1-96-DHP

IN THE MATTER OF THE DISQUALIFI-	:	
CATION FROM SCHOOL EMPLOYMENT	:	COMMISSIONER OF EDUCATION
OF JAMES A. COX.	:	DECISION
	:	

JANUARY 2, 1996

OAL DKT. NO. EDU 8640-95

IN THE MATTER OF THE DISQUALIFI- :

CATION FROM SCHOOL EMPLOYMENT : COMMISSIONER OF EDUCATION

OF JAMES A. COX. : DECISION

:

The record of this matter and advisement of appellant's failure to appear for hearing on his appeal of disqualification from school employment under criminal history record check laws have been transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-14.4. Additionally, a copy of the notification sent to appellant by OAL on December 2, 1995, providing him ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the appellant, this case is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice. Accordingly, the February 28, 1995 letter of the Deputy Commissioner finding that appellant had not demonstrated rehabilitation so as to be qualified for school employment pursuant to N.J.S.A. 18A:6-7.1 et seq., shall stand as the final decision in this case.

This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of September 6, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 2, 1996
DATE OF MAILING JANUARY 3, 1996

2-96

2-96-DHP

IN THE MATTER OF THE DISQUALIFI- :

CATION FROM SCHOOL EMPLOYMENT : COMMISSIONER OF EDUCATION

OF STEPHANIE A. SAMPSON. : DECISION

_____:

JANUARY 2, 1996

OAL DKT. NO. EDU 8582-95

IN THE MATTER OF THE DISQUALIFI- :

CATION FROM SCHOOL EMPLOYMENT : COMMISSIONER OF EDUCATION

OF STEPHANIE A. SAMPSON. : DECISION

:

The record of this matter and advisement of appellant's failure to appear for hearing on her appeal of disqualification from school employment under criminal history record check laws have been transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-14.4. Additionally, a copy of the notification sent to appellant by OAL on December 2, 1995, providing her ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the appellant, this case is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice. Accordingly, the January 24, 1995 letter of the Deputy Commissioner finding that appellant had not demonstrated rehabilitation so as to be qualified for school employment pursuant to N.J.S.A. 18A:6-7.1 et seq., shall stand as the final decision in this case.

This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of July 5, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 2, 1996
DATE OF MAILING JANUARY 3, 1996

3-96

#3-96R

RICHARD HARRIS AND KENTON P. GARAY,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

Petitioners, fully certificated teaching staff members employed by the Board, claimed that the Board violated N.J.A.C. 6:29-3.3 by appointing the holder of a county substitute certificate to a coaching position for which they were qualified.

By decision dated September 16, 1994, Commissioner affirmed the determination that the above-cited regulation was violated and directed implementation of the relief recommended by the ALJ, i.e. Board was directed to review petitioners' applications and to select one of them to be paid the applicable stipend plus interest. Commissioner, however, remanded matter for limited fact-finding and argument on petitioners' entitlement to additional relief for subsequent seasons.

On remand, the ALJ found sufficient evidence in the hearing record that petitioners asserted and presented testimony on their claim of rights in the wrestling seasons after the 1991-92 season. ALJ concluded petitioners' claims to further relief for 1992-93 and 1993-94 were appropriately raised.

Commissioner concurred with the ALJ that, under the circumstances herein, petitioners were entitled to the same relief for 1992-93 and 1993-94 wrestling seasons, as afforded for the 1991-92 seasons. Commissioner directed that the Board follow the same procedures administering relief for the 1992-93 and 1993-94 school years as ordered by the decision dated September 16, 1994 for the 1991-92 school year.

January 4, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5862-95

AGENCY DKT. NOS. 40-2/92 and 35-2/92 (Consolidated)

(ON REMAND EDU 9624-94)

RICHARD HARRIS AND
KENTON P. GARAY,

Petitioners,

v.

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

David B. Friedman, Esq., for petitioner Harris (Balk, Oxfeld, Mandell & Cohen, attorneys)

Stephen E. Klausner, Esq., for petitioner Garay (Klausner, Hunter & Seid, attorneys)

James P. Granello, Esq., for respondent

Record Closed: October 23, 1995 Decided: November 17, 1995

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

Richard Harris and Kenton Garay, petitioners, are teaching staff members employed by the respondent Hunterdon Central Regional High School District Board of Education who sought an order vacating the head wrestling coach position, awarding the position to "a fully qualified permanent staff member who applied for the position," and full back pay and emoluments to that person.

The matter was opened on two separate petitions before the Commissioner of Education. Both were transmitted to the Office of Administrative Law for determination pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. The matters were consolidated, heard, and an initial decision issued on August 2, 1994.

The initial decision found that the district suspended three wrestling coaches in 1991 after a rules infraction was discovered; the district posted and advertised the positions of head wrestling coach and assistant wrestling coach on October 1, 1991; several applications were received and reviewed by the high school principal and the director of student administration; four persons were interviewed, Gibble, Garay, Harris and Holcombe; the interviewers reached a consensus and recommended Gibble to the Superintendent; the Superintendent accomplished the necessary application through the County Superintendent of Schools because Gibble, although he worked for the district, held only a county substitute certificate, and there was no procedural defect in the approval process. The decision concluded that Harris and Garay were not legitimately ruled out.

It was ordered that the petitioners be granted relief in the following way: the Board was to review the applications of both petitioners and, if necessary, interview both petitioners; the Board would then select one of the two petitioners based on its assessments of their backgrounds and abilities; that person would be paid the stipend lost, plus interest since the last day of the 1991-92 wrestling season. No other moneys were to be paid because the petitioners limited their petition to the 1991-92 season.

The Commissioner agreed with the findings and conclusions with the exception of limitation of remedy to the 1991-92 school year and remanded for determination of the question whether relief should be so limited.

A second initial decision issued on April 6, 1995. On May 25, 1995, a second remand sought conclusions concerning the 1992-93 and 1993-94 school years, particularly whether the petitioners' failure to amend the pleadings bars their claim to further relief. Necessary to that determination is the certificate status of Gibble. Counsel agreed to the history that is marked C-1.

Preliminary, I **FIND** sufficient evidence in the hearing record that the petitioners asserted and presented testimony on their claim of rights in the wrestling seasons after the 1991-92 season. I therefore **CONCLUDE** that the petitioners' claims to further relief for 1992-93 and 1993-94 are appropriately raised.

The certification of Stephen Gibble (C-1) shows:

1992-1993	-	Substitute Certification No. 0050048
1993-1994	-	Substitute Certification No. 73223
1994-1995	-	Provisional Certificate, Teacher of Social Studies No. 00143213
1995-1996	-	Permanent certification is being processed by the State of New Jersey

True copies of the certificates were supplied and the tribunal is satisfied that the certification is correct in all particulars.

As to relief, *N.J.A.C.* 6:29-3.3(c) controls. That subsection provides:

> (c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed . . . provided that:
>
> 1. The district chief school superintendent demonstrates to the county superintendent that:

i. The vacant coaching position had been advertised; and

ii. There was no qualified applicant based on the written standards of the board of education;

2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.4(I) shall not apply to such coaching situations.

I **FIND** and **CONCLUDE** that under the circumstances of this case the petitioners are entitled to the same relief for 1992-93 and 1993-94 wrestling seasons as they were afforded for the 1991-92 season. Gibble ceased working under a substitute certificate at the end of the 1993-94 school year. This means that all facts and circumstances operative in 1991-92 were operative in 1992-93 and 1993-94. The hearing record shows the petitioners continued to apply for the position of head wrestling coach in those years. Given the identity of facts and circumstances, the same relief must flow.

The August 2, 1994 initial decision in the matter under docket numbers EDU 1945-92 and EDU 2223-92 (consolidated) ordered the Board to review the applications of both petitioners and, if necessary, interview both petitioners. The Board then was directed to select one of the petitioners based on its assessment of their backgrounds and abilities. That person was to be paid the stipend lost, plus interest from the last day of the wrestling season. This part of the initial decision was adopted by the Commissioner on September 16, 1994. Accordingly, it is **ORDERED** that the same procedures be followed for the 1992-93 and 1993-94 school years.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

17 NOVEMBER 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11/27/95
DATE

D. M. Contracts/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 29 1995
DATE

Joanne M. Restivo
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

Court's Exhibits:

C-1 Certification History of Stephen Gibble

For Petitioner:

None

For Respondent:

None

RICHARD HARRIS AND KENTON P. GARAY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

The Board's exceptions assert that petitioners' failure to amend their pleadings is a bar to relief beyond the 1991-92 school year. In this regard, the Board essentially recasts its arguments raised before the Administrative Law Judge (ALJ), and attaches for reference a copy of its brief on the issue. Additionally, the Board argues that the ALJ, in his most recent decision,

> ***makes no attempt to address the arguments raised by the Board of Education as to why the petitioners had to amend their petitions in order to be entitled to additional relief. Rather, he finds that petitioners asserted and presented testimony on their claim of rights.*** (Board's Exceptions at p. 2)

Accordingly, the Board claims that the ALJ has chosen "to ignore this issue" and find that petitioners were entitled to relief subsequent to 1991-92.

In reply, Petitioner Garay argues that both he and Petitioner Harris testified at the hearing regarding the years subsequent to 1991-92; the Board therein had the opportunity to cross-examine petitioners on the issue of relief for subsequent years. Petitioner Garay further points to N.J.A.C. 1:1-6.2(a), which provides,

> Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of overtechnical pleading requirements and would not create undue prejudice.

Petitioner further asserts that the Board "***ignores Roberts v. Keansburg Board of Education, 5 NJAR 208 (1983) which holds that the first pleading may be amended anytime, even after presentation of proofs." (Petitioner's Reply at p. 2) Thus, Petitioner Garay concludes that the Board's arguments must be rejected.

Upon careful and independent review, the Commissioner is satisfied that the ALJ finds in the hearing record, sufficient evidence "***that the petitioners asserted and presented testimony on their claim of rights***" to conclude that such claims for relief for 1992-93 and 1993-94 are appropriately raised. (Initial Decision at p. 3) The Commissioner herein determines that, inasmuch as the parties were provided the opportunity to submit arguments before the ALJ concerning the threshold question of whether failure to amend a pleading is a bar to further relief in this matter, his direction on remand is satisfied, notwithstanding that the ALJ's treatment of said issue in his initial decision is conclusory. Additionally, in light of the certification of Stephen Gibble, the Commissioner concurs with the ALJ that, under the circumstances herein, petitioners are entitled to the same relief for 1992-93 and 1993-94 wrestling seasons, as afforded for the 1991-92 seasons.

Accordingly, the Commissioner adopts the initial decision of the ALJ for the reasons expressed therein, and directs that the Board follow the same procedures administering relief for the 1992-93 and 1993-94 school years as ordered by the decision dated September 16, 1994 for the 1991-92 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 4, 1996

Date of mailing January 4, 1996

7-96

S.K., on behalf of her minor child, T.T., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY, : DECISION

:

RESPONDENT.

:

January 10, 1996

OAL DKT. NO. EDU 7615-95

S.K., on behalf of her minor child, T.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 1996
Date of Mailing, January 11, 1996

8-96

KENNETH RYAN AND I. DIANA RYAN, on behalf of their minor child, A.R.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

January 10, 1996

OAL DKT. NO. EDU 11490-94

KENNETH RYAN AND I. DIANA RYAN, on behalf of their minor child, A.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 1996
Date of Mailing, January 11, 1996

9-96

ALAN V. GROSSBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWORTH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

January 10, 1996

OAL DKT. NO. EDU 11487-94

ALAN V. GROSSBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWORTH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 1996
Date of Mailing, January 11, 1996

10-96

10-96

WOOD-METAL INDUSTRIES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY AND DEAN EQUIPMENT AND FURNITURE COMPANY, INC.,	:	DECISION
RESPONDENTS.	:	

January 10, 1996

OAL DKT. NO. EDU 4686-95

WOOD-METAL INDUSTRIES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY AND DEAN EQUIPMENT AND FURNITURE COMPANY, INC.,	:	DECISION
RESPONDENTS.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 1996
Date of Mailing, January 11, 1996

13-96

IN THE MATTER OF THE TENURE :
HEARING OF PETER LORIA, STATE- :
OPERATED SCHOOL DISTRICT OF THE :
CITY OF NEWARK, ESSEX COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Board certified tenure charges of inefficiency and unbecoming conduct to the Commissioner in February 1992 against respondent English teacher. Partial initial decision in September 1992 dismissed the inefficiency charge because of Board's failure to comply with statutory and regulatory requirements mandated when bringing charges of inefficiency. Matter was returned to OAL to proceed on remaining charges of unbecoming conduct.

ALJ found that, in this matter, respondent continuously failed to perform the duties of his position, in that he failed to discipline, control or teach the students in his charge. ALJ ordered respondent removed from his position as a tenured teaching staff member.

Commissioner concurred with the conclusion of the ALJ that the record made it abundantly clear that respondent should not be continued in his tenured teaching position and directed his dismissal as of the date of this decision.

January 11, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1364-92

AGENCY DKT. NO. 32-2/92

IN THE MATTER OF THE TENURE HEARING OF PETER LORIA, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Hope R. Blackburn, Acting General Counsel, and **Carolyn Ryan Reed**, Former Associate Counsel, for petitioner

Sheldon H. Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: February 14, 1995 Decided: October 6, 1995

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a hearing under the Tenure Employees Hearing Act seeking the removal of respondent, a teaching staff member, on charges of inefficiency and unbecoming conduct. The matter was transmitted to the Office of Administrative Law (OAL) on February 24, 1992, for hearing as contested case. The matter was assigned to the undersigned Administrative Law Judge (ALJ) on March 6, 1992, and a prehearing conference was scheduled

for April 21, 1992. The scheduled prehearing conference was adjourned and rescheduled because of the unavailability of attorney for respondent. The prehearing conference was rescheduled to May 13, 1992, and on that date a prehearing conference was held and concluded and a prehearing order was entered on June 1, 1992, settling the procedures to be followed in the matter.

Pursuant to the prehearing order, attorney for respondent filed a motion to dismiss the charge of inefficiency against respondent because of petitioner's alleged failure to comply with *N.J.A.C.* 6:24-5.1(c)(4), and to dismiss the charge of unbecoming conduct because of petitioner's alleged failure to comply with the requirements of *N.J.S.A.* 18A:6-13 and *N.J.A.C.* 6:24-5.1(b)(4), (5) and (6). This motion to dismiss was filed on July 17, 1992, and petitioner responded on August 5, 1992. By a Partial Initial Decision dated September 21, 1992, the ALJ dismissed the charge of inefficiency but denied respondent's motion to dismiss the charge of unbecoming conduct. This Partial Initial Decision was submitted to the Commissioner of the Department of Education for immediate review pursuant to *N.J.A.C.* 1:1-12.5(e) and respondent also appealed the denial of his motion to dismiss the unbecoming conduct charge. By decision dated October 21, 1992, the Commissioner of the Department of Education affirmed the Partial Initial Decision. Petitioner then appealed this decision to the State Board of Education and by its decision dated February 2, 1993, the Commissioner's affirmation of the Partial Initial Decision was affirmed by the State Board of Education.

The matter was then scheduled for hearing on October 22 and 27, 1992, November 6, 7, and 12, 1992, February 16, 1993, which hearing date was adjourned at the request of attorney for petitioner due to a death in the family, on February 22, 1993, March 15, 1993, August 11, 1994, which date was adjourned at the request of attorney for respondent due to his unavailability, and on September 22 and 27, 1994. At the conclusion of the hearing, the parties requested the opportunity to submit briefs and requested that the scheduling of the submission of these briefs be held in abeyance until the receipt of all transcripts of these proceedings. After the submission of briefs and reply briefs, the record closed on February 13, 1995.

As a result of extensions, the time within which this Initial Decision is to be submitted was extended to October 6, 1995.

FACTUAL DISCUSSION

The essential facts in this matter are disputed by the parties. The following is not intended to be a verbatim account of the testimony and evidence in this matter. It is intended to be a summary of the testimony found to be relevant as to the issues.

The first witness to testify for respondent was Lula Mae Rivers. Ms. Rivers indicated that she was respondent's immediate supervisor and his primary evaluator for the 1989-90 and 1990-91 school years. She testified as to her educational background and prior work experience. She was the English Department chairperson for nine years and also was employed as an adjunct professor at Keans College, Rutgers University. As the chairperson of the English Department, it is her responsibility to supervise the staff in order to ensure that it fulfilled its duties to prepare students. Petitioner was an English teacher assigned to her supervision for more than three years.

Ms. Rivers testified to an observation she conducted on October 11, 1989 (Exhibit P-1), in which she gave respondent an overall unsatisfactory rating. This was based upon respondent's lack of control in the classroom and lack of classroom management. During the observation students were talking and walking around the classroom at will and were socializing rather than performing their educational tasks. It appeared to Ms. Rivers that the students were accustomed to doing this. Respondent exhibited a nonchalant and uncaring attitude and there was no effort on his part to ask them to sit, to do their assignments, or otherwise to control their actions. There was no motivational technique used by respondent to implement the lessons and respondent failed to motivate the students to get involved in their lessons. The respondent did not pay any attention to the fact that the students were not paying attention. At the post-observation conference, Ms. Rivers indicated that she suggested to respondent various ways to provide a better learning environment. He did not respond to her suggestions in any way.

Ms. Rivers identified a memorandum sent to respondent on October 17, 1989 (Exhibit P-2), which discussed problems in respondent's classroom and gave him the suggestions that he give more challenging lessons and that he take off credit if a child disregards his directions.

Ms. Rivers testified to an informal observation on October 25, 1989 (Exhibit P-3), in which she observed that the lesson plans were not on the teacher's desk as required by the school district, respondent provided no attention to students, he did not direct instructional activity, and he paid no attention to classroom appearance. After this informal observation, Ms. Rivers indicated she never saw respondent use any of the techniques she suggested.

Ms. Rivers testified to an informal observation on November 28, 1989 (Exhibit P-4), and again she saw a lack of control on the part of respondent. The students were engaged in irrelevant conversations and respondent ignored these actions. She recommended more challenging lessons but never saw respondent attempt to implement this recommendation.

Ms. Rivers testified that she sent a memorandum to respondent on December 2, 1989 (Exhibit P-5), because of his failure to submit essays or writing samples from the students. She acknowledged that other teachers also submitted them late.

Ms. Rivers testified to a formal observation which she conducted on January 24, 1990 (Exhibit P-6), in which she again gave respondent an unsatisfactory overall rating. She indicated that it was difficult to determine what respondent's objective was for that class. She observed students talking among themselves and a lack of concern by the students. They were not paying any attention to respondent and respondent did not address this fact. There was an unsatisfactory student-teacher rapport and she felt that the students should be respectful to one another and to the teacher. Respondent failed to use study guides and failed to determine whether the students were comprehending the lesson. He failed to use any technique whatsoever in order to implement the lessons. In addition, he failed to begin the class promptly and he was working on paperwork at the beginning of the class. She indicated that the lesson should be started first and then paperwork could be done. Ms. Rivers testified that she discussed this observation with respondent and suggested that he use a directed reading lesson, that he use a seating chart, and that he make it clear that the students will be tested and will be responsible for the material. Respondent again failed to follow these suggestions or to use any of the recommendations.

Ms. Rivers testified that on January 29, 1990, she sent a memo to respondent (Exhibit P-7) requesting that he inform her how the district's literature textbook would be included in the lesson plans. She testified that each teacher is given a Course Proficiency and Course Outline which must be followed, and there was no indication he was doing so.

Ms. Rivers testified that she conducted an informal observation of respondent on January 31, 1990, (Exhibit P-8) at which time respondent was five minutes late for class. He eventually started the lesson ten minutes late. She indicated that respondent had been late previously, although there were no written memos confirming his prior lateness.

Ms. Rivers also testified to a memo given to respondent on February 22, 1990 (Exhibit P-9), at which time she observed students sitting on the steps waiting for the start of a voluntary class because respondent was late arriving. She indicated that there were other occasions when no one was in respondent's classroom when the class should have been held. She also indicated that respondent's tardiness did not improve after the memo.

Ms. Rivers testified to an informal observation on February 22, 1990 (Exhibit P-10), when respondent arrived late. After he arrived the students continued to walk around the classroom and to talk and socialize. Some of the students were using radios under their hats.

Ms. Rivers testified that she sent a memo to respondent on March 2, 1990 (Exhibit P-11), acknowledging that he had sent her a list of names of problem students and advising him that she would be supportive of him in taking disciplinary action against these students. She eventually determined that respondent simply sent the list of problem students to her but did not call any of the parents to attempt to resolve the disciplinary problems or take steps to deal with these students. He also never approached her concerning the disciplining of any of the students. Respondent denied that he ever received this memo.

Ms. Rivers indicated that on March 9, 1990 (Exhibit P-12), she conducted an informal observation in which she observed students singing while others engaged in other activities while respondent should have been conducting class. There was no attempt by respondent to maintain order and there was no seating organization. The students gathered their chairs in a corner and

were singing. She again suggested to respondent that he have a seating chart. However, she never observed that he made an orderly arrangement of seats.

Ms. Rivers indicated that on March 13, 1990, she sent a memo to respondent (Exhibit P-13) confirming the providing of a demonstration lesson to show respondent how to control his classroom. She indicated that students had been given exercise or "ditto" sheets and that it is not appropriate conduct for a teacher to give "dittos" five days a week. Many of the students found the lessons to be boring and they wanted their classroom changed. She also identified a memo sent to respondent on March 29, 1990 (Exhibit P-14). She indicated that respondent was using ditto sheets rather than the literature book mandated by the school district, which respondent indicated was too difficult for the students. Ms. Rivers noted that the teacher's copy of the required book is annotated and suggests adjustments based upon the abilities of the students. As a result, Ms. Rivers came up with a list of alternate books which she set forth in her memorandum. She also stated that respondent did not indicate that the required literature book was too difficult until the dittos that respondent repeatedly gave to the students were questioned by Ms. Rivers.

Ms. Rivers identified the Annual Evaluation Report of June 1990 (Exhibit P-15). She indicated that respondent's overall rating in this report was unsatisfactory because the items listed as unsatisfactory were consistently unsatisfactory throughout the school year on the part of respondent. There was no effort made by respondent to improve or change his behaviors. The areas needing attention or improvement were that the students were not paying attention in class, the teacher was not paying attention to the students, the students were bored with their class and were cutting classes, the students' expectations from class were low, the students lost interest and many were failing, respondent failed to investigate techniques for effective classroom discipline and management and he failed to engage in extracurricular activities. There was no follow-through by respondent on her suggestions. She recommended a refresher course on new teaching techniques. The second page of the Annual Evaluation is a Professional Improvement Plan (PIP) for the upcoming year, which is developed between the teacher and the supervisor. This suggested improvements in respondent's skills and the timeline when the improvements were to be completed.

Ms. Rivers testified that after the beginning of the next school year on September 19, 1990, she wrote a memo to respondent reminding him that writing samples were to be submitted to her. She explained that a certain number of writing samples must be submitted and that this is a district policy. However, no writing samples were submitted by respondent. She identified a follow-up memo of October 15, 1990 (Exhibit P-17), which reminded respondent of his failure to submit writing samples. None were ever submitted.

Ms. Rivers identified a memo of October 17, 1990 (Exhibit P-18), regarding respondent's lesson plans and the Board directives that were provided to respondent. Subsequently, respondent did not submit lesson plans to her satisfaction, and in some instances the elements required of lesson plans were missing. She indicated that lesson plans are due every payday and that respondent repeatedly failed to submit lesson plans on time (Exhibit P-19 and P-20). Eventually, respondent requested a sample incorporating elements of a proper lesson plan, and this was provided to him in a memo of November 15, 1990 (Exhibit P-21). She indicated that parts of his lesson plans were consistently missing.

Ms. Rivers testified to an informal observation on November 19, 1990 (Exhibit P-22), at which time she observed that graffiti was located in respondent's classroom bulletin boards, there were writing with magic marker around the room, and that the room was very depressing. In addition, there was students walking around the class and there was disruptive classroom behavior on the part of some of the students. She spoke to respondent afterwards concerning these items but no subsequent improvement was made or attempted by him.

Ms. Rivers testified that on November 19, 1990, she sent a memo to respondent indicating that the writing samples due in September 1990 had not yet been provided (Exhibit P-23). She also indicated that it is mandated by the school district that a practice High School Proficiency Test (HSPT) be given for diagnostic purposes to determine student needs. She sent a memo to respondent on November 20, 1990, and indicated that respondent never gave a practice test and never gave the results of such a test to her (Exhibit P-25).

Ms. Rivers testified to an observation report of November 20, 1990 (Exhibit P-26). On that occasion, respondent was excessively late. When he arrived he used a ditto for the lesson. During the lesson two girls were talking and one of the girls was combing the other girl's hair. The respondent said nothing to them. Ms. Rivers indicates that she admonished the girl, when this should have been the responsibility of respondent. When respondent handed out the dittos, a student in the classroom said "We have had this ditto a million times." Ms. Rivers testified that she then examined the ditto and recognized it as one that had been handed out to this class before. She also indicated that she had previously recommended getting the students interested and not just handing out a ditto. She concluded that respondent had failed to use any suggested strategies, that he used exactly the same ditto three times in a row. In the post-observation conference when this was discussed, respondent listened and signed the report but did not state he would use any of the discussed strategies.

Ms. Rivers indicated that on November 26, 1990, she again wrote a memo to respondent concerning the fact that his lesson plans were late (Exhibit P-27). She indicated that it was very rare that she received lesson plans from respondent when they were due. She also testified that respondent never came to her and gave any explanation or reasons for his failure to submit lesson plans on time.

Ms. Rivers testified that on November 12, 1990, she sent a memo to respondent listing various areas of concern (Exhibit P-28). However, she still did not receive lesson plans from respondent on time and he did not comply with the memo. She testified to an informal observation on December 2, 1990 (Exhibit P-29), when she saw a female student sitting on respondent's desk during class. There was no instruction going on at the time and students were socializing. A student was playing in respondent's hair. Another informal observation was conducted on December 3, 1990 (Exhibit P-30), and Ms. Rivers found the class to be so noisy that the noise could be heard in the hall. She went into the classroom and found respondent there and felt that this disruptive class behavior should have been controlled by him.

Ms. Rivers testified that on December 10, 1990, she again gave him a memo concerning his failure to submit lesson plans (Exhibit P-31). He never explained the reason for the failure and never provided the lesson plans. She sent another memo on the same date (Exhibit P-32), in

which she again reminded him that he failed to provide writing samples for September, October, November, and December, 1990. She also testified that on December 13, 1990, she conducted an informal observation (Exhibit P-33) at which time she saw classroom chairs in disarray, books were thrown about the classroom, no student work on exhibit, no posters, and nothing to enhance the learning environment. The students were disruptive and were walking, talking, playing, and socializing. Respondent was tardy to class in first period and she was in the hall and saw him arriving late. She also testified that by memo of January 7, 1991 (Exhibit P-34), she again reminded respondent that his lesson plans. However, they were not submitted after this memo. She also identified a memo of January 8, 1991 (Exhibit P-35), reminding respondent that at least four writing samples were due and that he had submitted none. She again sent him a memo on January 21, 1991, reminding him that he failed to submit lesson plans (Exhibit P-36). Another memo with respect to lesson plans was sent on February 4, 1991 (Exhibit P-37).

Ms. Rivers testified that she conducted an informal observation on February 18, 1991 (Exhibit P-38). Respondent was late for class and the classroom was noisy. The students were not responding to respondent's lesson, they were not paying attention, and respondent did nothing to get the students to pay attention. Ms. Rivers testified to an informal observation on February 19, 1991 (Exhibits P-39), in which she observed disruptive classroom behavior. This was the first period and when she went into the class, the teacher was not there on time. As a result, the students were uncontrolled and disruptive.

Ms. Rivers testified to a formal observation on February 20, 1991 (Exhibit P-40), in which respondent's overall rating was unsatisfactory. She indicated that there were serious areas of concern which had not been addressed by respondent, including classroom discipline, classroom atmosphere, the classroom physical environment, and the teaching strategies used by respondent. During the observation, respondent handed out a ditto sheet without adequate preparation and without explaining the basis or reasons for the ditto sheet or lessons. There was no teacher, direction or control. The strategies that Ms. Rivers previously suggested that respondent used to control the classroom and to direct the lesson were not used. She did not see any effort to employ these strategies as recommended by her. The activity in the classroom was inconsequential and lacked meaning to the students. There was no relationship to the building of writing skills. The ditto was performed by the students within a few minutes and without giving it

any importance. There were no lesson plans visible and the literature book was underused. She felt that the students were not being prepared to take the HSPT. There was excessive use of dittos and the students complained to her about the class being boring and about the use of dittos. She indicated that the literature book is district-oriented and it must be used to prepare the students to take the HSPT. After this observation, Ms. Rivers met with respondent and went over the observations and suggestions. Respondent refused to sign the observation report. He also continued to fail to comply with the due dates for the lesson plans. (Exhibit P-40).

Ms. Rivers testified that she sent the memo of February 25, 1991 (Exhibit P-41), to respondent reminding him that five writing samples were due and had not been submitted. Respondent did not explain the delay in providing these. Another memo dated March 11, 1991 (Exhibit P-42), again reminded respondent that he failed to provide lesson plans. He did not submit these or explain the delay. Another memo with respect to unsubmitted lesson plans and writing samples was sent to respondent on March 25, 1991 (Exhibit P-43).

Ms. Rivers testified that she gave respondent an Annual Evaluation Report in June 1991 (Exhibit P-44). She considered respondent's overall rating to be unsatisfactory because of the unsatisfactory areas observed during the entire school year. There was a lack of effort on the part of respondent to improve, to motivate students, to maintain student decorum, and a failure to comply with Board of Education directives and requirements. She recommended that respondent's employment be discontinued because she felt she had done all that she could to motivate respondent to teach students. She had made herself available to assist respondent and had offered the resources of the district, and in response respondent did not use the resources and made no effort to improve. He failed to have the attention of the class focus on him, failed to give adequate direction to the students, and failed to supervise students. His students cut class at will and disrupted classes. Respondent never addressed the students' discourtesy, rudeness, or disruptions. She made suggestions as to strategies and they jointly developed a PIP. However, he failed to motivate his students, failed to deal with or treat the students based on their ability or skill, and there were excessive failures in his classes. In addition, respondent was made aware of disciplinary procedures available to him to deal with problem students, but he rarely used them.

Ms. Rivers testified that the English Department held meetings in September, 1991 (Exhibit P-45a) and October, 1991 (Exhibit P-45), during which they discussed innovative teaching strategies, the district requirement that homework be required of all students, and the requirement that lesson plans must be up-to-date and visible on the teacher's desk at all times. She indicated that respondent attended these meetings and he signed-in. In addition, a pacing guide was established by the district to assist teachers. At the November meeting (Exhibit P-45c), strategies were discussed that required teachers and students to work together. The attendance sheet for that meeting indicated respondent attended. Ms. Rivers also identified a package of documents which she compiled to show how to get students to develop and improve their study habits and these were handed out to the teachers (Exhibit P-45d). There was also a discussion regarding students' study skills and teachers were requested to take steps to instill good study habits in the students (Exhibit P-45e). In addition, the school district established guidelines for teachers' performance (Exhibit P-45f). This document was distributed to all teachers on the very first meeting in September 1991, and lists what the principal expected of all teachers. A second copy of this was given to respondent by Ms. Rivers, after she observed the starkness of his classroom (Exhibit P-45g). Additional documents given to respondent as well as to all the English teachers were referred to and identified by Ms. Rivers (Exhibits P-45h and P-45i). She also provided an HSPT method for scoring of the test and indicated that it was important for the teachers to understand this in order to require students to write during the year (Exhibit P-45j). Teachers were provided with materials discussing cooperative learning methods, where students are placed in a group and everyone is assigned a task. She indicated that this increases participation and motivation (Exhibits P-45l).

Ms. Rivers testified that by memo dated September 26, 1991 (Exhibit P-46), she advised respondent of a preobservation conference and indicated that a number of items were discussed. This was given to respondent to point out the areas to be discussed and observed. These included proper rapport with students because she felt that respondent needed to develop better control over the students. In addition, there were suggestions as to how to improve respondent's instruction techniques. Ms. Rivers felt that respondent was not using proper techniques to keep the students interested and involved. In addition, she did not see any of the suggested techniques being used. She also recommended class activities that encouraged student responsiveness and leadership because his student involvement was very low.

Ms. Rivers sent a memo to respondent on October 4, 1991 (Exhibit P-47), advising respondent that she had reviewed his lesson plans and indicating that the plans he submitted did not utilize the course outline established by the district to be used throughout the district. Every ninth grader was to be responsible for the outlined subject matter and the supervisors were required to check to see if the lesson plans complied with the course outline. When she later checked she found no indication that respondent was using the course textbook in his lesson plans. She continued to observed him using the grammar dittos.

Ms. Rivers testified that on October 7, 1991, she conducted a formal observation (Exhibit P-48). The classroom seating was out of order and the seats were arranged by students so as to sit next to friends. There was no student work displayed and no motivation. Some of the lights in the classroom were out and it was not a pleasant environment. There were no posters and no indication that it was an English classroom. Respondent was in this particular classroom for five classes each day. This class did not start promptly and students were walking around, congregating and socializing. Once the class was started there was no serious concern for time on task. Respondent failed to demonstrate a wholesome rapport with the students. When respondent walked into the room, the students ignored him and he was not recognized as an authority figure. He failed to use a variety of materials for instruction but simply used a ditto. There was no effort to use these materials to meet the varying needs of individual students. His lesson plans were not available and he passed out the dittos to the students without discussing them. The students answered the dittos in a haphazard way and showed no concern about how their responses were completed. Ms. Rivers commented that respondent was not concerned about student seating, that one student had a hat on, and that there was congregating. There was no concern on respondent's part to deal with this. The lesson on the board was appropriate for second graders and not tenth graders. The work on the ditto was not challenging and if the students asked respondent for the answers to the questions on the ditto, he simply gave them the answers.

Ms. Rivers testified that respondent failed to submit student writing samples due on October 4, 1991 (Exhibit P-49).

Ms. Rivers also testified that she sent a memo to respondent on October 21, 1991, because she saw no effort on respondent's part to incorporate the course outline required by the district into his lesson plans (Exhibit P-51). She sent a memo on October 23, 1991 (Exhibit P-53), asking respondent to use the course outline and pacing guide and she reviewed his subsequent lesson plans and saw no evidence of any attempt to comply with these district requirements. She indicated that she did not consider respondent's students to be hard-core discipline problems. The students are grouped by basic skills and she did not observe the same conduct by students in other classes.

On cross-examination, Ms. Rivers indicated that 80 percent of the students required a basic skills class, since 80 percent are unable to pass the HSPT. Most come into reading a year or two below grade level. Separate teachers teach basic skills and, in essence, they are elementary school teachers.

The English I or ninth grade course subject areas including grammar and literature. The student must become proficient in certain skills in the texts. There is no single grammar text but there is a series of texts. The mandate is to teach grammar to the students through literature rather than through isolated grammar studies. One of the criteria in selecting the literature book was its ability to teach grammar through literature. The literature book was first used starting in 1990-91 school year. Prior to 90-91 texts were generated by the Board of Education. The average class size was 25 or less. The course outline is a separate outline promulgated by the school district.

Ms. Rivers testified that the policy of the school district is to teach grammar based on writing. The teacher must gear lessons to the needs of the students. The literature course outline covers various skills required by the HSPT. Activities for gifted students and for slower students are included in the course outline. Every student has a literature book and the needs of the students are assessed by having them write a writing sample and by reviewing this.

Ms. Rivers acknowledged that there are problems with student attendance and that the current goal is eighty percent attendance. She indicated that there has been an improvement but that 40 to 50 percent attendance is not correct.

Ms. Rivers indicated that while she eventually received respondent's lesson plans, they were not provided on the dates they were due. The district mandates that every teacher have lesson plans and they are due to be submitted to a supervisor every payday. The purpose is to determine what is being taught and how it aligns with the course outline. Each lesson plan must have goals, objectives, procedures, activities, and homework in order to achieve the goals of the lesson. There is Board of Education directive requiring lesson plans.

Ms. Rivers indicated that in Newark, homework has always been a mandate, since it is one of the methods used to assist teachers in instruction. A bulletin was issued with respect to mandatory homework, although she is not sure when it was issued.

With respect to respondent's lesson plans, they are reviewed by her and initialed to indicate her review. If there is no comment, the plan is approved. If there is a comment, a note is given to the teacher. If the plans are handed in at the end of the year, they are given to the main office. Respondent's plan do not appear to have been submitted to the main office because they were never submitted to her.

Ms. Rivers acknowledged that most of the classrooms are shared and there is usually someone else in the same classroom at different times during the day. There are established procedures for the care and use of materials and equipment in the classroom.

Ms. Rivers was generally cross-examined with respect to her evaluation. She indicated that on October 11, 1989 (Exhibit P-1), the overall lesson was not satisfactory and she was dissatisfied with student behavior on that day. She advised respondent to call the parents of a particular student who was a troublemaker, but she does not know if he called the parents. The student was never brought to her attention again by respondent and she assumes that the problem in class was rectified.

Ms. Rivers testified that teachers are not required to address problems in the hallway after the bell rings. The teacher should attempt to get his students from the hallway into the classroom and that on occasion a teacher may be required to marshall students. However, she never observed respondent gathering students. A teacher is not responsible for security. She did acknowledge that there are hall sweeps where students who are not in class are gathered .

Ms. Rivers indicated that with respect to writing samples, she expected to receive eight of them from respondent and actually got only one sample. A teacher is supposed to maintain two or three writing samples per student per week.

Ms. Rivers was cross-examined regarding her observation of January 24, 1990 (Exhibit P-6). She indicated that respondent handed out an activity sheet containing typed paragraphs and one the student was directed to read orally. However, the others students were not paying attention. Respondent then started to ask questions, to which the students gave oral responses. The remaining questions were given for homework or for independent work. No other materials were used that day.

Ms. Rivers indicated that she made the comment on the memo of January 29, 1990 (Exhibit P-7), because a high percentage of respondent's lesson plans related to grammar and not enough were related to the literature portion of the course work. She also indicated that respondent started class by taking attendance of students. She indicated that attendance must be taken on a daily basis but not necessarily at the beginning of the class.

Ms. Rivers testified that the zero period class (Exhibit P-9) is strictly voluntary and is a makeup class for students who missed an English class because respondent failed to show up for this class he did not continue to teach it. Ms. Rivers also stated that she did not observe the same kind of student conduct and disruptions in other classes and in the hallways as she observed in respondent's class.

Ms. Rivers testified that the union contract states that a teacher may request a demonstration lesson (Exhibit P-13). She also recalls that respondent was advised to use the

ninth grade literature book "Adventures in Reading," which is designed for ninth grade students. It can be taught to students who are a little above and a little below grade and there are supplemental materials used by the English Department. The book has an array of materials arranged in difficulty from sixth through tenth grade. Ms. Rivers recalls that she did not observe respondent teaching literature-related activities at all or very little. There was concern about respondent not teaching literature, but nothing raising this concern is listed on any evaluation form.

Bulletin 32 (Exhibit P-18) was issued to all high schools and the district was reinforcing the proper procedure for instructional objectives. She indicated that respondent had the ability to prepare lesson plans in objective terms but he was not consistent. On occasions he prepared a plan which was in proper form but then would go back to his old habits.

Ms. Rivers testified that with respect to November 20, 1990 observation (Exhibit P-26), respondent gave the students a ditto relating to a grammar exercise which she recalled seeing previously.

Harry Laub, School District Director of Reading and Language Arts testified in this matter. He testified to his educational background and experience. He indicated that he was called in to evaluate respondent because the school principal wanted an outside opinion. He made an observation of respondent on November 20, 1991 (Exhibit P-71). He found the classroom disorganized with the seats in no formal arrangement. The bulletin board was empty and unwashed. There was no attempt to give instruction to the students. The students were walking around the room and there was no direction given to them. Respondent was giving a ten question multiple choice test which was a 15 minute test. The students were given 40 minutes to complete the test. There were no instructions given about the test and the students were not taking the test seriously. There was no give and take with the students. The test was given as an open book test and it should not have been open book. There was no questions of the students, no introduction of the lesson to the students, and no motivation given to the students by respondent. Mr. Laub indicated that this was the first year of a new literature series book and an outline guide had been developed. Respondent was doing the first or second story in the book and this should have been completed in September of the school year rather than in November. Respondent indicated that

his lesson plans and study guide had been left home when he was asked to provide them. There was no attempt by respondent to engage the students and the students were not given any directions as far as lesson implementation. Mr. Laub's overall rating of respondent was unsatisfactory

Mr. Laub indicated that the Committee on Curriculum selected the literature book and this book was to be used by all grade nine students. On cross-examination, he acknowledged that a significant percentage of the students were reading below grade level. He acknowledged that there had been a problem with getting student programs going for the first several weeks of the school year. However, he did not know if there was a problem distributing the literature books. Only 3 of the 15 students in the class brought the textbook with them to class. The book was being utilized by respondent, but not efficiently.

Mr. Laub testified that the building principal was very general in his comments requesting this observation, and he was not aware of any charges pending against respondent. Respondent was not attending to clerical duties at the beginning of class but simply handed out the test. He observed students wander in and talk to some friends and walk out. Respondent allowed this to occur and did not discipline any students. He indicated that despite respondent's request for a demonstration lesson, he did not provide it because it is inappropriate for an outside teacher to come in and do so. On redirect examination, Mr. Laub indicated that he would have expected the students to progress beyond the first or second story in the literature text.

Doris Culver, who was the Principal of University High School at the time of the hearing, testified that when she was Vice Principal at Central High School she evaluated respondent both with informal observations and formal observations. She conducted an observation on November 28, 1989 (Exhibit P-59). The students were seated wherever they wished and there was no attempt by respondent to engage the students in their lesson. There was no order in the class when the students should have been actively engaged in the lesson. The bulletin board was bare. The teacher handed out a homework sheet and she indicated that this was not an effective use of time. The students were not involved with the lesson but respondent took no action to have them involved. There was no positive relationship, but merely a handing out of material. The curriculum guide was not used. She gave respondent unsatisfactory ratings in lesson

implementation because none of the required activities were engaged in by the respondent. Her overall evaluation of respondent was unsatisfactory. She indicated that direct classroom instruction should have occurred during this observation but instead the students were doing homework. The lesson was not challenging to the students and the students were not involved.

Ms. Culver testified to a second announced observation on January 17, 1990 (Exhibit P-60). She observed some student work on the bulletin board but the lesson implementation had not changed. Not all students were involved and the class and class time was not used effectively. There was no attempt on the part of respondent to engage the students and there was no exchange between teacher and student. There was no indication that respondent was using the curriculum guide, and he merely handed out worksheets. There was no attempt to motivate students to become involved. A student was disrupting the class and respondent permitted her to continue. In addition, it was not clear to the students what was to be done by them. The students were disengaging themselves from the class but the teacher did nothing about this. Homework is a mandate from the school district but none was given to the students. Respondent simply distributed materials to the students and gave no direction or follow-through. Her overall rating of respondent was unsatisfactory.

On cross-examination, Ms. Culver indicated that respondent did not refuse to follow her suggestions and he was not insubordinate to her. However, did not implement her suggestions and effective classroom instruction did not occur. Only 8 or 9 of the 12 to 20 students were present. The plan book was present. Respondent had the information available to present a lesson but did not present it in an efficient manner.

Carl L. Gregory, Principal of Central High School testified that at the beginning of the 1990-91 school year, all teachers and students had been provided schedules and that there had been no delay in giving out materials at the beginning of the year. All teachers were advised that they are to be at their door between classes and on February 9, 1990 (Exhibit P-66), respondent failed to comply with this directive. He indicated that on at least five or ten occasions respondent was not at the door and not in his class. He also indicated that on a number of occasions he would hear noise coming from respondent's class with no one supervising. At that point, he would go on and restore order.

Mr. Gregory testified to an observation he conducted on March 27, 1990 (Exhibit P-67). The room was not neat and it was in disarray. Classroom rules were not posted. There were no learning centers, no posting of student work and the bulletin board was bare. Some students had their heads down, other students were looking out the window, and other students came in late. Respondent had no control over the students. He was seated in a chair at the front desk and students were walking around the room. Once the period began, instruction should have begun but did not. Respondent handed out an exercise and the students were finished with it in two or three minutes. Respondent waited 10 or 15 minutes when he should have been giving instructions to the students. Mr. Gregory indicated he saw no instruction during his observation. There was very little interaction with the students and respondent merely distributed dittos. Respondent did nothing about the students not paying attention. Based on his observation during this lesson, there was nothing done connected with the lesson plan and curriculum guide. There was no checking to see if the students understood the subject matter of the lesson. He gave respondent an overall unsatisfactory rating.

Mr. Gregory testified that a teacher should always check for student understanding in order to adjust the teaching methods and approach to the students. Respondent did not do so nor did he take any steps to correct student conduct. There was also no evidence of homework being given either the day before or the day of the observation. A worksheet would be appropriate if given with instruction but there was no instruction given by respondent. There was very little teaching going on in this class.

On cross-examination, Mr. Gregory testified that respondent was given a 90-day period to improve his performance (Exhibit P-69). Respondent had the skills to teach but was he was not effective as a teacher. During the observations, respondent spent no time correcting student behavior and at no time addressed inappropriate behavior. He would do nothing to correct student behavior but would refer the students to others. Mr. Gregory was most concerned with respondent's ineffective teaching. He also viewed respondent's lesson plans and indicated there was nothing in them showing methodology, procedures, or homework. He recounted one incident when respondent was 20 minutes late getting to class. By way of explanation, respondent indicated that he was getting his paycheck.

Irene Miller Graves testified that she is the English Department chairperson at Westside High School. Respondent was a member of the staff at Westside from 1985 to 1988, when he left. She conducted an evaluation of respondent on June 10, 1987 (Exhibit P-61), in which gave him an overall unsatisfactory rating. She indicated that respondent failed to take into account the individual needs and abilities of the students. He used one set of lesson plans for both ninth and tenth grade and there was no distinction made for student abilities. His instructional methods were not sufficient, he simply distributed dittos. This method was both inefficient and insufficient. The only resources used by respondent were the dittos which he prepared. There was no use of textbooks or other resources. She observed students were late, students who did not belong in the class, and students who were making noise outside of the class, all of which should have been taken care of by respondent but were ignored by him. Respondent failed to appraise his own teaching methods and failed to function as part of the school program. There was no contact with colleagues and no participation in school activities. Respondent needed improvement in a number of areas. He failed to motivate students. Students did not wait for instruction or direction but simply started working on the dittos which he handed out. There was no teaching taking place in his class. There was very little interest or concern shown on the part of respondent. He spoke in a monotone and walked around the room looking out the window. There was no attempt to engage his students or to capture their attention. It did not matter to him if the students were listening. With respect to punctuality, respondent was tardy 43 times the prior year and 51 times in the current year.

Ms. Miller testified to an observation she conducted of respondent on November 9, 1987 (Exhibit P-62). The lesson consisted of four separate and totally unrelated concepts, where there being no continuity or sequence. There was no purpose or objective to the lesson and the skills being taught did not relate to each other. The classroom was in disarray with no seating arrangement. Respondent made no attempt to administer control and did not address any classroom discipline problems in any way. The class began five or ten minutes late and respondent started class five or ten minutes after he arrived, which left only 20 minutes for instruction. Respondent failed to use anything other than a ditto, when there were additional materials and resources he could use. Respondent displayed a lack of interest in teaching methods or procedures and he failed to relate to differing student abilities. He provided no motivation to

students. He failed to state the objective of the lesson and he provided no instruction, that is, there was no attempt to actually teach the students the concepts being dealt with in the ditto. Respondent also did not attempt to make use of any textbooks assigned for use by the students.

Ms. Miller made an observation of respondent on January 19, 1988 (Exhibit P-63). Some of the students arrived late but respondent failed to find out why and failed to administer discipline. Respondent also arrived late and he did other things before starting class. He failed to implement the lesson by failing to engage in instructional techniques and methods addressing the individual needs of students. A teacher is required to in part knowledge, therefore, the teacher must consider the students' abilities and needs, and respondent failed to do so. One student was listening to a portable radio which was against school regulations. The students did not know the title of the textbook and, according to one student, textbooks had not been assigned to them. While respondent was at the board writing instructions, the students were not paying attention but were working on the ditto. Respondent should have gotten the students' attention and explained the concepts he was dealing with. He failed to follow-up in order to assure that the students were getting a clear understanding of the concepts he was teaching.

Ms. Miller conducted an observation on February 29, 1988. She found the classroom disorganized and disorderly. There was no attempt to use the full 40 minutes of class time for teaching. Despite her prior recommendations, respondent again failed to use the assigned textbook and other resources. There was no attempt to use proper methods for implementing the lesson. A single prepared ditto lesson is not sufficient to meet the needs of all the students. Respondent had not made any attempt to incorporate the suggestions she had previously made to him into any of his lessons. There was an improvement by respondent in trying to focus on one area only. However, there was no indication by respondent as to the lesson objective and there was very little teaching taking place. She indicating that filling in information on a ditto is not teaching and there was no explaining, showing concepts, or instructions. Respondent was assigned the *Arrivals* textbook but he did not use it. He gave no advance directions or instructions as to what was required of the students to complete the dittos handed out. There was insufficient verbal communication between respondent and the students and he failed to engage the students.

Ms. Miller testified that on May 18, 1988, she provided the respondent's Annual Evaluation (Exhibit P-65), wherein she considered all observations made during the year. This indicated that there was no clearly established procedure on the part of respondent for planning or for considering the abilities of students. The only instructional method used by respondent was the ditto. There was no other teaching method, strategy, or technique used by him. There was no attempt by respondent to use resources or supplemental materials. The same types of discipline problems occurred even at the end of the year.

On cross-examination, Ms. Miller indicated that respondent was assigned to the ninth, which is the lowest level in the school. The students were probably reading on a fourth grade to seventh grade level and it was unlikely that any of them were reading on a eighth or ninth grade level. She indicated that in the 1986-87 school year the students were assigned an individual literature anthology to take home. The same was true in the 1987-88 school year, with each student having been assigned a separate textbook. These were distributed within the first two or three weeks of the school year. The teacher has the option not to use textbooks at the beginning of the school year. She cannot recall if the textbooks were given to respondent. She indicated that she reviewed respondent's lesson plan books and that her signature indicated her approval of the plans. The textbook was included in respondent's written lesson plans but she saw no textbooks being used during her observations. The dittos used by respondent appear to be teacher-made.

Ms. Miller recalls that respondent referred some disciplinary problem students to her but respondent did not spend an inordinate amount of time on discipline. She indicated that respondent was late to school for 51 of the 180 school days based on documents provided to her. She also admitted there is nothing wrong with ditto method of instruction but other methods also should have been used. She acknowledged that respondent indicated he had to use dittos because the required materials were too difficult for the students. She also admitted that respondent was competent and had ability, and that he was knowledgeable. He had the requisite skills but was not performing in an efficient manner. She indicated that she never felt that respondent behaved in an insubordinate way or in an unbecoming manner during all of the time that he was her subordinate. She acknowledged that at some time during the year, a VCR and television were stolen and could

not be used. On redirect she indicated that respondent did not make a serious attempt to incorporate all available materials in his teaching. There was no connection between the lesson and the skills being taught.

Dr. Jean Sharp Adilifu testified that she became familiar with respondent as a teacher of English at Central High School. She performed observations and evaluations in early 1991 because it had come to her attention that there had been three years of unsatisfactory performances by respondent.

Dr. Adilifu conducted an observation and prepared a Teacher Observation Summary on January 23, 1991 (Exhibit P-73). This was not a formal observation. The lesson and conduct of respondent were disjointed and unfocused. The students entered and left the classroom at will and were not provided any direction. The teacher's remarks were given in an off-handed manner with no pitch or tone to his voice. There was no connection to responses given to the teacher by students. Respondent chewed gum during this class, which she did not consider to be professional deportment, especially since his pronunciation was hampered by the gum in his mouth. She arrived at the beginning of the period and respondent arrived late. There was no immediate direction given by respondent to the students upon his arrival. Respondent had no lesson plans in written form. It was remarkable to Dr. Adilifu that the students were not defiant and that some were actually following directions. She spoke to respondent after the class. She felt that the respondent should assume the role of instruction leader and felt that there was a lack of professional behavior on his part. There were typographical errors in the material he supplied to the students. He only used a single instructional modality, which was a handout. She felt that students needed verbal instruction, engagement in question and answers, and other directions.

Dr. Adilifu conducted an observation of respondent on March 21, 1991 (Exhibit P-74). She found the teacher-controllable situations, including seating arrangement and orderliness, to be unsatisfactory. There was no display of student or teacher materials and no attempt to make the classroom learning-attractive. The respondent entered the class late and did not start promptly. There was no direction or time frame given to the students for the lesson. She observed a lack of substantive given-and-take between respondent and the students. Respondent did not use multiple teaching strategies but gave the students written work only. Respondent lacked a well-

modulated voice and spoke in a detached monotone which lacked enthusiasm. There was minimal eye contact, minimal verbalization, and minimal qualitative teacher-student exchange. Respondent used no board-approved curriculum guide, instructional strategies, stimulation of students, or lesson plans for the lesson being addressed. The students were not paying attention to him. He simply remained at his desk during the class when he should have been actively engaged in teaching. Respondent's increment was denied, based on his continued unsatisfactory performance (Exhibit P-75). Based on the three years of unsatisfactory performance, tenure charges were filed.

On cross-examination, Dr. Adilifu indicated that she observed respondent twice. On March 21, 1991, she recalls that respondent gave no instructions to the students. He simply delivered a ditto to the students and thereafter did very little instruction. The students ushered respondent into the classroom by telling him that he had a visitor and he might want to come into the classroom. She does not know what respondent was doing outside of the classroom. After he came in he handed out preprinted information. He was involved only with imperative sentences for the entire period. The plan book said that the lesson was for HSPT writing. She indicated that when she spoke to respondent afterwards respondent was not disrespectful and was not insubordinate toward her. She gave him suggestions and recommendations but indicated that these were not presented as direct orders. There was no failure to abide by orders given by her to respondent. She indicated that the suggestions she made to respondent were to cause him to perform in an efficient and satisfactory manner.

Carmela H. Pallotta testified that she is Vice Principal at Westside High School and she provided her educational background and experience. She was asked to evaluate respondent at Westside High School. She conducted an observation on December 3, 1991 (P-70), during which she was very confused about the subject of the lesson. The classroom environment was unsatisfactory because the students were calling out answers and banging on the file cabinets, and their unwillingness to behave and pay attention was not addressed by respondent. The classroom was completely bland and there was no evidence of any teaching activity. The lesson had no beginning, middle, or end and there was no organization to the lesson at all. At the conclusion of the class, the students ran out of the classroom before respondent could give a homework assignment. He did not attempt to communicate with the students and there was very little

interaction. Respondent passed out a sheet of paper which did not match the classroom discussion. He failed to communicate with the students and would utter only two or three sentences. There were no lesson plans in sight and when she asked respondent for lesson plans, he did not answer. His lesson implementation was generally unsatisfactory because no lesson took place. Respondent left the room twice and returned and began handing out books, but gave no explanation. This was not a lesson. It consisted merely of 40 minutes of marking time and filling up space. The students had no books or pencils and some came in late.

Ms. Pallotta indicated it is not good teaching practice to have students shout out answers. Respondent passed out blue paper with no explanation and she could not understand what was going on. In addition, respondent is not supposed to leave the room because it violates the teacher contract and there was no reason for leaving the room. Almost all of the students were unprepared. Respondent sat at his desk and said very little if anything. He asked undirected questions which were ignored by the students. She indicated that when one student was banging on the file cabinet and was disruptive, respondent did nothing, and eventually another student asked the disruptive student to stop. Students must understand the assignment and it is not teaching to simply to pass out a piece of paper. What took place in respondent's classroom was not teaching and respondent did not even bother to talk to the students. There was also no structure to the seating arrangement in class. She does not agree that respondent spent an inordinate amount of time disciplining students on the day of her observation. She felt that his conduct bordered on insubordination. The few words that he deigned to utter were not with a raised voice. The subject of the handout (attachment to P-70) was with respect to the lesson which should have been covered months prior. It did not match what respondent was saying during class, which should have been studied months earlier. She indicated that respondent is a very bright man but she does not know if he has the skills to be an effective teacher. She felt that he was inefficient on December 3, 1991. When she questioned him about what happened in the classroom he did not answer and he simply smiled at the Observation Report but did not read it.

Respondent testified that he has been employed as a teacher in the Newark school system for 20 years and has a certificate as an English teacher. He testified that Ms. Rivers supervised him prior to October 1989, and that in 1987-1988 she provided satisfactory evaluations (Exhibit R-40, R-41, R-42, and R-43). Respondent testified that Ms. Rivers would review his plan book

once every two weeks (Exhibit R-1). He would hand in the plan book to her every payday and she would return it the following Monday indicating her approval of the plans. On occasion, Ms. Rivers would hold onto the lesson plan longer. He recalls that there was one occasion when he was observed that Ms. Rivers had not returned his plan book to him.

Respondent testified that the source of the requirement for teaching of grammar is found in the school district's Book of Course Proficiencies for English 1 (Exhibit R-5) and for English 2 (Exhibit R-7). The course proficiencies for English 1 (Exhibit R-5) required that he teach grammar. Course proficiencies for English 2 is a separate document (Exhibit R-7). He used these as far as planning and implementing his lessons. He indicated that Ms. Rivers was aware that he was using ditto forms to teach grammar, including fundamentals of verbs (Exhibit R-9). This ditto was consistent with course proficiencies. Ms. Rivers had no problem with his use of these materials, which he prepared. When the students used his materials discipline and interest were less of a problem. There was always a problem keeping the attention of the students because they all had reading deficiencies. As ninth grade students, they generally had a reading level of fourth or fifth grade. Respondent indicated that there were well over 100 proficiencies in the course proficiencies booklet (Exhibit R-5) and that he compiled each of the ditto forms (Exhibit R-46) by taking district books and materials and using them to try to cover at least four proficiencies each day. These forms would also serve as homework, which could be finished at home. These forms used district textbooks for all pages except the answer sheet. Respondent also testified that he engaged in providing exercises by handing out dictionaries and having students use them (Exhibit R-47).

Respondent testified that Ms. Rivers did not remain in class for the entire period on October 11, 1989. A student was being disruptive and respondent admonished him a number of times. Ms. Rivers intervened, got into an argument with the student, and removed him. Therefore, she did not remain in the class for the entire period.

Respondent also testified that the exercise he used on January 24, 1990 (Exhibit P-6), was given to a class that consisted of approximately six or seven students. He explained that cutting classes was a problem at Central High School when the exercise was provided (Exhibit R-48). Respondent identified the absence list for a number of days starting with November 22, 1989

(Exhibit R-27). He indicated that the Central Office prepares a list of absences every day and places them in the teacher's mailboxes. Absences have always been a problem and it is not an easy problem to solve. Respondent also identified lists of Lefts and Transfers, which is also prepared by the Central Office (Exhibit R-28), and a Suspension List (Exhibit R-29), all of which interrupted the continuity of classes. Finally, he identified an Entry/Withdrawal Summary (Exhibit R-26). With student absences, there were some days when no students would show up for a class.

Respondent admitted that he received a packet of memos regarding student absences (Exhibit R-31). If a student arrived late for class, the student was to be allowed to come into the class. He always warned students as to the tardiness policies and admonished students afterwards. It had become a routine matter for students to come to class late. The Department chair, principal, and vice principals were supposed to be in the halls, but very often they were not. If they were there, the students disregarded their presence.

Respondent testified that hall sweeps were utilized from time to time. These were conducted during class time. The administrators were to deal with discipline and three to four minutes passing time between classes was permitted. However, hall sweeps are disruptive to the classes

Respondent testified that there were many last minute notices of changes in the daily schedule. He provided a number of copies of memos showing changes in the school schedule and shortening of classes (Exhibit R-25). This interrupted the normal routine of the school day and many students used this as an opportunity to leave school early. This would occur once every two weeks.

With regard to the observation of January 24, 1990 (Exhibit P-6), respondent testified that he asked Ms. Rivers for a demonstration of a directed reading lesson. He disagreed with her assessments and felt that they were not true. He did not understand the basis for the unsatisfactory ratings given to him.

Respondent then addressed the observation of November 20, 1990 (Exhibit P-26). He identified the worksheets for that class (Exhibit R-49) and indicated that the students' writing skills were "pretty bad." However, he indicated his exercise was in line with and was consistent with course requirements. He indicated that he recalls November 20, 1990, very well and that there was much confusion in the halls and in the classrooms. He frequently remained in the hall to get the students into the classrooms. It is very possible that the students were combing each other's hair; however, he indicated that he delivered his lesson for that day.

Respondent addressed the observation report by Mr. Gregory dated March 27, 1990 (Exhibit P-67), and Ms. Rivers' observation report of October 13, 1988 (Exhibit R-40). He indicated that there was a similarity in exercises given to both classes involving verbs and verb tenses. On March 27, 1990, he had made copies of certain pages of the HSPT for an instruction technique and he was familiarizing students with prior tests. He believes his instructional techniques on that date were effective, that the students were motivated to pass the test in order to get a diploma, and that the students understood completely what he was doing. He indicated that the Post-Observation Conference report (Exhibit P-7, paragraph VI.a.6) is contradicted by the policy to ignore tardiness unless it was dealt with later and that no student was to be denied access to the classroom. He felt that all the concepts he was using for instruction that day were in accordance with curriculum guidelines and study guides. He does not know the factual basis for Mr. Gregory's unsatisfactory ratings and he testified that he made every attempt to comply with these items. He felt that the post-observation conference was very brief because Mr. Gregory was in a hurry. He made the point that respondent had not made the lesson objective clear.

Respondent testified that Ms. Rivers' Observation Report of January 30, 1989 (Exhibit R-42), the Observation Report of February 29, 1988 (Exhibit P-64), and the Observation Summary of January 23, 1991 (Exhibit P-73) all dealt with the same lesson on these three dates, which was imperative sentences. He identified the class work on the date of the observation of January 23, 1991 (Exhibit R-56). This exercise required that the students write an imperative sentence, deal with outlining, pronouns, and antecedents. All of the concepts dealt with in the lesson are in line with the curriculum guides. He used the imperative sentence ditto for each of the three lessons on the different dates indicated. He felt that Ms. Rivers was very pleased by the lesson. The

materials were drawn from district supplemental workbooks. He personally formulated the materials on imperative sentences.

Respondent addressed the Teacher Observation Report of February 29, 1988 (Exhibit P-64), and in particular the unsatisfactory classroom environment and management. He explained that the classroom was dilapidated, windows were broken, the fixtures and desks were dented, beat up, old, and had not been painted in quite some time. With respect to teaching characteristics, he disagrees and feels he handled the class pretty well. He felt that his teaching and lesson implementation was effective. He provided materials for the general level of the class, which was poor and was at a fourth or fifth grade level. He indicated that the suggestions for improvement mentions a lesson found at page 76 in *Warriners English Grammar and Composition Third Course*, which is a standard English textbook. He indicated that he used a similar exercise. However, students were not at grade level and he had to redesign the materials to get the concepts across to below-grade students. He was attempting to use effective techniques, he attempted to motivate the students, he questioned the students thoroughly throughout the lesson, and he attempted to have the students think independently. He denies that the students were unaware of the objective of the lesson and he indicated he gave the students examples as well as the ditto stating what is expected of the students. He indicated that he designed these materials to suit this lower level class. He testified that even the *Arrivals* textbook was too difficult for the students and that it was not applicable to a grammar lesson on the imperative sentence. Ms. Miller never told him he was insubordinate.

Respondent testified that if he was late arriving at class, it was because he had to use his passing time to change his room. He also indicated that if there is a disturbance in the hall, it is a judgment call whether the teacher should respond to the disturbance or report to the classroom. Administrators were assigned to various areas to keep the halls clear but many times administrators were not present and teachers had to perform this function. It was very rare that students were in the classroom with the starting bell. He acknowledged that if he ever commenced class late, it was because he was in the hall attempting to get students into the classroom.

Respondent testified that he disagrees with Dr. Adilifu's observation (Exhibit P-73) in its entirety. He denies mumbling and asserted that the entire class could hear him. He denies the accuracy of this observation. He does not recall if he was four minutes late but indicates that it was always a problem getting students into the class. The material gone over was the same material as the previous school day. He also indicated that when there is a visitor in the classroom, the students get edgy. He also testified that workbooks had not been provided to the students and that he had to copy them. Respondent also indicated that the lesson plan book had been provided two weeks in advance but he felt he was not required to redo the plan book if he was not able to meet the objectives because of outside interruptions. He denies that seats were randomly arranged and denies that no lesson plans were present. He began class promptly and indicated that pacing guides did not come up until the next school year. He felt that his voice was loud and clear and that his directions were clear.

Respondent relied upon a Teacher Observation Report of May 6, 1985 (Exhibit R-62), to indicate that he used the same or similar materials previously and his performance was found to be satisfactory. He also indicated that he was complying with the PIP of June 4, 1985, by developing exercises (Exhibit R-63). He also relied upon an Instructional Survey of May 16, 1985 (Exhibit R-64), with respect to dittos.

Respondent also relied upon an Annual Evaluation of June 17, 1986 (Exhibit R-61). He testified that he did nothing different in 1986, when he was evaluated as satisfactory, than what he did in subsequent years.

Respondent testified that he generally submitted lesson plans on time, and that occasionally they may have been submitted late if he was absent. He felt that late submission of lesson plans was an exception. He also testified that Ms. Rivers never told him not to use the materials he used. He indicated that any time Ms. Rivers requested a change in the format of the lesson plans, he attempted to comply.

Respondent acknowledged receiving a memo from Ms. Rivers dated November 18, 1991 (Exhibit R-18), with respect to student writing samples. Respondent testified that he obtained writing samples from the students, although he indicated it was very difficult to get the students to

provide these writing samples (Exhibits R-12(a), R-12(b), R-12(c), R-12(d), and R-12(e)). He also provided copies of writing samples for ninth grade (Exhibits R-13(a) and R-13(b)). He also provided additional writing samples to satisfy the requirements for writing samples (Exhibits R-14(a), R-14(b), R-14(c), R-14(d), and R-14(e)). He additionally relied upon copies of book reports by students in response to handouts of the school district (Exhibits R-15(a), R-15(b), R-15(c), R-15(d), and R-15(e)). Students were assigned a book report per cycle, with four cycles in each school year. He also had the students write a friendly letter and indicated that more students responded to the friendly letter than to an open-ended essay, and that they responded better to a strongly specific exercise (Exhibits R-16(a), R-16(b), and R-16(c)). He indicated that mid-term essays are required as part of the mid-term grade and that the students were required to write about an aspect of a particular story (Exhibit R-17).

Respondent testified that he introduced literature concepts little-by-little and that he would introduce something new and would also reinforce prior materials at the same time (Exhibit R-10). Those students who were slow in class and could not complete the ditto would take it home as homework. He also identified samples of reading proficiency exercises level 2 and indicated that the better students used these in 1988-89, in 1989-90 or later (Exhibit R-8). He also identified random samples of exercises he used at Central High School geared to weaker students with weak reading ability at grades four to six level (Exhibit R-6). He used these materials and they were all taken from textbooks supplied by the district. He found and compiled these materials himself. There were changes and modifications to them and the strategies that worked were kept by him and those that did not work were changed by him.

Respondent identified an Observation Report on October 28, 1986 (Exhibit R-38). He testified that he attempted to use Ms. Miller's recommendation as set forth in the Observation Report and his lesson plan book after this shows that he followed her comment to use *Arrivals*. He identified the materials he used during the October 11, 1989 observation (Exhibit R-46). This material was the same as that which he used in prior years. With regard to the observation on November 17, 1989 (Exhibit P-4), he identified the materials he used on that day (Exhibit R-47). He indicated that it is possible that students engaged in irrelevant conversation at the beginning of the class. The job of the teacher is to get the students settled in and quieted down and to pay

attention to the lesson. For this lesson he used a set of dictionaries provided by the district, the objective being to show the dictionary as an abundant source of general information.

Respondent next referred to the observation of November 28, 1989, by Ms. Culver (Exhibit P-59). In general, he felt that the class was participating, that posters had been placed in the classroom, and that his instructional techniques were satisfactory. He was polite in the post-observation conference and he responded in writing by a memorandum on February 7, 1990 (Exhibit R-55).

Respondent next testified concerning the observation on January 17, 1990 (Exhibit P-60). The lesson that day dealt with finding evidence and focused on reading skills. He felt that the students participated very well and that all materials he used were in line with Board of Education curriculum guides and teacher guides. He feels that there is no factual basis upon which Ms. Culver could have concluded her unsatisfactory rating. The students responded to the lesson very well and his teaching effectiveness has been the same throughout his career.

Respondent addressed the Teacher Observation Report of March 27, 1990, by Mr. Gregory (Exhibit P-67). He indicated that the lesson given that day was the same lesson as the prior year when Ms. Rivers gave him a satisfactory rating.

Respondent testified by indicating that Ms. Rivers' memo of March 29, 1990 (Exhibit P-14), dealt with respondent's mentioning to Ms. Rivers that the assigned ninth grade text, *Adventures in Reading*, was too difficult for the students. Ms. Rivers suggested ten other textbooks. However, Ms. Rivers did not follow-up on the memo of March 29, 1990. It should be noted that it was the responsibility of respondent rather than Ms. Rivers to follow-up on this memo.

Respondent testified that there was no factual basis for the unsatisfactory rating in his Annual Evaluation of June 1990 (Exhibit P-15). He testified that he used the same strategies and materials that he used the prior year. However, as a result of this evaluation, he attempted several different strategies. The supervisors made suggest as to the use of materials, but did not require him to follow their suggestions. He denies that he engaged in any willful disregard of directives.

He never refused to obey any order or directive and did not disregard Board of Education regulations or any law. He indicated that he complied with his PIPs.

Respondent testified with respect to the Observation Report of November 20, 1990 (Exhibit P-26). He identified the materials used during the lesson on that day (Exhibit R-49). He indicated that these materials involved diagrams to familiarize students with the characteristics of English verbs. This was part of the curriculum guides and criteria. He responded to this evaluation with a memo of December 10, 1990 (Exhibit R-50). He indicated that very similar lessons were marked satisfactory in the prior school year by Ms. Rivers. He also indicated that on that date there was quite a bit of disruption in the halls and during the school day, and disruption has a negative effect on the lesson. He felt that he was involved in an effective use of time and in an effective lesson. He indicates that Ms. Rivers never provided him with a demonstration lesson, as requested by him in his memorandum. He acknowledged that Ms. Rivers did provide two demonstration lessons but not for the period one class.

Respondent testified that the Observation Report of March 21, 1991 (Exhibit P-74), is factually incorrect because he was not engaged in imperative sentences on that date. He identified copies of answer sheets relating to the HSPT booklet to confirm this fact (Exhibit R-57).

Respondent indicated that the Observation Report of February 20, 1991 (Exhibit P-40), indicates that the ditto sheet used that day was similar to numerous others seen by the observer on other occasions. Respondent denied using the same ditto over and over again. He testified that these ditto sheets or exercises are designed to be incremental. He denies that there was any factual basis for the unsatisfactory evaluation. The students responded very well to the exercises and they were consistent with the curriculum from district-provided books. He considered the suggestions made by Ms. Rivers. However, he indicated that beginning a class promptly is a serious problem throughout the high school. He also indicated that because Ms. Rivers did not observe him using literature and other textbooks does not mean that he is not using them. Respondent also testified that classroom discipline is a fact of life for all teachers at Central High School.

Respondent indicated that as to the Annual Evaluation Report of June 1991 (Exhibit P-44), that he never told Ms. Rivers that he would not comply with the recommendations. He was concerned about the level of performance by students but denies that there was any factual basis for the unsatisfactory rating. He denies that he willfully disregarded directives, that he committed insubordination, that he disregarded Board of Education procedures or law, or that he created a poor precedent.

Respondent testified that in the 1991-92 school year, he was subjected to four class changes from the tentative schedule given to him in spring of 1991 (Exhibit R-68). There was a big scheduling "glitch" in September 1991 and many students had no schedules. The schedule was eventually worked out in the first week in October, but there was an enormous amount of confusion in the meantime. Ms. Roseta Holiday was in charge of resolving the scheduling problems. Subsequent to October 7, 1991, respondent was still getting schedule changes and there were also changes in the levels of classes. There was also no continuity in lesson planning and the Prentice Hall series of assigned textbooks had not been distributed until mid-October 1991. Students had not yet been assigned lockers. Prentice Hall was new to all English materials and it was not until October 1991, that a meeting was scheduled to discuss a course outline and pacing charts (Exhibit R-69). He also indicated that there were in-service workshops with respect to the Prentice Hall materials to familiarize teachers with them in October, November, and December 1991. Thus, at the time of the observation of October 7, 1991 (Exhibit P-48), respondent had been in the classroom about one week or less and he was required to use materials he had used previously because of this confusion. As of that date, it was not possible to use the Prentice Hall materials because they had not yet been given to students and that teachers were not yet familiar with them. Even so, the lesson went very well that day. Respondent identified an exhibit containing Prentice Hall materials together with updated class lists indicating that the class lists had only been finalized at that time (Exhibit R-53). It was at this point that respondent began to incorporate the Prentice Hall materials into his classes.

Respondent testified as to demonstration lessons provided to him pursuant to the union contract (Exhibit R-22 and R-52). Ms. Rivers provided a demonstration lesson in a remedial class for students having difficulty with reading. The students' reactions were mixed and they read a story throughout the class period. However, they were disruptive during the class. Respondent

indicated that he felt the demonstration lesson was irrelevant to Ms. Rivers' criticisms of his performance and he wrote a lengthy memorandum concerning this (Exhibit R-23).

Respondent testified that the observation by Mr. Harry Laub on November 20, 1991, included a criticism to the effect that this lesson should have been taught much earlier in the school year. However, respondent indicated that when he and the students got the materials, he chose those materials that the students would have an easier time with. This was tenth grade but the students were far below the tenth-grade level. Mr. Laub was not aware of the practical problems experienced by Central High School. The students were having a difficult time with the materials and he tried to force the students to use the recommended materials but was not successful. They could not manage the district materials with any degree of comprehension. He provided the students' responses with respect to the materials (Exhibit R-58).

Respondent testified that during the observation by Ms. Pallotta on December 3, 1991 (P-70), the subject of the lesson would not have been unclear if Prentice Hall materials had not been used. He disagrees with this observation report in its entirety. He also indicated that he stepped out of the classroom to let another teacher into an adjoining classroom.

On cross-examination, respondent testified that he developed the exercise sheets or dittos because students could not handle the selected materials from the district-provided materials. The *Journeys* and *Arrivals* textbooks were not used because there were insufficient number of these books for each student. However, he denies that his expectations of the students was too low. He started at a low level and eventually tried to challenge the students. His strategy was to start where the student was capable of performing. There were varied levels of difficulties in the materials he provided. He testified that the photocopied materials worked well because this assured that each student would have a copy of the appropriate materials each day. Copies are acceptable to use if they are directed to a skill required by the students.

Respondent testified that he does not think it is possible to have the students progress one year. He does not know the cause of their low academic performance. He denies that he had a low expectation, just a realistic expectation. Many of the students came to school with problems and his expectation is to meet the student where he or she is and to move them as far as possible.

He admitted that he used the imperative sentence lesson on grades nine, ten and eleven, but this was because all three grades consisted of students who were not functioning at grade level. He considered the imperative sentence lesson to be an introductory lesson.

With respect to writing samples that were due on September 19, 1990, he did not know if he submitted any writing samples that year because the assignments were not done by the students. As he continued to give this assignment for writing samples to the students, he got less and less cooperation. He admitted that he did not always submit writing samples and he admitted that he did not give either writing samples or corrected writing samples to the Department chair. He admitted that he gave writing assignments and got some writing samples from the students but did not submit them to Ms. Rivers. He identified corrected writing samples (Exhibit R-14(a)).

Respondent testified that he used the assigned textbooks in a manner that the students could manage. He acknowledges that the observation of October 28, 1986 (Exhibit R-38), of January 19, 1988 (Exhibit P-63), and of February 29, 1988 (Exhibit P-64) indicated that the use of dittos is not acceptable. However, he takes the position that the dittos he used were taken from textbooks. Even though the evaluators all recommended against the use of dittos, he was aware of this but pointed out that dittos were copies of Board-approved materials.

Respondent disagrees with Ms. Culver's observation of November 28, 1989 (Exhibit P-59) and her assessment, as well as her assertion that he failed to handout homework. He eventually indicated that he disagrees with all his evaluators and he should not have been rated unsatisfactory.

With respect to the Prentice Hall textbook, Dr. Laub indicated that it was selected by the teachers in the school district. However, respondent stated that it was a very difficult textbook and the teachers from three or four high schools were aghast and said that it could not be used. However, the Board of Education wanted to have a uniform curriculum. He felt that the students could not manage the Prentice Hall textbook and his materials supplemented the Board's and are designed to make it easier for the students to learn the concepts set forth in the curriculum.

Lula Mae Rivers was called as a rebuttal witness. She testified that she never observed respondent assisting in getting students out of the hallways. She explained that hall sweeps were to get lingering students into the classroom after the classes have started. This was not considered to be the responsibility of teachers but that of school administrators.

Ms. Rivers identified *Adventures in Reading* (Exhibit P-80). She indicated that there is a range of reading levels and that all students could use this text with proper instruction. There are various strategies that could be used to match student levels with the text. She also indicated that a sufficient number of books were available to be provided to all students and that there were no shortages. She did acknowledge that there are losses of copies of books every year.

Ms. Rivers testified that the reasons why she gave satisfactory evaluations in prior years and then unsatisfactory ratings in subsequent years was that at first she was just getting to know respondent and trying to understand his teaching strategies. This takes a while and eventually she saw a deterioration in respondent's performance. He was arriving late and his encouragement of students was deteriorating. She saw too much grammar being taught in his classes and not enough focus on the rest of the curriculum. Providing grammar lessons without putting them into practice is not acceptable.

On cross-examination, Ms. Rivers indicated that the *Adventures* text was the only Board mandated textbook for Central High School. There were other resources but this was the specified textbook. She also indicated that she always gives the teacher and herself a chance to get to know each other before giving an unsatisfactory rating. She admitted to rating respondent satisfactory for the 1988-89 school year.

Irene Miller Graves testified that the *Journeys* textbook was ordered for those students reading below grade level. She disagrees that the abilities of the students vary. She indicated that she checked with the publishers to make sure that the text was not too difficult for below-grade readers. She indicated that the *Arrivals* text is designed for grades 2.5 to 5.6. She also indicated that there were a sufficient number of books available for all students.

Respondent testified to rebut the testimony of the witnesses. He identified the two textbooks and indicated that he tried to use them but had very little success. He denies that *Adventures in Reading* (Exhibit P-80) was a required textbook. Ms. Rivers gave him a curriculum booklet (Exhibit R-72), which lists *Adventures in Reading* as a recommended text. He attempted to use *Adventures in Reading* but was not able to do so.

LEGAL DISCUSSION AND ANALYSIS

The Commissioner of the Department of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. The discipline of tenured school employees is authorized by *N.J.S.A.* 18A:6-10, which generally provides that no tenured school employee shall be dismissed or reduced in compensation during good behavior and efficiency except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing.

The original charges in this matter which were certified by the school district on January 29, 1992, included a charge of inefficiency and a charge of unbecoming conduct. By a Partial Initial Decision dated September 21, 1992, in this matter, the undersigned granted respondent's motion to dismiss the inefficiency charge, but denied the dismissal of the unbecoming conduct charge. This was affirmed by the Commissioner of Education on October 21, 1992, and affirmed by the State Board of Education on February 2, 1993. Thus, the sole charge to be considered in this matter is whether respondent engaged in unbecoming conduct.

The tenure charges filed by respondent in this matter allege that respondent has engaged in conduct which is unbecoming of a teacher in that:

(a) Respondent spends inordinate amounts of time disciplining his students such that said students are deprived of effective instructional techniques and the proper environment for learning. (It is noted that this allegation was dismissed by the ALJ at the hearing.)

(b) Respondent has caused the administration to consume an inordinate amount of time seeking to address his conduct.

Respondent has willfully disregarded expressed and implied directives to conform his conduct to the level expected of teaching staff members.

Respondent has displayed insubordinate conduct, in that he has refused to obey the orders/directives by his superior(s) and/or department administrators who are entitled to give and have said directives obeyed.

Respondent's conduct and behavior evidence a complete disregard for board procedures and applicable law, and establishes a poor precedent for other teaching staff members of the school district.

Each of the above actions singularly constitutes conduct unbecoming of a teacher; however, the aggregate of the above actions evidences gross and harmful conduct unbecoming a teacher.

The essence of respondent's argument, as set forth in respondent's Brief and Reply Brief is that an examination of the proofs in this matter reveals that petitioner has failed to prove the above assertions by a preponderance of the evidence. Respondent argues that petitioner failed to prove that respondent caused the administration of the school district to consume an inordinate amount of time seeking to address his conduct. It is pointed out that none of the seven witnesses who testified against respondent mentioned spending an inordinate amount of time seeking to address his conduct. It is also observed that it not clear from the record whether the expenditure of inordinate amounts of time by supervisors and administrators is an element of proof in establishing unbecoming conduct.

Respondent additionally argues that the school district failed to establish that the respondent refused to obey the directives or orders of his superiors either expressed or implied. Respondent further argues that petitioner has failed to establish that respondent displayed insubordinate conduct by refusing to obey the orders/directives by his superiors and/or department administrators. In this regard, only one of the seven witnesses who testified in

support of petitioner's case against respondent indicated in any way that respondent acted in an insubordinate manner. I generally agree with respondent's arguments as to these issues.

Finally, respondent argues that petitioner produced no evidence of gross and harmful conduct on the part of respondent. In order to determine whether the petitioner met the elements of this charge, it is necessary to discuss what is intended by the term, "unbecoming conduct".

There is no single definition of the term unbecoming conduct. In *Laba v. Newark Board of Education*, 23, *N.J.* 364, 384 (1957), it was made clear that the touchstone of the charge is a teacher's fitness to discharge the duties and functions of one's office or position. See also, *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13, 28-29 (App. Div. 1974), certif. denied, 65 *N.J.* 292 (1974). There are numerous cases in which specific conduct was found to be unbecoming conduct. For example, the use of physical force by a teacher to maintain discipline was held to be unbecoming conduct. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). A teacher with an uncontrollable temper who verbally and physically abused students was found to have engaged in unbecoming conduct. *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 741 (App. Div. 1988).

Outside the field of education, unbecoming conduct on the part of public employees is conduct which adversely affects the moral or efficiency of the agency of which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in the operation of governmental services, or which violates an implicit standard of good behavior. *City of Asbury Park v. Dep't. of Civil Service*, 17 *N.J.* 419 (1955). A finding of unbecoming conduct does not require that any specific rule or regulation have been violated but may be based primarily on a violation of an implicit standard of good behavior. *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960); *Newark v. Massey*, 93 *N.J. Super.* 317, 323 (App. Div. 1967).

In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. See *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), affirmed o.b. 131 *N.J.L.* 326 (E.&A. 1944). In that mater, a school principal was found guilty of the charges of

inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. See, 128 *N.J.L.* 281, 282 (Sup. Ct. 1942). The court stated:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. (130 *N.J.L.*.at 371.)

Generally, in order for the charging party in a tenure hearing to prevail, the truth of the charges must be established by a preponderance of the credible evidence. *In re Phillips*, 117 *N.J.* 567, 575 (1990); *In re Polk*, 90 *N.J.* 550, 560 (1982); *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962).

This general statement concerning the burden of proof raises the question how to deal with unsatisfactory teacher evaluations which were not previously challenged by respondent in a prior proceeding before the Commissioner of Education. From this follows the additional question whether a teacher such as respondent in the within matter may challenge an unsatisfactory evaluation and its factual underpinnings where they form the basis for a tenure charge or are submitted in evidence in support of the charge, if the teacher failed to challenge the original evaluation within 90 days of its issuance pursuant to *N.J.A.C.* 6:24-1.2(c).

Challenges to unsatisfactory ratings generally arise when a school district withholds an annual salary increment. In such cases, the courts have made it clear that the responsibility of the Commissioner is to determine whether the underlying facts were as those who made the evaluation claimed, and whether it was unreasonable for the evaluators to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice and closely familiar with the *mise en scene*. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 296-297 (App. Div. 1960). In any event, the burden of proving the unreasonableness of the evaluation is upon the teacher challenging the evaluation. *Id.*

There is no authority which I have been able to locate dealing with these issues either way. In view of the salutary purpose of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -

25, which is to protect teachers and other school employees against arbitrary dismissal, I **FIND** and **CONCLUDE** that a respondent has the right to challenge the facts underlying an unsatisfactory evaluation. However, the burden of proving the unreasonableness of the evaluation remains upon the respondent. *Kopera, supra.*

The proofs submitted by petitioner in this matter were extraordinarily detailed and extensive and required considerable analysis in order to reach certain conclusions. There were 16 formal observations in this matter made between October 11, 1989 and December 3, 1991 (Exhibits P-1, P-6, P-26, P-40, P-48, P-71, P-59, P-60, P-67, P-61, P-62, P-63 and P-64). These 16 formal observations were conducted by seven different individuals, including five by Ms. Rivers, one by Mr. Laub, two by Ms. Culver, one by Mr. Gregory, four by Ms. Miller, two by Dr. Adilifu and one by Ms. Pallotta. In many respects these formal observations are consistent with each other in many of their conclusions as to respondent's deficiencies. In 14 of the 16 formal observations, respondent was given unsatisfactory ratings because he was found to be unsatisfactory in disciplining and controlling student behavior. In 12 of these observations respondent was given unsatisfactory ratings because of unsatisfactory teaching or no teaching whatsoever. On 11 of the formal observations respondent was given unsatisfactory ratings for unsatisfactory lesson implementation or no lesson implementation whatsoever. In ten of the observations respondent was given unsatisfactory ratings based on his failure to use either mandated or recommended textbooks or other resources rather than an exercise sheet or "ditto". Eight of these observations rated respondent unsatisfactory based on his failure to attempt to motivate his students. Seven of the observations gave respondent unsatisfactory ratings because of poor classroom atmosphere or environment. In six of these observations, respondent was reported to have been late either arriving in class or late in actually starting the class. In five of the observations respondent was given unsatisfactory ratings based upon his lack of interest or concern in dealing with his class, his failure to have his lesson plans available and his failure to respond to or to follow prior recommendations or suggestions for his improvement as a teacher. The remainder of the unsatisfactory ratings generally dealt with the findings that respondent's lesson objectives or subject matter was unclear, that he did not use his teaching time effectively, or that he gave no homework assignment to the students as mandated by school district policy. One of the observations indicated that respondent reused a ditto which he had previously used for the same class.

The Annual Evaluations given to respondent (Exhibits P-15, P-44 and P-65) each rated respondent as unsatisfactory and each one generally found the same or similar deficiencies. In these, it was indicated that there was a lack of discipline and control of the students by respondent, there was a use of dittos as the only resource with no other materials, teaching methods, strategies or techniques being utilized, and there was a failure to use effect classroom teaching techniques. They also indicated that respondent failed to follow the directives and requirements of the school district, including a failure to use assigned text books, and that he failed to use resources or supplemental materials other than the dittos. Finally they generally indicated that there was a failure on the part of respondent to make any efforts to improve his teaching methods or to follow through on suggestions and recommendations for the improvement of his teaching.

Petitioner also relied upon 12 "Informal Observations" made of respondent on a casual basis between October 1989 and February 1991. These Informal Observations apparently involve incidents or situations observed by a supervisor of a staff member. The supervision places the observation writing so as to notify the staff member of the incident, deficiency or problem, and so as to keep a written record of the observation. There was no indication in the record what procedure is available to a staff member who disagrees with the contents of an Informal Observation. It is presumed that upon receipt of an Informal Observation, the staff member has the opportunity to respond in writing either disputing the contents of the observation or explaining the circumstances under which the incident occurred. In this matter, Ms. Rivers provided 11 of the Informal Observations (Exhibits P-3, P-4, P-8, P-10, P-12, P-22, P-29, P-30, P-33, P-38, and P-39), and Mr. Gregory provided one of the Informal Observations (Exhibit P-66). Each of these informal observations generally included more than one deficiency which was observed by the supervisor. With respect to the Informal Observations relied upon petitioner in this matter eight of them related to incidents in which they found that respondent exercised no discipline and control of the students in his classes. Five of the informal observations generated by Ms. Rivers related to incidents of lateness on the part of respondent, and the one observation generated by Mr. Gregory reported an incident when respondent failed to be at his classroom door in accordance with district policies. Four of the Informal Observations related to failures on the part of respondent to follow up on recommendations and suggestions for the improvement of

his teaching methods and four related to his failure to provide lesson implementation and direction to his classes. Three related to problems of classroom appearance and one involved respondent's failure to have lesson plans available in the classroom. It should be noted that there is reflected nowhere in the record any responses on the part of respondent to these Informal Observations.

Ms. Rivers testified to 27 memos or other writings given by her to respondent, 26 of which involved deficiencies or other problems relating to respondent's performance. Of these, ten dealt with respondent's failure to provide student writing samples as mandated by district policy, nine involved respondent failing to submit lesson plans for approval on a timely basis, five dealt with deficiencies regarding respondent's teaching methods, two dealt with deficiencies in the lesson plans submitted by respondent and one involved a response to a memo from respondent dealing with the discipline of students.

In response to foregoing testimony and evidence, respondent testified that Ms. Rivers supervised him prior to October 19, 1989 and that in the 1987-88 school year she gave him satisfactory evaluations (Exhibits R-40, R-41, R-42 and R-43) when he was using the same teaching methods and materials that he used in subsequent years when he was given unsatisfactory evaluations. He also testified that there were occasions when Ms. Rivers would hold the lesson plans which he submitted to her and that, as a result, he would not have them available to him when he was teaching a particular class.

Respondent testified that he prepared and used exercise or ditto forms to teach grammar as required by the district. These dittos were consistent with district course proficiencies and were based upon and copied from recommended or required texts provided by the school district. He indicated that Ms. Rivers approved of the use of these materials and that these dittos were better than the district-suggested or mandated textbooks because they kept the attention of students, all of whom had reading deficiencies.

Respondent testified that Ms. River did not remain in the class for the entire evaluation of October 17, 1989, because of a disruptive student. He indicated that Ms. Rivers got into a dispute with the student and she removed the student. He also testified that absences from class because of students cutting class, transfers and withdrawals of students were also disruptive of his

classes and caused a decline in the number of students attending. He also stated that at least once every two weeks all classes were disrupted by assemblies which shortened class periods. In addition, hall sweeps which were conducted by school administrators for the purpose of removing students from the halls and placing them in their proper classes were also disruptive to the classes and interfered with instruction.

Respondent testified that he frequently remained in the hallway in order to get the students into the classrooms, and this was believed to be the reason why he was late arriving at his classes. He also indicated that student discipline was a serious problem and a fact of life in all of the school district high schools, and that this problem caused disruptions in all classes. Respondent felt that the unsatisfactory ratings given to him because of his alleged failure to deal with students who were tardy was contradicted by the policy of the school district requiring the teacher to accept the student into the class and deal with the tardiness after the class.

Respondent denied Ms. Rivers' conclusion that the same ditto or exercise was used by him in the same class on prior occasions. He explained that his use of dittos is incremental and that it is necessary for him to go over a subject a number of times in order to teach the students in a proper manner.

Respondent addressed the various allegations of unsatisfactory classroom environment by explaining that the classrooms are dilapidated, windows are broken, fixtures and desks are dented, beat up and old, and there has been no painting of classrooms for quite some time.

Respondent indicated that because of the below-grade level of all students, he could not use the recommended or, in later years, required text books. As a result, it was necessary for him to use materials which would match the students' abilities in order that he could get the concepts across to below-grade students. He asserts that he was using effective teaching techniques and that he was attempting to motivate his students. He disagrees with the assertion that he did not question the students to determine if they were learning and he testified that he questioned the students thoroughly throughout lessons and he attempted to have them think independently. He generally denied that the students were unaware of the objective of the lessons and he indicated that in some cases he was on the same lesson for several days so that the students were fully

aware of what the lesson involved. He asserts that the textbooks which were recommended and were eventually mandated by the school district were too difficult for the students and they could not be used to teach principles or grammar.

Respondent testified he the disagrees with Dr. Adilifu's observation of January 23, 1991 (P-73) in its entirety. He testified that it was on this occasion that the material gone over in class was the same material that was used on the previous school day. He indicated that work books had not been provided to the students and that he was required to copy them. He denied that he mumbled in speaking to the class, and he stated that he felt that his voice was loud and clear and that his directions to the students were clear. He relied upon a Teacher Observation Report of May 6, 1985 (R-62), when he used the same or similar materials as those he was using when he was observed by Dr. Adilifu, and on the prior occasion, his performance was found to be satisfactory. He indicated that he was complying with a PIP requirement by developing exercises and by creating dittos.

Respondent testified that he submitted his lesson plans generally on time, although they may have been submitted late on occasion if he were absent. Therefore, he denies Ms. Rivers' testimony that he was consistently late in submitting his lesson plans. He indicated that it was very difficult to get students to provide writing samples and he admitted that there were some occasions when he had writing samples from students which he did not submit to Ms. Rivers.

Respondent relied upon various materials showing the class work of his students for the purpose of establishing that he was complying with school district requirements as to curriculum. He disagrees with each of his observers by asserting that there was no factual basis for their arriving at their conclusions. He testified that he felt he felt that he was teaching in an effective and satisfactory manner. In essence, he relies upon evaluations in prior years during which he asserts he used the same or similar type of teaching strategies and techniques and was given satisfactory ratings and in comparison he was given unsatisfactory ratings in subsequent years.

Respondent specifically testified with respect to Mr. Laub's observation on November 20, 1991 (Exhibit P-71). In his report Mr. Laub indicated that respondent was teaching a lesson in November which should have been taught at the beginning of the school year. Respondent

answered this by testifying that there was a scheduling "glitch" in September 1991 which caused an enormous amount of confusion. In addition, the Prentice Hall materials had not been provided until mid-October and there were no in-service workshops with respect to these materials until October, November, and December, 1991. It was for these reasons that there was a delay in his dealing with the subject-matter of the lesson on that date. He also indicated with respect to Ms. Pallotta's observation on December 3, 1991 (Exhibit P-7) that there would have been much less confusion but the materials had just been passed out and he had just begun to incorporate them into his classes.

It was previously indicated that when dealing with unsatisfactory evaluations, the burden of proving the unreasonableness of the evaluation is upon the teacher or staff member challenging the evaluation. *Kopera v. West Orange Bd. Of Education, supra.* The reason for imposing this burden on the challenging teacher is apparent, and appears in the statement by the court in *Kopera* that it is to be born in mind that the evaluators are experts admittedly without bias or prejudice and are closely familiar with the situations they are observing. Thus, the burden on the challenging teacher is to establish that the underlying facts were not as set forth by those who made the evaluations.

In this matter, I have heard the testimony of Ms. Rivers, Mr. Laub, Ms. Culver, Mr. Gregory, Dr. Adilifu and Ms. Miller on behalf of the school district. I have closely scrutinized their testimony as well as the written evaluations they provided. I have been unable to discern any improper motivation, bias or prejudice on their part which would cause them to be anything less than truthful in this matter. In this regard, respondent argued that two of the school district witnesses, Ms. Rivers and Ms. Miller, lacked credibility, citing numerous examples. However, my specific recollection of the testimony of these two witnesses was that their testimony was credible under the circumstances. There were certain inconsistencies in their testimony, but these were understandable based on the passage of time and acknowledging the fact that no one's memory is perfect. It was also clear that when testifying as to respondent's deficiencies as a teacher, both witnesses were entirely consistent in their testimony. In addition, while the seven witnesses/evaluators of respondent did not always use the same words in describing respondent's teaching deficiencies, they were entirely consistent in the impressions they gave of respondent's conduct. In particular, with respect to Mr. Laub, Ms. Culver and Dr. Adilifu, they were called in

to observe and evaluate respondent not as his direct supervisors, but as independent evaluators for the purpose of providing an independent evaluation of his teaching methods.

In response to these evaluations, respondent generally indicated that he was not aware of the factual basis for the unsatisfactory evaluations. He relied upon written materials, all of which were submitted in evidence, to show that he attempted to follow the curriculum. Respondent generally denied their assessments that he lacked effectiveness as a teacher, lacked discipline and control of the students, failed to use resources other than dittos, lacked interest or concern, failed to motivate students, and generally that he failed to teach.

I found respondent's testimony to be incredible and, in most cases, entirely missing the point of the unsatisfactory evaluations. At no time did respondent address his failure to teach his students other than by using the excuses that his students were discipline problems, they were absent from class, and they were below grade level in their reading skills. At no time did respondent address his failure to use various teaching strategies and techniques in order to attempt to motivate his students, other than by asserting that the dittos he employed were based on district textbooks and materials, and were appropriate because of the below-grade levels of the students. At no time did respondent dispute the testimony of virtually all of his evaluators that when they arrived in his class he was usually late, usually less than prompt in starting the lesson, and that the lesson usually consisted of him merely passing out a ditto form with no directions or instructions, and having the students return the ditto forms to him at the end of class. At no time did respondent address the fact that he was only rarely observed using any resources or materials other than the ditto forms. At no time did respondent address the consistently observed fact that students in his class were disruptive, unruly and undisciplined, and that he made no effort to correct these disruptions and discipline problems. At no time did respondent address the real issue in this matter which is his lack of classroom discipline and control and failure to engage in the teaching of his students.

Is it unbecoming conduct for a teacher to fail to maintain classroom control and to fail to teach his students? It seems axiomatic that a person who fails to perform a duty which is imposed by law or is clearly inherent in the nature of the position is guilty of unbecoming conduct. *Compare, N.J.S.A.* 2C:30-2b.

Respondent argues that the evaluations in this matter actually deal with the charge of inefficiency rather than unbecoming conduct. However, I **FIND** that the failure of a teacher to discipline and control the students in his charge, the failure of a teacher to teach his students in an effective manner, or in this case, in any manner whatsoever, is clearly unbecoming conduct. In this matter, I **FIND** that respondent has continuously failed to discipline and control the students in his charge, has failed to teach his students in an effective manner and on many occasions has continuously failed to teach his students in any manner whatsoever. Therefore, I **CONCLUDE** that respondent is guilty of unbecoming conduct.

The next issue to be resolved is the appropriate remedy or penalty based on the finding of guilt in this matter. *In the Matter of the Tenure Hearing of Elizabeth Merkooloff, School District of the Twp. of Washington*, 1980 *S.L.D.* 1370, the Commissioner stressed again that which he previously said in *Clinton F. Smith et al. v. Bd. of Ed. of the Boro of Paramus*, 1968 *S.L.D.* 62:

> The principal enunciated by the Court in *Bates v. Board of Education*, 72 *P.* 907 (Calif. Sup. Ct., 1963), and quoted with approval in *McGrath v. Burkhard*, 280 *P.2d* 864 (Calif. App. 1955), bears repeating here:
>
> The public schools were not created, nor are they supported, for the benefit of the teachers therein, . . . but for the benefit of the pupils and the resulting benefit to their parents and the Community at large. . . (at 67).
> (at 1371).
>
> The Commissioner also stated at 1371 in *Merkooloff*:
>
> The Commissioner believes that these young pupils in their formative years surely deserve the best education possible with as complete continuity as can be accorded them. . . .

In the Matter of the Tenure Hearing of Joseph A. Maratea, Twp. of Riverside, 1966 *S.L.D.* 77, the Commissioner said:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to

> perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the school is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the school rests with the employee then, the Commissioner holds, the protection of tenure is forfeit (at 106).

In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 *S.L.D.* 302, the Commissioner said:

> [T]hey [teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job, it is a calling. (at 321).

It was also stated *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Twp. of Teaneck,* 1972 *S.L.D.* 284:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . and must accept the consequences of his actions.
>
> * * *
>
> The Commissioner's basic and fundamental concern must be in the welfare of the students in the Teaneck School System and, therefore, in the proper administration of that School System.(at 296).

In this matter, it is clear to me that it is not in the best interest of the students of the Newark School District that respondent remain as a teacher. Respondent has, over an extended period of time, clearly and consistently failed to provide his best efforts to teach the children of the school district. His consistent and continuous failure to impose discipline on the students and his consistent and continuous refusal to attempt to teach his students effectively leads me to the conclusion that his removal is in the best interests of the children of the school district.

Therefore, I **FIND** and **CONCLUDE** that respondent should be removed as a teacher in the School District of the City of Newark.

DECISION AND ORDER

Based upon the foregoing I **FIND** respondent guilty of the charge of unbecoming conduct and I **ORDER** his removal as a teaching staff member of the School District of the City of Newark.

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

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

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

October 6, 1995
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

10/11/95
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 16 1995
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES

For petitioner:

Peter Loria

For respondent:

Lula Mae Rivers

Harry Laub

Doris Culver

Carl L. Gregory

Irene Miller Graves

Jean Sharp Adilifu

Carmela H. Pallotta

LIST OF EXHIBITS

For petitioner:

P-1	Observation Report, October 11, 1989
P-2	Memo of October 17, 1989
P-3	Informal Observation, October 25, 1989
P-4	Informal Observation, November 28, 1989
P-5	Memo of December 2, 1989
P-6	Observation Report, January 24,1990
P-7	Memo of January 29, 1990 Re: Lesson Plans
P-8	Informal Observation, January 29, 1990
P-9	Memo of February 22, 1990

P-10	Informal Observation, February 22, 1990
P-11	Memo of March 2,1990
P-12	Informal Observation, March 9, 1990
P-13	Memo of March 13, 1990
P-14	Memo of March 29, 1990
P-15	Teacher Annual Evaluation Report, June 1990
P-16	Memo of September 19, 1990
P-17	Memo of October 15, 1990
P-18	Memo of October 17, 1990
P-19	Memo of October 22, 1990
p-20	Memo of November 12, 1990
P-21	Memo of November 15, 1990
P-22	Informal Observation Report, November 19, 1990
P-23	Memo of November 19, 1990
P-25	Memo of November 20, 1990
P-26	Teacher Observation Report, November 20, 1990
P-27	Memo of November 26, 1990
P-28	Memo of November 12,1990
P-29	Informal Observation Report December 2, 1990
P-30	Informal Observation Report December 3, 1990
P-31	Memo of December 10, 1990
P-32	Memo of December 10, 1991 (Should be 1990)
P-33	Informal Observation Report, December 13, 1990
P-34	Memo of January 7, 1991
P-35	Memo of January 8, 1991
P-36	Memo of January 21, 1991
P-37	Memo of February 4, 1991
P-38	Informal Observation Report, February 18, 1991
P-39	Informal Observation Report, February 19, 1991
P-40	Teacher Observation Report, February 20, 1991
P-41	Memo of February 25, 1991

P-42	Memo of March 11, 1991
P-43	Memo of March 25, 1991
P-44	Teacher Annual Evaluation Report, June 1991
P-45A	September 1991 Agenda, English Department
P-45B	October 1991 Agenda, English Department
P-45C	November 1991 Agenda, English Department
P-45D	November 11, 1991 Information regarding improving student study habits
P-45E	Discussion of Student Study Skills
P-45F	Guidelines of Instructional Staff Performance
P-45G	Suggestion for Using Educational Posters
P-45H	Motivating Students to Write
P-45I	The Writing Process- Suggestions for Writing Samples
P-45J	Registered Holistic Scoring
P-45K	Samples of better essays which scored high
P-45L	Cooperative Learning Outline
P-45M	Selected Topic Suggestions
P-45N	Preparing for Tests - Activity Sheets
P-46	Memo of September 26, 1991
P-47	Memo of October 4, 1991
P-48	Teacher Observation Report, October 7, 1991
P-49	Memo October 15, 1991
P-51	Memo of October 21, 1991
P-53	Memo of October 23, 1991
P-59	Teacher Observation Report, November 28, 1989
P-60	Teacher Observation Report, January 17, 1990
P-61	Teacher Annual Evaluation, June 10, 1987
P-62	Teacher Observation Report, November 9, 1987
P-63	Teacher Observation Report, January 19, 1988
P-64	Teacher Observation Report, February 29, 1988
P-65	Teacher Annual Evaluation, May 18, 1988
P-66	Memo to respondent, dated February 15, 1990

P-67	Teacher Observation Report, March 27, 1990
P-68	Memo from Carl L. Gregory of May 1, 1990
P-69	Memo from Carl L. Gregory of December 9, 1990
P-70	Teacher Observation Report, December 3, 1991
P-71	Teacher Observation Report, November 20, 1991
P-72	Memo from respondent, dated December 10, 1991
P-73	Teacher Observation Summary of January 23, 1991
P-74	Teacher Observation Report, March 21, 1991
P-75	Memo dated May 8, 1991
P-76	Memo dated July 9, 1991
P-78	Memo dated December 12, 1991
P-79A	Excerpt from Collective Bargaining Agreement with NTU, School Years 1988-91
P-79B	Excerpt from Collective Bargaining Agreement with NTU, School Years 1991-94
P-80	*Adventures in Reading*, Heritage Edition Revised (Copyright 1980, 1985)
P-81	*Journeys-Arrivals* (Copyright 1982)

R-1	Plan Book 1988-89
R-2	Plan Book 1989-90
R-3	Plan Book 1990-91
R-4	Plan Book 1991-92
R-5	Course Proficiencies - English I
R-6	Packet-Reading Proficiency Exercises - English I
R-7	Course Proficiencies - English II
R-8	Packet - Reading Proficiency Exercises - English II
R-9	Packet -Fundamentals of Grammar - Verbs
R-10	Packet -Grammar Exercises - Sentence Combined with Verbs
R-11	Packet - Literature Exercise
R-12(a)	1990-91 Writing Sample #1 - Period 1
R-12(b)	1990-91 Writing Sample #1 - Period 4
R-12(c)	1990-91 Writing Sample #1 - Period 6
R-12(d)	1990-91 Writing Sample #1 - Period 7

R-12(e)	1990-91 Writing Sample #1 - Period 8
R-13(a)	1990-91 Writing Sample #2 - Period 1
R-13(b)	1990-91 Writing Sample #2 - Period 8
R-14(a)	1990-91 Writing Sample #3 - Period 1
R-14(b)	1990-91 Writing Sample #3 - Period 4
R-14(c)	1990-91 Writing Sample #3 - Period 6
R-14(d)	1990-91 Writing Sample #3 - Period 7
R-14(e)	1990-91 Writing Sample #3 - Period 8
R-15(a)	1990-91 Book Reports - Period 1
R-15(b)	1990-91 Book Reports - Period 4
R-15(c)	1990-91 Book Reports - Period 6
R-15(d)	1990-91 Book Reports - Period 7
R-15(e)	1990-91 Book Reports - Period 8
R-16(a)	1990-91 Writing Samples - Period 1
R-16(b)	1990-91 Writing Samples - Period 4
R-16(c)	1990-91 Writing Samples - Period 6
R-17	1991-92 Mid Term Essays
R-18	Memo-Rivers to Loria November 18, 1991 - Re: Student Writing Samples
R-19	Memo-Loria to Rivers dated February 15, 1990 - Re: Evaluations dated October 11, 1989 and January 24, 1990
R-22	Memo-Loria to Rivers, dated October 17, 1991-Re: Teacher Observation Report, October 9, 1991
R-23	Memo-Loria to Rivers, dated December 19, 1991 - Re: Demonstration Lesson
R-25	Packet Re: Bell Schedule Changes for Non-Instructional Programs and Activities
R-26	Entry/Withdrawal Summary, July 1, 1991 - June 25, 1992
R-27	Packet-Absence Lists
R-28	Packet-Lefts and Transfers Lists
R-29	Packet-Suspensions List
R-31	Packet-Student Tardiness
R-33	Memo dated October 16, 1991, Re: Hall Sweeps
R-38	Observation Report, October 28, 1986 (Miller)

R-40 Observation Report, October 13, 1988 (Rivers)

R-41 Observation Report, November 21, 1988 (Rivers)

R-42 Observation Report, January 30, 1989 (Rivers)

R-43 Observation Report, May 17, 1989 (Rivers)

R-44 Annual Evaluation, June, 1989 (Rivers)

R-45 Professional Improvement Plan - May, 1989

R-46 Class materials used during October 11, 1989 observation by Rivers

R-47 Worksheet materials applicable to November 17, 1989 (sic See P-4) Informal Observation by Rivers

R-48 Worksheet materials applicable to January 24, 1990 Observation by Rivers (P-6)

R-49 Worksheet materials applicable to November 20, 1990 Observation by Rivers (P-26)

R-50 Memo, December 10, 1990 from Loria to Rivers - Re: November 20, 1990 Observation

R-51 Worksheet materials applicable to February 20, 1991 Observation (P-40)

R-52 Materials from Rivers October 24, 1991 - Demonstration Lesson

R-53 Materials relating to Informal Observation by Rivers October 22, 1991

R-55 Memo, Loria to Culver, dated February 7, 1990 - Re: Evaluations dated November 28, 1989 and January 17, 1990

R-56 Materials relating to Observation Report of January 23, 1991

R-57 Materials relating to March 21, 1991 Observation Report (Adilifu)

R-58 Materials relating to November 20, 1991 Observation Report (Laub)

R-59 Materials relating to December 3, 1991 Observation Report (Pallotta)

R-60 Observation Report - May 21, 1986 (Bennett)

R-61 Annual Evaluation and PIP - June 17, 1986 (Bennett)

R-62 Observation Report - May 6, 1985 (Domigan)

R-63 Professional Improvement Plan - June 4, 1985 (Domigan)

R-64 Instructional Survey - May 16, 1985

R-68 Memo, October 7, 1991 Schedule Changes

R-69 Memo Rivers to Loria October 7, 1991 course Outline Pacing Chart

R-70 Memo from James Moore, September 24, 1991

R-71	English Department Agenda, October 1991
R-72	Secondary English Curriculum

OAL DKT. NO. EDU 1364-92

IN THE MATTER OF THE TENURE :
HEARING OF PETER LORIA, STATE- :
OPERATED SCHOOL DISTRICT OF THE :
CITY OF NEWARK, ESSEX COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent (hereinafter "Loria") filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. No reply was filed by the District.

Loria's exceptions primarily recast and reiterate his argument made in post-hearing submissions to the Administrative Law Judge (ALJ), i.e., that all of the evidence presented by the District in this matter supports its previously dismissed charges of inefficiency rather than the charge at issue here, unbecoming conduct.

After his careful and independent review, which included transcripts of the nine days of hearings conducted at the OAL, the Commissioner concurs with the conclusion of the ALJ that the record of the within matter makes it abundantly clear that Loria should not be continued in his tenured teaching position with the State-operated School District of Newark.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter. Loria is hereby dismissed from his tenured position as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 11, 1996
Date of Mailing, January 12, 1996

13-96

EDU #1364-92
C# 13-96
SB # 11-96

IN THE MATTER OF THE TENURE	:	
HEARING OF PETER LORIA, STATE-	:	STATE BOARD OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE	:	DECISION
CITY OF NEWARK, ESSEX COUNTY.	:	

Decided by the Commissioner of Education, January 11, 1996

For the Petitioner-Respondent, Gregory Johnson, Esq.

For the Respondent-Appellant, Bucceri & Pincus (Sheldon H. Pincus, Esq., of Counsel)

On January 11, 1996, the Commissioner of Education adopted the recommended decision of the Administrative Law Judge ("ALJ") sustaining tenure charges of unbecoming conduct against Peter Loria (hereinafter "respondent"). The Commissioner directed that respondent be dismissed from his tenured employment. Respondent filed the instant appeal to the State Board of Education.

After a careful review of the record, we reverse the decision of the Commissioner and remand for further proceedings in accordance with our decision herein.

Although the ALJ acknowledged the Board's burden of proof in this matter, he also indicated, in reliance upon Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960), that respondent had the burden of proving the unreasonableness of the performance evaluations placed into evidence by the Board. Kopera, however, did not involve a district board's certification of tenure charges, but,

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rather, a staff member's challenge to a board's action in withholding his salary increments. The only question open for review in such cases is whether the district board had a reasonable basis for its factual conclusion, id. at 295, and the burden of proving unreasonableness is on the party challenging the board's action. Id. at 297.

In contrast, the burden of proof in tenure proceedings lies not with the staff member, but with the district board certifying the charges, which is required to establish the truth of those charges by a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982). In requiring respondent to have proven the unreasonableness of his performance evaluations, the ALJ improperly shifted that burden.

Accordingly, under the circumstances, we reverse the Commissioner's decision, which adopted the ALJ's findings and conclusions, and remand this matter to the Commissioner for a determination of the charges under the correct standard, i.e., whether the Board has established respondent's unbecoming conduct by a preponderance of the credible evidence. While we are mindful of the protracted nature of these proceedings, we find such action necessary in order to provide the Commissioner with the opportunity to determine this matter under the proper legal standard. See In the Matter of the Tenure Hearing of Patrick Caporaso, Docket #A-4558-85T6 (App. Div. 1987).

June 5, 1996

Date of mailing JUN 07 1996

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IN THE MATTER OF THE TENURE	:	
HEARING OF PETER LORIA, STATE-	:	COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF	:	DECISION ON REMAND
THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of inefficiency and unbecoming conduct to the Commissioner in February 1992 against respondent English teacher. Partial initial decision in September 1992 dismissed the inefficiency charge because of District's failure to comply with statutory and regulatory requirements mandated when bringing charges of inefficiency. Matter was returned to OAL to proceed on remaining charges of unbecoming conduct. Thereafter, the ALJ found that the failure of a teacher to discipline and control the students in his charge and the failure of a teacher to teach his students in an effective manner are clearly unbecoming conduct. ALJ found that, in this matter, respondent continuously failed to discipline and control the students in his charge, failed to teach his students in an effective manner and, on many occasions, continuously failed to teach his students in any manner whatsoever. Thus, ALJ concluded that respondent was guilty of unbecoming conduct. ALJ ordered respondent removed from his position as a tenured teaching staff member. Commissioner concurred with the conclusion of the ALJ that the record made it abundantly clear that respondent should not be continued in his tenured teaching position and directed his dismissal as of the date of the decision.

State Board reversed and remanded matter, finding that the ALJ improperly shifted the burden of proof from the District to respondent. State Board directed determination of the charges under the correct standard of whether the District established respondent's unbecoming conduct by a preponderance of credible evidence.

On remand, the ALJ, having considered the testimony and evidence mindful of the burden of proof, concluded that respondent was guilty of unbecoming conduct as he continuously failed to impose discipline on his students and refused to teach his students effectively. ALJ found that removal from his position was warranted. ALJ also ruled on claim for back salary and benefits, finding that respondent was underpaid by three days, that the District had to provide proof of payment for unemployment benefits, that pension contributions were due from respondent and that respondent was due post-judgment interest.

Upon careful review of the record, including transcripts of nine days of hearing and exhibits consisting of a number of observations made of respondent, the Commissioner agreed with the determination of the ALJ that respondent was guilty of unbecoming conduct warranting his dismissal. In light of the State Board's remand, the Commissioner concluded that the documentary and testimonial proofs advanced established, by a preponderace of the credible evidence, Charges 2 and 3 of the District's unbecoming conduct charges. Citing *Bradley*, the Commissioner noted not only respondent's unsatisfactory behavior but also the impact of this behavior on the students. Commissioner directed that respondent be dismissed from his position and the matter be transmitted to the State Board of Examiners for further appropriate action. As to the money issue, the Commissioner found that the existing record did not provide the necessary detail to enable him to make the conclusive determinations required. Therefore, he remanded that issue to the OAL for expansion of the record and determination on this limited issue.

JANUARY 26, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7220-96
(On Remand EDU 1364-92)
AGENCY DKT. NO. 32-2/92

IN THE MATTER OF THE TENURE HEARING OF PETER LORIA, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Gregory G. Johnson, Esq., for petitioner

Sheldon H. Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: September 15, 1997 Decided: October 30, 1997

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves the remand on an Initial Decision which was affirmed by the Commissioner of Education sustaining tenure charges of unbecoming conduct against respondent and dismissing respondent from his tenured employment as a teacher after a hearing under the Tenure Employees Hearing Act. The matter was originally transmitted to the Office of Administrative Law (OAL) on February 24, 1992, for hearing as contested case and was assigned

to the undersigned Administrative Law Judge (ALJ). By a Partial Initial Decision dated September 21, 1992, the ALJ granted respondent's motion to dismiss the charge of inefficiency but denied respondent's motion to dismiss the charge of unbecoming conduct. This Partial Initial Decision was submitted to the Commissioner of the Department of Education for immediate review pursuant to *N.J.A.C.* 1:1-12.5(e) and by decision dated October 21, 1992, the Commissioner affirmed the Partial Initial Decision, and by its decision dated February 2, 1993, the Commissioner's affirmation of the Partial Initial Decision was affirmed by the State Board of Education.

The matter was then heard at a series of hearings held between October 1992, and September 1994, and the record closed on February 13, 1995. By an Initial Decision dated October 6, 1995, the ALJ sustained tenure charges of unbecoming conduct against respondent and directed that he be dismissed from his tenured teaching position. On January 11, 1996, the Commissioner of Education adopted the recommended decision of the ALJ (96 *N.J.A.R.2d* (EDU) 379). The respondent filed an appeal to the State Board of Education, and by a Decision entered on June 5, 1996, the State Board of Education reversed the decision of the Commissioner and remanded the matter for further proceedings in accordance with its decision. In particular the State Board of Education required a determination of the charges against respondent under the correct standard, that is, whether the school district has established respondent's unbecoming conduct by a preponderance of the credible evidence.

This matter was then transmitted on remand to the OAL on July 2, 1996, for hearing as contested case and was reassigned to the undersigned ALJ on July 12, 1996. The matter was scheduled for a prehearing conference which was held on August 12, 1996, and a schedule for further proceedings was established. On that date, attorney for respondent indicated his intention to file a motion for recusal of the ALJ. Further proceedings in the matter were held in abeyance pending this motion for recusal. A schedule for submission of the motion and response thereto was established.

On September 4, 1996, attorney for respondent filed a motion to compel petitioner to reinstate respondent's full salary and benefits, and to pay immediately to respondent back pay and benefits with interest. In response, attorney for petitioner filed a motion to stay respondent's

reinstatement. These motions were decided by the ALJ on October 3, 1996, by an Order Granting Motion for Reinstatement and Denying Motion for Stay. Respondent then filed a motion for interlocutory review by the Commissioner of Education. The Commissioner granted the motion and by a determination issued on November 4, 1996, the Commissioner ruled the petitioner was required to continue respondent's paid suspension and that respondent isnot required to return to his teaching duties during this period.

By a Letter Order entered on October 7, 1996, respondent's request for an opportunity to present additional testimony and evidence was denied and a schedule was established for the filing of written submissions.

In the meantime, on September 4, 1996, attorney for respondent filed a notice of motion for recusal, and on September 11, 1996, attorney for petitioner responded thereto. By an order denying motion for recusal entered on September 24, 1996, respondent's motion was denied. On October 2, 1996, respondent filed a motion for interlocutory review by the Director of the OAL. On October 9, 1996, an order granting interlocutory review was entered by the Director and by final order of affirmance entered on October 21, 1996, the order denying the motion for recusal was affirmed. Following this, on or about November 5, 1996, attorney for respondent filed a notice of motion for leave to appeal with the Superior Court of New Jersey, Appellant Division. By an order entered on December 16, 1996, respondent's motion for leave to appeal was denied. Because neither the OAL nor the ALJ was aware of this denial, further proceedings in this matter were held in abeyance until February 4, 1997, when a copy of the order of the Appellate Division was provided to the ALJ.

Thereafter, the parties engaged in a series of disputes and disagreements with respect to the calculation of amounts due and owing to respondent by petitioner for back salary less unemployment benefits in mitigation, benefits and reimbursement for expenditures by respondent, pension deductions and post judgment interest. The parties have submitted this dispute for determination as a part of this matter, and this dispute will be dealt with herein.

After the parties were given a full opportunity to submit argument as to their respective positions both with regard to the back pay and benefits dispute as well as the underlying tenure charges, the record was closed by the ALJ on September 15, 1997.

CLAIM FOR BACK PAY AND BENEFITS

There is no dispute that respondent is entitled to payment of back salary from the period from January 12, 1996, through December 6, 1996. It is the calculation of this payment that is causing the difficulty in this matter.

It is undisputed that respondent's annual salary is $47,070. The parties agree that as a teacher, respondent is a ten-month employee. According to respondent's certification, teacher salaries in Newark are paid based on a per diem rate determined by dividing the teacher's annual salary by an agreed upon number of days and 21 checks are then issued on specified pay dates. The total of these checks is to equal the annual salary.

For the 1995-96 school year, respondent's per diem rate was determined by dividing his annual salary of $47,070, by 211 days resulting in a per diem rate of $233.08. For the 1996-97 school year, respondent's total salary was divided by 214 days resulting in a per diem rate of $219.95. The parties do not dispute these per diem rates.

It is not disputed that by a check issued on December 13, 1996, respondent was paid a total of $25,877.28 representing 116 days from Janaury 12, 1996 to June 23, 1996 at $223.08 per day. It is also not disputed that petitioner should have paid to respondent an additional three days pay from June 23 through June 26, 1996 or a total of $669.24.

There is a dispute concerning the additional portion of the check of December 13, 1996. Petiitoner's certifications establish that this check included a payment of $12,947.05 representing payment of salary for 59 days from September 3, 1996 to November 22, 1996 at $219.95 per diem. In addition, this check included respondent's regular two weeks pay of $2,230.80 for the period from November 23, 1996 to December 6, 1996.

With respect to the amounts included in the check issued to respondent on December 13, 1996, I **FIND** that petitioner has underpaid respondent by three days representing the period from June 24 through June 26, 1996, for a total underpayment of $669.24. In addition, I **FIND**, notwithstanding the contents of respondent's certification, petitioner has made payment to respondent for a total period of 69 days from September 3, 1996 through December 6, 1996, these amounts having been included in the check issued on December 13, 1996. As I understand it, it does not appear to be disputed that respondent has been receiving his regular pay checks after December 13, 1996, and it is not necessary to become involved in the correctness of these subsequent payments.

Respondent also seeks reimbursement for amounts he has expended out-of pocket for his healthcare insurance coverage in the amount of $4,959.51. By letter dated May 1, 1997, attorney for petitioner indicated that this amount has been paid.

There is no dispute as to the amount to be set off from any payment to respondent by petitioner for unemployment benefits received by respondent and to be reimbursed to petitioner. The only dispute concerning this is the request by respondent that petitioner provide proof that any sums withheld were actually transmitted to the Division of Unemployment Insurance. I agree with this request and it is **ORDERED** that proof of such payments shall be provided by petitioner to respondent.

Respondent additionally asserts that petitioner is required to deduct from the salary still due to him a total of $1,820.69 in pension deductions. Petitioner, through the certification of Michelle Revey dated March 5, 1997, indicates that total pension contributions due for respondent's share is $1,634. based on this certification, it is **ORDERED** that this pension contribution shall be made and respondent may either forward a check in this amount to petitioner or advise petitioner to deduct the same from his payroll check for payment.

In addition, I **FIND** that respondent is entitled to post judgment interest. However, my finding is based upon respondent's entitlement to three days pay of $669.24, and reimbursement

for out of pocket health insurance expenditures of $4,959.51. Accordingly, it is **ORDERED** that post judgment interest shall be calculated based on these amounts only.

FACTUAL DISCUSSION

1. Correct standard to be applied to the proofs.

In the original Initial Decision in this matter it was indicated that generally, in order for the charging party in a tenure hearing to prevail, the truth of the charges must be established by a preponderance of the credible evidence, citing *In re Phillips*, 117 *N.J.* 567, 575 (1990); *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982); *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962). However, the following questions were raised by the ALJ: (1) How to deal with unsatisfactory teacher evaluations which were not previously challenged by respondent in a prior proceeding before the Commissioner of Education? (2) Whether a teacher such as respondent may challenge an unsatisfactory evaluation and its factual underpinnings where they form the basis for a tenure charge or are submitted in evidence in support of the charge, if the teacher failed to challenge the original evaluation within 90 days of its issuance pursuant to *N.J.A.C.* 6:24-1.2(c).

Challenges to unsatisfactory ratings generally arise when a school district withholds an annual salary increment. In such cases, the courts have made it clear that the responsibility of the Commissioner is to determine whether the underlying facts were as those who made the evaluation claimed, and whether it was unreasonable for the evaluators to conclude as they did upon those facts, bearing in mind that they are experts, admittedly without bias or prejudice and closely familiar with the *mise en scene*. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 296-297 (App. Div. 1960). In any event, the burden of proving the unreasonableness of the evaluation is upon the teacher challenging the evaluation. *Id.*

No authority was found dealing with the two specified issues either way. In view of the salutary purpose of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -25, which is to protect teachers and other school employees against arbitrary dismissal, I found that a respondent

has the right to challenge the facts underlying an unsatisfactory evaluation. However, the burden of proving the unreasonableness of the evaluation remains upon the respondent. *Kopera, supra.*

However, in its decision, the State Board of Education indicated that the *Kopera* case did not involve a district board certification of tenure charges, but rather a staff member's challenge to a Board's action in withholding his salary increment. The only question opened for review in such cases is whether the district board had a reasonable basis for its factual conclusion, *Id.*, at 295, and the burden of proving unreasonableness is on the party challenging the board's action. *Id.*, at 297. the State Board indicated that in contrast, the burden of proof in tenure proceedings lies not with the staff member, but with the district board certifying the charges, which is required to establish the truth of those charges by a preponderance of the credible evidence, citing *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982). The State Board found that by requiring respondent to prove the unreasonableness of his performance evaluations, the ALJ improperly shifted that burden. Accordingly, the State Board reversed this decision and remanded this matter for a determination of the charges under the correct standard, *i.e.*, whether the Board has established respondent's unbecoming conduct by a the preponderance of the credible evidence. The Board found such action necessary in order to provide the Commissioner with the opportunity to determine this matter under the proper legal standard.

In view of this decision by the State Board of Education, and after considering the guidance given by the Board in its decision, I have reviewed the testimony and evidence mindful that the burden of proof is upon the Board of Education to establish the charges of unbecoming conduct by the preponderance of the legally competent and credible evidence.

2. Discussion of the testimony and evidence.

I have reviewed by bench notes as well as the factual discussion as set forth in my original Initial Decision in this matter. The essential facts in this matter with respect to the alleged unbecoming conduct of respondent are disputed by the parties. The following is not intended to be a verbatim account of the evidence, but is intended to be a summary of that evidence found to be relevant as to the issue of unbecoming conduct.

The first witness for respondent was Lula Mae Rivers. Ms. Rivers was respondent's immediate supervisor and his primary evaluator for the 1989-90 and 1990-91 school years. She was the English Department chairperson for nine years and also was employed as an adjunct professor at Kean College, Rutgers University. As the chairperson of the English Department, it is her responsibility to supervise the staff of the Department in order to ensure that it fulfilled its duties to prepare students. Petitioner was an English teacher assigned to her supervision for more than three years.

Ms. Rivers testified to an observation she conducted on October 11, 1989 (P-1), in which she gave respondent an overall unsatisfactory rating. This was based upon respondent's lack of control in the classroom and lack of classroom management. During the observation students were talking and walking around the classroom at will and were socializing rather than performing their educational tasks. It appeared to Ms. Rivers that the students were accustomed to doing this. Respondent exhibited a nonchalant and uncaring attitude and there was no effort on his part to ask them to sit, to do their assignments, or otherwise to control their actions. There was no motivational technique used by respondent to implement the lessons and respondent failed to motivate the students to get involved in their lessons. The respondent did not pay any attention to the fact that the students were not paying attention. At the post-observation conference, Ms. Rivers indicated that she suggested to respondent various ways to provide a better learning environment. He did not respond to her suggestions in any way.

Ms. Rivers identified a memorandum sent to respondent on October 17, 1989 (P-2), which discussed problems in respondent's classroom and gave him the suggestions that he give more challenging lessons and that he take off credit if a child disregards his directions.

Ms. Rivers testified to an informal observation on October 25, 1989 (P-3), in which she observed that the lesson plans were not on the teacher's desk as required by the school district, respondent provided no attention to students, he did not direct instructional activity, and he paid no attention to classroom appearance. After this informal observation, Ms. Rivers indicated she never saw respondent use any of the techniques she suggested.

Ms. Rivers testified to an informal observation on November 28, 1989 (P-4), and again she saw a lack of control on the part of respondent. The students were engaged in irrelevant conversations and respondent ignored these actions on the part of the students. She recommended more challenging lessons but she never saw respondent attempt to implement this recommendation.

Ms. Rivers testified that she sent a memorandum to respondent on December 2, 1989 (P-5), because of his failure to submit essays or writing samples from the students. She acknowledged that other teachers also submitted them late.

Ms. Rivers testified to a formal observation which she conducted on January 24, 1990 (P-6), in which she again gave respondent an unsatisfactory overall rating. She indicated that it was difficult to determine what respondent's objective was for that class. She observed students talking among themselves and a lack of concern on the part of the students. They were not paying any attention to respondent and respondent did not address this fact. There was an unsatisfactory student-teacher rapport and she felt that the students should be respectful to one another and to the teacher. Respondent failed to use study guides and failed to determine whether the students were comprehending the lesson. He failed to use any technique whatsoever in order to implement the lesson. In addition, he failed to begin the class promptly and he was working on paperwork at the beginning of the class. She indicated that the lesson should be started first and then paperwork could be done. Ms. Rivers testified that she discussed this observation with respondent and she suggested that he use a directed reading lesson, that he use a seating chart, and that he make it clear that the students will be tested and will be responsible for the material. Respondent again failed to follow these suggestions or to use any of the recommendations.

Ms. Rivers testified that on January 29, 1990, she sent a memo to respondent (P-7) requesting that he inform her how the district's literature textbook would be included in the lesson plans. She testified that each teacher is given a Course Proficiency and Course Outline which must be followed, and there was no indication he was doing so.

Ms. Rivers testified that she conducted an informal observation of respondent on January 31, 1990, (P-8) at which time respondent was five minutes late for class. He eventually started the lesson ten minutes late. She indicated that respondent had been late previously, although there were no written memos confirming his previously being late.

Ms. Rivers also testified to a memo given to respondent on February 22, 1990 (P-9), at which time she observed students sitting on the steps waiting for the start of a voluntary class because respondent was late arriving. She indicated that there were other occasions when no one was in respondent's classroom when the class should have been held. She also indicated that respondent's tardiness did not improve after the memo.

Ms. Rivers testified to an informal observation on February 22, 1990 (P-10), when respondent arrived late. After he arrived the students continued to walk around the classroom and to talk and socialize. Some of the students were using radios under their hats.

Ms. Rivers testified that she sent a memo to respondent on March 2, 1990 (P-11), acknowledging that he had sent her a list of names of problem students and advising him that she would be supportive of him in taking disciplinary action against these students. She eventually determined that respondent simply sent the list of problem students to her but did not call any of the parents to attempt to resolve the disciplinary problems or take any other steps to deal with the disciplinary problems being caused by these students. Respondent also never approached her concerning the disciplining of any of the students. Respondent denied that he ever received this memo.

Ms. Rivers testified that on March 9, 1990, she conducted an informal observation (P-12) in which she observed students singing during class while others engaged in other activities while respondent should have been conducting class. There was no attempt by respondent to maintain order and there was no seating organization. The students gathered their chairs in a corner and were singing. She again suggested to respondent that he have a seating chart. However, she never observed that respondent made an orderly arrangement of seats.

Ms. Rivers testified that on March 13, 1990, she sent a memo to respondent (P-13) confirming the providing of a demonstration lesson to show respondent how to control his classroom. She indicated that students had been given exercise or "ditto" sheets and that it is not appropriate conduct for a teacher to give "dittos" to the students five days a week. Many of the students found the lessons to be boring and they wanted their classroom changed. She also identified a memo sent to respondent on March 29, 1990 (P-14). She observed that respondent was using ditto sheets rather than the literature book mandated by the school district, which respondent indicated was too difficult for the students. Ms. Rivers noted that the teacher's copy of the required book is annotated and suggests adjustments based upon the abilities of the students. As a result, Ms. Rivers came up with a list of alternate books which she set forth in her memorandum. She also stated that respondent did not indicate that the required literature book was too difficult until the dittos that respondent repeatedly gave to the students were questioned by Ms. Rivers.

Ms. Rivers identified respondent's Annual Evaluation Report of June 1990 (P-15). Respondent's overall rating in this report was unsatisfactory because the items listed as unsatisfactory on the part of respondent were consistently unsatisfactory throughout the school year. Ms. Rivers testified that there was no effort made by respondent to improve or change his behaviors. The areas needing attention or improvement were that the students were not paying attention in class, the teacher was not paying attention to the students, the students were bored with their class and were cutting classes, the students' expectations from class were low, the students lost interest and many were failing, respondent failed to investigate techniques for effective classroom discipline and management and he failed to engage in extracurricular activities. Ms. Rivers stated that there was no follow-through by respondent on her suggestions. She recommended a refresher course on new teaching techniques. The second page of the Annual Evaluation is a Professional Improvement Plan (PIP) for the upcoming year, which is developed between the teacher and the supervisor. This suggested improvements in respondent's skills and the timeline when the improvements were to be completed.

Ms. Rivers testified that after the beginning of the next school year in September 1990, she wrote a memo to respondent reminding him that student writing samples were to be submitted to her. She explained that a certain number of student writing samples must be submitted and that

this is a district policy. However, no writing samples were submitted by respondent. She identified a follow-up memo of October 15, 1990 (P-17), which reminded respondent of his failure to submit writing samples. None were ever submitted.

Ms. Rivers identified a memo of October 17, 1990 (P-18), regarding respondent's lesson plans and the Board directives that were provided to respondent. Subsequently, respondent did not submit lesson plans to her satisfaction, and in some instances the elements required of lesson plans were missing. She indicated that lesson plans are due every payday and that respondent repeatedly failed to submit lesson plans on time (P-19 and P-20). Eventually, respondent requested a sample incorporating elements of a proper lesson plan, and she provided this sample to him in a memo of November 15, 1990 (P-21). She indicated that parts of his lesson plans were consistently missing.

Ms. Rivers testified to an informal observation on November 19, 1990 (P-22), at which time she observed that graffiti was located in respondent's classroom bulletin boards, there were writings with magic marker around the room, and that the room was very depressing. In addition, there were students walking around the classroom and there was disruptive classroom behavior on the part of some of the students. She spoke to respondent afterwards concerning these items but no subsequent improvement was made or even attempted by respondent.

Ms. Rivers testified that on November 19, 1990, she sent a memo to respondent indicating that the writing samples due in September 1990 had not yet been provided (P-23). She also indicated that it is mandated by the school district that a practice High School Proficiency Test (HSPT) be given for diagnostic purposes to determine student needs. She sent a memo to respondent on November 20, 1990. She testified that respondent never gave a practice test to his students and never gave the results of such a test to her (P-25).

Ms. Rivers testified to an observation report of November 20, 1990 (P-26). On that occasion, respondent was excessively late. When he arrived he used a ditto for the lesson. During the lesson two girls were talking and one of the girls was combing the other girl's hair. When the respondent said nothing to them, Ms. Rivers admonished the girl. She felt that this should have been the responsibility of respondent. When respondent handed out the dittos, a

student in the classroom said "We have had this ditto a million times." Ms. Rivers testified that she then examined the ditto and recognized it as one that had been handed out to this class before. She also indicated that she had previously recommended getting the students interested and not just handing out a ditto. She concluded that respondent had failed to use any of the strategies which she had suggested, and that he used exactly the same ditto three times in a row. In the post-observation conference when this was discussed, respondent listened and signed the report but did not state he would use any of the discussed strategies.

Ms. Rivers testified that on November 26, 1990, she again wrote a memo to respondent concerning the fact that his lesson plans were late (P-27). She stated that it was very rare for her to receive lesson plans from respondent when they were due. She also testified that respondent never came to her and to give any explanation or reasons for his failure to submit lesson plans on time.

Ms. Rivers testified that on November 12, 1990, she sent a memo to respondent listing various areas of concern (P-28). However, she still did not receive lesson plans from respondent on time and he did not comply with the memo or address any of the concerns.

Ms. Rivers testified to an informal observation on December 2, 1990 (P-29), when she saw a female student sitting on respondent's desk during class. There was no instruction going on at the time and students were socializing. A student was playing in respondent's hair. Another informal observation was conducted on December 3, 1990 (P-30), and Ms. Rivers found the class to be so noisy that the noise could be heard in the hall. She went into the classroom and found that respondent was present. She felt that this disruptive class behavior should have been controlled by respondent.

Ms. Rivers testified that on December 10, 1990, she again gave respondent a memo concerning his failure to submit lesson plans (P-31). He never explained the reason for his failure to do so and never provided the lesson plans. She sent another memo on the same date (P-32), in which she again reminded respondent that he failed to provide writing samples for September, October, November, and December, 1990. She also testified that on December 13, 1990, she conducted an informal observation of respondent (P-33) at which time she saw classroom chairs

in disarray, books thrown about the classroom, no student work on exhibit, no posters, and nothing to enhance the learning environment. The students were disruptive and were walking, talking, playing, and socializing during class. Respondent was tardy to class in the first period and she was in the hall and saw him arriving late. She also testified that by memo of January 7, 1991 (P-34), she again reminded respondent that his lesson plans had not been submitted. However, they were not submitted by respondent after this memo. She also identified a memo of January 8, 1991 (P-35), reminding respondent that at least four writing samples were due and that he had submitted none. She again sent respondent a memo on January 21, 1991, reminding him that he failed to submit lesson plans (P-36). Another memo with respect to lesson plans was sent to respondent on February 4, 1991 (P-37).

Ms. Rivers testified that she conducted an informal observation on February 18, 1991 (P-38). Respondent was late for class and the classroom was noisy. The students were not responding to respondent's lesson, they were not paying attention, and respondent did nothing to get the students to pay attention. Ms. Rivers also testified to an informal observation on February 19, 1991 (Exhibits P-39), in which she observed disruptive classroom behavior. This was the first period and when she went into the class, the teacher was not there on time. As a result, the students were uncontrolled and disruptive.

Ms. Rivers testified to a formal observation of respondent which she conducted on February 20, 1991 (P-40), in which respondent's overall rating was unsatisfactory. She indicated that there were serious areas of concern which had not been addressed by respondent, including poor classroom discipline, classroom atmosphere, the classroom physical environment, and the teaching strategies used by respondent. During the observation, respondent handed out a ditto sheet without adequate preparation and without explaining the basis or reasons for the ditto sheet or lessons. There was no teacher direction or control. The strategies that Ms. Rivers previously suggested that respondent use to control the classroom and to direct the lesson were not used by him. She did not see any effort by respondent to employ these strategies as recommended by her. The respondent's activity in the classroom was inconsequential and lacked meaning to the students. There was no relationship of his activities to the building of writing skills. The ditto was performed by the students within a few minutes and without giving it any importance. There were no lesson plans visible and the literature book was underused. She felt that the students

were not being prepared to take the HSPT. There was excessive use of dittos and the students complained to her about the class being boring and about the use of dittos. She indicated that the literature book is district-oriented and it must be used to prepare the students to take the HSPT. After this observation, Ms. Rivers met with respondent and went over the observations and suggestions. Respondent refused to sign the observation report. He also continued to fail to comply with the due dates for the lesson plans. (P-40).

Ms. Rivers testified that she sent the memo of February 25, 1991 (P-41), to respondent reminding him that five writing samples were due and had not been submitted. Respondent did not explain the delay in providing these. Another memo dated March 11, 1991 (P-42), again reminded respondent that he failed to provide lesson plans. He did not submit these or explain the delay. Another memo with respect to unsubmitted lesson plans and writing samples was sent to respondent on March 25, 1991 (P-43).

Ms. Rivers testified that she gave respondent an Annual Evaluation Report in June 1991 (P-44). She considered respondent's overall rating to be unsatisfactory because of the unsatisfactory areas observed during the entire school year. There was a lack of effort on the part of respondent to improve, to motivate students, to maintain student decorum, and there was a failure by respondent to comply with Board of Education directives and requirements. She recommended that respondent's employment be discontinued because she felt she had done all that she could to motivate respondent to teach students. She had made herself available to assist respondent and had offered the resources of the district, and in response respondent did not use the resources and made no effort to improve. He failed to have the attention of the class focus on him, failed to give adequate direction to the students, and failed to supervise students. His students cut class at will and disrupted classes. Respondent never addressed the students' discourtesy, rudeness, or disruptions. She made suggestions as to strategies and they jointly developed a professional impprovement plan (PIP). However, he failed to motivate his students, failed to deal with or treat the students based on their ability or skill, and there were excessive failures in his classes. In addition, respondent was made aware of disciplinary procedures available to him to deal with problem students, but he rarely used them.

Ms. Rivers testified that the English Department held meetings in September, 1991 (P-45A) and October, 1991 (P-45), during which they discussed innovative teaching strategies, the district requirement that homework be required of all students, and the requirement that lesson plans must be up-to-date and visible on the teacher's desk at all times. She indicated that respondent attended these meetings and he signed-in. In addition, a pacing guide was established by the district to assist teachers. At the November meeting (P-45C), strategies were discussed that required teachers and students to work together. The attendance sheet for that meeting indicated respondent attended. Ms. Rivers also identified a package of documents which she compiled to show how to get students to develop and improve their study habits, and these were handed out to the teachers (P-45D). There was also a discussion regarding students' study skills and teachers were requested to take steps to instill good study habits in the students (P-45E). In addition, the school district established guidelines for teachers' performance (P-45F). This document was distributed to all teachers on the very first meeting in September 1991, and lists what the principal expected of all teachers. A second copy of this was given to respondent by Ms. Rivers, after she observed the starkness of his classroom (P-45G). Additional documents given to respondent as well as to all the English teachers were referred to and identified by Ms. Rivers (Exhibits P-45H and P-45I). She also provided an HSPT method for scoring of the test and indicated that it was important for the teachers to understand this in order to require students to write during the year (P-45J). Teachers were provided with materials discussing cooperative learning methods, where students are placed in a group and everyone is assigned a task. She indicated that this increases participation and motivation (Exhibits P-45L).

Ms. Rivers testified that by memo dated September 26, 1991 (P-46), she advised respondent of a preobservation conference and indicated that a number of items were discussed. This was given to respondent to point out the areas to be discussed and observed. These included developing proper rapport with students because she felt that respondent needed to develop better control over the students. In addition, there were suggestions as to how to improve respondent's instruction techniques. Ms. Rivers felt that respondent was not using proper techniques to keep the students interested and involved. In addition, she did not see any of the suggested techniques being used. She also recommended class activities that encouraged student responsiveness and leadership because his student involvement was very low.

Ms. Rivers sent a memo to respondent on October 4, 1991 (P-47), advising respondent that she had reviewed his lesson plans and indicated that the plans he submitted did not utilize the course outline established by the district to be used throughout the district. Every ninth grader was to be responsible for the outlined subject matter and the supervisors were required to check to see if the lesson plans complied with the course outline. When she later checked she found no indication that respondent was using the course textbook in his lesson plans. She continued to observed him using the grammar dittos.

Ms. Rivers testified that on October 7, 1991, she conducted a formal observation of respondent (P-48). The classroom seating was out of order and the seats were arranged by students so as to sit next to friends. There was no student work displayed and no motivation. Some of the lights in the classroom were out and it was not a pleasant environment. There were no posters and no indication that it was an English classroom, although espondent was in this particular classroom for five classes each day. This class did not start promptly and students were walking around, congregating and socializing. Once the class was started there was no serious concern for time on task. Respondent failed to demonstrate a wholesome rapport with the students. When respondent walked into the room, the students ignored him and he was not recognized as an authority figure. He failed to use a variety of materials for instruction but simply used a ditto. There was no effort to use these materials to meet the varying needs of individual students. His lesson plans were not available and he passed out the dittos to the students without discussing them. The students answered the dittos in a haphazard way and showed no concern about how their responses were completed. Ms. Rivers commented that respondent was not concerned about student seating, that one student had a hat on, and that there was congregating of students. There was no concern on respondent's part to deal with this. The lesson on the board was appropriate for second graders and not tenth graders. The work on the ditto was not challenging and if the students asked respondent for the answers to the questions on the ditto, he simply gave them the answers.

Ms. Rivers testified that respondent failed to submit student writing samples which were due on October 4, 1991 (P-49).

Ms. Rivers testified that she sent a memo to respondent on October 21, 1991, because she saw no effort on respondent's part to incorporate the course outline required by the district into his lesson plans (P-51). She sent a memo on October 23, 1991 (P-53), asking respondent to use the course outline and pacing guide and she reviewed his subsequent lesson plans and saw no evidence of any attempt to comply with these district requirements. She indicated that she did not consider respondent's students to be hard-core discipline problems. The students are grouped by basic skills and she did not observe the same conduct by students in other classes.

On cross-examination, Ms. Rivers indicated that 80 percent of the students required a basic skills class, since 80 percent are unable to pass the HSPT. Most come into reading a year or two below grade level. Separate teachers teach basic skills and, in essence, they are elementary school teachers.

The English I or ninth grade course subject areas including grammar and literature. The student must become proficient in certain skills in the texts. There is no single grammar text but there is a series of texts. The mandate is to teach grammar to the students through literature rather than through isolated grammar studies. One of the criteria in selecting the literature book was its ability to teach grammar through literature. The literature book was first used starting in the 1990-91 school year. Prior to the 1990-91 school year, texts were generated by the Board of Education. The average class size was 25 or less. The course outline is a separate outline promulgated by the school district.

Ms. Rivers testified that the policy of the school district is to teach grammar based on writing. The teacher must gear lessons to the needs of the students. The literature course outline covers various skills required by the HSPT. Activities for gifted students and for slower students are included in the course outline. Every student has a literature book and the needs of the students are assessed by having them write a writing sample and by reviewing this.

Ms. Rivers acknowledged that there are problems with student attendance and that the current goal is eighty percent attendance. She indicated that there has been an improvement but that 40 to 50 percent attendance is not correct.

Ms. Rivers indicated that while she eventually received respondent's lesson plans, they were not provided on the dates they were due. The district mandates that every teacher have lesson plans and they are due to be submitted to a supervisor every payday. The purpose is to determine what is being taught and how it aligns with the course outline. Each lesson plan must have goals, objectives, procedures, activities, and homework in order to achieve the goals of the lesson. There is Board of Education directive requiring lesson plans.

Ms. Rivers indicated that in Newark, homework has always been a mandate, since it is one of the methods used to assist teachers in instruction. A bulletin was issued with respect to mandatory homework, although she is not sure when it was issued.

With respect to respondent's lesson plans, Ms. Rivers testified that they are reviewed by her and initialed to indicate her review. If there is no comment, the lesson plan is approved. If there is a comment, a note is given to the teacher. If the plans are handed in at the end of the year, they are given to the main office. Respondent's plans do not appear to have been submitted to the main office because they were never submitted to her.

Ms. Rivers acknowledged that most of the classrooms are shared and there is usually someone else in the same classroom at different times during the day. There are established procedures for the care and use of materials and equipment in the classroom.

Ms. Rivers was generally cross-examined with respect to her evaluations. She indicated that on October 11, 1989 (P-1), the overall lesson was not satisfactory and she was dissatisfied with student behavior on that day. She advised respondent to call the parents of a particular student who was a troublemaker, but she does not know if he called the parents. The student was never brought to her attention again by respondent and she assumes that the problem in class was rectified.

Ms. Rivers testified that teachers are not required to address problems in the hallway after the bell rings. The teacher should attempt to get his students from the hallway into the classroom and that on occasion a teacher may be required to marshall students. However, she never

observed respondent gathering students. A teacher is not responsible for security. She did acknowledge that there are hall sweeps where students who are not in class are gathered .

Ms. Rivers indicated that with respect to writing samples, she expected to receive eight of them from respondent and actually got only one sample. A teacher is supposed to maintain two or three writing samples per student per week.

Ms. Rivers was cross-examined regarding her observation of respondent on January 24, 1990 (P-6). She indicated that respondent handed out an activity sheet containing typed paragraphs and one of the students was directed to read it orally. However, the others students were not paying attention. Respondent then started to ask questions, to which the students gave oral responses. The remaining questions were given for homework or for independent work. No other materials were used that day.

Ms. Rivers indicated that she made the comment on the memo of January 29, 1990 (P-7), because a high percentage of respondent's lesson plans related to grammar and not enough were related to the literature portion of the course work. She also indicated that respondent started class by taking attendance of students. She indicated that attendance must be taken on a daily basis but not necessarily at the beginning of the class.

Ms. Rivers testified that the zero period class (P-9) is strictly voluntary and is a makeup class for students who missed an English class. Because respondent failed to show up for this class he did not continue to teach it. Ms. Rivers also stated that she did not observe the same kind of student conduct and disruptions in other classes and in the hallways as she observed in respondent's class.

Ms. Rivers testified that the union contract states that a teacher may request a demonstration lesson (P-13). She also recalls that respondent was advised to use the literature book "Adventures in Reading," which is designed for ninth grade students. It can be taught to students who are a little above and a little below grade and there are supplemental materials used by the English Department. The book has an array of materials arranged in difficulty from sixth through tenth grade. Ms. Rivers recalls that she did not observe respondent teaching literature-

related activities at all or very little. There was concern about respondent not teaching literature, but nothing raising this concern is listed on any evaluation form.

Ms. Rivers testified that Bulletin 32 (P-18) was issued to all high schools and the district was reinforcing the proper procedure for instructional objectives. She indicated that respondent had the ability to prepare lesson plans in objective terms but he was not consistent. On occasions he prepared a plan which was in proper form but then would go back to his old habits.

Ms. Rivers testified that with respect to her November 20, 1990 observation of respondent (P-26), he gave the students a ditto relating to a grammar exercise which she recalled seeing previously.

Harry Laub, School District Director of Reading and Language Arts testified in this matter. He testified to his educational background and experience. He indicated that he was called in to evaluate respondent because the school principal wanted an outside opinion. He made an observation of respondent on November 20, 1991 (P-71). He found the classroom disorganized with the seats in no formal arrangement. The bulletin board was empty and unwashed. There was no attempt by respondent to give instruction to the students. The students were walking around the room and there was no direction given to them by respondent. Respondent gave the students a ten question multiple choice test which was a 15 minute test, but the students were given 40 minutes to complete the test. There were no instructions given about the test and the students were not taking the test seriously. The test was given as an open book test and it should not have been open book. There was no give and take between respondent and the students, there was no questions of the students, no introduction of the lesson to the students, and no motivation given to the students by respondent. Mr. Laub indicated that this was the first year of a new literature series book and an outline guide had been developed. Respondent was doing the first or second story in the book and this should have been completed in September of the school year rather than in November. When he was asked to provide his lesson plans and study guide, respondent indicated that they had been left home. There was no attempt by respondent to engage the students and the students were not given any directions as far as lesson implementation. Mr. Laub's overall rating of respondent was unsatisfactory

Mr. Laub indicated that the Committee on Curriculum selected the literature book and this book was to be used by all grade nine students. On cross-examination, he acknowledged that a significant percentage of the students were reading below grade level. He acknowledged that there had been a problem with getting student programs going for the first several weeks of the school year. However, he did not know if there was a problem distributing the literature books. Only 3 of the 15 students in the class brought the textbook with them to class. The book was being utilized by respondent, but not efficiently.

Mr. Laub testified that the building principal was very general in his comments requesting this observation, and he was not aware of any charges pending against respondent. Respondent was not attending to clerical duties at the beginning of class but simply handed out the test. He observed students wander in and talk to some friends and walk out. Respondent allowed this to occur and did not discipline any students. He indicated that despite respondent's request for a demonstration lesson, he did not provide it because it is inappropriate for an outside teacher to come in and do so. On redirect examination, Mr. Laub indicated that he would have expected the students to progress beyond the first or second story in the literature text by November of the school year.

Doris Culver, who was the Principal of University High School at the time of the hearing, testified that when she was Vice Principal at Central High School she evaluated respondent both with informal and formal observations. She conducted an observation of respondent on November 28, 1989 (P-59). The students were seated wherever they wished in the classroom and there was no attempt by respondent to engage the students in their lesson. There was no order in the class when the students should have been actively engaged in the lesson. The bulletin board was bare. The teacher handed out a homework sheet and she indicated that this was not an effective use of time. The students were not involved with the lesson but respondent took no action to have them involved. There was no positive relationship, but merely a handing out of material. The curriculum guide was not used. She gave respondent unsatisfactory ratings in lesson implementation because none of the required activities were engaged in by the respondent. Her overall evaluation of respondent was unsatisfactory. She indicated that direct classroom

instruction should have occurred during this observation but instead the students were doing homework. The lesson was not challenging to the students and the students were not involved.

Ms. Culver testified to a second announced observation of respondent which took place on January 17, 1990 (P-60). She observed some student work on the bulletin board but the lesson implementation had not changed. Not all students were involved in the class and class time was not used effectively. There was no attempt on the part of respondent to engage the students and there was no exchange between teacher and student. There was no indication that respondent was using the curriculum guide, and he merely handed out worksheets. There was no attempt by respondent to motivate students to become involved. A student was disrupting the class and respondent permitted her to continue. In addition, it was not clear to the students what was to be done by them. The students were disengaging themselves from the class but the teacher did nothing about this. Homework is a mandate from the school district but none was given by respondent to the students. Respondent simply distributed materials to the students and gave no direction or follow-through. Her overall rating of respondent was unsatisfactory.

On cross-examination, Ms. Culver indicated that respondent did not refuse to follow her suggestions and he was not insubordinate to her. However, he did not implement her suggestions and effective classroom instruction did not occur. Only 8 or 9 of the 12 to 20 students were present. The plan book was present. Respondent had the information available to present a lesson but did not present it in an efficient manner.

Carl L. Gregory, Principal of Central High School testified that at the beginning of the 1990-91 school year, all teachers and students had been provided schedules and that there had been no delay in giving out materials at the beginning of the year. All teachers were advised that they are to be at their door between classes and on February 9, 1990 (P-66), respondent failed to comply with this directive. He indicated that on at least five or ten occasions respondent was not at the door to his classroom and was not in his classroom. He also indicated that on a number of occasions he would hear noise coming from respondent's classroom with no one supervising. At that point, he would go in to the classroom and restore order.

Mr. Gregory testified to an observation of respondent which he conducted on March 27, 1990 (P-67). The classroom was not neat and it was in disarray and classroom rules were not posted. There were no learning centers, no posting of student work and the bulletin board was bare. Some students had their heads down, other students were looking out the window, and other students came in late. Respondent had no control over the students. Respondent was seated in a chair at the front desk and students were walking around the room. Once the class period began, instruction by respondent should have begun, but it did not. Respondent handed out an exercise and the students were finished with it in two or three minutes. Respondent waited 10 or 15 minutes during which time he should have been giving instruction to the students. Mr. Gregory indicated he saw no instruction during his observation. There was very little interaction by respondent with the students and respondent merely distributed dittos. Respondent did nothing about the students' not paying attention. Based on his observation during this lesson, Mr. Gregory felt that there was nothing done by respondent connected with the lesson plan and curriculum guide. There was no checking by respondent to see if the students understood the subject matter of the lesson. He gave respondent an overall unsatisfactory rating.

Mr. Gregory testified that a teacher should always check for student understanding in order to adjust the teaching methods and approach to the students. Respondent did not do so nor did he take any steps to correct student conduct. There was also no evidence of homework being given either the day before or the day of the observation. Giving a worksheet to the students would be appropriate if it were given with instructions but there was no instructions given by respondent. There was very little teaching going on in this class.

On cross-examination, Mr. Gregory testified that respondent was given a 90-day period to improve his performance (P-69). Respondent had the skills to teach but was he was not effective as a teacher. During the observations, respondent spent no time correcting student behavior and at no time did he address inappropriate behavior. He would do nothing to correct student behavior but would refer the students to others. Mr. Gregory was most concerned with respondent's ineffective teaching. He also viewed respondent's lesson plans and indicated there was nothing in them showing methodology, procedures, or homework. He recounted one incident when respondent was 20 minutes late getting to class. By way of explanation, respondent indicated that he was getting his paycheck.

Irene Miller Graves testified that she is the English Department chairperson at Westside High School. Respondent was a member of the staff at Westside from 1985 to 1988, when he left. She conducted an evaluation of respondent on June 10, 1987 (P-61), in which gave respondent an overall unsatisfactory rating. She indicated that respondent failed to take into account the individual needs and abilities of the students. He used one set of lesson plans for both ninth and tenth grade and there was no distinction made for student abilities. His instructional methods were not sufficient, and he simply distributed dittos. This method was both inefficient and insufficient. The only resources used by respondent were the dittos which he prepared. There was no use of textbooks or other resources. She observed students who were late, students who did not belong in the class, and students who were making noise outside of the class, all of which should have been taken care of by respondent but were ignored by him. Respondent failed to appraise his own teaching methods and failed to function as part of the school program. There was no contact by respondent with colleagues and no participation in school activities. Respondent needed improvement in a number of areas. He failed to motivate students. Students did not wait for instruction or direction but simply started working on the dittos which he handed out. There was no teaching taking place in his class. There was very little interest or concern shown on the part of respondent. He spoke in a monotone and walked around the room looking out the window. There was no attempt to engage his students or to capture their attention. It did not matter to him if the students were listening. With respect to punctuality, respondent was tardy 43 times the prior year and 51 times in the current year.

Ms. Miller testified to an observation she conducted of respondent on November 9, 1987 (P-62). The lesson consisted of four separate and totally unrelated concepts, there being no continuity or sequence. There was no purpose or objective to the lesson and the skills being taught did not relate to each other. The classroom was in disarray with no seating arrangement. Respondent made no attempt to administer control and did not address any classroom discipline problems in any way. The class began five or ten minutes late and respondent started class five or ten minutes after he arrived, which left only 20 minutes for instruction. Respondent failed to use anything other than a ditto, when there were additional materials and resources he could use. Respondent displayed a lack of interest in teaching methods or procedures and he failed to relate to differing student abilities. He provided no motivation to students. He failed to state the

objective of the lesson and he provided no instruction, that is, there was no attempt to actually teach the students the concepts being dealt with in the ditto. Respondent also did not attempt to make use of any textbooks assigned for use by the students.

Ms. Miller made an observation of respondent on January 19, 1988 (P-63). On that occasion, some of the students arrived late but respondent failed to find out why and failed to administer discipline. Respondent also arrived late and he did other things before starting class. He failed to implement the lesson by failing to engage in instructional techniques and methods addressing the individual needs of students. A teacher is required to impart knowledge, therefore, the teacher must consider the students' abilities and needs, and respondent failed to do so. One student was listening to a portable radio which was against school regulations. The students did not know the title of the textbook and, according to one student, textbooks had not been assigned to them. While respondent was at the board writing instructions, the students were not paying attention but were working on the ditto. Respondent should have gotten the students' attention and explained the concepts he was dealing with. He failed to follow-up in order to assure that the students were getting a clear understanding of the concepts he was teaching.

Ms. Miller conducted an observation of respondent on February 29, 1988. She found the classroom disorganized and disorderly. There was no attempt to use the full 40 minutes of class time for teaching. Despite her prior recommendations, respondent again failed to use the assigned textbook and other resources. There was no attempt to use proper methods for implementing the lesson. A single prepared ditto lesson is not sufficient to meet the needs of all the students. Respondent had not made any attempt to incorporate the suggestions she had previously made to him into any of his lessons. There was an improvement by respondent in trying to focus on one area only. However, there was no indication by respondent as to the lesson objective and there was very little teaching taking place. Ms. Miller indicated that filling in information on a ditto is not teaching and there was no explaining, showing concepts, or instruction. Respondent was assigned the *Arrivals* textbook for use by his class, but he did not use it. He gave no advance directions or instructions as to what was required of the students to complete the dittos handed out. There was insufficient verbal communication between respondent and the students and he failed to engage the students.

Ms. Miller testified that on May 18, 1988, she provided to the respondent his Annual Evaluation (P-65), wherein she considered all observations made during the year. This indicated that there was no clearly established procedure on the part of respondent for planning or for considering the abilities of students. The only instructional method used by respondent was the ditto. There was no other teaching method, strategy, or technique used by him. There was no attempt by respondent to use resources or supplemental materials. The same types of discipline problems continued to occur even at the end of the year.

On cross-examination, Ms. Miller indicated that respondent was assigned to the ninth grade class, which is the lowest level in the school. She admitted that the students were probably reading on a fourth grade to seventh grade level and it was unlikely that any of them were reading on a eighth or ninth grade level. She indicated that in the 1986-87 school year the students were assigned an individual literature anthology to take home. The same was true in the 1987-88 school year, with each student having been assigned a separate textbook. These were distributed within the first two or three weeks of the school year. The teacher had the option not to use textbooks at the beginning of the school year. She cannot recall if the textbooks were given to respondent. She indicated that she reviewed respondent's lesson plan books and that her signature indicated her approval of the plans. The textbook was included in respondent's written lesson plans but she saw no textbooks being used during her observations. The dittos used by respondent appeared to be teacher-made. She admitted that there is nothing wrong with ditto method of instruction but other methods also should have been used. She acknowledged that respondent indicated he had to use dittos because the required materials were too difficult for the students.

Ms. Miller recalled that respondent referred some disciplinary problem students to her but respondent did not spend an inordinate amount of time on discipline. She indicated that respondent was late to school for 51 of the 180 school days based on documents provided to her. She also admitted that respondent was competent and had ability, and that he was knowledgeable. He had the requisite skills but was not performing in an efficient manner. She indicated that she never felt that respondent behaved in an insubordinate way or in an unbecoming manner during all of the time that he was her subordinate. She acknowledged that at some time during the year, a

VCR and television were stolen and could not be used. On redirect examination Ms. Miller indicated that respondent did not make a serious attempt to incorporate all available materials in his teaching. There was no connection between the lesson and the skills trying to be taught.

Dr. Jean Sharp Adilifu testified that she became familiar with respondent when he was a teacher of English at Central High School. She performed observations and evaluations in early 1991 because it had come to her attention that there had been three years of unsatisfactory performances by respondent.

Dr. Adilifu conducted an observation and prepared a Teacher Observation Summary of respondent on January 23, 1991 (P-73). This was not a formal observation. The lesson and conduct of respondent were disjointed and unfocused. The students entered and left the classroom at will and were not provided any direction. The teacher's remarks were given in an off-handed manner with no pitch or tone to his voice. There was no connection to responses given to the teacher by students. Respondent chewed gum during this class, which she did not consider to be professional deportment, especially since his pronunciation was hampered by the gum in his mouth. She arrived at the beginning of the period and respondent arrived late. There was no immediate direction given by respondent to the students upon his arrival. Respondent had no lesson plans in written form. It was remarkable to Dr. Adilifu that the students were not defiant and that some were actually following directions. She spoke to respondent after the class. She felt that the respondent should assume the role of instruction leader and felt that there was a lack of professional behavior on his part. There were typographical errors in the material he supplied to the students. He only used a single instructional modality, which was a handout. She felt that the students needed verbal instruction, engagement in question and answers, and other directions.

Dr. Adilifu conducted an observation of respondent on March 21, 1991 (P-74). She found the teacher-controllable situations, including seating arrangement and orderliness, to be unsatisfactory. There was no display of student or teacher materials and no attempt to make the classroom learning-attractive. The respondent entered the class late and did not start promptly. There was no direction or time frame given to the students for the lesson. She observed a lack of substantive given-and-take between respondent and the students. Respondent did not use

multiple teaching strategies but gave the students written work only. Respondent lacked a well-modulated voice and spoke in a detached monotone which lacked enthusiasm. There was minimal eye contact, minimal verbalization, and minimal qualitative teacher-student exchange. Respondent used no board-approved curriculum guide, instructional strategies, stimulation of students, or lesson plans for the lesson being addressed. The students were not paying attention to him. He simply remained at his desk during the class when he should have been actively engaged in teaching. Respondent's increment was denied based on his continued unsatisfactory performance (P-75). Based on the three years of unsatisfactory performance, tenure charges were filed.

On cross-examination, Dr. Adilifu indicated that she observed respondent twice. On March 21, 1991, she recalls that respondent gave no instructions to the students. He simply delivered a ditto to the students and thereafter did very little instruction. The students ushered respondent into the classroom by telling him that he had a visitor and he might want to come into the classroom. She does not know what respondent was doing outside of the classroom. After he came in he handed out preprinted information. He was involved only with imperative sentences for the entire period. The lesson plan book said that the lesson was to be for HSPT writing. She indicated that when she spoke to respondent afterwards respondent was not disrespectful and was not insubordinate toward her. She gave him suggestions and recommendations but indicated that these were not presented as direct orders. There was no failure to abide by orders given by her to respondent. She indicated that the suggestions she made to respondent were to cause him to perform in an efficient and satisfactory manner.

Carmela H. Pallotta testified that she is Vice Principal at Westside High School and she provided her educational background and experience. She was asked to evaluate respondent at Westside High School. She conducted an observation on December 3, 1991 (P-70), during which she was very confused about the subject of the lesson. The classroom environment was unsatisfactory because the students were calling out answers and banging on the file cabinets, and their unwillingness to behave properly and pay attention was not addressed by respondent. The classroom was completely bland and there was no evidence of any teaching activity. The lesson had no beginning, middle, or end and there was no organization to the lesson at all. At the conclusion of the class, the students ran out of the classroom before respondent could give a

homework assignment. He did not attempt to communicate with the students and there was very little interaction. Respondent passed out a sheet of paper which did not match the classroom discussion. He failed to communicate with the students and would utter only two or three sentences. There were no lesson plans in sight and when she asked respondent for lesson plans, he did not answer. His lesson implementation was generally unsatisfactory because no lesson took place. Respondent left the room twice and returned and began handing out books, but gave no explanation. This was not a lesson. It consisted merely of 40 minutes of marking time and filling up space. The students had no books or pencils and some came in late.

Ms. Pallotta indicated it is not good teaching practice to have students shout out answers. Respondent passed out blue paper with no explanation and she could not understand what was going on. In addition, respondent is not supposed to leave the room during a class because it violates the teacher contract, and there was no reason for leaving the room. Almost all of the students were unprepared. Respondent sat at his desk and said very little, if anything. He asked undirected questions which were ignored by the students. She indicated that when one student was banging on the file cabinet and was disruptive, respondent did nothing, and eventually another student asked the disruptive student to stop. Students must understand the assignment and it is not teaching to simply to pass out a piece of paper. What took place in respondent's classroom was not teaching and respondent did not even bother to talk to the students. There was also no structure to the seating arrangement in class. She does not agree that respondent spent an inordinate amount of time disciplining students on the day of her observation. She felt that his conduct bordered on insubordination. The few words that he deigned to utter were not with a raised voice. The subject of the handout (attachment to P-70) was with respect to the lesson which should have been covered months prior. It did not match what respondent was saying during class, which should also have been studied months earlier. She indicated that respondent is a very bright man but she does not know if he has the skills to be an effective teacher. She felt that he was inefficient on December 3, 1991. When she questioned him afterwards about what happened in the classroom he did not answer, and he simply smiled at the Observation Report but did not read it.

Respondent testified that he has been employed as a teacher in the Newark school system for 20 years and holds a certificate as an English teacher. He testified that Ms. Rivers supervised

him prior to October 1989, and that in 1987-1988 she provided him with satisfactory evaluations (R-40, R-41, R-42, and R-43). Respondent testified that Ms. Rivers would review his lesson plan book once every two weeks (R-1). He would hand in the lesson plan book to her every payday and she would return it the following Monday indicating her approval of the plans. On occasion, Ms. Rivers would hold onto the lesson plan longer. He recalls that there was one occasion when Ms. Rivers had not returned his plan book to him.

Respondent testified that the source of the requirement for teaching of grammar is found in the school district's Book of Course Proficiencies for English 1 (R-5) and for English 2 (R-7). The course proficiencies for English 1 (R-5) required that he teach grammar. Course proficiencies for English 2 is a separate document (R-7). He used these as far as planning and implementing his lessons. He indicated that Ms. Rivers was aware that he was using ditto forms to teach grammar, including the fundamentals of verbs (R-9). This ditto was consistent with course proficiencies. Ms. Rivers had no problem with his use of these materials, which he prepared. When the students used his materials discipline and interest were less of a problem. There was always a problem keeping the attention of the students because they all had reading deficiencies. As ninth grade students, they generally had a fourth or fifth grade reading level.

Respondent indicated that there were well over 100 proficiencies in the course proficiencies booklet (R-5) and that he compiled each of the ditto forms (R-46) by taking district books and materials and using them to try to cover at least four proficiencies each day. These forms could also be finished at home as homework if the students were unable to finish them in class. These forms used district textbooks for all pages except the answer sheet. Respondent also testified that he engaged in providing exercises by handing out dictionaries and having students use them (R-47).

Respondent testified that Ms. Rivers did not remain in his class for the entire period on October 11, 1989. A student was being disruptive and respondent admonished him a number of times. Ms. Rivers intervened, got into an argument with the student, and removed him. Therefore, she did not remain in the class for the entire period.

Respondent also testified that the exercise he used on January 24, 1990 (P-6), was given to a class that consisted of approximately six or seven students. He explained that when the exercise was provided cutting classes was a problem at Central High School (R-48). Respondent identified the absence list for a number of days starting with November 22, 1989 (R-27). He indicated that the Central Office prepares a list of absences every day and places them in the teachers' mailboxes. Absences have always been a problem and it is not an easy problem to solve. Respondent also identified lists of Lefts and Transfers, which is also prepared by the Central Office (R-28), and a Suspension List (R-29). He indicated that all of these interrupted the continuity of classes. Finally, he identified an Entry/Withdrawal Summary (R-26). With student absences, there were some days when no students would show up for a class.

Respondent admitted that he received a packet of memos regarding student absences (R-31). If a student arrived late for class, the student was to be allowed to come into the class. He always warned students as to the tardiness policies and admonished students afterwards. It had become a routine matter for students to come to class late. The Department chair, principal, and vice principals were supposed to be in the halls, but very often they were not. If they were there, the students disregarded their presence.

Respondent testified that hall sweeps were utilized from time to time. These were conducted during class time. The administrators were to deal with discipline and three to four minutes passing time between classes was permitted. However, hall sweeps are disruptive to the classes

Respondent testified that there were many last minute notices of changes in the daily schedule. He provided a number of copies of memos showing changes in the school schedule and shortening of classes (R-25). This interrupted the normal routine of the school day and many students used this as an opportunity to leave school early. This would occur once every two weeks.

With regard to the observation of January 24, 1990 (P-6), respondent testified that he asked Ms. Rivers for a demonstration of a directed reading lesson. He disagreed with her

assessments and felt that they were not true. He did not understand the basis for the unsatisfactory ratings given to him.

Respondent addressed the observation of November 20, 1990 (P-26). He identified the worksheets for that class (R-49) and indicated that the students' writing skills were "pretty bad." However, he indicated his exercise was in line with and was consistent with course requirements. He recalled November 20, 1990, very well and there was much confusion in the halls and in the classrooms. He frequently remained in the hall to get the students into the classrooms. It is very possible that the students were combing each other's hair; however, he indicated that he delivered his lesson for that day.

Respondent addressed the observation report by Mr. Gregory dated March 27, 1990 (P-67), and Ms. Rivers' observation report of October 13, 1988 (R-40). He indicated that there was a similarity in exercises given to both classes involving verbs and verb tenses. On March 27, 1990, he had made copies of certain pages of the HSPT for an instruction technique and he was familiarizing students with prior tests. He believes his instructional techniques on that date were effective, that the students were motivated to pass the test in order to get a diploma, and that the students understood completely what he was doing. He indicated that the Post-Observation Conference report (P-7, paragraph VI.a.6) is contradicted by the policy to ignore tardiness unless it was dealt with later and that no student was to be denied access to the classroom. He felt that all of the concepts he was using for instruction that day were in accordance with curriculum guidelines and study guides. He does not know the factual basis for Mr. Gregory's unsatisfactory ratings and he testified that he made every attempt to comply with these items. He felt that the post-observation conference was very brief because Mr. Gregory was in a hurry. Mr. Gregory made the point that respondent had not made the lesson objective clear.

Respondent testified that Ms. Rivers' Observation Report of January 30, 1989 (R-42), the Observation Report of February 29, 1988 (P-64), and the Observation Summary of January 23, 1991 (P-73) all dealt with the same lesson on these three dates, which was imperative sentences. He identified the class work on the date of the observation of January 23, 1991 (R-56). This exercise required that the students write an imperative sentence, deal with outlining, pronouns, and antecedents. All of the concepts dealt with in the lesson are in line with the curriculum

guides. He used the imperative sentence ditto for each of the three lessons on the different dates indicated. He felt that Ms. Rivers was very pleased by the lesson. The materials were drawn from district supplemental workbooks. He personally formulated the materials on imperative sentences.

Respondent addressed the Teacher Observation Report of February 29, 1988 (P-64), and in particular the unsatisfactory classroom environment and management. He explained that the classroom was dilapidated, windows were broken, the fixtures and desks were dented, beat up, old, and the room had not been painted in quite some time. With respect to teaching characteristics, he disagreed and felt that he handled the class pretty well. He felt that his teaching and lesson implementation were effective. He provided materials for the general level of the class, which was poor and was at a fourth or fifth grade reading level. He indicated that the suggestions for improvement mentions a lesson found at page 76 in *Warriners English Grammar and Composition Third Course*, which is a standard English textbook. He indicated that he used a similar exercise. However, students were not at grade level and he had to redesign the materials to get the concepts across to below-grade students. He was attempting to use effective techniques, he attempted to motivate the students, he questioned the students thoroughly throughout the lesson, and he attempted to have the students think independently. He denied that the students were unaware of the objective of the lesson and he indicated he gave the students examples as well as the ditto stating what was expected of the students. He indicated that he designed these materials to suit this lower level class. He testified that even the *Arrivals* textbook was too difficult for the students and that it was not applicable to a grammar lesson on the imperative sentence. Ms. Miller never told him he was insubordinate.

Respondent testified that if he was late arriving at class, it was because he had to use his passing time to change his room. He also indicated that if there is a disturbance in the hall, it is a judgment call whether the teacher should respond to the disturbance or report to the classroom. Administrators were assigned to various areas to keep the halls clear but many times administrators were not present and teachers had to perform this function. It was very rare that students were in the classroom with the starting bell. He acknowledged that if he ever commenced class late, it was because he was in the hall attempting to get students into the classroom.

Respondent testified that he disagrees with Dr. Adilifu's observation (P-73) in its entirety. He denies mumbling and asserted that the entire class could hear him. He denied the accuracy of this observation. He does not recall if he was four minutes late but indicated that it was always a problem getting students into the classroom. The material which he went over was the same material as the previous school day. He also indicated that when there is a visitor in the classroom, the students get edgy. He testified that workbooks had not been provided to the students and that he had to copy them. Respondent also indicated that the lesson plan book had been provided two weeks in advance but he felt he was not required to redo the plan book if he was not able to meet the objectives because of outside interruptions. He denied that seats were randomly arranged and denied that no lesson plans were present. He began class promptly and indicated that pacing guides did not come up until the next school year. He felt that his voice was loud and clear and that his directions were clear.

Respondent relied upon a Teacher Observation Report of May 6, 1985 (R-62), to indicate that he used the same or similar materials previously and his performance was found to be satisfactory. He also indicated that he was complying with the PIP of June 4, 1985, by developing exercises (R-63). He also relied upon an Instructional Survey of May 16, 1985 (R-64), with respect to dittos.

Respondent also relied upon an Annual Evaluation of June 17, 1986 (R-61) to show that his performance was satisfactory. He testified that he did nothing different in 1986, when he was evaluated as satisfactory, than what he did in subsequent years.

Respondent testified that he generally submitted lesson plans on time, although they may have been submitted late occasionally if he was absent. He felt that late submission of lesson plans was an exception. He also testified that Ms. Rivers never told him not to use the materials he used. He indicated that any time Ms. Rivers requested a change in the format of the lesson plans, he attempted to comply.

Respondent acknowledged receiving a memo from Ms. Rivers dated November 18, 1991 (R-18), with respect to student writing samples. Respondent testified that he obtained writing

samples from the students, although he indicated it was very difficult to get the students to provide these writing samples (Exhibits R-12(a), R-12(b), R-12(c), R-12(d), and R-12(e)). He also provided copies of writing samples for ninth grade (Exhibits R-13(a) and R-13(b)). He also provided additional writing samples to satisfy the requirements for writing samples (Exhibits R-14(a), R-14(b), R-14(c), R-14(d), and R-14(e)). He additionally relied upon copies of book reports by students in response to handouts of the school district (Exhibits R-15(a), R-15(b), R-15(c), R-15(d), and R-15(e)). Students were assigned one book report per cycle, with four cycles in each school year. He also had the students write a friendly letter and indicated that more students responded to the friendly letter than to an open-ended essay, and that they responded better to a strongly specific exercise (Exhibits R-16(a), R-16(b), and R-16(c)). He indicated that mid-term essays are required as part of the mid-term grade and that the students were required to write about an aspect of a particular story (R-17)

Respondent testified that he introduced literature concepts little-by-little and that he would introduce something new and would also reinforce prior materials at the same time (R-10). Those students who were slow in class and could not complete the ditto would take it home as homework. He also identified samples of reading proficiency exercises level 2 and indicated that the better students used these in the 1988-89 school year, in the 1989-90 school year or later (R-8). He also identified random samples of exercises he used at Central High School geared to weaker students with weak reading ability at grades four to six levels (R-6). He used these materials and they were all taken from textbooks supplied by the district. He found and compiled these materials himself. There were changes and modifications to them and the strategies that worked were kept by him and those that did not work were changed by him.

Respondent identified an Observation Report on October 28, 1986 (R-38). He testified that he attempted to use Ms. Miller's recommendation as set forth in the Observation Report and his lesson plan book after this shows that he followed her comment to use *Arrivals*. He identified the materials he used during the October 11, 1989 observation (R-46). This material was the same as that which he used in prior years. With regard to the observation on November 17, 1989 (P-4), he identified the materials he used on that day (R-47). He indicated that it is possible that students engaged in irrelevant conversation at the beginning of the class. The job of the teacher is to get the students settled in and quieted down and to pay attention to the lesson. For this lesson

he used a set of dictionaries provided by the district, the objective being to show the dictionary as an abundant source of general information.

Respondent next referred to the observation of November 28, 1989, by Ms. Culver (P-59). In general, he felt that the class was participating, that posters had been placed in the classroom, and that his instructional techniques were satisfactory. He was polite in the post-observation conference and he responded in writing by a memorandum on February 7, 1990 (R-55).

Respondent next testified concerning the observation on January 17, 1990 (P-60). The lesson that day dealt with finding evidence and focused on reading skills. He felt that the students participated very well and that all of the materials he used were in line with Board of Education curriculum guides and teacher guides. He feels that there is no factual basis upon which Ms. Culver could have concluded her unsatisfactory rating. The students responded to the lesson very well and his teaching effectiveness has been the same throughout his career.

Respondent addressed the Teacher Observation Report of March 27, 1990, by Mr. Gregory (P-67). He indicated that the lesson given that day was the same lesson as the prior year when Ms. Rivers gave him a satisfactory rating.

Respondent testified by indicating that Ms. Rivers' memo of March 29, 1990 (P-14), dealt with respondent's mentioning to Ms. Rivers that the assigned ninth grade text, *Adventures in Reading*, was too difficult for the students. Ms. Rivers suggested ten other textbooks. However, Ms. Rivers did not follow-up on the memo of March 29, 1990. It should be noted that it was the responsibility of respondent rather than Ms. Rivers to follow-up on this memo.

Respondent testified that there was no factual basis for the unsatisfactory rating in his Annual Evaluation of June 1990 (P-15). He testified that he used the same strategies and materials that he used the prior year. However, as a result of this evaluation, he attempted several different strategies. The supervisors made suggestions as to the use of materials, but did not require him to follow their suggestions. He denied that he engaged in any willful disregard of

directives. He never refused to obey any order or directive and did not disregard Board of Education regulations or any law. He indicated that he complied with his PIPs.

Respondent testified with respect to the Observation Report of November 20, 1990 (P-26). He identified the materials used during the lesson on that day (R-49). He indicated that these materials involved diagrams to familiarize students with the characteristics of English verbs. This was part of the curriculum guides and criteria. He responded to this evaluation with a memo of December 10, 1990 (R-50). He indicated that very similar lessons were marked satisfactory in the prior school year by Ms. Rivers. He also indicated that on that date there was quite a bit of disruption in the halls and during the school day, and disruption has a negative effect on the lesson. He felt that he was involved in an effective use of time and in an effective lesson. He indicated that Ms. Rivers never provided him with a demonstration lesson, as requested by him in his memorandum. He acknowledged that Ms. Rivers did provide two demonstration lessons but not for the period one class.

Respondent testified that the Observation Report of March 21, 1991 (P-74), is factually incorrect because he was not engaged in imperative sentences on that date. He identified copies of answer sheets relating to the HSPT booklet to confirm this fact (R-57).

Respondent testified that the Observation Report of February 20, 1991 (P-40), indicates that the ditto sheet used that day was similar to numerous others seen by the observer on other occasions. Respondent denied using the same ditto over and over again. He testified that these ditto sheets or exercises are designed to be incremental. He denied that there was any factual basis for the unsatisfactory evaluation. The students responded very well to the exercises and they were consistent with the curriculum from district-provided books. He considered the suggestions made by Ms. Rivers. However, he indicated that beginning a class promptly is a serious problem throughout the high school. He also stated that because Ms. Rivers did not observe him using literature and other textbooks does not mean that he was not using them. Respondent also testified that classroom discipline problems are a fact of life for all teachers at Central High School.

Respondent testified that as to the Annual Evaluation Report of June 1991 (P-44), that he never told Ms. Rivers he would not comply with the recommendations. He was concerned about the level of performance by students but denied that there was any factual basis for the unsatisfactory rating. He denied that he willfully disregarded directives, that he committed insubordination, that he disregarded Board of Education procedures or law, or that he created a poor precedent.

Respondent testified that in the 1991-92 school year, he was subjected to four class changes from the tentative schedule given to him in spring of 1991 (R-68). There was a big scheduling "glitch" in September 1991, and many students had no schedules. The schedule was eventually worked out in the first week in October, but there was an enormous amount of confusion in the meantime. Ms. Roseta Holiday was in charge of resolving the scheduling problems. Subsequent to October 7, 1991, respondent was still getting schedule changes and there were also changes in the levels of classes. There was also no continuity in lesson planning and the Prentice Hall series of assigned textbooks had not been distributed until mid-October 1991. Students had not yet been assigned lockers. Prentice Hall was new to all English materials and it was not until October 1991, that a meeting was scheduled to discuss a course outline and pacing charts (R-69). He also indicated that there were in-service workshops with respect to the Prentice Hall materials to familiarize teachers with them in October, November, and December 1991. Thus, at the time of the observation of October 7, 1991 (P-48), respondent had been in the classroom about one week or less and he was required to use materials he had used previously because of this confusion. As of that date, it was not possible to use the Prentice Hall materials because they had not yet been given to students, and teachers were not yet familiar with them. Even so, the lesson went very well that day. Respondent identified an exhibit containing Prentice Hall materials together with updated class lists indicating that the class lists had only been finalized at that time (R-53). It was at this point that respondent began to incorporate the Prentice Hall materials into his classes.

Respondent testified as to the demonstration lessons provided to him pursuant to the union contract (R-22 and R-52). Ms. Rivers provided a demonstration lesson in a remedial class for students having difficulty with reading. The students' reactions were mixed and they read a story throughout the class period. However, they were disruptive during the class. Respondent

indicated that he felt the demonstration lesson was irrelevant to Ms. Rivers' criticisms of his performance and he wrote a lengthy memorandum concerning this (R-23).

Respondent testified that the observation by Mr. Harry Laub on November 20, 1991, included a criticism to the effect that this lesson should have been taught much earlier in the school year. However, respondent indicated that when he and the students got the materials, he chose those materials that the students would have an easier time with. This was tenth grade but the students were far below the tenth-grade level. Mr. Laub was not aware of the practical problems experienced by Central High School. The students were having a difficult time with the materials and he tried to force the students to use the recommended materials but he was not successful. They could not manage the district materials with any degree of comprehension. He provided the students' responses with respect to the materials (R-58).

Respondent testified that during the observation by Ms. Pallotta on December 3, 1991 (P-70), the subject of the lesson would not have been unclear if Prentice Hall materials had not been used. He disagreed with this observation report in its entirety. He also indicated that he stepped out of the classroom to let another teacher into an adjoining classroom.

On cross-examination, respondent testified that he developed the exercise sheets or dittos because students could not handle the selected materials from the district-provided materials. The *Journeys* and *Arrivals* textbooks were not used because there were insufficient numbers of these books for each student. However, he denied that his expectations of the students was too low. He started at a low level and eventually tried to challenge the students. His strategy was to start where the student was capable of performing. There were varied levels of difficulties in the materials he provided. He testified that the photocopied materials worked well because this assured that each student would have a copy of the appropriate materials each day. Copies are acceptable to use if they are directed to a skill required by the students.

Respondent testified that he did not think it is possible to have the students progress one year. He does not know the cause of their low academic performance. He denied that he had a low expectation, just a realistic expectation. Many of the students came to school with problems and his expectation was to meet the student where he or she is and to move them as far as

possible. He admitted that he used the imperative sentence lesson on grades nine, ten and eleven, but this was because all three grades consisted of students who were not functioning at grade level. He considered the imperative sentence lesson to be an introductory lesson.

With respect to writing samples that were due on September 19, 1990, he did not know if he submitted any writing samples that year because the assignments were not done by the students. As he continued to give this assignment for writing samples to the students, he got less and less cooperation. He admitted that he did not always submit writing samples and he admitted that he did not give either writing samples or corrected writing samples to the Department chair. He admitted that he gave writing assignments and got some writing samples from the students but did not submit them to Ms. Rivers. He identified corrected writing samples (R-14(a)).

Respondent testified that he used the assigned textbooks in a manner that the students could manage. He acknowledged that the observation of October 28, 1986 (R-38), of January 19, 1988 (P-63), and of February 29, 1988 (P-64) indicated that the use of dittos is not acceptable. However, he took the position that the dittos he used were taken from textbooks. Even though the evaluators all recommended against the use of dittos, and he was aware of this, he pointed out that dittos were copies of Board-approved materials.

Respondent disagrees with Ms. Culver's observation of November 28, 1989 (P-59), and her assessment of his performance as well as her assertion that he failed to hand out homework. He eventually indicated that he disagrees with all his evaluators and he should not have been rated unsatisfactory.

With respect to the Prentice Hall textbook, Dr. Laub indicated that it was selected by the teachers in the school district. However, respondent stated that it was a very difficult textbook and the teachers from three or four high schools were aghast at its selection and said that it could not be used. However, the Board of Education wanted to have a uniform curriculum. He felt that the students could not manage the Prentice Hall textbook. His materials supplemented those of the Board and are designed to make it easier for the students to learn the concepts set forth in the curriculum.

Lula Mae Rivers was called as a rebuttal witness. She testified that she never observed respondent assisting in getting students out of the hallways. She explained that hall sweeps were to get lingering students into the classroom after the classes have started. This was not considered to be the responsibility of teachers but that of school administrators.

Ms. Rivers identified *Adventures in Reading* (P-80). She indicated that there is a range of reading levels and that all students could use this text with proper instruction. There are various strategies that could be used to match student levels with the text. She indicated that a sufficient number of books were available to be provided to all students and that there were no shortages. She did acknowledge that there are losses of copies of books every year.

Ms. Rivers testified that the reasons why she gave satisfactory evaluations to respondent in prior years and then unsatisfactory ratings in subsequent years was that at first, she was just getting to know respondent and trying to understand his teaching strategies. This takes a while and eventually she saw a deterioration in respondent's performance. He was arriving late and his encouragement of students was deteriorating. She saw too much grammar being taught in his classes and not enough focus on the rest of the curriculum. Providing grammar lessons without putting them into practice is not acceptable.

On cross-examination, Ms. Rivers indicated that the *Adventures* text was the only Board mandated textbook for Central High School. There were other resources but this was the specified textbook. She also indicated that she always gives the teacher and herself a chance to get to know each other before giving an unsatisfactory rating. She admitted to rating respondent satisfactory for the 1988-89 school year.

Irene Miller Graves testified that the *Journeys* textbook was ordered for those students who were reading below grade level. She disagreed that the abilities of the students vary. She indicated that she checked with the publishers to make sure that the text was not too difficult for below-grade readers. She indicated that the *Arrivals* text is designed for grades 2.5 to 5.6. She also indicated that there were a sufficient number of books available for all students.

Respondent testified to rebut the testimony of the rebuttal witnesses. He identified the two textbooks and indicated that he tried to use them but had very little success. He denied that *Adventures in Reading* (P-80) was a required textbook. Ms. Rivers gave him a curriculum booklet (R-72), which lists *Adventures in Reading* as a recommended text. He attempted to use *Adventures in Reading* but was not able to do so.

LEGAL DISCUSSION AND ANALYSIS

The Commissioner of the Department of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. The discipline of tenured school employees is authorized by *N.J.S.A.* 18A:6-10, which generally provides that no tenured school employee shall be dismissed or reduced in compensation during good behavior and efficiency except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing.

The original charges in this matter which were certified by the school district on January 29, 1992, included a charge of inefficiency and a charge of unbecoming conduct. By a Partial Initial Decision dated September 21, 1992, in this matter, the undersigned granted respondent's motion to dismiss the inefficiency charge, but denied the dismissal of the unbecoming conduct charge. This was affirmed by the Commissioner of Education on October 21, 1992, and affirmed by the State Board of Education on February 2, 1993. Thus, the sole charge to be considered in this matter is whether respondent engaged in unbecoming conduct.

The tenure charges filed by respondent in this matter allege that respondent has engaged in conduct which is unbecoming of a teacher in that:

(a) Respondent spends inordinate amounts of time disciplining his students such that said students are deprived of effective instructional techniques and the proper environment for learning. (It is noted that this allegation was dismissed by the ALJ at the hearing.)

(b) Respondent has caused the administration to consume an inordinate amount of time seeking to address his conduct.

Respondent has willfully disregarded expressed and implied directives to conform his conduct to the level expected of teaching staff members.

Respondent has displayed insubordinate conduct, in that he has refused to obey the orders/directives by his superior(s) and/or department administrators who are entitled to give and have said directives obeyed.

Respondent's conduct and behavior evidence a complete disregard for board procedures and applicable law, and establishes a poor precedent for other teaching staff members of the school district.

Each of the above actions singularly constitutes conduct unbecoming of a teacher; however, the aggregate of the above actions evidences gross and harmful conduct unbecoming a teacher.

The legal and factual issues on remand of this matter are:

1. Whether, upon reexamination of the record of testimony and evidence in this matter, the school district has met its burden of establishing the truth of the charges of unbecoming conduct on the part of respondent by the correct standard of the preponderance of the credible evidence?

2. If, upon such reexamination, some or all of the charges are sustained, what is the appropriate penalty?

The essence of respondent's argument, as set forth in respondent's Brief and Reply Brief is that an examination of the proofs in this matter reveals that petitioner has failed to prove the above assertions by a preponderance of the evidence. Respondent argues that petitioner failed to prove that respondent caused the administration of the school district to consume an inordinate amount of time seeking to address his conduct. It is pointed out that none of the seven witnesses who testified against respondent mentioned spending an inordinate amount of time seeking to address his conduct. It is also observed that it not clear from the record whether the expenditure of inordinate amounts of time by supervisors and administrators is an element of proof in establishing unbecoming conduct.

Respondent additionally argues that the school district failed to establish that the respondent refused to obey the directives or orders of his superiors either expressed or implied. Respondent further argues that petitioner has failed to establish that respondent displayed insubordinate conduct by refusing to obey the orders/directives by his superiors and/or department administrators. In this regard, only one of the seven witnesses who testified in support of petitioner's case against respondent indicated in any way that respondent acted in an insubordinate manner. I generally agree with respondent's arguments as to these issues.

Finally, respondent argues that petitioner produced no evidence of gross and harmful conduct on the part of respondent. In order to determine whether the petitioner met the elements of this charge, it is necessary to discuss what is intended by the term, "unbecoming conduct".

There is no single definition of the term unbecoming conduct. In *Laba v. Newark Board of Education*, 23, *N.J.* 364, 384 (1957), it was made clear that the touchstone of the charge is a teacher's fitness to discharge the duties and functions of one's office or position. See also, *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 28-29 (App. Div. 1974), certif. denied, 65 *N.J.* 292 (1974). There are numerous cases in which specific conduct was found to be unbecoming conduct. For example, the use of physical force by a teacher to maintain discipline was held to be unbecoming conduct. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). A teacher with an uncontrollable temper who verbally and physically abused students was found to have engaged in unbecoming conduct. *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 741 (App. Div. 1988).

Outside the field of education, unbecoming conduct on the part of public employees is conduct which adversely affects the moral or efficiency of the agency of which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in the operation of governmental services, or which violates an implicit standard of good behavior. *City of Asbury Park v. Dep't. of Civil Service*, 17 *N.J.* 419 (1955). A finding of unbecoming conduct does not require that any specific rule or regulation have been violated but may be based primarily on a violation of an implicit standard of good behavior. *In re Emmons*, 63

N.J. Super. 136, 140 (App. Div. 1960); *Newark v. Massey*, 93 *N.J. Super.* 317, 323 (App. Div. 1967).

In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. See *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), affirmed o.b. 131 *N.J.L.* 326 (E.&A. 1944). In that matter, a school principal was found guilty of the charges of inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. See, 128 *N.J.L.* 281, 282 (Sup. Ct. 1942). The court stated:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. (130 *N.J.L.* at 371.)

As was previously indicated, in order for the charging party in a tenure hearing to prevail, the truth of the charges must be established by a preponderance of the credible evidence. *In re Phillips*, 117 *N.J.* at 575; *Atkinson v. Parsekian*, 37 *N.J.* at 149; *In re Polk License Revocation*, 90 *N.J.* at 560. It should be noted that in the *Polk* case, the fact finder, as an additional factor to determine the truth or falsity of the charges, examined and compared the testimony of all of the witnesses and determined that they shared a common core in their factual allegations. *Id.* at 558

The proofs submitted by petitioner in this matter were extraordinarily detailed and extensive and required considerable analysis in order to reach certain conclusions. There were 16 formal observations in this matter made between October 11, 1989, and December 3, 1991 (Exhibits P-1, P-6, P-26, P-40, P-48, P-71, P-59, P-60, P-67, P-61, P-62, P-63 and P-64). These 16 formal observations were conducted by seven different individuals, including five by Ms. Rivers, one by Mr. Laub, two by Ms. Culver, one by Mr. Gregory, four by Ms. Miller, two by Dr. Adilifu and one by Ms. Pallotta. In a number of significant respects the testimony of these observers and the writings which document their observations are consistent with each other in many of their conclusions as to respondent's deficiencies. In 14 of the 16 formal observations, respondent was given unsatisfactory ratings because he was found to be unsatisfactory in

disciplining and controlling student behavior. In 12 of these observations respondent was given unsatisfactory ratings because of unsatisfactory teaching or no teaching whatsoever. On 11 of the formal observations respondent was given unsatisfactory ratings for unsatisfactory lesson implementation or no lesson implementation whatsoever. In ten of the observations respondent was given unsatisfactory ratings based on his failure to use either mandated or recommended textbooks or other resources rather than an exercise sheet or "ditto". Eight of these observations rated respondent unsatisfactory based on his failure to attempt to motivate his students. Seven of the observations gave respondent unsatisfactory ratings because of poor classroom atmosphere or environment. In six of these observations, respondent was reported to have been late either arriving in class or late in actually starting the class. In five of the observations respondent was given unsatisfactory ratings based upon his lack of interest or concern in dealing with his class, his failure to have his lesson plans available and his failure to respond to or to follow prior recommendations or suggestions for his improvement as a teacher. The remainder of the unsatisfactory ratings generally dealt with the findings that respondent's lesson objectives or subject matter was unclear, that he did not use his teaching time effectively, or that he gave no homework assignment to the students as mandated by school district policy. One of the observations indicated that respondent reused a ditto which he had previously used for the same class.

The Annual Evaluations given to respondent (Exhibits P-15, P-44 and P-65) each rated respondent as unsatisfactory and each one generally found the same or similar deficiencies. Ms. Rivers indicated that as to respondent's Annual Evaluation Report of June 1990 (P-15), his overall rating was unsatisfactory because the items listed as unsatisfactory were consistently unsatisfactory throughout the school year. She explained that there was no effort made by respondent to improve or change his behaviors. Ms. Rivers also testified that she gave respondent an unsatisfactory Annual Evaluation Report in June 1991 (P-44) because of the unsatisfactory areas observed during the entire school year. There was a lack of effort on the part of respondent to improve, to motivate students, to maintain student decorum, and there was a failure by respondent to comply with Board of Education directives and requirements. Ms. Miller testified as to respondent's Annual Evaluation of May, 1988 (P-65). She considered all observations made during the year and indicated that respondent had no clearly established procedure for planning or for considering the abilities of students, the only instructional method used by respondent was the

ditto and there was no other teaching method, strategy, or technique used by him. There was no attempt by respondent to use resources or supplemental materials.

The testimony and evidence concerning each of the annual evaluations was consistent. The same types of student discipline problems which occurred at the beginning of each school year continued to occur even at the end of the year. It was indicated that there was a lack of discipline and control of the students by respondent, there was a use of dittos as the only resource with no other materials, teaching methods, strategies or techniques being utilized, and there was a failure to use effect classroom teaching techniques. It was also indicated that respondent failed to follow the directives and requirements of the school district, which included a failure to use assigned text books, and that he failed to use resources or supplemental materials other than the dittos. Finally, it was generally indicated that there was a failure on the part of respondent to make any efforts to improve his teaching methods or to follow through on suggestions and recommendations for the improvement of his teaching.

Petitioner also relied upon 12 "Informal Observations" made of respondent on a casual basis between October 1989 and February 1991. These Informal Observations apparently involve incidents or situations observed by a supervisor or a staff member. The supervisors followed the practice of placing the informal observation writing so as to notify the staff member of the incident, deficiency or problem, and so as to keep a written record of the observation. There was no indication in the record what procedure is available to a staff member who disagrees with the contents of an Informal Observation. It is presumed that upon receipt of an Informal Observation, the staff member has the opportunity to respond in writing either disputing the contents of the observation or explaining the circumstances under which the incident occurred. In this matter, Ms. Rivers testified as to 11 of the Informal Observations which she made (Exhibits P-3, P-4, P-8, P-10, P-12, P-22, P-29, P-30, P-33, P-38, and P-39), and Mr. Gregory testified as to one of the Informal Observations (P-66). Each of these informal observations generally included more than one deficiency which was observed by the supervisor. With respect to the Informal Observations testified to by Ms. Rivers and Mr. Gregory in this matter, eight of them related to incidents in which they found that respondent exercised no discipline and control of the students in his classes. Five of the informal observations generated by Ms. Rivers related to incidents of lateness on the part of respondent, and the one observation generated by Mr. Gregory

reported an incident when respondent failed to be at his classroom door in accordance with district policies. Four of the Informal Observations related to failures on the part of respondent to follow up on recommendations and suggestions for the improvement of his teaching methods and four related to his failure to provide lesson implementation and direction to his classes. Three related to problems of classroom appearance and one involved respondent's failure to have lesson plans available in the classroom. It should be noted that there is reflected nowhere in the record any responses on the part of respondent to these Informal Observations.

Ms. Rivers testified to 27 memos or other writings given by her to respondent, 26 of which involved deficiencies or other problems relating to respondent's performance. Of these, ten dealt with respondent's failure to provide student writing samples as mandated by district policy, nine involved respondent's repeated failure to submit lesson plans for approval on a timely basis, five dealt with deficiencies regarding respondent's teaching methods, two dealt with deficiencies in the lesson plans submitted by respondent, and one involved a response to a memo from respondent dealing with the discipline of students.

In response to foregoing testimony and evidence, respondent testified that Ms. Rivers supervised him prior to October 19, 1989. He indicated that in the 1987-88 school year Ms. Rivers gave him satisfactory evaluations (Exhibits R-40, R-41, R-42 and R-43) when he was using the same teaching methods and materials that he used in subsequent years when he was given unsatisfactory evaluations. He also testified that there were occasions when Ms. Rivers would hold on to the lesson plans which he submitted to her and that, as a result, he would not have them available for his use when he was teaching a particular class.

Respondent testified that he prepared and used exercise or ditto forms to teach grammar as required by the district. These dittos were consistent with district course proficiency requirements and were based upon and copied from recommended or required texts provided by the school district. He indicated that Ms. Rivers approved of the use of these materials and that these dittos were actually better than the district-suggested or mandated textbooks because they kept the attention of students, all of whom had reading deficiencies.

Respondent testified that Ms. River did not remain in the class for the entire evaluation of October 17, 1989, because of a disruptive student. He indicated that Ms. Rivers got into a dispute with the student and that she removed the student. He also testified that absences from class because of students' cutting class, and because of transfers and withdrawals of students were also disruptive to his classes and caused a decline in the number of students attending. He also stated that at least once every two weeks all classes were disrupted by assemblies which shortened class periods. In addition, hall sweeps which were conducted by school administrators for the purpose of removing students from the halls and placing them in their proper classes, were also disruptive to the classes and interfered with instruction.

Respondent testified that he frequently remained in the hallway in order to get the students into the classrooms, and he believed this to be the reason why he was late arriving at his some of his classes. He also indicated that student discipline was a serious problem and a fact of life in all of the school district's high schools, and that this problem caused disruptions in all classes. Respondent felt that the unsatisfactory ratings given to him because of his alleged failure to deal with students who were tardy were contradicted by the policy of the school district requiring the teacher to accept the tardy student into the class and deal with the tardiness after the class.

Respondent denied Ms. Rivers' conclusion that he used the same ditto or exercise in the same class on prior occasions. He explained that his use of dittos is incremental and that it is necessary for him to go over a subject a number of times in order to teach the students in a proper manner.

Respondent addressed the various allegations of unsatisfactory classroom environment by explaining that the classrooms are dilapidated, windows are broken, fixtures and desks are dented, beat up and old, and there has been no painting of classrooms for quite some time.

Respondent indicated that because of the below-grade reading level of all students, he could not use the recommended or, in later years, required textbooks. As a result, it was necessary for him to use materials which would match the students' abilities in order that he could get the concepts across to below-grade students. He asserted that he was using effective teaching techniques and that he was attempting to motivate his students. He disagreed with the

assertion that he did not question the students to determine if they were learning. He testified that he questioned the students thoroughly throughout lessons and he attempted to have them think independently. He generally denied that the students were unaware of the objective of the lessons and he indicated that in some cases he was on the same lesson for several days so that the students were fully aware of what the lesson involved. He asserted that the textbooks which were recommended and were eventually mandated by the school district were too difficult for the students and they could not be used to teach principles of grammar.

Respondent testified that he disagreed with Dr. Adilifu's observation of January 23, 1991 (P-73), in its entirety. He testified that it was on this occasion that the material gone over with the students in class was the same material that was used on the previous school day. He indicated that work books had not been provided to the students and that he was required to copy them. He denied that he mumbled when speaking to the class, and he stated that he felt that his voice was loud and clear and that his directions to the students were clear. He relied upon a Teacher Observation Report of May 6, 1985 (R-62), when he used the same or similar materials as those he was using when he was observed by Dr. Adilifu, and on the prior occasion, his performance was found to be satisfactory. He indicated that he was complying with a PIP requirement by developing exercises and by creating dittos.

Respondent testified that he submitted his lesson plans generally on time, although they may have been submitted late on occasion if he were absent. Therefore, he denied Ms. Rivers' testimony that he was consistently late in submitting his lesson plans. He indicated that it was very difficult to get students to provide writing samples and he admitted that there were some occasions when he had writing samples from students which he did not submit to Ms. Rivers.

Respondent relied upon various materials showing the class work of his students for the purpose of establishing that he was complying with school district requirements as to curriculum. He disagreed with each of his observers by asserting that there was no factual basis for their arriving at their conclusions. He testified that he felt he was teaching in an effective and satisfactory manner. In essence, he relied upon observations and evaluations made of his performance in prior years during which he asserted that he used the same or similar types of

teaching strategies and techniques and was given satisfactory ratings, and in comparison he was given unsatisfactory ratings in subsequent years.

Respondent specifically testified with respect to Mr. Laub's observation on November 20, 1991 (P-71). In his report Mr. Laub indicated that respondent was teaching a lesson in November which should have been taught at the beginning of the school year. Respondent answered this by testifying that there was a scheduling "glitch" in September 1991 which caused an enormous amount of confusion. In addition, the Prentice Hall materials had not been provided until mid-October and there were no in-service workshops with respect to these materials until October, November, and December, 1991. It was for these reasons that there was a delay in his dealing with the subject-matter of the lesson until that date. He also indicated with respect to Ms. Pallotta's observation on December 3, 1991 (P-7), that there would have been much less confusion but the materials had just been passed out and he had just begun to incorporate them into his classes.

In this matter, I have carefully considered the testimony of Ms. Rivers, Mr. Laub, Ms. Culver, Mr. Gregory, Dr. Adilifu and Ms. Miller on behalf of the school district. I have closely scrutinized their testimony in light of the written evaluations they provided. I have been unable to discern any improper motivation, bias or prejudice on their part which would cause them to be anything less than truthful in this matter. In this regard, respondent argued that two of the school district's witnesses, Ms. Rivers and Ms. Miller, lacked credibility, citing numerous examples. However, my specific recollection of the testimony of these two witnesses was that their testimony was credible under the circumstances. While there were certain inconsistencies in their testimony, these were understandable based on the passage of time and acknowledging the fact that no one's memory is perfect. It was also clear that when testifying as to respondent's deficiencies as a teacher, both of these witnesses were entirely consistent in their testimony. In addition, while the seven witnesses/evaluators of respondent did not always use the same words in describing respondent's teaching deficiencies, they were entirely consistent in the impressions they gave of respondent's conduct. In particular, with respect to Mr. Laub, Ms. Culver and Dr. Adilifu, they were called in to observe and evaluate respondent not as his direct supervisors, but as independent evaluators for the purpose of providing an independent evaluation of his teaching methods.

In response to these evaluations, respondent generally indicated that he was not aware of or disputed the factual basis for the unsatisfactory evaluations. He relied upon written materials, all of which were submitted in evidence, to show that he attempted to follow the school district's policies, directives and curriculum. Respondent generally denied the repetitive assessments of his evaluators that he lacked effectiveness as a teacher, lacked discipline and control of the students, failed to use resources other than dittos, lacked interest or concern, failed to motivate students, and generally that he failed to teach.

I found respondent's testimony to be incredible and, in most cases, entirely missing the point of not only the unsatisfactory evaluations, but also of the testimony of the witnesses who conducted the evaluations. Respondent did not address his failure to teach his students other than by using the excuses that his students were discipline problems, they were absent from class, and they were below grade level in their reading skills. Respondent did not address his failure to use various teaching strategies and techniques suggested to him by his supervisors and others in order to attempt to motivate his students, other than by asserting that the dittos he employed were based on district textbooks and materials, and were appropriate because of the below-grade reading levels of the students he was teaching. Respondent failed to dispute the testimony of virtually all of his evaluators that when they arrived in his class he was usually late, usually less than prompt in starting the lesson, and that the lesson usually consisted of him merely passing out a ditto form with no directions or instructions, and having the students return the ditto forms to him at the end of class. Respondent failed to address the fact that he was only rarely observed using any resources or materials other than the ditto forms. Respondent failed to address the consistently observed fact that students in his class were disruptive, unruly and undisciplined, and that he made no effort to correct these disruptions and discipline problems. Respondent failed to address the real issue in this matter which is his lack of classroom discipline and control and his failure to engage in the teaching of the students assigned to his classes.

Respondent argues that the proofs in this matter actually deal with the charge of inefficiency rather than unbecoming conduct. However, I **FIND** that the failure of a teacher to discipline and control the students in his charge, the failure of a teacher to teach his students in an effective manner, or in this case, in any manner whatsoever, is clearly unbecoming conduct. I

FIND that a person who fails to perform a duty which is imposed by law or which is clearly inherent in the nature of the position is guilty of unbecoming conduct. *Compare, N.J.S.A.* 2C:30-2b. In this matter, I **FIND** that respondent has continuously failed to discipline and control the students in his charge, has failed to teach his students in an effective manner and on many occasions has continuously failed to teach his students in any manner whatsoever. Therefore, I **CONCLUDE** that respondent is guilty of unbecoming conduct.

The next issue to be resolved is the appropriate remedy or penalty based on the finding of guilt in this matter. *In the Matter of the Tenure Hearing of Elizabeth Merkooloff, School District of the Twp. of Washington*, 1980 *S.L.D.* 1370, the Commissioner stressed again that which he previously said in *Clinton F. Smith et al. v. Bd. of Ed. of the Boro of Paramus*, 1968 *S.L.D.* 62:

> The principal enunciated by the Court in *Bates v. Board of Education*, 72 *P.* 907 (Calif. Sup. Ct., 1963), and quoted with approval in *McGrath v. Burkhard*, 280 *P.2d* 864 (Calif. App. 1955), bears repeating here:
>
> The public schools were not created, nor are they supported, for the benefit of the teachers therein, . . . but for the benefit of the pupils and the resulting benefit to their parents and the Community at large. . . (at 67).
> (at 1371).
>
> The Commissioner also stated in *Merkooloff* at 1371:
>
> The Commissioner believes that these young pupils in their formative years surely deserve the best education possible with as complete continuity as can be accorded them. . . .

In *In the Matter of the Tenure Hearing of Joseph A. Maratea, Twp. of Riverside*, 1966 *S.L.D.* 77, the Commissioner said:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the school is adversely affected. When the responsibility for the conditions

> unfavorable to the effective operation of the school rests with the employee then, the Commissioner holds, the protection of tenure is forfeit (at 106).

In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 *S.L.D.* 302, the Commissioner said:

> [T]hey [teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling. (at 321).

It was also stated *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Twp. of Teaneck,* 1972 *S.L.D.* 284:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . and must accept the consequences of his actions.
>
> * * *
>
> The Commissioner's basic and fundamental concern must be in the welfare of the students in the Teaneck School System and, therefore, in the proper administration of that School System.(at 296).

In this matter, it is clear to me that it is not in the best interest of the students of the Newark School District that respondent remain as a teacher. Respondent has, over an extended period of time, clearly and consistently failed to provide his best efforts to teach the children of the school district. His consistent and continuous failure to impose discipline on the students and his consistent and continuous refusal to attempt to teach his students effectively leads me to the conclusion that his removal is in the best interests of the children of the school district. Therefore, I **FIND** and **CONCLUDE** that respondent should be removed as a teacher in the School District of the City of Newark.

DECISION AND ORDER

Based upon the foregoing, I **FIND** respondent guilty of the charge of unbecoming conduct and I **ORDER** his removal as a teaching staff member of the School District of the City of Newark.

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

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

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

October 30, 1997
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

10/31/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 3 1997
DATE

Barbara A Hanneh
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES

For petitioner:

Peter Loria

For respondent:

Lula Mae Rivers

Harry Laub

Doris Culver

Carl L. Gregory

Irene Miller Graves

Jean Sharp Adilifu

Carmela H. Pallotta

LIST OF EXHIBITS

For petitioner:

P-1	Observation Report, October 11, 1989
P-2	Memo of October 17, 1989
P-3	Informal Observation, October 25, 1989
P-4	Informal Observation, November 28, 1989
P-5	Memo of December 2, 1989
P-6	Observation Report, January 24,1990
P-7	Memo of January 29, 1990 Re: Lesson Plans
P-8	Informal Observation, January 29, 1990
P-9	Memo of February 22, 1990

P-10	Informal Observation, February 22, 1990
P-11	Memo of March 2,1990
P-12	Informal Observation, March 9, 1990
P-13	Memo of March 13, 1990
P-14	Memo of March 29, 1990
P-15	Teacher Annual Evaluation Report, June 1990
P-16	Memo of September 19, 1990
P-17	Memo of October 15, 1990
P-18	Memo of October 17, 1990
P-19	Memo of October 22, 1990
p-20	Memo of November 12, 1990
P-21	Memo of November 15, 1990
P-22	Informal Observation Report, November 19, 1990
P-23	Memo of November 19, 1990
P-25	Memo of November 20, 1990
P-26	Teacher Observation Report, November 20, 1990
P-27	Memo of November 26, 1990
P-28	Memo of November 12,1990
P-29	Informal Observation Report December 2, 1990
P-30	Informal Observation Report December 3, 1990
P-31	Memo of December 10, 1990
P-32	Memo of December 10, 1991 (Should be 1990)
P-33	Informal Observation Report, December 13, 1990
P-34	Memo of January 7, 1991
P-35	Memo of January 8, 1991
P-36	Memo of January 21, 1991
P-37	Memo of February 4, 1991
P-38	Informal Observation Report, February 18, 1991
P-39	Informal Observation Report, February 19, 1991
P-40	Teacher Observation Report, February 20, 1991
P-41	Memo of February 25, 1991

P-42	Memo of March 11, 1991
P-43	Memo of March 25, 1991
P-44	Teacher Annual Evaluation Report, June 1991
P-45A	September 1991 Agenda, English Department
P-45B	October 1991 Agenda, English Department
P-45C	November 1991 Agenda, English Department
P-45D	November 11, 1991 Information regarding improving student study habits
P-45E	Discussion of Student Study Skills
P-45F	Guidelines of Instructional Staff Performance
P-45G	Suggestion for Using Educational Posters
P-45H	Motivating Students to Write
P-45I	The Writing Process- Suggestions for Writing Samples
P-45J	Registered Holistic Scoring
P-45K	Samples of better essays which scored high
P-45L	Cooperative Learning Outline
P-45M	Selected Topic Suggestions
P-45N	Preparing for Tests - Activity Sheets
P-46	Memo of September 26, 1991
P-47	Memo of October 4, 1991
P-48	Teacher Observation Report, October 7, 1991
P-49	Memo October 15, 1991
P-51	Memo of October 21, 1991
P-53	Memo of October 23, 1991
P-59	Teacher Observation Report, November 28, 1989
P-60	Teacher Observation Report, January 17, 1990
P-61	Teacher Annual Evaluation, June 10, 1987
P-62	Teacher Observation Report, November 9, 1987
P-63	Teacher Observation Report, January 19, 1988
P-64	Teacher Observation Report, February 29, 1988
P-65	Teacher Annual Evaluation, May 18, 1988
P-66	Memo to respondent, dated February 15, 1990

P-67	Teacher Observation Report, March 27, 1990
P-68	Memo from Carl L. Gregory of May 1, 1990
P-69	Memo from Carl L. Gregory of December 9, 1990
P-70	Teacher Observation Report, December 3, 1991
P-71	Teacher Observation Report, November 20, 1991
P-72	Memo from respondent, dated December 10, 1991
P-73	Teacher Observation Summary of January 23, 1991
P-74	Teacher Observation Report, March 21, 1991
P-75	Memo dated May 8, 1991
P-76	Memo dated July 9, 1991
P-78	Memo dated December 12, 1991
P-79A	Excerpt from Collective Bargaining Agreement with NTU, School Years 1988-91
P-79B	Excerpt from Collective Bargaining Agreement with NTU, School Years 1991-94
P-80	*Adventures in Reading*, Heritage Edition Revised (Copyright 1980, 1985)
P-81	*Journeys-Arrivals* (Copyright 1982)

R-1	Plan Book 1988-89
R-2	Plan Book 1989-90
R-3	Plan Book 1990-91
R-4	Plan Book 1991-92
R-5	Course Proficiencies - English I
R-6	Packet-Reading Proficiency Exercises - English I
R-7	Course Proficiencies - English II
R-8	Packet - Reading Proficiency Exercises - English II
R-9	Packet -Fundamentals of Grammar - Verbs
R-10	Packet -Grammar Exercises - Sentence Combined with Verbs
R-11	Packet - Literature Exercise
R-12(a)	1990-91 Writing Sample #1 - Period 1
R-12(b)	1990-91 Writing Sample #1 - Period 4
R-12(c)	1990-91 Writing Sample #1 - Period 6
R-12(d)	1990-91 Writing Sample #1 - Period 7

R-12(e)	1990-91 Writing Sample #1 - Period 8
R-13(a)	1990-91 Writing Sample #2 - Period 1
R-13(b)	1990-91 Writing Sample #2 - Period 8
R-14(a)	1990-91 Writing Sample #3 - Period 1
R-14(b)	1990-91 Writing Sample #3 - Period 4
R-14(c)	1990-91 Writing Sample #3 - Period 6
R-14(d)	1990-91 Writing Sample #3 - Period 7
R-14(e)	1990-91 Writing Sample #3 - Period 8
R-15(a)	1990-91 Book Reports - Period 1
R-15(b)	1990-91 Book Reports - Period 4
R-15(c)	1990-91 Book Reports - Period 6
R-15(d)	1990-91 Book Reports - Period 7
R-15(e)	1990-91 Book Reports - Period 8
R-16(a)	1990-91 Writing Samples - Period 1
R-16(b)	1990-91 Writing Samples - Period 4
R-16(c)	1990-91 Writing Samples - Period 6
R-17	1991-92 Mid Term Essays
R-18	Memo-Rivers to Loria November 18, 1991 - Re: Student Writing Samples
R-19	Memo-Loria to Rivers dated February 15, 1990 - Re: Evaluations dated October 11, 1989 and January 24, 1990
R-22	Memo-Loria to Rivers, dated October 17, 1991-Re: Teacher Observation Report, October 9, 1991
R-23	Memo-Loria to Rivers, dated December 19, 1991 - Re: Demonstration Lesson
R-25	Packet Re: Bell Schedule Changes for Non-Instructional Programs and Activities
R-26	Entry/Withdrawal Summary, July 1, 1991 - June 25, 1992
R-27	Packet-Absence Lists
R-28	Packet-Lefts and Transfers Lists
R-29	Packet-Suspensions List
R-31	Packet-Student Tardiness
R-33	Memo dated October 16, 1991, Re: Hall Sweeps
R-38	Observation Report, October 28, 1986 (Miller)

R-40	Observation Report, October 13, 1988 (Rivers)
R-41	Observation Report, November 21, 1988 (Rivers)
R-42	Observation Report, January 30, 1989 (Rivers)
R-43	Observation Report, May 17, 1989 (Rivers)
R-44	Annual Evaluation, June, 1989 (Rivers)
R-45	Professional Improvement Plan - May, 1989
R-46	Class materials used during October 11, 1989 observation by Rivers
R-47	Worksheet materials applicable to November 17, 1989 (sic See P-4) Informal Observation by Rivers
R-48	Worksheet materials applicable to January 24, 1990 Observation by Rivers (P-6)
R-49	Worksheet materials applicable to November 20, 1990 Observation by Rivers (P-26)
R-50	Memo, December 10, 1990 from Loria to Rivers - Re: November 20, 1990 Observation
R-51	Worksheet materials applicable to February 20, 1991 Observation (P-40)
R-52	Materials from Rivers October 24, 1991 - Demonstration Lesson
R-53	Materials relating to Informal Observation by Rivers October 22, 1991
R-55	Memo, Loria to Culver, dated February 7, 1990 - Re: Evaluations dated November 28, 1989 and January 17, 1990
R-56	Materials relating to Observation Report of January 23, 1991
R-57	Materials relating to March 21, 1991 Observation Report (Adilifu)
R-58	Materials relating to November 20, 1991 Observation Report (Laub)
R-59	Materials relating to December 3, 1991 Observation Report (Pallotta)
R-60	Observation Report - May 21, 1986 (Bennett)
R-61	Annual Evaluation and PIP - June 17, 1986 (Bennett)
R-62	Observation Report - May 6, 1985 (Domigan)
R-63	Professional Improvement Plan - June 4, 1985 (Domigan)
R-64	Instructional Survey - May 16, 1985
R-68	Memo, October 7, 1991 Schedule Changes
R-69	Memo Rivers to Loria October 7, 1991 course Outline Pacing Chart
R-70	Memo from James Moore, September 24, 1991

R-71	English Department Agenda, October 1991
R-72	Secondary English Curriculum

OAL DKT. NOS. EDU 7220-96 and EDU 1364-92 (ON REMAND)
AGENCY DKT. NO. 32-2/92

IN THE MATTER OF THE TENURE	:	
HEARING OF PETER LORIA, STATE-	:	COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF	:	DECISION ON REMAND
THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination herein. No submission was filed by the District.

Upon a careful and thorough review, which included transcripts of the nine days of hearing conducted at the OAL,[1] the Commissioner agrees with the conclusion of the Administrative Law Judge (ALJ) that the within respondent is guilty of conduct unbecoming a teaching staff member warranting his dismissal from his tenured position in the District. In his consideration of this matter, the Commissioner concludes that the documentary and testimonial proofs advanced herein establish, by a preponderance of the credible evidence, Charges 2 and 3 of the District's unbecoming conduct charges,[2] and he, therefore, categorically rejects, for the

[1]Hearing in this matter took place on November 6, 12 and 17, 1992, October 22 and 27, 1992, March 15, 1993, September 22 and 27, 1994, and October, 24, 1994.

[2] The Commissioner concurs with the ALJ's dismissal of Charge 1a., as the within record establishes that respondent, rather than spending an inordinate amount of time disciplining his students, spent virtually no time whatsoever engaging in this endeavor. The Commissioner also accepts that b of this Charge has not been established by the District. With respect to Charges 4 and 5, he finds that these are more appropriately categorized as conclusory statements rather than charges. (See *In the Matter of the Tenure Hearing of April Renee Bradley, Board of*

reasons which follow, the ALJ's apparent agreement with respondent's arguments that these have not been proven. (Initial Decision at p. 46) Specifically, these charges state:

> 2. He has willfully disregarded express and implied directives to conform his conduct to the level expected of teaching staff members;
>
> 3. Mr. Loria displayed insubordinate conduct, in that he has refused to obey the orders/directives by his superior(s) and/or department administrators who are entitled to give and have said directives obeyed.

Initially, in his review, the Commissioner observes that the record reflects that, at the beginning of each school year, the District disseminates to its teaching staff members a document entitled "Guidelines for Instructional Staff Performance," prepared by District administrators, which states on its face that it is intended "to clarify the rules under which each staff member of Central High School is expected to function ***." (See Exhibit P-45G and H.) Pursuant to this document, *inter alia,* teachers are expected to report to class on time; should have regular lesson plans available at all times when teaching; should give students homework every day; are expected to submit timely reports; should establish the rules and regulations of the class; are expected to follow the recommendations of supervisors; and should be located at their classroom doors during the passing of classes to minimize improper student activities in the halls. (*It is noted that this last requirement is also specifically mandated by the teacher's union contract* - See Exhibit *P-79B at 9B.)*

The within record confirms that a large number of observations were made of respondent, both formal and informal, over a protracted period of time, by his supervisor and other administrative staff members, and reports prepared by these individuals, and shared with respondent, uniformly and repeatedly detail certain consistent behavior of the respondent which

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Education of the City of Newark, 1990 *S.L.D.* 790, affirmed in part, reversed in part by the State Board, 1991 *S.L.D.* 2521.

reflected significant deviation from that which is required and expected of teaching staff members in the District, *i.e.*, lateness in arriving to class (Exhibits P-8, P-38, P-39, P-44, P-46, P-61, P-64, P-65, P-73), failure to have and/or display lesson plans (Exhibits P-3, P-48, P-73), failure to be present at his classroom door during the passing of classes (Exhibits P-66, P-67), failure to assign homework to students (Exhibit P-60), a total failure to even attempt to control or conduct his class (Exhibits P-4, P-8, P-10, P-12, P-26, P-30, P-33, P-46, P-59, P-62, P-64, P-65, P-67, P-71), and use of dittos as his sole teaching source rather than in conjunction with textbooks and other materials mandated by the District. (Exhibits P-62, P-67). The Commissioner rejects as untenable any argument that the reports of these evaluators, detailing such behavior, were merely suggestions for improvement of his teaching style and, therefore, that respondent's complete refusal to alter his behavior as a result of these was not a failure to respond to "directives." Rather, he concludes that the observation reports, presented to respondent and discussed with him, irrespective of the nomenclature or vernacular utilized on the evaluation forms themselves, which notified this teaching staff member that he was observed engaging in conduct which he knew or should have known is violative of conduct expected of a teaching staff member in the District, must be viewed, at a minimum, as implied directives to cease such behavior. It is observed that despite all of the warnings received by respondent that his conduct was in violation of what was recognized to be comportment required of teaching staff members in the District, the record reflects that he totally ignored such directives and continued his discordant behavior. As such, the Commissioner finds and determines that Charge 2 has been amply demonstrated through respondent's refusal to conform his conduct to that demanded of all teaching staff members by District policies and their teaching contract.

Moreover, it is further noted that the testimony of respondent's immediate supervisor, Lula Mae Rivers, confirmed by exhibits in the record, detailed numerous memos

which she sent to respondent advising that he was not complying with certain District mandates and **directing** him to do so. These include his repeated failure to submit student writing samples (Exhibits P-16, P-17, P-23, P-28, P-32, P-35, P-41, P-43, P-49; failure to submit lesson plans for approval on a timely basis and to display and use such plans as required (Exhibits P-19, P-20, P-27, P-28, P-31, P-34, P-36, P-37, P-42, P-43); failure to remain at his door during the changing of classes (Exhibits P-28, P-66), failure to address discipline in his classroom (Exhibits P-29, P-33, P-38); his lateness to class (Exhibits P-9, P-38); and failure to utilize the District Literature outline in preparing lesson plans (Exhibit 51). Ms. Rivers further testified that, for the most part, respondent neither complied with her directives nor did he offer any reason or excuse for not doing so. (Tr. 10/22/92, pp. 40, 74-75, 127-128, 130, 140, 146, 152; Tr. 10/27/92, pp. 7, 18, 19)

That this deliberate disobedience constituted insubordinate conduct is undeniable. In this connection, the ALJ's agreement with the advanced argument of respondent, contending that because there was no testimony which established that he engaged in any overt exhibition of disrespect or verbal refusal to perform duties required of his position, the District had not proven that he displayed insubordinate conduct in his failure to obey the orders/directives of his superiors or department administrators, is misplaced. Rather the Commissioner determines that the lack of "overt" insubordinate behavior is not dispositive in the substantiation of the charge here. Rather, he finds that insubordinate conduct, in the context of the unbecoming conduct charge in the instant case, is fully established by respondent's willful and intentional disregard of the lawful and reasonable directives of his duly authorized supervisor, which were not casual suggestions but requirements expected of all teaching staff members and with which he was compelled to adhere. (See *Board of Education of the Township of Teaneck, Bergen County v. Leon Wilburn,* 91 *N.J.A.R.* 2d (EDU) 48, aff'd State Board, 92 *N.J.A.R.* 2d (EDU) 328.)

The Commissioner's comprehensive review in the instant matter further leads him to concur with the ALJ's assessment of the credibility of the District's witnesses (Initial Decision at p. 53) and, likewise, to find respondent's testimony herein, which consisted of categorically denying and/or disagreeing with deficiencies and behavioral aberrations observed by each of his evaluators and which attempted to attribute any perceived less than exemplary behavior on his part to the shortcomings and proclivities of his students, uncooperative administrators, lack of provision of materials, and dilapidated classroom conditions, wholly "incredible." (*Id.* at p. 54)

Respondent's exceptions in this matter vehemently argue, as he has throughout this protracted case, that all of the evidence advanced goes to inefficiency and does not rise to the level of unbecoming conduct warranting his dismissal. The Commissioner finds this contention without merit. As stated by the New Jersey Superior Court, Appellate Division, in *In the Matter of the Tenure Hearing of Walter Driscoll, School District of Woodstown-Pilesgrove Regional High School, Salem County,* decided October 25, 1983, Docket No. A-748-82T2

> ****N.J.S.A.* 18A:6-10 provides for dismissal of a tenured teacher for inefficiency, incapacity, unbecoming conduct or other just cause. Whether the charges fall under any of the categories is a determination for the Commissioner to make. Regardless of the label placed on the conduct charged and proven **"the touchstone is fitness, to discharge the duties and functions of one's office and position**." (emphasis added) *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 (App. Div. 1974), certif. den. 65 *N.J.* 292 (1974); *Redcay v. State Board of Education,* 130 *N.J.L.* 369, 371 (1943), aff'd. 131 *N.J.L.* 326 (E&A 1944). (Slip Opinion at p. 3)

As such, the Commissioner concludes that the necessary focus does not stop with respondent's established behavior, it is also highly significant to look at the impact this behavior had on students. Here, the totality of the record establishes that respondent's conduct amply portrays a teaching staff member who exhibits total disregard for fulfillment of the requisite responsibilities of his position, the authority and directives of the District, administrators, his supervisor, and,

most importantly, the welfare of his students, with the resultant consequence of depriving these students, in one of the neediest districts in the state, of that to which they are legally entitled, a thorough and efficient education, a situation which cannot be tolerated. The Commissioner views this matter as similar to that which existed in *In the Matter of the Tenure Hearing of April Renee Bradley, Board of Education of the City of Newark*, 1990 *S.L.D.* 790, affirmed in part, reversed in part, by the State Board, 1991 *S.L.D.* 2521, wherein the Commissioner and the State Board both found

> Bradley's conduct demonstrated contempt, disregard, and a lack of confidence in the professional judgment of her immediate supervisor and others who attempted to assist her. The resultant effect created an intolerable working relationship which interfered with the efficient management and operation of the Clinton Avenue School. The most significant impact unfortunately falls on children. Commissioner decision at 822; State Board decision at 2525,

a finding which is totally apropos in the instant case and which amply supports respondent's dismissal from his tenured position.

Also particularly troubling in this matter is the uniform observation of respondent's evaluators that he evidenced a nonchalant, uncaring attitude toward his students and his teaching. (Tr. 10/22/92, p. 10; Tr. 11/6/92, pp. 7-8, 127; Tr. 11/12/92, p. 13; Tr. 3/15/93, p. 15); the testimony of his supervisor which reported

> ***I didn't find any effort on the part of Mr. Loria, to fulfill his obligations as a teacher to comply with the Board's mandate to perform certain functions, such as submitting his lesson plans, submitting writing samples which is mandated by the Board ***to perform certain clerical matters that related to tasks that we were mandated to do in preparation--in preparing the students for tests, or improvement in classroom management, so that the *** time in the classroom could be better used for teaching purposes. Tr. 10/22/92, p. 153

> ***I found that the students felt that because of the kind of situation that was prevalent in this class, that they didn't have to come to class on time, they didn't have to be respectful, they didn't

> have to do the homework, they didn't have to comply with *** whatever they were told to do, because nothing would happen, they thought. But at the end of the year, I found that a vast majority of those students failed. Tr. 10/22/92, pp. 157-158;

and respondent's own testimony which demonstrates his cavalier attitude with respect to satisfying the requirements of his position where, although admitting that he was required to submit writing samples of his students every month, when queried as to whether he had submitted such samples he replied "some I did, some I did not." (Tr. 9/27/94, p. 113, L9-16)

With respect to the moneys which may be due the parties in this matter, the Commissioner finds that the arguments and proffered evidence advanced are inconsistent in this regard and, therefore, he finds that the existing record does not provide the necessary detail to enable him to make the conclusive determinations required.[3] As such, he concludes that this matter must be remanded to the OAL, on this singular issue, for expansion of the record sufficient to allow such determinations to be made.

Accordingly, the Commissioner accepts the recommendation of the OAL that respondent be dismissed from his tenured employment with the District for conduct unbecoming a teaching staff member and adopts the initial decision as the final decision in this matter for the reasons expressed therein as amplified above. He hereby directs that the issue of moneys which

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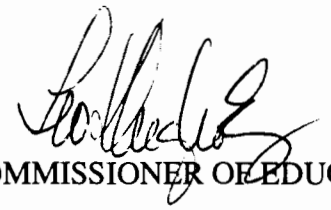
[3] As examples, it is noted that, although the record indicates that the parties agree that the District was entitled to an additional set-off of $2,920, representing unemployment benefits paid to respondent during the period September 22, 1996 through November 30, 1996, the May 1, 1997 letter of the District's counsel, Gregory G. Johnson, indicates, without explanation, that $2,230 was the amount actually set-off. Additionally, this same letter, which, it is observed, contains computation errors, states that the District paid $224.10 in post-judgment interest but provides no details as to how this figure was calculated. Finally, it is also noted that the Certification of Kamal Diyandidh, Coordinator of Safety and Health Insurance, dated March 5, 1997, states

> The District is self-insured for unemployment compensation. When Mr. Loria applied for and received unemployment compensation from the Department of Education, the district was charged for the costs of Mr. Loria's benefits (See attached Exhibit "B"). In simple terms, for every dollar Mr. Loria was paid the District was charged. (See Diyandidh Certification at p. 4.)

As such, it would appear, absent any further clarifying information, that such a situation would obviate the need for the transmission of recouped unemployment insurance moneys to the New Jersey Department of Labor, Division of Unemployment Insurance, as was demanded by respondent and ordered by the ALJ.

may be due and owing the parties in this case be severed from the tenure matter herein and that this sole issue be remanded to the OAL for expansion of the record and necessary determinations consistent with his expressed concerns. The tenure matter will be transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6(a), for action as it deems appropriate.



COMMISSIONER OF EDUCATION

JANUARY 26, 1998
DATE OF MAILING JANUARY 26, 1998

13 - 96

EDU #1364-92
C# 13-96
SB # 11-96
EDU #7220-96
C # 482-96L
C # 25-98R
SB # 30-98

IN THE MATTER OF THE TENURE	:	
HEARING OF PETER LORIA, STATE-	:	STATE BOARD OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE	:	DECISION
CITY OF NEWARK, ESSEX COUNTY.	:	

Decided by the Commissioner of Education, January 11, 1996

Remanded by the State Board of Education, June 5, 1996

Decision on motion by the Commissioner of Education, November 4, 1996

Decision on remand by the Commissioner of Education, January 26, 1998

For the Petitioner-Respondent, Gregory Johnson, Esq.

For the Respondent-Appellant, Bucceri & Pincus (Sheldon H. Pincus, Esq., of Counsel)

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

August 5, 1998

Date of mailing AUG 07 1998

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F. LYNN GALBRAITH, Ed. D., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioning riffed supervisor claimed violation of her tenure rights in the Board's failure to appoint her to a vacant supervisory position. Board contended petitioner did not possess the requisite certification for the position.

ALJ found that petitioner was entitled to the position of Supervisor-Social Studies/Music/Art over a nontenured supervisor by virtue of her tenure and seniority as a supervisor in the Board's employ. (N.J.S.A. 18A:28-10 and 28-12) Commissioner has held that there is no such entity as a subject matter supervisor certificate. Rather, a supervisory certificate is general in nature and not specific to a subject area. (Rogers) While there is nothing to prevent a local board from establishing additional instructional certification requirements, absent a showing that instructional certification is necessary to perform the duties of the position at issue, such requirements cannot sidestep the educator's tenure rights on a preferred eligibility list of supervisors. Board was ordered to place petitioner in the position with compensation retroactive to September 1, 1994.

Commissioner adopted findings and determination in initial decision as his own and directed placement of petitioner with compensation.

January 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8492-94

AGENCY REF. NO. 339-8/94

F. LYNN GALBRAITH, ED. D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner,

William H. Kenney, Esq., for respondent, (Archer & Greiner, attorneys)

Record Closed: October 5, 1995 Decided: November 20, 1995

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a tenured supervisor in the employ of the Board of Education of the Lenape Regional High School District (Board) was subject to a reduction in force (RIF) alleges, among other things, that the Board failed to assign her to a position of supervisor over a non-tenured

supervisor in violation of petitioner's tenure rights. The Board denies the allegations contending, among other things, that petitioner did possess the requisite certification for the position.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Pursuant to prehearing conference, the parties agree and jointly move for summary disposition of the matter under N.J.A.C. 1:1-12.5, and the criteria set forth in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

ISSUES

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

1. Whether petitioner, a riffed Supervisor in the Board's employ, is entitled to the position of Supervisor of Humanities, or any other supervisor position held by a nontenured supervisor, which was vacant subsequent to petitioner's reduction in force?

2. Whether petitioner holds the appropriate certificate to qualify for the position of Supervisor of Humanities?

3. Whether the Petition of Appeal is time barred by the applicable period of limitations?

The parties hereby stipulate to the following fact:

1. Lenape Regional High School District is a limited purpose regional school district for grades nine (9) through twelve (12) and includes three high schools, Lenape, Cherokee and Shawnee.

2. Lynn Galbraith has been employed in the Lenape Regional High School District since on or about January 1, 1974. Her employment history in the school district is as follows:

1974 - 1990	Teacher of English Lenape High School

1976 - 1990	Community Relations Coordinator
1990 - 1994	Supervisor of Curriculum/ Community Relations
1994 - present	Teacher of English Shawnee High School

3. Lynn Galbraith has the following certificates/endorsements issued by New Jersey Department of Education:

Instructional certificate
Teacher of English endorsement

Administrative certificate
Principal endorsement
Supervisor endorsement

4. At a meeting on May 18, 1994, Lynn Galbraith was informed by the Superintendent that he would be recommending to the Board of Education that her position be abolished. The Superintendent indicated that it was the opinion of the school district that Ms. Galbraith has tenure as a Supervisor of Curriculum/Community Relations and does not have rights to any other supervisor position. The Superintendent further indicated that if the Board of Education did abolish her position, Ms. Galbraith would be reassigned as a teacher.

5. On June 21, 1994, the Board of Education eliminated the position of District Supervisor of Curriculum/Community Relations. Lynn Galbraith was notified of the Board's action in a letter dated June 23, 1994. (Exhibit 1)

6. As a result of a retirement, on or about July 5, 1994, the position of Supervisor-Social Studies/Art/Music became vacant at Cherokee High School.

7. In a letter to the Superintendent of Schools, Daniel Hicks, dated July 8, 1994, Lynn Galbriath requested placement in the vacant position. In a letter dated July 11, 1994, Mr. Hicks denied Ms. Galbraith's request. (Exhibit 2 and 3)

8. For the 1994-95 school year, the Board of Education employed eight (8) supervisors in each of the three high schools, for a total of 24 supervisors. Each high school had the following supervisory position:

Supervisor	English/Foreign Language
Supervisor	Mathematics/Science
Supervisor	Industrial Arts/Home Economics and Business
Supervisor	Social Studies/Art/Music
Supervisor	Student Personnel Services
Supervisor	Physical Education and Health
Supervisor	Special Services
Supervisor	Educational Media Services

Job Descriptions are attached as Exhibits 4 through 11

9. During the 1994-95 school year, one Supervisor - Special Education taught one class during the first semester only. None of the other supervisors taught any classes during the second semester of the 1994-95 school year.

10. On or about September 1, 1994, the Board of Education employed a person not previously employed in the school district as a supervisor and with no tenure rights as a supervisor into the position of Supervisor-Social Studies/Art/Music at Cherokee High School.

POSITION OF THE PARTIES

PETITIONER'S STATEMENT OF FACTS AND ARGUMENT

The facts and documents in this matter have been stipulated and are attached hereto.

Essentially, petitioner is tenured as a teacher and supervisor in respondent school district as a teacher and supervisor. Her employment history is set forth in the stipulation. On or about June 21, 1994, respondent eliminated petitioner's position of District Supervisor of Curriculum/Community Relations. As a result of a retirement, on or about July 5, 1994, the position of Supervisor-Social Studies/Art/Music became vacant. On or about September 1, 1994

respondent employed a non-tenured supervisor to the aforesaid position. For the 1995-95 school year, petitioner was employed as a teacher of English.

Petitioner contends that as a tenured supervisor, she is entitled to the position of Supervisor-Social Studies/Art/Music over a non-tenured supervisor. Respondent contends that petitioner does not have rights to the position in that petitioner does not have an instructional certificate with an endorsement in Social Studies, Art or Music. Petitioner has an instructional certificate with a Teacher of English endorsement.

POINT I

SUMMARY DECISION IS APPROPRIATE IN THE MATTER SUBJUDICE

Summary decision is appropriate when there is no genuine issue as to a material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954). Administrative agency procedures for summary decision are set forth in N.J.A.C. 1:1-12.5.

In the matter sub judice, there is no issue of any material fact and the parties have stipulated the relevant facts to render a determination. A review of the petition and answer indicates that there is no controversy as to the substantive facts in this matter. Respondent has admitted all the factual allegations in the petition. Respondent has denied the allegations in paragraph 8. The allegations in that paragraph present the legal issue of whether petitioner has tenure rights to the position of Supervisor-Social Studies/Art/Music. Therefore, since there is no issue as to material facts, summary decision is appropriate.

POINT II

PETITIONER IS ENTITLED TO THE POSITION OF SUPERVISOR-SOCIAL STUDIES/ART/MUSIC BY VIRTUE OF HER TENURE RIGHTS

It is petitioner's contention that the appointment of a person non-tenured as a supervisor to the position of Supervisor-Social Studies/Art/Music is a violative of petitioner's tenure rights. It is uncontroverted that petitioner was a tenured supervisor in the Lenape Regional High School District, when her position was abolished on or about June 21, 1994, effective August 31, 1994. On or about September 1, 1994, respondent employed a non-tenured supervisor to the position of Supervisor-Social Studies/Art/Music. Respondent's failure to employ petitioner in the aforesaid position is violative of her tenure rights. The overwhelming body of decisional law clearly holds that untenured personnel cannot be retained or hired over a tenured individual with reference to a position for which the tenured individual is certified. Capodilupo v. West Orange Twp. Ed. Bd., 218 N.J. Super. 510 (App. Div. 1987); Bednar v. Westwood Bd of Ed., 221 N.J. Super. 239 (App. Div. 1987).

For example, in Capodilupo, supra., the Appellant Division affirmed the reinstatement of an individual who had obtained tenure as a Physical Education teacher to the position of elementary school Physical Education teacher despite the fact that the teacher had no demonstrable experience in the elementary school position over an untenured, certified teacher with actual experience in the position. In its decision, the Appellate Division upheld the State Board of Education's determination that:

> seniority provides a mechanism for ranking all tenured teaching staff members so that reduction among the tenured force can be effected in an equitable fashion and in accordance with sound educational policies. See Lichtman v. Ridgewood Bd. of Ed., supra., 93 N.J. at 368. 218 N.J. Super. at 514.

The court further averred "a tenured teacher, however, is entitled to retention as against a non-tenured teacher under the tenure law. To hold otherwise would be to defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed number of years of service." See Viemeister v. Prospect Park Bd. of Ed., 5 N.J.Super. 215, 218 (App. Div. 1949)."

218 N.J. Super. at 514-15. Accordingly, the Court upheld the State Board's determination that "a tenured teacher seeking reinstatement with the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification." 218 N.J. Super. at 515.

Similarly, in Bednar v. Westwood Bd of Ed., supra., the Appellate Division reversed the judgment of the State Board of Education which had denied the claim of the tenured elementary Art teacher that respondent's reduction of petitioner to a part-time elementary Art teaching position, while retaining a non-tenured individual in a middle school or high school position, violated his tenure rights. In reversing the State Board's determination, the Appellate Division recognized that:

> The tenure statute authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF. N.J.S.A. 18A:28-13. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 n.4 (1983); Capodilupo v. West Orange Twp. Ed. Bd., 218 N.J. Super. 510, 514 (App. Div. 1987). The statue does not create or authorize the Commissioner to create competing rights for non-tenured teachers. 221 N.J. Super. at 242.

Moreover, the Court stated that the tenure statue "surely does not contemplate use of the seniority regulations to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher." 221 N.J. Super. at 242.

Recognizing that the State Board perceived a tension between tenure and seniority, the Appellate Division specifically held:

> The defect in the Board's approach is this. N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in RIF. Among them, seniority is determinative. But, the statue does not authorize regulatory dilution of tenure rights by affording a non-tenured "seniority". The tension perceived by the State Board between tenure and seniority is one the board created. Its only proper resolution is to rule that the rights conferred by the tenure statute may not be dissolved by implementing regulations. 221 N.J. Super. at 243.

Finally, the Court determined:

> The State Board's approach may or may not represent sound educational policy. However, it erodes tenure rights which appear plain on the face of the statue which we are bound to recognize and which can be removed only by the Legislature. See In re Jamesburg High School Closing, 83 N.J. 540, 547 (1908).

Subsequent to the Bednar and Capodilupo decisions, school law decisions have consistently and emphatically held that tenured individuals are entitled to positions held by non-tenured individuals within the area of a tenured individual's certification. For example, in Mirandi v. Bd. of Ed. of Twp. of West Orange, Essex County 1988 S.L.D. 1988, aff'd as mod. State Bd. 1989 S.L.D. 3057, petitioner, a tenured high school assistant principal who had been "riffed" and assigned to a position of high school social studies teacher, was held to be entitled to the position of middle school assistant principal despite having no experience in the latter position as against a non-tenured individual with actual experience.

Likewise, in Burke v. Bd. of Boro. of Union Beach 1988 S.L.D. 1318, petitioner, a tenured school social worker who had been "riffed", was found to be entitled to the position of Student Assistance Counselor as opposed to a non-tenured individual who was employed in that position. Moreover, in Burke, the Commissioner recognized that where a petitioner has "a statutory entitlement to [a] position by virtue of her tenure status... [i]t [is] the Board's duty to recognize her tenure status and notify her of the fact it was available to her."

While a faithful, logical reading of Bednar and Capodilupo and the school law decisions cited by petitioner in and of itself is indicative of petitioner's rights to the controverted position, the decisions articulated in Schaeffer v. So. Orange-Maplewood Bd. of Ed. 1988 S.L.D. 553, aff'd State Bd. 1990 S.L.D. 3077 and Herbert v. Middletown Bd. of Ed., 1989 S.L.D. 2148, aff'd State Bd. 1990 S.L.D. 1759, aff'd App. Div. A-318-90T1, May 22, 1991, squarely address the analysis advanced by petitioner.

In Schaeffer supra., petitioner, a tenured junior high school and middle school department chairperson for English who had been "riffed" and reassigned to a classroom teaching position, was found to be entitled to the district-wide position of Director of Language Arts/English (K-8) as opposed to a non-tenured individual who was employed in that position.

While, in Herbert, supra., the Commissioner affirmed the decision that a tenured Supervisor of Elementary Education who had been "riffed" was entitled to the position of Supervisor of Special Services, a highly regulated and substantially complicated area, as against a non-tenured supervisor. As the Administrative Law Judge determined:

> As the line of cases discussed above makes clear, the tenure law grants the tenured teaching staff member a right over a non-tenured teaching staff member to any position for which the tenured staff member qualifies him or her. The tenure laws do not contain any exemptions or exceptions. The Legislature has determined that a person who obtains an endorsement is qualified for all positions under that endorsement. To allow subjective educational reasons to override the tenure law is to ignore the law and is clearly impermissible.
>
> The incumbent undoubtedly is qualified for the position. The Board may believe that she would perform better than the petitioner as Supervisor of Special Services. But the law gives the petitioner an unequivocal right to the position. He cannot be deprived of his tenure rights by virtue of the Board's impression that the incumbent would do the job better. This approach may not be the best educational policy, but it is the law, and only the Legislative can change the law. That the position in this case may differ from the petitioner's prior positions more than the positions at issue in Bednar or Mirandi does not alter the outcome. The tenure laws cannot be modified by a board's belief that a particular position is somehow unique. The point of Bednar and Mirandi is that the tenure laws must apply despite the particular experience or inexperience of the person involved. Not only is there no measurable way of determining when a position is unique to a degree that would allegedly exempt it from the strictures of the tenure law, the law simply does not permit that type of analysis or exemption.
>
> The petitioner is entitled as a matter of law to the position held by the nontenured incumbent. He must be instated, with retroactive seniority, to that position with all back pay.

As it is uncontroverted that petitioner, F. Lynn Galbraith, is tenured as a supervisor. It is eminently clear that she is entitled to the position of Supervisor-Social Studies/Art/Music as opposed to a non-tenured supervisor. See also Schienholtz et al. v. Ewing Bd. of Ed., 1989 S.L.D. 1860 aff'd State Bd. 1990 S.L.D. 1809.

In each of the above referenced decisions, the Commissioner of Education found Bednar, supra., and Capodilupo, supra., directly on point that a non-tenured person cannot be employed over a tenured person. Respondent contends that petitioner is not entitled to the position of Supervisor-Social Studies/Art/Music because, although she has tenure as a Supervisor of Curriculum/Community Relations she does not hold an instructional certificate with an endorsement in social studies, art or music and is, therefore, not certified for the position of Supervisor-Social Studies/Art/Music. This contention flies in the face of Herbert, supra. As the Appellant Division determined in Herbert, supra., at page 5:

> Likewise, in this case, the problem lies with the fact that supervisor certificates are issued without regard to the differences which may exist in the requirements to perform the various jobs and duties of such personnel.

In Rogers v. Highland Park Bd. of Ed., 1990 S.L.D. 685, aff'd State Board 1990 S.L.D. 691, petitioner attained tenure as a supervisor in the position of Department Chairperson-Social Studies. As a result of a reorganization the position was abolished and a position of Cultural and Social Studies Supervisor was created. The new position included the Social Studies Department, Foreign Languages and ESL. When the Board appointed a teacher to the new position, Mr. Rogers petitioned the Commissioner seeking the position based upon his tenure rights as a supervisor. In affirming the Administrative Law Judge, the Commissioner determined:

> Firstly, it must be emphasized that there is no such entity as "an English supervisor certificate." (emphasis supplied) (Id., at page 3) Unlike the seniority regulations wherein each supervisor position is a separate category, a supervisory certificate is general, i.e., not specific to a subject area.

Accordingly, respondent is incorrect in its contention that petitioner only has tenure as a Supervisor of Curriculum/Community Relations. It is clear that petitioner has tenure as a supervisor. Furthermore, respondent is incorrect that petitioner is not entitled to the position of Supervisor-Social Studies/Art/Music. The Commissioner determined at page 689:

> While the Board is correct in arguing that a supervisor must have served and acquired tenure under such certificate, it is in error when maintaining that a tenured supervisor subject to a reduction in force could not make a

> claim to a supervisory position related to English if it were held by a nontenured supervisor had not served in the area of English.
>
> In the instant matter, petitioner has acquired tenure as a Supervisor and is, therefore, in a reduction in force circumstance entitled to any position held by a nontenured supervisor. (emphasis in the original)

The State Board in affirming the Commissioner further emphasized the above holding at page 691:

> The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We reiterate that, having achieved tenure in the separately tenurable position of "supervisor". Petitioner was entitled to tenure protection following a reduction in force in any supervisory assignment for which he was qualified by virtue of his certification as against individuals with no tenure as supervisors. See Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988); Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987); Herbert v. Board of Education of the Township of Middletown, decided by the State Board of Education, August 1, 1990.

In So. River Education Association v. So. River Bd. of Ed. 1985 S.L.D. 1384, rev'd State Bd. 1987 S.L.D. 2727, aff'd. App. Div. A-1695-87T8, April 16, 1990, the board of education has elementary teachers who were on a preferred eligible list as a result of a reduction in force. Subsequently, a teaching vacancy occurred in a position entitled computer literacy teacher with qualifications that encompassed an instructional certificate and 9 credits, the board of education hired an out-of-district candidate. The ALJ recommended that the petition be dismissed. The Commissioner agreed. However, the State Board of Education reversed and the Appellate Division affirmed the decision of the State Board. The State Board determined:

> Although the education laws permit a district board to establish qualifications beyond the threshold qualifications established by statute and regulation for employment in or promotion to a particular position title...we find that [the respondent's] desire to employ or retain individuals with such additional qualifications cannot defeat the seniority rights conferred by statue on teaching staff members. N.J.S.A. 18A:28-10,; N.J.S.A. 18A:28-12.

A contrary holding:

> would undermine the seniority system by permitting the creation of positions distinct for seniority purposes based on distinctions in subject matter beyond those made by the certification rules.

Unfortunately, in the matter of Timko and Mikush v. Bridgewater-Raritan Bd of Ed., 1991 S.L.D. 967, remanded State Bd. July 1, 1992, Initial Decision on remand, April 27, 1994, Comm. dec. June 13, 1994, aff'd State Bd. Nov. 2, 1994, a final resolution of this issue was not made. In Timko, supra., petitioner, Timko was a tenured supervisor assigned to social studies. Timko had a supervisor endorsement. Mikush was a tenured supervisor, assigned to Industrial Arts. Mikush did not have a supervisor endorsement. Rather, he had a limited supervisor of industrial arts certificate issued under prior rules. Therefore, Mikush, by certification, could only supervise industrial arts. As a result of a reorganization, the positions held by Timko and Mikush were eliminated. As part of the reorganization, other supervisory position, were created and non-tenured supervisors were selected. Timko and Mikush petitioned the Commissioner averring that they were entitled on the basis of tenure and seniority to the positions. The Board argued that in addition to the supervisor endorsement, it also required an instructional certificate which neither petitioner possessed.

The Commissioner rejected the Initial Decision and determined that Timko was entitled on the basis of his endorsement as a supervisor and his tenure as a supervisor to one of the new positions. Unfortunately for Mr. Mikush, his certificate was limited to supervising industrial arts and he was, therefore, not certified and hence, not qualified for any of the new positions. The Commissioner based his decision on Herbert, supra., and So. River, supra.

The State Board remanded for a determination as to the particular duties which would require an instructional certificate. Prior to the hearing on remand, Timko and the Board of Education settled the controversy and dispute between them and Timko withdrew his petition. The ALJ, the Commissioner and the State Board all determined that the issue of the instructional certificate requirement was rendered moot by Timko's withdrawal.

In the matter sub judice, there are sufficient stipulated facts and documentation on the record to support a finding and determination by the ALJ that there are not enough substantial duties for the position of Supervisor-Social Studies/Art/Music to allow the local requirement of an instructional certificate in one of those areas to defeat petitioner's tenure rights as a supervisor. The record shows that for the 1994-95 school year, the board employed 24 supervisors, 8 in each of its 3 high schools. Each high school had a supervisor in the areas set forth in paragraph #4 of the Stipulation. During the entire 1994-5 school year, one Supervisor - Special Education taught one class during the first semester only. No other supervisor taught any other classes. None of the three Supervisors-Social Studies/Art/Music taught my classes. Historically, the supervisors in the school district do not teach classes. Therefore, there is no necessity for the supervisor to teach students in the Lenape Regional High School District.

Furthermore, for the position of Supervisor-Social Studies/Art/Music, the job description requires an instructional certificate with an endorsement in social studies, art or music. Therefore, the school district is not requiring someone be a subject specialist because a music or art person qualifies to supervise the social studies teachers which are the overwhelming majority of the teachers to be supervised by the aforesaid position. Clearly, someone like petitioner, with an English background is just as qualified to supervise social studies teachers as a person with an art or music background. The State Board of Education recognized this by the fact that the supervisor endorsement is general and generic. It authorizes the holder to supervise any subject matter and/or any grade level. It is similar to a high school principal or assistant principal with a background in English. The principal on the basis of his/her certificate can observe and evaluate a Physics teacher or a Russian language teacher. The principal is not the subject matter specialist. The teacher is. However, the principal can observe and evaluate good teaching. The same is true in this matter. The supervisor observes and evaluates teaching and teaching methods. In fact on each of the attached job descriptions, this is clearly stated:

> The major function of the supervisor is to provide assistance in the development of an improved teaching-learning situation.

Petitioner, by virtue of her tenure as a supervisor and her possession of supervisor endorsement is qualified to perform the duties of the position. Accordingly, respondent's requirement of an instructional certificate with an endorsement in social studies, art, or music

cannot override petitioner's tenure rights as a supervisor. Respondent should be ordered to employ petitioner as the Supervisor-Social Studies/Art/Music.

THE BOARD'S STATEMENT OF FACTS AND ARGUMENT

STATEMENT OF FACTS

The facts pertinent to consideration of this matter are set forth in the Stipulation of Facts, and in the documents attached thereto.

Petitioner is tenured as a teacher of English, and has been employed in the Lenape Regional High School District ("Lenape") since 1974. She also served as Community Relations Coordinator from 1976 through 1990, at which time she was appointed to the then newly established position of Supervisor of Curriculum/Community Relations, which position she held until it was eliminated by Board action on June 21, 1994.

The job description for the position to which petitioner here lays tenure claim, Supervisor-Social Studies/Art/Music at Cherokee High School (one of the three high schools in the Lenape District), sometimes referred to in the literature as Director of Humanities and the job descriptions for each of the other content area supervisors' positions (Exhibits 4 through 11 to the Stipulation of Facts) lists the qualifications to include an administrative certificate with endorsement as Supervisor and, as well, an instructional certificate endorsed in at least one of the disciplines to be supervised. In this particular case, the qualifications include an instructional certificate with endorsement in social studies, art or music. (Exhibit 7 to Stipulation of Facts.) Each of these job descriptions, save the Student Personnel Services and Educational Media Services positions, had been in existence since 1971.

None of the supervisors' job descriptions has been changed, in any material respect, since 1989.

Petitioner has known, since May 18, 1994, that respondent took the position that petitioner had acquired tenure as a Supervisor of curriculum/Community Relations, but that this

tenure did not afford her any rights to other existing supervisory positions in the Lenape District. (Stipulated Fact No. 4). Respondent's position in this regard was confirmed for Petitioner in the July 11, 1994, letter of Superintendent Daniel F. Hicks (Exhibit 3 to Stipulated Facts).

Each of the supervisory job descriptions lists, among the various duties to be performed by the Supervisor, the following:

> "Performs other duties which may be within the scope of his/her employment and certifications as may be assigned by his/her superior(s) under authority of the Board of Education." See, e.g., Exhibit 7, at page 4, paragraph 24.

ARGUMENT

Petitioner suggests, in Point 1 of her brief, that the allegations in paragraph 8 of the Petition present the single legal issue to be decided: whether petitioner has tenure rights to the position of Supervisor-Social Studies/Art/Music at Cherokee High School. Respondent agrees this is the single claim raised by the Petition. However, petitioner lacks the certifications required in the job description for the position of Supervisor-Social Studies/Art/Music, and this is not a disputed fact. The job description does, and at all times relevant herein did, list the requirement of a teaching certificate endorsed in one of these subject matter areas. Again, this fact is not disputed. Knowledge of the qualifications for each of the supervisor positions can be imputed to petitioner since those qualifications were listed in the Respondent's Book of By-Laws and Policies.

Petitioner admits being informed of the Respondent's position at a meeting on May 18, 1994, concerning her tenure rights vis-a-vis the subject area supervisory positions. Moreover, petitioner admits that the respondent's position in this regard was clarified for her in a letter from Superintendent Hicks dated July 11, 1994 (Exhibit 3) which unequivocally states that petitioner did not possess the qualifications for the position of Supervisor-Humanities or Supervisor-Social Studies/Art/Music, which qualifications include a requirement that the applicant hold a teaching certificate endorsed in one of the disciplines over which the appointee would exercise supervision.

Still, petitioner chose not to challenge the validity of the qualifications set forth in the job description.

The Petition is a plain vanilla tenure claim. No more, no less. Petitioner's brief, however, breaks out into two specific arguments: first, a straight tenure claim argument which totally ignores the additional certification requirements in the description of the job at issue; and, second, an attack on the validity or propriety of the "local requirement of an instructional certificate" in the qualifications for this position. The second argument is made despite the fact that the Petition does not challenge the validity of the job description or local certification requirement.

Respondent's reply is as follows:

> (a) Petitioner did not put the validity of the job description, or the propriety of the job description, or the propriety of the local requirement for additional certification in issue in her petition and she is now time-barred from so doing, either by amendment to the Petition or by simply attempting to argue the point on motion;
>
> (2) Petitioner does not possess the certificates required for this position and cannot, therefore, lay claim to the position;
>
> (3) The "any other duties" provision in the job description, generally interpreted broadly enough to include teaching duties, is sufficient justification for inclusion of the additional certification requirements of the supervisory position at issue here;
>
> (4) There is nothing to suggest that the local certification requirements set forth in each of the supervisory position job descriptions was drafted for purposes, in whole or in part, of frustrating possible tenure claims of others, and petitioner has failed to meet her burden to show that the respondent's acts were arbitrary, capricious or unreasonable.

For all the foregoing reasons, the Petition must be dismissed.

POINT ONE

PETITIONER'S ATTACK UPON THE VALIDITY OF THE SUPERVISORY POSITION IS TIME BARRED

N.J.A.C. 6:24-1.2(c) sets the limitations period for filing Complaints with the Commissioner of Education, and provides that a Petition shall be filed "no later that the ninetieth day from the date of receipt of the notice of a final order, ruling or other action by the District Board of Education, individual party, or agency, which is the subject of the requested contested case hearing."

The order, ruling or "other action" here challenged occurred, at the latest, on or about September 1, 1994, when respondent appointed another to the position of Supervisor-Social Studies/Art/Music at Cherokee High School (Stipulated Fact No. 10).[1] In Halpern v. Bd. of Ed. of Twp. of Delran, 94 N.J.A.R. 2d (EDU 22), Petitioner, a tenured Coordinator of Child Study Team, who worked under an educational services certificate with a school psychologist's endorsement and an administrative certificate with a supervisor's endorsement, filed a Petition challenging his failure to be appointed to the position of Director of Curriculum and Pupil Personnel Services, into which he sought to "bump" following elimination of his Coordinator of Child Study Team position as a result of a reduction in force. While attempting to reach agreement on stipulated facts, so that the matter could be presented for decision, petitioner sought to assert that the position of Director of Curriculum and Pupil Personnel Services was an unrecognized position title, that the procedures necessary to recognition of such a title (which required possession of a principal's endorsement) had not been followed, and suggested that testimony would be necessary on the issue of why the Respondent Board of Education concluded that the principal's endorsement was required for this position.

[1] The action of hiring another for the position gives rise to petitioner's claim, as set forth in her Petition. The additional claims which petitioner seeks to set forth via her brief, challenging the validity of the position itself and the inclusion of additional certification requirements, are actions of which Petitioner had notice as early as May 18, 1994. Respondent's action of determining that Petitioner did not possess the required certifications for this supervisory position was known to petitioner on or about July 11, 1994.

The process set forth in Halpern is strikingly similar to the process in the instant matter. In Halpern, the Administrative Law Judge required petitioner to move for leave to amend the petition "to include the assertions with respect to N.J.A.C. 6:11-3.3(b)." That motion was then denied and petitioner was precluded from challenging the validity of the newly created position, or the propriety of the requirement for possession of a principal's endorsement on the administrative certificate, by reason of the untimeliness of the claim. In that regard, the judge said "No challenge is made to the timeliness of the original Petition (filed February 3, 1992) ... Unquestionably absent from that Petition, however, is any allegation that the title 'Director of Curriculum and Pupil Personnel Services' is an unrecognized position title requiring approval of the County Superintendent of Schools." Id. at 23. Again, the similarity to the instant matter is striking.

Continuing, the Administrative Law Judge held Petitioner to have been aware of the actions of which he now complained, as early as October, 1991, when the Board first attempted to abolish his position and establish the new, allegedly unrecognized position. The Court also noted that the job description for the new position was approved and posted in November, 1991, again suggesting that this implies knowledge, on the part of petitioner, whom the Court noted was "also charged with knowledge of the regulatory provisions ... published in the Administrative Code." On these grounds, the Administrative Law Judge held petitioner's efforts to raise these claims by amendment in 1993 to be timed-barred. Once again, the similarities are striking.

The final parallel between these two cases involves the commencement of discussions between counsel for the parties concerning the issue of the County Superintendent's role in determining the appropriate certification for the position at the heart of the Petition. In Halpern, the court noted that "the fact that (the attorneys) commenced having discussions about (County Superintendent's role) in or about May, 1992, does not alter the determination (to time-bar the amendment) since an attempted amendment, asserting additional claims, in May, 1992, would also have been time-barred." Id. at 23.

Here, the first discussion between counsel for the parties concerning the issue of recognition of the title, Director of Humanities, or Director of social Science/Art/Music, and the related issue of the propriety of the local requirement for additional certification, took place on January 6, 1995, during the course of the pre-hearing conference. In response to the Court's

invitation to petitioner's attorney to file any amendments which might be in order, respondent's attorney noted that respondent would object to any attempt to amend the Petition to assert claims challenging the propriety of the job title or description.

The only subsequent discussion in these regards occurred while counsel for the parties were attempting to reach accord on the stipulated facts. As set forth in the attached Certification, petitioner's efforts to include the facts set forth in paragraphs 8 and 9 in the Stipulation were met with objection on the grounds that they were irrelevant to the claims made in the Petition. Counsel for the parties eventually agreed to include these facts, as stipulated, with the understanding that respondent considered these facts irrelevant and would assert the time-bar defense, on the grounds that no challenge to the propriety of the position or its certification requirements had been set forth in the Petition.

That said, even if an amendment had been sought (and the parties were offered the opportunity to move to amend their pleadings) following that January 6, 1995 discussion, such amendment would have been out of time with respect to any of the operative dates: the September 1, 1994, hiring of another for the position; the August 10, 1994, filing of the Petition; or the July 11, 1994, letter, from Superintendent Hicks to Petitioner Galbraith.

A function of a statue of limitation is a measure of repose. Ochs v. Federal Insurance Co., 90 N.J. 108 (1982). Even under egregious circumstances, such as those seen in Kaprow v. Berkeley Twp. Bd. of Educ., 255 N.J. Super. 76 (App. Div.1992), where respondent board of education failed, for several years, to maintain an eligibility list for the position of Assistant Superintendent (from which position petitioner had been RIFFED six years earlier), despite acknowledging its duty to do so, and failed to inform petitioner of positions for which he had tenure rights, again despite a request from (and commitment to) petitioner to do so, the importance of an even-handed application of the limitations period has been recognized. While it was the board in Kaprow whose inaction's precipitated the claim, petitioner's failure to file his claim until seven days after the ninety-day period had expired proved fatal. The circumstances here do not even hint at any culpable conduct, animus, or intentional wrongful conduct, and call for an evenhanded application of the limitations period.

In short, petitioner's efforts to now amend her petition, either actually on leave granted, or impliedly through the arguments raised in her brief, is time-barred and must be rejected.

POINT TWO

PETITIONER DOES NOT POSSESS THE REQUIRED CERTIFICATION FOR THE POSITION

The position of supervisor of Social Studies/Art/Music requires not only an administrative certificate, with supervisor's endorsement, it also requires a teaching certificate with an endorsement in one of the three subject areas to be supervised. Petitioner admits that her teaching certificate, with endorsement for English, is not endorsed for social studies, art or music. She is not entitled to the position.

In Point II of her brief, petitioner cites several cases in apparent support for her claim that she is entitled to the Humanities position. Her argument ignores the requirement of an appropriately endorsed teaching certificate. The petitioner's reliance upon the cited cases is misplaced. None of the cases relied upon by petitioner involves certification requirements for the sought-after position which differ from those of the eliminated position. It is in this distinguishing regard that each of these cases makes reference to petitioner's entitlement to a position "for which he/she is certified," or "for which the tenured staff member qualifies."

Capodilupo v. West Orange Twp. Ed., 218 Super. 510 (App. Div. 1987), for example, involved a physical education teacher, whose tenure was earned as a high school teacher, laying a tenure claim to the same position at the elementary school level. No different or additional certification requirements were involved. The Appellate division upheld the State Board's determination that petitioner had tenure "in all positions for which his instructional certificate qualified him." Id. at 514. (Emphasis added).

Similarly, petitioner in Bednar v. Westwood Bd. of Ed., 221 Super. 239 (App. Div.1987), had tenure as a result of teaching art for seventeen years at the elementary level. His position was reduced to part time as a result of a RIF. The Court, reversing the State Board, held that Bednar's tenure entitled him to bump into a full time position as a high school art teacher, over the rights of a non-tenured occupant of that position.

In Mirandi v. Bd. of Ed. of Twp. of West Orange, Essex County, 1988 S.L.D. 1988, aff'd as mod. State Board, 1989 S.L.D. 3057, petitioner's principal's certificate entitled him to lay a tenure claim to a position as assistant principal of the middle school, even though he had only served in the position of high school assistant principal. His principal's certificate was held to be "valid for all levels," giving him tenure in "a position for which such person shall be qualified." Id. at 3062.

Petitioner principally relies upon Schaeffer v. Bd. of Ed. of South Orange-Maplewood, 1988 S.L.D. 553, aff'd State Bd. 1989 S.L.D. 3077, and Herbert v. Middletown Bd. of Ed., 1989 S.L.D. 2148, aff'd State Bd. 1990 S.L.D. 1759, aff'd App. Div. (unpublished opinion attached to petitioner's brief). Neither case deals with additional/different certification requirements. Neither furthers petitioner's cause.

Schaeffer was a tenured junior and middle school English Department Chairperson. He was held entitled, by tenure, to the new position of district-wide Director of Language Arts/English (K-8). Both the RIFFED position and the new position required a supervisor's certificate, which Schaeffer possessed. Nothing disqualified petitioner from the new position.

Herbert is similarly unenlightening. The job description for the new position of Supervisor of Special Services called for a supervisors endorsement to an administrative certificate and three years experience in special education. Petitioner had the required certificate and tenure as a supervisor. The appointee was certified and had the experience called for, but was not tenured as a supervisor. The three years experience requirement was an invalid attempt to place seniority above tenure rights. Locally imposed requirements for background experience or personal qualities, perhaps appropriate for screening purposes, cannot be used to defeat a riffed, tenured

employee's claim to a position. See, South River Educ. Assoc. v. South River Bd. of Ed., 1987 S.L.D. 2724.

Petitioner attempts to convert the singular principle sustained in the cases discussed above - tenure under a certificate entitles one to a position requiring that certificate over one who does not have tenure under the certificate - into an argument that respondent cannot require two certificates for the position at issue - Supervisor of Social Studies/Art/Music at Cherokee High School. There is no nexus between the line of cases offered by petitioner and this theory. Moreover, there is no legal authority for this proposition.

In Dennery v. Bd. of Ed., 131 N.J. 626, 638 (1993), the Supreme Court said it was "unable to conclude ... that the requirement of two certificates to qualify for a single education position is anomalous, arbitrary, or irrational. Nor is it unlawful or invalid." Thus, on its face, the requirement for two certificates for the position at issue in this matter is not invalid, and does not afford petitioner any basis to claim a tenure claim that the position is invalid, the only basis for overturning the respondent's action would be a finding of facial invalidity of the two certification requirement. Such a finding would be inconsistent with Dennery.

Nonetheless, petitioner argues that there are sufficient stipulated facts upon which this tribunal can determine that "there are not enough substantial duties for the position of Supervisor-Social Studies/Art/Music to allow the local requirement of an instructional certificate in one of those areas to defeat petitioner's tenure rights as a supervisor." (petitioner's brief, page 12.) This is simply not true.

First, petitioner chose to go forward without setting out any challenge to the validity of the position or its requirements as contained in the long standing job description. As discussed in Point I, supra, Petitioner is now barred from asserting that challenge. Second, petitioner chose to proceed on the record as set forth in the stipulated facts. Those stipulated facts are a plainly insufficient basis upon which this Court could determine to overturn the decision of Respondent Board of Education to require that subject area supervisors be qualified to teach in the area of supervision. The record simply does not allow a finding that the respondent's actions are arbitrary, capricious, an abuse of its discretion, or unreasonable.

In that regard, there is nothing to suggest any ill motive or purpose in the drafting of the job description at issue. Indeed, the job description and the two certification requirement predate this petition by two decades. The subject area teaching certification requirement is applied across the board - to all twenty-four supervisors positions.

An arbitrary, capricious, or unreasonable analysis focuses on the reasons for the challenged action and petitioner bears the burden of proving that the challenged action deserves one of these adjectives. Petitioner has failed to meet her burden here. In Gargano v. Bd. of Ed. Twp. of Union, Union County, 93 N.J.A.R. 2d (EDU) 670, the board's decision to assign petitioner, a supervisor, to teach three (rather than the usual two) classes in addition to performing his supervisory duties, was held to be based upon fundamentally sound educational reasons, including: his familiarly with the curriculum (having helped develop it); the fact that he had taught in the past; budget considerations and the concomitant need for flexibility in staffing decisions; and various logistical considerations.

> "In short, while one legitimately may take issue with the exercise of the managerial judgment made in Gargano's case, there were fundamentally sound educational reasons to support that decision. It was Gargano's burden, not that of respondent, to prove that the decision was arbitrary, capricious, or unreasonable, and he failed to do so." Id. at 673.

The same can be said here. Petitioner may disagree with respondent's decision, but she has failed to show that there is any basis to overturn it.

For all of the foregoing reasons, the Petition should be dismissed.

PETITIONER'S REPLY

The facts in this matter are essentially uncontroverted and are stipulated. Petitioner has attained tenure as a "supervisor" in the Lenape Regional High School District. Respondent erroneously contends that petitioner has tenure as a "supervisor of curriculum/Community Relations." Petitioner clearly and unequivocally has tenure as a "supervisor". See all cases cited petitioner's brief.

The other relevant facts are that on June 21, 1994, respondent abolished the position of district supervisor of Curriculum/Community Relations and notified petitioner that she would be reassigned to her former position as teacher. As a result of a retirement on or about July 5, 1994, the position of Supervisor-Social Studies/Art/Music became vacant. The qualifications for the aforesaid position as set forth in the job description requires an administrative certificate with an endorsement as supervisor, principal or school administrator and an instructional certificate with an endorsement in social studies, art or music. It is equally uncontroverted that petitioner is the holder of the administrative certificate with an endorsement as principal and supervisor. In fact, petitioner has attained tenure as a supervisor under this certificate and endorsement. It is also uncontroverted that petitioner has an Instructional certificate with a Teacher of English endorsement and has attained tenure as a teacher. Petitioner does not have an endorsement in social studies, art or music.

The issues in this matter are set forth in the Prehearing Order and are:

1. Whether petitioner, a riffed Supervisor in the Board's employ, is entitled to the position of Supervisor of Humanities, or any other supervisor position held by a nontenured supervisor, which was vacant subsequent to petitioner's reduction in force?

2. Whether petitioner holds that appropriate certificate to qualify for the position of Supervisor of Humanities?

3. Whether the Petition of Appeal is time barred by the applicable period of limitations?

With regards to Issue #3 as to whether this matter is time barred. N.J.A.C. 6:24-1.2(c) indicates that petitions are to be filed no later than the 90th day after notice of the action by the district board of education. Respondent abolished petitioner's position on June 21, 1994 and notified petitioner in a letter, dated June 23, 1994. On June 5, 1994, the position at issue in this matter became vacant. (See stipulations). The petition was filed on August 11, 1994. By all measures, the petition was clearly filed within the 90 day period of limitations.

Respondent argues that petitioner had notice on May 18, 1994, that the superintendent would be recommending the abolishment of her position. It is well established in New Jersey school law that the superintendent's recommendation does not constitute action by a district board of education. However even assuming arguendo, but not conceding, that the May 18, 1994, meeting placed petitioner on notice and started the clock ticking, the petition was filed on the 85th day from May 18 and is still within the regulatory timeline. Therefore, respondent's affirmative defense that the matter is time barred is unfounded and fails.

There is no basis for respondent to contend that petitioner did not put the propriety of the local requirement of additional certification at issue in the petition. Petitioner's contention that she is entitled to a supervisor position held by a non-tenured supervisor is set forth in paragraphs 6 and 8 of the petition. Respondent admits in paragraph 6 of its answer that petitioner is not certified for the position and the issue is enumerated in the prehearing order. Respondent has opined from the onset of this matter that due to petitioner's lack of a subject matter endorsement in social studies, music or art, she is not entitled to the supervisor position at issue. Petitioner has opined that her tenure as a supervisor entitles her to the position over a non-tenured supervisor. The issue was known to respondent from the onset of this matter, (Stipulations - Exhibit 2; admitted paragraph 6 of Answer), respondent raised the issue as an affirmative defense in its answer and the issue is clearly enumerated in the prehearing order. There is no merit whatsoever to respondent's argument that the question of whether the local requirement of an instructional certificate can thwart petitioner's tenure rights as a supervisor is somehow time barred.

With regards to issue #1 as to whether petitioner is entitled as a tenured supervisor to any supervisor position held by a non-tenured supervisor, the long line of cases set forth in petitioner's brief supports the position that she is entitled to said position. The cases further hold that a person attains tenure as a "supervisor" and not as respondent incorrectly contends as a "supervisor of something," in this matter Supervisor of Curriculum/Community Relations. It is well-established in the caselaw cited in petitioner's brief that a person attains tenure as a "supervisor" because that endorsement is generic and authorizes the holder to supervisor any subject matter and any grade level. See N.J.A.C. 6:11-9.3(c).

The issue for the Administrative Law Judge to decide is issue #2, whether petitioner holds the appropriate certificate for the position of Supervisor-Social Studies/Music/Art. Respondent in its brief essentially relies on two decisions, Halpern v. Delran Bd. of Ed., 94 N.J.A.R. 2d 22 and Dennery v. Passaic Co. Reg. Bd. of Ed., 131 N.J. 626 (1993) for its argument that petitioner does not have appropriate certification. The facts in Halpern, were that the Board of Education eliminated Halpern's position of Coordinator, in which he was tenured as a supervisor, and created a position of Director because the latter position required a principal endorsement which is a separately tenurable position under the school law. The facts in the Halpern matter are not analogous to this matter and an application of Commissioner's holding in Halpern is irrelevant to this matter.

In the current matter, the issue revolves around the local requirement of two certificates and the endorsements under those certificates. The cases dealing with this issue are few. The cases relevant to deciding this issue are Dennery, supra., Tinko et al v. Bridgewater-Raritan Bd. of Ed., supra., So. River Ed. Assn. v. So. River Bd. of Ed., supra., and Herbert v. Middletown Bd. of Ed., supra. Petitioner has analyzed the decision in Timko, supra., So. River, supra., and Herbert, supra., in her brief and shall rely upon that analysis herein. Timko, supra., is the only decision dealing with the same set of facts as in this matter. It must be noted that the Commissioner determined on page 20 of the slip opinion of the June 19, 1991 decision that:

> As to the arguments raised about local certification requirements, it must be emphasized that there is nothing to prevent a board of education from having such requirements but those requirements cannot thwart the tenure rights of a staff member on a preferred eligibility list.

The State Board remanded on page 9 of its slip opinion of its decision for a determination of whether the duties were of such a nature to require an instructional certificate in addition to supervisor in order to be authorized to perform the duties. Petitioner has addressed this issue in her brief.

The other question then becomes whether this matter is distinguishable from the Supreme Court decision in Dennery, supra. For the reasons that follow, petitioner contends that Dennery is distinguishable. In Dennery, the Board of Education abolished the positions of guidance

counselor and replaced those positions with Area Supervisors, a position which required an administrative certificate. In Dennery, petitioner had attained tenure under her educational services certificate, but had no actual experience under the administrative certificate. In this matter, it is uncontroverted that petitioner has tenure and actual experience under her administrative certificate as a supervisor. It is equally uncontroverted that petitioner has tenure and actual experience as a teacher under her Instructional certificate. (Stipulation of Facts, #2). In respect to tenure and actual experience under two certificates, petitioner has both. The Supreme Court went on to state:

> The Legislature has delegated the responsibility for the regulation and administration of public education tenure to the State Board. The State Board, in turn, has established comprehensive and detailed regulations governing tenure. Those regulations cover the certification of education personnel. N.J.A.C. 6:11. The state board of examiners is authorized to "grant appropriate certificates to teach or to administer, direct or supervise, the teaching, instruction, or educational guidance in public schools." 131 N.J. at 633.

The State Board of Education has authorized the holder of an administrative certificate with a supervisor endorsement "with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." N.J.A.C. 6:11-9.3(c). The endorsement is generic. It authorizes the supervision of any subject matter and any grade level. Petitioner, by holding this endorsement, is properly authorized to supervise teachers of social studies, art, music or any other subject discipline. In the vernacular, petitioner is properly certified for the position.

With regards to petitioner's instructional certificate, she has actual service under that certificate and has attained tenure as a teacher. N.J.S.A. 18A:28-5. It is uncontroverted that petitioner has attained tenure as a teacher under her instructional certificate. This fact distinguishes this matter from Dennery. Ms. Dennery had attained tenure under her educational services certificate, but she had no actual experience under her administrative certificate. The Supreme Court determined that Dennery could not transfer her tenure under her educational services certificate, since she had no actual experience under the administrative certificate. In this matter, petitioner has actual service under both her administrative certificate and her instructional certificate. In fact, she has tenure as both a supervisor and a teacher.

The Court went on to note that the State Board of Education is authorized by the legislature "to fashion standards and promulgate guidelines concerning the qualification and certification of public educators within the State." 131 N.J. at 637. In the instant matter, the State Board has authorized the holder of the administrative certificate with the supervisor endorsement to supervise any subject matter and any grade level. Petitioner is the holder of said certificate and endorsement. Accordingly, she is properly certified to hold the position of Supervisor of Social Studies/Art/Music and is entitled to the position based upon her tenure as a supervisor. As noted by the commissioner in Timko, supra., the local requirement on an instructional certificate cannot thwart petitioner's tenure rights as a supervisor.

For all the foregoing reasons, petitioner respectfully requests that the Administrative Law Judge find and determine that petitioner holds the appropriate certificate and is entitled to the position of supervisor-Social Studies/Art/Music. It is further requested that the ALJ Order respondent to employ petitioner in the aforesaid position with all salary, benefits and emoluments, retroactive to September 1, 1994.

DISCUSSION AND CONCLUSIONS

The Commissioner's decision in Rogers v. Highland Park Bd. of Ed., 1990 S.L.D. 685, aff'd State Board 1990 S.L.D. 691, sums up the law and regulations with respect to the instant matter. In Rogers, supra., the Commissioner expressly held that there is no such entity as a subject matter supervisor certificate. Rather, a supervisory certificate is general in nature and not specific to a subject area. The Commissioner further held in Rogers that with the acquisition of tenure as a supervisor, and a subsequent reduction in force which affects that tenured supervisor, the riffed supervisor is entitled to any position held by a nontenured supervisor. Id. at 689. The State Board affirmed the Commissioner's decision at 1990 S.L.D. 691.

Here, it is uncontroverted that petitioner has acquired a tenure status as a supervisor and was subject to a reduction in force. It is equally clear that subsequent to petitioner's reduction in force, the Board engaged a nontenured supervisor for the position of Supervisor-Social Studies/Art/Music and bypassed petitioner for the position. The Board asserts that petitioner is

not qualified for the supervisory position because petitioner lacks an instructional certificate with an endorsement in social studies, art or music. As with the Board in Highland Park in Rogers, the herein Board is mistaken. Petitioner is entitled to the position of Supervisor-Social Studies/Art/Music over the nontenured supervisor by virtue of her tenure and seniority as a Supervisor in the Board's employ.

I **CONCLUDE**, therefore, that petitioner, Dr. F. Lynn Galbraith, is entitled to the position of Supervisor-Social Studies/Art/Music by virtue of her acquired tenure and seniority as a supervisor with the Board.

ORDER

Accordingly, it is **ORDERED** that petitioner, Dr. F. Lynn Galbraith, be placed into the position of Supervisor-Social Studies/Art/Music immediately with all salary benefits and other emoluments to which she is entitled, retroactive to September 1, 1994.

It is further **ORDERED** that Summary Decision be **ENTERED** on behalf of petitioner and the Board's motion for Summary Decision is hereby **DENIED.**

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

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

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

20 November 1995
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

11-28-95
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 01 1995
DATE

Joanne M. Preston
OFFICE OF ADMINISTRATIVE LAW

ai

OAL DKT. NO. EDU 8492-94

F. LYNN GALBRAITH, Ed. D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Respondent Board's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that petitioner is not entitled to superior seniority rights entitling her to the position of Supervisor-Social Studies/Art/Music. The Board argues that "the position *** requires an instructional certificate endorsed in one of the subject areas to be supervised --a requirement which Petitioner admittedly does not satisfy." (Board's Exceptions at p. 2) It argues, citing Halpern, supra, that petitioner can thereby only succeed in her claim by having the position title declared invalid, that petitioner did not assert a challenge of the local requirements within the regulatory timeline and, thus, petitioner failed to meet her burden of proof not having developed the record necessary to

support the conclusion she seeks. (Board's Exceptions at pp. 2-3) Additionally, the Board states that the petition was filed in an untimely manner. (Id. at p. 1)

In her reply, petitioner argues that the ALJ's initial decision was correct and should be affirmed. (Petitioner's Reply Exceptions at p. 1) Petitioner distinguishes the facts in Halpern, supra, from the present case by pointing out that the case involved a supervisor seeking a position requiring a principal endorsement, a separately tenurable position. Petitioner contends that Halpern is not analogous to the present case involving a tenured supervisor seeking a supervisor position and is, therefore, irrelevant. (Petitioner's Reply Exceptions at p. 2)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner is entitled to the position in question based on applicable laws. N.J.S.A. 18A:28-10; N.J.S.A. 18A:28-12. The law is well-settled that a supervisor endorsement is generic and authorizes the holder to supervise any subject matter and any grade level. N.J.A.C. 6:11-9.3(c); Rogers, supra. Moreover, while there is nothing to prevent a local board from establishing additional instructional certification requirements, absent a showing that instructional certification is necessary to perform the duties of the position at issue, such requirements cannot sidestep the educator's tenure rights on a preferred eligibility list of supervisors. See Dennery, supra, at 639, 640 and Timko, supra.

In so finding, the Commissioner is satisfied that the ALJ squarely addressed the issues requested for clarification in the Board's exceptions, including timeliness, and that he need not address such issues further. See Initial Decision at pp. 24-25.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law and orders that Petitioner F. Lynn Galbraith

be immediately placed in the position of Supervisor-Social Studies/Art/Music with back pay and compensation for benefits lost retroactive to September 1, 1994.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 12, 1996
Date of Mailing, January 12, 1996

14-96

EDU #8492-94
C # 14-96
SB # 8-96

F. LYNN GALBRAITH, Ed.D.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 12, 1996

For the Petitioner-Respondent, Wayne J. Oppito, Esq.

For the Respondent-Appellant, Archer & Greiner (William H. Kenney, Esq., of Counsel)

The decision of the Commissioner of Education concluding that the district Board had violated the tenure rights of petitioner, a tenured teaching staff member, when it failed to appoint her to the position of Supervisor-Social Studies/Art/Music is affirmed as modified herein. We find no indication in the record that the duties attending the controverted position are of such character as to require possession of an instructional certification in the subject field in addition to certification as a supervisor in order to be authorized by statute and regulation to perform such functions. See Herbert v. Board of Education of the Township of Middletown, decided by the State Board, August 1, 1990, aff'd, Docket #A-318-90T1 (App. Div. 1991); Timko and Mikush v. Board of Education of

6/5/96

the Bridgewater-Raritan Regional School District, decided by the State Board, July 1, 1992, decision on remand by the Commissioner, June 13, 1994, aff'd by the State Board, November 2, 1994. Nor is there any indication in the record that the County Superintendent had determined that dual certification was appropriate for this particular unrecognized position title. See N.J.A.C. 6:11-3.3.

However, we correct the Commissioner's assertion that the Administrative Law Judge ("ALJ") "squarely addressed" the Board's contention that the petition herein was time-barred under N.J.A.C. 6:24-1.2(c). The ALJ's review of the timeliness issue, including that section of the initial decision cited by the Commissioner, was simply a verbatim recitation of the parties' arguments set forth in their briefs. The ALJ neither addressed the issue further nor rendered a determination thereon. Nonetheless, given our authority as the ultimate administrative factfinder and decision-maker in school matters, In the Matter of the Tenure Hearing of Lynn Jenisch Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), we have conducted our own review.

N.J.A.C. 6:24-1.2(c) requires a petition to be filed with the Commissioner "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education...which is the subject of the requested contested case hearing." The facts in this case, as stipulated by the parties, indicate that the Board abolished petitioner's supervisory position in a reduction in force on June 21, 1994. On or about July 5, 1994, a vacancy occurred in the position of Supervisor-Social Studies/Art/Music. In a letter dated July 8, 1994, petitioner wrote to the Superintendent of Schools requesting placement in that position by virtue of her

tenure rights as a supervisor. In a reply letter dated July 11, the Superintendent denied petitioner's request, stating that petitioner was not qualified for the position since the job description adopted by the Board required possession of an instructional certificate with an endorsement in social studies, art or music, in addition to certification as a supervisor. Petitioner filed the instant petition on August 11, 1994, alleging that the Board had violated her tenure rights in failing to assign her to that position. On or about September 1, 1994, the Board assigned a non-tenured individual to the position.

In that petitioner filed her petition with the Commissioner within 90 days after the Superintendent rejected her tenure claim to such position, we conclude that she complied with the terms of N.J.A.C. 6:24-1.2(c), and we reject the Board's contention that the petition was not filed in a timely manner. The fact that the petition does not specifically challenge the Board's dual certification requirement for that position does not alter the result. The petitioner expressly claimed that the Board had violated her tenure rights by failing to appoint her to the vacant supervisory position at issue herein.

We therefore affirm the decision of the Commissioner as modified herein.

June 5, 1996

Date of mailing JUN 07 1996

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15-96

COASTAL LEARNING CENTER, INC., DR. RONALD BOEDART, HELENE BOEDART, JOSEPH J. SCALABRINI, NANCY SCALABRINI, JOHN BRUENIG , VERA BRUENIG, FRANK D. VISCOMI, JOYCE VISCOMI AND ROBERT VISCOMI,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
NEW JERSEY STATE BOARD OF EDUCATION, COMMISSIONER OF EDUCATION, AND STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning private, for-profit school for the handicapped, together with its owner/operators, contended that the State Board and State Department of Education improperly adopted and applied to them a regulation (N.J.A.C. 6:20-4.4(a)47) excluding certain rental costs from the rate of tuition chargeable to public school districts, specifically, excess rental charges attributed to a sale and leaseback arrangement, wherein a facility is sold to another entity and then leased back at a cost higher than would have been incurred had the facility not been sold. Petitioners contended that their rental arrangement did not constitute a sale and leaseback.

ALJ found that petitioners' rental arrangement did in fact constitute a sale and leaseback within the purview of the regulation, so that the State Department acted properly in applying the regulation to petitioners. ALJ further found no impropriety in State Board's adoption of the regulation at issue. Petition was dismissed.

Based on independent review of record, Commissioner concurred with ALJ's conclusions and dismissed appeal.

January 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2535-91

AGENCY DKT. NO. 12-1/91

COASTAL LEARNING CENTER, INC., DOCTOR RONALD BOEDART, HELENE BOEDART, JOSEPH J. SCALABIRINI, NANCY SCALABIRINI, JOHN BRUENIG, VERA BRUENIG, FRANK D. VISCOMI, JOYCE VISCOMI AND ROBERT VISCOMI,

Petitioners,

v.

STATE BOARD OF EDUCATION, DEPARTMENT OF EDUCATION, COMMISSIONER OF EDUCATION, AND DIVISION OF FINANCE,

Respondents.

Timothy B. Middleton, Esq., for petitioners

Arlene Goldfus Lutz, Deputy Attorney General, for respondents (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: May 25, 1995 Decided: June 30, 1995

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

The petitioners, who operate a private, for profit school for exceptional pupils charge that the State Board and State Department of Education improperly adopted and applied to them certain regulations concerning certain costs calculations and affecting the maximum tuition the school may charge.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. One day of hearing was held on April 10, 1995, and the last post hearing submission was received on May 25, 1995.

Coastal Learning Center, Inc. (Coastal) is a New Jersey for profit corporation that operates a private, state-approved school for the handicapped pursuant to *N.J.S.A.* 18A:46-14(g). Coastal began operation in or about 1974. The school presently has three campuses: one in Howell, Monmouth County; one in Morganville, Monmouth County and one in Tuckerton, Ocean County. The clientele is children who have been classified as emotionally disturbed. The classification is made by Child Study Teams (CSTs) employed by local boards of education. Coastal receives tuition monies from the local public school districts that send children to it. The State Board of Education regulates the calculation of tuition. *N.J.A.C.* 6:20-4.1 through -4.11.

In 1990, the State Board limited the amount of rent that may be included in the tuition rate charged by a private school for the handicapped when its facility is sold and leased back. See, 22 *N.J.R.* 2637-2639 and 22 *N.J.R.* 3738-3740.

Coastal's fiscal year (FY) runs from July 1 through June 30, as does the FY of most public school districts. Coastal must provide at least 180 days of pupil instruction. *N.J.A.C.* 6:20-4.1(a)1. Coastal is given a tentative tuition rate from the Commissioner prior to the start of the school year. *N.J.A.C.* 6:20-4.1(f). Coastal charges the public school districts this tentative rate during the school year. After the school year ends, but before November 1, Coastal must file a certified audit with the Department. *N.J.A.C.* 6:20-4.8. The audit serves two purposes. First, the auditor calculates the school's actual cost per pupil, *N.J.A.C.* 6:20-4.8(c), and second, during this

process, the auditor verifies that the school spent the tuition monies it received on "allowable costs."

This dispute focuses on *N.J.A.C.* 6:20-4.4(a)47. The rule addresses non-allowable costs. It states that a cost which is not allowable in the calculation of the certified actual cost per pupil includes the following . . . "47. Rental costs under sale and leaseback arrangements in excess of the amount that would be incurred had the organization continued to own the property." The parties differ as to what this means.

PAROL AND DOCUMENTARY EVIDENCE

Ronald Boedart, a shareholder and officer of Coastal, testified that Coastal has rented the Howell Township facility since 1980. The facility contains approximately 8,000 square feet and sits on approximately five acres. It has ten classrooms and office space. Coastal leased the facility from Metedeconk Enterprises, Inc., from 1980-1982. Coastal leased the facility from Penta Associates from 1982-December 31, 1986. It leased from Arnold Associates from January 1, 1987 through the present. At no point between 1980 and 1990 did the Department disallow the lease amounts that Coastal paid to any of the lessors.

The leases between Coastal and Penta Associates for the term July 1984-June 1989 and the agreement between Coastal and Arnold Associates, December 30, 1986-June 30, 1997 were introduced into evidence as P-3 and P-4, respectively. Boedart gave the ownership history of the property. It was originally purchased by Metedeconk in 1979 or 1980. Metedeconk constructed the school building by substantially renovating an existing structure. Boedart also stated he was a shareholder of Metedeconk and that Metedeconk is a New Jersey corporation. The other shareholders of Metedeconk are Joseph Scalabirini, Robert Viscomi, Frank Viscomi and John Bruenig. The five shareholders of Metedeconk are also the five shareholders of Coastal. Penta Associates is a New Jersey partnership and the same five persons are the partners of Penta.

In or about 1982, Metedeconk deeded the Howell school building to Penta. No money was exchanged in the transaction and the transfer was made based upon advise from the group's then attorney. Penta sold the Howell building to Arnold on December 31, 1986 for $685.000 (P-

1). The December 31, 1986 deed transferring the property was introduced as P-2. The agreement of sale is between First Dover Properties, Inc. and Penta Associates. Boedart testified that prior to the closing, First Dover assigned its contractual rights to Arnold. The witness stated that paragraph 18 of the sales agreement (P-1) permits such an assignment. The record shows that the actual document that assigned First Dover's rights in the contract to Arnold was provided to the respondents at hearing. The deed (P-2) is from Penta to Arnold which verifies that the sales transaction was from Penta to Arnold.

Boedart further testified that Bruce Bowe, Don Jump and Francis P. Piscal are the partners comprising Arnold. Bowe was Coastal's certified public accountant prior to 1986, but not after. Boedart stated that no one associated with Coastal - or close family members - has an interest in Arnold or First Dover. He also stated that the transfer between Penta and Arnold was an arms-length transaction and that no one associated with Penta has any right to purchase the facility in the future. No one associated with Coastal has any right to purchase the facility in the future. I take this to mean that there are no reverter clauses and I further take this mean that although there is no right to repurchase neither is there any prohibition against repurchase.

Boedart also testified that Coastal at no time owned the Howell building property. Exhibit R-1, Consent to Corporate Action dated January 30, 1979, states in pertinent part:

> WHEREAS, this corporation, having changed its name from Garden State Educational Consultants, Inc., is the contract purchaser of a contract dated March 29, 1978 between Robert W. and Theresa J. Sellers and this corporation;
> NOW THEREFORE, BE IT RESOLVED the Board of Directors of the corporation consider it to be in the best interest of the corporation to transfer its entire right and interest in the March 29, 1978 contract to Metedeconk Enterprises, Inc.

Boedart further testified Arnold did not assume Coastal's lease with Penta, which lease term expired in June 1989. Coastal and Arnold entered into a separate lease agreement that extends the lease from 1989 to 1997 (P-4). The lease amounts Coastal paid to Arnold were comparable to what Coastal pays for its Morganville property. Coastal desired a lease extension with Arnold in order to ensure that it had a secure location for the future. Coastal had "lost" its

school building in Lakewood in 1980. The idea of a secure location was thus much in Coastal's collective mind.

Boedart also stated that Penta sold the property for several reasons. The capital gains tax law was being repealed as of December 31, 1986. Therefore, there were tax advantages in selling the property on or before that date. The effective capital gains tax rate was approximately 15 percent compared to the 30 percent plus rate in effect after that date.

Paragraph ten of the Contract of Sale provided that Penta could cancel the deal if closing did not occur on or before December 31, 1986. In September 1986, the State Board added an additional non-allowable cost item concerning leasehold charges in transactions between related parties. The regulation limited the amount of rent a private school could include in its tuition rate in related party transactions to the related party landlord's actual cost of ownership. This seemed to be an disincentive for related party transactions. The Penta partners each had personal reasons for wanting to sell the property. The witness had two children going to college and would certainly need money for that purpose.

Coastal engaged a certified public accountant (CPA). The accountant is also a Public School Accountant. He testified that he had performed audits for seven private schools for handicapped children since 1986. He was recently appointed chair of the New Jersey Society of CPA's Government Auditing and Accounting Committee. The witnesses' six-page report was submitted in evidence in lieu of direct testimony (P-7). The sole issue to which the CPA testified was whether or not the sale from Penta to Arnold was a sale-leaseback arrangement. The witness stated this was the type of issue that a private school auditor would address during an audit. In his report and in other examination, the witness stated that, in his professional opinion, the sale from Penta to Arnold on December 31, 1986 was not a sale-leaseback arrangement. He relied for his conclusion primarily upon generally accepted accounting principles (GAAP). *N.J.A.C.* 6:20-4.3(a)(1) sets forth that private schools' accounts must be kept in accordance with GAAP unless the regulations specifically modifiy GAAP. In this case, the regulations provided no specific definition of the term "sale and leaseback arrangement" and, hence, did not modify GAAP. He concluded that in this case, GAAP should be used to provide assistance in defining the term.

The witness stated he reviewed the following documents and relied on the following facts in reaching his conclusion:

1. The verified complaint;
2. The agreement of sale between Penta and First Dover (P-1). Scott testified he understood this contract was assigned by First Dover to Arnold;
3. The deed transferring the property from Penta to Arnold (P-2);
4. The summary of comments prepared by the Department of Education which define the term (P-3);
5. The fact that Penta did not lease the premises subsequent to the sale to Arnold on December 31, 1986;
6. The fact that there were no reverter clauses involved in the sale from Penta to Arnold;
7. The fact that Coastal never owned of the property.

The witness also stated he had not specifically reviewed the leasehold agreement between Coastal and Arnold, although he was aware of the fact that Coastal was currently leasing the property from Arnold. A review of the lease was not necessary, in his opinion, because he was asked to determine whether or not the Penta sale to Arnold was a sale-leaseback.

The witness also stated he reviewed Coastal's answers to Department interrogatories, Financial Accounting Standards Board (FASB) Statements 66 and 98 and the facts in his report, P-7. If any assumed facts were incorrect, it could have affect his opinion.

Scott's report opines that a sales-leaseback includes a reverter clause. There are eight criteria for determining the existence of a sales-leaseback arrangement. They are not present in this transaction so the witness believes there is no sale and leaseback here.

The witness knew that the Penta owners and the Coastal owners were the same persons. On page 3 of his report he notes the December 31, 1986 sale from Penta to Arnold. "Arnold"

does not appear in the contract. The witness looked at the substance of the transaction more than the form. Based on what he knew, the owners of Arnold were three distinct individuals. He deduced this from the documents, however, having had no discussion with Boedart, Scalabirini, Bruenig or Viscomi. The deed recites that this is an at arms-length transaction.

The witness did not know who did prior audits. Neither did he know that Boedart had written to the Department. Because he saw no reverter, or reserved future interest, he made an inquiry and asked for any addenda or codicils to the papers he had reviewed. None were forthcoming. The lease cites a term of ten years. It actually is ten and one-half years, ending on December 31, 1997. The witness stated that for the years 1980-1985, Penta charged Coastal rent based on a comparable commercial square footage rental rate. This was submitted to the Commissioner in the school's annual budget for tuition rate approval. The annual budgets were approved as submitted. The allowability for the rent was based on *N.J.A.C.* 6:20-4.1(a)1. The witness was not aware of the adoption date of that rule, but stated it was used for the period 1980-1985. On page 4 of his report, he cites the rule again and states that it became effective in September 1986. The witness began special education audits in 1986, after the rule changes.

In reference to FASB Bulletins 66 and 98, the witness stated that 66 addresses accounting of sales of real estate and sets forth criteria for each transaction and illustrates how each should be reported. Publication 98 deals with accounting for leases including sale-leasebacks and sales-type leases and the document defines lease term. The glossary defines sale-leaseback accounting. The accounting literature defines sale-leaseback. Here, GAAP are modified by regulations. Coastal presently is putting all rent into the tuition calculation. Coastal had had a stay of the regulation, but the stay was dissolved. The witness conceded a certified audit is not the final word in matters of this type. He did not look at the subject lease. He looked at accounting literature concerning sale-leasebacks and concentrated on the risk and reward being transferred to the purchaser.

The objective of a sale-leaseback is for the seller to sell at fair market value and retain the right to repurchase at the end of the lease term at a favorable price. The seller gains cash flow and only temporarily surrenders ownership. Fair market value is generally understood to be appraised value or the price that a willing seller would pay to a willing buyer in an arm's length transaction. Not all sale-leasebacks have reverters and not all allow the seller to repurchase.

The subject regulation implies reverter, in his opinion, in its definition of sale-leaseback, although the actual words do not appear. He believes the same to be true as to any way in which the original seller takes back the property.

In GAAP for governments, there is no requirement of a reverter to be in a sale-leaseback but there are other criteria applied that come from FASB publication 98. The witness stated he defines sale-leaseback using the criteria from FASB publication 98.

The deputy attorney general examined the witness on FASB publication 98. The witness acknowledged and the document shows that under Criteria for Sale-Leaseback Accounting, sale-leaseback accounting shall be used by a seller-lessee only if a sale-leaseback transaction includes all of the following: ". . . Payment terms and provisions that transfer *all* of the other risks and rewards of ownership as demonstrated by the absence of *any* other continuing involvement by the seller-lessee described in paragraphs 11-13 of this Statement . . . ." [Emphasis in original.] The witness stated much depends on how much risk is transferred to the purchaser.

A normal leaseback in defined in the publication as "a lessee-lessor relationship that involves the active use of the property by the seller-lessee in consideration for payment of rent, including contingent rentals that are based on the future operations of the seller-lessee and excludes other continuing involvement provisions or conditions . . . ." The publication clearly uses the word "excludes." The witness stated he believes this to be a typographical error and that the word should be "includes." In his opinion, the ten factors referred to are those that a normal sale-leaseback must include. FASB publication 98 says in a normal leaseback one must exclude these factors.

Concerning paragraph 9 on page 5 of the publication, the witness stated he has seen sale-leasebacks without reverters. These usually have to do with equipment, not real property. A capital lease would be treated under FASB publication 13. *N.J.A.C.* 6:20-4.4(a)47 is not limited to real estate.

A normal sale-leaseback could vary because he uses the modifier "normal period." There could be several accounting methods applied. Using his judgment, according to GAAP he consulted the FASB glossary. He also consulted the Bureau of National Affairs (BNA) tax management materials. The witness knew this question was previously litigated but did not know that a consultant at that time said this sale was a sale-leaseback.

The administrative code is not clear in that it gives no definition of sale-leaseback. Therefore, the witness relied on GAAP. The language in New Jersey Administrative Code is the same used by the Federal Government. The witness was familiar with federal circulars and stated that they give no more definition than does the New Jersey Administrative Code.

The witness reviewed the Department Education Matrix (P-5). He cannot say what the legal effect is and he cannot say if it was adopted when published by the State Board. He took the exhibit as fact. If a particular part is not factual or correct, that could influence his outcome.

Regulations have little effect on his opinion even if he cited them wrongly. When he applies paragraphs 11-13 of FASB publication 98, this transaction is not a sale-leaseback. The buyer/lessor owns the property. The buyer/lessor has not alienated the property to the witness' knowledge. All risks were transfer to the new owner, Arnold. There is no leaseback from Arnold. Subsection 47 says "had the organization continued to own the property." The witness did not ask about any other lease. The only transaction he examined was between Penta and Arnold. The witness conceded that a related party could include only operating costs plus 2.5 percent in its calculations.

The witness also answered a series of questions concerning regulation changes, transfer to a related corporation for lease holding purposes and spinning off an asset while retaining common control of the asset.

DETERMINATION AND ORDER

Petitioners' Arguments

The petitioners assert that Penta's sale of the Howell property to Arnold is not a sale-leaseback arrangement according to GAAP. Therefore, *N.J.A.C.* 6:20-4.4(a)47 does not apply to Coastal's lease arrangement with Arnold. The code clearly says, "A cost which is nonallowable in the calculation of the certified actual cost per pupil includes the following: . . . 47. Rental costs under sale and leaseback arrangements in excess of the amount that would have been incurred had the organization continued to own the property." According to the petitioners, the crucial language is the phrase "sale and leaseback arrangement." If a leasehold arrangement is not a sale-leaseback, the regulation is not triggered. The petitioners state that the sale from Penta to Arnold is not a sale-leaseback arrangement. The regulation does not apply to Coastal's lease from Arnold.

Because the regulations do not provide a definition of sale-leaseback, reference to GAAP is necessary. *N.J.A.C.* 6:20-4.3(a)1 states that "Accounts shall be kept in accordance with generally accepted accounting principles (GAAP) as defined by the American Institute of Certified Public Accountants, except as already modified in the rules."

The petitioners' CPA testified that Penta was not actively using the property after the sale, there was no repurchase agreement or option to repurchase, and the risk of ownership passed from Penta to Arnold at closing of title. The CPA correctly stated the elements of the GAAP definition of sale-leaseback. He also cited the BNA definition that says a sale-leaseback typically involves execution of two transactions.

The petitioners cite *Y.A.L.E. School v. Department of Education*, 92 *N.J.A.R.* 2d (EDU 571 (1992)). In that case, the allowability of a number of cost items was addressed. One item was landscaping expenses. The amount paid was $4,425 and Y.A.L.E. charged it as a teaching supply. The Department disallowed the cost during an audit, stating that the amount should have been capitalized and depreciated as an improvement to the school facilities. *N.J.A.C.* 6:20-4.3(a)3. That code section states that a fixed asset expenditure of $1,000 or more shall be

capitalized and depreciated. At hearing, Y.A.L.E. argued counter to this and stated that according to GAAP, only expenditures which increase "the capacity or operating efficiency of an asset should be capitalized and minor expenditures should be expensed." *Y.A.L.E.*, above at 578. Despite the specific reference in code, Y.A.L.E. claimed that this item should be expensed and not capitalized. The judge cited *N.J.A.C.* 6:20-4.3(a)1 and noted that GAAP applied to the accounting and bookkeeping systems for private schools for the handicapped. However, the judge took further note that in certain cases GAAP maybe modified by the rules, stating that "where the regulations themselves modify accounting principles which might otherwise be defined by the American Institute of Certified Public Accountants, the rules and regulations take precedence." Ibid.

In *Y.A.L.E.*, the judge agreed with the Department analysis and pointed out that the code specifically sets forth that a "fixed asset expenditure of $1,000 or more shall be capitalized and depreciated . . . ." The judge then held that "generally accepted accounting principles as they apply to the treatment of fixed asset expenditures of $1,000 or more are superseded by *N.J.A.C.* 6:20-4.3[a]3." Based on this ruling, the remaining issue was whether landscaping and planting were fixed assets which would trigger the capitalization rule. The deputy attorney general cited an accounting text that stated landscaping and planting constitute a fixed asset. Thus, the Department's counsel obviously looked outside the regulations and to GAAP standards regarding the definition of the term fixed asset because the regulations did not provide otherwise.

In the present case, GAAP are not superseded because the regulations do not explicitly provide a definition of sale-leaseback. In fact, the regulations provide no guidance at all. In this case, GAAP must be used to define the term.

The petitioners also assert that the history of the regulation shows that the Penta sale to Arnold is not a sale-leaseback arrangement and thus, the regulation does not apply to Coastal's lease with Arnold. On September 4, 1990, the rule was proposed in the New Jersey Register. 22 *N.J.R.* 2633. The essence of the statements was that the nonallowable cost items were being proposed to prohibit business practices which were inconsistent with the administration of public funds dedicated to special education. There was no mention as to what the term sale-leaseback arrangement met. Exhibit P-6, prepared by the Department, defines the term sale-leaseback as "a

seller agrees to sell a property to a third party on the condition that the property is leased back to the original owner." The definition adds that "typically at the end of the lease the property is generally sold back to the original seller at a nominal sum" thus allowing the owner to obtain profit twice.

Even if this tribunal rules that *N.J.A.C.* 6:20-4.4(a)47 applies to the Coastal and Arnold lease, the regulation still is void because it impairs Coastal's contractual rights. Coastal cites *Penta Associates II* and *Coastal Learning Center v. New Jersey Department of Education*, 1989 *S.L.D.* 1682 (Mar. 23, 1989), aff'd Comm'r of Ed. 1989 *S.L.D.* 1708 (May 22, 1989), aff'd St. Bd. 1990 *S.L.D.* 1784. The State Board discussed the contract clause and how it applies to private school leases for school buildings. Penta II leased an office and gymnasium building to Coastal. The lease term was February 14, 1984 through February 13, 1987. On September 8, 1986, the State Board enacted nonallowable cost item *N.J.A.C.* 6:20-4.4(8)45 which limited the amount of rent a private school could include in its tuition rate in a lease with a related party to the related party's "actual cost of ownership." The regulation specifically defined actually cost of ownership.

In *Penta II*, Coastal and Penta II argued that the related party rule violated the contract clause. The State Board acknowledged that the authority to abridge existing contracts between private schools is subject to limits. However, the State Board held that the impact in that matter was minimal because the regulation was enacted on September 8, 1986 and Penta II's lease expired on February 7, 1987.

The State Board noted that the regulation was aimed at furthering the broad interest in insuring that tuition paid by public schools for handicapped students to attend private schools represents the actual costs of providing the education. The State Board acknowledged that twenty-one private schools for the handicapped were engaged in related party transactions at that time. The related party rule regulation was needed to deal with a potentially broad problem.

In the present case, Coastal and Arnold entered into a lease beginning on January 1, 1987 and running through June 30, 1997. Coastal obligated itself to make lease payments as set forth in an addendum to the lease. In the years 1987-1990, Coastal paid Arnold in accordance with the

lease. The payments were never disallowed by the Department. Now the Department wants to apply *N.J.A.C.* 6:20-4.4(a)47 to the lease agreement and presumably wants to disallow some of the rent charges. The period of disallowance would be from October 1992 (the date the injunction was lifted) until the end of the lease term, June 30, 1997.

If the regulation is applied to Coastal's lease, there is a chance that a portion of Coastal's rent could be deemed a nonallowable cost. If the phrase "organization" contained in the regulation means Penta, the former owner of the property, then the rent charge would be calculated by applying the related party rule because Penta and Associates are related parties. Boedart testified that the related party rule would limit Coastal's allowable rent cost to Penta's "actual cost of ownership as defined by regulation." This would include mortgage interest, straight line depreciation, property insurance, real estate taxes and maintenance. He also stated that because Penta had not owned the property since 1986, it would difficult to project Penta's actual cost of ownership as of 1995. Nonetheless, Boedart noted Penta's mortgage payment was approximately $50,000 in 1986 and, even after adding depreciation, insurance, taxes and maintenance to this figure, the amount would be less than Coastal is obligated to pay Arnold. If any of Coastal's rent was disallowed, Coastal would incur financial hardship. If the regulation is applied to Coastal, it will impair Coastal's contractual rights with Arnold.

Respondents were under the obligation to prove that there is a significant and legitimate public purpose behind the regulation. They put forth no proof that there is such purpose. The rule proposal offered no statement that the rule was being proposed to effect a significant and legitimate public purpose. The only stated purpose for the regulation is found in Exhibit P-6 in which the Department stated that the regulation was needed to prevent property sellers from profiting twice inasmuch as the Department believed that in a sale-leaseback arrangement, the seller-tenant receives the property at the end of the lease for a nominal sum. As noted previously, there are no reverter clauses in this case. The stated policy provision is not applicable here.

Even if the rule applies to Coastal's lease with Arnold, the rule is void for vagueness because it is impossible to calculate the allowable rent charged. Assuming, *arguendo*, the Coastal and Arnold lease is a sale-leaseback arrangement, the regulation then limits Coastal's allowable rental charge to an amount not in excess of the amount that would be incurred had the

organization continued to own the property. "Organization" is not defined. There is no guidance provided regarding how to calculate the allowable rental charge. It would appear that the word organization refers to the former owner of the property inasmuch as the phrase "continued to own the property" follows it.

In this case, Penta is the former owner of the property. Penta and Coastal are related parties. *N.J.A.C.* 6:20-4.4(a)45 would apply and Coastal's allowable rent would be limited to Penta's actual cost of ownership as defined. However, Penta has not owned the property since December 31, 1986. It would be difficult even to approximate Penta's actual cost of ownership.

There is an anomaly in the regulation. The term "actual cost of ownership" assumes that an entity owns the property. Since Penta does not own the property, it would be impossible to calculate its actual cost of ownership. One would have to speculate as to the mortgage interest to be included inasmuch as interest rates have changed and inasmuch as the principal amount of a loan is unknown. It would be pure speculation to project what the maintenance charges would have been if Penta owned the property.

Respondent's Arguments

On August 6, 1986, after execution of the lease between Coastal and Penta, the State Board promulgated *N.J.A.C.* 6:20-4.4(a)45, which limits inclusion in the tuition for rental charges and lease transactions between related organizations to 2.5 percent above the actual cost of ownership. The regulation states, in pertinent part:

> A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:
>
> . . .
>
> 45. Costs related to transactions between parties in which one party to the transaction is able to control or substantially influence the action of the other. Such transactions are defined by the relationship of the parties and include, but are not limited to, those between divisions of an institution; institutions or organizations under common control through common officers, directors or members; and an institution and a director, trustee, officer, or key employee of the institution or his or her immediate family either

> directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. Such costs shall include:
>
> > i. Rental costs for buildings and equipment in excess of the actual allocated costs of ownership (such as straight line depreciation, mortgage interest, real estate taxes, property insurance and maintenance costs) incurred by the related property owner including a 2.5 percent return calculated on the actual cost of ownership incurred by the related party . . . a regulation limiting the rent that could be charged by related party landlords has been recommended by the New Jersey Commission on Investigation (SCI) which in 1978 issued a report on the misuse of public funds in the operation of non-public schools for handicapped children . . . .

In the summary published with the introduction, the State Board cited the ability of certain operators to use rental costs as a means of creating increased profit. It further referred to the fact that certain private schools for the handicapped had set up commonly owned corporations whose sole purpose was to purchase assets.

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

Accordingly, beginning in the 1986-87 school year, the amended rule prohibited private schools from including in the tuition the full rent charged by the related party landlord. They were permitted to include in the tuition only those costs that they would have borne if the school had harmed the property and a 2.5 percent profit. The regulation was found to be facially valid and valid as applied to the lease between Coastal and Penta II. *Penta Associates, II*, above.

When *N.J.A.C.* 6:20-4.4(a) was adopted, Coastal was renting a property from Penta Associates, which was comprised of the same five people who were the shareholders of Coastal and Penta II. Coastal included in the tuition calculation the rental charged by its related corporation. If the five shareholders had placed the property in the name of Coastal, they would have been able to include in the tuition only the costs of ownership of the facility, but not the profit the owners earned by renting to themselves. With the promulgation of the August 1986 regulation, the only portion of the rent Penta II charged that Coastal could include in the tuition calculation was the actual cost of ownership and a 2.5 percent rate of return on the cost. The school could no longer include the full rental that the owners, as Penta, were charging themselves as Coastal.

In this circumstance, the lessor had a guaranteed tenant and the tenant would always pay the rent. Rental costs were included in the tuition rate paid by public school districts that sent their pupils to the school. The shareholders' acquisition of their asset was completely at public expense. All costs of the property, including the mortgage, were guaranteed by and paid for by State funds; nonetheless, when the property was sold, the owners divided the profits among themselves.

The Department of Education saw the need to control related party transactions. The regulation at issue in this matter, *N.J.A.C.* 6:20-4.4(a)47, was adopted on December 17, 1990. It disallows rental costs under sale and leaseback arrangements in excess of the amount that would be incurred had the organization continued to own the property. The Office of Management and Budget has issued Circular A-122, "Cost Principles for Non-Profit Organizations," which identifies those expenditures that may be included in contracts or grants. The language of the circular is identical to the regulation. Circular A-122 also contains a restriction on rental costs between related parties that is nearly identical to paragraph 1 of *N.J.A.C.* 6:20-4.4(a)45.

The regulation is not limited to whether the school continued to own the property, but, whether the "organization" continued to own the property. The organization plainly refers to related parties under common control through common officers, directors or members. It is undisputed that Penta and Coastal are organizations under common control. As the judge noted

in *Penta II*, above, the State Board was concerned with addressing the problem of straw transactions in which corporations providing private schooling for the handicapped created partnerships or corporations for the sole purpose of acquiring property and later renting it to themselves in the form of another partnership or corporation. By limiting the rent charged in a sale and leaseback transaction entered by the "organization" rather than by "the school," the regulation limits the amount of rent that a school is able to charge the State after its straw corporation sells the property and the purchaser leases it back to the school. If the regulation were not addressed to the "organization," it would encourage creation of straw corporations and transfer of assets to them followed by taking profits by having the straw corporations enter sale and leaseback arrangements.

The transaction here comes within the definition set forth in the regulation, notwithstanding that Coastal technically was not the seller of the property. Coastal is, in fact, a part of the organization that consists of the school and its two related party landlords and is governed by the regulation. While the property may have been sold by Penta, Penta was merely a straw corporation for Coastal. Its only purpose was to own property that it leased to the school, thereby inflating the tuition that could be charged and increasing the profit of the related party owners.

As a condition of the property sale to First Dover by Penta, a tenant under the lease, Coastal, was required to sign the contract "in order to indicate their assent to the execution of that lease" (P-1 at 8). Coastal's owners, the same individuals who are the shareholders in Penta, therefore signed the contract of sale. If Coastal had merely been an unrelated tenant, neither the seller nor the purchaser of the property could compel the tenant to participate in the sale. Compelling Coastal to assent to the sale was a recognition that Coastal was more than an unrelated tenant.

The Department also asserts that, as further proof that Penta was merely a shell corporation, exhibit R-1 demonstrates that Coastal transferred the contract for sale on the property to Metedeconk Enterprises, the precursor of Penta. There must be a reason for a transfer. The petitioner's offered no valid reason for the transfer. The owners were merely transferring the contract to themselves. However, by doing so they increased the amount that

they would earn from tuition monies over what they would have received if Coastal continued to own the asset. The entire transaction was undertaken by entities comprised of related parties. Notwithstanding the petitioners' expert's opinion, the regulation applies to the lease. If the State Board had not imposed the restriction it did, the organization would compel the State to fund the property twice - once by paying the mortgage and other associated costs and a second time by paying rental costs.

The petitioners do not understand an "as applied" challenge to a regulation. Thus, they have improperly relied on documents not at issue. By constructing their case on a comment in the Department's matrix, they have failed to comprehend that the transaction at issue is a sale and leaseback within the purview of the regulation.

Moreover, the petitioners eliminated their challenge to the facial validity of the regulation when they amended their petition. They cannot now challenge the regulation as unclear or vague. By accepting the regulation, the petitioners do not contest the regulation itself, they only challenge how it is employed as to them. If, as petitioners contend, the regulation does not include definitions of sale and leaseback or organization, then the petitioners could have mounted a facial challenge to the regulation. By failing to do so and relying on an as applied challenge, the petitioners must accept the regulation on its face. Contrary to the petitioners' apparent understanding, in an as-applied challenge, it is not necessary to look to prior history to interpret the regulation. The language of the regulation herein plainly applies to the sale and leaseback transaction. Comments made pending adoption of the regulation are of no import.

The respondents also attack the petitioners' expert. They cite testimony which they contend lessens his credibility. Even if he is an expert in the areas of accounting and auditing, those areas are not at issue in this case. This challenge concerns the application of a regulation to a transaction. The respondents press the fact that the witness defined sale and leaseback in accounting terms and that that definition does not cover the issue before this tribunal which must decided whether the sale and leaseback at issue represents a sale and leaseback for regulatory purposes. The petitioners also argue that *N.J.A.C.* 6:20-4.4(a)47 does not violate the contract clause of the United States Constitution or of the New Jersey Constitution because the subject contract is not impaired. The lease between Coastal and Arnold has not been impaired. The

parties retain all rights and obligations under the contract after the promulgation of the regulation that they did at the time they entered into the lease (P-4). That contract remains enforceable.

The only difference resulting from the promulgation of the regulation is a limitation on how much of the rent that was agreed to in a legally binding contract may be included in the tuition rate calculation. The regulation at issue merely limits the portion of the rent to be born by the public schools to those costs which could have been included in the tuition rate had the organization not elected to sell its facility and then lease it back. A decision to limit the amount of an expenditure that will be reimbursed from State funds does not impair the contract between Coastal and Arnold. There has been no impairment of the contract at issue and, therefore, the State had no obligation to show that there was a significant and legitimate purpose behind the regulation.

Petitioners claim they have been harmed by operation of the regulation. The fact that application of a rule may yield a harsh or undesirable result in a particular case does not make the rule invalid. Moreover, the petitioners' problem is of their own making. They signed a lease for ten years, confident they could sell the property acquired at State expense, make a profit on the sale of the property and then continue to charge the State for rent. They entered into a ten-year lease without any provision to terminate or renegotiate. They disregarded the fact that, as a highly regulated entity, the school was subject to regulations that could change.

The petitioners have failed to prove that the regulation is void for vagueness. Although they contend that the regulation is void for vagueness, their arguments do not make clear if they challenge the regulation facially or as applied. The petitioners have amended their petition to remove any facial challenge to the regulation. Therefore, the only remaining claim is that the regulation is faulty as applied.

The proofs here are weak. The director of the school testified he did not know how to calculate what would be allowable costs. The fact that he had difficulty arriving at a figure does not make the regulation vague. He is an educator, not an accountant. He conceded that he did not seek guidance from the Department of Education when he was attempting to calculate the

allowable costs. With no more than the testimony of a person unskilled in accounting, this tribunal cannot find the regulation void for vagueness as applied.

The petitioners' contention that there is anomaly in the regulation is a challenge to the facial validity of the regulation. But the petitioners must accept the language of the regulation, which is identical to the mandate in all federal cost recovery contracts. If the petitioners believed the regulation was unclear, they could have and should have challenged the validity of the regulation. They chose not do so, and, therefore they may prove only that the clear language of the regulation violates their rights.

No matter what the petitioners argue, they cannot remove themselves from requirements of the regulation because the director of the school found calculation to be difficult. Nor can they be made exempt from the regulation because they entered a sweetheart deal to dispose of the property financed by public funds. They have failed to prove that the language of the regulation has violated any of their rights.

Determination

The petitioners allege that the State Board and State Department of Education improperly adopted and applied to them certain regulations concerning cost calculations and affecting the maximum tuition their school may charge. The first part of the allegation must be dismissed immediately. There has been no showing that the adoption of the regulation was in any way improper or beyond the authority invested in the State Board and the State Department by the Legislature. It is black letter law that an agency may act only when it has statutory or incidental authority to act. When a challenge is mounted, however, it is not the burden of the agency to show that it has statutory authority. Rather, it is the burden of the challenger to show that the agency either does not have suitable statutory or incidental authority or has exceeded the statutory authority it has. Neither of these circumstances has been demonstrated. So much of the petition as speaks to improper adoption of *N.J.A.C.* 6:20-4.1 through -4.11, or any part thereof, is **DISMISSED**. It is so **ORDERED**.

What is left is the question whether the regulations applied to Coastal by the respondents were in any manner improperly applied. For the reasons that follow, I **FIND** that there was no misapplication.

First, I **FIND** that the various corporate and partnership forms and embodiments are related organizations. As the State correctly points out, the challenged regulation is not limited to whether the school continued to own the property, but whether the "organization" continued to own the property. Whether one applies traditional state caselaw standards or Internal Revenue Code Standards (see, Section 267), a related party includes a corporation that is controlled by the regulated entity. Penta, Metedeconk and Coastal are organizations under common control. They are, in fact, the same entities in different garb. Arnold is a stalking horse of another color.

The present regulation and its predecessor, *N.J.A.C.* 6:20-4.4(a)39, came into being to prevent precisely the situation that exists here. *Penta Associates, II and Coastal Learning Center v. State of New Jersey, Department of Education*, OAL Dkt. No. EDU 1425-87 (Mar. 23, 1989), aff'd Comm'r of Ed. (May 22, 1989), aff'd St. Bd. (Feb. 9, 1990), aff'd No. A-3631-89T1 (App. Div. July 8, 1991). Thus, it is well settled that the regulation is valid and related organizations are subject to it. Ronald Boedart's testimony establishes that the sale and leaseback were created for several reasons, not the least of which was financial advantage. Making a profit is not a crime and trying to maximize profits is not a transgression. Playing musical chairs with business organizations in order to circumvent a regulation, however, is not permitted.

Preliminarily, the petitioners' assertion that the word organization is not defined in regulation and, therefore, acts as a sort of bar to the State in this action does not withstand scrutiny. If the language is plain, unambiguous and uncontrolled by other parts of the regulation, a court cannot give other than the ordinary meaning to a word or phrase. This standard of interpretation has been employed by New Jersey courts consistently. *Fahey v. Jersey City*, 52 *N.J.* 103 (1968); *Duke Power Co. v. Patten*, 20 *N.J.* 42 (1955); *Imbracco v. State Civil Service Comm'n*, 150 *N.J. Super.* 105 (App. Div. 1977). All of these arguments and those discussed above are subsidiary to the central issue. If the State Department misapplied the rule to Coastal, then Coastal must prevail. If the rule was not misapplied, the State must prevail. The arguments about words are largely without substance. Professor Melvin Eisenberg produced an excellent

article twenty years ago that is as perceptive and applicable today as when written. "Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants" 63 *Cal. L. Rev.* 375, 417-429 (1975). Among other things, Eisenberg addressed generally accepted accounting principles:

> It might seem reasonable to expect that the essential standard for certifying the acceptability of an accounting principle would be that the principle presents fairly the transaction it describes. The accountants, however, do not so interpret the matter. In their view, a principle can be certified as "generally accepted" merely on the basis of pass use in other financial statements or support in the literature. Since accounting principles are selected by management, however, the test of pass use need only mean that a few accountants have agreed not to object . . . ."

Thus, the discussion of word definitions, while entertaining, is not central. The void for vagueness and as applied questions having been put to rest and the semantic arguments having been put aside, the circumstances are these: a sale and leaseback can exist and does exist in the absence of a reverter clause; statutes, ordinances and regulations change fairly often; business organizations seek advantageous positions, and there is often friction between and among these elements. The United States Supreme Court said in *Village of Belle Terre v. Borass*, 416 U.S. 1 8 (1974), "But every line drawn by a legislature leaves out what might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." The same reasoning applies to regulations. Wherever a line is drawn, there will be those who argue that they should be just on the other side.

An administrative agency's interpretation of its regulations is entitled to substantial weight. *Simon v. Board of Trustees*, 233 *N.J. Super.* 186 (App. Div. 1989); *Petition of Adamar of New Jersey*, 222 *N.J. Super.* 464 (App. Div. 1989). The agency's interpretation can be overcome, but the task is a difficult one. That job has not been accomplished in this case. Administrative agencies may pass regulations in light of current or future requirements of the public interest. There is no vested right in the continuation of any regulation. *St. Joseph's Hospital and Medical Center v. Finley*, 153 *N.J. Super.* 214 (App. Div. 1977).

In addition to the findings, above, I **FIND**:

1. Coastal and Arnold are not related parties in the sense discussed above;

2. Coastal and Arnold did not enter an at-arm's-length ten-year lease;

3. As a condition of the property sale by Penta to First Dover, Coastal was required to sign the contract "in order to indicate their assent to the execution of that lease" (P-1);

4. Involvement of Coastal in the sale bespeaks Coastal's position as more than an unrelated tenant;

5. The series of transactions in this case were not unlawful per se;

6. The effect of this series of transactions was an attempt to circumvent *N.J.A.C.* 6:20-4.4(a)47.

Coastal and Arnold are not the same entities in different clothes. They are clearly related, however. I **CONCLUDE** that the series of the moves had as its major object, if not sole object, circumvention of the rule. Therefore, I **CONCLUDE** that the State Department of Education correctly applied *N.J.A.C.* 6:20-4.4(a)47 to Coastal Learning Center, Inc. I further **CONCLUDE** that the petition is without merit. Accordingly, the petition is **DISMISSED**. It is so **ORDERED**.

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

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

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

30 June 1995
DATE

Bruce R. Campbell by [illegible], ALJ
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

July 6, 1995
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 10 1995
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

Robert Boedart
John J. Scott, Jr.

LIST OF EXHIBITS

On behalf of Petitioners:

P-1 Agreement of Sale, Penta to First Dover, December 30, 1986, 15 pp.
P-2 Deed, including description and cover sheet, Penta to Arnold, recorded, Monmouth County, December 31, 1986, 5 pp.
P-3 Lease, Penta to Coastal, July 1984 - June 1989, 4 pp.
P-4 Lease, Arnold to Coastal, January 1, 1987 - June 30, 1997 with two addenda, 9 pp.
P-5 Summary of Comments Received on proposed revision of N.J.A.C. 6:20-4, November 7, 1990, 10 pp.
P-6 Curriculum Vitae, John J. Scott, Jr., CPA, 2 pp.
P-7 Expert report created by John J. Scott, Jr., February 6, 1995, 6 pp. and cover letter
P-8 Statement of Financial Accounting Standards No. 98, Financial Accounting Series, No. 063, May 1988, 51 pp.

On behalf of Respondents:

R-1 Certificate of Amendment to the Certificate of Incorporation of Garden State Educational Consultants, Inc., filed October 13, 1978; Consent to Corporate Action dated September 25, 1978 and filed October 13, 1978; Consent to Corporate Action dated January 30, 1979; Resolutions, September 4, 1980; Resolution, June 15, 1982

OAL DKT. NO. EDU 2535-91

COASTAL LEARNING CENTER, INC., DR. RONALD BOEDART, HELENE BOEDART, JOSEPH J. SCALABRINI, NANCY SCALABRINI, JOHN BRUENIG , VERA BRUENIG, FRANK D. VISCOMI, JOYCE VISCOMI AND ROBERT VISCOMI,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
NEW JERSEY STATE BOARD OF EDUCATION, COMMISSIONER OF EDUCATION, AND STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioners in accordance with N.J.A.C. 1:1-1.18, as were replies thereto by respondents.

In their exceptions, petitioners contend that the ALJ erred in a number of his conclusions, which are neither properly explained nor supported by facts and evidence. First, petitioners argue that the regulation the ALJ accuses them of trying to circumvent was enacted four years *after* the transactions which form the basis of the purported circumvention. (Petitioners' Exceptions at pp. 3-4) Second, petitioners argue that the ALJ erred in determining that a sale and leaseback existed in the instant circumstances; specifically, he failed to recognize that the terms of regulation at issue must be defined in accordance with GAAP, and ignored petitioners' additional evidence, including explanatory comments presented to the State Board by the Division of Finance at the time the regulation was adopted, that a reverter clause is a necessary precondition to any sale and leaseback arrangement. (Id. at pp. 4-10) Third, petitioners contest the ALJ's finding that the 10-year lease entered into by Coastal Learning

Center (Coastal) and Arnold Associates (Arnold) was a less-than-arm's length transaction, as the fact that this lease happened to be negotiated at the same time as Arnold and Penta Associates (Penta) were negotiating sale of the leased building is irrelevant in view of the undisputed lack of relationship between Arnold and Coastal, the fact that both parties acted independently and in their own self-interest, and the unquestioned fairness of the amount of rent being paid to Arnold by Coastal. (Id. at pp. 11-16)

Finally, petitioners urge that the ALJ made several other unsupported findings and conclusions, including 1) reading the regulation at issue to be triggered not by the existence of a sale and leaseback arrangement, but by the existence of an "organization" which would have continued to own the property had it not been sold; 2) assuming that having common owners makes three separate corporate entities a single "organization" and ignoring the fact that a fourth, unrelated, entity actually owns the property at issue; 3) imputing, without any basis in fact, that Arnold Associates is somehow part of a larger scheme or pretextual arrangement operative among the parties; 4) confusing the intent of the "less-than-arm's length" landlord-tenant regulation with the regulation at issue herein, which acts solely to prevent taxpayer subsidy of profits from a "double sale" arrangement; 5) ascribing arguments to petitioners that they did not make, such as the lack of definition of the term "organization" acting as a bar to State action; 6) ignoring petitioners' argument that the regulation at issue impairs Coastal's rights under the Contracts Clause of the United States and New Jersey Constitutions, in that Coastal entered into the instant lease in 1986 with the expectation of recouping its rental costs through tuition, and the 1990 regulation, if applied in this case, would create the devastating result that Coastal must substantially absorb these costs itself; and 7) implying that Arnold and Coastal are in some manner related, even as he states that they are not "related parties." (Petitioners' Exceptions at pp. 16-27)

In reply, respondents (the State) argue that petitioners have confused "as applied" challenge with facial challenge. In the former type of case, the facial validity of a regulation is assumed; the Court is not required to justify the regulation, interpret it, or explore its history; it merely determines if the regulation was properly applied to a given circumstance. The State avers that the fundamental question to be resolved in this case is a simple one, i.e., whether N.J.A.C. 6:20-4.4(a)(47) applies to the petitioners' lease arrangement, or put another way,

whether the lease arrangement at issue was a sale and leaseback, and whether the various entities involved constituted an "organization" within the purview of the regulation, so as to invoke the State's application of the regulation. (Respondents' Reply Exceptions at pp. 1-4) With respect to petitioners' contention that their arrangement is not a sale and leaseback because the controlling agreement lacks a reverter clause, petitioners cannot add a term to the regulation which is not expressly contained within the language adopted by the State Board; neither can they attribute to the Board any intent or interpretation beyond what is stated in the actual regulation as adopted, including requirements that GAAP or real estate principles will control for purposes other than accounting. (Id. at pp. 4-6) With respect to the parties' constituting an organization, the State notes that Coastal, Penta and Metedeconk are all related parties under the control of the same five shareholders, notwithstanding their individual corporate identities, so that they are clearly an "organization" within the purview of the regulation at issue. (Id. at pp., 3) The State further argues that, while petitioners' may not, as a matter of history, have created their lease arrangement for the specific purpose of circumventing a regulation that did not yet exist, their machinations nonetheless created an arrangement to which the regulation, once adopted, applied. (Id. at p. 6)

Additionally, the State contends that the entire lease proceeding undertaken by the parties was plainly a less-than-arm's length transaction, as evidenced by facts such as 1) Bruce Bowe, whose corporation came into existence solely to purchase the property at issue, having written to the Department of Education on behalf of Coastal, which he was then serving as certified public accountant, to advise that he would tell the school to enter a sale and leaseback arrangement if related party regulations went into effect in 1986 as proposed; and 2) no appraisal was ever done of the property prior to sale, as Bowe and Boedart simply decided what the selling price should be and anticipated that it would be recouped via public school tuition payments. (Respondents' Reply Exceptions, at pp. 6-7) Finally, the State avers that petitioners' federal and state contract clause arguments were correctly ignored by the ALJ, in that they do not apply to a matter where the contract at issue remains in full force and effect, as Coastal's contract with its landlord does herein. (Id. at p. 7)

Upon independent review and consideration of the record, including the transcript of hearing, the Commissioner is satisfied that the ALJ fully and fairly summarized the testimony

and arguments of the parties, and correctly concluded from these that the lease arrangement operative among petitioners herein fell within the ambit of N.J.A.C. 6:20-4.4(a)47.

In so holding, the ALJ inherently rejected, and the Commissioner herein expressly rejects, petitioners' contention that the meaning of the regulatory provision at issue is controlled by GAAP, real estate practice or any other external consideration over and above what is stated in the regulation on its face, accorded its ordinary meaning, so as to impose technical requirements not specifically embodied in the rule (e.g., that a reverter clause is a necessary component of a sale and leaseback). The Commissioner further finds petitioners' claim of distinct corporate entities to be disingenuous in light of the fact that the corporations in question are undisputedly owned by the same five people, all closely engaged in various business arrangements with each other; likewise unpersuasive is petitioners' reliance on the "nonrelated" status of Arnold Associates, when the record clearly establishes that one of that firm's three partners is the former accountant for Coastal. Finally, while the ALJ did not, in his determination, specifically address petitioners' arguments based on state and federal contract law, he did summarize both parties' positions and may be presumed not to have been persuaded by petitioners' claims, as the Commissioner is not for the reasons given by the State in its post-hearing submission (referenced in Initial Decision at pp. 18-19).

Accordingly, the Commissioner affirms determination of the ALJ to dismiss the Petition of Appeal, based on his conclusions that N.J.A.C. 6:20-4.4(a)47 was properly adopted and applied to petitioners, and that State respondents acted appropriately in excluding affected rental amounts from the tuition rate at which Coastal Learning Center is permitted to charge public school districts contracting for its services.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 12, 1996
Date of Mailing, January 16, 1996

15-96

COASTAL LEARNING CENTER, INC., DR. RONALD BOEDART, HELENE BOEDART, JOSEPH J. SCALABRINI, NANCY SCALABRINI, JOHN BRUENIG , VERA BRUENIG, FRANK D. VISCOMI, JOYCE VISCOMI AND ROBERT VISCOMI,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
NEW JERSEY STATE BOARD OF EDUCATION, COMMISSIONER OF EDUCATION, AND STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning private, for-profit school for the handicapped, together with its owner/operators, contended that the State Board and State Department of Education improperly adopted and applied to them a regulation (N.J.A.C. 6:20-4.4(a)47) excluding certain rental costs from the rate of tuition chargeable to public school districts, specifically, excess rental charges attributed to a sale and leaseback arrangement, wherein a facility is sold to another entity and then leased back at a cost higher than would have been incurred had the facility not been sold. Petitioners contended that their rental arrangement did not constitute a sale and leaseback.

ALJ found that petitioners' rental arrangement did in fact constitute a sale and leaseback within the purview of the regulation, so that the State Department acted properly in applying the regulation to petitioners. ALJ further found no impropriety in State Board's adoption of the regulation at issue. Petition was dismissed.

Based on independent review of record, Commissioner concurred with ALJ's conclusions and dismissed appeal.

15-96

EDU #2535-91
C # 15-96
SB # 12-96

COASTAL LEARNING CENTER, INC., DR. RONALD BOEDART, HELEN E. BOEDART, JOSEPH J. SCALABRINI, NANCY SCALABRINI, JOHN BRUENIG, VERA BRUENIG, FRANK D. VISCOMI, JOYCE VISCOMI AND ROBERT VISCOMI,

PETITIONERS-APPELLANTS,

V.

NEW JERSEY STATE BOARD OF EDUCATION, COMMISSIONER OF EDUCATION AND STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 12, 1996

For the Petitioners-Appellants, Timothy N. Middleton, Esq.

For the Respondents-Respondents, Arlene G. Lutz, Deputy Attorney General (Deborah T. Poritz, Attorney General of New Jersey)

The State Board of Education affirms the Commissioner's determination that petitioners' rental arrangement constituted a sale and leaseback arrangement within the meaning of N.J.A.C. 6:20-4.4(a)(47) so that the State Department of Education acted properly in applying the regulation to them. In so doing, we stress that as the Appellate Division has found, and contrary to petitioners' claims in these proceedings, Coastal Learning Center and Penta are essentially one entity. Penta

2/10/96

Associates II and Coastal Learning Center v. State of New Jersey, Department of Education and the Commissioner of Education, Docket #A-3631-89T1 (App. Div. 1991). Hence, and substantially for the reasons expressed by the Administrative Law Judge (ALJ) and the Commissioner, we affirm the Commissioner's ultimate determination that the New Jersey Department of Education properly disallowed rental costs from the calculation of tuition that were in excess of those that Coastal would have incurred had Penta continued to own the property. N.J.A.C. 6:20-4.4(a)(47). We also stress that pursuant to its express terms, N.J.A.C. 6:20-4.4(a)(47) applies to all sale and leaseback arrangements so that whether or not Arnold and Coastal are considered to be "related parties" by virtue of the fact that Coastal's former accountant is a general partner in Arnold is not determinative of the result in this case.

July 10, 1996

Date of mailing JUL 12 1996

(SB) 16-96

SB # 16-96

IN THE MATTER OF THE REVOCATION : STATE BOARD OF EDUCATION

OF THE TEACHING CERTIFICATE OF : DECISION ON MOTION

SHAWN R. HINES. :

Decided by the State Board of Examiners, October 19, 1995

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General
(Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Shawn R. Hines, pro se

The State Board of Education grants the Board of Examiners' motion to supplement the record with the certification of Ida B. Graham, Director of the Office of Licensing and Credentials.

June 5, 1996

Date of mailing JUN 07 1996

(SB) 16-96

SB #16-96

IN THE MATTER OF THE REVOCATION :
OF THE TEACHING CERTIFICATE OF :
SHAWN R. HINES. :

STATE BOARD OF EDUCATION

DECISION

Decided by the State Board of Examiners, October 19, 1995

Decision on motion by the State Board of Education, June 5, 1996

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General
(Deborah T. Poritz, Attorney General of New Jersey)

For the Respondent-Appellant, Shawn R. Hines, pro se

This matter is before us by virtue of an appeal filed by Shawn R. Hines (hereinafter "respondent") from a decision made by the State Board of Examiners revoking a county substitute certificate issued to him on October 23, 1993, pursuant to N.J.A.C. 6:11-4.5.[1] The proceedings that resulted in that decision were initiated when the Commissioner of Education notified the State Board of Examiners that a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 had revealed that

[1] N.J.A.C. 6:11-4.5 provides in pertinent part that:

> (a) Persons who do not hold a standard instructional certificate issued by the State Board of Examiners but who can present a minimum of 60 semester-hour credits...may be granted a county substitute certificate for day-to-day substitute teaching in the county which grants the certificate.
> (b) Each district board of education shall submit to the county superintendent for review and approval, each applicant's official transcripts, oath of allegiance, and credentials.
> (c) The certificate will be issued for a three-year period, but the holder may serve for no more than 20 consecutive days in the same position during the school year. Such certificates, which are issued by the county superintendent of schools, are to be granted only when the supply of properly certificated teachers is inadequate to staff the school....

11/6/96

respondent had been convicted of criminal assault.[2] On May 30, 1995, the State Board of Examiners issued an order to show cause why respondent's county substitute certificate should not be revoked on the basis of this conviction.[3] When respondent did not respond to that order, the State Board of Examiners deemed him to be in default and voted to revoke his county substitute certificate.[4]

On March 10, 1996, respondent filed an appeal to the State Board of Education from the decision of the State Board of Examiners, claiming that he had not received the Board of Examiners' decision until February 12, 1996,[5] and maintaining that he had never received notice of the proceedings that resulted in the Board of Examiners' determination to revoke his county substitute certificate. He also argued that the Board of Examiners' decision should be reversed because the State Board of Education had found that his conviction for simple assault was not a disqualifying offense under N.J.S.A. 18A:6-7.1 in the absence of bodily injury.[6] In the Matter of the Disqualification

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[2] N.J.S.A. 18A:6-7.3 requires the Commissioner of Education to furnish the State Board of Examiners with the names of those individuals who are disqualified from employment under N.J.S.A. 18A:6-7.1 and their disqualifying offense.

[3] N.J.A.C. 6:11-3.6(2) provides that the State Board of Examiners may authorize the issuance of an order to show cause upon knowledge of any criminal conviction as described in N.J.S.A. 2C:51-2(a) involving a certificate holder.

[4] N.J.A.C. 6:11-3.6(b) provides that cases which are not contested are to be referred to the Secretary of the Board of Examiners for determination of revocation.

[5] Pursuant to N.J.S.A. 18A:28-6, appeals to the State Board of Education must be filed within thirty days of the filing date of the decision being appealed.

[6] The State Board of Education, however, remanded that matter to the Commissioner for a determination as to the outcome of an arrest for the possession of marijuana which had been revealed by review of the record. In a decision issued on December 6, 1995 pursuant to our remand, the Deputy Commissioner found that the marijuana charge had been vacated and all fines paid. The Deputy Commissioner therefore concluded that respondent was "qualified" for school employment. By decision of June 5, 1996, we clarified the Deputy Commissioner's decision and dismissed the appeal.

from School Employment of Shawn Hines, decided by the State Board of Education, September 6, 1995.

On April 3, 1996, the State Board of Examiners filed a motion to supplement the record in this matter with a certification by Ida B. Graham, Director of the Office of Licensing and Credentials, detailing the steps taken by the Board of Examiners to notify respondent of the revocation proceedings and of its determination. By decision of June 5, 1996, the State Board of Education granted the motion, and the briefing schedule was reestablished. After both parties had submitted their briefs, the matter was placed before the State Board and scheduled for our consideration.

However, pursuant to the terms of N.J.A.C. 6:11-4.5(c), respondent's county substitute certificate expired on October 23, 1996, three years from its date of issuance. See supra n.1. Hence, this matter is now moot. In the absence of any significant public interest, we therefore dismiss the appeal. In so doing, we stress that county substitute certificates, in contrast to standard certificates, are issued by the county superintendent rather than by the State Board of Examiners and, as the State Board of Examiners acknowledged in its brief in support of its motion to supplement the record, are not teaching certificates.

November 6, 1996

Date of mailing NOV 08 1996

(SB) 17-96

SB #17-96

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL FOR THE BOARD OF EDUCA-	:	
TION OF THE WALLINGTON SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT, BERGEN COUNTY.	:	DECISION

Decided by the Commissioner of Education, March 12, 1996

This matter was initiated by a request made by the Board of Education of the Wallington School District (hereinafter "Board") to the Commissioner of Education pursuant to N.J.S.A. 18A:7D-28(e) to exceed its maximum permissible budget for 1996-97 by $216,580. The Commissioner approved $168,188 of the request, and denied $48,392.

On appeal, the Board is seeking a modification of the Commissioner's determination so as to increase the amount awarded by $29,450. This portion of the waiver was intended to permit the Board to make computer hardware purchases as planned under its five-year technology plan. In denying this portion of the Board's request, the Commissioner accepted the County Superintendent's recommendation. That recommendation was based on the rationale that since this was a "[p]roposed increase for equipment which had been deferred this year...then [it was] not essential and [could be] defer[red] again." 1996-1997 Cap Waiver Request, County Superintendent's Budget Review and Reallocation Analysis, at 16.

3/27/96

The Board argues that technology is an integral part of a thorough and efficient education. It contends that this is demonstrated by the fact that technology-based education is a common theme throughout the proposals being made by the Department of Education, such as those for core curriculum standards. Consequently, it is the Board's position that the Commissioner should not have accepted the County Superintendent's recommendation to deny this portion of the waiver.

In order to convince us to increase the amount of the cap waiver approved by the Commissioner, the Board must demonstrate that it is necessary to further increase its maximum permissible budget in order for the school district to be able to provide a thorough and efficient education to its students. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995, appeal dismissed, Docket #4098-94T2 (App. Div. 1995); cf. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

After carefully reviewing the documentation, we agree with the Board that a waiver for the additional amount is necessary in this instance. Again, the Board sought this portion of the waiver in order to continue implementing its five-year technology plan. That plan had been developed during 1992-93, and the Board began implementing it in 1994-95. Review of the plan shows that it is a modest plan, aimed at meeting the technology needs of the students in a K-12 district whose enrollment has increased from 1,111 students in 1993 to 1,199 in 1995.

We do not agree with the County Superintendent that the proposed equipment purchases should be deferred this year. The fact that they had been deferred last year due to budgetary constraints indicates to us that it is prudent to enable the school district to make the purchases this year. There is no question that the need for this equipment remains and deferring the purchases once again will only compound the situation. In our view, this portion of the waiver requested by the Board represents funding for an existing program. Moreover, as the Board has highlighted, technology-based education is a common theme throughout all of the proposals for educational improvement being made by the Department of Education, including the core curriculum standards which the State Board is now considering. We find that the expenditures planned by the Wallington School District in order to be able to provide such an education are more than warranted at this point.

Therefore, for the reasons stated, we modify the Commissioner's determination so as to increase the amount of the cap waiver granted to the Board of Education of the Wallington School District by $29,450. In so doing, we stress that the funds generated by this waiver must be dedicated by the school district to the specific purchases of computer hardware that the Board proposed in seeking the waiver.

March 27, 1996

Date of mailing MAR 27 1996

18-96L

C #18-96L
SB # 9-96

PAUL McVEIGH, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, January 17, 1996

For the Petitioner-Appellant, Paul McVeigh, pro se

For the Respondent-Respondent, Fogarty & Hara (Rodney T. Hara, Esq., of Counsel)

On January 10, 1996, Paul McVeigh (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education seeking to set aside the results of a bond referendum conducted by the Board of Education of the Westwood Regional School District (hereinafter "Board") on December 19, 1995. On January 17, 1996, the Commissioner dismissed the petition, finding that petitioner had failed to file within 20 days of the election as required by N.J.S.A. 18A:24-65.

Petitioner filed the instant appeal to the State Board of Education. The Board filed an answer brief, along with a motion seeking an expedited decision by the State Board.

5/1/96

After a careful review of the record, we reverse the determination of the Commissioner that the petition was not filed in a timely manner.

N.J.S.A. 18A:24-65 provides that:

> No action to contest the validity of any proceeding or election authorizing the issuance of any bonds...shall be commenced after the expiration of 20 days from the date of...the holding of such election.

Since the challenged election in this instance was held on December 19, 1995, petitioner was required to have filed his petition with the Commissioner by Monday, January 8, 1996. The record indicates that petitioner mailed his petition by certified mail on Friday, January 5. However, as the result of a blizzard which occurred during the weekend of January 6-7, the Governor issued an executive order declaring a statewide State of Emergency, and State offices were closed on January 8. Although the State of Emergency was lifted the next day, Tuesday, January 9, we have ascertained that there was no mail delivery that day to the Department of Education offices in the building occupied by the Commissioner because of the severe weather conditions. Consequently, it was not possible to file anything with the Commissioner by mail on either January 8 or January 9. The petition was, in fact, received by the Commissioner the following day, Wednesday, January 10, the first day after the storm when such filing was possible. Additionally, we have learned that January 8 was deemed the same as a legal holiday for purposes of computing time periods under the Rules of Court. Notice to the Bar from Chief Justice Robert N. Wilentz, dated January 19, 1996. Under these circumstances, fairness dictates that the petition be deemed filed in a timely manner on January 10.

Accordingly, inasmuch as we conclude that petitioner filed his petition with the Commissioner in a timely manner, we reverse the decision of the Commissioner dismissing the petition and remand this matter to him for further proceedings.[1] Given the amount of time which has already passed, however, we direct that such proceedings and a final determination by the Commissioner be rendered on an expedited basis.

We do not retain jurisdiction.

May 1, 1996

Date of mailing MAY 03 1996

[1] We note that while the Commissioner made reference in his decision to the fact that petitioner had failed to submit the signatures of ten qualified voters in filing his petition, N.J.S.A. 18A:14-64, his determination to dismiss the petition was not predicated on such failure. We therefore do not pass upon the applicability of N.J.S.A. 18A:14-64 to this matter or the effect of such failure upon the petition.

18-96

C # 18-96L
SB # 9-96
EDU #5172-96
C # 350-96
SB # 67-96

PAUL McVEIGH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, January 17, 1996

Remanded by the State Board of Education, May 1, 1996

Decision on remand by the Commissioner of Education, August 12, 1996

For the Petitioner-Appellant, Paul McVeigh, pro se

For the Respondent-Respondent, Fogarty & Hara (Rodney T. Hara, Esq., of Counsel)

Paul McVeigh (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education seeking to set aside the results of a bond referendum conducted by the Board of Education of the Westwood Regional School District (hereinafter "Board"). On August 12, 1996, the Commissioner dismissed the petition.

On September 13, 1996, petitioner filed the instant appeal to the State Board. He thereafter filed a motion to supplement the record on appeal pursuant to N.J.A.C.

12/4/96

6:2-1.9, and, on October 3, 1996, we placed the briefing schedule in abeyance pending our decision on that motion.

After careful review, we deny petitioner's motion. Petitioner has not demonstrated that the information he now seeks to offer was not available to him during the earlier proceedings in this matter. Cf. In the Matter of the Tenure Hearing of David Borrelli, decided by the State Board, July 6, 1994. Nor has he shown that the proposed submissions are material to the issues on appeal. We further find that the record established below is sufficient to permit a fair determination of this matter. Consequently, we find no basis for supplementation in this instance.

Accordingly, we reestablish the briefing schedule and direct that petitioner file a brief in support of his appeal within twenty days from the date of this decision. The Board shall file its responsive brief within twenty days thereafter.

December 4, 1996

Date of mailing DEC 06 1996

C # 18-96L
SB # 9-96
EDU #5172-96
C # 350-96
SB # 67-96

18-96

PAUL B. McVEIGH,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 17, 1996

Remanded by the State Board of Education, May 1, 1996

Decision on remand by the Commissioner of Education, August 12, 1996

Decision on motion by the State Board of Education, December 4, 1996

For the Petitioner-Appellant, Paul B. McVeigh, pro se

For the Respondent-Cross/Appellant, Fogarty & Hara (Rodney T. Hara, Esq., of Counsel)

The decision on remand of the Commissioner of Education is affirmed substantially for the reasons expressed therein. We add only with regard to the issue of petitioner's standing to bring the instant action that New Jersey has historically taken a liberal approach to the issue of standing. Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98, 101 (1971); Ridgewood Educ. Assn. v. Ridgewood Bd. of Educ., 284 N.J. Super. 427 (App. Div. 1995).

March 5, 1997

Date of mailing MAR 0 7 1997

(SB) 18-96

SB #18-96

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL FOR THE BOARD OF EDUCA-	:	
TION OF THE HALEDON SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT, PASSAIC COUNTY.	:	DECISION

Decided by the Commissioner of Education, March 12, 1996

This matter was initiated by a request made to the Commissioner of Education pursuant to N.J.S.A. 18A:7D-28(e) by the Board of Education of the Haledon School District (hereinafter "Board") to exceed its maximum permissible budget for 1996-97 by $168,422. The Commissioner approved $119,643 of the request, and denied $48,779.

On appeal, the Board is seeking modification of the Commissioner's determination so as to increase the amount awarded. The Board specifically challenges the amount of $40,500 denied by the Commissioner. This portion of the waiver included $24,000 to permit the school district to purchase computers and supporting equipment as planned under its five-year technology plan, and $16,500 for renovation of a shop room to create two new student areas to accommodate therapy sessions and physical education programs for preschool handicapped and autistic classes, and to provide group instruction and activities for combined special education classes.

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In denying these portions of the Board's request, the Commissioner accepted the County Superintendent's recommendation, which was based on the rationale that "[p]urchase of two computers can be deferred @ $12,000 = $24,000," and that the "District does not need two classes from renovated shop for 1996/97. Leave in $6,500 to start process for 1997/98 school year use." 1996-1997 Cap Waiver Request, County Superintendent's Budget Review and Reallocation Analysis, at 16-17.

The Board argues that technology is essential to its provision of a thorough and efficient education and that the renovations to its shop room are essential in order to maintain programs for its increased population and special education students. Consequently, it is the Board's position that the Commissioner should not have accepted the County Superintendent's recommendation to deny these portions of the waiver.

In order to convince us to increase the amount of the cap waiver approved by the Commissioner, the Board must demonstrate that it is necessary to further increase its maximum permissible budget in order for the school district to be able to provide a thorough and efficient education to its students. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995, appeal dismissed, Docket #4098-94T2 (App. Div. 1995); cf. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

After careful review of the documentation, we affirm the Commissioner's determination granting approval to the Board to exceed its maximum permissible budget by $119,643 pursuant to N.J.S.A. 18A:7D-28(e) and, in addition, modify that decision so as to increase the amount of the Board's request approved by the Commissioner by an additional $24,000. We agree with the Board that a waiver in the additional amount of $24,000 is necessary in this instance for implementation of its five-year technology plan. Review of that plan shows that it includes modest goals aimed at meeting the technology needs of the school district's students. The Board's stated goals for 1996-97, the first year of its written plan, include supplying the fourth, fifth and sixth grades with a computer and printer in each classroom. That plan had been developed during the 1995-96 school year, and the Board has already begun implementing it with purchases of computers for the library and selected classrooms. The Board also indicates that it received a funding grant in the amount of $5,911 from the State for technology development.

We do not agree with the County Superintendent that the proposed purchases should be deferred. There is no question that the need for this equipment remains and deferring the purchases will only compound the situation. Moreover, technology-based education is a common theme throughout all of the proposals for educational improvement being made by the Department of Education, including the core curriculum standards which the State Board is now considering. We find that the expenditures planned by this school district in order to be able to provide such an education are more than warranted at this point. We note further that the County

Superintendent erred in indicating that the Board proposes purchasing two computers at $12,000 each. The $24,000 represents two capital outlay line items in the amount of $12,000 each, and the Board's five-year technology plan calls for providing the fourth, fifth and sixth grades with a computer and printer in each classroom in 1996-97.

We, however, concur with the Commissioner's determination to deny the Board's request for $16,500 to renovate a shop room to create two new student areas. We find that the Board has failed to demonstrate that it is necessary to further increase its maximum permissible budget by such amount in order for the school district to be able to provide a thorough and efficient education to its students.

Thus, for the reasons stated, we modify the Commissioner's determination so as to increase the amount of the cap waiver granted to the Haledon School District by $24,000. In so doing, we stress that the school district is required to dedicate the funds generated by this waiver to the purchase of technology equipment and that such funds must be utilized in a manner which is consistent with the specific goals set forth for 1996-97 in its five-year plan.

March 27, 1996

Date of mailing MAR 27 1996

(SB) 19-96

SB #19-96

IN THE MATTER OF THE CAP WAIVER APPEAL FOR THE BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, March 12, 1996

For the Appellant, Dennis A. Maycher, Esq.

This appeal challenges a decision made by the Commissioner of Education which denied in full the request made by the Board of Education of the Carlstadt-East Rutherford Regional High School District (hereinafter "Board") pursuant to N.J.S.A. 18A:7D-28(e) to exceed its maximum permissible budget for 1996-97 by $74,813. The Commissioner's decision was based on his determination to reallocate $100,790, which included $506 from the general fund free balance and $65,667 from surplus balances.

On appeal, the Board is seeking modification of the Commissioner's determination denying its request. The Board now seeks a waiver in the reduced amount of $36,390.

After careful review, the State Board of Education affirms the Commissioner's determination denying approval to the Board to exceed its maximum permissible budget pursuant to N.J.S.A. 18A:7D-28(e). We stress that the Board was required to

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demonstrate to us that an increase beyond its maximum permissible budget was required in the amount it had requested in order for the school district to be able to provide a thorough and efficient education. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995, appeal dismissed, Docket #4098-94T2 (App. Div. 1995); cf. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

After reviewing the documentation, we are not convinced that it is necessary for the Board to increase its maximum permissible budget as requested. We note in so doing that the Board has failed to demonstrate that the amounts reallocated from surplus by the Commissioner would leave it with insufficient funds to meet any unexpected circumstances or in any way impede its ability to provide a thorough and efficient education.

March 27, 1996

Date of mailing MAR 27 1996

21-96

21-96

IN THE MATTER OF THE TENURE :
HEARING OF HERMINE POTTS, SCHOOL :
DISTRICT OF ATLANTIC CITY, :
ATLANTIC COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

JANUARY 19,, 1996

OAL DKT. NO. EDU 531-94

IN THE MATTER OF THE TENURE :
HEARING OF HERMINE POTTS, SCHOOL :
DISTRICT OF ATLANTIC CITY, :
ATLANTIC COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 19, 1996
DATE OF MAILING JANUARY 19, 1996

(SB) 21-96

SB #21-96

IN THE MATTER OF THE CAP WAIVER :
APPEAL FOR THE BOARD OF EDUCA- :
TION OF THE WASHINGTON TOWNSHIP: STATE BOARD OF EDUCATION
SCHOOL DISTRICT, MERCER COUNTY. : DECISION

Decided by the Commissioner of Education, March 12, 1996

This matter was initiated by a request made by the Board of Education of the Washington Township School District (hereinafter "Board") to exceed its maximum permissible budget for 1996-97. By its request, the Board sought approval to place before the voters a budget which would exceed its permissible budget by a total of $938,932. $815,086 of this amount was included in the Board's request to the Commissioner pursuant to N.J.S.A. 18A:7D-28(e). In addition, the Board sought approval to exceed its permissible budget by another $204,816 to fund other items it deemed necessary to the provision of a thorough and efficient education. It also proposed to seek voter approval pursuant to N.J.S.A. 18A:7D-28(f) to raise the amount of the tax levy beyond its maximum permissible net budget by another $99,030 in order to fund items that it desired, but which were not essential to the provision of a thorough and efficient education.

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By letter of March 12, 1996, the Commissioner granted the Board a waiver of its budget limitation pursuant to N.J.S.A. 18A:7D-28(e) in the amount of $785,352. The Board has appealed that determination to the State Board.

By this appeal, the Board is seeking to fund additional items totaling $164,550 above the amount of the cap waiver granted by the Commissioner under N.J.S.A. 18A:7D-28(e). Specifically, the Board is seeking a determination by the State Board that the additional items it wishes to fund are necessary for a thorough and efficient education. The Board would then submit the question to the voters pursuant to N.J.S.A. 18A:7D-28(f).

However, as set forth in our decision in Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994, all amounts that are essential in order for a given school district to provide a thorough and efficient education are to be included in that portion of the proposed education budget placed before the voters pursuant to N.J.S.A. 18A:22-7 et seq., and none of those amounts should be included in proposals made under authority of N.J.S.A. 18A:7D-28(f). Edgewater, supra, at 14. Hence, to the extent we find any of the items at issue in this case to be necessary for the provision of a thorough and efficient education, the proper course is to direct an increase in the amount of the waiver which the Commissioner has granted pursuant to N.J.S.A. 18A:7D-28(e), rather than to permit the Board to place the question before the voters pursuant to N.J.S.A. 18A:7D-28(f).

In this respect, we stress that although this school district met the criteria specified by N.J.S.A. 18A:7D-28(e) in order for a district board to be eligible to request a waiver of its budget limitation from the Commissioner, the terms of that provision did not entitle the Board to a waiver for any specific amount. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995, appeal dismissed, Docket #4098-94T2 (App. Div. 1995). Similarly, the terms of N.J.S.A. 18A:7D-28(e) do not limit the authority of the Commissioner of Education to determine the amount by which it is necessary for a board that meets the statutory criteria to exceed its maximum budget in order to provide a thorough and efficient education.

We have carefully reviewed each of the items which the Board contends is necessary in order for it to provide a thorough and efficient education to its students, and we have scrutinized the amounts it claims are necessary to fund those items. Among those items is an increase of .4 for a guidance counselor position ($15,000) to allow this one person to provide services to 819 students in three locations. It also seeks the funds to support the first year of a lease purchase arrangement ($8,000) to obtain a truck in order to facilitate sharing cleaning equipment and snow removal among its three buildings.

On the basis of the documentation that has been provided and the arguments submitted by the Board in support of its appeal, we conclude that the Board has demonstrated the necessity to direct a further increase in the school district's maximum permissible budget by an additional $8,000 to support the lease purchase arrangement

by which it proposes to obtain a truck with a snowplow to ensure that its students will have access to school during periods of snow. We also find that the Board has demonstrated the need for an additional $15,000 to meet the school district's need for guidance services at its three schools. However, the Board has not convinced us that it is necessary to fund the other items it desires in order for the school district to provide a thorough and efficient education in 1996-97.

Accordingly, we direct that the Commissioner's determination be modified so as to increase by $23,000 the amount of the cap waiver granted the Board pursuant to N.J.S.A. 18A:7D-28(e). In so doing, we stress that the funds generated by this waiver must be dedicated by the school district to the purposes for which they have been awarded by this decision. We further stress that the Board may seek to fund those items which we have not found essential by including them in the proposal it is submitting to the voters pursuant to N.J.S.A. 18A:7D-28(f).

March 27, 1996

Date of mailing MAR 27 1996

(SB) 22-96

SB #22-96

IN THE MATTER OF THE CAP WAIVER :
APPEAL FOR THE BOARD OF EDUCA- :
TION OF THE NORTH ARLINGTON : STATE BOARD OF EDUCATION
SCHOOL DISTRICT, BERGEN COUNTY. : DECISION

Decided by the Commissioner of Education, March 12, 1996

For the Appellant, Fogarty & Hara (Stephen R. Fogarty, Esq., of Counsel)

This matter was initiated by a request made to the Commissioner of Education by the Board of Education of the North Arlington School District (hereinafter "Board") pursuant to N.J.S.A. 18A:7D-28(e) to exceed its maximum permissible budget for 1996-97 by $222,050. The Commissioner approved $132,781 of the request, and denied $89,269.

On appeal, the Board is seeking modification of the Commissioner's determination so as to increase the amount awarded. The Board specifically challenges the amount of $27,000 denied by the Commissioner. This portion of the waiver includes $10,000 to cover a deficit in the North Arlington School District's food services account, $10,000 for professional educational services, and $7,000 to convert a guidance services secretary to full-time. The Board contends that such additional amounts are necessary in order to provide a thorough and efficient education.

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After careful review, the State Board of Education affirms the Commissioner's determination granting approval to the Board to exceed its maximum permissible budget by $132,781 pursuant to N.J.S.A. 18A:7D-28(e) and denying it approval to further exceed its permissible budget. In so doing, we stress that the Board was required to demonstrate to us that an increase beyond its maximum permissible budget was required in the amount it had requested in order for the school district to be able to provide a thorough and efficient education. In the Matter of the Cap Waiver Appeal for the Board of Education of the Hopewell Valley Regional School District, decided by the State Board, April 5, 1995, appeal dismissed, Docket #4098-94T2 (App. Div. 1995); cf. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, decided by the State Board, July 6, 1994.

After reviewing the documentation, we find that the Board has failed to demonstrate that an increase beyond its maximum permissible budget is required in the amount requested on appeal in order for the North Arlington School District to be able to provide a thorough and efficient education. Consequently, we are not convinced that it is necessary for the Board to increase its maximum permissible budget beyond the amount of the increase approved by the Commissioner.

March 27, 1996

Date of mailing MAR 27 1996

24-96

24-96DHP

IN THE MATTER OF THE DISQUALIFI- :

CATION FROM SCHOOL EMPLOYMENT : COMMISSIONER OF EDUCATION

OF RALPH McCULLOUGH. : DECISION

:

January 18, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8581-95

AGENCY DKT. NO. DHP #440

RALPH McCULLOUGH,

Petitioner,

v.

NEW JERSEY STATE

DEPARTMENT OF EDUCATION,

Respondent.

Ralph McCullough, petitioner, pro se

Respondent, appearing pursuant to *N.J.A.C.* 1:1-5.6(a)

Record Closed: November 14, 1995 Decided: November 30, 1995

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises as a result of a decision issued by respondent, State Board of Education (Board) on or about July 5, 1995, remanding these proceedings to the Commissioner of Education for a hearing. The purpose of the hearing is to provide Mr. McCullough with an adequate opportunity to establish a record in support of his contention that he has satisfied the

statutory standard for "rehabilitation" pursuant to *N.J.S.A.* 18A:6-7.1(e), following his conviction of crimes which disqualified him from school employment. Following the remand by the Board to the Commissioner of Education, the latter transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 on September 20, 1995. The matter was heard at the Office of Administrative Law, Mercerville, New Jersey on November 14, 1995 at which time the record closed.

ISSUE AND BURDEN OF PROOF

The sole issue to be determined in these proceedings is whether pursuant to *N.J.S.A.* 18:6-7.1(e) the petitioner can demonstrate that he should not be disqualified from school employment on the basis of his criminal record in that he may demonstrate that he has been rehabilitated. In respect to this issue, the burden rests exclusively on the petitioner: Mr. McCullough must affirmatively demonstrate by clear and convincing evidence that he has been rehabilitated.

THE FACTS

I FIND:

Based on the Board's review of the submissions made by Mr. McCullough to the Deputy Commissioner of Education, the former found that Mr. McCullough "has shown significant evidence of rehabilitation on that basis alone." Board remand order July 5, 1995 at 2. The purpose of the OAL proceedings therefore is to give Mr. McCullough an even greater opportunity to reinforce the decision already arrived at by the Board.

The facts in this matter are not in dispute. Mr. McCullough is a 36 year-old man who has acknowledged that he has had a history of alcohol and drug abuse dating from the mid-1980s when he was in his late twenties. He indicated that he was the product of a divorced family in which his father was volatile and, in which he, the petitioner, was not welcome in the home. He lived mostly on the streets at that time and occasionally at home.

Mr. McCullough, as a result of his acknowledged alcohol difficulties, was involved in a variety of petty crimes including shoplifting for which he was arrested on February 23, 1984 and found guilty on March 29, 1984. His sentence was a fine of $325 and one-year of probation. Apparently there was another shoplifting charge accompanying the foregoing for which he was also found guilty on the same date, March 29, 1984 and he was sentenced to the Mercer County Work House for what appears to be 30 days. He was also assessed a fine in the amount of $275.[1] Earlier, on November 8, 1978, Mr. McCullough was arrested and charged with possession of amphetamines. No disposition is indicated on the document eluded to; however, Mr. McCullough represents that the charges were dismissed.

The two charges which ostensibly resulted in Mr. McCullough's disqualification from school employment occurred in 1987. On April 11, 1987, he was arrested for possession of dangerous drugs. He indicated in his testimony that it was crack cocaine. On October 22, 1987 he was arrested and charged with possession of narcotic equipment, which he indicated was a small crack pipe. He was found guilty on both charges and sentenced to a fine of $225 and, although not found in the documents, Mr. McCullough indicated that he also served a short period, perhaps 12 to 13 days, in the Mercer County Workhouse and placed on probation. This was the last criminal conviction of Mr. McCullough for any crime.

On November 30, 1993, Mr. McCullough, as an incident to his application for employment within the school system, completed an application authorization and certification with the New Jersey State Department of Education Office of Criminal History Review. To the best of Mr. McCullough's recollection, he applied for and was accepted as a custodian in an elementary school in East Windsor Township, New Jersey, the Kreps Elementary School. After what he believed to be several months, perhaps two to three months in that position, he was formally advised that he was terminated as a consequence of his disqualification from school employment based upon his criminal record.

[1] The arrest and conviction record to which I refer was contained in the transmittal documents and is a printout with a cover letter of January 31, 1994, by a representative of the Office of Criminal History Review.

Thereafter, as was noted in the procedural history of this matter, the Board, overruling the administrative decision made by the Deputy Commissioner of Education concluded "on the papers" that Mr. McCullough had demonstrated through his submissions his rehabilitation pursuant to the applicable criteria set forth at *N.J.S.A.* 18A:6-7.1.

Subdivision (e) of that statue provides as follows:

> Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
> (1) The nature and responsibility of the position which the convicted individual would hold;
> (2) The nature and seriousness of the offense;
> (3) The circumstances under which the offense occurred;
> (4) The date of the offense;
> (5) The age of the individual when the offense was committed;
> (6) Whether the offense was an isolated or repeated incident;
> (7) Any social conditions which may have contributed to the offense;
> (8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendations of persons who have had the individual under their supervision.
> [*N.J.S.A.* 18A:6-7.1(e)]

Mr. McCullough's rehabilitation began shortly after his arrest and convictions for crack cocaine and a crack pipe in 1987. Shortly thereafter, pursuant to his testimony, while wandering the streets of Trenton, a car pulled along side him driven by the Reverend Perkins Broach, Sr., pastor to the Trenton Deliverance Church. The Reverend took Mr. McCullough under his charge, and since that time Mr. McCullough has literally turned his life around. To this day he continues to be actively involved with Rev. Broach and the Trenton Deliverance Church indicating that he attends church three times weekly and that he also actively participates in counseling kids on the streets of Trenton in respect to drugs. This is confirmed by a letter submitted by Reverend Broach on March 25, 1994 (P-2) indicating that the petitioner has been a

member of his church for the past six years. He notes "he has changed his life with the assistance of the Lord." Reverend Broach confirms Mr. McCullough's very active participation with the substance abuse program at the Church. The Reverend continues that the petitioner "has demonstrated consistently a life of one who is gone into the work force and has maintained sobriety." Ibid.

As part of his rehabilitation, the petitioner in or about December 19, 1993, satisfactorily completed and was awarded a high school diploma (P-6). Mr. McCullough attended Mercer County Community College in a program of microcomputer repair which began July 22, 191 and was completed in May of 1992. That program was satisfactorily completed by the petitioner (P-4). Indeed, Mercer County Community College awarded Mr. McCullough a certificate of achievement for his successful completion of that program on June 1, 1992 (P-7). In addition, the petitioner has recently completed a full-time program involving office automation at the Cittone Institute, which he indicated was in Princeton, New Jersey. The registrar of the program writes on March 4, 1994 that at that time he was a student in good standing and indicates that the program was a full-time program. On November 29, 1994, the petitioner was awarded a certification indicating that he had successfully completed the program in office automation and was certified as a "specialist."

Mr. McCullough indicated that he was able to pursue his training by returning to live with his mother who took him back following his complete sobriety and by receiving general assistance and an additional grant as a consequence of an injury which he had sustained.

More recently, Mr. McCullough has been working on a temporary basis wherever his skills have permitted him to do so. He has also indicated that as of July of this year he was married and that he and his wife have adopted three children whose mother was a crack addict living in Philadelphia. Prior to his marriage, his wife, then Lucy M. Perry, wrote a letter on March 9, 1994, attesting to his love for then her three adopted daughters and his strong family orientation and spirituality. Ms. Perry, now Mrs. McCullough, is employed full-time at the New Jersey Housing and Mortgage Financing Agency and met Mr. McCullough at the Trenton Deliverance Church.

At the hearing, Mr. McCullough submitted an additional document, a letter dated October 27, 1995, from a Mr. Lloyd Plummer, who served as head custodian at the Kreps Elementary School when Mr. McCullough was employed for that short period of time as a custodian. Mr. Plummer indicates, among other things, that the petitioner "was no doubt a good worker, respectful, caring and [a] somewhat mysterious and mature young man. "Mr. Plummer reiterates and confirms Mr. McCullough's narrative concerning the dramatic change in his life following his late night meeting with the Reverend Perkins Broach. Mr. Plummer and Mr. McCullough have maintained a friendship since the petitioner's termination from his employment, Plummer notes that although the petitioner is much younger than he, Mr. McCullough has helped him a great deal through his inspirational and spiritual instruction. He also confirms Mr. McCullough's continuous, deep and profound involvement with the church and his active participation in the drug abuse program and helping the homeless. He notes that on a recent occasion he was advised that Mr. McCullough allowed two homeless people to sleep in his new car, leaving the keys so they could warm themselves through the cold night. Unfortunately, they stole his car and his belongings. In spite of that McCullough was not concerned about the car but grieved instead about the souls of the homeless persons. Mr. Plummer provides further additional information about Mr. McCullough's charitable side and concludes, "isn't [Ralph]['s] story why we as tax payer['s] pay our taxes and contributions to the government so that the government which constructs programs and men like Ralph [who] would be helped and hopefully live a clean productive life. This young man is a success story." (P-1 at 2).

ANALYSIS

Examining the various criteria of *N.J.S.A.* 18A:6-7.1(e) it is clear in my judgment that Mr. McCullough has demonstrated that each of the factors that must be considered are those which satisfactorily demonstrate the enormous strides that he has made following the drug-related offenses of which he was found guilty in 1987. Clearly, the position which he occupied, custodian, does not involve direct involvement with students, although frankly if he is to be believed, and I do believe him, I think his story and his remarkable transition can serve as an inspiration for children. The offense was a serious one, although the amount of crack cocaine involved, based upon Mr. McCullough's testimony and the sentence, was small. Nevertheless,

drugs, especially crack cocaine and heroine - are anathema to our society and raise the gravest concerns amongst our children. Mr. McCullough's testimony and that which confirms it are that ever since his chance meeting with Reverend Broach, he not only underwent a profound spiritual and religious transition, but has never since consumed drugs, alcohol, tobacco, or any other substances which might by viewed as toxic. The criminal incidents occurred some eight years ago, not an insufficient period of time, given the clean record of the petitioner since. While the offense itself was isolated, Mr. McCullough candidly acknowledged that he was a "bum" at that time. He consumed alcohol, drugs, committed petty thefts, at one time was involved a domestic dispute, but never, even when he was at his most desperate, did he assault, rob or burglarize anyone. Certainly, the social conditions in which he found himself -the child of divorced parents whose lives became volatile, wandering the streets of Trenton - are typical of too many young people in America. Finally, Mr. McCullough's life experiences since his conviction have been remarkable. He has completed his high school education, obtained specialized education from Mercer County Community College as well as a private computer school. He has married and adopted three children. His wife, based on the documents, appears to be an articulate, intelligent, hard working, dedicated person who may very well be remarkable in her own right. I was also impressed with Mr. McCullough's demeanor. He was articulate, respectful, insightful, pleasant and seemed genuinely and sincerely appreciative of my efforts to provide him a forum to demonstrate his rehabilitation. Of course, judges as fact finders can be deceived, can be "conned" by a street smart individual who knows how to push the right buttons. While I certainly cannot guarantee that I was not taken in by McCullough's charm and sincerity, his record over the past eight years strongly suggests the contrary. As Mr. Plummer indicated in his letter, it would certainly seem at this time at least that Mr. McCullough indeed "is a success story." I hope for his sake, the sake of his wife, and three children that that story has only begun.

Accordingly, I **CONCLUDE** that the petitioner has affirmatively demonstrated by clear and convincing evidence and pursuant to the criteria set forth at *N.J.S.A.* 18A:6-7.1 and consistent with the conclusion arrived at by the Board that he has been rehabilitated. It is therefore **ORDERED** that the petitioner's criminal history no longer disqualifies him from school employment as a custodian.

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

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

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

11/3-/95
DATE

STEVEN C. REBACK, ALJ

Dec 5, 1995
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 07 1995
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On behalf of petitioner:

Ralph McCullough

On behalf of respondent:

None

EXHIBITS

On behalf of petitioner:

P-1 Letter from Lloyd Plummer, October 27, 1995 (2 pages)

P-2 Letter from Reverend Perkins Broach, Sr., March 25, 1994

P-3 Letter from Lucy M. Perry, March 9, 1994

P-4 Letter from representative of Mercer County Community College, March 23, 1994

P-5 Letter from the Cittone Institute, March 4, 1994

P-6 High school diploma awarded to petitioner, December 1993

P-7 Certificate of Achievement awarded to petitioner by Mercer County Community College, Career Training Institute, June 1, 1992

P-8 Certification issued to petitioner by the Cittone Institute

On behalf of respondent:

None

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT : COMMISSIONER OF EDUCATION
OF RALPH McCULLOUGH. : DECISION
:

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

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that the within petitioner has demonstrated rehabilitation by clear and convincing evidence in accordance with N.J.S.A. 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws. The Commissioner does, however, observe that notwithstanding the fact that the position petitioner seeks to occupy, i.e., custodian, "does not," as noted by the ALJ, "involve direct involvement with students" (Initial Decision at p. 6) in that these individuals are not responsible for the care, supervision or instruction of students, such a position nevertheless affords the individual significant and otherwise unsupervised access to children, a consideration which should not be minimized when examining rehabilitation pursuant to N.J.S.A. 18A:6-7.1.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter. The within petitioner is deemed qualified for school employment as a custodian for the

reasons clearly articulated in the initial decision. This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of July 5, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 18, 1996
Date of Mailing, January 19, 1996

25-96

BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY,

PETITIONER,

V.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE; STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, BUREAU OF SCHOOL FINANCE; DIVISION OF YOUTH AND FAMILY SERVICES, BERGEN COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; DIVISION OF YOUTH AND FAMILY SERVICES, PASSAIC COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; HOLLEY CHILD CARE AND DEVELOPMENT CENTER OF YOUTH CONSULTATION SERVICE; GEORGE WASHINGTON SCHOOL OF YOUTH CONSULTATION SERVICE; THE BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY; THE BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY; AND L.P.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board appealed assignment of tuition responsibility for institutionalized child, L.L., for the 1992-93 school year. Matter involved the question of which governmental entity was financially responsible under the State Facilities Planning Act of 1979, N.J.S.A. 18A:17B-1 to -13, for the education of a child placed in a private school by the State child welfare agency, the Division of Youth and Family Services (DYFS).

ALJ concluded that petitioner was the "district of residence" of L.L. within the meaning of N.J.S.A. 18A:7B-12 as subsection (b) specified that the district of residence for children in residential State facilities or who have been placed by a State agency in group homes, private schools or out-of-state facilities "shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency." ALJ found, however, that DYFS exceeded its legitimate authority when it unilaterally placed L.L. in an out-of-district private school without consultation with the local child study team. Thus, absent a showing that DYFS obtained any educational evaluation whatsoever, there was no legal basis on which to impose the tuition costs for this unauthorized placement upon the petitioning school district. ALJ ordered that the petitioning Board was not responsible for the education costs of L.L. for June 1992 and the 1992-93 school year.

Commissioner concurred with the ALJ that petitioning Board was the district of residence for L.L. With respect to the Board's responsibility for payment of tuition for the period in question, however, the Commissioner was unable to concur with the ALJ that the District should not be held responsible for payment. Commissioner remanded matter for further fact-finding concerning the circumstances surrounding the placement of L.L., specifically to determine whether L.L.'s placement was emergent in nature, and for proofs as to whether the instant placement situation justified nonconformance with the specific terms of the applicable regulation (N.J.A.C. 6:28-7.4(b)5(ii)) on the part of the State.

January 19, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3045-94

AGENCY DKT. NO. 376-11/93

BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE; STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, BUREAU OF SCHOOL FINANCE; DIVISION OF YOUTH & FAMILY SERVICES, BERGEN COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; DIVISION OF YOUTH AND FAMILY SERVICES, PASSAIC COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; HOLLEY CHILD CARE AND DEVELOPMENT CENTER OF YOUTH CONSULTATION SERVICE; GEORGE WASHINGTON SCHOOL OF YOUTH CONSULTATION SERVICE; THE BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY; THE BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY; AND L. P.

Respondent,

Anthony C. Sartori, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for the State respondents
(Deborah T. Poritz, Attorney General of New Jersey, attorney)

Brian M. Foley, Esq. for respondents Holley Child Care & Developmental Center and George Washington School
(Kalison & McBride, attorneys)

Joanne L. Butler, Esq. for respondent Board of Education of Teaneck
(Young, Dimiero & Sayovitz, attorneys)

Gary P. Hall, Esq. for respondent Board of Education of Oakland
(Fogarty & Hara, attorneys)

Record Closed: April 21, 1995 Decided: October 23,1995

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

Statement of the Case

This is an appeal by a local school district from the assessment of private-school tuition expenses for an institutionalized child in June 1992 and the 1992-93 school year. It involves the question of which governmental entity is financially responsible under the State Facilities Planning Act of 1979, *N.J.S.A.* 18A:17B-1 to -13, for the education of a child placed in a private school by the state child welfare agency, the Division of Youth & Family Services ("DYFS"). Basically, the Department of Education ("Department") contends that Prospect Park school district is responsible as "the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State

agency." *N.J.S.A.* 18A:7B-12(b). In applying this statute, the Department maintains that the relevant dates are June 15, 1992, the date on which the child was most recently placed in the school, and October 15, 1992, the date of the annual school census for 1992-93.

Petitioner Board of Education of the Borough of Prospect Park ("Board") urges that the relevant dates for ascertaining district of residence are either November 2, 1990, when DYFS originally obtained custody of the child, or March 7, 1991, when the child was initially placed at the school. Alternatively, the Board argues that the responsible district is "the district in which the parent or guardian last resided prior to becoming homeless" within the meaning of *N.J.S.A.* 18A:7B-12(c) or that DYFS is financially responsible as the agency with legal custody of the child. In addition, the Board urges that the Department's belated efforts at collecting payment are barred by the equitable doctrines of estoppel and laches.

Procedural History

By letter dated May 26, 1993, Melvin L. Wyns, director of the Bureau of School Finance in the Department of Education, notified the Board of his determination that the Prospect Park school district is responsible for the educational costs of "a child who was placed by DYFS in Holley Center [in Hackensack, New Jersey] on June 2, 1992." Further, the letter explained that the mother "is residing at 76 Struyk Avenue, Prospect Park, New Jersey, and has been a resident at that address since the date of placement." After exhausting an intermediate level of review, the Board filed an appeal to the Commissioner of Education ("Commissioner") on November 12, 1993. On January 4, 1994, the Attorney General's Office filed an answer on behalf of the subagencies in the Department of Education and DYFS (collectively the "State respondents"). Subsequently, on March 30, 1994, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Although the Board had joined various other local school districts and service providers as respondents, these parties have been dismissed by voluntary stipulation. The OAL

held hearings on December 13 and 14, 1994 and March 9, 1995. Both sides filed post-hearing briefs on April 21, 1995. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Most of the relevant facts are undisputed. **I FIND**:

L.L is a thirteen year old child currently under the physical and legal custody of DYFS.[1] In or about 1990, L.L's mother, L.P., lived in the Borough of Oakland in Bergen County. Insofar as the record reflects, L.L. lived primarily with her mother at that time, although the child may have been left occasionally with other caretakers. No record exists that L.L. ever lived with her father, whose identity is unknown.[2] Due to allegations of sexual abuse and concerns about the mother's transient lifestyle, DYFS conducted an investigation into the circumstances of L.L, then only eight years old, in April 1990. On November 2, 1990, the mother voluntarily consented to placement of her child in foster care.[3] Shortly thereafter, on December 10, 1990, DYFS obtained the first of a series of successive court orders awarding it temporary custody of L.L.[4]

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[1] To protect their confidentiality, the child will be identified by the initials L.L. and her mother by the initials L.P.

[2] The mother gave three different names of possible fathers, including one man to whom she was apparently married at the time of L.L.'s birth. Since DYFS was never able to locate the whereabouts of any of these men, paternity could not be established through scientific testing.

[3] *N.J.S.A.* 30:4C-11 authorizes DYFS to accept a parent's voluntary surrender of custody where it appears that "the child's welfare will be endangered unless proper care or custody is provided."

[4] Pursuant to *N.J.S.A.* 30:4C-12 the Superior Court, Chancery Division, Family Part may place a child "under the care and supervision" of DYFS for various reasons, including that the parent has "fail[ed] to provide such child with proper protection, maintenance and education or is endangering the welfare of such child. Such protective-service orders must be renewed at six-month intervals and do not permanently sever parental rights Final termination of parental rights can only be achieved through a separate guardianship proceeding where the parent's unfitness now and in the foreseeable future is demonstrated by clear and convincing evidence. *N.J.S.A.* 304C-15. *In re Guardianship of J.C.* 136 *N.J.* 546 (1994).

DYFS records reveal that L.L. stayed in a foster home until November 26, 1990, when she was admitted to Bergen Pines County Hospital in Paramus. At some later date, L.L. left the hospital and entered Holley Center, a private residential facility in Hackensack. It is difficult to pinpoint the exact date with accuracy. Gwendolyn Sifford, the DYFS social worker presently assigned to the case, testified from the case file that L.L. went to Holley Center for the first time "around December 15, 1990." Court papers, however, suggest that L.L. remained at Bergen Pines through at least February 10, 1991 and, according to a report by the child placement review board, that the "date of placement" at Holley Center was March 7, 1991. In any event, it is uncontroverted that L.L. resided at Holley Center until her discharge on August 29, 1991, after which she was placed consecutively at two different foster homes "somewhere in Bergen County." Leaving foster care again, L.L. stayed briefly at a shelter for two weeks until a bed became available at Holley Center.

On June 15, 1992, L.L. returned to Holley Center, where she has been living ever since. Holley Center is affiliated with the George Washington School, both of which are operated by an outfit known as Youth Consultation Service.[5] L.L. eats her meals and sleeps at Holley Center and receives her education at George Washington School. DYFS pays for L.L.'s room and board at Holley Center, but not for her educational expenses at George Washington School. Tuition costs at George Washington School amounted to $1,376 for June 1992 and $20,201 for 1992-93, or a total of $21,577.

Meanwhile, in January or February 1992, the mother, L.P., had become homeless and was, by all accounts, "living in a car." Reportedly, she had little or no possessions other than "the clothes on her back." Sometime prior to March 13, 1992, L.P. accepted an offer of Regina Johnson to move into a house at 76 Struyk Avenue in Prospect Park and take care of Mae Doorn, an elderly bedridden woman who occupied the first floor. That date can be fixed with certainty because Ms. Johnson, a close

[5]George Washington School is on a list of approved private schools for children with learning disabilities published by the Department. 1989-90 DIRECTORY OF APPROVED PRIVATE SCHOOLS FOR THE HANDICAPPED (Oct. 1989)

friend of the Doorn family, was present when L.P. witnessed Ms. Doorn's living will on March 13, 1992. Essentially, L.P. agreed to serve as caretaker for Ms. Doorn in exchange for a place to stay. Ms. Johnson testified that L.P. and a male companion, whom she had assumed to be L.P.'s husband, lived in the home in Prospect Park for over a year and that L.P. "had no other residence." On her daily visits to the Prospect Park property, Ms. Johnson regularly observed L.P. at various times of the day and night. Moreover, L.P. received her mail at the Prospect Park address.

Toward the end of 1992, L.P. stopped doing her job properly and often left the helpless old lady in her charge unattended for hours. When Ms. Johnson asked her to leave, however, L.P. refused to comply. Ms. Johnson's attorney advised her that L.P. had acquired the rights of a tenant. Consequently, Ms. Johnson had to institute eviction proceedings to regain possession of the property. It took months to reach a settlement, whereby L.P. agreed to vacate the premises by June 3, 1993.

After verifying that L.P. had moved out of Bergen County, DYFS transferred the case file to Passaic County where the parent now lived. Numerous official records kept by DYFS in the ordinary course of business corroborate that L.P. was living at the Prospect Park address in June 1992 and for one year thereafter. For example, an information sheet dated June 18, 1992 lists the mother's address as "c/o Mae Doorn, 76 Struyk Ave., Prospect Park, N.J." Similarly, an assessment report covering May 1 to November 1, 1992 refers to the same address in Prospect Park. A contact sheet chronicles that on August 12, 1992 a DYFS worker "went to 76 Struyk Ave., Ist floor, Prospect Park and picked up mother" for a visit to her daughter at Holley Center. An envelope in what appears to be L.P.'s own handwriting gives the Prospect Park residence as her return address. As late as April 3, 1993, a DYFS record still shows L.P. as living in Prospect Park. Likewise, a court report prepared on March 18, 1993 confirms that L.P. "continues to reside at the same address" in Prospect Park. [6]

[6]Board counsel made a point of a single DYFS document showing a computer-generated address in the City of Paterson, but that address was crossed-out and the correct Prospect Park address handwritten alongside it. Social worker Gwendolyn

The Board was unaware that it might be charged for L.L.'s education until Mr. Wynn's letter dated May 26, 1993. By that time, of course, the 1992-93 school year was nearly over. Prior to receipt of that letter, the school administration "didn't even know of her existence." Thus, the district did not have a meaningful opportunity to check the mother's residence in Prospect Park. More importantly, the district's child study team did not have any input into the decision to enroll L.L. at George Washington School.[7] Indeed, the record is barren of the details of L.L's particular handicapping condition or the rationale for placing her in a private school approved for emotionally-disturbed children[8]

DYFS itself candidly acknowledges that it failed to follow the usual practice of consulting with local education officials about the appropriate educational placement of children entrusted to its care and supervision. Henry Lawton, a DYFS field worker with twenty-three years of experience, declared that he always conferred with the local child study team "to ask for available [pupil] records" and "[to] solicit their cooperation" in making a residential educational placement. Working with the local school system "is supposed to be an overall way of DYFS operating" When deciding whether to remove a child from his home, DYFS considers a variety of noneducational factors, such as how the child functions in the family and community and the nature of any emotional

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Sifford explained that there is a time-lag before obsolete information in the computer data base can be updated.

[7]Children with educational handicaps are entitled to a free and appropriate public education, including a special education tailored to meet a child's unique learning needs. *Lascari v. Ramapo Indian Hills Reg. High Sch. Bd. of Educ.*, 116 *N.J.* 7 (1989). Child study teams, comprised of a school psychologist, learning-disabilities consultant and school social worker, are responsible under the regulatory scheme for determining a child's eligibility for special education and for developing, monitoring and evaluating a child's individualized educational program. *N.J.A.C.* 6:28-3.1. *Lascari*, at 35.

[8]Federal law creates a strong statutory preference for educating children with disabilities in the least restrictive environment. 20 *U.S.C.A.* §1412(5)(B). Before placing a child in a segregated school, a local school district must determine that the child cannot be satisfactorily educated in a mainstream setting with appropriate supplementary aids and services. *Oberti v. Clementon Bd. of Educ.*, 995 *F.* 2d 1204, 1215 (3rd Cir. 1993).

problems. However, Mr. Lawton did not know of any DYFS-connected child study team which could properly assess a child's educational needs.[9]

Schools superintendent Thomas Vannatta expressed similar sentiments based on his own past dealings with state agencies. Previously, whenever a state agency wanted to put a child residing in Prospect Park in an outside placement, "it would notify us." In one particular instance, Mr. Vannatta recalled, the child study team reviewed a recommended residential placement for a preschool child and concurred in the result. Since the local school district bears "ultimate responsibility" for a child's educational program, Mr. Vannatta reasoned that the school district "should become part of any placement [decision.]"

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Prospect Park is the "district of residence" of L.L. within the meaning of *N.J.S.A.* 18A:7B-12; and, further, that the DYFS exceeded its legitimate authority when it unilaterally placed L.L. in an out-of-district private school without consultation with the local child study team.

N.J.S.A. 18A:7b-12 prescribes the method for determining "district of residence" for school funding purposes of certain children who are not residing with their parent or guardian. Subsection (a) provides that the district of residence for children in foster homes "shall be the district in which the foster parent resides." Subsection (b), applicable here, specifies that the district of residence for children in residential state facilities or who have been placed by a state agency in group homes, private schools or out-of-state facilities "shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency." Subsection (c) of *N.J.S.A.* 18A:7B-12 adds that

[9]It appears that the primary reason for L.L.'s enrollment at George Washington School was its affiliation with Holley Center. Mr. Lawton said that DYFS has a contract with Youth Consultation Service and that "persons placed by DYFS at Holley Center are educated by the George Washington School."

the district of residence for children whose parent or guardian temporarily moves from one school district to another as a result of being homeless "shall be the district in which the parent or guardian last resided prior to becoming homeless." Lastly, subsection (d) creates a catch-all category where the district of residence cannot be determined according to the foregoing criteria, in which case "the State shall assume fiscal responsibility for the tuition of the child."

Here L.L. was placed in a private school by a state agency, so the pertinent portion of *N.J.S.A.* 18A:7B-12 is subsection (b). Implementing regulations clarify that the "present district of residence" referred to in subsection (b) shall mean, for the first school year, the New Jersey district of residence of the child's parent or guardian "as of the date of the child's initial placement by the State agency" and, in subsequent years, the New Jersey district of residence of the child's parent or guardian "as of the last school day prior to October 16." *N.J.A.C.* 6:20-5.3 (b). Hence, the key dates are June 2, 1992, the date on which the child was "most recently placed" at George Washington School, and October 15, 1992 for the subsequent school year. Proofs clearly demonstrate that the district of residence of the mother on both those dates was Prospect Park, where she was working full time as a live-in caretaker. Unrefuted evidence shows that on the relevant dates the mother slept at the Prospect Park address, received mail there, used it as her return address on outgoing mail, and was picked up there for a visit to her daughter. In order to evict her from the premises, the owner had to resort to court action. Accordingly, it is immaterial whether the living arrangement happened to be made "as an incident of the employment." What matters is that the mother was actually living in Prospect Park on the two key dates.

Petitioner's efforts to shift the inquiry to other possible dates are unavailing. Pointing to the phrase "initial placement" in the regulation, *N.J.A.C.* 6:20-5.3(a)(2), the Board argues that the focus should be on November 2, 1990, when the mother originally consented to placement of her child, or March 7, 1991, when the child had been previously placed at Holley Center. But the regulatory language should not be read out of context.. As noted, the underlying statute uses the words "most recent" rather than "initial" placement. Moreover, the regulation draws a distinction between

"initial" placement associated with the current institutionalization as opposed to continuing placement "in subsequent years." Viewed in its correct context, the term "initial placement" in the regulation must mean the latest or most recent time when the child was placed in a state facility or private school and not an earlier placement that occurred years ago and has been superseded by intervening events. Subsequent to her previous placement at Holley Center, L.L. has been to at least two foster homes and a temporary shelter before her readmittance to Holley Center on June 2, 1992. Support for such interpretation is derived from *N.J.S.A.* 18:7B-12(a), which provides that, "If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement had occurred." Any contrary interpretation would run directly counter to the express statutory language and thereby exceed the agency's proper rule-making authority. Administrative regulations cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute. *N.J. Chamber of. Commerce v. N.J. Election Law Enforcement Comm'n,* 82 *N.J.* 57, 82 (1980); *Kingsley v. Hawthorne Fabrics, Inc.*, 41 *N.J.* 521, 528 (1964).

Similarly, the mother cannot be considered homeless in the sense of "temporarily lack[ing] a fixed, regular and adequate residence" as contemplated by *N.J.S.A.* 18A:7B-12(a). While that description may well fit her situation immediately before March 13, 1992, by that date she had taken up permanent residence in Prospect Park and had a stable and constant abode. Her period of genuine homelessness lasted only a few months in early 1992.

Apart from its interpretation of the statute, the Board also urges that the state respondents should be equitably estopped from imposing tuition costs on the school district because of alleged "knowing and intentional misrepresentation" by DYFS workers. Equitable estoppel is the doctrine that voluntary conduct may preclude someone from asserting rights "as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse." *W. V. Prangborne & Co. v. N. J. Dep't of Transp.* 116 N.J. 543, 553-54 (1989); *Somerset Hills Sch., Inc. v. Ellis,* No. A-3087-93T2, slip op. at 13 (N.J. App. Div. Aug. 3, 1995).

"estoppel connotes a change in position by a person to his detriment in reliance upon the word or conduct of another." *Rossum v. Jones*, 97 *N.J. Super.* 382, 392 (App. Div. 1967). Certain elements must be established in order for the defense of estoppel to be invoked. First, there must be some conduct on respondent's part amounting to a misrepresentation or concealment of material facts. Either silence or omission can constitute "conduct" where there is a duty to speak or act. Second, the party being estopped must have knowledge of the facts, or the circumstances must be such that knowledge is necessarily imputed to him. Third, the truth concerning these facts must be unknown to the party claiming the benefit of the estoppel. Fourth, the conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party. Fifth, the conduct must be relied upon by the innocent party and, sixth, his reliance must have caused him to change his position for the worse. *Feldman v. Urban Commercial, Inc.*, 70 *N.J. Super.* 463, 474-475 (Ch. Div. 1961), aff'd 87 *N.J.* Super. 391 (App. Div. 1965).

Equitable estoppel is rarely applied against public entities, particularly when estoppel would interfere with essential governmental functions. Nonetheless, equitable estoppel considerations are relevant to assessing governmental conduct, *Skulski v. Nolan*, 68 *N.J.* 179, 198 (1975), and may be invoked to prevent manifest injustice or unfairness. *O'Malley v. Dep't of Energy*, 109 *N.J.* 309, 316 (1987); *Vogt v. Borough of Belmar*, 14 *N.J.* 195, 205 (1954). *See also, Somerset Hills,* slip op. at 15. Generally, the issue is "extremely fact-sensitive." *Airwork Service Div. v. Dir., Div. of Taxation*, 97 *N.J.* 290 , 297 (1984), *cert. den.* 471 *U.S.* 1127, 105 *S. Ct.* 2662, 86 *L. Ed.* 2d 278 (1985).

With respect to the first element of an estoppel, the only alleged "misrepresentation" was DYFS having misidentified the parent's district of residence. The record clearly demonstrates, however, that DYFS made a good faith effort to apply the statute in a rapidly-changing situation. As previously discussed, Prospect Park is the parent's district of residence in accordance with the governing standards. Even if DYFS had made an error, it would hardly rise to the level of a purposeful attempt to mislead the school district. At worst, it was be nothing more than an innocent mistake.

Absent misrepresentation or concealment of material facts, done with the intention or expectation that an innocent party will rely on it, equitable estoppel should not arise against a governmental agency. *Somerset Hills*, slip op. at 17. *Accord, Boyd v. Dep't of Institutions & Agencies*, 126 *N.J. Super.* 273, 275 (App. Div. 1974).

Another missing element is detrimental reliance on the part of the Board. Petitioner has not done anything differently as the result of any action or nonaction by the State respondents. If the statute requires that a particular school district must bear the costs of a child's education, then that district remains financially obligated, regardless of whether or not it was aware of her existence on October 15 of the year in question. Significantly, the Board has not shown that it actually suffered any loss of state aid due to its inability to include this child on its 1992-93 census. Distribution of state aid for the 1992-93 school year was based on the census taken on October 15th of the prebudget year or October 15, 1991. Since Prospect Park did not become responsible for L. L. until June 1992, the district could not possibly have received any additional aid on her behalf for 1992-93. Categorical aid for 1993-94, including aid for special education, bilingual education and county vocational education, was "frozen" at the amount which the district received in the 1992-93 school year. *L.* 1993. c. 7. §2a. Foundational aid for 1993-94 was also frozen at 1992-93 levels, multiplied by a factor of 1.04. *L.* 1993, c. 7 §2d. Thus, Prospect Park did not lose any state aid for 1993-94.

In addition, the Board argues that the State respondents are barred by laches from imposing extra costs on a school district after the budget for that year had been adopted.[10] Laches is defined as "the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done" or, more succinctly, as "inexcusable delay in asserting a right." *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145, 151 (1982).. It occurs "when there is a delay, unexplained and inexcusable, in enforcing a known right, and prejudice has resulted to

[10]Mr. Vannatta testified that the school budget is prepared early in the prebudget year for the upcoming year. *See N.J.S.A.* 18A:22-32, -33. By the time that L.L. entered George Washington School in June 1992, it was already too late to include her projected tuition costs in the 1992-93 budget.

the other party because of that delay." *Rolnick v. Rolnick* , 262 *N.J. Super.* 343, 364 (App. Div. 1993). Knowledge and delay are essential prerequisites to application of the doctrine of laches. *Notch View Associates v. Smith*, 260 *N.J. Super.* 190, 207 (Law Div. 1992). When deciding whether to apply laches, courts look at "[t]he length of the delay, reasons for delay, and changing conditions of either or both parties during the delay." *Lavin*, at 152. Because the central issue is whether it is inequitable to enforce the claim, "the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant." *Lavin*, at 153.

Although state respondents waited until May 1993 to seek payment of expenses which had begun accruing in June 1992, the lapse of time is reasonable under the circumstances. Given the mother's high mobility and her relocation to a county serviced by a different DYFS district office, it took awhile to identify her district of residence. A delay of less than one year in this context cannot be considered excessive. *Compare, e.g., Lavin* (claim for teacher's military service credit not made until more than nine years after her employment commenced) or *Notch View Associates* (delay of nearly two years before bringing suit to rescind partnership agreement). Again, it must be emphasized that the Board has not suffered any genuine harm as a result of the mere passage of time. Prospect Park would not have been entitled to any greater amount of state aid if it had known earlier about its potential liability. Even if DYFS had immediately notified the district as soon as the child enrolled in George Washington School, it would already have been too late for tuition costs to be included in the 1992-93 school budget. While its legal analysis is couched in terms of estoppel and laches, the Board's real objection is not to the delay itself, but rather to having to expend limited taxpayer funds for the education of a child with such tenuous ties to the local community.

More problematic is the question of whether DYFS is authorized to enroll a child in an approved private placement without prior consultation with the school district responsible for providing a free and appropriate public education to children with special needs. Although the Board discusses this issue as if it were a matter of estoppel and laches, it is really a question of the statutory authority vested in DYFS.

Foster care is one of several social services that DYFS is empowered to provide to troubled families. *In re Guardianship of J.C.*, 129 *N.J.* 1, 7 (1992). "Care" means "cognizance of a child for the purpose of providing necessary welfare services, or maintenance, or both." "Custody" means "continuing responsibility for the person of a child . . . for the purpose of providing necessary welfare services, or maintenance, or both." *N.J.S.A.* 30:4C-2(c) and (d). Presumably, DYFS, is entitled to enroll a child committed to its care and custody in a public school district to the same extent as if it were the parent or guardian of the child. But the question arises whether DYFS possesses greater rights than a parent to decide what is the appropriate educational placement for a handicapped child. Delivery of educational services to children with educational disabilities is governed by "a complex scheme of federal and state statutes and administrative regulations." *Lascari v. Ramapo Indian Hills Reg. High Sch. Bd. of Educ.*, 116 *N.J.* 7, 33 (1989). It is primarily the local child study team which evaluates the eligibility of a child for special education and related services and develops an individualized education program. *N.J.A.C.* 6:28-3.3. *Lascari*, at 35. Parents have the right to be involved at important stages in the decision-making process. *Burlington Sch. Comm. v. Mass Dept. of Educ.,* 471 *U.S.* 359, 105 *S. Ct.* 1996, 85 *L. Ed.* 2d 385 (1985). *Lascari*, at 33. If parents are dissatisfied with the placement recommendation of the child study team, they may request an impartial due process hearing. 20 *U.S.C.A.* §1415(b)(2); *N.J.A.C.* 6:28-2,7. *Burlington,* 471 *U.S.* at 369. *Lascari*, at 37. In the alternative, parents may unilaterally enroll the child in a particular placement at their own financial risk and sue the school district for reimbursement. *Burlington*, at 373; *Lascari,* at 49-55.

DYFS has not cited any statute or other legal authority for overriding the central role of the district's child study team in making special education placements. To the contrary, DYFS's standard practice of consulting with local child study teams before making such placements suggests the value of input from the educational experts. Several policy considerations also strongly favor this approach. Above all is the desirability of an informed and rational decision about what is educationally appropriate. Apparently DYFS does not conduct its own independent educational evaluation. Consequently, the placement determination would be made without

consideration of the child's educational needs if involvement of the local child study team is circumvented. Moreover, it is fiscally irresponsible for a state agency to pass along whatever the costs of private placement may happen to be, without adequate consideration of whether comparable educational services are available at less cost. *Cf. Essex Cty. Educ. Servs. Comm'n v. N.J. Dept. of Educ.*, 93 *N.J.A.R.* 2d (Vol 4A) 522, 525 (Comm'r June 8, 1993), aff'd (St. Bd. Dec. 1, 1993), disapproving of a public body's "practice of routinely charging whatever the market will bear." In essence, DYFS is writing a blank check for the local school board to pay. [11]

Statutes which relate to the same subject matter "are to be construed together as a unitary and harmonious whole, in order that each may be fully effective." *Clifton v. Passaic Cty. Bd. of Taxation*, 28 *N.J.* 411, 421 (1958). *Lawrence v. Butcher*, 130 *N.J. Super.* 209, 212 (App. Div. 1974). Where the Legislature has established a mechanism for determining a child's district of residence, it cannot be assumed that such enactment was intended to allow a state agency to ignore the procedures under federal law for placement of a handicapped child. In the event of any conflict between federal and state requirements, federal law would be clearly controlling. New Jersey's receipt of federal funding to assist state and local agencies in educating handicapped children is conditioned on the State's compliance with federal law. *Lascari*, at 33. The Individuals With Disabilities Education Act, 20 *U.S.C.A.* §1401 to 1461, "provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures." *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 *U.S.* 176, 179 102 S. Ct. 3034, 73 L:. Ed. 2d 690 (1982). It is unnecessary to decide such questions as whether DYFS could have conducted its own child study team evaluation or whether DYFS was obligated to request a due process hearing if its professional

[11] The same problem does not occur in the event of placement in another public school district, where tuition costs are fixed at "an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board." *N.J.S.A.* 18A:38-19. Nor does the problem occur in the event of placement in a state facility, where the district's share of the financial burden is limited to "an amount equal to the State foundation amount plus the appropriate special education aid." *N.J.S.A.* 18A:7B-2.a.

staff disagreed with the recommendations of a local child study team. Absent a showing that DYFS obtained any educational evaluation whatsoever, there is no legal basis on which to impose the tuition costs for this unauthorized placement upon the Prospect Park school district.[12]

Order

It is **ORDERED** that the Board of Education of the Borough of Prospect Park is not responsible for the education costs of L.L. for June 1992 and the 1992-93 school year.

[12]Ironically, state respondents suggest that the "logical" child study team to conduct an evaluation was Teaneck, where the child had been placed "in a failed foster home." However, there is no indication on the record that DYFS ever sought an evaluation by the Teaneck child study team.

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

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

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

Oct. 23, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Oct. 24, 1995
DATE

D. Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 24 1995
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Regina Johnson

2. Gwendolyn Sifford, social worker, Division of Youth & Family Services

3. Thomas Vannatta, superintendent of schools, Prospect Park school district

4. Henry Lawton, caseworker, Division of Youth & Family Services

List of Exhibits

No.	Description
J-1	Copy of order to show cause in the matter entitled In re L.P., Superior Court of New Jersey, Chancery Division, Family Part, Dkt. No. FN-02-11-91-A, entered on December 10, 1990
J-2	Copy of order in the matter entitled In re L.P., Superior Court of New Jersey, Chancery Division, Family Part, Dkt. No. FN-02-11-91-A, entered on January 8, 1991
J-3	Copy of order in the matter entitled In re L.P., Superior court of New Jersey, Chancery Division, Family Part, Dkt. No. FN-02-11-91-A, entered on February 19, 1991

J-4 Copy of order in the matter entitled In re L.P., Superior Court of New Jersey, Chancery Division, Family Part, Dkt. No. FN-02-11-91-A, entered on July 5, 1991

J-5 Copy of order in the matter entitled In re L.P., Superior Court of New Jersey, Chancery Division, Family Part, Dkt. No. FN-02-11-91-A, entered on November 7, 1991

J-6 Copy of order in the matter entitled In re L.P., Superior Court of New Jersey, Chancery Division, Family Part, Dkt. No. FN-02-11-91-A, entered on July 17, 1992

J-7 Invoice for tuition payments due to George Washington School of Youth Consultation Service for June 1992 and the 1992-93 school year

P-1 Id. Answers to interrogatories by the Oakland Board of Education, certified April 14, 1994

P-2 Copy of review board recommendation to judge, dated November 18, 1992

P-3 Estimate of categorical aid and foundation aid for 1992-93

(a) Actual categorical aid and foundation aid for 1992-93

P-4 Copy of a letter to Thomas W. Vannatta from Melvin L. Wyns, dated May 26, 1993

R-1 copy of living will and medical decision power of attorney for Mae E. Doorn, dated March 13, 1992

R-2	Copy of the stipulation of settlement in the matter entitled Johnson v. L.P., Passaic County Special Civil Part, Dkt. No. T-224-537, dated May 20, 1993
R-3	Copy of DYFS record entitled assessment face sheet, dated June 29, 1992
R-4	Copy of DYFS record entitled assessment face sheet, dated June 29, 1992
R-5	Copy of DYFS case summary for closing/transfer, dated July 9, 1991
R-6	Copy of case conference information sheet, dated March 25, 1992
R-7	Copy of envelope addressed to L.L., postmarked March 25, 1992
R-8	Copy of aid request, dated July 16, 1992
R-9	Copy of DYFS contact sheet from August 10, 1992 to August 17, 1992
R-10	Copy of assessment face sheet, dated November 2, 1992
R-11	Copy of court report in the matter entitled In re L.P., Superior Court of New Jersey, Chancery Division, Family Part, Dkt. No. FN-02-11-91-A, dated March 18, 1993
R-12	Copy of letter to L.P. from Natalie Caminiti, dated December 21, 1992

R-13 Copy of DYFS family intervention services sheet, dated April 3, 1993

R-14 Copy of DYFS contact sheet from May 19, 1993 to May 24, 1993

R-15 Id. Handwritten notes of DAG Arlene Goldfus Lutz, undated

R-16 Id. Copy of DYFS district of residence determination form, dated April 20, 1993

BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY, PETITIONER, V. STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE; STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, BUREAU OF SCHOOL FINANCE; DIVISION OF YOUTH AND FAMILY SERVICES,BERGEN COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; DIVISION OF YOUTH AND FAMILY SERVICES, PASSAIC COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; HOLLEY CHILD CARE AND DEVELOPMENT CENTER OF YOUTH CONSULTATION SERVICE; GEORGE WASHINGTON SCHOOL OF YOUTH CONSULTATION SERVICE; THE BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY; THE BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY; AND L.P., RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondents' exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4. Petitioner's primary and reply exceptions were untimely filed as they were not received by the Commissioner until November 21, 1995 and, therefore, are not considered herein.

The exceptions of State Respondents concur with the determination that Prospect Park was the district of residence of L.L.'s parent but take exception to the Administrative Law Judge's (ALJ) determination that the conduct of the Division of Youth and Family Services (DYFS) precludes the imposition of tuition costs upon the Board of Education of Prospect Park. Respondents aver that the sole statutory requirement for financial responsibility for L.L.'s education is determined by the residency of the parent, L.P. and, thus, Prospect Park must pay for the educational costs of L.L. (Exceptions at p. 2) Respondents argue that once the court determined residence, that should have been the end of the inquiry as the statute does not provide for any defenses such as estoppel or improper placement. (Id.) Also, respondents argue that the ALJ's finding is contrary to the legislative intent of the statute which does not authorize a penalty if the State agency fails to confer with a local district over placement of a child, (Id. at p. 5) notwithstanding that the ALJ may be displeased with the effect of the statutory scheme. (Id. at p. 7) Moreover, respondents argue that if affirmed, the ALJ's initial decision "[would] have dangerous precedential value" requiring DYFS to secure the approval of the district of residence prior to a child's placement since emergency situations arise where emergency placement is necessary. (Id.)

Respondents Holley Center et al. file exceptions further arguing that the statute and applicable regulations contain no requirement that the State obtain a child study team evaluation from a local school district before placing the child in a residential facility or "private school" and, in reality, it is usually not possible to obtain such an evaluation prior to placement (Exceptions at p. 4), a requirement that would create a hardship in emergency cases. They also argue that the ALJ imposed an additional burden onto the statutory and regulatory scheme that is

not, and should not, be present. Further, they argue that that there is no precondition to payment stating that the child study team must first evaluate (Id. at pp. 5-6) and that when a child is placed with DYFS, the child cannot always wait until the mother's district of residency is determined, as in this case, where it took almost one year for such determination to be made, for a child must be educated and cannot be expected to wait for the determination of the district responsible for his/her education. (Id.).

Upon a careful and independent review, the Commissioner concurs with the findings and conclusion of the ALJ that Prospect Park is the "district of residence" of L.L. within the meaning of N.J.S.A. 18A:7B-12. The ALJ reviewed the facts of the mother's residency and found that L.P. was a resident of Prospect Park, both at the time L.L. was initially placed in the Holley Center on June 15, 1992 and on October 15, 1992. The existing record provides no cause to challenge any of the determinations or credibility assessments made by the ALJ with regard to the residency of L.L., nor may the Commissioner properly reject such findings of fact without reviewing those portions of the transcript(s) where such findings were reached. Rowley v. Board of Education of Manalapan-Englishtown, 205 N.J. Super. 65, 75 (App. Div. 1985); In re Morrison, 216 N.J. Super. 143, 158-159 (App. Div. 1987).[1] Accordingly, not having been provided with transcripts and accepting the findings of the ALJ, the Commissioner determines that Prospect Park is the district of residence for Respondent L.L from October 15, 1992 through June 30, 1993.

[1] It is the responsibility of those challenging such determinations to provide the Commissioner with challenged portions of the transcript, Morrison at 158-159. In that no transcripts were provided in the instant case, no obligation arises for the Commissioner to review them before rendering a final decision regarding the findings and recommendations of the ALJ.

With respect to Prospect Park's responsibility for payment of tuition for this period, however, the Commissioner is unable to concur with the ALJ on the present record that the District should not be held responsible for payment. Regulation does require at N.J.A.C. 6:28-7.4(b)5(ii) that where a pupil with an educational disability is placed in an approved residential private school by a public agency, other than the district board of education, the agency must consult with the school district prior to placement. That section states, "the Chief School Administrator or his or her designee shall participate with the public agency in the placement decision if the district board of education is to be responsible for the special education costs." While the State may not have acted in strict conformance with this regulation in the instant situation, the Commissioner hesitates to render a determination waiving district responsibility for payment without further fact-finding as to whether an emergency existed that would have justified L.L's placement without participation of the petitioning Board, as the State and Respondent Holley Center contend in their exceptions.

Therefore, the Commissioner remands this matter for further fact-finding concerning the circumstances surrounding the placement of L.L., specifically to determine whether L.L.'s placement was emergent in nature, and for proofs as to whether the instant placement situation justified nonconformance with the specific terms of the applicable regulation on the part of the State.

Accordingly, for the reasons set forth above, the Commissioner affirms in part the initial decision of the Office of Administrative Law and remands in part for further fact-finding consistent with the parameters set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 18, 1996
Date of Mailing, January 19, 1996

25-96

510-97 R
(25-96)

BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE; STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, BUREAU OF SCHOOL FINANCE; DIVISION OF YOUTH AND FAMILY SERVICES, BERGEN COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; DIVISION OF YOUTH AND FAMILY SERVICES, PASSAIC COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES,	:	COMMISSIONER OF EDUCATION DECISION ON REMAND
RESPONDENTS.	:	

SYNOPSIS

In prior decision, Commissioner had found petitioning district to be the district of residence for tuition purposes for institutionalized child L.L., who had been placed in a private school by the Division of Youth and Family Services (DYFS) without consulting petitioner as required by regulation. Commissioner remanded for factual findings as to whether emergency circumstances existed such as would justify DYFS's apparent noncompliance with rule.

On remand, the ALJ elicited testimony and evidence and concluded that DYFS had ample time within which to consult with petitioner prior to placing L.L. in the private school, but failed to do so.

Commissioner adopted factual findings of ALJ and held that petitioner is in fact L.L.'s district of residence and, as such, is generally responsible for her education. However, under the particular circumstances established herein, which clearly demonstrated noncompliance by DYFS with rules regarding consultation prior to placement, Commissioner declined to hold petitioning district responsible for tuition for period at issue (June 1992 and 1992-93 school year).

SEPTEMBER 25, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1512-95
(EDU 3045-94 - Remanded)
AGENCY DKT. NO. 376-11/93

BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK,
Petitioner,
v.
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE; STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, BUREAU OF SCHOOL FINANCE; DIVISION OF YOUTH AND FAMILY SERVICES, BERGEN COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; and DIVISION OF YOUTH AND FAMILY SERVICES, PASSAIC COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES,
Respondent.

Anthony C. Sartori, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for respondents
(Peter T. Verniero, Attorney General of New Jersey, attorney)

Record Closed: April 1, 1997 Decided: June 24, 1997

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

Statement of the Case

This is the continuation of a hearing regarding whether a local school district is financially responsible for tuition costs of an institutionalized child placed in a private school by the Division of Youth & Family Services ("DYFS"). Whenever a child with an educational disability is placed in an approved residential school by a public agency other than the district board of education, state regulations prescribe that:

> The chief school administrator or his or her designee shall participate with the public agency in the placement decision if the district board of education is to be responsible for the special education costs. *N.J.A.C.* 6:28-7.4(b)(5)(ii).

In an initial decision issued on October 23, 1995, I recommended that the Board of Education of Prospect Park ("Board") should not be held liable for tuition costs because of DYFS's failure to consult with the local school district about the appropriateness of the proposed educational placement. On January 18, 1996, the Commissioner of Education ("Commissioner") remanded the matter to the Office of Administrative Law ("OAL") "for further fact-finding concerning the circumstances surrounding the placement" of the child identified as L.L.[1] In particular, the Commissioner instructed that findings be made on "whether L.L.'s placement was emergent in nature" and "whether the instant placement situation justified nonconformance with the specific terms of the applicable regulation on the part of the State."

Procedural History

By a letter dated May 26, 1993, the Department of Education notified the Board that the Prospect Park school district is responsible for the educational costs of L.L.'s private placement for two weeks in June 1992 and the 1992-93 school year. Respondent appealed that determination to the Commissioner on November 12, 1993.

[1] However, the Commissioner adopted that portion of the initial decision which found that Prospect Park is the parent's district of residence.

Subsequently, on March 30, 1993, the Commissioner transmitted to the Office of Administrative Law ("OAL") for hearing. After three days of testimony, the OAL issued an initial decision on October 23, 1995. Thereafter, on January 15, 1995, the Commissioner remanded the matter to the OAL for further fact-finding. The OAL held an additional day of hearing on April 1, 1997. Exhibits previously marked at the earlier hearings retain the same numbers. New exhibits and witnesses are listed in the appendix.

Findings of Fact

All of the factual findings set forth in the prior initial decision are incorporated herein as if set forth at length. Of particular significance is the admission by DYFS caseworker Henry Lawton that his normal practice is to solicit the cooperation of the local school child study team in making residential placements and that consultation with school officials "is supposed to be an overall way of DYFS operating." *Prospect Park Bd. of Educ. v. State of New Jersey, et als.,* OAL Dkt. No. EDU 3045-94 (Oct. 23, 1995), slip op. at 7. Mr. Lawton is assigned to the residential-placement unit of the Bergen district office and is familiar with its operations.

Another DYFS employee, Nathalie Caminiti, was L.L.'s "primary caseworker," and the person who arranged for L.L.'s residential placement in June 1992. She is assigned to intake and investigations in Bergen County and does not ordinarily become involved in making residential placements. Indeed, this case was the first and only emergency residential placement that she has ever handled. Ms. Caminiti's involvement began prior to November 1990, when she investigated a complaint that L.L., then only nine years old, had been assaulted by her mother's boyfriend, whom L.L. regarded as her father. Ultimately, her attacker was convicted of a criminal offense and put in jail. L.L. was traumatized and "needed therapy." On November 2, 1990, her mother signed a voluntary agreement granting DYFS custody of the child. Initially DYFS placed her in a foster home, but she became so "disruptive" that DYFS quickly

moved her to a second foster home. By the end of November, L.L. had to be hospitalized at Bergen Pines Hospital because of "suicidal ideation."

L.L. remained at Bergen Pines through March 1991, and appeared to do well "in a structured setting." On March 7, 1991, she was discharged to Fisher Hall at the recommendation of the hospital's professional staff. Fisher Hall is a therapeutic facility operated by Youth Consultation Services, the same outfit that also operates the private school where L.L. was later placed. According to Ms. Caminiti, Fisher Hall was the only real option at the time. Other available facilities were either too restrictive or served an older population. L.L.'s condition continued to improve at Fisher Hall. After six months, she was ready to try a less formal setting. On August 29, 1991, she transferred to an "aftercare-treatment home," a specialized foster home run by caretakers with intensive training in dealing with difficult children. Since her new foster home was in Teaneck, she attended special-education classes in the Teaneck public schools. Meanwhile, Fisher Hall continued providing therapy to L.L and her mother.

L.L. had always hoped one day to return to her natural mother. A major setback occurred when L.L. had a disastrous meeting with her mother, which "put her over the edge." After this meeting, L.L.'s condition rapidly deteriorated. She began to urinate and defecate in her clothing and to hide her feces around the house. In late May 1992, L.L. ran away from her foster home, took a ride in a stranger's car, and contacted her natural mother. Her foster mother refused to take her back and demanded that DYFS find another placement. Although Ms. Caminiti tried to get her to reconsider, the foster mother wanted L.L. out of her home "immediately."

Again, the options were limited. L.L. was too young for the Bergen County children's shelter and had already been unsuccessful in three foster homes. Both Ms. Caminiti and her supervisor decided to place L.L. in Holley Center, which is affiliated with Youth Consultation Services.[2] Before she was formally admitted into the

[2] While the relationship was not fully developed on the record, it appears that Fisher Hall, Holley Center and the George Washington School are all associated with the "umbrella" organization known as Youth Consultation Services.

residential treatment program, L.L. went into "respite care" at Holley Center for two weeks so that a psychiatric evaluation could be obtained and her medical records could be reviewed. Holley Center was not certain that it would accept L.L. and there was still time to look for other placements. Significantly, DYFS made no attempt during this two-week hiatus to plan for her educational needs. DYFS never explored any educational alternatives because children at Holley Center automatically go to George Washington School. Although the regular school year was almost over, DYFS failed to contact Teaneck school officials in order to avoid disruption of her education. Instead, L.L. did not receive any educational services during the two-week respite period. After she had been accepted at Holley Center on June 2, 1992, she entered the George Washington School for the final two weeks before summer vacation. Thus, L.L. was removed from her familiar educational setting and plopped into new school surroundings just as the current school year was coming to an end. She not only suffered instability in her home life, but she lost the support of her school as well.

Although Ms. Caminiti knew that the natural mother lived in Prospect Park, she made no effort to contact that school district to discuss L.L.'s immediate transfer or make arrangements for the upcoming school year. Ms. Caminiti admitted that she personally knew by March 25, 1992, if not sooner, that the natural mother was living in Prospect Park. In addition to a case record prepared by Ms. Caminiti herself on that date showing the mother's address in Prospect Park, the DYFS file also contains an envelope postmarked March 25, 1992 with the mother's return address. Generally, it is not within the scope of her duties for Ms. Caminiti to make residential placements. She has no educational expertise and "[does] not get involved with the educational component of a residential placement." Ms. Caminiti did not realize a school district must develop an individualized educational program as a prerequisite to delivery of special-education services. When placing L.L in a private school, she did not follow any written guidelines or refer to the DYFS manual. Rather, she merely discussed the case with her supervisor and did "what we felt was expedient."

At first, Ms. Caminiti indicated that she was too busy during the two-week respite period to contact Prospect Park school officials for advice. Later, however, she

acknowledged that it would have taken only "about twenty minutes" to make a telephone call to the superintendent of schools. Further, she had ample time over the summer to write to the Prospect Park district about suitable educational placements when school resumed in September.

I FIND that emergent conditions do not justify the admitted failure of DYFS to comply with the legal requirement to solicit participation of Prospect Park school representatives "if the district board of education is to be responsible for the special education costs." Even if unusual circumstances necessitated the immediate removal of the child from her foster home, proofs establish that there was a two-week hiatus during which DYFS had sufficient time to gather other materials preparatory to actual placement. While collecting such other information, DYFS could easily have sought input from local school officials. DYFS knew where the mother was living at the time, but neglected to notify the responsible school district of its preparations for the child's educational future. Afterwards, DYFS missed a second opportunity to confer with school authorities during the long summer vacation. DYFS has no excuse for such omission, since any genuine emergency had now ceased and the agency had more than two months before school would open again. Had DYFS followed proper procedure, the district's child study team would have had a chance to evaluate L.L.'s educational functioning and make recommendations concerning appropriate educational placements. As it turned out, there is no expert testimony that the George Washington School is a suitable educational placement or that other less-restrictive placements do not exist.

Conclusions of Law

Based on the foregoing facts, **I CONCLUDE** that the circumstances do not warrant waiver of the regulatory requirement that DYFS consult with the responsible school district about placement of L.L. in a residential private school.

At the outset, the Board questions the inherent authority of the Commissioner to waive application of a valid rule. Waiver by an administrative agency of its own rules on a case-by-case basis subverts the uniform application of published standards and runs the risk of "hamper[ing] efficient rule application." *Dougherty v. Human Serv. Dep't*, 91 *N.J.* 1, 9 (1982). Fundamental fairness requires that an administrative agency use its rulemaking power to establish the standards it intends to enforce by adjudication. *Bower v. Bd. of Educ.*, No. A-88/89-96, slip op. at 22 (N.J. Sup. Ct. June 10, 1997). *See generally, Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313 (1984). *Ad hoc* tinkering with rules increases the chances of unequal application in similar situations. Where the Commissioner recognizes exceptions to a general rule, he knows how to set forth specific grounds on which a waiver may be granted. *E.g.*, *N.J.A.C.* 6:24-1.14 (relaxation of procedural rules); *N.J.A.C.* 6:28-7.1 (exception to requirement that out-of-state private school must be approved). Pointing out that waiver of a rule is typically used as a "shield" to relieve someone of an onerous requirement, the Board argues that waiver should not be used as a "sword" to impose a financial burden where none otherwise exists.

Implicit in the Commissioner's remand order is the assumption that he possesses the power to waive a rule in appropriate emergent circumstances. This tacit ruling represents the law of the case. The Commissioner is not asking for advice on the scope of his authority, but simply for development of a factual record on which to decide whether or not to exercise his discretion. Any attack on the Commissioner's authority must be raised directly with the Commissioner and cannot be considered at this level. For purposes of this initial decision, it must be presumed that the Commissioner could waive the rule in the interests of justice. Here, however, the factual record clearly demonstrates that DYFS had plenty of time to consult with the school authorities before finalizing L.L.'s educational placement and, therefore, that the rule requiring participation of the Prospect Park school superintendent should not be waived.

Order

I hereby certify these additional factual findings to the Commissioner for consideration together with the facts determined in the prior initial decision.

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

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

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

June 24, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6/24/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1[illegible] 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses (Continued)

5. Nathalie Caminiti, caseworker, Division of Youth & Family Services

List of Exhibits (Continued)

No.		Description
P-5	Id.	Respondents' answers to petitioner's supplementary interrogatories, undated

OAL DKT NO. EDU 1512-95 (EDU 3045-94 ON REMAND)
AGENCY DKT. NO. 376-11/93

BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE; STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, BUREAU OF SCHOOL FINANCE; DIVISION OF YOUTH AND FAMILY SERVICES, BERGEN COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES; DIVISION OF YOUTH AND FAMILY SERVICES, PASSAIC COUNTY DISTRICT OFFICE, NEW JERSEY DEPARTMENT OF HUMAN SERVICES,	:	COMMISSIONER OF EDUCATION DECISION ON REMAND
RESPONDENTS.	:	

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

Upon review, the Commissioner determines to adopt the factual findings and conclusions of the ALJ. These have been derived in response to the Commissioner's prior directive to ascertain whether emergency conditions might have existed surrounding the placement of L.L., so as to justify the failure of DYFS to comply with *N.J.A.C.* 6:28-7.4(b)5(ii) by conferring with petitioner's chief school administrator prior to L.L.'s placement in the George Washington School.

This question having now been answered in the negative, the Commissioner concurs with the conclusion of the ALJ's earlier initial decision that the Commissioner may not hold petitioner responsible for the educational costs associated

with L.L.'s placement during the period at issue. Notwithstanding that the statutory scheme requires such costs to be borne by the district of residence, that provision is qualified by regulation requiring that the chief school administrator (or designee) of that district is to be consulted prior to any placement for which it may be held fiscally responsible. The Commissioner recognizes that circumstances may arise where such consultation is not strictly possible, as observed by respondents; there the intent of the law would be met by compliance at the earliest date feasible under the circumstances.* Here, however, there clearly was ample opportunity for DYFS to have consulted with petitioner prior to its placement of L.L. in the George Washington School, so that the controlling regulation was honored neither in letter nor intent, and, thus, the precedent condition for ultimate district responsibility was not met.

Accordingly, the initial decision of October 23, 1995 and the within decision on remand, as amplified by the Commissioner's prior decision and herein, are affirmed. The Prospect Park Board of Education is held to be the district of residence for L.L. and, as such, is the district generally responsible for her education; however, under the circumstances herein established, the Commissioner declines to hold the district responsible for L.L.'s educational costs for June 1992 and the 1992-93 school year.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

* The Commissioner here notes that allowing for a finding of substantial compliance with this rule by taking operative individual circumstances into account does not constitute a "waiver" of the rule, as suggested by the Board (Initial Decision, at p. 7).

SEPTEMBER 25, 1997
DATE OF MAILING SEPTEMBER 26, 1997

26-96

D.M., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Student Athlete challenged Board's denial of credits needed to complete sophomore year and participate in fall cross-country and spring track events.

ALJ concluded that the Board's failure to allow petitioner to take two Spanish make-up quizzes and to change petitioner's failing grade to a passing grade was not arbitrary, capricious or unreasonable. ALJ found that petitioner failed to establish any right to relief as he did not satisfy his responsibilities as a student to ensure that all work which was missed when he was absent was made up. Petition was dismissed.

Commissioner adopted findings and conclusion in initial decision as his own.

January 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8781-95

AGENCY DKT. NO. 389-9/95

J.M., BY HIS GUARDIAN, D.M.,

Petitioner,

v.

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,

Respondent.

Robert A. Ballard, Jr., Esq., for petitioner

James P. Granello, Esq., for respondent

Record Closed: October 27, 1995 Decided: December 4, 1995

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on September 28, 1995 when D.M., the guardian of J.M. (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that the actions of the Hunterdon Central Regional High School District (hereinafter respondent) refusing to change petitioner's Spanish II final grade to a passing grade or to permit him to take a make-up test, were arbitrary, capricious and unreasonable; the petition

also requested an order from the Commissioner determining that petitioner had completed the necessary credits to complete his sophomore year and should be deemed eligible to participate in Fall cross-country and Spring track events. Also on September 28, 1995, petitioner filed a motion for emergent relief scheduling the plenary hearing on an expedited basis and allowing petitioner to participate in Fall cross-country pending a determination on the merits. An answer on behalf of respondent was filed on October 3, 1995. A prehearing conference was conducted on October 4, 1995 at which time it was noted that the school district which petitioner currently attends, North Hunterdon Regional High School District, and the New Jersey State Interscholastic Athletic Assocation (NJSIAA) had not been named in the petition or served with any papers, and accordingly no emergent relief permitting petitioner to participate in Fall cross-country events pending a determination on the merits herein could be contemplated. The plenary hearing was scheduled for October 13, 1995 and October 26, 1995, at the Trenton office of the Office of Administrative Law.

The hearing commenced as scheduled and concluded on October 13, 1995. Following the close of testimony the record remained open for the receipt of written submissions. A letter memorandum on behalf of petitioner, dated October 19, 1995, was received on October 20, 1995. A letter memorandum on behalf of respondent, dated October 17, 1995, was also received on October 20, 1995. No reply having been received to either initial submission within the time allocated, the record closed on October 27, 1995.

FINDINGS OF FACT

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

In May 1995 petitioner, who has been a star athlete in both cross-country and track events, was a sophomore at Hunterdon Central Regional High School. On May 12, 1995, another student, C.S., and petitioner collided; petitioner suffered a broken collar bone. Petitioner was absent from school as a result of his injury on May 12, a Friday, and May 15, 16, 17, and 18,

Monday through Thursday of the following week. Because he wanted to attend a dance at the school on Friday evening May 19, he did go to some of his classes on May 19, 1995, including his Spanish II class. Thereafter he was absent again on May 22, 1995, a Monday. For the balance of the school year from May 23, 1995 to June 22, 1995, he attended all of his Spanish II classes. Hunterdon Central Regional High School issued final report cards on June 22, 1995. Petitioner's report card, R-1 in evidence, indicates that he passed English II, and U.S. History II (semester I), with grades of 72 and 78, respectively. (70 is the passing grade at Hunterdon Central Regional High School). He passed Biology with a final grade of 79 and Accounting I with a final grade of 81. His final grade in U.S. History (semester II) was 63 and in Geometry 67 and in Spanish II, 67, and accordingly, he received no credit for any of those courses. He also failed Driver Education and therefore received no credit for that course. Including five credits which he received for Physical Education, he earned 22.5 credits during his sophomore year. Assuming petitioner's report card as issued was correct, petitioner was ineligible to participate in extra-curricular activities, including sports. In order to be eligible to participate in sports during his junior year, he needed to have earned 27.5 credits during his sophomore year.

In late May 1995 petitioner's parents filed a notice of tort claim concerning the injury petitioner had suffered on May 12, 1995.

During the summer of 1995, petitioner's mother moved petitioner to petitioner's grandmother's house and enrolled petitioner in North Hunterdon Regional High School. Sometime during August petitioner's mother placed a telephone call to respondent and left a message on the voice mail of Frank DeCavalcante, Director of Curriculum, wherein she requested an explanation for the calculation of petitioner's Spanish grade. Mr. DeCavalcante relayed the message to Patricia Wilkinson, who had been petitioner's Spanish II teacher during the school year.

On September 8, 1995, when petitioner was at cross-country practice at North Hunterdon Regional High School, he was approached by a newspaper reporter who stated that petitioner was

ineligible to participate in sports.* On Monday, September 11, 1995, petitioner and his mother had a meeting at respondent's high school with Principal Linda Batz and Ms. Wilkinson. Ms. Wilkinson indicated that the reason petitioner had received a final grade of 67 for Spanish II was his failure to make-up two quizzes which he had missed when he was absent because of his collar-bone injury. There is some dispute concerning whether one missed quiz or two missed quizzes were discussed, but petitioner's position was that he had in fact made up the missed quiz or quizzes and Ms. Wilkinson's position was that he had not made up either quiz. Ms. Wilkinson had calculated petitioner's final average for the fourth marking period as 58 using the following grades: 82, 1, 70, 1, 60, 60, 85, 85, 70, 70; the "ones" represent missed quizzes since "one" is used as a place-holder in the computer rather than zero. Petitioner's final grade for the year in Spanish II was calculated as follows:

Mid-term	78 (x 1)
Final	68 (x 1)
First quarter	61 (x 2)
2nd quarter	71 (x 2)
3rd quarter	72 (x 2)
4th quarter	58 (x 2)

670 divided by 10 = 67.

Petitioner and his mother requested if respondent would not change petitioner's Spanish II grade based upon petitioner's representations that he had made up the quizzes that he be given the opportunity to re-take the quizzes. Respondent declined to permit petitioner to take the quizzes in September 1995 and also declined to change petitioner's grade. The within matter followed. This concludes the recitation of uncontested facts.

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* Presumably the basis for this conclusion was that petitioner had insufficient academic credits. Petitioner stipulates that he filed no Transfer Waiver Form pursuant to NJSIAA rules Article V, Section 4K(5) or (6); the parties in this case disagree concerning whether one was required to be filed, but that is not an issue for determination herein.

Petitioner testified on his own behalf. He indicated that running cross-country and track were activities which were very important to him because he hoped to obtain a college scholarship based on his athletic abilities. He testified concerning his winning achievements in the sports up until spring 1995 when he suffered the collar-bone injuries which prevented him from continuing in the Spring 1995 track season. He also testified concerning letters of inquiry he had received from various colleges and universities based upon their interest in his athletic achievements. Although his injuries were such that his doctors would not permit him to continue to participate in Spring track events, he testified that he had recovered sufficiently that he could have participated in Fall cross-country activities at his new school, North Hunterdon Regional High School. He testified that on September 8, 1995, when the newspaper reporter had approached him during practice, he was somewhat surprised because his coach had not said anything to him about not being eligible to participate in cross-country events. After his coach checked with the athletic director that day, however, the athletic director had confirmed that he was ineligible. When questioned by the undersigned, petitioner admitted that he was fully aware all along that he needed 27.5 academic credits to be eligible to participate in sports his junior year. He also admitted that he was aware on August 7, 1995 that he had failed Spanish II; he testified that his mother received a post card from respondent on that date which stated that he had failed both geometry and Spanish II and that she had called him at his friend's house to tell him. According to petitioner, he saw the post card later and it said nothing about his having failed history or any other course. Accordingly, petitioner admitted, he was aware on August 7, 1995, that he had earned only 22.5 academic credits during his sophomore year and that he was ineligible to participate in sports during his junior year.

Petitioner acknowledged that during the meeting with Ms. Batz and Ms. Wilkinson on September 11, 1995, he told them that he had taken two make-up quizzes which he had missed and that he had received 100 on each quiz. During his testimony in the within matter, however, he testified that he had no recollection of taking a quiz concerning "Spanish-speaking nations;" he insisted he took the quiz on "Chapter 14-commands," but he could not remember when he had taken it. He remembered having a conversation with Ms. Wilkinson on May 19 about a missed

quiz. One of the make-up quizzes he had taken during a regular class period when all of the other students were doing other homework, he indicated. He could not remember the subject matter of that test. He testified that when he got the quiz back he had received a 100 for a grade; he took the test home and his mother put it on the refrigerator where it stayed for four or five days after which it was disposed of, he testified. Concerning whether there were one or two quizzes given during the time he was absent because of his injury, he testified that he only recalled taking one quiz which he had missed as a result of his injury. He did recall taking another quiz and getting a 100 on it some other time, he said. During another portion of his testimony he admitted that he had been questioned by Ms. Wilkinson about making up test(s), "I made them all up", he testified.

Petitioner indicated that he was very surprised in August when his mother told him he had failed Spanish II; he knew that he had failed geometry because his teacher had advised him that he would not be passing that course, he said. He was unaware that Spanish II was not offered in summer school. He knew he could have taken geometry in summer school but he decided not to do so because he assumed he was passing Spanish and would have the necessary 27.5 credits. On cross-examination when asked by counsel for respondent whether Ms. Wilkinson had indicated to him that he had two quizzes to make-up, he responded, "I can't remember back that far." He finally admitted that he had only made up one quiz which he had missed while he was absent because of his collar bone injury; however, when asked by the undersigned whether he had ever gotten a 100 on a quiz before or after, he responded that there had been one other quiz where he had received 100 before the quiz he made up in May.

Petitioner also testified concerning a conversation he had with one of respondent's administrators when he had been sent to the office by Ms. Wilkinson for coming in late to Spanish class. Petitioner explained that he had been late to class; however, he had a pass from the nurse because after his collar bone injury he was not supposed to be in the halls the same time as the other students. Ms. Wilkinson knew this, he indicated, because he had come into class late on other days after the injury, but she nevertheless sent him to the office because she thought he had an attitude. According to petitioner the vice-principal had complained to him that since he had filed a tort claim notice, the parent of the other child was in the office every morning. Petitioner

testified that he had said that he did not care since the other child was not the one who had lain in the hospital with the injury and was forced to miss participating in sports activities. Finally, after he indicated that he first learned that he had failed Spanish when his mother received a post card on August 7, because no final report card had been sent home, the undersigned asked him whether he had not been curious at the end of June to know why had had not received his report card, and he responded, no."

Petitioner's mother, S.M., also testified on his behalf. She specifically recalled seeing a 100 percent written in red ink on a Spanish quiz paper which petitioner brought home at the end of May. She testified that she had put the quiz on the refrigerator for a few days until it had to be moved to make way for other papers. She recalled seeing only one quiz paper with a 100 percent on it, she acknowledged. She testified that after petitioner had gone back to school following his injury, she had telephoned Ms. Frascella, petitioner's guidance counselor, and had asked her how petitioner was doing. According to S.M., Ms. Frascella told her that petitioner needed some tutoring in geometry but that it was not necessary for him to go to summer school. She testified that his final report card for the 1994-95 school year had never come in the mail. She first saw it on September 11, 1995, when Ms. Batz produced it, she testified. She had made no effort at the end of the school year when she did not receive the report card to find out where it was because she was so disgusted with respondent she just wanted to get her son out of that school and get him a fresh start. She testified that she felt that she had never received any help for her son from respondent and that matters were even worse after C.S., who did not like it that petitioner ran faster than he did, had smashed petitioner to the ground and broke petitioner's collar bone. She remembered having received one interim report of progress, not the one dated March 3, 1995, which was marked as R-3 in evidence, but an earlier one. After receiving the report, she had made arrangements with the guidance office for periodic progress reports and had regularly checked and signed petitioner's work. After that petitioner's grades improved, she said. She had no idea that he was failing Spanish II and was very surprised when she received the notice on August 7, she said. She also recalled having a conversation with the guidance counselor wherein she had advised Ms. Frascella that she was not receiving petitioner's report cards. She testified that she had asked Ms. Frascella to send the report cards home with petitioner rather than mail

them. She was certain that petitioner had not intercepted the reports from the mail box because her mail comes in the morning and petitioner never returns from school before late afternoon or early evening.

Ms. Wilkinson testified that her lesson plans indicate that on May 18, she gave petitioner's class a quiz on "Spanish-speaking nations" and on May 22, she had given petitioner's Spanish II class a quiz on "Chapter 14 Command Forms of Verbs. Her attendance records indicate that petitioner was absent from class on May 18 but that he was present on May 22 but did not take the quiz with the class. She acknowledged that her attendance records could be incorrect, especially since she had been present in the court room and had heard petitioner's mother testify that he had been absent on May 22, a Monday, because of the pain from his injury. In any event, she was sure that he had not taken either quiz. She indicated that petitioner was advised on May 19 that he had missed the Spanish-speaking nations quiz and all quizzes were announced ahead of time so he would have learned on May 19 about the quiz coming up on Monday, May 22. Ms. Wilkinson testified that during the meeting on September 11, 1995, petitioner had stated that another student, L.R., had observed him taking the make-up test. She testified that Ms. Batz had then gone to speak with the student, L.R., and reported back that the student recalled seeing petitioner get back some quiz and that he had complained that the grade was not a good one. She was also sure that she had advised petitioner several times that he needed to come and make up the quizzes and that he always responded that he would; however, he never did, she testified. Nevertheless, she allowed him to take the final exam because there was no reason to prevent him from taking it, she said. She assigned him a failing grade rather than an incomplete because it was her opinion that he had plenty of time after May 22 and before June 22 to make-up the quizzes and she assigns incomplete as a grade only when there was insufficient time to make-up the work. Petitioner never asked her for more time to come and make-up the quizzes, she said.

Ms. Wilkinson acknowledged that she had received a message from Dr. DeCalvalcante at the end of August that petitioner's mother was questioning his grade. She did not call petitioner's mother that day because she did not have her grade book at home, she said, but two days later after she had retrieved her grade book she tried to call one time in the morning and received no

answer. There was no answering machine so she could not leave a message, and she never tried again. When asked by the undersigned whether she would have been surprised if petitioner received a grade of 100 percent on both missed quizzes, she said she would be surprised because both of the quizzes had been "challenging"; none of the students in petitioner's class who took either quiz received a grade of 100 percent. The highest grade on each was 92. She acknowledged that petitioner had received a 100 percent on a quiz in March covering material in chapter 10 and that no other student had received a 100 percent on that quiz. It was Ms. Wilkinson's opinion that petitioner should not be permitted to take the quizzes months later after the school year was over simply because he chose not to make them up at the appropriate time. She described petitioner as having been sometimes uncooperative during the school year. There were times when he exhibited no real desire to learn or to want to listen in class or to study and cooperate in general. She thought he was capable of doing much better than his grades indicated. She acknowledged at times she was not happy with him. When she was asked whether she had issued an interim report for the fourth marking period indicating that petitioner was doing poorly, she could not recall whether she had issued one or not, although she thought most likely she would not have given an interim report for the fourth marking period because at the time it would have been issued petitioner would not yet have missed either of the quizzes in question.

Carol Frascella, petitioner's guidance counselor during the time he was a student at respondent's school district, testified that she had been unable to locate an interim report of progress for petitioner for the fourth marking period. She indicated that all of the interim reports which had been issued for the fourth marking period for her students had been together in a pack in her office and she had them when she had prepared letters to parents on June 2, 1995. She identified the form letter which she had sent to petitioner's parents, R-7 in evidence. Ms. Frascella denied that she had ever told petitioner's mother that he did not need to go to summer school or to have a tutor in Spanish II class. She said that she would have no more information about how petitioner was doing in Spanish II at the beginning of June than petitioner's mother. The only conversation she remembered having with petitioner's mother during the fourth quarter report period concerned his mother's perception that he was not being treated fairly in regard to

the injury he had suffered when the other student, C.S., had knocked him over. She could not recall any discussion regarding academics at that time.

Dr. DeCalvalcante testified and confirmed that he had received a message from petitioner's mother in late August questioning calculation of the Spanish II grade. He testified that he had called Ms. Wilkinson who was on vacation and had asked her to handle the inquiry. After Ms. Wilkinson indicated that she would call petitioner's mother, Dr. DeCalvalcante did not call petitioner's mother back himself.

With respect to the facts in dispute, I found respondent's witnesses to be far more credible than petitioner's. Ms. Wilkinson was candid in admitting that her attendance records could be in error, that she could have inadvertently failed to mark petitioner absent on Monday, May 22. She was also candid in acknowledging that she did not know whether she had sent home an interim report during the fourth marking period. She also candidly acknowledged that she had no specific recollection of saying to petitioner that he had to come and make up the missed quizzes, although she was sure that she had done so because she always does. Petitioner's testimony, on the other hand, was confused and confusing. At one point he testified that he was fully aware that he needed 27.5 credits in order to be eligible to play sports and at another point in his testimony he claimed to be surprised when the newspaper reporter told him that he was not eligible to participate. He said he could not remember whether he had missed one quiz or two while he was out because of his collar bone, but he admitted that he had told Ms. Batz and Ms. Wilkinson on September 11, 1995, that he had taken two quizzes and had gotten 100 on each. Perhaps this is simply the result of a misunderstanding rather than deliberate fabrication, since it appears that he did finally testify in the within matter that he had taken only one make-up quiz as a result of having missed the quiz while he was absent because of his collar bone injury and the other make-up quiz upon which he claims to have received 100 percent was taken at a different time as the result of an absence not attributable to his collar bone. The uncontested evidence reveals that he did receive a 100 percent in March on chapter 10 material. Therefore, if he did in fact take one of the two quizzes which he missed during May, probably the chapter 14 quiz on commands since he testified that he had no recollection of having taken a test on Spanish-speaking nations, then he

would have received two 100 percents. Since there was also a test, as opposed to just a quiz on chapter 14, it could also be that he is simply remembering having taken the test (which he did on May 24) and not the quiz which he missed on May 22. Whether he took one of the two missed quizzes, however, is not determinative of the outcome. What is determinative is the fact which I find that he failed to make-up at least one of the quizzes. While I believe it is possible that Ms. Wilkinson could have failed to record one make-up grade, it is not likely that she would have failed to record two make-up grades. In addition, petitioner does not recall making up the test on Spanish-speaking nations. I **FIND** that petitioner was aware on May 19 that he had missed a quiz on May 18 and that there would be another quiz on May 22. I further **FIND** that Ms. Wilkinson on several occasions reminded him to come in to make up the quizzes and that, for whatever reason, he failed to make-up at least one of them.

APPLICABLE LAW AND DISCUSSION

The rule is well settled that actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960). The burden of proving by a preponderance of the competent and credible evidence that his failing grade in Spanish II was the result of respondent's arbitrary, capricious or unreasonable actions is upon petitioner. Petitioner argues in his post-hearing written submission that the Commissioner should change his grade to a passing grade because he took one make-up quiz and received a 100 percent on it and because Ms. Wilkinson could not indicate where she had recorded the grade of 70 which she awarded for petitioner's oral presentation of his report on Spanish-speaking nations; "it is entirely possible that J. could have taken that quiz and received a 70 on it." Petitioner's post-hearing submission, page two. Petitioner also argues in his post-hearing submission that the Commissioner should conclude that he took the quiz on chapter 14 which was given on May 22, because Ms. Wilkinson had him marked present for that day and she could not satisfactorily explain why he would not have taken the quiz with the class. By petitioner's own evidence, however, he was absent on May 22, 1995. His mother testified she had to take him to the hospital and get additional medication for him on that date because of pain

associated with the injury. In fact, Ms. Wilkinson never said she could not indicate where the score for the oral report was recorded; it is clearly apparent on R-5 in evidence. What she indicated was that she could not say when he gave the oral report because the oral reports by the rest of the class were given on May 11 and May 12, dates which she had him marked absent.

Petitioner also states at page four of his written post-hearing summary, "As the Court is aware, J. merely needed to obtain grades of 60 on each of the two alleged missed quizzes in order to receive a passing grade for the fourth semester, which would have permitted him to pass the course for the year." This statement is simply inaccurate as a matter of basic mathematics. Ten grades were used to calculate the average for the fourth quarter. The test on chapter 13 counted double (two 60's); the test on chapter 14 counted double (two 70's), and the Spanish-speaking-nations written report counted double (two 85's). The other grades were a chapter 13 vocabulary quiz (82), Spanish-speaking nations oral report (70) and the two missed quizzes, one on Spanish-speaking nations the other on Chapter 14, Commands. In order to receive a passing grade for the quarter which would also permit him to pass the course for the entire year, the ten numbers would have to add up to at least 730, not 700, because his grade for the quarter would have had to have been 73 in order to end up with a 70 average for the entire year. See calculations on page 4 above. Accordingly, petitioner needed to have grades on the two quizzes which when added together totaled 148; in other words the two quiz grades had to average 74.

Petitioner's theory is that respondent was annoyed with him for filing a tort claim notice over the injury caused by C.S. and was further annoyed because their star track/cross-country star was transferring to North Hunterdon Central and therefore, it made no effort to ensure that petitioner made up his quizzes and refused to allow him to make them up after the failing grade had already been issued. There is simply no evidence to support this theory, however. The Spanish grade was not calculated by respondent; it was calculated by Ms. Wilkinson, petitioner's Spanish teacher. There is not one bit of evidence that Ms. Wilkinson had any interest in or even knew about the potential law suit against respondent because of petitioner's injuries. The only issue remaining for determination herein is whether respondent's failure in September 1995 to allow petitioner to take two Spanish quizzes which should have been taken in May or June of

1995, prior to calculation of petitioner's final grade, was arbitrary, capricious and unreasonable. I **CONCLUDE** that it was not. To permit students to neglect to make-up work which they have missed until after the final grade has been issued and then, when the grade is failing, to require the administration of special make-up tests to see whether the grade could be changed to a passing grade, would do nothing but encourage student irresponsibility. What incentive would there be to find out what you had missed while you were absent and make it up if you knew that in the event your omissions resulted in a failing grade, you could then make it up.? Perhaps respondent could have done more in this matter to ensure that petitioner's grade in Spanish II would have been a passing one. Respondent did enough to satisfy its responsibilities, however. It is petitioner who failed to satisfy his responsibilities as a student to ensure that all work which was missed when he was absent was made up. It appears that he simply assumed that because he is an excellent athlete somehow his failure in Spanish II would be remedied and he would be permitted to participate in sports. He has failed in the context of these proceedings to establish any right to relief, however, and accordingly, the petition of appeal is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

Dec 4, 1995
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

12/6/95
DATE

DAR
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 08 1995
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For respondent:

R-1 Petitioner's report card for academic year 1994-95

R-2 Student transcript, dated 6/28/95

R-3 Interim report of progress, dated 3/3/95

R-4 Newsletter concerning, inter alia, summer school programs - summer 1995

R-5 Photocopy of Ms. Wilkinson's grade book (2 pages)

R-6 Computer print-out for Ms. Wilkinson's Spanish II period 6 class, dated 6/23/95

R-7 Form letter to parents of petitioner from Carol Frascella, counselor, dated June 2, 1995 (2 pages)

EXHIBITS FOR IDENTIFICATION ONLY

For petitioner:

P-1 Ms. Wilkinson's grade book for the 1994-95 school year

WITNESSES

For petitioner:

J.M.

S.M., petitioner's mother

For respondent:

Patricia Wilkinson

Carol L. Frascella

Frank DeCavalcante

OAL DKT. NO. EDU 8781-95

D.M., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the Respondent Board's refusal to change petitioner's failing grade to a passing grade may not be upset unless it can be demonstrated to be patently arbitrary, capricious or unreasonable. Kopera, supra, at 294.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law and finds that the within Petition of Appeal must be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 18, 1996
Date of Mailing, January 19, 1996

(SB) 26-96

State of New Jersey

DEPARTMENT OF EDUCATION
CN 500
TRENTON NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

LEO KLAGHOLZ
Commissioner

April 17, 1996

John J. Coyle, Esq.
865 U.S. Highway 22 West
P.O. Box 5270
Phillipsburg, NJ 08865

Craig U. Dana, Esq.
Morris, Downing and Sherred
One Main Street
P.O. Box 67
Newton, NJ 07860

Dear Counsel:

MARTIN A. DOMACASSE V. BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL SCHOOL DISTRICT, WARREN COUNTY, STATE BOARD DOCKET #26-96

Following a hearing held on February 7, 1996, the Board of Education of the North Warren Regional School District (hereinafter "Board") determined that Martin A. Domacasse (hereinafter "petitioner"), a senior at North Warren Regional High School, had assaulted and used obscene language towards a teacher during a student demonstration at the school, and had intentionally destroyed a badminton net. As a result, the Board suspended petitioner from school for the third marking period of the school year and barred him from all extracurricular activities until the end of the school year.

On March 5, 1996, petitioner filed a petition of appeal with the Commissioner of Education challenging the Board's action. On March 19, petitioner filed a motion for emergent relief with the Commissioner, requesting that the Board's action be rescinded and that he be permitted to return to school immediately. In a letter decision dated April 4, 1996, the Commissioner denied petitioner's request for emergent relief and transmitted this matter to the Office of Administrative Law for further proceedings.

On April 9, 1996, petitioner filed the instant application for emergent relief with the State Board of Education, pursuant to N.J.A.C. 6:2-2.4. That application was received by the State Board on April 11. Inasmuch as petitioner was permitted to return to school on April 3, his application challenges only the Board's action in excluding him from extracurricular activities for the duration of the school year. In support thereof, petitioner argues that "money cannot replace

the memories he will have foregone as a result of not participating in the daily and extra-curricular activities of a high school senior nor the right to attend his senior prom and his high school graduation." Brief in support of application for emergent relief, at 6-7. Petitioner further contends that he has a "legal right" to participate in extracurricular activities and that he is likely to prevail on the merits of the case since his contact with the teacher was "an involuntary defensive reaction to her unwarranted advances" and "minimal at most." Id. at 7-8.

In a brief filed in opposition to petitioner's application, the Board argues that petitioner has failed to demonstrate a basis for emergent relief or to satisfy the applicable standard for such relief.

Inasmuch as we agree that petitioner's application fails to meet the standards that would entitle him to emergent relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny his application.[1]

We reject petitioner's contention that he will suffer irreparable harm in the event his application is denied. Like the Commissioner, we find that "the memories [petitioner] will have foregone as a result of not participating in...extracurricular activities," brief in support of application for emergent relief, at 6, do not provide him with the requisite harm warranting the extraordinary relief requested. Moreover, the fact that petitioner "resides in the district with his parents who are taxpayers," id. at 7, does not, as petitioner urges, afford him a "legal right" to participate in extracurricular activities. See Camden City Board of Education v. NJSIAA, Docket #A2802-91T2 (App. Div. 1992); Burnside v. NJSIAA, 1984 S.L.D. 1696 (App. Div. 1984), cert. denied, 101 N.J. 236 (1985). Nor do we find any basis in petitioner's submissions for concluding that he is likely to prevail on the merits of this matter.

Accordingly, for the reasons stated, we deny petitioner's application for emergent relief.

Sincerely,

Anne S. Dillman, President
State Board of Education

Robert A. Woodruff, Chairperson
Legal Committee of the State Board

c: Members, State Board of Education
Jane Keehn, County Superintendent
Angela Moyer, Board Secretary
Audrey Kerrigan
Nancy Kaplen
Roslynne Novack

ASD/RAW/JL/Domacass

[1] Pursuant to N.J.A.C. 6:2-3.3, "[t]he President of the State Board or, in the President's absence, the chairperson of the Legal Committee is authorized to decide on behalf of the State Board applications for emergency relief made pursuant to N.J.A.C. 6:2-2.4 unless the determination would constitute the final decision with respect to the controversy."

27-96

27-96

STANLEY KRZYSIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 19, 1996

OAL DKT. NO. EDU 9746-94

STANLEY KRZYSIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 19, 1996

DATE OF MAILING JANUARY 19, 1996

28-96

28-96

ALBERT JONES AND JOHNNIE MAE JONES, HIS WIFE,	
PETITIONERS,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	DECISION
RESPONDENT.	

JANUARY 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6585-95
AGENCY DKT. NO. 167-5/95

ALBERT JONES and JOHNNIE MAE JONES, his wife,
Petitioners,
v.
SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD,
Respondent,

Jason Holt, Esq., for petitioner

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

Record Closed: December 11, 1995 Decided: December 12,1995

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

Statement of the Case

This matter was transmitted to the Office of Administrative Law on June 23, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

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

Dec. 12, 1995
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Dec. 14, 1995
DATE

D. N. Antanaitis/fa
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 14 1995
DATE

Barbara A. Kennedy
OFFICE OF ADMINISTRATIVE LAW

al

YOUNG, DIMIERO & SAYOVITZ, P.C.
A Professional Corporation
Skyline Plaza
414 Eagle Rock Avenue
West Orange, NJ 07052
(201) 736-5200
Attorneys for Respondent/Counterclaimant

DEC 1 [illegible] PM '95

ALBERT JONES and JOHNNIE MAE JONES, his wife, Petitioners v. SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NEW JERSEY Respondent	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDU 6585-95N** **STIPULATION OF DISMISSAL WITH PREJUDICE**

THE MATTER IN DIFFERENCE in the above entitled action, having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the Petition and Counterclaim be and hereby are dismissed with prejudice and without costs against either party, and each party releases the other from any and all claims which may have arisen relative to this matter.

ALBERT JONES

BY: JASON HOLT

JOHNNIE MAE JONES

BY: JASON HOLT

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD

BY: JOANNE L. BUTLER

OAL DKT. NO. EDU 6585-95

ALBERT JONES AND JOHNNIE MAE JONES, HIS WIFE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of an acceptance of settlement rendered by the Office of Administrative Law (OAL) have been reviewed. Upon careful and independent review of the record, which includes as part of the initial decision a document identified as a Stipulation of Dismissal with Prejudice, the Commissioner finds that the terms of the proposed settlement are nowhere spread on the record. Consequently, because this case was transmitted to the OAL as a contested matter pursuant to N.J.S.A. 52:14B, the parties may not settle their controversy without the Commissioner's consideration of the terms of the settlement accord, pursuant to N.J.A.C. 1:1-19.1. Therefore, the Commissioner must remand the matter for explanation of the terms of the amicable resolution reached by the parties.

Accordingly, the instant initial decision must be rejected and the matter remanded to the Office of Administrative Law for further action consistent with this determination.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 19,, 1996
DATE OF MAILING JANUARY 19, 1996

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(28-96)
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ALBERT JONES AND JOHNNIE MAE JONES, HIS WIFE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLE-WOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

MARCH 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1502-96
(OAL DKT. NO. 6585-95 - Remanded)
AGENCY DKT. NO. 167-5/95

ALBERT JONES and JOHNNIE MAE JONES, his wife,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT,
Respondent,

Jason Holt, Esq., for petitioner

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

Record Closed: February 2, 1996 Decided: February 6,1996

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

Statement of the Case

This matter was remanded to the Office of Administrative Law by order of the Commissioner of Education entered on January 19, 1996 "for explanation of the terms of the amicable resolution reached by the parties.". Previously, on December 12, 1995, the OAL had issued an initial decision which failed adequately to disclose the

settlement terms as required by *N.J.A.C.* 1:1-19.1. On January 29, 1996, both parties submitted supplemental letters which contained all the terms and conditions of settlement. These letters are attached and incorporated as part of this initial decision.

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

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

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

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

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

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

Feb 6, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

2/8/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 13 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

LAW OFFICES OF
JASON HOLT

MEMBER:
U.S. Supreme Court
Third Circuit Court of Appeals
Federal District Court
N.J. & PA. Bars

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JAN 29 11 41 AM '96

January 25, 1996

Honorable Ken R. Springer
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

RE: Albert Jones & Johnnie Mae Jones v. South Orange and Maplewood Board of Education
Agency Reference No.: 167-5/95
OAL Docket No.: 6585-95N

Dear Judge Springer:

As you are aware, this firm represents the Petitioners, Albert Jones and Johnnie Mae Jones in the above referenced matter.

We have received a copy of the January 19, 1996 Decision of the Commissioner of Education remanding this matter for explanation of the terms of the amicable resolution reached by the parties. As indicated in the Stipulation of Dismissal, the parties mutually dismissed their pleadings with prejudice and without costs, while releasing each other from andy and all future claims.

In order to resolve this matter without further judicial intervention, please be advised as follows:

1. It is my understanding that the Respondent/Counterclaimant withdraw their Counterclaim; and

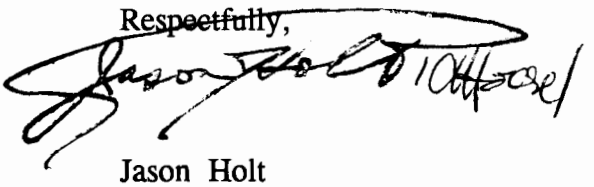
2. Based upon the withdrawal of the Counterclaim, the Petitioners herein withdraw their Petition against Respondent.

3a

P.O. Box 2436 • 7 Glenwood Avenue • Suite 304
East Orange, New Jersey 07019-2436
(201) 673-0300 • 1 (800) 227-HOLT

Should you Honor have any comments or questions with regard to this matter, please feel free to contact me.

Respectfully,



Jason Holt

JH:cm
cc: Joanne L. Butler, Esq.
Albert & Johnnie Mae Jones

YOUNG, DIMIERO & SAYOVITZ
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SKYLINE PLAZA
414 EAGLE ROCK AVENUE
WEST ORANGE, NEW JERSEY 07052

(201) 736-5200
TELECOPIER (201) 669-8149

SIDNEY A. SAYOVITZ
ALFRED D. DIMIERO*
CERTIFIED CIVIL TRIAL ATTORNEY
GARY S. YOUNG*
MONICA E. PECK
BARBARA ANN SGRO
JOANNE L. BUTLER
CELIA S. BOSCO*

* MEMBER N.J. & N.Y. BARS

NEW YORK OFFICE
120 WALL STREET
NEW YORK, NEW YORK 10005
(212) 483-0737

OF COUNSEL
ROBERT H. GREENWOOD

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JAN 29 11 41 AM '96

January 26, 1996

Honorable Ken R. Springer
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: Albert Jones and Johnnie Mae Jones v. Board of Education of the School District of South Orange and Maplewood
Agency Reference No. 167-5/95
OAL Docket No. 6585-95N
Our File No. G95.095/1808

Dear Judge Springer:

As you are aware, this firm represents the Respondent/Counterclaim Board of Education of the School District of South Orange and Maplewood in the above referenced matter.

We have received a copy of the January 19, 1996 Decision of the Commissioner of Education remanding this matter for explanation of the terms of the amicable resolution reached by the parties. As previously discussed with your Honor, the parties mutually dismissed their pleadings with prejudice and without costs, while releasing each other from any and all future claims.

In order to resolve this matter without further judicial intervention, please be advised as follows:

1. It is my understanding that the Petitioners withdraw their Petition; and

2. Based upon the withdrawal of the Petition, the Respondent Board herein withdraws its Counterclaim against Petitioners.

Should your Honor have any comments or questions with regard to this matter, please feel free to contact me.

Respectfully submitted,

YOUNG, DIMIERO & SAYOVITZ, P.C.
A Professional Corporation

Joanne L Butler

JOANNE L. BUTLER

JLB/has
cc: Jason Holt, Esq.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark N.J. 07102
(201) 648-7145

William Speziale,
Legal Assistant II/
Deputy Clerk

February 6, 1996

Deborah Antanaitis, Acting Director
Bureau of Controversies and Disputes
Dept. of Education
225 W. State Street
CN 500
Trenton, NJ 08625

Re: N.C. v. BOE of South Orange and Maplewood
OAL Dkt. No.:EDU 1257-96
Agency Ref. No.: 10-1/96

Dear Ms.Blackburn:

Enclosed is Judge Kenneth Springer's order dated February 6, 1996 granting petitioner's motion for emergent relief. Also enclosed is a copy of the oral argument tape.

Kindly sign this acknowledgement of receipt and return it to our courier..

Very truly yours,

William Speziale

William Speziale

/jb
Enclosure

DNA
RECEIVED BY

2/8/96
DATE

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

OAL DKT. NOS. EDU 1052-96 AND EDU 6585-95 (REMANDED)

ALBERT JONES AND JOHNNIE MAE JONES, HIS WIFE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLE-WOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law on remand have been reviewed. The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 25, 1996
DATE OF MAILING MARCH 26, 1996

(SB) 28-96

DHPL #99-96
SB #28-96

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF LONDELA Y. BRYANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, March 15, 1996

For the Petitioner-Appellant, Londela Y. Bryant, pro se

The decision of the Deputy Commissioner of Education disqualifying petitioner from school employment as a teacher's aide following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed substantially for the reasons expressed therein. We add that while the statute regards a conviction for simple assault to be disqualifying only if it involved "the use of force which results in bodily injury," the criminal complaint filed against petitioner in June 1985, which resulted in her conviction for simple assault, charged petitioner with purposely and knowingly causing bodily injury to the complainant by striking her in the head and arm with a wooden stick. Consequently, petitioner's 1985 conviction for simple assault constituted a disqualifying offense under N.J.S.A. 18A:6-7.1.

Moreover, while the record before us does not include the results of a criminal record check conducted by the Federal Bureau of Investigation, see N.J.S.A. 18A:6-7.1, the criminal history review in the record, conducted by the State Bureau of Investigation, reveals a disqualifying offense under the statute, and we agree with the

7/10/96

Deputy Commissioner that petitioner has failed to demonstrate her rehabilitation by clear and convincing evidence.

Petitioner's request for oral argument is denied as not necessary for a fair determination of the case. N.J.A.C. 6:2-3.2.

July 10, 1996

Date of mailing JUL 12 1996

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29-96E

CAROL J. CALLOWHILL, THERESA KELLY AND BARBARA PERSKIE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, MARVIN HILL, PRESIDENT, AND DR. CHARLES B. HAWN, JR., SECRETARY, ATLANTIC COUNTY,	:	
RESPONDENTS.	:	

For Petitioners, Hankin, Sandson and Sandman (Robert S. Sandman, Esq.)

For Respondents, George G. Frino, Esq.

This matter comes before the Commissioner of Education by way of Petition of Appeal with Motion for Emergent Relief, filed on January 22, 1996, by three members of the respondent Atlantic City Board of Education, all of whom are representatives of sending districts appointed to membership on the receiving Board pursuant to N.J.S.A. 18A:38-8.1 et seq. Petitioners contend that the Board has improperly denied them the right to participate in discussion and voting pertaining to the employment contract of the current superintendent, which contract is scheduled to be the subject of deliberations at an executive session of the Board at 5:00 this evening. The Board in turn contends that the deliberations at issue are outside the purview of the law's intent, so that the petitioning Board members have no right to participate in such deliberations.

In their papers, petitioners seek the following reliefs:

1) injunction against the Atlantic City Board of Education from proceeding with tonight's meeting and from any further meeting or discussion on the proposed superintendent's contract pending a final ruling in this matter;

2) Explanation and tabulation of how the Board counted sending district votes from April 1995 to present;

3) Access to all legal opinions pertaining to sending district participation in board discussion or voting, as well as all opinions pertaining to the proposed superintendent's contract; and

4) Commissioner interpretation of N.J.S.A. 18A:38-8.1 to determine what issues sending district representatives may generally discuss and vote upon under that law.

On January 22, 1996, pursuant to his authority under N.J.S.A. 18A:4-33, the Commissioner delegated the emergent aspect of this matter to the Deputy Commissioner for immediate hearing. A telephonic conference was conducted and the arguments of the parties were heard.

Having heard the arguments of the parties and considered the standard for grant of extraordinary relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), the Deputy Commissioner rules as follows:

With respect to the meeting scheduled for this evening, the Deputy Commissioner finds, as indicated verbally at hearing, that petitioners have met the standard for grant of emergent relief. In so ruling, the Deputy Commissioner finds that irreparable harm would come to petitioners should they later be found entitled to participate in discussions and voting, and a meeting were to have occurred where significant deliberations took place without their participation. He moreover finds that, for purposes of a temporary injunction, petitioners have demonstrated a sufficient likelihood of success on the merits, and that greater harm would come to petitioners were a short stay not granted than would come to the Board if it were required to temporarily postpone discussions which it does not wish to open to petitioners. Accordingly, the respondent Board is restrained from any discussion or vote on the superintendent's employment contract that does not include petitioners while the merits of this matter are pending before the Commissioner.

With respect to petitioners' request for tabulation of prior votes as they relate to counting of sending district representatives, that request is denied, as the question at hand is one of law rather than practice and prior voting patterns will have no bearing on the outcome of either the emergent matter or the merits in full.

With respect to petitioners' request for access to legal opinions, that request is granted to the extent that the opinions in question were provided to other Board members and

pertain specifically to the employment contract at issue, solely in the event the Board elects to proceed with discussions including petitioners rather than suspend further discussions until the Commissioner's final ruling. Access to the other requested opinions is denied, as these rulings would effectively constitute respondents' defense on the merits of the matter under dispute and petitioners will have ample opportunity to hear and respond to these defenses during subsequent briefings as set forth below.[1]

With respect to petitioners' request for interpretation of N.J.S.A. 18A:38-8.1 et seq. so as to generally set forth the issues that sending district board members may discuss under that law, this request shall be treated as an application for declaratory judgment pursuant to N.J.A.C. 6:24-2.1, and the Commissioner shall determine in due course whether or not he will entertain such application.

Accordingly, petitioners' Motion for Emergent Relief is granted to the extent that the respondent Board must either postpone or include petitioners in, and provide them with pertinent background materials for, any discussions or votes on the superintendent's employment contract held pending issuance of the Commissioner's decision on the merits of this matter. That decision shall issue as soon as practicable following submission of an answer to the petition by the Board and briefs by both parties in accordance with an expedited schedule to be forthwith established and communicated to the parties by the Bureau of Controversies and Disputes.

IT IS SO ORDERED.

DEPUTY COMMISSIONER

January 22, 1996

[1] It is noted that one particular legal opinion, on petitioners' right to attend the meeting at issue herein, was faxed to the Deputy Commissioner a few moments before the hearing in anticipation of the apparent likelihood that Board counsel might be unavailable during the scheduled telephonic conference. However, in the event, Board counsel was able to make argument orally, and while the Deputy Commissioner acknowledged receipt of the document during the course of proceedings, he read it neither prior to nor during the hearing, did not consider it in rendering his decision, and has determined not to make it part of the record herein.

JANUARY 23, 1996
DATE OF MAILING JANUARY 23, 1996

30-96

30-96

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

SYNOPSIS

Petitioner contested her involuntary transfer with reduction in salary from Supervisor of Pupil Personnel Services to Individualized Education Program (IEP) Facilitator. Petitioner claimed transfer violated her tenure rights as supervisor.

ALJ concluded that petitioner did achieve tenure in a supervisory capacity under N.J.S.A. 18A:28-6 by virtue of her service in the Special Services position, which, while designated as "Acting," was, in fact, full service in a vacant position, for more than two years while holding the requisite certificates. Moreover, the ALJ found that the IEP facilitator-teacher duties were not supervisory in nature. Thus, the ALJ concluded that service as an IEP facilitator-teacher did not inure to the service necessary to acquisition of tenure or seniority in a supervisory capacity. However, the ALJ determined that absent a showing that petitioner's supervisory seniority of two years and five days was superior to the seniority enjoyed by others, particularly by intervenor, there was not enough in the record to support the relief petitioner sought. Petition was dismissed.

Commissioner determined to adopt in part and reverse in part the ALJ's decision. Commissioner concurred with ALJ that petitioner acquired supervisory tenure by virtue of her service as Acting Supervisor of Pupil Personnel Services from March 24, 1992 until March 28, 1994. Commissioner also concurred that petitioner's IEP facilitator-teacher duties were not supervisory in nature and, therefore, do not inure to the service necessary to acquire tenure in a supervisory capacity. Pursuant to N.J.A.C. 6:3-5.1 wherein each supervisory category is considered a separate category for the purpose of calculating seniority, Commissioner found petitioner had seniority in the position of Supervisor of Pupil Personnel Services while intervenor did not have seniority in that position having no service in that role prior to her appointment on March 28, 1994. Therefore, Board was ordered to restore petitioner to said position with compensation from the effective date of her transfer.

January 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4538-94

AGENCY DKT. NO. 73-4/94

PENNY WEBB,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO,

Respondent.

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

James P. Granello, Esq., for respondent

Wayne J. Oppito, Esq., for intervenor, Alma Singleton

Record Closed: October 24, 1995 Decided: December 8, 1995

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

The petitioner, Penny Webb, contests her involuntary transfer from Supervisor of Pupil Personnel Services to Individualized Education Program Facilitator and says (1) she has tenure as Supervisor of Pupil Personnel Services, (2) the transfer violates her tenure rights and (3) the transfer will result in reduction of her salary, which also violates her tenure rights.

The Board denies the allegations and sets forth affirmative defenses:

1. The petitioner did not acquire tenure as Supervisor of Pupil Personnel Services;

2. The petitioner had no tenure rights and was bumped by others who exercised their tenure and seniority rights;

3. The petitioner's salary is consistent with the labor contract;

4. A dispute under the collective bargaining agreement must be arbitrated (*N.J.S.A.* 34:13A-5.3);

5. The person appointed Supervisor of Pupil Personnel Services pursuant to *N.J.S.A.* 18A:28-12 is a necessary party to this matter;

6. The petitioner has failed to state a claim on which relief may be granted.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held by telephone on September 14, 1994. The petitioner's counsel and the Board's then counsel agreed to submit a stipulation of facts which, if accepted by the judge, would form the basis for cross motions for summary judgment. Thereafter, Wayne J. Oppito, Esquire, moved to intervene on behalf of Alma Singleton, now holding the position of Supervisor of Pupil Personnel Services. The motion to intervene was granted.

On February 23, 1995, all three counsel met with this judge. Counsel agreed on all documents to be presented in this matter. The judge directed a stipulation of facts to be drawn and submitted. It was further directed that Petitioner Webb would move for summary judgment, papers being due March 24, 1995 and that the Respondent Board would cross move for summary

judgment, papers due April 14, 1995. The intervenor's papers were also due on April 14,1995. No reply briefs were anticipated.

Thereafter, there was a substitution of counsel. The previously announced schedule was modified only slightly and the record closed on May 15, 1995.

STIPULATION OF FACTS

The three parties stipulate the following:

1. Petitioner, Penny Webb, began her employ in the Willingboro School District on or about September 1, 1970.

2. From September 1, 1970 through March 23, 1992 petitioner served at various times as a classroom teacher and as an IEP facilitator. Neither position required a supervisor endorsement.

3. On or about March 24, 1992 petitioner entered into an employment contract with the Willingboro Board of Education for the position of Acting Supervisor, Special Services with a term from March 24, 1992 through June 30, 1992. See Exhibit 33W.

4. On or about June 8, 1992 the Board considered adopting a Motion to reappoint petitioner to the position of Acting Supervisor "Secondary Special Education (Substitute Position)." The Motion failed and was not adopted. See Exhibit 46W

5. The Board of Education again considered a Motion to reappoint petitioner to the position of Acting Supervisor of Special Education on or about June 22, 1992. The Motion again failed. See Exhibit 47W.

6. On or about June 30, 1992 the Board again considered a Motion to reappoint petitioner to the position of Acting Supervisor of Special Education to be made effective July 1, 1992. This time, the Motion carried and was adopted by the Willingboro Board of

Education. See Exhibit 50W. The Board minutes on the reappointment state: "Mr. Smith offered an Amendment to the motion to reappoint this position for 30 days until the administration sort out what employee would be legally entitled to this position . . . . Mr. Schmidt [the Acting Superintendent] stated he spoke with the board's solicitor and how we (the district) do have a number of people who served as department chairpersons in the past who are on a recall list for any supervisory position." See Exhibits 34W through 36W which are memoranda dated June 12, 1992 from supervisory employees on the recall list indicating interest in the position of Supervisor of Special Services.

7. On July 13, 1992 the Board tabled a recommendation that P. Webb be appointed Acting Supervisor of Secondary Special Education effective August 1st. The minutes note: "It is recommended that P. Webb be appointed Acting Supervisor of Secondary Special Education at a salary of $53,706.00 effective August, pending the outcome of the board's appeal to the Commissioner of Education regarding status of claims by tenured supervisors. Salary to be prorated." See Exhibit 52W.

8. On or about July 27, 1992 the Board adopted a Motion to reappoint petitioner to the position of Acting Supervisor of Secondary Special Education effective August 1, 1992. See Exhibit 53W.

9. On or about July 28, 1992 petitioner entered into an employment contract made effective August 1, 1992 with the Willingboro Board of Education for the position of Acting Supervisor of Special Education. See Exhibit 54W.

10. On or about May 10, 1993 the petitioner was reappointed for the 1993-1994 school term to the position of Supervisor of Pupil Personnel Services. See Exhibit 55W.

11. On or about May 13, 1993 petitioner entered into an employment contract with the Willingboro Board of Education for the position of Acting supervisor of Special Services made retroactive from July 1, 1993 through June 30, 1994. See Exhibit 56W.

12. On or about November 12, 1993 Superintendent Geraldyn O. Foster corresponded with Petitioner advising her that the District was replacing all individuals serving in an "acting" capacity with permanent appointments. Petitioner was advised that she would be returned to her former position of IEP Facilitator 60 days from November 23, 1993. See Exhibit 57W.

13. Petitioner was notified on or about January 31, 1994 of her "transfer" from the position of Acting Supervisor of Pupil Personnel Services (interchangeably referred to as Special Education) to IEP Facilitator. This was a result of action taken by the Willingboro Board of Education on or about January 24, 1994. The effective date of Petitioner's transfer was March 28, 1994. See Exhibits 58W, 59W and 60W.

14. Joyce Brown had been named to the position of Supervisor of Pupil Personnel Services for the period September 1, 1991 through June 30, 1992. See Exhibit 22B/S.

15. James Semmel was appointed to the position of Elementary Principal at Hawthrorne School the period September 1, 1991 to June 30, 1992. See Exhibit 23B/S/

16. On or about December 17, 1991 Mr. Semmel corresponded with the then Acting Superintendent, Mr. Austin Gumbs, advising Mr. Gumbs that he was tendering his resignation from his employ with the Willingboro School District effective March 31, 1992. See Exhibit 24B/S/ In this regard, a Certification of Service and Final Salary for Mr. Semmel was filed with the Teachers Pension and Annuity Fund on or about January 27, 1992 confirming that Mr. Semmel's service with the Willingboro Board of Education terminated March 31, 1992. See Exhibit 25 B/S.

17. On February 24, 1992 the Board appointed Joyce Brown as Acting Principal at Hawthorne School effective 4/1/92. See Exhibit 26 B/S. On February 25, 1992 Joyce Brown signed an employment contract appointing her Acting Principal from April 1, 1992 to June 30, 1992. See Exhibit 29 B/S.

18. On or about March 23, 1992, the Board of Education adopted a resolution appointing Petitioner as Acting Supervisor of Secondary Special Education. See Exhibit 27B/S. At the same meeting, on March 23, 1992, the Board of Education adopted a resolution to "set the salary for Joyce Brown" as acting principal at the Hawthorne School. See Exhibit 28B/S. On April 27, 1992 the Board reappointed petitioner IEP teacher. See Exhibit 43W.

19. On or about June 8, 1992 Joyce Brown was named "Principal" of the Hawthorne Elementary School effective July 1, 1992, with a notation "(presently Acting Principal @ H.)". See Exhibit 32B/S.

20. Intervenor, Alma Singleton, served as a Home Economics Department Head at the Willingboro Memorial Junior High School for the 1979-80 school term. The position of Department Head required a "supervisor" endorsement. See Exhibit 3S.

21. Intervenor, Singleton continued to serve as a Home Economics Department Head for the school years 1981-82, 1982-83, 1983-84, 1984-85, 1987-88 an 1989-90. See Exhibits 6S through 11S.

22. During the 1982-83 school term Intervenor's title was Vocational Education Chairperson. See Exhibit 7S. During the 1988-89 school term Intervenor was referred to as a department chairperson. See Exhibit 11S. During the 1989-90 school term Intervenor was referred to as "supervisor." See Exhibit 12S.

23. On or about April 9, 1990 the Willingboro Board of Education adopted a resolution approving the reduction in force which encompassed the position held by the Intervenor Singleton. See Exhibit 14S through Exhibit 17S.

24. Upon petitioner's transfer from the position of Supervisor of Pupil Personnel Services to the position of IEP Facilitator, Intervenor Singleton was appointed to the title of Supervisor of Pupil Personnel Services effective March 28, 1994. Intervenor Singleton

had been serving as a Home Economics teacher at the Willingboro Memorial Junior High School. See Exhibit 19S.

25. Petitioner currently holds a supervisor's endorsement and a certificate as a teacher of the handicapped.

26. Intervenor Singleton currently holds a supervisor endorsement but does not hold any special education certificate and/or endorsement.

27. The Willingboro Board of Education job description for the position of Supervisor of Pupil Personnel Services is attached.

28. The job description for IEP Facilitator-Teacher is attached.

Following receipt of the stipulations and correspondence from counsel, the judge determined to hold a limited hearing on the question of dates of Joyce Brown's service as Supervisor of Secondary Special Education. Testimony on the limited issue was heard on October 2, 1995, at the Office of Administrative Law, Trenton. Counsel were allowed a further submission and the record closed on October 24, 1995.

PAROL AND DOCUMENTARY EVIDENCE

Penny Webb testified that she began service as Acting Supervisor of Pupil Personnel Services on March 24, 1992. The prior supervisor, Joyce Brown, was not present on that day. Webb moved her offices to what had been Brown's offices and began her duties on March 24. There was no transition period.

On March 24, 1992, the Director of Pupil Personnel circulated a memorandum (P-1) stating:

> Please be advised that Penny Webb was appointed the Acting Supervisor of Secondary Special Education to fill the position

> vacated by Joyce Brown. Ms. Webb will serve in this position for the remainder of the school year. Your cooperation with her would be appreciate and we look forward to a smooth last quarter of this year. Thank you.

The petitioner testified that at the time the memo was circulated, there were two supervisors, one serving the elementary population and the other serving the secondary population. There was some confusion over titles and the titles were, sometimes, used interchangeably.

The witness had been District I.E.P. Facilitator. At that time, she was required to hold a supervisory certificate. That requirement no longer is in effect. The witness served approximately fifteen years as the IEP facilitator. She also served as a special education resource teacher and a first and second grade teacher.

According to Webb, the title included the word acting because there was a list of supervisors of instruction, they were considered middle level management, there was some question concerning the group's status and rights to bump, and litigation was pending concerning the group's status and rights. Webb was told she had to take the acting title. The district had no personnel manager at the time. The district referred to her as acting until it got direction.

The petitioner states she was never told that her position could be affected by the outcome of the litigation. She served in an acting capacity for two years, more or less. She held her first appointment until June 30, 1992. She was reappointed acting supervisor effective July 1, 1992. The Board minutes of June 8, 1992 show that a motion to reappoint Webb failed. However, the motion to appoint past at a later meeting and the petitioner replaced Joyce Brown who had become a school principal. See Stipulations paragraphs 17-19 and exhibits 27-29.

Webb also testified that when she was reassigned in March 1992, the IEP facilitator needed only teacher certification with a teacher of the handicapped endorsement. This change in certification requirements was the result of an earlier reorganization. When Webb was appointed, the IEP facilitator needed and she held supervisory certifications or endorsements. She did not learn until some five years later that that supervisory endorsement was no longer required. The

witness believed she held tenure. She stated there was no change in her salary when the position qualifications changed.

Joyce Brown testified that she was appointed acting principal of the Hawthorne school effective April 1, 1992. See exhibits 26, 29 and 30. Brown replaced a principal who retired. She began at Hawthorne's school on March 23, 1992. She physically moved her offices to Hawthorne school on that date and assumed her new and different duties as principal.

Because the former principal retired and actually left the district, Brown had to assume the job before the official April 1 starting date. See exhibits 24, 25 and 32. The prior principal's resignation became effective March 31, 1992, but he was not physically present beginning on March 23. On May 12, 1992, Brown was appointed principal, not acting principal, effective July 1, 1992.

THE PARTIES' ARGUMENTS

The Petitioner

At hearing on October 2, 1995, Joyce Brown, who had served as Supervisor Secondary Special Education prior to the petitioner's service in that position, testified that as of March 24, 1994 the date on which Webb began her service as Supervisor of Secondary Special Education, Brown had already begun serving as the principal of the Hawthorne Elementary School. Brown acknowledged that on March 24, 1992, when Webb began serving, Brown was not present in the office or in the building where Webb's office was housed.

In addition, the petitioner testified that when she served as the IEP supervisor, the position required a supervisory endorsement. Webb stated she initially served in the position of IEP facilitator for a period of approximately five years, under a supervisory endorsement. Thereafter, the requirement was dropped.

The former job description requires a supervisory endorsement. Based on Webb's unrebutted testimony as well as the job description submitted on October 13, 1995, the petitioner

now asserts that she not only had tenure a supervisor when she was removed from the Supervisory of Secondary Special Education position on March 28, 1994, but that she had tenure as a supervisor when she was appointed to that position on March 23, 1992.

With the submission of the old job description for the position of IEP facilitator dated February 1984 which clearly requires a supervisory endorsement, Webb's unrebutted testimony that the endorsement was required when she initially served as IEP facilitator for approximately five years shows she enjoyed a tenured status as a supervisor when appointed to the position of Acting Supervisor of Special Services. This has been acknowledged by the Board by way of the October 13, 1995 submission.

Because the Board and petitioner agreed that she acquired tenure as a supervisor prior to her appointment as the acting supervisor of special services, the only question is whether her reassignment to the IEP facilitator position on or about March 28, 1994 was a violation of her tenure rights.

While the Board acknowledges the petitioner's tenure as a supervisor, the Board also asserts that Webb's return to the IEP facilitator position was merely a "reassignment within the certifications under which she acquired tenure without loss of pay or benefits." The Board also asserts that the petitioner's tenure rights in the position of IEP facilitator continue to accrue under both her supervisory and teaching certifications as they did when the Board amended the job description by deleting the requirement of a supervisory certificate for individuals hired after the adoption of the new job description. The revision of the job description did not alter the petitioner's vested rights. She continues to accrue tenure in both certifications.

Webb asserts the Board is correct. She continues to accrue tenure under both certifications. Service in the facilitator position does not now require a supervisory endorsement. However, that does not change the fact that the petitioner has tenure as a supervisor. Whether the petitioner continues to accrue tenure as a supervisor even if she serves is a non-supervisory position does not face the question of what her tenure entitles her to. Whether she experienced a loss of salary when she was returned to the facilitator position and irrespective of whether she continues to accrue tenure, by not assigning Webb to a supervisor position which she is entitled to

hold and in which she is entitled to serve, the Board violated her tenure rights. Reassigning a tenured supervisor to a non-supervisory position, a position that does not even require a supervisory endorsement is as much as tenure violation as the reassignment of any teaching staff member from one separately tenurable position to another.

As to the position of Supervisor of Pupil Personnel Services, currently held by Singleton, Webb alleges she has greater seniority. The parties agree that the petitioner served in the supervisory position now held by the Intervenor from March 24, 1992 until March 28, 1994. As of March 28, 1994, the intervenor had never served as Supervisor of Pupil Personnel Services or in any other title the position has been called. The intervenor's seniority was limited to Home Economics Department Head and Vocational Department Chair.

Because the intervenor never served in the position of Supervisor of Pupil Personnel Services, she did not have seniority to the Supervisor of Pupil Personnel position to which she was appointed on March 28, 1994. According to *N.J.A.C.* 6:3-5.1, seniority is calculated based on the years of service in the anumerated categories set forth. Each supervisory title is a separate category.

The petitioner was tenured as a supervisor when she was appointed to the Supervisor of Special Services position on March 23, 1992. She served in the position for two years and five days. The petitioner had two years and five days of seniority in the position of Supervisor of Special Services, also known as the Supervisor of Secondary Special Education and Supervisor of Pupil Personnel Services when she was reassigned to the IEP facilitator position on March 28, 1994.

The Board

At the judge's direction, the Board submitted a copy of the previous IEP facilitator job description (R-1). The qualifications demand a supervisory certificate and one of the following certifications: school psychology, counselor, social worker, learning disability teacher-consultant, teacher of the handicapped, school nurse or speech correctionist. The present job description does not require supervisory certification. The petitioner testified that she was initially employed

under the previous job description and was required to hold a supervisory certificate. She did work under the previous job description for a period of at least five years. The second stipulation of facts states that the petitioner served from September 1, 1970 through March 23, 1992 at various times as a classroom teacher and as a IEP facilitator. Neither position required supervisory endorsement. This stipulation is contrary to the petitioner's testimony and does not take into consideration the existence of the provisions in the IEP facilitator job description.

The petitioner having served for an initial period in excess of three school years as an IEP facilitator, which required her to have both supervisory and teaching certification, it is obvious that the petitioner did acquire tenure as an IEP facilitator under her supervisory and teaching certification. She has been returned to the IEP facilitator position as of January 31, 1994. This was a reassignment within certifications under which she held tenure without loss of pay or benefits. Her time served as "Acting Supervisor of Special Services" did not give rise to new tenure rights. These rights had already vested after three school years in the position of IEP facilitator under the old job description.

The stipulation of facts submitted by the parties must be amended to conform to the testimony of the petitioner. The judge must consider the legal effect of the petitioner having served in the IEP facilitator position for five years and being required to be the holder of supervisory certification. The petitioner's tenure rights in the IEP facilitator position continue to accrue under both her supervisory and teaching certifications as they did when the Board amended the job description and deleted the requirement of supervisory certification. The job description revision did not change the petitioner's vested tenure rights. She continues to accrue tenure in both certifications.

The petitioner concedes she served as IEP facilitator under a job description that required her to hold both certifications and that she served in excess of five years. She never was RIF'ed from this position and only being reassigned to an acting supervisor's position in Special Services, her rights to tenure were not affected by reason of her reassignment to the IEP facilitator position. It is true the current IEP facilitator job description does not require supervisory certification. This does not mean that the petitioner's tenure rights to the former IEP facilitator position are affected.

The petitioner has no right to claim a particular position within the district as long as her tenure rights have not been violated.

The petitioner has no right to claim the position of Supervisor of Pupil Personnel Services when she presently holds a position under which she acquired tenure in both supervisory and teaching categories.

The Intervenor

The intervenor argues that the petitioner has not obtained tenure as a supervisor. Thus, she has no claim to the position of Supervisor of Special Services. Subpart (c) of *N.J.S.A.* 18A:28-6 provides that a person obtains tenure upon transfer or promotion with:

> employment in the new position within the period of any three consecutive academic years, for the equivalent of more than two academic years.

N.J.S.A. 18A:16-1.1 provides:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

The petitioner did not serve the requisite time to attain tenure under *N.J.S.A.* 18A:28-6 because the time she spent in an acting capacity did not count toward the time necessary. The petitioner was an acting supervisor from July 1, 1992 through March 27, 1994. Joyce Brown was appointed acting principal in March 1992 to replace a person who retired effective April 1, 1992. Joyce Brown was not appointed principal until July 1, 1992. Giving the petitioner the greatest

benefit of time, she was a supervisor at best from April 1, 1992 through March 27, 1994. This does not constitute more than two academic years as required *N.J.S.A.* 18A:28-6(c). The period from April 1, 1992 through June 30, 1992 is the period in which Brown was acting principal.

When the former principal left his position at Hawthorne School, Brown was appointed his replacement and designated acting principal. Webb was named acting supervisor in place of Brown. The principal position did not become vacant until April 1, 1992. In the time between March 23 and March 31, 1992, the former principal was still the principal whether present in school or not. Brown was the acting principal, substituting for him. No vacancy existed until the principal officially retired effective April 1, 1992. Therefore, during that time, Brown was still Supervisor of Special Education although acting as principal. For the time March 23 through March 31, 1992, Webb was acting supervisor substituting for Brown. This time does not count toward the acquisition of supervisory tenure by the petitioner. If the principal position did not become vacant until April 1, 1992, then the supervisor position did not become vacant until April 1, 1992.

On June 12, 1992, the Board advised supervisors on the preferred eligibility list that there was a vacancy in the position for Supervisor of Special Services, the position Brown had held and vacated upon appointment as principal. The vacancy was effective July 1, 1992. A number of tenured supervisors expressed interest in the position.

In *Lammers v. Board of Education, Borough of Point Pleasant,* 134 *N.J.* 264 (1933), the Supreme Court determined that an absence, even for an extended period, does not create a vacancy. As explained above, the supervisor position did not become vacant at the earliest, until the former principal's retirement on April 1, 1992. Assuming that the petitioner could begin accruing time toward tenure in the position of Acting Supervisor of Special Education on April 1, 1992, she did not serve two calendar years in a vacant position as required by *N.J.S.A.* 18A:28-6.

The intervenor also argues that the petitioner did not obtain tenure as a supervisor through her service as an IEP facilitator-teacher. In pertinent part, *N.J.S.A.* 18A:28-12 provides:

> If any teaching staff member shall be dismissed as a result of such reduction [in force], such person shall be and remain upon a preferred eligible list in order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and shall be reemployed by the body causing dismissal, ...

A tenured teaching staff member whose position is abolished in a reduction in force is entitled by virtue of tenure to a position as against a non-tenured individual. When the supervisor position become vacant either on April 1, 1992 or more appropriately on July 1, 1992, tenured supervisors on the preferred eligibility list had claim to the position. The tenured, reduced supervisors were entitled to the position as against the non-tenured petitioner.

In Willingboro, the tenured supervisors on the preferred eligibility list did not waive or abandon their interest in being considered for the vacancy when it occurred in the summer of 1992. They responded to the Personnel Department's inquiry. The intervenor also responded to the Personnel Department's memorandum concerning the anticipated opening for Supervisor of Special Services for the 1992-93 school year. The Board was aware that the petitioner was not eligible for the position because the teaching staff members who were on the recall list had tenure, and thus seniority, which the petitioner did not enjoy. Singleton was appropriately recalled from the preferred eligible list and appointed the position.

The petitioner's employment as an IEP facilitator-teacher does not equate to tenure as a supervisor. The title of IEP facilitator-teacher is not a recognized title pursuant to Department of Education rules. *N.J.A.C.* 6:11-3.3 requires Boards of Education to assign position titles contained in the rules. If a district wants to use an unrecognized title, it must submit a written request to use the proposed title to the county superintendent of schools. The request must include a detailed job description. The county superintendent's role is to approve the title and make a determination as to the appropriate certification for the position. The county superintendent's decision is binding on future seniority determinations.

The current job description for the position of IEP facilitator-teacher does not include a requirement for a supervisory endorsement; the previous job description does contain such a

requirement. But there is nothing in the record to indicate that the Board submitted either the current or previous job descriptions to the county superintendent for approval and a determination as to the certification required for the position. In the absence of county superintendent approval, there is nothing to indicate that the IEP facilitator-teacher position is a supervisory position. Because "teacher" is an integral part of the title, in the absence of county superintendent approval, this is a teacher position. Furthermore, in the former job description, the college degree requirement contradicts the need for a supervisory endorsement. The college degree requirement set forth in the previous job description is a Bachelor's degree. By regulation, *N.J.A.C.* 6:11-9.2(a)1, a Master's degree is a necessary requirement for the supervisor endorsement. At no time before October 2, 1995 has there been any claim that the petitioner is tenured as a supervisor as a result of being IEP facilitator-teacher. The petitioner's claim is that she met the years of service requirement to obtain tenure as a supervisor while being employed as an acting supervisor.

Conversely, if the petitioner has tenure as a supervisor because of her years of service as IEP facilitator-teacher, her transfer back to that position does not violate her tenure as a supervisor. Rather, that transfer would constitute a reassignment to a position in which she has tenure and thus, there is no violation of her tenure rights.

DETERMINATION

Lammers, above, holds that a teacher's one-year leave of absence does not create a vacancy or a temporary vacancy under the statute requiring that qualified tenure teachers, terminated or demoted as a result of a reduction in force, be considered to fill a vacancy on the basis of seniority. Clearly, no leave of absence was involved in the present case. *In Sayreville Education Ass'n v. Board of Education of Sayreville*, 193 *N.J. Super.* 424, 474 (App. Div. 1984), the Appellate Division had to decide whether a local Board of Education could fill a teaching staff vacancy occurring after the start of the academic year by appointing a substitute teacher for the balance of the year pursuant to *N.J.S.A.* 18A:16-1.1. To resolve that issue, the court had to distinguish between absences and vacancies. *N.J.S.A.* 18A:16-1.1 provides for the hire of temporary employees "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee."

The Appellate Division found that *N.J.S.A.* 18A:16-1.1 applied "when the services of a substitute teacher are required because of the temporary absence, even protracted, of a regular teacher whose return to duty is contemplated." 193 *N.J. Super.* at 428. The court also explained that the plain meaning of *N.J.S.A.* 18A:16-1.1 clearly implies a temporary arrangement. That is, the "place" which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. If that other employee has, however, terminated his employment, then the place which the appointee "substitute" is filling is not the place of the other but a vacant place, and the statute ordinarily does not apply. *Ibid.*

The distinction recognized by the Appellate Division in *Sayreville* between a vacancy and an absence is unmistakable. An absence exists when the missing teaching staff member is scheduled ultimately to return to the position. A vacancy exists when the teacher leaves the position permanently, as in the case of a resignation or a retirement. *Lammers* at 268.

The language and reasoning in Sayreville accords with well-established law. In a 1952 case, *Fiscella v. Nulton*, 22 *N.J. Super.* 367 (App. Div. 1952). The court examined several cases and resorted to *Black's Law Dictionary* (4th Ed.) for definition of vacancy in the case of an election, defining it as an existing office without an incumbent. Other state courts interpreting similar education statutes have reached the same conclusion with regard to the meaning of vacancy. A teacher taking a sabbatical leave, for example, does not create a vacancy. A person retiring or resigning from position creates a vacancy. The word vacancy is commonly understood to mean an unoccupied position to which an incumbent does not intend to return.

As in *Lammers*, above, this tribunal recognizes that tenure laws are to be construed liberally. Nonetheless, liberal construction must be reasonable in light of the plain language of the controlling statutes.

In consideration of the foregoing, I **FIND** in addition to the stipulated facts:

1. Webb's dates of service in the Special Services position were March 24, 1992 through March 28, 1994, a period of two years and five days;

2. Although designated acting, Webb filled the position formerly held by Brown in the same manner that Brown filled the position formerly held by Hawthorne School principal James Semmel;

3. Webb and Brown both filled vacancies. In neither situation was there an incumbent who intended, sooner or later, to return to the position;

4. Webb served for a period greater than two years thus satisfying the requirement of *N.J.S.A.* 18A:28-6.(c).

Not absence or disability or disqualification were involved. Semmel's former position was vacant. Brown's former position was vacant. Whatever the Board's reasons for using the acting designation, they do not square with the statute and there is nothing in the record to indicate county superintendent approval of the use.

I **CONCLUDE** that Webb achieved a tenure status in the Special Services position. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982).

The remaining question is whether Webb enjoyed tenure as a supervisor when she was appointed to the Special Services position by virtue of her IEP facilitator service. Exhibit R-1 is the job description in effect when Webb assumed the IEP facilitator position. The document refers to the title as individual education plan (IEP) facilitator-teacher. A subscript on the second page indicates that the document was typed in February 1984. No date of adoption or amendment is indicated.

Under responsibility, the document states, "The IEP Facilitator-Teacher shall be responsible to the Director of Pupil Personnel Services." Under function, the documents states, "The IEP facilitator-teacher will coordinate the scheduling, implementation, and revision of IEP's for all classified students in their division." The documents lists twenty seven duties. Among them are providing training sessions for all staff in the writing of IEP's, systematic follow-up for all assigned programs and schools in the implementation of IEP's, determining if IEP's conform

to the intent of state and federal guidelines, ascertainment of appropriateness of IEP's to the needs of the pupil, scheduling reviews and/or revisions of IEP's when changing circumstances warrant and serving as a member of the District Placement Review Board, among others.

The qualifications are stated as:

1. New Jersey Certificate -

   Supervisor and one of the following: School Psychology, Counselor, Social Worker, LDTC, Teacher of Handicapped, School Nurse, Speech Correction

2. College Degree required -

   Bachelor's

3. Prior job experience required -

   a. 3 years in Teaching under one of the above Certificates

The duties set forth in the job description do not require supervisory certification. The IEP facilitator-teacher does not evaluate other persons. The duties are ministerial, supportive and statistical in nature. A broad knowledge of special education is clearly necessary. Supervisory certification clearly is not. The Board, realizing this, amended the job description by deleting the supervisory certification requirement.

In *Grasso v. Board of Education of Hackensack*, 1960-61 S.L.D. 137, the Commissioner stated:

> Administration deals with the planning, organizing and directing of the day-by-day management and operation of the public schools to achieve the objectives of public education in conformance with law, State Board of Education rules, and local board of education rules and policies.
>
> Supervision deals with the development and maintenance of high standards of curriculum, instruction and guidance and the continuous improvement thereof. It includes, among other things,

> the observing, advising and directing of teachers in their instructional and guidance activities inside and outside the classroom. Through advice, either upon request or otherwise, through programs of in-service training and through curriculum improvement activities, the supervisory staff acquaints the classroom teachers with the aims, materials and methods of education and encourages and assists them to achieve the objectives of the schools. Supervisory staff is also available to the administrative staff as consultants on educational problems.

There are times when teachers are assigned duties that may border on what might be considered supervisory or administrative areas. As the Commissioner stated in *Grasso*, at 140, "Any conclusion in such a case would have to rest on what the teacher actually did and the degree to which the activity went beyond teaching or clerical work to decision-making and the directing of others."

I **FIND** the wisdom expressed in *Grasso*, above, very much to the point of this case. Applying the *Grasso* standard, I **FIND** the IEP facilitator-teacher duties were not supervisory in nature. Accordingly, I **CONCLUDE** that service as IEP facilitator-teacher does not inure to the service necessary to acquisition of tenure in a supervisory capacity. I also **CONCLUDE** that the petitioner did achieve tenure in a supervisory capacity by virtue of her service in the Special Services position for more then two years while holding the requisite certificates. Where there is tenure, seniority follows. However, the petitioner's supervisory seniority comprises only two years and five days. Absent a showing that this is superior to the seniority enjoyed by others, and particularly by the intervenor, there is not enough in this record to support the relief the petitioner seeks.

The petition of appeal is **DISMISSED**. It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

8 DECEMBER 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

December 11, 1995
DATE

Receipt Acknowledged:

W. M. Contaminatis/fr
DEPARTMENT OF EDUCATION

DEC 15 1995
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

For Petitioner:

Penny Webb
Joyce Brown

For Respondent:

None

LIST OF EXHIBITS

Exhibits suffixed S refer to the intervenor, Alma Singleton. Exhibits suffixed B refer to Joyce Brown. Exhibits suffixed W refer to the petitioner, Penny Webb.

For Intervenor Singleton:

1S	Evaluation, Alma Singleton, November 10, 1970
2S	Evaluation, Alma Singleton, November 10, 1970
3S	Letter, Borochaner to Singleton, March 13, 1979
4S	Supervisory Report cover sheet
5S	Supervisory Report, Alma Singleton, January 23, 1981
6S	Letter, Coppola to Singleton, August 6, 1981
7S	Letter, Coppola to Singleton, July 26, 1982
8S	Letter, Coppola to Singleton, August 16, 1983
9S	Letter, Coppola to Singleton, July 25, 1984
10S	Appointment Notice, date receipted April 29, 1987
11S	Appointment Notice, date receipted April 27, 1988
12S	Appointment Notice, date receipted April 27, 1989
13, 14, 15S	Excerpt, Board Minutes, April 9, 1990
16S	Letter, Hampton to Singleton, April 25, 1990
17S	Letter, Hampton to Singleton, March 29, 1990
18S	Memorandum, Vance to Singleton, July 11, 1990
19S	Notification of Transfer, Alma Singleton, January 31, 1994
20S	Letter, Young to Dear Employee, undated
21S	Letter with certified mail receipt, Young to Dear Employee, undated

For Intervenor Joyce Brown:

22B	Appointment Notice, date receipted April 5, 1991
23B	Appointment Notice, date receipted July 9, 1991
24B	Letter, Semmel to Gumbs, December 17, 1991
25B	Certification of Service, January 27, 1992

26B	Excerpt, Superintendent's Report, February 24, 1992
27,28B	Excerpt, Board Minutes, March 23, 1992
29B	Employment Contract, date receipted February 26, 1992
30B	Employment Contract, date receipted March 30, 1992
31B	Excerpt, Superintendent's Report, June 8, 1992
32B	Excerpt, Board Minutes, June 8, 1992

For Petitioner Webb:

33W	Employment Contract, March 24, 1992
34W	Memorandum, Tucker to Sjogren, June 12, 1992
35W	Memorandum, Tucker to Hasanlaugh, June 12, 1992
36W	Memorandum, Tucker to Fanelli, June 12, 1992
37W	Memorandum, Tucker to Mulder, June 12, 1992
38-44W	Excerpt, Superintendent's Report, April 27, 1992
45W	Duplicate of 32B
46W	Excerpt, Board Minutes, June 8, 1992
47, 48W	Excerpt, Board Minutes, June 22, 1992
49, 51W	Excerpt, Board Minutes, June 30, 1992
52W	Excerpt, Board Minutes, July 13, 1992
53W	Excerpt, Board Minutes, July 27, 1992
54W	Employment Contract, dated receipted August 6, 1992
55W	Excerpt, Board Minutes, May 10, 1993
56W	Employment Contract, May 13, 1993
57W	Letter, Foster to Webb, November 12, 1993
58W	Excerpt, Board Agenda, January 24, 1994
59W	Notification of Transfer, January 31, 1994
60W	Appointment Notice and Acceptance, undated

For Petitioner:

P-1	Memorandum, Mako to All Pupil Personnel Staff, March 24, 1992

For Respondent:

R-1	Previous Job Description, IEP Facilitator-Teacher, unnumbered and undated, 3 pp.

OAL DKT. NO. EDU 4538-94

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner and intervenor, as was the reply thereto, in accordance with N.J.A.C. 1:1-18.4.

Petitioner argues that she has seniority in the position of Supervisor of Pupil Personnel Services[1] by virtue of her service for two years and five days in that role. Citing N.J.A.C. 6:3-5.1, petitioner reasons that since Intervenor Singleton, who currently holds the Supervisor of Pupil Personnel Services position, did not serve in that capacity prior to her appointment on March 28, 1994, intervenor did not have seniority in the position at the time of her appointment. Consequently, petitioner asserts she was entitled to continue to serve as the Supervisor of Pupil Personnel Services as of March 28, 1994.

Additionally, petitioner maintains that she acquired tenure as a supervisor by virtue of her services as an Individualized Education Program (IEP) facilitator, contrary to the

[1] Also referred to as Supervisor of Special Education or Supervisor of Secondary Special Education

determination of the Administrative Law Judge (ALJ). Petitioner argues that she relied upon the fact that the Board required, at the time, that she hold a supervisor's certificate in order to serve as the IEP facilitator. Petitioner concludes that having served in a position requiring a supervisor endorsement, and having met the statutory requirements of N.J.S.A. 18A:28-5 et seq., she acquired tenure as a supervisor while serving as the IEP facilitator. Moreover, given the Board's agreement as to petitioner's acquisition of tenure while serving in that role, petitioner asserts the ALJ was "***without authority to discount the Board's requirement during the mid 1980's that the position of IEP facilitator require a supervisor endorsement." (Petitioner's Exceptions at p. 4)

While intervenor requests that the Commissioner affirm the ALJ's dismissal of the petition, she excepts to that part of the initial decision which found that petitioner attained tenure as a supervisor by virtue of her service as the Acting Supervisor of Pupil Personnel Services. Inasmuch as intervenor essentially recasts her argument as set forth before the ALJ, her position is not herein summarized.

The Board in its reply simply urges that the Commissioner adopt the initial decision of the ALJ in its entirety and dismiss the within petition for failure to demonstrate that petitioner is entitled to relief.

Upon careful and independent review, the Commissioner determines to adopt the initial decision in part, and to reverse the decision in part, as set forth below. Initially, the Commissioner concurs with the ALJ's conclusion that petitioner has acquired supervisory tenure by virtue of her service as the Acting Supervisor of Pupil Personnel Services from March 24, 1992 until March 28, 1994. Further, the Commissioner is satisfied that the record supports the ALJ's conclusion that petitioner's IEP facilitator-teacher duties were not

supervisory in nature, and, therefore, do not inure to the service necessary to acquire tenure in a supervisory capacity. (Initial Decision at p. 20) Having determined that petitioner is a tenured supervisor, and there being no dispute as to intervenor's protected status as a tenured supervisor, the remaining question is whether petitioner was entitled to the position of Supervisor of Pupil Personnel Services over intervenor. Said question requires a seniority analysis pursuant to N.J.A.C. 6:3-5.1.

New Jersey Administrative Code provides that "[s]eniority *** shall be determined according to the number of academic or calendar years of employment *** in the school district in specific categories as *** provided." (N.J.A.C. 6:3-5.1) Each supervisory category is considered a separate category for the purpose of calculating seniority. Here, petitioner served as Acting Supervisor of Pupil Personnel Services for two years and five days. (Initial Decision at p. 17) There is no showing that Intervenor Singleton served in the role of Supervisor of Pupil Personnel Services prior to her appointment on March 28, 1994, nor does intervenor dispute petitioner's assertion in this regard. Accordingly, as of March 28, 1994, the date of intervenor's appointment to a position in which she had no seniority, petitioner had seniority in that position, pursuant to N.J.A.C. 6:3-5.1, and was entitled to be appointed to said position over intervenor.

Accordingly, the initial decision of the Office of Administrative Law is adopted in part, as indicated above, and reversed in part as herein provided. The Board is hereby directed to

restore petitioner to the position of Supervisor of Pupil Personnel Services, with all back pay and emoluments owed from the effective date of her transfer from the position.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 25, 1996

Date of Mailing, January 26, 1996

30-96

EDU #4538-94
C # 30-96
SB # 10-96

PENNY WEBB, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

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

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, January 25, 1996

For the Petitioner-Respondent, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

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

For the Intervenor-Appellant, Wayne J. Oppito, Esq.

The convoluted facts of this matter can be summed up as follows. Penny Webb (hereinafter "petitioner") began her employment with the Board of Education of the Township of Willingboro (hereinafter "Board") in September 1970. Thereafter, she served at various times as a classroom teacher and an Individual Education Program ("IEP") Facilitator-Teacher through March 23, 1992.

On or about December 17, 1991, James Semmel ("Semmel"), the principal at the Hawthorne Elementary School, tendered his resignation effective March 31, 1992. On February 24, 1992, the Board appointed Joyce Brown ("Brown"), who had been

12/4/96

employed as Supervisor of Pupil Personnel Services, as the acting principal at the Hawthorne School effective April 1, 1992. However, since Semmel was absent from the district beginning on March 23, 1992, Brown moved her offices to the Hawthorne School on that date and assumed her duties as acting principal one week prior to the effective date of her appointment.

On March 23, 1992, the Board appointed petitioner as the Acting Supervisor of Pupil Personnel Services for the period from March 24 through June 30, 1992.[1] She was reappointed as the Acting Supervisor for 1992-93 and 1993-94. However, on January 24, 1994, the Board took action to "transfer" petitioner back to an IEP Facilitator-Teacher position, effective March 28, 1994. The district superintendent had indicated in an earlier letter to petitioner that the acting positions in the district had been created "to fill vacancies on an emergency basis. They were never designed to be long term assignments; consequently, permanent appointments are being made to eliminate the acting situations." Exhibit 57W, in evidence. Alma Singleton (hereinafter "intervenor") was appointed Supervisor of Pupil Personnel Services effective March 28, 1994.

Petitioner thereupon filed the instant petition with the Commissioner of Education, alleging that she had achieved tenure in the district as a supervisor as a result of her service as the Acting Supervisor of Pupil Personnel Services and that the Board had violated her tenure rights in removing her from her supervisory position and reducing her salary.

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[1] We note that the Board used the titles Supervisor of Special Services, Supervisor of Special Education and Supervisor of Pupil Personnel Services interchangeably. See Stipulation of Facts, at 3. For purposes of our decision, all references herein will be to the position title "Supervisor of Pupil Personnel Services."

On December 8, 1995, an Administrative Law Judge ("ALJ") concluded, upon review of the job description for the IEP position, that petitioner had not achieved tenure as a supervisor as the result of her previous employment as the IEP Facilitator-Teacher since the duties thereof were not of such character as to accrue towards the achievement of tenure as a supervisor. He did, however, find that petitioner had achieved tenure in a supervisory position as a result of her service as the Acting Supervisor of Pupil Personnel Services. The ALJ observed that both petitioner and Brown had filled vacancies during the final week in March 1992 and that, in neither case, was there an incumbent who intended to return to the position. As a result, he concluded that petitioner had accrued tenure as a supervisor during the entire period from March 24, 1992 through March 28, 1994, more than two academic years within a period of three consecutive academic years, N.J.S.A. 18A:28-6(c), and had therefore achieved tenure status in such position. Nonetheless, the ALJ recommended dismissing the petition, finding that there was not enough in the record to support the relief sought since there was no showing that petitioner's seniority was superior to that of any other tenured supervisors.

On January 25, 1996, the Commissioner adopted in part and rejected in part the ALJ's recommendations. The Commissioner agreed with the ALJ that petitioner had not achieved tenure as a supervisor as the result of her previous service as the IEP Facilitator-Teacher but that she had achieved tenure as a supervisor by virtue of her service as the Acting Supervisor of Pupil Personnel Services for the period from March 24, 1992 through March 28, 1994. However, stressing that each supervisory category is considered a separate category for seniority purposes, the Commissioner

concluded that petitioner was entitled to reinstatement as the Supervisor of Pupil Personnel Services as against the intervenor. The Commissioner observed that while the petitioner had served as the Acting Supervisor of Pupil Personnel Services for over two years, there was no showing that the intervenor, who had previously served as a department chairperson, had ever been employed in that specific assignment prior to her appointment thereto on March 28, 1994. As a result, the Commissioner found that the intervenor had no seniority in the particular regulatory category applicable to such assignment prior to her appointment thereto. He therefore directed the Board to reinstate petitioner as the Supervisor of Pupil Personnel Services with back pay and emoluments.

The intervenor filed the instant appeal from the decision of the Commissioner, contending that the Commissioner improperly concluded that petitioner had achieved tenure as a supervisor by virtue of her service as the Acting Supervisor of Pupil Personnel Services.

On August 21, 1996, our Legal Committee issued a report in this matter which recommended reversing the determination of the Commissioner that petitioner had achieved tenure as a supervisor by virtue of her employment as the Acting Supervisor of Pupil Personnel Services.

The Board filed exceptions to that report, requesting the State Board to address whether the intervenor was to be reinstated as the Supervisor of Pupil Personnel Services and whether the Board had the right to recover moneys paid to petitioner as a result of the Commissioner's decision. Petitioner also filed exceptions, contending that she had achieved tenure as a result of her service as the Acting Supervisor of Pupil

Personnel Services and that, in any event, she had achieved tenure as a supervisor as a result of her previous employment as an IEP Facilitator-Teacher.[2]

Given the questions raised by these exceptions, we found it necessary to issue a revised report in this matter on October 24, 1996.

After an exhaustive review of the record, including the exceptions filed by the parties to the reports of our Legal Committee, we reverse the determination of the Commissioner that petitioner had achieved tenure in the district as the result of her service as the Acting Supervisor of Pupil Personnel Services. For the reasons that follow, we find that petitioner's employment as the Acting Supervisor of Pupil Personnel Services during the period from March 24 through March 31, 1992 cannot be credited towards the achievement of tenure as a supervisor. However, in that we are unable to determine on the record before us whether petitioner had previously achieved tenure as a supervisor by virtue of her employment as an IEP Facilitator-Teacher, we remand this matter to the Commissioner for further proceedings in accordance with our decision herein.

Tenure is created by statute, and the Tenure Act, N.J.S.A. 18A:28-1 et seq., defines with specificity the conditions under which teaching staff members are entitled to the security of tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 72 (1982). In order to achieve tenure, the precise statutory conditions must be met. Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962).

N.J.S.A. 18A:16-1.1 provides, in pertinent part:

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[2] Although the Board filed a reply to petitioner's exceptions, our regulations do not permit the filing of additional papers without leave of the Legal Committee. N.J.A.C. 6:2-1.17. Consequently, we have not considered the Board's reply in determining this matter.

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee....[N]o person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

We stress initially that a teaching staff member appointed to an acting title would not receive tenure credit for such service in those instances in which he or she is, in actuality, acting "in place of any officer or employee during the absence, disability or disqualification of any such officer or employee." N.J.S.A. 18A:16-1.1. (Emphasis added.) However, the use of an acting title by a district board does not necessarily preclude the staff member employed in such capacity from achieving tenure as a result of that service. Rather, the accrual of tenure in such instances is dependent upon whether the staff member is serving in an acting capacity as authorized by the statute.

Given the circumstances herein, we find that petitioner was acting in the place of Brown during her absence from her supervisory position during the period from March 24 through March 31, 1992. Notwithstanding the fact that Brown began to perform her duties as acting principal on March 23, 1992, her appointment thereto was not effective until April 1, 1992, the effective date of Semmel's retirement. Semmel continued to occupy the position of principal until April 1 despite his absence from the district during the last week in March, and Brown remained the Supervisor of Pupil Personnel Services. There is no indication in the record that the Board took any action to modify the commencement date of Brown's appointment as acting principal. Indeed, to the contrary, on March 24, 1992, the same day that the Board entered into a contract with petitioner to be the acting supervisor, it entered into a substitute contract with

Brown designating her specific salary as the acting principal and again establishing a commencement date of April 1 for such employment. Exhibit 30B/S, in evidence.

Consequently, we conclude that Brown continued to occupy the supervisory position in Pupil Personnel Services until April 1, 1992 and that petitioner was acting in place of Brown during her absence therefrom during the last week of March 1992. As a result, petitioner's service during that period could not be credited towards the achievement of tenure as a supervisor. N.J.S.A. 18A:16-1.1. Cf. Lammers v. Bd. of Educ., 134 N.J. 264 (1993); Sayreville Education Ass'n v. Board of Education, 193 N.J. Super. 424 (App. Div. 1984). As a consequence of such determination, petitioner did not accrue tenure as a supervisor for more than two academic years within a period of three consecutive academic years, N.J.S.A. 18A:28-6(c), in satisfaction of the precise statutory conditions for the achievement of tenure as a supervisor.

Accordingly, we reverse the Commissioner's determination that petitioner had achieved tenure as a supervisor by virtue of her employment as the Acting Supervisor of Pupil Personnel Services.

In view of such determination, we find it necessary, in order to properly effectuate our decision herein, to address whether petitioner had achieved tenure as a supervisor by virtue of her previous service as an IEP Facilitator-Teacher.[3] However, on the basis of the record before us, we find that we are unable to determine whether petitioner had achieved tenure as a supervisor as the result of such employment and, if

[3] We note that petitioner, who was found to be tenured as a supervisor by the Commissioner and granted the relief sought, did not file a cross-appeal from that portion of the Commissioner's decision determining that she had not achieved tenure as a supervisor as a result of her previous service as an IEP Facilitator-Teacher.

so, whether her tenure rights were properly effectuated when the Board "transferred" her back to an IEP position in March 1994.

The confusion in this area results from the fact that petitioner had been employed for a portion of her service as IEP Facilitator-Teacher under a job description which required certification as a supervisor, despite the parties' stipulation prior to hearing that the IEP position had not required certification as a supervisor. See Stipulation of Facts, at 1. That particular job description was not submitted into evidence by the Board until after the hearing in this matter.

The ALJ, as noted, concluded that petitioner had not achieved tenure as a supervisor by virtue of her previous service as the IEP Facilitator-Teacher. That determination, which was adopted by the Commissioner, was based upon a review of the duties listed in the former job description for that position.[4] Exhibit R-1, in evidence. That job description, which is undated, requires certification as a supervisor, in addition to possession of one of the following endorsements: "School Psychology, Counselor, Social Worker, LDTC, Teacher of Handicapped, School Nurse, Speech Corection [sic]." However, the specific period of time during which this job description was in effect cannot be determined on this record. Nor can we determine how long petitioner actually served under that particular job description.

Petitioner testified, as summarized by the ALJ,[5] that she had been employed for approximately 15 years as an IEP Facilitator-Teacher and that the elimination of the supervisory certification requirement in the job description:

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[4] We note that the specific duties listed in the former and current job descriptions for IEP Facilitator-Teacher are identical.

[5] We note that the parties did not provide us with transcripts of the hearing held in this matter.

> was the result of an earlier reorganization. When Webb was appointed, the IEP facilitator needed and she held supervisory certifications or endorsements. She did not learn until some five years later that that supervisory endorsement was no longer required.

Initial Decision, slip op. at 8.

Petitioner indicated that at the time she was appointed the Acting Supervisor of Pupil Personnel Services in 1992, she was serving under the IEP job description which did not require certification as a supervisor. Id.

The ALJ based his determination that the responsibilities of the IEP Facilitator-Teacher were not of such character as to require certification as a supervisor upon a review of the duties shown in the job description. There is no indication in the record that the Board submitted that job description or the revised job description for the unrecognized position title of IEP Facilitator-Teacher to the county superintendent for approval and determination of the appropriate certification, N.J.A.C. 6:11-3.3(b), and the actual duties of the IEP position as performed by petitioner were neither stipulated by the parties nor litigated at hearing.

If petitioner had not achieved tenure as a supervisor prior to her appointment as the Acting Supervisor of Pupil Personnel Services, then, pursuant to our determination herein, the Board properly returned her to her former IEP position pursuant to N.J.S.A. 18A:28-6. However, in the event that petitioner had achieved tenure as a supervisor by virtue of her previous employment as the IEP Facilitator-Teacher, the Board could properly have reassigned her within that tenured "position," but could not have transferred her to another separately tenurable "position" without her consent. Capodilupo v. W. Orange Tp. Ed. Bd., decided by the State Board, 1986 S.L.D. 3010,

3015-16, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987). Nor could the Board have dismissed petitioner or reduced her in compensation except for just cause after a hearing held pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et. seq., or as the result of a reduction in force, N.J.S.A. 18A:28-9.

Consequently, if it is determined that petitioner did achieve tenure as a supervisor as a result of her previous employment as the IEP Facilitator-Teacher, it would also be necessary to determine whether the Board properly recognized petitioner's tenure rights when it "transferred" her back to an IEP position in March 1994. We note in that regard that since the job description for IEP Facilitator-Teacher had been revised at some point by the Board so as to eliminate the requirement for supervisory certification, it cannot be determined on the basis of this record whether the actual duties of the unrecognized IEP position in March 1994 required certification as a supervisor, and, as a consequence, whether the Board's action in "transferring" petitioner back to an IEP position was a proper recognition of her tenure rights. The record does indicate, however, that petitioner's salary was reduced when she was "transferred" back to an IEP position. Her compensation as the Acting Supervisor of Pupil Personnel Services during 1993-94 had been $55,818, exhibit 56W, in evidence, and her salary upon return to the IEP position in March 1994 was $54,823, exhibits 58W and 60W, in evidence.

Accordingly, for the reasons expressed herein, we reverse the Commissioner's determination that petitioner achieved tenure as a supervisor by virtue of her employment as the Acting Supervisor of Pupil Personnel Services, and remand to the

Commissioner for the limited purpose of determining whether petitioner had achieved tenure as a supervisor by virtue of her previous employment as the IEP Facilitator-Teacher and, if so, whether the Board properly effectuated those tenure rights when it "transferred" petitioner back to an IEP position in March 1994.[6]

We do not retain jurisdiction.

Attorney exceptions are noted.

December 4, 1996

Date of mailing DEC 0 6 1996

[6] Given our determination to remand this matter to the Commissioner, we do not find it necessary to address the Board's exceptions concerning reinstatement of the intervenor and recovery of moneys paid to petitioner as a result of the Commissioner's decision.

30-96

436-97 R
(30-96)

PENNY WEBB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner contested her involuntary transfer with reduction in salary from Supervisor of Pupil Personnel Services to Individualized Education Program (IEP) Facilitator. Petitioner claimed transfer violated her tenure rights as supervisor. ALJ concluded that petitioner did achieve tenure in a supervisory capacity and that the IEP facilitator-teacher duties were not supervisory in nature. Thus, the ALJ concluded that service as an IEP facilitator-teacher did not inure to the service necessary to acquisition of tenure in a supervisory capacity. However, the ALJ determined that absent a showing that petitioner's seniority of two years and five days was superior to the seniority enjoyed by others, particularly by intervenor, there was not enough in the record to support the relief petitioner sought. Petition was dismissed. Commissioner determined to adopt in part and reverse in part the ALJ's decision. Commissioner concurred with ALJ that petitioner acquired supervisory tenure by virtue of her service as Acting Supervisor of Pupil Personnel Services from March 24, 1992 until March 28, 1994. Commissioner also concurred that petitioner's IEP facilitator-teacher duties were not supervisory in nature and, therefore, do not inure to the service necessary to acquire tenure in a supervisory capacity. Pursuant to *N.J.A.C.* 6:3-5.1 wherein each supervisory category is considered a separate category for the purpose of calculating seniority, Commissioner found petitioner had seniority in the position of Supervisor of Pupil Personnel Services while intervenor did not have seniority in that position having no service in that role prior to her appointment on March 28, 1994. Board was ordered to restore petitioner to said position with compensation from effective date of her transfer.

State Board reversed Commissioner's decision that petitioner achieved tenure as a supervisor. However, in that the State Board was unable to determine whether petitioner achieved tenure as a supervisor by virtue of her previous employment in the District, the State Board remanded the matter to the Commissioner for further proceedings.

On remand, based on an analysis of her duties, the ALJ determined petitioner failed to show that she achieved tenure as a supervisor by virtue of her service in the District as an IEP Facilitator. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

AUGUST 21, 1997
DATE OF MAILING AUGUST 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 165-97

AGENCY DKT. NO. 73-4/94

(ON REMAND EDU 4538-94)

PENNY WEBB,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Joan Kane Josephson, Esq., for respondent (Hill Wallack, attorney)

Wayne J. Oppito, Esq., for intervenor, Alma Singleton

Record Closed: March 21, 1997 Decided: June 4, 1997[1]

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

Penny Webb, petitioner, contested her involuntary transfer from Supervisor of Pupil Personnel Services to Individualized Education Program Facilitator and alleged she had tenure as Supervisor of Pupil Personnel Services, the transfer violated her tenure rights and the transfer will result in reduction of her salary which also violates her tenure rights. The Board denied the

[1] Time extended pursuant to *N.J.A.C.* 1:1-18.8

allegations and set forth affirmative defenses. The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. A prehearing conference was held, Wayne J. Oppito, Esq. moved to intervene on behalf of Alma Singleton who holds the position of Supervisor of Pupil Personnel Services, the motion to intervene was granted and the matter proceeded on stipulated facts and briefs.

An Initial Decision was issued on December 8, 1995. On January 25, 1995, the Commissioner adopted in part and remanded in part as follows. The Commissioner agreed that the petitioner had not achieved tenure as a supervisor as the result of her previous service as the I.E.P. Facilitator-Teacher, but that she had achieved tenure as a Supervisor because of her service as the Acting Supervisor of Pupil Personnel Services for the period March 24, 1992-March 28, 1994. However, the Commissioner concluded that the petitioner was entitled to reinstatement as the Supervisor of Pupil Personnel Services as against the intervenor, Singleton. The Commissioner observed that while the petitioner had served as the Acting Supervisor for over two years, there was no showing that the intervenor who had previously served as a Department Chairperson, had ever been employed in that specific assignment before her appointment to it on March 28, 1994. The Commissioner found that the intervenor had no seniority in the particular regulatory category applicable to the assignment prior to her appointment to the assignment. He directed the Board to reinstate the petitioner as the Supervisor of Pupil Personnel Services with backpay and emoluments.

The intervenor filed an appeal from the decision of the Commissioner before the State Board of Education. On August 21, 1996, the State Board Legal Committee issued a report that recommended reversing the Commissioner's determination that the petitioner had achieved tenure as a Supervisor by virtue of her employment as the Acting Supervisor of Pupil Personnel Services. The Board filed exceptions to that report and requested that that the State Board address whether the intervenor was to be reinstated as the Supervisor of Pupil Personnel Services and whether the Board had the right to recover monies paid to the petitioner as a result of the Commissioner's decision.

The petitioner also filed exceptions and contended that she had achieved tenure as a result of her service as the Acting Supervisor and that, in any event, she had achieved tenure as a supervisor as a result of her previous employment as an I.E.P. Facilitator-Teacher.

After reviewing the exceptions, the State Board found it necessary to issue a revised report on October 24, 1996. After a complete review of the record, the full Board reversed the determination of the Commissioner that the petitioner had achieved tenure in the district as a result of her service as the Acting Supervisor of Pupil Personnel Services. The State Board found that the petitioner's employment as the Acting Supervisor in the period March 24-March 31, 1992 could not be credited toward the achievement of tenure as a supervisor. However, the State Board was unable to determine whether the petitioner had previously achieved tenure as a supervisor by virtue of her employment as an I.E.P. Facilitator-Teacher. The State Board remanded the matter for further proceedings to develop the necessary facts.

Upon receiving the State Board of Education's December 4, 1996 decision, I scheduled a hearing to determine "the actual duties of the I.E.P. position as performed by petitioner." Counsel appeared on February 28, 1997 at which time additional testimony and documents were received.

Penelope Webb stated that she began as I.E.P. Facilitator in September 1980. The Supervisor endorsement was required. She did not learn for some five years that a Supervisor endorsement was no longer required for the position. Webb also testified that during the initial years in which she served in this position, she observed and evaluated teaching staff members in the special education area.

The Board does not dispute that evaluations were done by I.E.P. Facilitators during at least one year, the 1981-82 school year. The Board presented correspondence from Fred Price, then Director of the Division of Field Services, dated October 17, 1980, to the Burlington County Superintendent of Schools, in which the recommendation was that a Supervisor certificate or endorsement was appropriate for the I.E.P. Facilitator-Teacher position. The Board's job description of 1984 also required Supervisory certification or endorsement. Joint Exhibit D.

Webb argues that she had been employed for approximately fifteen years as an I.E.P. Facilitator-Teacher. A Supervisor endorsement, which she held, was required. The Board has agreed that evaluations were done by I.E.P. Facilitators in at least one year, the 1982-82 school year. After hearing concluded, the Board produced the Price letter of October 17, 1980. This confirmed Webb's testimony and the district's job description dated 1984.

Webb also presented evaluations of persons in the special education area which, she says, confirmed her evaluation responsibilities in years other than 1981-82.

In the Initial Decision in this matter, the judge concluded that the petitioner's employment as an I.E.P. Facilitator-Teacher did not equate to tenure as a supervisor. During the first hearing of this matter, the job description offered did not include a requirement for a Supervisor endorsement. Subsequently, a job description that did contain such a requirement was submitted. Further, the judge did not have any evidence that the County Superintendent had approved either the title of I.E.P. Facilitator-Teacher or made a determination as to appropriate certification for the position.

Webb asserts that we now know the I.E.P. Facilitator-Teacher position was submitted to the County Superintendent and that a recommendation was made by the County Superintendent that a Supervisor certificate or evaluation be required of the position. As an I.E.P. Facilitator, Webb was involved in the evaluations and observations of both tenured and non-tenured staff members.

Webb served in an I.E.P. Facilitator position for fifteen years. For more than two years of that time, a Supervisor certificate or endorsement was required. That requirement had been approved by the County Superintendent. For more than two years, Webb either directly or indirectly observed and evaluated both tenured and non-tenured teaching staff members. Therefore, she met the precise requirements of *N.J.S.A.* 18A:28-6 and acquired a tenured status as a Supervisor.

Alma Singleton, the intervenor, argues that the manner in which tenure is obtained in a position is set forth in three criteria:

> 1. A certificate issued by the State Board of Examiners is required;
>
> 2. The person in the position holds the required certificate, and,
>
> 3. The person has been employed in the position for the time set forth in *N.J.S.A.* 18A:28-6.

Based on the letter from Dr. Price to the County Superintendent, it appears that the Supervisor certificate or endorsement was required for the position during the 1980-81 school year and that Webb possessed this certificate or endorsement at the time of her hire.

The question is whether Webb met the statutory time requirements for attaining tenure set forth in the statute. Although Webb served as I.E.P. Facilitator-Teacher for fifteen years, she testified that, at some time, the requirement for Supervisory certification or endorsement was discontinued. If it was discontinued in the 1982-83 school year, Webb did not attain tenure as a Supervisor. All the subsequent documentation concerning staff evaluations that has been introduced demonstrates that Webb had input into the evaluations, but that the building principals signed the evaluations. Furthermore, Webb testified that she did evaluations for a short time and then was informed by central administration that she should discontinue doing them because of a grievance filed by the Willingboro Education Association, the teacher's union to which Webb also belonged. Margaret J. Woolford, the current Director of Pupil Personnel Services, testified that when she became an I.E.P. Facilitator-Teacher in September 1983, she was told not to do evaluations. If the position did not require the Supervisory certificate or endorsement in the 1982-83 school year, it was an auxiliary position in which tenure as a Supervisor could not be attained. Input into evaluations is not sufficient for attaining tenure as a Supervisor.

The Board relies on its earlier arguments. At one time, the job qualifications demanded a Supervisory certificate or endorsement and one of the following certifications or endorsements:

School Psychology, Counselor, Social Worker, Learning Disability Teacher/Consultant, Teacher of the Handicapped, School Nurse or Speech Correctionist. The present job description does not require Supervisory certification or endorsement. Webb worked under the previous job description for at least five years. The petitioner having served for an initial period in excess of three school years as an I.E.P. Facilitator, which required her to have both Supervisory and Teaching certification, the petitioner did acquire tenure as an I.E.P. Facilitator under her Supervisory and her Teaching certifications. She has been returned to the I.E.P. Facilitator position as of January 31, 1994. This was a reassignment within certifications under which she held tenure without loss of pay or benefits. Her time served as Acting Supervisor of Special Services did not give rise to new tenure rights. These rights had already vested after three school years in the position of IEP Facilitator under the old job description.

The petitioner's tenure rights in the I.E.P. Facilitator position continue to accrue under both her Supervisory and Teaching certifications as they did when the Board amended the job description and deleted the Supervisory certification requirement. The job description revision did not change the petitioner's vested tenured rights. She continues to accrue tenure in both certifications.

The petitioner had no right to claim the position of Supervisor of Pupil Personnel Services when she presently holds a position under which she acquired tenure in both Supervisory and Teaching categories.

DETERMINATION AND ORDER

Tenure is created by statute and is defined with specificity. In order to achieve tenure, the precise statutory conditions must be met. *Zimmerman v. Newark Bd. of Ed.*, 38 *N.J.* 65, 72 (1962).

If Webb served as a Supervisor for more than three years in the I.E.P. Facilitator-Teacher position, she has achieved tenure as a Supervisor. If she achieved tenure as a Supervisor, it must

then be considered if her tenure rights were properly recognized when the Board replaced her in an I.E.P. position in March 1994.

Webb was employed for part of her service as an I.E.P. Facilitator-Teacher under a job description that required Supervisory certification or endorsement. However, it is the duties of the job, not the job title that determine tenure rights. *See, e.g., Elizabeth v. North Bergen Bd. of Ed.*, 1974 *S.L.D.* 805, 814:

> The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. He must be equally vigilant against the employment of devices to confer tenure upon those who are not entitled to its protection. The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. Nomencolatures may not be the deciding factor.

See, also Arthur L. Page v. Trenton Bd. of Ed., and Pasquale A. Maffei, 1975 *S.L.D.* 644:

Here, the evidence tends to show that Webb did evaluate teaching staff members for one academic year, 1981-82. The evidence also tends to show that Webb had input, but not ultimate observation and evaluation responsibilities in other academic years. Thus, if Webb has achieved tenure in a Supervisor capacity it must be on the basis of other duties.

In Webb's own tenure evaluation, the evaluator, Dr. Brian G. Gross, commented on her important duties.

> You continue to meet your responsibilities in a most effective, enthusiastic, and professional manner. As the I.E.P. Facilitator for the Elementary Special Instruction Department, you are an important link between the department and the child study teams, thus insuring that each classified youngster has a current I.E.P.
>
> In your role as I.E.P. Facilitator, you do a fine job as a member of the Placement Board, assisting with both in and out-of-district placements. You play a key role in the I.E.P. mandated mainstreaming process for classified children and you have been instrumental in helping to implement the new pass/fail grading

> policy. Your assistance in developing this year's class lists was most appreciated.
>
> The responsibilities of the I.E.P. Facilitator are varied and demanding. Record keeping tasks are a vital part of the position. In a well organized manner, you have kept track of classified students who are suspended. You have also been instrumental in processing I.E.P. Revision Forms from the classroom teachers through to the terms and in scheduling monthly I.E.P. conferences.
>
> In-services presented by you, earlier this school year, on the current grading policy and the departmentalization of resource room programs were well planned, informative, and interesting.
>
> It should also be noted that you assisted in writing the District's Annual Special Education Plan. You also wrote forty-three tenure and non-tenure evaluation inputs that were placed in 1985-1986 teacher evaluations for the department. All of this was done with your usual efficiency and thoroughness.
>
> You maintain excellent communication with both the teaching staff in the department and with building administrators. During your monthly I.E.P. monitoring visits to each of the ten elementary schools, you have been most helpful and professional.

While this is laudatory, the language bespeaks support, liaison and facilitation functions rather than supervisory duties. The job description, Joint Exhibit D, states the responsibility of the position as follows:

> The I.E.P. Facilitator-Teacher shall be responsible to the Director of Pupil Personnel Services.

The function is described as follows:

> The I.E.P. Facilitator-Teacher will coordinate the scheduling, implementation, and revision of I.E.P.'s for all classified in their division.

Twenty-seven duties are specified. Evaluation of teaching staff members is not specifically mentioned. Of course, the last duty, "Perform such other duties related to programs for the

handicapped as specified by the Director of Pupil Personnel Services," is a catch-all, and could be read as admitting evaluative work, provided such was assigned by the Director of Pupil Personnel Services.

Viewing the evidence in its entirety, I **FIND** insufficient support for the proposition that Webb achieved Supervisory tenure status by service in the I.E.P. Facilitator-Teacher position. This is somewhat circumstantial; it is at least deductive. However, it is the petitioner who carries the burden of persuasion in an administrative proceeding. The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. This tribunal, therefore, must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." *Jackson v. D.L. and W.R.R.*, 11 *N.J.L.* 487, 490 (E. & A. 1933). The evidence is found to preponderate if it "establishes 'the reasonable probability of the fact'." *Jaeger v. Elizabethtown Consolidated Gas Co.*, 124 *N.J.L.* 420, 423 (Sup. Ct. 1940). The evidence must be such as to "generate belief that the tenured hypothesis is in all human likelihood the fact." *Loew v. Union Beach*, 56 *N.J. Super.*; 93, 104 (App. Div. 1959).

In consideration of the foregoing analysis and of the entire record, I **CONCLUDE** that Penny Webb has failed to show that she achieved a tenure status in the Supervisory category by virtue of her service with the Willingboro Board of Education as I.E.P. Facilitator-Teacher.

This conclusion having addressed the sole issue of the State Board of Education on remand, the petition of appeal is **DISMISSED**. It is **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4 JUNE 1997
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/6/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 1997
DATE

Barbara A. Gerard
OFFICE OF ADMINISTRATIVE LAW

slf

WITNESSES

On behalf of the Petitioner:

Penelope Webb

On behalf of the Respondent:

Margaret Jane Woolford

EXHIBITS

On behalf of the Petitioner:

None

On behalf of the Respondent:

R-a Letter, Douglas B. Groff, County Superintendent of Schools, to Geraldyn Foster, Superintendent, Willingboro School District, March 28, 1996, with 2pp. attachment, Individual Education Plan Facilitator Job Description

Joint Exhibits:

J-a Staff Evaluations, including an Individual Professional Improvement Plan, for teaching staff member Pam Willis, 1980-83, 22pp.

J-b Staff Evaluations, including an Individual Professional Improvement Plan, for teaching staff member Jeanne Doerner, 14pp.

J-c Staff Evaluations, including an Individual Professional Improvement Plan, for teaching staff member Meredith Gregory, 14pp.

J-d Job Description I.E.P. Facilitator, Willingboro Public Schools, 3pp

PENNY WEBB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

In petitioner's exceptions, she renews her assertion that the supervisory nature of the Individualized Education Program (IEP) Facilitator position is evidenced by her undisputed writing of evaluations for the 1981-82 school year, and for her "evaluative responsibilities" for the 1982-83, 1983-84, 1984-85, 1985-86 and 1986-87 school years. (Petitioner's Exceptions at p. 4) Petitioner reasons that, absent a supervisory endorsement, she could not have participated in the evaluation process, either as the primary evaluator, or by having input into the evaluations written by the principals. (*Id.* at p. 5) Moreover, petitioner claims that the supervisory nature of the IEP Facilitator position is substantiated by the initial job description, as well as correspondence from a former Director of the Division of Field Services to the County

Superintendent of Schools recommending that a supervisor's endorsement was appropriate for this position. (*Id.* at p. 4)

Petitioner contends that, by his decision, the Administrative Law Judge (ALJ) has "collaterally attacked" a decision rendered by the County Office of the Department of Education seventeen years prior. "Petitioner maintains that Judge Campbell is without authority at this juncture to substitute his judgment for that of the Director of Field Services of the County Superintendent of Schools." (*Id.* at p. 5) Having performed these supervisory functions, and having held a title which required a supervisory endorsement, petitioner reasons that she has met the two-year statutory requirement to acquire tenure as a supervisor. (*Id.* at p. 6)

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioner has failed to establish by a preponderance of credible evidence that, except for the 1981-82 school year, she performed duties such that she was required to hold a supervisor's endorsement. Therefore, petitioner could not have met the statutory requirement under *N.J.S.A.* 18A:28-6, as claimed, for acquiring tenure as a supervisor by virtue of her service as the IEP Facilitator.

Moreover, as to petitioner's contention that a prior certification decision rendered by the county office should be determinative in this matter, the Commissioner emphasizes that

> ***While the county superintendent is charged with responsibility in the first instance for determining the appropriate certification for service in an unrecognized position title based upon the specific duties required to be performed, the State Board of Education has the ultimate administrative authority for determining appropriate certification, *South River Education Association v. Board of Education of the Borough of South River*, decided by the State Board, November 4, 1987, *aff'd*, Docket #A-1695-87T8 (App. Div. 1990); *Pezullo v. Board of Education of the Township of Willingboro*, decided by the State Board, March 1, 1989, *appeal dismissed,* Docket #A-4006-88T1 (App. Div. 1989), ***. *John Zachau v. Burlington County Vocational and Technical Schools,*

Burlington County, 97 *N.J.A.R.* 2d (EDU) 4, decided by the State Board September 4, 1996. (State Board Slip Opinion at p. 3)

Accordingly, the Commissioner affirms the ALJ's conclusion and recommended order that the within Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 21, 1997
DATE OF MAILING AUGUST 21, 1997

30-96

EDU #4538-94
C # 30-96
SB # 10-96
EDU # 165-97
C # 436-97R
SB # 70-97

PENNY WEBB, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

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

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, January 25, 1996

Remanded by the State Board of Education, December 4, 1996

Decision on remand by the Commissioner of Education, August 21, 1997

For the Petitioner-Appellant, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Joan K. Josephson, Esq.

For the Intervenor, Wayne J. Oppito, Esq.

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

January 7, 1998

Date of mailing JAN 09 1998

31-96

G.M., on behalf of his minor child, D.M., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioning parent sought stay of the NJSIAA's determination that his son, D.M., was ineligible to participate in interscholastic contests (basketball) until February 1, 1996, by application of Article V, Section 4E (academic credit rule). District contended D.M. failed to earn requisite academic credits. Petitioner claimed D.M.'s failure to earn the credits was beyond his control as the District did not provide a tutor, as requested, and did not apprise D.M. that his eligibility was jeopardized by failure to earn requisite academic credits since that requirement was not included in the District's Handbook in the 1994-95 school year.

Citing Burnside, Commissioner concluded that D.M. was afforded the due process to which he was entitled and that the Eligibility Appeals Committee's determination was not arbitrary, capricious or unreasonable so as to warrant the Commissioner's intervention. Thus, the Commissioner affirmed the NJSIAA's decision. Petition was dismissed.

January 26, 1996

G.M., on behalf of his minor child, D.M., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, : DECISION

RESPONDENT. :

For Petitioner, G. M., Pro Se

For Respondent, Picco, Herbert, Kennedy (Michael J. Herbert, Esq., of Counsel)

This matter has come before the Commissioner of Education by way of a Petition of Appeal and Motion for Emergent Relief filed by petitioner on December 22, 1995, seeking a stay of the determination by the New Jersey State Interscholastic Athletic Association (NJSIAA) that D.M. is ineligible to participate in interscholastic contests until February 1, 1996, by application of Article V, Section 4E (academic credit rule). Respondent NJSIAA submitted its Answer and Reply Brief on December 29, 1995, together with the record of proceedings before NJSIAA. It was determined that the Commissioner would decide the merits of this matter on an accelerated schedule, thereby obviating the need to decide the Motion for Emergent Relief.

The Commissioner decides the merits of this matter under the standard of review articulated by the courts in reviewing appeals from determinations of NJSIAA. That standard holds that the Commissioner will not substitute his judgment for that of the Association, even if

he were to decide differently in a de novo hearing, where due process has been provided and where there is an adequate basis for the decision reached by the NJSIAA Committee. See, e.g., Dam Jin Koh and Hong Jun Kim v. NJSIAA, decided by the Commissioner February 3, 1987.

The facts in this case are undisputed. D.M., currently a high school senior in the Central Regional School District, initially enrolled in seven classes, for a total of 36 credits, for the 1994-95 school year. With his parents' approval, D.M. withdrew from a five-credit course early in the school year. Thereafter, he failed a Geometry course, thereby falling short of the requisite 27.5 credits needed to remain eligible to play basketball. The record shows that D.M. consulted with his counselor during the course of the year about his progress. He was offered the opportunity to attend summer school, but declined the offer. The District concedes that the academic credit requirement was not included in the District's Handbook in the 1994-95 school year, and there may have been some confusion about the import of petitioner's actions with respect to his sports eligibility.

Petitioner asserts that NJSIAA's decision to exclude D.M. from basketball games until February 1, 1996, the start of the new semester, is arbitrary, capricious and unreasonable. Petitioner argues that the academic credit rule should be waived in this instance, since D.M.'s failure to earn the necessary credits was beyond his control. Here, petitioner contends that the District did not follow through in providing D.M. with a tutor, as requested. Moreover, petitioner argues that D.M. was never fairly apprised that his eligibility was jeopardized by failure to earn requisite academic credits.

NJSIAA counters that petitioner has failed to demonstrate the existence of circumstances beyond D.M.'s control, such that the granting of a waiver of Article V, Section 4E of the NJSIAA bylaws is appropriate. With respect to petitioner's argument that the academic

credit rule was not contained in the District's Handbook and that he was not properly advised by school staff, NJSIAA observes

> This is precisely the argument that was made and rejected by both the Commissioner of Education and the Appellate Division in the Burnside case. *** There, the NJSIAA had changed to its current academic restrictions, but some member schools did not adopt appropriate alterations in their student Handbook. The Commissioner and the Appellate Division held that any such inaction by the member school could not constitute the basis of an eligibility waiver. To make absolutely certain that appeals are not prosecuted on such a basis, the NJSIAA specifically provided that schools should advise appealing students and their parents of their rights as set forth in the NJSIAA Handbook. In addition, at page 61 of the Handbook, it is clearly stated:
>
> > **Misinterpretation of NJSIAA eligibility regulations or the failure by the school's staff to properly advise a Student-Athlete will not be considered grounds for waiver of the eligibility requirements.** (Emphasis in original) (NJSIAA's Reply Brief at pp. 9, 10)

After a thorough consideration of the record, which includes petitioner's documentation submitted to the Eligibility Appeals Committee (EAC), the transcript of the hearing below, as well as the written decision of the EAC, the Commissioner is persuaded that the hearing of the NJSIAA's EAC on December 6, 1995 fully provided petitioner with the due process to which he is entitled, and that the EAC's determination was not arbitrary, capricious or unreasonable so as to warrant the Commissioner's intervention. Thus, the Commissioner concludes that petitioner has failed to meet his burden under the appropriate standard of review, and the NJSIAA's decision must, therefore, be affirmed.

Accordingly, the Commissioner affirms the decision of the NJSIAA in this matter and hereby dismisses the Petition of Appeal with prejudice.

COMMISSIONER OF EDUCATION

January 26, 1996

Date of Mailing, January 30, 1996

32-96

BEVERLY LOOKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOOTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

January 26, 1996

OAL DKT. NO. EDU 9280-95

BEVERLY LOOKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOOTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 26, 1996
Date of Mailing, January 29, 1996

33-96

33-96 DHP

IN THE MATTER OF THE DISQUALIFI-	:	
CATION FROM SCHOOL EMPLOYMENT	:	COMMISSIONER OF EDUCATION
OF GREGORY T. CAMPBELL.	:	DECISION
_____	:	

JANUARY 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8583-95

AGENCY DKT. NO. DHP #471

GREGORY T. CAMPBELL,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

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

Respondent appearing pursuant to *N.J.A.C.* 1:1-5.6(a)

Record Closed: November 29, 1995 Decided: December 14, 1995

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises as a result of a remand by the State Board of Education (Board) to the Commissioner of Education for a hearing in order to provide the petitioner with an adequate opportunity to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation, pursuant to *N.J.S.A.* 18a:6-7.1(e) following his convictions for crimes

which disqualified him from school employment. The remand followed a determination arrived at by the Deputy Commissioner of Education, which concluded that Mr. Campbell had not been rehabilitated. Following the remand by the Board to the Commissioner of Education the latter transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 on September 20, 1995. The matter was originally scheduled to proceed to hearing on November 14, 1995; Mr. Friedman did not appear indicating that he had not received notice of the matter. The case was then rescheduled and heard on November 29, 1995 at the Office of Administrative Law, Mercerville, New Jersey at which time the record closed.

ISSUE AND BURDEN OF PROOF

The primary issue to be determined in these proceedings is whether, pursuant to *N.J.S.A.* 18:6-7.1(e), the petitioner can demonstrate that he should not be disqualified from school employment as a custodian on the basis of his criminal record in that he has been rehabilitated. In respect to this issue the burden rests exclusively with the petitioner: Mr. Campbell must affirmatively demonstrate by clear and convincing evidence that he has been rehabilitated.

In addition, as part of the remand, the Board specifically asked for clarification in respect to the circumstances surrounding the petitioner's incarceration in or about 1989. See Board remand. July 7, 1995 at 2. The Board notes that "This information is particularly critical in view of the deputy commissioner's conclusion, based on his statement that the petitioner was convicted of "possession of narcotics" in 1989, that insufficient time has lapsed for him to have been convinced of petitioner's rehabilitation." Id at 2-3.

THE FACTS

The facts are not in dispute. I **FIND:**

The petitioner, Gregory T. Campbell, is 41 years of age and for the past year and one-half has resided with a woman who he has described as his "fiancee" in Hampton, New Jersey. He is divorced and has two children, daughters ages 20 and 18. One of them is employed and the other

is a student at college. He indicates that he has a good, close relationship with both of them. His fiancee has three children, sons, and they apparently have been living in familiar relationship for at least 18 months. They have not set a date in respect to marriage. His fiancee earns income as a baby-sitter. She is a recovering alcoholic.

Mr. Campbell's criminal record is not in dispute. On or about January 7, 1982, following a July 8, 1981 indictment, Campbell entered a plea of guilty to a violation of *N.J.S.A.* 24:21-19a(1) and 2C:2-6a, b, and c, aiding and abetting the distribution of a controlled dangerous substance. As part of his sentence he was incarcerated for 90 days with the opportunity for work release on weekdays and he was also placed on one year's probation. The drug involved in the offense was cocaine and it was Mr. Campbell's testimony that he was arrested in a bar where he was employed for possessing approximately one gram of cocaine. He acknowledged that part of the reason for his conduct was that he was "mixed in with the wrong crowd."

Some two years later, in 1984, Mr. Campbell was arrested for possession of methaemphetamines in violation of *N.J.S.A.* 24:21-20A-1 and possession with intent to sell in violation of *N.J.S.A.* 24:21-19a-1. On May 6, 1985 he entered a plea of guilty to the former charge which was dispositive of all charges. He was sentenced to four years probation and in addition served nine months in Hunterdon County Jail.

As was requested in the remand of this matter by the Board, Mr. Campbell's incarceration in 1989 was clarified. That incarceration did <u>not</u> result from any arrests for a substantive criminal offense and in no way involved an arrest and/or conviction for any drug-related offense. The 1989 incarceration resulted from his parole violation. Campbell acknowledged that as an incident to his 1985 conviction he was sentenced to four years probation and that he frequently, if not systemically, failed to meet with his probation officer. As a consequence of his failure to do so he was incarcerated at the Mountainview Youth Correctional Facility from February 10, 1989 to June 9, 1989 when he was placed on parole. He was discharged from parole on March 17, 1990.

In addition, he successfully completed as part of his parole, random urinalysis testing. Consequently, the inquiry by the Board on remand in respect to Mr. Campbell's 1989 incarceration reveals that he was not involved in any narcotics-related offense based upon his

criminal record subsequent to his conviction in May of 1985. There is therefore more than a decade in which Mr. Campbell has not been convicted of any crime related to a controlled dangerous substance; indeed, he has not been convicted of any crime within that period of a substantive nature but for his culpability which resulted in additional incarceration because he failed to meet his probation obligations.

Campbell has acknowledged that through 1984-85 he suffered from a severe alcoholic problem he has received counseling for that which was mandated by his release after his 1989 incarceration. This counseling has been documented. See, exhibit P-3, which is a letter from the Reverend Richard A. Miller of the Stanton Reformed Church, dated August 8, 1995. Reverend Miller notes that he counseled Mr. Campbell for approximately six months at weekly sessions for one hour each. He notes that the counseling was alcohol rehabilitation oriented. Reverend Miller describes Campbell's response as being receptive, that he recognized his alcoholism. Campbell also acknowledged that he had a drug abuse problem for which he also received counseling. He did however deny that he was ever addicted to drugs or that he was ever an alcoholic. He indicates that he does not drink regularly; perhaps once or twice a year he will have a drink. The Reverend Miller's letter also notes that once Campbell began working as a custodian he abstained from alcohol completely.

Mr. Campbell dropped out of high school in his junior year but in 1980 obtained a graduate equivalent diploma. After applying for a position as a custodian in the Reddington School District, Hunterdon County, Campbell was hired in that capacity and worked as a custodian from April 19, 1994 through May 1995 when he was terminated from his position because of his criminal record.

ANALYSIS

In order to demonstrate that an individual has rehabilitated himself such that he is no longer disqualified from school employment, he must satisfy the applicable criteria set forth at *N.J.S.A.* 18A:6-7.1.

Subdivision (e) of that statue provides as follows:

> Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
> (1) The nature and responsibility of the position which the convicted individual would hold;
> (2) The nature and seriousness of the offense;
> (3) The circumstances under which the offense occurred;
> (4) The date of the offense;
> (5) The age of the individual when the offense was committed;
> (6) Whether the offense was an isolated or repeated incident;
> (7) Any social conditions which may have contributed to the offense;
> (8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendations of persons who have had the individual under their supervision.
> [*N.J.S.A.* 18A:6-7.1(e)]

Mr. Campbell's efforts at rehabilitation in one sense began after his conviction for possession of methaenphatimes in 1985. In another sense however, he really did not begin his rehabilitation at that time. It is my judgment that the inference must be drawn that his violation of probation reasonably was correlated to either gross irresponsibility on his part or behavior which was motivated in part by alcohol and/or substance abuse. Certainly, to have violated probation to the extent that he served nine months in state prison in 1988-89, is a serious infraction. The ten-year gap between Mr. Campbell's last criminal drug-related conviction and his disqualification from his employment is a significant period of time. There is also, looking at the case in the darkest light possible for Mr. Campbell, a period of at least six years when he has been drug and alcohol free, has undergone counseling and has made what appears to be a good faith effort to create a family life and a home life for himself, his fiancee and her children. By his testimony he also has indicated that he maintains a good fatherly relationship with his natural children. Mr. Campbell's explanation as to the circumstances of his convictions - that he was mixing with the wrong kind of people - is understandable but in my view does not in any way justify criminal or

drug-related behavior. Neither is his explanation in respect to his probation violation. He indicated in his testimony that a primary reason for his failing to appear at his probation office was that his probation officer too often failed to make his appointments. I reject that explanation. It seems to me that even if (and I do not know this for as fact) a probation officer is not present, a responsible convict would see to it that a record is made that he did appear so as not to jeopardize the possibility of having return to jail. Thus I am somewhat concerned that Mr. Campbell has not accepted and taken full responsibility for his misconduct both as it relates to drugs as well as to his probation violation. Nevertheless, the record of his conduct outweighs what might be some ambiguity in respect to his state of mind. Petitioner has submitted a significant number of letters attesting to his strong family ties, his responsible attitude, his sense of purpose in life and his successful ability to come to grips and conquer his alcohol problems.

In addition, Mr. Campbell has submitted letters from the former administrator of Mountainview Youth Correctional Facility (P-6 & P-7). They unambiguously indicate that his stay at that institution was a successful one from the perceptive of his response to the rules and to the rapport which was established between himself, staff and other inmates. His adjustment was characterized as excellent.

In addition and significantly, letters were submitted by other employees at the Reddington Middle School where Mr. Campbell worked for approximately one year as custodian. One of those letters, from a mathematics teacher, (P-2) noted that Mr. Campbell was a "conscientious hard working" man. He was characterized as thorough and efficient and maintained a positive attitude with administrators, supervisors, teachers and students. The letter concludes "I would not hesitate to recommend Greg Campbell for a position as a custodian. I am sure he would be a cooperative addition to any custodial staff. P-2. The letter is dated July 13, 1995.

The nature and responsibility of the position which the individual holds is also a significant factor in assessing his rehabilitation. Clearly, the greater the relationship that a convicted criminal has to students, the greater the risks present and the more scrupulous one must be in assessing the various other factors set forth under the statute. Here as a custodian Mr. Campbell has minimal contact with students. From his testimony however, one learns that he for the past one and a half years, has been residing with his fiancee and her three sons and there was no indication whatever

that in this most intimate environment in respect to children - the home - that there have been any adverse consequences on the children based upon Mr. Campbell's prior drug-related criminal history.

Based upon all the foregoing, it is my judgment that the petitioner has met the burden of the statute. While the a fact finder can of course be duped into accepting the credibility of an individual who is earnest and appears responsible and candid - and I am no different from any fact other finder in that regard - the record in this matter, which is punctuated by some six years of complete uninvolvement with the criminal justice system, supports and reinforces Mr. Campbell's sworn testimony.

Accordingly, I **CONCLUDE** that the petitioner has affirmatively demonstrated by clear and convincing evidence and pursuant to the criteria set forth at *N.J.S.A.* 18A:6-7.1 that he has been rehabilitated. It is therefore **ORDERED** that the petitioner's criminal history no longer disqualifies him from school employment as a custodian.

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

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

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

12/14/95
DATE

STEVEN C. REBACK, ALJ

12/18/95
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 22 1995
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On behalf of petitioner:

Gregory T. Campbell

On behalf of respondent:

None

EXHIBITS

On behalf of petitioner:

P-1 Letter from Michael J. Billas to "To Whom It May Concern," June 19, 1995

P-2 Letter from Delma Dupcak to "To Whom It May Concern," July 13, 1995

P-3 Letter from Rev. Richard A. Miller to Richard A. Friedman, Esq., August 8, 1995

P-4 Letter from Rev. Richard A. Miller to "To Whom It May Concern," June 10, 1994

P-5 Letter from Stephen J. Hatrak to Richard A. Friedman, Esq., August 29, 1995

P-6 Letter from Stephen M. Domovich to Hope R. Blackburn, March 9, 1995

P-7 Letter from Stephen M. Domovich to Carl H. Canabelli, June 24, 1994

P-8 Letter from James P. Longo, D.C., to "To Whom It May Concern," June 23, 1994

P-9 Judgment of Conviction and Order of Commitment in respect to Mr. Campbell's plea of guilty, November 19, 1981 (2 pages)

P-10 Letter from Joseph Tichy, June 1994

P-11 Letter from Virginia Kutiak to "To Whom It May Concern" notarized, and undated

P-12 Letter from Carol Anderson to "To Whom It May Concern," notarized and undated

P-13 Letter from Edward C. Engisch to "To Whom It May Concern," March 23, 1994, notarized June 27, 1994

P-14 Notarized letter from individual whose name is illegible to To Whom It May Concern," June 28, 1994

OAL DKT. NO. EDU 8583-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
GREGORY T. CAMPBELL.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner cannot concur with the conclusion of the Administrative Law Judge that Mr. Campbell has demonstrated rehabilitation by clear and convincing evidence in accordance with N.J.S.A. 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws. Rather, in reviewing the evidence presented in the record and at the hearing against the statutory factors which must be considered in reviewing an individual's assertion of rehabilitation, the Commissioner is unable to find Mr. Campbell qualified within the intent of the statute at this time.

Initially, the Commissioner observes that although Mr. Campbell's last offense occurred over 10 years ago, he was not a youth, but a 31-year-old man at that time. Further, this offense was not an isolated incident but, rather, a repeated occurrence of serious criminal misconduct involving drugs. In this connection, the Commissioner must remain continually

mindful of his responsibility to ensure that the students in the state are provided with environments which are safe and free of alcohol and drugs. The Commissioner's determination is further influenced by the recitation of the details of Mr. Campbell's incarceration in 1989 for violation of the terms of his probation as such belie his assertion that his efforts at rehabilitation began after his conviction for possession of amphetamine in 1985.

With respect to the nature and responsibility of the position Mr. Campbell wishes to occupy, although a custodial/maintenance position is not one where the incumbent has direct involvement with students in that he/she is responsible for their care, supervision or instruction, the Commissioner has been consistently mindful that such a position nevertheless affords an individual significant and otherwise unsupervised access to children, a consideration which must not be minimized when examining rehabilitation pursuant to N.J.S.A. 18A:6-7.1.

Based on the above considerations, the Commissioner cannot be persuaded, as he must by law, that Mr. Campbell has demonstrated rehabilitation by clear and convincing evidence.

Accordingly, the initial decision of the OAL is reversed and Mr. Campbell's disqualification from school employment is sustained. This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of July 5, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 30, 1996
DATE OF MAILING JANUARY 30, 1996

34-96

34-96

GEORGE WATSON, JR.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JANUARY 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12475-94
AGENCY DKT. NO. 398-9/94

GEORGE WATSON, JR.,

Petitioner,

v.

BOARD OF EDUCATION,

TOWNSHIP OF EAST HANOVER,

Respondent.

George Watson, Jr., petitioner, *pro se*

Nathanya G. Simon, Esq., and **Thomas Russo**, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: November 2, 1995 Decided: December 18, 1995

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

NATURE OF THE CASE

George Watson, Jr. (petitioner or Watson) was previously employed as a transportation coordinator by the East Hanover Board of Education (Board or respondent) pursuant to a contract executed on December 15, 1993. The term of employment was December 15, 1993 to June 30, 1994. On approximately June 1, 1994, petitioner requested an appointment as a substitute school bus driver. At a regular meeting held on June 14, 1994, the Board adopted a resolution terminating

petitioner's employment from the position of transportation coordinator, effective July 1, 1994. At a regular meeting conducted on June 28, 1994, respondent approved petitioner's appointment as a substitute bus driver, pending submission of certain documents and a criminal history record check.

The current matter pertains to claims raised by petitioner regarding the action by respondent terminating him and his status as a substitute driver. On October 17, 1995, counsel for the Board moved for dismissal of the petition. The case has a protracted procedural history. Consideration of this history, as well as the nature of the issues raised by the parties, are relevant to consideration of the motion.

PROCEDURAL HISTORY

On approximately September 15, 1994, Watson filed a petition for declaratory judgment with the Commissioner of the Department of Education (DOE) regarding the termination of his employment by and his status as a substitute driver with the Board. The DOE required resubmission of the petition, and the filing was perfected on approximately November 18, 1994. The Board filed an answer and affirmative defenses on October 14, 1994, in which it raised, in part, the affirmative defense that Watson's petition was barred because it was not timely filed.

Subsequent to the submission of briefs by the parties, on December 13, 1994, the Commissioner of the DOE issued a letter order, determining, in part, that the matter would be transmitted to the Office of Administrative Law (OAL). The DOE transmitted the matter to the OAL on December 28, 1994 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was conducted on March 19, 1995, and a prehearing order issued on April 10, 1995. The prehearing order was subsequently amended by an order issued by this judge on June 28, 1995, on motion by the Board.

As reflected in the April 10, 1995 prehearing order, hearings were initially scheduled for September 21 and 22, 1995. The order stated that no adjournments would be granted except in strict accordance with *N.J.A.C.* 1:1-9.6. In January 1995, petitioner had improperly served discovery on various individuals, including current and former employees of respondent, contrary to *N.J.A.C.* 1:1-10.2(a). Respondent had previously served discovery on petitioner in January 1995. As reflected in the prehearing order, respondent's counsel, who had copies of petitioner's discovery, agreed to provide responses within thirty days. Petitioner agreed to provide responses to the Board's discovery within thirty days. The June 28, 1995 order amending the prehearing order did not affect the scheduled hearing dates, the procedure applicable to adjournment requests, and the discovery deadlines. However, although the Board served responses to Watson's discovery, petitioner did not serve responses to the Board's discovery until October 1995.

In the interim, a telephone conference was conducted on May 31, 1995. During the course of the conference, this judge requested that the parties appear that day for an in-person conference, which they subsequently did. An in-person conference was conducted, on the record, later in the day on May 31, 1995.

During the in-person conference, Watson represented that he had decided to withdraw his petition and requested that a withdrawal be processed with a "transfer" to other related matters, which he had indicated had been filed in federal district court. I requested that petitioner file a letter of withdrawal, stating his request with specificity, which Watson agreed to do by facsimile transmission. The parties were allowed one week to file letters citing authority for and against transfer jurisdiction, and petitioner agreed to provide a copy of the cover letter effectuating the filing of his petition in federal court, but did not agree to file a copy of the petition itself.

On June 8, 1995, the Board filed a letter brief in opposition to petitioner's notice of withdrawal. Watson did not file a letter of withdrawal, and subsequent to several letters from this judge to the parties regarding the status of the case, and in response to subsequent telephone communications from petitioner, a telephone conference was

conducted on June 23, 1995. Watson represented that he had decided not to withdraw his petition in the current matter.

In the interim, on April 25, 1995, the Board filed a motion to dismiss. Petitioner filed a reply in opposition to the motion, and the Board filed a response to the reply. On August 11, 1995, I issued an order granting and denying, in part, the Board's motion to dismiss.

The pleadings filed by petitioner are somewhat unclear on their face. However, as noted in the order issued on August 11, 1995, Watson's initial petition raised apparent claims and allegations pertaining to the conduct of the June 14 and 25, 1994 Board meetings; Watson's status as a substitute driver; alleged discrimination by respondent against bus drivers on the basis of race; a claim that bus routes and classes in the district are designed in a discriminatory manner, on the basis of race; the claim that Watson had so informed the Board, and that he was terminated in retaliation; and claims that the Board generally discriminated against Watson, who is African American, on the basis of race. In reference to the June 14 and 28, 1994 Board meetings, respondent claimed violations of the Open Public Meetings Act, *N.J.S.A.* 10:4-1 to 21.

In my order of August 11, 1995, I dismissed all claims of petitioner other than those that respondent discriminated and retaliated against Watson in terminating him on June 14, 1994 and those pertaining to his status as a substitute driver. I also ordered that the Board file responses to petitioner's interrogatories no later than August 31, 1995, which respondent did; the Board had refrained from doing so pending a ruling on its motion.

Watson subsequently called this judge's office, advising that a stay of the proceedings of the current matter would be issued by federal district court. However, no such documents were ever filed with the OAL.

On September 5, 1995, this judge issued a letter order directing that the parties be prepared to commence hearings on September 21, 1995 and that petitioner serve responses to respondent's discovery no later than September 12, 1995. The September 22, 1995 hearing was adjourned, at the request of respondent. Petitioner did not file an objection to the request, although given an opportunity to do so.

A telephone conference was conducted on September 20, 1995, and a letter order issued on September 21, 1995, confirming rulings which had been rendered. Because of pending motions, the hearing scheduled for September 21, 1995 was adjourned. The order stated that hearings remained scheduled for October 11, 17, and 20, 1995, which hearings had previously been scheduled. In the interim, the Board filed a motion to dismiss for failure to comply with discovery directives on September 18, 1995. Petitioner filed a reply and cross-motion on September 20, 1995. Respondent ultimately filed a response to petitioner's reply on September 25, 1995.

During the September 20, 1995 conference, petitioner represented that his prior letter of September 18, 1995 constituted his reply to respondent's motion to dismiss. Watson was directed to file copies of all interrogatories served by him, no later than September 29, 1995, which he did not do. Petitioner represented that he intended to file a motion for reconsideration of the order issued on August 11, 1995. This judge directed that he file any such motion no later than September 29, 1995 and that any motion filed after that date would not be considered, unless good cause for any delay were established.

On October 6, 1995, this judge issued an order on respondent's motion to dismiss and petitioner's reply and cross-motion. Although noting that respondent had advanced a persuasive case for dismissal, I ruled that both parties should serve responses to certain interrogatories no later than 11:00 a.m. on October 13, 1995. The hearing scheduled for October 11, 1995, only, was adjourned. Thereafter, this judge issued a supplemental letter order pertaining to the discovery to which respondent was directed to respond. Previously, on July 6, 1995, the OAL had mailed to the parties a formal notice of the hearing scheduled for October 11, 17 and 20, 1995.

Neither petitioner nor a representative on behalf of Watson appeared for the hearing scheduled for October 17, 1995. The record was opened at approximately 10:10 a.m. Counsel and three witnesses appeared on behalf of the Board. No communications were received by or on behalf of Watson regarding his nonappearance. Counsel for respondent orally moved for a dismissal of the petition.

By letter dated October 17, 1995, this judge directed that the parties file, no later than 2:00 p.m. on October 18, 1995, written positions directed to the question of whether the petition should be dismissed; and written replies, no later than 1:00 p.m. on October 19, 1995. This letter was sent by facsimile transmission as well as regular mail. However, for reasons not apparent, the facsimile transmission to Watson could not be effectuated, although he was advised by telephone communication to his answering machine that a transmission was imminent.

By letter dated October 19, 1995, I advised the parties that the hearing scheduled for October 20, 1995 was adjourned and that a ruling on the motion to dismiss would thereafter issue. A letter was sent to both parties by regular and facsimile transmission. Watson did not file initial nor responsive positions on the motion to dismiss within the scheduled deadlines.

On November 2, Watson filed a communication, by mailgram, regarding his prior nonappearance. This communication read as follows:

> 10-31-95 PLEASE BE ADVISED THAT I DIDN'T ATTEND YOUR MEETING BECAUSE OF MY FILING AN APPEAL TO THE COMMISSIONER OF EDUCATION FOR INTERLOCKETORY (SIC) REVIEW AND STAY OF YOUR PROCEEDINGS.

FINDINGS OF FACT

I **FIND** the procedural history, as stated hereinabove, to be facts for purposes of consideration of respondent's motion to dismiss.

DISCUSSION

The Uniform Administrative Procedure Rules (UAPR), which govern the conduct of contested cases, shall be interpreted to achieve fair results, simplicity in procedure, fairness, and the elimination of unjustifiable expense and delay. *N.J.A.C.* 1:1-1.3(a). Hearings and other proceedings shall proceed with all reasonable expedition. The parties shall promptly advise the presiding judge of any event which will probably delay the conduct of a case. *Id.* at § 14.2.

Applications for adjournments shall be made to the presiding judge. *Id.* at §9.6(a). Adjournments shall be granted only in exceptional situations which cannot have reasonably been foreseen or prevented. *Id.* at §(d).

If after notice, neither a party nor a representative for that party, appears on any proceedings scheduled by a judge, the judge shall hold the matter for one day before taking action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the clerk to return the matter to the transmitting agency for appropriate disposition. *Id.* at §14.4(a) If the judge concludes from any written explanation subsequently filed regarding the nonappearance that the nonappearing party or representative was intentionally attempting to delay the proceedings, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis to the conclusion. *Id.* at §(b)2.

In general, a presiding judge's powers include the scheduling of any form of hearing in a proceeding. *Id.* at §14.6(a). In a particular case, the judge may schedule additional hearing dates, declare scheduled hearing dates unnecessary, or schedule

any number of in-person or telephone conferences. *Id.* at §(c). The judge may also render any ruling or order necessary to decide any matter presented which is within the jurisdiction of the transmitting agency. *Id.* at §(h). In addition, the judge may take any actions necessary for the proper, expeditious and fair conduct of the hearing or other proceedings, development of a record, and rendering of a decision. *Id.* at §(p).

In general, an order or ruling of a presiding judge may be reviewed interlocutorily by an agency head at the request of a party. *Id.* at §14.10(a) Either the presiding judge or the agency head may order a stay of the proceedings. Applications for stays should be made in the first instance to the presiding judge. *Id.* at §(i).

For unreasonable failure to comply with any order of a judge or any requirements of the UAPR, the presiding judge may dismiss or grant a motion or application, suppress a defense or claim, exclude evidence, order costs or reasonable expenses, or take any other appropriate case-related action. *Id.* at §14.14.

I am persuaded that respondent's motion to dismiss should be granted with prejudice. As discussed hereinabove, administrative proceedings are to proceed with reasonable expedition, and adjournments shall not be generally granted. In addition, the fact that petitioner acted to appeal rulings of this judge on an interlocutory basis was not a basis *per se* for an adjournment of the hearing in question. In any event, petitioner, pursuant to the applicable regulations, should have requested an adjournment of this judge, not simply not appear for the scheduled hearing.* Pursuant o the applicable rules, petitioner's nonappearance at the hearing scheduled for October 17, 1995 could have been treated as an abandonment. However, Watson was given an opportunity to subsequently file a position on whether his petition should be dismissed, which was not filed until November 2, 1995, subsequent to the deadlines established by this judge.

*By letter dated October 24, 1995, the DOE advised petitioner that it was unable to determine what action the motion was requesting the Commissioner to take. Petitioner was requested to file a clarification and supporting documentation within 20 days.

Petitioner's failure to appear at the hearing, which, as indicated hereinabove, was not based on a valid reason and was contrary to the principles reflected in the UAPR, as well as the procedural history of this case, support the imposition of the sanction of dismissal of his petition, with prejudice, pursuant to *N.J.A.C.* 1:1-12.5. I am persuaded that the record evidences, at a minimum, an extreme dilatoriousness by petitioner or, at the worse, intentional delay. It may be inferred from petitioner's involvement in the current matter, including the filing by Watson of various documents, motions, and replies to motions filed by the Board, as well as his involvement in a prior administrative proceeding, *George Watson, Jr., v. Marlboro Board of Education, et al*, 1990 *S.L.D.* 1663 (*Marlboro*), that petitioner, although not represented by counsel, was aware of his obligations in the context of administrative proceedings. It is noted in this respect that the Board relied on *Marlboro*, *supra,* in the current matter in support of a prior motion to dismiss.

CONCLUSION

I **CONCLUDE** that the Board's motion to dismiss Watson's petition because of petitioner's nonappearance at the hearing scheduled for October 17, 1995 should be granted and that the petition filed by Watson with the DOE on September 15, 1994, which filing was perfected on November 18, 1994, should be dismissed with prejudice.

ORDER

It is hereby **ORDERED** that respondent's motion to dismiss be and is hereby **GRANTED** and that the petition filed by Watson on September 15, 1994 with the DOE, which filing was perfected on November 18, 1994, be and is hereby **DISMISSED WITH PREJUDICE.**

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

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

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

December 18, 1995
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

12/26/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 28 1995
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

jrp/njf

OAL DKT. NO. EDU 12475-94

GEORGE WATSON, JR.,	:	
PETITIONER,		
	:	COMMISSIONER OF EDUCATION
V.		
	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	
RESPONDENT.	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that dismissal of this matter was proper based on petitioner's failure to comply with court rules in that Office of Administrative Law judges are authorized to proceed under the New Jersey Court Rules, according to N.J.A.C. 1:1-1.3. The Commissioner further finds that after receiving proper notice, petitioner's failure to appear for a hearing in the within matter sufficiently warranted dismissal of the instant case.

In making this determination, the Commissioner is mindful that petitioner was afforded a full opportunity to present his allegations at a judicial hearing and refused to comply with court rules so as to avail himself of this opportunity. Thus, the Commissioner finds that the ALJ's

determination achieves the aim of "elimination of unjustifiable expense and delay" pursuant to the above-cited regulation governing judicial construction.

Accordingly, the Commissioner affirms the initial decision of the Office of Administrative Law for the reasons expressed therein, dismissing the within Petition of Appeal with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 30, 1996

DATE OF MAILING JANUARY 30, 1996

34-96

EDU #12475-94
C # 34-96
SB # 13-96

GEORGE WATSON, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 30, 1996

For the Petitioner-Appellant, George Watson, Jr., pro se

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nathanya G. Simon, Esq., of Counsel)

By letter dated March 29, 1996, the counsel to the State Board notified appellant that his request to place the briefing schedule in abeyance pending his receipt and transmittal of transcripts from the proceedings held in the Office of Administrative Law in this matter had been granted. On October 1, 1996, the district Board filed a request to dismiss the appeal on the basis of appellant's failure to provide the State Board with those transcripts or to offer any explanation for the delay. In that appellant has now provided us with copies of the transcripts and filed his appeal brief, we deny the Board's request to dismiss the appeal. Consequently, upon the filing of an answer brief by the

12/4/96

Board and after sufficient time has passed for the filing of a reply thereto by appellant, we will proceed to a review on the merits of this matter.

December 4, 1996

Date of mailing DEC 06 1996

34-96

EDU #12475-94
C # 34-96
SB # 13-96

GEORGE WATSON, JR.,

PETITIONER-APPELLANT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY, : DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, January 30, 1996

Decision on motion by the State Board of Education, December 4, 1996

For the Petitioner-Appellant, George Watson, Jr., pro se

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nathanya G. Simon, Esq., of Counsel)

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

February 5, 1997

Date of mailing FEB 07 1997

35-96

35-96

FRANCIS AND KATHLEEN MACKINNEY, guardians of E.O.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners, guardians of E.O., contested Board's determination that E.O. was not domiciled in the District and, therefore, was not entitled to a free public education in the District.

In light of Gunderson, ALJ concluded that E.O. was entitled to a free public education in the District and that the failure of E.O.'s father to submit a sworn statement that he was "not capable of supporting or providing care for the child" (N.J.S.A. 18A:38-1(b)(1)) would not bar petitioners from obtaining relief.

Commissioner adopted findings and determination in initial decision.

JANUARY 31, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12035-95

AGENCY DKT. NO. 372-9/95

FRANCIS AND KATHLEEN MACKINNEY,

GUARDIANS OF E.O.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF

CLIFTON, PASSAIC COUNTY,

Respondent.

Francis and Kathleen MacKinney, petitioners, *pro se*

Anthony V. D'Elia, Esq., attorney for respondent

Record Closed: December 18, 1995 Decided: December 20, 1995

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioners contest the determination of respondent, Board of Education of the City of Clifton, Passaic County (the Board) that the child, E.O., is not domiciled in the district and is, therefore, not entitled to a free public education therein.

PROCEDURAL HISTORY

On September 8, 1995, petitioners submitted an application to the Board to enroll E.O. as a student in the district. On September 13, 1995, the Board disapproved the application on the grounds that E.O. was not domiciled within the district. On September 19, 1995, petitioners filed a Verified Petition of Appeal with the Commissioner of Education on behalf of E.O.

On November 20, 1995, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. A hearing was held on December 14, 1995. The record closed on December 18, 1995.

FACTS

The **FACTS** in this case are undisputed. I, therefore, **FIND** as follows:

E.O. is the ten year old son of J.O., the mother, and D.O., the father. J.O. and D.O. are divorced. Pursuant to the divorce papers, D.O. and J.O. have joint custody of E.O. and another son, K.O. The children were living with J.O. in Nevada after the divorce.

J.O. is a drug addict. She was arrested and incarcerated on drug charges. She subsequently was confined to a drug rehabilitation center and is now in a drug rehabilitation program. After J.O.'s incarceration, D.O. took the children to live in Idaho with him and his new wife and her child. D.O. cannot read or write and he is collecting welfare benefits.

In May 1995, D.O. telephoned petitioners and cried to them that he was unable to control his sons' behavior at home and in school. Petitioners agreed to take E.O. into their home. K.O., who has a learning disability, went to live with relatives in Utah. On September 8, 1995, D.O. agreed to give temporary custody of E.O. to petitioners, commencing September 12, 1995. On September 12, 1995, E.O. came to live with petitioners. When he arrived, E.O. weighed fifty-five pounds and his clothes were filthy. A box of clothing that E.O. had brought with him had to be immediately disposed of because they also were filthy. E.O. later told petitioners about his life

with D.O. E.O. stated that he was forced to sleep on the floor and he was physically and emotionally abused by D.O.

Since September 12, 1995, D.O. has not supported E.O and has sent no funds for E.O.'s support. D.O. also has not seen E.O. since September 12, 1995 and only has spoken to him by telephone on three occasions. E.O. has expressed to petitioners that he never wants to go back to live with his father and that he will commit suicide if he is forced to do so. Although E.O. wants to someday return to live with his mother, he cannot do so at this time because she is in a drug rehabilitation program for at least a year.

Petitioners have been domiciled in the district for many years. E.O. has continuously lived with them since September 12, 1995. Since he came to live with them, petitioners have been supporting E.O. *gratis* as if he were their own child. They have been paying for his food, shelter and clothing and they receive no contribution from E.O.'s parents. They also have assumed all personal obligations for E.O. relative to school requirements. They intend to keep and support E.O. gratuitously for a longer time than merely through the school term. Petitioners submitted a sworn statement to the Board attesting to the above. D.O. has refused to provide a sworn statement.

On November 22, 1995, petitioners filed a Complaint for legal guardianship of E.O. in the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, bearing Docket No. FD-001622-96. That matter shall be scheduled for a hearing within 90 days. Petitioners intend to obtain legal guardianship of E.O. and to take all necessary legal steps to keep him with them.

DISCUSSION AND CONCLUSION

Pursuant to *N.J.S.A.* 18A:38-1, certain proofs must be presented to the Board in order for an individual child to receive a free and public education in the district. *N.J.S.A.* 18A:38-1(b)(1) provides, in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term...and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.

Petitioners have filed the required sworn statement with the Board and have presented proofs under oath at the OAL hearing as to their compliance with the above statute. They also have submitted proofs that J.O. is in drug rehabilitation and incapable of supporting and caring for E.O. and that D.O. cannot read or write, has refused to provide any sworn statement and is financially incapable of supporting and caring for E.O. The failure of D.O. to submit a sworn statement shall not alone preclude the granting of the relief sought by petitioners. *See: Gunderson v. Board of Education of the City of Brigantine, Atlantic County,* OAL Docket No. EDU 2000-94 (1994).

Based upon the facts of this case, I **CONCLUDE** that petitioners have demonstrated by a preponderance of the credible evidence that E.O. is entitled to a free and appropriate education within the Clifton school system. For whatever reason, D.O. does not want to submit a sworn statement. In every other way, however, he has relinquished control of E.O. to petitioners and has relegated E.O.'s everyday care and maintenance to them. D.O. and J.O also are not providing any financial support to E.O. All financial support comes solely from petitioners.

ORDER

It is, therefore, **ORDERED** that E.O. is entitled to a free and appropriate education within the Clifton school system so long as there is no change in his or petitioners' circumstances that would alter such entitlement.

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

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

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

Dec 20, 1995
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

12/27/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 28 1995
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

FRANCIS AND KATHLEEN MACKINNEY, guardians of E.O.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's conclusion that E.O. is entitled to a free public education in the Clifton School District. The Commissioner further concurs that the failure of E.O.'s father to submit a sworn statement that he is "not capable of supporting or providing care for the child" (N.J.S.A. 18A:38-1(b)(1)) will not alone bar petitioners from obtaining the relief they seek herein. (Initial Decision at p. 4) As set forth in Gunderson,

> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the non-parent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, [due] to particular circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its

children. (citations omitted) Gunderson v. Board of Education of the City of Brigantine, Atlantic County, 95 N.J.A.R. 2d (EDU) 39, 42.

Under the circumstances presented herein, where the petitioners receive no financial assistance from E.O.'s father, where E.O.'s mother is in drug rehabilitation and incapable of supporting and caring for E.O., and where petitioners have supported E.O. *gratis*, as if he were their own child, since September 12, 1995, and are taking steps to establish legal guardianship of E.O., the Commissioner is satisfied that the statutory purpose is being effectuated and accepts the above indicia in lieu of the affidavit required by the Board. Gunderson, supra at 42.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein, and the Board is hereby ordered to admit E.O. into its public school system, so long as there is no change in petitioners' circumstances that would alter E.O.'s entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 31, 1996

DATE OF MAILING JANUARY 31, 1996

(SB) 35-96

DHP BL #159-96
SB # 35-96

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF RHONDA A. SREBNICK. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, April 26, 1996

For the Petitioner-Appellant, Rhonda A. Srebnick, pro se

The decision of the Deputy Commissioner of Education disqualifying petitioner from school employment as a bus driver following a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 is affirmed for the reasons expressed therein. Like the Deputy Commissioner, we find that petitioner has failed to affirmatively demonstrate her rehabilitation by clear and convincing evidence. We clarify only that petitioner was convicted of simple assault, rather than "Assault (Bodily Injury)" as the Deputy Commissioner indicates. Moreover, while there is no indication in the record that petitioner's offense involved bodily injury, N.J.S.A. 18A:39-19.1, unlike N.J.S.A. 18A:6-7.1, does not require the use of force resulting in bodily injury in order for a simple assault conviction to be disqualifying.

August 7, 1996

Date of mailing AUG 09 1996

36-96

IN THE MATTER OF THE TENURE :
HEARING OF DIANE MONTGOMERY, :
STATE-OPERATED SCHOOL DISTRICT :
OF JERSEY CITY, HUDSON COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4235-95
AGENCY REF. NO. 84-4/95

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

Patricia A. Taylor, Esq., Assistant General Counsel, for State Operated School District of Jersey City
(Charlotte Kitler, General Counsel, attorney)

Nancy I. Oxfeld, Esq., for respondent, Diane Montgomery
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 13, 1995 Decided: December 13, 1995

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 26, 1995 as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The parties agreed to settle the matter and prepared the attached Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have agreed to the settle the matter as evidenced by their signatures.

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the settlement be approved. It is further **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

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

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

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

12/13/95
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

12/18/95
DATE

D. N. Antanaitis/h
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 22 1995
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am

PATRICIA A. TAYLOR
Assistant General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 4235-95N
AGENCY REF.NO. 84-4/95

IN THE MATTER OF THE TENURE HEARING OF DIANE MONTGOMERY STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Petitioner	:	SETTLEMENT AGREEMENT
v.	:	
DIANE MONTGOMERY, Respondent.	:	

This agreement is made this 11th day of December, 1995, by and between the State Operated School District of Jersey City, New Jersey 07305, hereinafter referred to as the "District,"

AND

Diane Montgomery, whose home address is 29 East 46th Street, Bayonne, New Jersey 07002, hereinafter referred to as "Ms. Montgomery."

WITNESSETH:

WHEREAS, Ms. Montgomery has been employed by the District since 1983, and

WHEREAS, Ms. Montgomery's employment continued in said district when it became the State-Operated School District of Jersey City on October 4, 1989; and

WHEREAS, tenure charges of unbecoming conduct were certified against Ms. Montgomery by Frank M. Sinatra, Interim State District Superintendent, on March 20, 1995; and

WHEREAS, the tenure charges were certified to the Commissioner of Education on April 7, 1995; and

WHEREAS, Ms. Montgomery's attorney filed an Answer and Cross-Petition denying said charges on April 13, 1995; and

WHEREAS, in lieu of proceeding with the tenure charges in accordance with the Tenure Employees Hearing Law, the District and Ms. Montgomery desire to resolve the matter without resort to full litigation, which would require substantial expense of the time and resources of both parties; and

WHEREAS, the public interest would best be served by resolving the present controversy:

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The District agrees to withdraw, with prejudice, the tenure charges of unbecoming conduct bearing Agency Docket No. 84-4/95 and OAL Docket No. EDU 4235-95N.

2. Ms. Montgomery agrees to withdraw, with prejudice, all claims asserted in her Answer and Cross-Petition to the tenure charges, filed for determination under the above mentioned docket numbers, including the appeal of the withholding of her salary increment for the 1995-1996 school year.

3. Ms. Montgomery agrees to forfeit the 120 days' pay withheld as a result of her suspension without pay from the date of certification of the tenure charges, April 7, 1995, through August 6, 1995.

4. The District and Ms. Montgomery agree that the withdrawal of the tenure charges and Cross-Petition, and Ms. Montgomery's acceptance of the 120 days' suspension and increment withholding, will serve as full and final settlement of the tenure matter. The District will return Ms. Montgomery to active employment status.

5. The parties further agree that neither party will initiate or respond to any media requests for information or comment about any facts relevant to this matter.

6. The District and Ms. Montgomery acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves of the terms of the settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

7. The parties recognize that each has been represented by legal counsel of her or its own choosing and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

8. This Agreement shall be subject to the laws of the State of New Jersey.

9. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

FOR THE RESPONDENT

Nancy Oxfeld, Esq.
Balk, Oxfeld, Mandell and
Cohen

Dated: 12/8/95

FOR THE STATE-OPERATED
SCHOOL DISTRICT

Frank M. Sinatra

Dated: 12/8/95

Patricia A. Taylor
Assistant General Couns

Dated: 12-11-95

OAL DKT. NO. EDU 4235-95

IN THE MATTER OF THE TENURE :
HEARING OF DIANE MONTGOMERY, :
STATE-OPERATED SCHOOL DISTRICT :
OF JERSEY CITY, HUDSON COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

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

After a careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured as he cannot be satisfied by the present record that the proposed settlement meets the Cardonick standard for resolution of tenure matters (In re Cardonick, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842, 846).

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest ot to pursue them. In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of e City of Orange, Essex County, decided by the Commissioner March 22, 1982, decision on

remand June 16, 1983, affirmed with modification State Board of Education November 2, 1983, affirmed Superior Court January 30, 1986. The present record contains little explanation except that the settlement was reached in order to hold down litigation costs. Further, in this case there is no indication that the teacher was advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. Disclosure should be part of this agreement. Cardonick,supra.

The Commissioner notes that his determination in this regard was influenced by the sensitive nature of the charges, i.e., allegations that petitioner made racially inflammatory remarks. While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the school children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside of tenure matters as expressed in Cardonick, supra.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the Office of Administrative Law for further settlement negotiations consistent with the concerns herein expressed. If the parties are unwilling or unable to reach accord on a modified agreement for submission, the matter shall proceed to a plenary hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1996

DATE OF MAILING FEBRUARY 1, 1996

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IN THE MATTER OF THE TENURE	:	
HEARING OF DIANE MONTGOMERY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF JERSEY CITY, HUDSON COUNTY.	:	
	:	

OCTOBER 18, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU ~~4235-95~~ 1749-96

AGENCY REF. NO. 84-4/95

IN THE MATTER OF THE TENURE HEARING OF DIANE MONTGOMERY, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY.

Patricia A. Taylor, Esq., Assistant General Counsel, for State-Operated School District of Jersey City
(Charlotte Kitler, General Counsel, attorney)

Nancy I. Oxfeld, Esq., for respondent, Diane Montgomery
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: August 27, 1996 Decided: August 29, 1996

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 26, 1995 as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties agreed to settle the matter and prepared the attached Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have agreed to the settle the matter as evidenced by their signatures.

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the settlement be approved. It is further **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

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

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

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

7/29/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

9/5/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 3 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

am

THE JERSEY CITY PUBLIC SCHOOLS
346 CLAREMONT AVENUE
JERSEY CITY, NEW JERSEY 07305
(201) 915-6231

AUG 27 11 23 AM '96

Charlotte Kitler
General Counsel

Patricia A. Taylor
Assistant General Counsel

LEGAL DEPARTMENT

August 26, 1996

Honorable MaryLouise Lucchi-McCloud, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: In The Matter of The Tenure Hearing of Diane Montgomery
OAL Dkt. No. EDU 4235-95

Dear Judge Lucchi-McCloud:

Enclosed please find an executed original copy of the Settlement Agreement in the above-captioned case. If such meets with your Honor's approval, kindly advise counsel of the adjournment of the November hearing dates.

Very truly yours,

Patricia A. Taylor

PAT:rmc

Enc.

c: Frank M. Sinatra, Interim State District Superintendent
David Friedman, Esq.

PATRICIA A. TAYLOR
Assistant General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305

AUG 27 11 25 AM '96

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 4235-95N
AGENCY REF. NO. 84-4/94

IN THE MATTER OF THE TENURE HEARING OF DIANE MONTGOMERY STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	
Petitioner,	:	SETTLEMENT AGREEMENT
v.	:	
DIANE MONTGOMERY,	:	
Respondent.	:	

This agreement is made this 26th day of August, 1996, by and between the State Operated School District of Jersey City, New Jersey 07305, hereinafter referred to as the "District,"

AND

Diane Montgomery, whose home address is 29 East 46th Street, Bayonne, New Jersey 07002, hereinafter referred to as "Ms. Montgomery."

WITNESSETH:

WHEREAS, Ms. Montgomery has been employed by the District since 1983, and

WHEREAS, Ms. Montgomery's employment continued in said district when it became the State-Operated School District of Jersey City on October 4, 1989; and

WHEREAS, Ms. Montgomery was alleged to have made a comment of a racially insensitive nature, resulting in the certification of tenure charges of unbecoming conduct against Ms. Montgomery by Frank M. Sinatra, Interim State District Superintendent, on March 20, 1995; and

WHEREAS, the tenure charges were certified to the Commissioner of Education on April 7, 1995; and

WHEREAS, Ms. Montgomery's attorney filed an Answer and Cross-Petition denying said charges on April 13, 1995; and

WHEREAS, in lieu of proceeding with the tenure charges in accordance with the Tenure Employees Hearing Law, the District and Ms. Montgomery desire to resolve the matter without resort to full litigation; and

WHEREAS, the public interest would best be served by resolving the present controversy; in that the witnesses to the alleged incident were seniors at the time of the occurrence, and have since graduated, and the school district perceives some difficulty in securing their presence for hearing;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The District agrees to withdraw, with prejudice, the tenure charges of unbecoming conduct bearing Agency Docket No. 84-4/95 and OAL Docket No. EDU 4235-95N.

2. Ms. Montgomery agrees to withdraw, with prejudice, all claims asserted in her Answer and Cross-Petition to the tenure charges, filed for determination under the above mentioned docket numbers, including the appeal of the withholding of her salary increment for the 1995-1996 school year.

3. Ms. Montgomery agrees to forfeit the 120 days' pay withheld as a result of her suspension without pay from date of certification of the tenure charges, April 7, 1995, through August 6, 1995.

4. Ms. Montgomery neither admits nor denies the allegation, but out of concern

and interest to resolve the situation, Ms. Montgomery agrees to attend a workshop concerning the teaching of children with Multiple Intelligences, including a component on sensitivity in teaching students of diverse cultures, to be held as part of the District's Teacher's Academy in late August or September 1996.

5. The District and Ms. Montgomery agree that the withdrawal of the tenure charges and Cross-Petition, and Ms. Montgomery's acceptance of the 120 days' suspension and increment withholding, and Ms. Montgomery's attendance at the aforementioned workshop, will serve as full and final settlement of the tenure matter. The District will return Ms. Montgomery to active employment status.

6. The parties further agree that neither party will initiate or respond to any media requests for information or comment about any facts relevant to this matter.

7. Pursuant to In re Cardonick, Commissioner's Decision April 7, 1982 aff'd State Board of Education April 6, 1983, 1990 S.L.D. 842, 846, Ms. Montgomery has been advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

8. The District and Ms. Montgomery acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency

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disapproves of the terms of the settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

9. The parties recognize that each has been represented by legal counsel of her or its own choosing and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

10. This Agreement shall be subject to the laws of the State of New Jersey.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

FOR THE RESPONDENT

David B. Friedman, Esq.
Balk, Oxfeld, Mandell and Cohen

Dated: 8/23/96

FOR THE STATE-OPERATED SCHOOL DISTRICT

Frank M. Sinatra
Interim State District Superintendent

Dated: 8/28/96

Patricia A. Taylor
Assistant General Counsel

Dated: 8-26-96

34

IN THE MATTER OF THE TENURE	:	
HEARING OF DIANE MONTGOMERY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF JERSEY CITY, HUDSON COUNTY.	:	
	:	

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

After considering the record herein, the Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846.* The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

* The initial settlement in this matter was remanded to OAL because it contained little explanation and there was no indication that respondent was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations to the State Board of Examiners for possible revocation of certificate in accordance with *Cardonick, supra.*

OCTOBER 18, 1996
DATE OF MAILING OCTOBER 18, 1996

(SB) 36-96

DHPL #102-96
SB # 36-96

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF STEPHEN E. SEIGEL. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, March 15, 1996

For the Petitioner-Appellant, Stephen E. Seigel, pro se

The decision of the Deputy Commissioner of Education disqualifying petitioner from school employment following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed for the reasons expressed therein.

July 10, 1996

Date of mailing JUL 12 1996

37-96

37-96

D.K., on behalf of her minor son, D.K.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL FOR MOOTNESS AND FAILURE TO PROSECUTE PURSUANT TO N.J.A.C. 1:1-14.14

OAL DKT. NO. EDU 7065-95

AGENCY DKT. NO. 214-6/95

D.K., on behalf of her minor son, D.K.,

Petitioner,

v.

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

Respondent.

None by or on behalf of petitioner

Viola S. Lordi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: December 8, 1995 Decided: December 18, 1995

BEFORE **ROBERT S. MILLER,** ALJ:

On July 7, 1995 the above-entitled matter was submitted to the Office of Administrative Law, at the request of the petitioner, challenging the Edison Township Board of Education's determination prohibiting a minor from graduating as arbitrary, capricious and unreasonable. A telephone prehearing conference was scheduled on October 16, 1995. Petitioner either failed or refused to make herself available, or thereafter to explain her failure or refusal to participate. Accordingly, I requested respondent's attorney to move to dismiss this matter for lack of prosecution and mootness.

Respondent's motion to dismiss has not been opposed by petitioner. Good cause appearing, I hereby dismiss with prejudice the petition of appeal filed in this matter.

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

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

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

December 19, 1995
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

12/21/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 1995
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 7065-95

D.K., on behalf of her minor son, D.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner affirms the initial decision of the Administrative Law Judge dismissing this matter for mootness and for petitioner's failure to appear for a hearing following the denial of emergent relief by Commissioner's designee. This appeal concerned petitioner's challenge to participate in graduation ceremonies, the date of which has since passed.

Accordingly, the Commissioner adopts the initial decision and the within appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRIARU 1, 1996

DATE OF MAILING FEBRUARY 1, 1996

39-96

JOSE R. RIOS, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, : DECISION

RESPONDENT. :

:

FEBRUARY 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6847-92
AGENCY DKT. NO. 380-8/92

JOSE R. RIOS,
Petitioner,
v.
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

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

Joseph M. Jacobs, Esq., for respondent

Record Closed: December 11, 1995 Decided: December 15, 1995

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

This matter was transmitted to the Office of Administrative Law on September 4, 1992, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

15 December 1995
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 1995
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

DEC 11

JOSEPH M. JACOBS, ESQ.
1415 Penrose Avenue
Atlantic City, New Jersey 08401
(609) 345-5000

Attorney for Respondent

JOSE R. RIOS	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	OAL DOCKET NO: EDU 6847-92
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY	:	**SETTLEMENT AGREEMENT AND STIPULATION OF DISMISSAL**
Respondent.	:	

WHEREAS, the above-captioned Petition of Appeal was filed on July 29, 1992, before the Commissioner of Education by Petitioner, a tenured Principal, after he was denied appointment to a vacant principalship position in the Atlantic City School District; and

WHEREAS, on September 13, 1994, in contemplation of a settlement and dismissal of this matter, Respondent appointed Petitioner as principal of Chelsea Junior High School; and

WHEREAS, Petitioner and Respondent have agreed to a settlement of this Petition of Appeal, which they believe is in the best interests of all concerned parties;

NOW THEREFORE, it is hereby agreed and stipulated that the entire controversy and dispute of all matters concerning the above-captioned Petition of Appeal before the Commissioner of Education shall be SETTLED and RESOLVED in the following manner:

1. Petitioner shall continue his employment as principal of the Chelsea Junior High School during good behavior and shall promptly and faithfully comply with and respond to all directives issued by the Atlantic City Board of Education, the Commissioner of Education, and the Superintendent of Schools for the Atlantic City School District.

2. Petitioner shall remain employed with the Respondent as principal of the Chelsea Junior High School until September 13, 1996, as per his contract (which includes provisions for vacation and pay until September 13, 1996), subject to the Petitioner's said good behavior and compliance with the directives set forth in Paragraph 1,

3. The parties agree that on the said date of September 13, 1996, Petitioner shall have no continuing duty and/or obligation to perform under the contract. Further, Respondent shall have no continuing duty and/or obligation to employ the Petitioner beyond September 13, 1996.

4. The parties agree that Petitioner shall have no further entitlement or claim to his current position, or any other position in the Atlantic City School District by virtue of tenure, seniority, or otherwise, after September 13, 1996.

5. The parties further agree that as of the date of the execution of this agreement, Petitioner shall submit a letter of resignation to the Superintendent of Schools and the Atlantic City Board of Education, effective September 13, 1996 and contingent upon the Commissioners approval of this Settlement Agreement.

6. The parties further agree that in exchange for Petitioner's letter of resignation as referenced in Paragraph 5, Respondent shall pay Petitioner a sum of one-half (1/2) of what would have been Petitioner's salary for the 1996-1997 school term, a sum which the parties agree amounts to $43,995.00. The sum shall be paid to Petitioner on or before April 1, 1996.

7. It is further agreed that the Petitioner's failure to submit said letter of resignation shall in no way imply or infer the Petitioner's entitlement to continue employment beyond said date of September 13, 1996.

8. The parties further agree that neither party shall have any legal claims against the other for compensation for services rendered pursuant to this litigation and settlement and that each party hereto shall personally bear the cost of its own legal fees, court costs, and expenses.

9. The parties further agree that this settlement constitutes the entire agreement between the parties and that no other terms not herein embodied shall be permitted to be admitted in any court of law or administrative proceeding to refute the express terms recited herein.

10. The parties further agree that this settlement is subject to the approval of the Commissioner of Education if the Commissioner rejects this settlement the matter will be referred to the Office of Administrative Law for further proceedings. An approval by the Commissioner is equivalent to adjudication on the merits and an informal decision.

11. The parties further agree and stipulate to the dismissal of the above-captioned petition with prejudice, subject to the above terms.

Alicia Ellerton
WITNESS

Jose R. Rios
JOSE R. RIOS, PETITIONER
Dated: 11-20-95

WITNESS

RICHARD A. FRIEDMAN, ESQ.
ATTORNEY FOR PETITIONER
Dated: 12/8/95

WITNESS

ATLANTIC CITY BOARD OF EDUCATION
MARVEN F. HILL, PRESIDENT
Dated: 11/28/95

WITNESS

JOSEPH M. JACOBS, ESQ.
ATTORNEY FOR RESPONDENT
Dated: 12/4/95

CHELSEA JUNIOR HIGH SCHOOL
Atlantic City, New Jersey

MEMO

To: Marvin Hill, President, Atlantic City Board of Education

From: Jose R. Rios, Principal Chelsea Junior High School

Date: November 20, 1995

Re: Retirement

Please accept my retirement from service as school Principal. The last day I will be working will be September 13, 1996.

Let me take this opportunity to thank the Atlantic City Board of Education and the higher administration for the opportunity to serve the Atlantic City Public Schools k-12 in the capacity of Student Counselor and School Principal since 1974.

This resignation effective only upon approval by Commissioner of agreement in settlement of Rios v. Atlantic City Board of Education, OAL Docket No: EDU 6847-92

OAL DKT. NO. EDU 6847-92

JOSE R. RIOS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner approves the terms of the settlement with the exclusion of specified language set forth in Paragraph 10 which states, "***An approval by the Commissioner [of this settlement] is equivalent to adjudication on the merits and an informal decision." With this modification, the Commissioner adopts the settlement as the final decision in this matter. The Commissioner specifically excludes the above-stated language in Paragraph 10 because the Commissioner's acceptance of a settlement in no way equates to any adjudication on the merits; rather, it merely indicates that the parties have resolved their differences in a manner not inconsistent with law and sound educational policy. Further, there is no provision in law for the Commissioner to render an "informal" decision in a controverted matter.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1996

DATE OF MAILING FEBRUARY 1, 1996

(SB) 39-96

DHPL #103-96
SB # 39-96

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF ROSE M. MORGAN. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, March 15, 1996

For the Petitioner-Appellant, Rose M. Morgan, pro se

On March 15, 1996, the Deputy Commissioner of Education affirmed the determination of the Office of Criminal History Review disqualifying Rose M. Morgan (hereinafter "appellant") from school employment as a substitute teacher following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1.[1] The Deputy Commissioner determined that appellant had failed to affirmatively demonstrate her rehabilitation by clear and convincing evidence.

On May 20, 1996, appellant, acting pro se, filed a notice of appeal to the State Board of Education. By letter dated May 22 from the Counsel to the State Board, appellant was advised that her appeal had been due within 30 days of the filing date of the Commissioner's decision, and that this matter was being referred to our Legal

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

2/10/96

Committee for consideration of the effect of her failure to file timely notice. Appellant was given until June 5 to file an affidavit setting forth the circumstances of her late filing.

In response thereto, appellant filed a letter on June 4, in which she stated:

> In receipt of your letter dated May 22, 1996. I must begin this letter with an apology to you. This position is very important to me and that's why I'm embrassed [sic] to have forgotten the deadline of appeal. No disrespect to you or the board. Sir could you please forgive me this time and I promise this will never happen again. Thanking you in advance.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5.

We conclude that the statutory filing requirement with which appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute

could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Deputy Commissioner's decision was rendered on March 15, 1996 and mailed to appellant on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on March 18, 1996, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), appellant was required to file her notice of appeal to the State Board on or before April 17, 1996. Appellant's notice of appeal was dated May 20,1996 and filed on that date, more than a month after the filing deadline.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. While we are mindful of appellant's pro se status, the fact that she forgot the deadline for filing her appeal to the State Board does not excuse her compliance with the statutory requirement.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

July 10, 1996

Date of mailing JUL 12 1996

1/2-96

42-96R

GEORGE WEBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, ROBERT E. SMITH. REGINA WHITE, AND CHARLES DE LORENZO, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

FEBRUARY 5, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5716-95
(On Remand - EDU 10603-94)
Agency #403-9/94

GEORGE WEBER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, ROBERT E. SMITH, REGINA WHITE and CHARLES DE LORENZO, Individually and as President of the Board of Education of the Borough of Wood Ridge, Bergen County,

Respondent.

Alan S. Goldberger, Esq., for petitioner
(Goldberger & Goldberger, attorneys)

Mark T. Janeczko, Esq., for respondent

Record Closed: December 11, 1995 Decided: January 2, 1996

BEFORE **JEFFREY A. GERSON**, ALJ

This matter was remanded to the Office of Administrative Law (OAL) in order for the specific terms of the settlement to be spread on the record for the Commissioner's review.

Having reviewed the contents of the attached documents, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, **I CONCLUDE** that the attached documents meets the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

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

DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

1996

DATE

OFFICE OF ADMINISTRATIVE LAW

/g

ADDENDUM

Alan S. Goldberger's letter dated December 7, 1995

Stipulation of Settlement

Stipulation of Dismissal with prejudice

GOLDBERGER & GOLDBERGER

1373 BROAD STREET
P.O. BOX 447
CLIFTON, NEW JERSEY 07015-0447
(201) 471-9200
(201) 763-3800
TELECOPIER (201) 779-5908
CABLE: GOLDLAW

MILTON H. GOLDBERGER
(1936-1979)
ALAN S. GOLDBERGER
NEW JERSEY AND NEW YORK BARS
OF COUNSEL
ALEXANDER GUREVITCH
NEW YORK BAR

GUREVITCH & GOLDBERGER
161 NORTH MIDDLETOWN ROAD
PEARL RIVER, NEW YORK 10965
(914) 735-2600
TELECOPIER (914) 735-2716
CABLE: ATTYCPA

December 7, 1995

Honorable Jeffrey Gerson
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Re: Weber, George vs. Board of Education
of the Borough of Wood-Ridge et als

Dear Judge Gerson:

I have conferred with Mark Janeczko, Esquire, attorney for Respondents in the above-captioned matter, relative to the hearing returnable December 11, 1995 before your Honor.

Your Honor's decision of March 30, 1995 clearly indicates that the within matter has been settled. Nevertheless, to supplement the record in this matter in accordance with the Commissioner's decision of May 15, 1995, I am enclosing herewith for filing the Stipulation of Settlement which has heretofore been filed in the Superior Court, Chancery Division.

I should also confirm my telephone advice to your Honor that the matters in dispute are now moot in as much as the settlement has been consummated, and the acts required to be done by the parties have been done.

Accordingly, I am respectfully requesting that the enclosed be appended to the record in this matter and will consent to your Honor's disposing of the matter on the papers.

Yours very respectfully,

Alan S. Goldberger

ASG:cg
Enclosure
cc: Mark T. Janeczko, Esq. (w. encl.)
weber.ctl

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OFFICE OF ADMIN. LAW

DEC 8 3 13 PM '95

MARK T. JANECZKO
ATTORNEY AT LAW
109 HACKENSACK STREET
P.O. BOX 123
WOOD-RIDGE, NEW JERSEY 07075
(201)939-8800
ATTORNEY FOR DEFENDANT,
WOOD-RIDGE BOARD OF EDUCATION

GEORGE WEBER,

Plaintiff

vs.

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, ROBERT E. SMITH, REGINA WHITE and CHARLES DELORENZO, individually and as President of the Board of Education of the Borough of Wood-Ridge,

Defendants

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY:
CHANCERY DIVISION

DOCKET NO. C-351-94E

CIVIL ACTION

STIPULATION OF SETTLEMENT

The parties having amicably adjusted all matters in dispute with respect to the plaintiff's Complaint and all parties intending to be legally bound hereunder, they agree and stipulate as follows:

1. This settlement agreement shall not constitute, and shall not be construed as an admission by any of the defendants of liability or of the validity of any claim made by the plaintiff. This settlement agreement is solely entered into by the parties as an expeditious and businesslike resolution of the matters in difference between the parties. Specifically, the defendants do not by the execution of this Stipulation and by the fulfillment of its terms, admit that any claim as alleged in the Complaint was true. The parties defendant believe that the actions of the Board of Education and its agents, servants and employees as alleged in the Complaint were in good faith and without malice. The plaintiff believes that his actions as alleged in the Complaint were in good faith and without malice.

2. Defendant, Wood-Ridge Board of Education, agrees to cause the plaintiff to be paid the sum of $4,438.00.

3. Defendant, Wood-Ridge Board of Education, agrees to cause the plaintiff to be appointed to the position of assistant baseball coach for the Spring 1995 semester at the previously negotiated stipend of $2,773.00 for the plaintiff's appropriate participation as assistant baseball coach.

4. This Stipulation shall also act as a release by the plaintiff running to each and every defendant; and by each and every defendant running to the plaintiff. The dismissal of the subject Complaint with prejudice releases any and all claims which any party may have against any other party which were raised or could have been raised in the within matter.

5. In consideration of the settlement of this matter

and the mutual promises made in this Stipulation of Settlement, plaintiff agrees to relinquish any and all tenure rights to position of Athletic Director or Acting Athletic Director as such positions were and are promulgated by the Wood-Ridge Board of Education. Plaintiff acknowledges that any tenure and all seniority rights with regard the positions of Athletic Director or Acting Athletic Director are terminated effective immediately. Plaintiff further agrees not to submit an application for such positions in the event they should become vacant in the future.

6. Plaintiff agrees to simultaneously with the filing of this Stipulation of Settlement cause to be filed with the Office of Administrative Law, a Stipulation of Dismissal With Prejudice regarding the action filed by the plaintiff as petitioner therein bearing Docket No. EDUOA 10603-94N.

7. The parties agree that, except as necessary to effectuate the terms of the settlement of this matter, they will not at any time talk about, write about or otherwise publicize the terms or existence of this Stipulation of Settlement or any facts concerning its negotiation, execution or implementation.

8. Each party agrees to be responsible for its own attorney fees incurred in this matter.

9. All parties executing this instrument represent that they have full authority to execute this Stipulation of Settlement and consummate all of the transaction hereby contemplated.

IN WITNESS WHEREOF, the parties or their respective attorneys for such party and on behalf of each party have

signed this Stipulation of Settlement.

CHARLES DE LORENZO,
Defendant, Individually

Dated: February 17, 1995

REGINA T. WHITE, Defendant,
Individually

Dated: February 15, 1995

ROBERT E. SMITH, Defendant,
Individually

Dated: February 17, 1995

Mark T. Janeczko, Esq.
Attorney for Defendant,
Wood-Ridge Board of
Education

Dated: February 17, 1995

GOLDBERGER & GOLDBERGER

By: _____
Alan S. Goldberger, Esq.
Attorney for Plaintiff

Dated:

GEORGE WEBER, Plaintiff

Dated:

MAR 16 1 10 PM '95

ALAN S. GOLDBERGER
GOLDBERGER & GOLDBERGER
1373 Broad Street
P.O. Box 447
Clifton, New Jersey 07015
(201) 471-9200
Attorneys for Petitioner

WEBER, GEORGE Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, et als Respondents	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO. EDUOA 10603-94N CIVIL ACTION STIPULATION OF DISMISSAL W. PREJUDICE

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice, without costs against either party.

Date: January ,1995

GOLDBERGER & GOLDBERGER
Attorney for Petitioner,
GEORGE WEBER

By _____
ALAN S. GOLDBERGER

_____
MARK T. JANECZKO
Attorney for Respondents:
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, ROBERT E. SMITH, REGINA WHITE AND CHARLES DELORENZO, individually and as President of the Board of Education of the Borough of Wood-Ridge

OAL DKT. NOS. EDU 5716-95 AND EDU 10603-94 (ON REMAND)

GEORGE WEBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, ROBERT E. SMITH, REGINA WHITE, AND CHARLES DE LORENZO, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 5, 1996

DATE OF MAILING FEBRUARY 5, 1996

(SB) 42-96

EDE # 5861-95
SBE #82-06/88-57
SB # 42-96

IN THE MATTER OF THE REVOCATION :

OF THE TEACHING CERTIFICATE OF : STATE BOARD OF EDUCATION

GLORIA JACKSON BY THE STATE : DECISION

BOARD OF EXAMINERS. :

Decided by the State Board of Examiners, March 28, 1996

For the Petitioner-Respondent, Michelle L. Miller, Deputy Attorney General
(Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, John M. Esposito, Esq.

The decision of the State Board of Examiners is affirmed for the reasons expressed therein.

September 4, 1996

Date of mailing SEP 06 1996

43-96

43-96E

N.O., on behalf of her minor child, O.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

FEBRUARY 2, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 203-96

AGENCY DKT. NO. 7-1/96

N.O. ON BEHALF OF HER MINOR CHILD, O.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT,

Respondent.

N.O., petitioner, *pro se*

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

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

N.O. (petitioner) seeks review of the Bridgewater-Raritan Board of Education (respondent) decision that her son be denied attendance under the provisions of *N.J.S.A.* 18A:7B-12 and -12.1.

The matter was opened on January 16, 1996, when the petitioner filed a petition of appeal with the Commissioner of Education challenging the Board's determination. The matter was

transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. The transmission included a request, treated as a motion, for emergent relief.

The motion for emergent relief was argued on January 29, 1996, at the Office of Administrative Law in Trenton.

N.O. asserts that she, her husband and their two children resided at 10 Hilltop Road until evicted in December 1994 for being two months late in payment of the $2,500 per month rental. The lease, however, was in her mother's and brother's names, not hers and her husband's. She represents she and her husband were represented by an attorney and that she still is trying to reach an understanding with the owner of the property. N.O. also asserts there was a lease-purchase agreement, she and her husband have approximately $75,000 invested in the house and the lease-purchase agreement is not memorialized in the lease document.

N.O. is employed as a medical assistant. Her husband is self-employed in the antique restoration business he operates from a store for which he pays $600 per month in rent.

N.O. also represents that she and her family have lived with relatives for varying amounts of time since being put out of their rented home. December 1994-February 1995 were spent with a sister in Belleville, Essex County; from early February-March with a sister in Springfield, Union County; then a period of at least two months with a brother in South Brunswick, Middlesex County, and most recently the family stayed in Belleville.

N.O. sent many letters to various officials, but apparently not until her son was ordered by the Board to cease attending the Crim Primary School. She did not respond to the Board's offer of a hearing, exhibit R-2, extended on November 29, 1995. The first letter in the record from N.O. is addressed to the Commissioner and is stamped received in his office on January 10, 1996. Exhibit R-6.

The Board argues it has acted lawfully in all respects in this case. It became apparent approximately a year ago that O.O. was not living in the district and was being dropped off each

school day at the Crim School. The district attendance officer investigated and determined that the parents were not residing at the Hilltop Road address, but were living with various relatives outside of the district. The attendance officer believed both parents were gainfully employed. For some time, the parents represented to the district that they were going to resume residence on Hilltop Road. At some point, N.O. alleged the family was homeless.

The district referred the questions of homelessness and what its responsibilities would be if the family were in fact homeless to the County Superintendent of Schools. In his reply, the County Superintendent states that neither the family nor the child meets the requirements of *N.J.A.C.* 6:3-8.3, a part of the regulations carrying out the statutory requirements of *N.J.S.A.* 18A:7B-12 and -12.1. Exhibit R-1. The regulation states:

> **Determination of homelessness**
>
> (a) A child or youth shall be considered homeless for purposes of this program if he or she resides in any of the following:
>
> 1. A supervised publicly or privately operated shelter designed to provide temporary living accommodations, including:
>
> i. Welfare hotels;
>
> ii. Congregate shelters;
>
> iii. Transitional housing for families; and
>
> iv. Transitional housing for the mentally ill;
>
> 2. An institution that provides a temporary residence for individuals intended to be institutionalized; or
>
> 3. A public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings.
>
> (b) Additionally, a child or youth shall be considered homeless if he or she is:
>
> 1. Living with a parent in a domestic violence shelter;
>
> 2. A runaway living in a shelter;
>
> 3. A school-aged mother residing in a home for adolescent mothers;
>
> 4. Sick or abandoned and residing in a hospital and would otherwise be released if he or she had a permanent residence;
>
> 5. Abandoned and therefore has no permanent residence;
>
> 6. The child of a homeless family which is out of necessity living with relatives or friends; or
>
> 7. The child of a migrant family which lacks adequate housing.

> (c) When a dispute occurs regarding the determination of homelessness, the involved districts shall immediately notify the county superintendent of schools, who shall decide the status of the child within 48 hours.

The Board conferred with counsel upon receipt of the County Superintendent's opinion and decided to afford N.O. a hearing before the Board. The district superintendent wrote to N.O. at a post office box that N.O. used and continues to use in Bridgewater, exhibit R-2, advising of the county superintendent's conclusion, enclosing of copy of the County superintendent's letter and advising of N.O.'s opportunity for a hearing if she notified the superintendent in writing by December 6 that she requested a hearing.

When a week passed after December 6 without reply, the superintendent again wrote to N.O. and advised her that the Board ordered on December 12 the removal of O.O. from the Crim School. The letter also advised that the Board would stay its order for 21 days, the period in which N.O. could file an appeal with the Commissioner of Education. Exhibit R-3.

On January 10, 1996, the Commissioner received a letter from N.O. Exhibit R-6. The letter states N.O. received a letter (from the superintendent) on December 22, 1995 concerning a meeting held (by the Board) without her presence and at which the Board decided against her son's education. N.O. requests a hearing. She does not mention the first letter sent by the superintendent (R-2).

The Bureau of Controversies and Disputes in the Department of Education decided a letter it received from N.O. on January 16, 1996, Exhibit R-7, constituted a petition of appeal. The Board's counsel wrote to the Bureau on January 17, 1996 objecting to acceptance of the petition because it was time barred by *N.J.S.A.* 18A:38-1b.(2). Exhibit R-8. The pertinent language in the statute is:

> (2) If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the

> person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner.

On the same day, the Bureau responded, Exhibit R-4. Among other things, the letter stated that N.O. would be given the opportunity to show that her petition was timely. The letter also states:

> In the alternative, if petitioner concedes that her appeal was, in fact, filed beyond the 21-day time period which would trigger operation of N.J.S.A. 18A:38-1, she may apply for an order granting her son's admittance to school during the pendency of residency proceedings through submission to the Commissioner of a Motion Requesting Emergent Relief in accordance with N.J.A.C. 6:24-1.5. Pursuant to this section, the Commissioner may issue a decision on emergent relief only upon filing of this motion, accompanied by a letter memorandum or brief which shall address the standard to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982). This means that the petitioner must demonstrate that:
>
> 1. Irreparable harm will be experienced if the relief is not granted;
> 2. The petitioner has a likelihood of prevailing on the merits of the claims;
> 3. The petitioner will suffer greater harm than the Board of Education if the relief is not granted; and
> 4. Public interest compels the granting of emergent relief.

> In view of the need for prompt resolution of petitioner's son's status during the pending appeal, we ask that petitioner submit the filings requested within five (5) days of receipt of this letter and serve them upon the Board of Education or its attorney, Mr. Soriano. The Board may then file any reply submissions it may wish to make within three (3) days of receipt of petitioner's submission.

On January 23, 1996, N.O. filed copies of a series of letters, most of which are discussed above, and copies of certified mail receipts. N.O. concedes she has sent the same letter with different inside addresses, not copies, to more than one person on several occasions. No letter memorandum or brief was filed. The Board, with nothing to respond to, nevertheless presented a three-page memorandum at hearing. The Board also moved for summary decision at the conclusion of argument.

DETERMINATION AND ORDER

N.O. has conceded that she, her husband and their two children spend varying amounts of time, but usually of two or three months' duration, with relatives in communities other than Bridgewater or Raritan. It is admirable that such a sense of family and assistance to family exists. Yet it is precisely this candid admission that undercuts her position.

The applicable statutes and implementing regulations have the salutary goal of maintaining the educations of homeless children and, quite properly, they define what constitutes homelessness. I **FIND** the subject pupil meets no statutory or regulatory criterion regarding homelessness. If it were possible for the family to stay in one place for more than one to three months, domicile could be established and O.O. could properly be admitted to attendance, whether as an affidavit pupil or a "regular" pupil. Even if the caring relatives were willing to provide the affidavits, *N.J.S.A.* 18A:38-1, -2, the results would be pernicious. The child could not approach a semblance of normal, continuous education.

The parent appears to see herself and her child as victims of animosity and, perhaps, prejudice. As to the child, I agree he is a victim of circumstances he did not make. As to the

parent, I **FIND** nothing in the record to support a finding of less than evenhanded treatment. If the circumstances satisfied any statutory or regulatory criterion, there would be no hesitation to place the pupil. That is, after all, the goal of the statutes, the regulations and sound public policy.

In consideration of the entire record, I **CONCLUDE** that emergent relief is inappropriate here. The four principles actually expressed in *Crowe v. DeGioia*, are:

1. emergent relief should not issue except when necessary to prevent irreparable harm;

2. emergent relief should be withheld when the legal right underlying the claim is unsettled;

3. emergent relief should not issue where all material facts are controverted; that is, the pleader must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

4. in considering the grant, or not, of emergent relief, the relative hardships to the parties must be weighed.

90 *N.J.* 132-134.

Assuming without deciding that N.O. could prevail on the first, second and fourth prongs of the test, there is no way she can prevail on the third.

Accordingly, the request for emergent relief is **DENIED**. It is so **ORDERED**.

This leaves two issues unanswered. By far the more important is the education of O.O. So long as his parents chose to move him from place to place and school district to school district, their only option is a tuition arrangement, either with a public school district or with a nonpublic school. Inasmuch as the Commissioner cannot require this arrangement and he cannot exert any

control over the parents' movements, this judge recommends that the Commissioner send a copy of his order in this matter to the Division of Youth and Family Services, Department of Human Services.

As to the Board's motion for summary decision, that is governed by *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). The test is whether there exists a genuine issue with respect to a challenged material fact that requires the judge to consider whether the competent evidential materials in the record, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard (here, a simple preponderance), are sufficient to permit a rational factfinder to resolve the alleged dispute in favor of the non-moving party. This assessment of the evidence is to be conducted in the same manner as that required under Rule 4:37-2(b). In other words, the Court has applied the same evidentiary standard of proof to the summary judgment motion as applies in a hearing on the merits in deciding whether genuine issues of material fact exist.

Before applying this, however, fundamental fairness requires that the non-moving party, N.O., have an opportunity to argue against the Board's motion in light of the new test and the newness of the test. It is noted that the petitioner is *pro se* and that *Brill* is not yet in a bound volume of New Jersey Reports. Although a *pro se* takes on all the burdens and responsibilities of an attorney, it would be affront basic notions of fairness to expect her to be aware of ruling so fresh.

Accordingly, it is **ORDERED** that N.O. submit in writing her arguments as to why summary judgment should not be granted to the Board not later than 10 days following receipt of this order from the Commissioner of Education. If she does not so respond, the judge will grant the motion, ending the case. If N.O. does respond, the Board may file and serve further papers responding to any matter raised by N.O. not later than five days after receiving N.O.'s papers.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

31 JANUARY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

/cat

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Letter, Novembre to McGarry, November 15, 1995, 2 pp.
R-2 Letter, McGarry to N.O., November 29, 1995
R-3 Letter, McGarry to N.O., December 13, 1995
R-4 Letter, Bureau of Controversies and Disputes to parties, January 17, 1996, 2 pp.
R-5 Letter, N.O. to Department of Education, January 21, 1996
R-6 Letter, N.O. to Commissioner of Education, undated, received January 10, 1996
R-7 Letter, N.O. to Department of Education, January 11, 1996, 2 pp.
R-8 Letter, Soriano to Bureau of Controversies and Disputes, January 17, 1996, 2 pp.
R-9 Letter, Bureau of Controversies and Disputes to parties, January 16, 1996

OAL DKT. NO. EDU 203-96

N.O., on behalf of her minor child, O.O.,	:	
PETITIONER,	:	
V.		
	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION ON MOTION
	:	
RESPONDENT.		
	:	

N.O., petitioner, pro se

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

This matter was opened before the Commissioner of Education by way of a Petition of Appeal contesting the Board's decision to exclude O.O. from attendance in the Bridgewater-Raritan School District on the basis of his failure to meet the residency requirements set forth in N.J.S.A. 18A:38-1. Counsel for the Board responded with a written objection to said Petition of Appeal, asserting that the petition was untimely filed pursuant to N.J.S.A. 18A:38-1, and accordingly, O.O. was not entitled to attend school in the District during the pendency of the proceedings before the Commissioner. Petitioner thereafter filed what is deemed to be a Motion for Emergent Relief before the Commissioner, seeking that O.O. be immediately reinstated as a full-time pupil in the District, pending a final determination as to petitioner's claim that O.O. was improperly removed from school on the basis of residency.

Upon careful and independent review of the record in this matter, the Commissioner finds and determines that it is unnecessary for him to reach to the Administrative

Law Judge's (ALJ) determination on Emergent Relief, inasmuch as the pupil, O.O., is hereby deemed entitled to attend school during the pendency of the proceedings by operation of law. N.J.S.A. 18A:38-1.

Upon review of the record, and in light of testimony, arguments and evidence adduced at the hearing on emergent relief, the Commissioner finds that petitioner was not dilatory in her attempt to appeal the residency determination made by the Board. Specifically, petitioner asserts that she did not receive notice of the Board's residency decision until December 22, 1995. (Order, page 4)[1] On January 11, 1996, petitioner filed with the Commissioner of Education a letter, which, while not constituting a perfected Petition of Appeal, evidences her clear intent to appeal the Board's determination. Thus, in the interest of justice to a pro se petitioner, and in accordance with the Commissioner's authority under N.J.A.C. 6:24-1.15 to relax the technical requirements governing the filing of petitions, petitioner's submission of January 11, 1996 is deemed to constitute a Petition of Appeal before the Commissioner of Education. Inasmuch as petitioner asserts she first received notice of the Board's decision on December 22, 1995, the petition was, therefore, timely filed in accordance with N.J.S.A. 18A:38-1, and petitioner's son is entitled, by operation of law, to attend school in the Board's District during the pendency of the proceedings on the merits of this case.

Further, with respect to the ALJ's determinations and order, including his recommendation that this matter be brought to the attention of the Division of Youth and Family Services (Order, at p. 8) and his order that petitioner submit arguments as to the granting of

[1] Petitioner did not attend the Board hearing on December 6, 1995. The letter informing petitioner of the Board's decision to remove her son from the District is dated December 13, 1995. The letter indicates that the Board would stay its decision to remove her son from school for 21 days, until January 2, 1996, allowing her time to appeal its decision to the Commissioner of Education.

summary judgment (Id.), are found to be of no force and effect in that they reach the merits of this case which were not before the ALJ on a Motion for Emergent Relief. Moreover, said determinations and orders shall not be determinative in the subsequent hearing on the merits.

Finally, the Commissioner determines that the ALJ's specific finding that O.O. meets no statutory or regulatory criterion regarding homelessness (Id. at p. 6) is misplaced in an order on emergent relief, and therefore, as stated supra, is without force and effect. The Commissioner, in remanding this matter to the Office of Administrate Law for a hearing on the merits, directs that the ALJ reevaluate petitioner's circumstances under the regulations governing homeless students, found at N.J.A.C. 6:3-8.3, particularly 6:3-8.3(b)6, which states that a child shall be considered homeless if he is the child of a homeless family which is out of necessity living with relatives or friends. Additionally, in remanding this matter to be heard on its merits, the Commissioner directs that further argument and fact-finding be made in light of N.J.S.A. 18A:38-1, which demands an analysis of domicile, rather than residency, as well as the pertinent case law. (See Fort Lee Board of Education v. Kintos, decided by the Commissioner 92 N.J.A.R. 2d (EDU) 96 and 93 N.J.A.R. 2d (EDU) 837, affirmed by the State Board 94 N.J.A.R. 2d (EDU) 316, affirmed with modification by the Appellate Division October 13, 1995, A-4944-93.)

Accordingly, the Commissioner directs that O.O. be readmitted forthwith to the Board's public school system. The Commissioner further directs that this matter proceed at the Office of Administrative Law for an expedited hearing on its merits, in accordance with the parameters set forth above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

FEBRUARY 2, 1996

DATE OF MAILING FEBRUARY 2, 1996

(SB) 43-96

DHP #55-95
SB #43-96

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT : DECISION
OF CHRISTOPHER J. FIORE. :

Decided by the Deputy Commissioner of Education, May 4, 1995

For the Petitioner-Appellant, Christopher J. Fiore, pro se

On May 4, 1995, the Deputy Commissioner of Education upheld the determination of the Office of Criminal History Review disqualifying Christopher J. Fiore (hereinafter "appellant") from school employment as a substitute teacher following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 which revealed two convictions for possession of marijuana. The Deputy Commissioner determined that appellant had failed to affirmatively demonstrate his rehabilitation by clear and convincing evidence.[1]

On June 13, 1996, appellant, acting pro se, filed a notice of appeal and arguments in support of his appeal with the State Board of Education. By letter dated July 1, 1996 from the Counsel to the State Board, appellant was advised that his appeal

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

9/4/96

had been due within 30 days of the filing date of the Deputy Commissioner's decision, and that this matter was being referred to our Legal Committee for consideration of the effect of his failure to file timely notice. Appellant was given until July 10 to submit a written explanation of the reasons for his late filing. Appellant did not respond to that letter.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5.

We conclude that the statutory filing requirement with which appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Deputy Commissioner's decision was rendered on May 4, 1995 and mailed to the appellant on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on May 7, 1995, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), appellant was required to file his notice of appeal to the State Board on or before June 6, 1995. Appellant's appeal, however, was not filed until June 13, 1996, more than a year after the filing deadline.[2]

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. In his papers filed with the State Board on June 13, 1996 in support of his appeal, appellant indicated, inter alia, that:

> On May 4, 1995, I received a letter from [the Deputy Commissioner] denying my appeal of disqualification from school employment. I was told that I could appeal that decision by submitting all of my materials to your office, which I did promptly. A few weeks later I called the office to see if a decision had been made, and was told that I would have to wait for a reply. When I called your office a few weeks ago I was told that the materials I had submitted for an appeal had never reached your office.

While we are mindful of appellant's pro se status, he has provided nothing to support his contention that he had submitted an appeal to the State Board "promptly" after receiving the Deputy Commissioner's decision in May 1995. Nor does the record in this matter reflect any such filing.

[2] Although appellant's notice of appeal was not dated, the envelope was postmarked on June 13, 1996.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

September 4, 1996

Date of mailing SEP 06 1996

45-96

45-96

GWYNNE KESSELMAN, PETITIONER, V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, AND DR. WILLIAM SURIANO, RALPH BAYARD, JOHN TUDOR, DAVID DICKINSON, NANCI GULYA AND PHILIP LABASI, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioning Board member alleged respondents violated the Open Public Meetings Act (OPMA) in that a majority of Board members continued to discuss Board business after a Board meeting was formally adjourned and some Board members had left the building.

In light of findings of fact and testimonial evidence presented at hearing, the ALJ concluded that the record was completely barren of any support for the allegation that any Board business was improperly discussed after the adjournment of the Board meeting in question. Thus, there was no violation of OPMA. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

FEBRUARY 6, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 946-95

AGENCY DKT. NO. 486-12/94

GWYNNE KESSELMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON AND DR. WILLIAM SURIANO, RALPH BAYARD, JOHN TUDOR, DAVID DICKINSON, NANCI GULYA AND PHILIP LABASI, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Respondents.

Joel G. Scharff, Esq., for petitioner

George L. Vitureira, Esq., for respondent Board of Education and William Suriano, Ralph Bayard, David Dickinson, Nancy Gulya and Philip Labasi (Siff, Rosen, attorneys)

Anthony L. Mezzacca, Esq., for respondent John Tudor

Record Closed: December 4, 1995 Decided: December 14, 1995

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

This matter concerns an Open Public Meetings Act complaint against the Edison Township Board of Education by one of its members. This matter was transferred from the Superior Court of New Jersey to the Commissioner of Education by order of the Honorable Richard S. Rebeck, J.S.C., December 5, 1994.

The Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held by telephone on April 6, 1995. Among other things, it was settled that the issue to be resolved was whether a violation of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 through -21, by the Edison Board of Education occurred, and, if so, what the appropriate relief would be. There were no discovery problems. The matter was scheduled for hearing on July 113, 1995. After two adjournments for good cause, the matter was heard on November 9, 1995, in the Perth Amboy Municipal Building. I kept the record open until December 4, 1995 to allow the parties an opportunity to resolve the matter amicably. On December 4, 1995, I received a letter from petitioner's counsel indicating that the matter was not susceptible of settlement.

STIPULATED FACTS

Counsel submit the following joint stipulation of facts:

1. Respondent Edison Township Board of Education ("Board") is a public body which operates the public schools of Edison Township in accordance with Title 18A of New Jersey statutes.

2. At all relevant times, Respondents Dr. William W. Suriano, Ralph Bayard, John Tudor, David Dickinson, Nancy Gulya, and Philip Labasi were elected members of the Edison Board of Education.

3. At all relevant times, Petitioner Gwynne Kesselman was an elected member of the Board.

4. At all relevant times, Joseph LaCorte and Barry Miller were also elected members of the Board not parties to this action.

5. On July 21, 1994, all of the Board Members were in attendance, except Barry Miller, and convened a special public meeting ("July 21, 1994 Meeting") for the purpose of considering candidates for the position of School Superintendent.

6. Notice of the July 21, 1994 Meeting was properly provided in accordance with the requirements of the New Jersey Open Public Meetings Act ("O.P.M.A."), *N.J.S.A.* 10:4-6, *et seq.*

7. The July 21, 1994 Meeting was convened in the office of the Superintendent of Schools. There were no members of the public in attendance.

8. Minutes of the July 21, 1994 Meeting were taken and maintained by Daniel Machaud, Secretary of the Edison Board.

9. The July 21, 1994 Meeting Of the Board was called to order at 6:00 p.m. and the Board adjourned into executive session at 6:05 p.m.

10. The executive session of the July 21, 1994 Meeting was adjourned at 11:45 p.m.

11. At the conclusion of the July 21, 1994 Meeting, Petitioner and Board Member Joseph LaCorte left the Board of Education building.

12. At the conclusion of the July 21, 1994 Meeting, Respondents remained in the Board of Education building for a period of time.

13. After the July 21, 1994 Meeting, Board Secretary Machaud left the Board of Education building at approximately 12 midnight.

14. At the July 21, 1994 Meeting, the Board interviewed three candidates: Dr. Leonard Elowitz, Dr. David Witmer, and Dr. Keim. None of these candidates were ever appointed Superintendent.

15. There were several other meetings properly convened under the O.P.M.A. to consider candidates for the Superintendent position both before and after the July 21, 1994 Meeting at issue, including on May 12, 1994, May 16, 1994, May 18, 1994, May 23, 1994, June 1, 1994, June 3, 1994, August 31, 1994, September 22, 1994 and October 10, 1994.

16. The Board first interviewed Melindo A. Persi ("Persi"), the person eventually appointed Superintendent of Schools, at the August 31, 1994 meeting.

17. The Board gave Persi a second interview at the September 22, 1994 meeting.

18. The Board passed a resolution appointing Persi the Superintendent of Schools at the October 10, 1994 Board meeting.

TESTIMONIAL EVIDENCE

The petitioner testified that she attended a scheduled Board meeting on July 21, 1994. The meeting ended at approximately 11:45 p.m. The witness went downstairs and exited the building with Board member LaCorte. After a few minutes of conversation, the two went across the street to a diner.

The meeting had been held in a second floor office of the administration building. The superintendent's or interoffice was the site of the meeting. A secretary's or outer office lay between the superintendent's office and the hallway. There was a stairway outside the superintendent's office leading to the parking lot.

After repairing to the diner, the witness returned to the superintendent's office to find something she had left behind. She found the superintendent's office door closed. Other board members were inside. She left the building immediately.

Before the next board meeting, she asked the board secretary what had been discussed by other board members after she left. The board secretary advised the petitioner that he had left the building at approximately the same time she did.

At the next board meeting, in closed session, she asked each board member what they had discussed on July 21. Each replied that nothing had been discussed and none denied being present.

The petitioner is now the board president. She knows the provisions of the Open Public Meetings Act (OPMA) and knew them generally in July 1994. She knows of the personnel exception to open meetings and has participated in many meetings dealing with personnel including interviews and discussions.

The petitioner alleges no other OPMA violations. She stated the meeting was formally adjourned at 11:45 p.m. and that doors invariably are opened and left open upon adjournment. She did not enter the superintendent's office upon return. She does not know with certainty who was in the office. She saw no one leave the building, but did not check other areas and did not ask other board members of they were in the superintendent's office at all times. Neither did she check to see if the superintendent's door was locked when she returned to the building. The petitioner left voluntarily upon adjournment.

The petitioner had no knowledge of any action at or as a result of the unlawful meeting she says took place after adjournment of the July 21 meeting. The petitioner had no knowledge of what, if any, Board matters were discussed.

The petitioner was part of all subsequent deliberations on Superintendent selection. The candidate ultimately selected was not interviewed until late August. The petitioner had no knowledge of any decision reached at the alleged unlawful meeting.

Joseph LaCorte testified that the executive session on July 21, 1994 ended at approximately 11:45 p.m. He and the petitioner left the building and went to the parking lot. A few minutes later, they decided to go to a diner across the street. The petitioner returned to the building. When she met the witness again at the diner, she was upset. He advised the petitioner to let wiser heads prevail and suggested that she ask the Board secretary for information and guidance.

At the next Board meeting a few days later, the Board secretary told the witness that the office door was closed, some board members were present, that the board secretary's telephone pager sounded a signal and the board secretary went to make a telephone call.

The witness said that the secretary reported that Board member Suriano advised the secretary that he was no longer needed. The secretary told the witness that he made a telephone call from the outer office. The door to the interoffice remained closed.

The petitioner brought up the question at the next Board meeting. LaCorte's recollection is very much the same as the petitioner's. He also asked which of the Board's members were present and all who were present stated that no business had been discussed. Board member Suriano stated that perhaps a couple of things were discussed. At that point, the agenda was moved and the witness's follow-up question (what were you discussing) was drowned out.

The witness heard no discussion of Board matters after the adjournment on July 21. He had no personal knowledge of what if anything concerning board business was discussed. Nothing leads him to believe any votes or other actions were taken.

The witness spent "a couple of minutes" speaking with Kesselman in the parking lot. He saw no other Board members leave. However, the complex is large and has several exits and more than one parking lot.

The Board secretary who is also the Business Administrator testified. He has attended all board meetings since 1987 unless ill or on vacation. He is responsible for minutes of public and closed meetings.

The witness attended the July 21, 1994 public session and the executive session that followed. The executive session, called to discussed superintendent selection, ended at approximately 11:45 p.m. Upon conclusion of the executive session, there was return to public session. Two board members left and the balance of board members remained. He waited a few moments because he usually straightens the area after each meeting. There were some small discussions going on about the room.

The witness's telephone pager sounded a signal and the witness observed, "There's my daughter." At this point, Board member Suriano said, "We're pretty much finished. You can leave."

The witness went to the outer office and called his home. The door to the interoffice closed behind him. While the witness was on the phone, Suriano twice looked out through the door and closed the door again.

The secretary saw no board member leave while he was on the telephone. He cannot say with certainty which board members remained in the room. He believes the number was less than four. His telephone call lasted three to five minutes. He cleaned up the outer office where refreshments had been laid out, went to his own office, closed up, turned out the lights and locked exterior doors. He locked the doors from the hallway to the superintendent's offices so that they would lock when the last person left. The witness did not know if anyone left before he did at approximately midnight. He could not see the superintendent's offices while he was in his own office area.

The Board called William Suriano, a member from 1993-96. He attended the July 21, 1994 session. He served as Board president at the time. The closed session was dedicated to

candidate interviews and discussions. There were prior and subsequent meetings concerning superintendent choice. There were two group interviews, the second being held on July 21, 1994.

So far as the witness knows, no one from the first group subsequently was considered for selection. The witness believes he attended all meetings concerning superintendent selection. Each Board member had a rating form and after each session of interviews there was discussion based on the Board members' individual ratings.

The July 21, 1994 session ended at about 11:45 p.m. Everyone rose and moved about the room. The witness was aware that Kesselman and LaCorte left, but could not specify the time at which they left. There was no group discussion among remaining Board members of any Board matter. There were small conversations of one or two persons concerning various matters of personal nature. The vice-president and the witness spoke about a personal matter having to do with a summer home.

The witness does not recall whether the door to the Superintendent's office was opened or closed. He did go to the door and observe the secretary on the telephone. He knows the Board secretary is a single parent and he expressed some concern. He recalls saying at some point to the secretary that the secretary could leave. Board member Dickinson also used the telephone in the outer office. The witness got a sandwich from the outer office.

At a subsequent meeting, Kesselman and LaCorte asked what had occurred after they left the July 21 meeting. He replied that many topics were discussed and that there was no group discussion of Board business.

After eating a sandwich and engaging in more small talk, the witness picked up his materials from the Superintendent's area and left. He probably said good night to those present.

The Superintendent's office is relatively small. It contains a desk, shelves, two couches and two large conference tables with ten to twelve chairs. The room was quite crowded.

David Dickinson was present at the July 21, 1994 executive session meeting. He recalled that the petitioner and LaCorte left. He remained for about fifteen minutes, but not in the office at all times. At the end of the meeting, he called a friend, visited the men's room and returned to the office. He can recall no group discussion of any Board matter, no votes, no actions and no decisions after Kesselman and LaCorte left.

Philip Labasi also attended the July 21, 1994 executive session. He stated that Kesselman and LaCorte left at approximately 11:45 p.m. He stood and stretched and than went to the outer office for a sandwich. He put the sandwich at his place at table in the interoffice and went to the men's room in another corridor. He returned to the superintendent's office to clean up his area and to eat the sandwich.

The witness believes he was in the building approximately fifteen minutes after Kesselman and LaCorte left. He was out of the superintendent's office for probably ten minutes of that time. Before he left the superintendent's office, he spoke to someone about the Simpson trial and about a time-share condominium he had just purchased. Upon his return from the men's room, he recalls Board member Dickinson mentioned something about Army Reserve duty. There was no discussion of Board business.

DETERMINATION

Having reviewed the entire record in this matter, I **FIND**:

1. No reading of the stipulated facts can support a finding of any violation of OPMA;

2. The testimony presented supports no finding of any violation of OPMA.

The petitioner may have belief, but she has no knowledge of an impropriety. She had no knowledge of any action at or as a result of the alleged meeting following the scheduled July 21, 1994 meeting. She has no knowledge of what, if any, board matters were discussed at the alleged meeting.

The purpose of the regular meeting was superintendent candidate interviews and discussion of superintendent candidates. The person ultimately selected for the position had not yet been interviewed on July 21, 1994.

In sum, I **CONCLUDE** that the record is completely barren of any support for the suspicion, charge, allegation or hunch that any Board business was improperly discussed after the adjournment of the July 21, 1994 meeting at approximately 11:45 p.m.

Accordingly, I **CONCLUDE** that the petition of appeal is without merit and I **ORDER** it **DISMISSED**.

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

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

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

14 DECEMBER 1995
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/26/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 28 1995
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cae

LIST OF WITNESSES

For Petitioner:

Gwynne Kesselman
Joseph LaCorte
Daniel Michaud

For Respondents:

William Suriano
David Dickinson
Philip Labasi

LIST OF EXHIBITS

Joint Exhibits:

J-1	Petition and Order of Transfer from Superior Court
J-2	Answer to Amended Complaint
J-3	Minutes of Special Board Meeting of July 21, 1994, Agenda and Purchase Order
J-4	Minutes of Special Board Meeting of May 12, 1994, Agenda and Purchase Order
J-5	Minutes of Special Board Meeting of May 16, 1994, Agenda and Purchase Order
J-6	Minutes of Special Board Meeting of May 18, 1994, Agenda and Purchase Order
J-7	Minutes of Special Board Meeting of May 23, 1994, Agenda and Purchase Order
J-8	Minutes of Special Board Meeting of June 1, 1994, Agenda and Purchase Order
J-9	Minutes of Special Board Meeting of June 3, 1994, Agenda and Purchase Order
J-10	Minutes of Special Board Meeting of August 31, 1994, Agenda and Purchase Order
J-11	Minutes of Special Board Meeting of September 22, 1994, Agenda and Purchase Order
J-12	Minutes of Regular Board Meeting of October 10, 1994, Resolution Appointing Melindo A. Persi Superintendent and Agenda

OAL DKT. NO. EDU 946-95

GWYNNE KESSELMAN, PETITIONER, V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, AND DR. WILLIAM SURIANO, RALPH BAYARD, JOHN TUDOR, DAVID DICKINSON, NANCI GULYA AND PHILIP LABASI, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondents' reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4 and 1:1-18.8.

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, inter alia, that respondents violated the Open Public Meetings Act, (OPMA), N.J.S.A. 10:4-6 to 21, in that a majority of members continued to discuss Board business after a Board meeting was formally adjourned and some Board members had left the building. (Petitioner's Exceptions at p. 1) Petitioner further contends that the ALJ erred in concluding that the testimonial evidence as presented at the hearing did not support a finding that the OPMA was violated. (Petitioner's Exceptions at p. 4)

Respondents' reply exceptions support the conclusions of the ALJ that the Board did not violate the OPMA following the conclusion of a regular meeting. The Board further urges rejection of petitioner's claim that the ALJ failed to correctly assess the testimonial evidence at

hearing asserting that the ALJ "properly concluded that this testimony supported no finding of any violation of the OPMA. " (Respondents' Reply Exceptions at p. 3)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the within petition does not evidence a violation of the OPMA.

The existing record provides no cause to challenge any of the determinations or credibility assessments made by the ALJ with regard to this matter, nor may the Commissioner properly reject such findings of fact without reviewing those portions of the transcript(s) where such findings were reached. Rowley v. Board of Education of Manalapan-Englishtown, 205 N.J. Super. 65, 75 (App. Div. 1985); In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987). [1]

Accordingly, in accepting the factual findings of the ALJ, the Commissioner determines that petitioner did not meet her burden of proof that a violation of the OPMA occurred.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law dismissing the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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1 Additionally, it is the responsibility of those challenging such determinations to provide the Commissioner with such portions of the transcript, Morrison at 158, and no obligation arises for the Commissioner to review them before rendering a final decision regarding the findings and recommendations of the ALJ.

FEBRUARY 6, 1996

DATE OF MAILING FEBRUARY 6, 1996

46-96

46-96

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL ASH, DIVISION	:	COMMISSIONER OF EDUCATION
OF JUVENILE SERVICES,	:	DECISION
DEPARTMENT OF HUMAN SERVICES,	:	
STATE OF NEW JERSEY.	:	

SYNOPSIS

Petitioning Department of Human Services, Division of Juvenile Services, certified tenure charges of unbecoming conduct against respondent teacher for alleged sexual harassment of a coworker.

ALJ concluded that the Division presented compelling evidence to support its tenure charges of unbecoming conduct. Moreover, having considered the Department's policy of progressive discipline, the ALJ affirmed the Division's imposition of a 60-day suspension without pay on respondent due to respondent's prior incidents.

Commissioner adopted findings and determination in initial decision as his own.

FEBRUARY 7, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6594-95

AGENCY DKT. NO. 188-5/95

IN THE MATTER OF THE TENURE HEARING OF PAUL ASH, DIVISION OF JUVENILE SERVICES, DEPARTMENT OF HUMAN SERVICES, STATE OF NEW JERSEY

Timothy Crowley, Deputy Attorney General, for the petitioner (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Raymond A. Ash, III, Esq., for the respondent

Record Closed: November 13, 1995 Decided: December 27, 1995

BEFORE **CAROL LASKIN**, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 22, 1995, the Department of Human Services, Division of Juvenile Services (petitioner, Division or Department) certified to the Commissioner of Education its determination of tenure charges against Paul Ash (respondent) alleging conduct unbecoming a tenured teacher, specifically charging Ash with sexual harassment of a coworker (C-1). The Division

simultaneously imposed its determined discipline, a suspension without pay for sixty days. Respondent denies all charges, asserts procedural deficiencies and claims this a matter of retaliation--the fury of a "woman scorned" (C-2).

After the Commissioner transferred the matter on June 23, 1995, to the OAL as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*, the telephonic prehearing conference was conducted on August 15, 1995. Said conference resulted in an order scheduling the matter for hearing on September 28 and 29, 1995.

At hearing five witnesses and eight exhibits were presented by the Division; nine witnesses and one exhibit offered by the respondent. The certified tenure charges and answers thereto were entered jointly as Commissioner's exhibits C-1 and C-2. Upon conclusion of the hearing, the parties waived oral argument requesting a briefing schedule. Said schedule was extended upon joint request of the parties. To ensure the opportunity for respondent Ash to reply to the Division's initial brief, receipt of which by the undersigned was delayed due solely to an error of the postal service, the record closed on November 13, 1995.

CHARGES PROFFERED AND EVIDENCE PRESENTED.

Paul Ash is a tenured teacher, pursuant to *N.J.S.A.* 18A:60-1.2, with the Department of Human Services assigned by the Division of Juvenile Services to instruct physical education. Mr. Ash, on a regular weekly schedule, travels to provide educational services to juveniles enrolled in various programs throughout the State. Petitioner does not allege improper conduct towards any student or juvenile. Nor does it assert that any of the alleged conduct unbecoming a teacher interfered with Mr. Ash's performance of his teaching duties. Rather, Mr. Ash is charged was the sexual harassment of a coworker, Ella Ruth Tenant.

As outlined by the certified tenure charges, the specifications are as follows:

a. Mr. Ash tried to pull another employee, Ella Tenant into empty rooms on the pretext he just wanted to talk.

b. Mr. Ash admitted he had shown up at Ms. Tenant's home to bring her flowers.

c. Mr. Ash had given out Ms. Tenant's telephone number to a male friend without her permission.

d. Mr. Ash stated to Ms. Tenant while at work: "Um, um, look at that body, look at that body."

e. Mr. Ash made other inappropriate sexual remarks towards Ms. Tenant.

f. On November 15, 1994, Mr. Ash stood behind Ms. Tenant while she was climbing into a van and was staring at her buttocks.

g. On February 14, 1995, Mr. Ash took advantage of a situation at work, when the building was almost empty, to force his presence upon Ms. Tenant. Mr. Ash refused to leave and stayed in the area for approximately one hour. Even though Ms. Tenant has requested that he leave, he stayed and was watching every movement Ms. Tenant made." (C-1)

The burden of production and persuasion to establish by a preponderance of the credible evidence that Mr. Ash committed the offenses charged and that the resulting sixty-day penalty was appropriate herein rests on the Division.

To meet this burden, the Division first presented George Anthony Burgos, an affirmative action officer for the Department of Human Services, to outline the Department's sexual harassment policies, P-2 and P-3. Only upon response to specific questions on cross-examination did Mr. Burgos identify two other coworkers, Sandra Mahoney Still and Peggy Lee DeShields,

who alleged like inappropriate conduct. Thus, in addition to Ms. Tenant, both Peggy Lee DeShields -- a Division employee at the Cumberland Day Treatment Program and Sandra Mahoney Still -- a social worker at the Cumberland Day Treatment Program, testified. Each identified conduct of respondent which they reasonably believed created an intimidating, hostile work environment which interfered with their work productivity. (See P-4, P-5 and P-9.) As its final witness, the Division presented Donald Mangus, Assistant Director of Employer Relations for the Department of Human Services, who identified the Department's corrective/disciplinary action for acts of sexual harassment, P-7, P-6 and reviewed both the instant investigation and determination to impose the sixty-day penalty.

To refute the evidence proffered by the Division, respondent along with eight other witnesses, testified. Robert Dayton -- a building trades teacher of the Division, Mark Chiappini -- a teacher familiar with respondent's work at the Camden Prep Program, and Alvin Herron -- a recreation supervisor at the Camden Prep Program each testified as to respondent's positive work habits and their lack of knowledge of any inappropriate or unprofessional behavior. Likewise, Lawrance Herdegen -- a vocation teacher at Camden House, Kathlyn M. Gray, a learning disability teacher/child study team case manager at Gloucester Day Training, and Loris Davis -- an employee at Camden House, testified they never witnessed any inappropriate conduct. Moreover, each of those witnesses claimed respondent at all times acted professionally and courteously towards them.

Sylvester Wade, Jr., a physical education teacher of the Division, who knows both Ella Tenant and Mr. Ash also provided testimony. Wade disclosed that after Ella Tenant called him on two occasions to seek out personal information about Ash, he teasingly informed respondent that Ms. Tenant had a "fatal attraction" towards him. Susan Ash, respondent's final witness and wife, recounted her happy years of marriage.

With the sole exception of Paul Ash, I find that the testimony and documentary evidence presented by each of the witnesses is credible. Only respondent's demeanor and testimony do I **FIND** to be incredulous. Mr. Ash denied each and every specified charge, listed above, C-1, claiming that Ella Tenant fabricated everything and that "nothing ever happened." Ash suggested

that Ella Tenant was an angry and scorned woman. With regard to co-employee DeShields, even after begrudgingly admitting authorship of P-5, Ash swore that he never had an intimate relationship with DeShields. Likewise, Ash claimed that she too was pursuing him. The absurdity and vacillation of respondent's testimony in regard to the allegation of inappropriate conduct made by Ms. Mahoney Still patently reveal respondent's lack of credibility. Again, only after being presented with his letter of apology, P-9, did respondent concede that he "pecked" the social worker on the cheek in front of her supervisor.

FINDINGS OF FACT

Upon reflection of the testamentary and documentary evidence presented and upon review of the record in its entirety, I make the following Findings of Fact:

1. In or around August 1993, the Department of Human Services issued its Corrective/Disciplinary Action for Acts of Sexual Harassment, P-7. This disciplinary directive identified Administrative Order 4:09 as defining, "sexual harassment," P-2, and Administrative Order 4:08 sec. E.1., as classifying the appropriate range of penalties for acts of "sexual harassment," P-6.

The articulated definition of sexual harassment mirrored that contained in *N.J.A.C.* 4A:7-1.3, *Prohibition of sexual harassment in State government.*

2. In or around September 1, 1993, the Department of Human Services provided to each of its employees P-3, the statewide Policy on Sexual Harassment. The definition or Sexual Harassment therein likewise mirrored *N.J.A.C.* 4A:7-1.3. Thus each employee, was informed, *inter alia*, as to the department's understanding of harassment:

> (a) Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct based on the gender of the employee affected when: . . .
>
> 3. Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an unreasonably intimidating, hostile or offensive working

environment. This type of sexual harassment includes, but is not limited to:

i. Generalized gender-based remarks and behavior;

ii. Inappropriate, unwanted, offensive physical or verbal sexual advances and comments;

iii. Solicitation of sexual activity or other sex-linked behavior or promise of reward;

iv. Coercion of sexual activity by threat of punishment; and

v. Gross sexual imposition such as touching, fondling, grabbing or assault. . . .

(c) Conduct under (a)3 above by a supervisor, other superior or by (coworkers) constitutes prohibited sexual harassment when a reasonable person of the same sex in the employee's position would consider it sufficiently severe or pervasive to alter the conditions of employment or to create an intimidating, hostile or offensive work environment. [emphasis supplied]

3. Respondent, Paul Ash, was provided a copy of The Statewide Policy on Sexual Harassment, P-3, in or around September 1, 1993.

4. Ella Tenant met coworker Paul Ash at the Department's facility in Camden in or around July 1994. Ms. Tenant was interested in dating Ash, believing him to have recently moved to Southern New Jersey. Ms. Tenant and Mrs. Ash went out to lunch together on a few occasions. Thereafter, seeking personal information about respondent, Ms. Tenant on at least two occasions called Sylvester Wade. While Mr. Wade was not helpful, Ms. Tenant did learn from others that Mr. Ash was married and a long established resident of Southern New Jersey. Thereafter, Ms. Tenant informed respondent that she would not date a married man and requested only that they have a "working relationship."

5. Mr. Ash, refusing to accept Ms. Tenant's decision not to have other than a "working relationship" engaged in a course of conduct which interfered with her work performance and created an unreasonably intimidating work environment. *See N.J.A.C.* 4A:7-

1.3(a)3(c), P-3. Specifically, with the exception of 6b [Mr. Ash admitted he had shown up at Ms. Tenant's home to bring her flowers], I **FIND** that respondent committed the conduct alleged in the specifications of the tenure charges, C-1, listed verbatim above. While I do not **FIND** that any single act committed above falls within the definition of sexual harassment of a coworker, P-3, I **FIND** that the pervasive continuation of the conduct viewed in its entirety supports Ms. Tenant's feeling of fear of Mr. Ash. Thus, I **FIND** that a reasonable female co-employee would consider Mr. Ash's conduct as creating an intimidating, hostile work environment.

6. On November 16, 1994, Ms. Tenant made a written complaint regarding respondent's conduct with the van (6.f, C-1) and on February 22, 1995, she completed a Formal Discrimination Appeal Processing Form, C-1, C-2, regarding the February 14, 1994 incident.

7. On or about October 25, 1994, at the Cumberland Day Program, Paul Ash inappropriately touched the arm of coworker Sandra Mahoney Still and kissed her, without consent, in the presence of Ms. Mahoney Still's supervisor, P-9. Ms. Still, prior to the instant tenure hearing, was unaware of the allegations of Ella Tenant. After an investigation resulting from the complaint of Ms. Mahoney Still, on January 10, 1995, the Department conducted a counseling session with Paul Ash, issued an Oral Warning Notice, and required respondent to attend training on sexual harassment on January 24, 1995. Soon after attending the January 24, 1995 training on sexual harassment, respondent made improper gestures and sexual comments to Ms. Tenant concerning his appreciation of her body. (Expressions such as: "My, My, don't I like that behind; and, "I would love to have that body.")

8. Peggy Lee DeShields is a teacher aide of juvenile boys at the Cumberland Day Treatment Facility in Bridgeton, New Jersey. In or around late summer, 1993, she met coworker Paul Ash. She ceased engaging in a consensual personal relationship when she learned that respondent was married. Respondent refused to accept that the relationship was over and engaged in escalating course of conduct which intimidated Ms. DeShields. This conduct including, *inter alia*, statements of a sexual nature, touching and groping or grabbing. Ms. DeShields never informed her supervisors of the offensive conduct. Petitioner learned of Ms. DeShields' concern during the investigation of Ms. Tenant's discrimination appeal.

9. Upon receipt of the discrimination appeal processing form executed by Ms. Tenant and supporting documentation, George Anthony Burgos conducted an investigation to determine whether there was probable cause to credit Ms. Tenant and whether or not her allegations constituted sexual harassment, P-3. Mr. Burgos was involved in the prior investigation which led to the issuance of P-1, record of counseling and oral warning upon the complaint of Sandra Mahoney Still. During the course of the instant investigation, Burgos interviewed, *inter alia*, respondent, Ms. Tenant, Peggy DeShields, and Sylvester Wade. Mr. Burgos' investigation was ultimately reviewed by Donald Mangus, Assistant Director of Employee Relations. Upon reflection, Mangus determined only to institute filing of tenure charges upon the allegations of Ms. Tenant, and not Ms. DeShields. Thus, by letter dated May 4, 1995, respondent was notified of the Department's intention to impose a 60-day suspension, was provided with supporting documentation and instructed that he had 15 days to file a written response.

On May 22, 1995, at 11:30 a.m., after consulting with the Director of Employee Relations, Donald Mangus determined that there was probable cause and imposed a sixty-day suspension without pay deeming it appropriate progress discipline. Later that same day, at 4:06 p.m., respondent timely filed his reply, C-2. Donald Mangus persuasively testified that he personally viewed respondent's reply and found nothing therein to change his recommendation to the Director to certify the instant charge. This review was made prior to forwarding the certified tenure charges to the Commissioner of the Department of Education

10. In or around late February, 1995, upon the filing of Ms. Tenant's discrimination appeal, respondent's work locations were reassigned; he no longer reports to Camden House. On May 24, 1995, the sixty-day suspension penalty was imposed. Respondent returned to work in late August, 1995.

CONCLUSION AND ORDER

A. Procedural Issue

Respondent's first argument that the instant charges must be dismissed based upon *N.J.S.A.* 18A:6-10 due to a "clear lack of jurisdiction and blatant disregard for proper procedure" (respondent's brief at 2) fails. The tenure statute clearly provides for suspension upon certification of charges. See, *Slater v. Board of Education*, 237 *N.J. Super*. 424 (App. Div. 1989). And, while it would serve the Division well to insure that its employees have had full opportunity to present written rebuttal evidence prior to a certification of charges, I **FIND** that any diminimis procedural defect was cured by the Assistant Director of Employee Relations, Donald Mangus, when he reviewed respondent's rebuttal evidence prior to forwarding the certificate of determination to the Commissioner of Education. The process for filing and certifying the instant tenure charges against respondent, a tenured teacher within the Department of Human Services, did comply with *N.J.A.C.* 6:24-5.4.

B. Merits of the Charge:

As articulated above, I **CONCLUDE** that the Division presented compelling evidence to support its tenure charges. Respondent's action towards coworker Ellis Tenant constituted sexual harassment within the meaning of the Department's policies (P-2, P-3, and P-7) and *N.J.A.C.* 4A:7-1.3(a). While Paul Ash may not have intended to offend, his inappropriate remarks, touching and staring created an intimidating, hostile and offensive working environment. *Lehmann v. Toys 'R Us, Inc.*, 132 *N.J.* 587, 603-604 (1993); *Brown v. Trenton Psychiatric Hospital,* 94 *N.J.A R.* 2d (CSV 41), aff'd 95 *N.J.A.R.* 2d (CSV 233) (App. Div.).

C. Penalty:

The Department disciplinary action program, Administrative Order 4.08, P-6, outlining offenses and application of penalty, clearly advances a philosophy of corrective rather than

punitive discipline. Progressive discipline and consideration of mitigation factors are incorporated. It's table of offenses and penalties reveals that a penalty for a first offense of sexual harassment can range from counseling to removal; the second offense from a five-day suspension to removal; the third offense mandates removal. P-6, Administrative Order 4.08E.1.

Respondent asserts that these considerations of corrective discipline require a penalty of no greater than two weeks of loss of pay herein, while Assistant Director Don Mangus reasoned that only a sixty-day penalty for the second offense would be consistent with the Department's policy of progressive discipline.

My concern in determining the appropriate remedy herein involves examination of the timing of the infractions committed by Mr. Ash. Most of the conduct I found to be sexual harassment took place prior to Mr. Ash's January 24, 1995 training session (P-1). As it is not the Department's policy to punish its employees, any penalty must be imposed with the view of Mr. Ash's conduct after he had been provided the opportunity to understand what is acceptable work place behavior. Upon this reflection, I nevertheless find that the penalty imposed by the Division is warranted. See, *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967).

The Division has acted in the spirit of corrective discipline and took a reasonable and enlightened position by providing Mr. Ash with only a oral warning and instructional counseling for the conduct he committed towards Ms. Sandra Mahoney Still. Respondent egregiously disregarded the instruction when he made sexual offensive remarks and gestures towards Ms. Ella Tenant only a day or so after the counseling instruction. Mr. Ash's denial of any culpability at hearing even in the face of documentary evidence to the contrary adds further support for the penalty. Accordingly, finding that Mr. Ash's action constitute conduct unbecoming a tenured employee within the Department of Human Services and that the evoked penalty was warranted, I **ORDER** that the decision of the Division to impose a sixty-day penalty be **AFFIRMED**. As the Division seeks corrective and progressive discipline, cognizant of its intention to remove respondent in the event of a third infraction, I further recommend that Mr. Ash be provided with an opportunity for additional training in sexual harassment.

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

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

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

December 27, 1995
DATE

Carol A Laskin, t/a
CAROL A. LASKIN, ALJ t/a

Receipt Acknowledged:

12/28/95
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 03 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lam

EXHIBITS

On behalf of the Court:

C-1 Tenure charges and certificate of the determination of tenure charges

C-2 Statement of position and answer to tenure charges by respondent Paul James Ash

On behalf of the Petitioner:

P-1 Two page counseling session, dated January 18, 1995

P-2 Department of Human Services Administrative Order 4:09

P-3 State-wide policy on sexual harassment of Department of Human Services, dated September 13, 1993

P-4 Incident Report of Ella Tenant, dated November 16, 1994

P-5 "Your friend's letter" from respondent to Peggy DeShields, dated October 17, 1994

P-6 The Department's disciplinary action program Administrative Order 4:08

P-7 Department of Human Services corrective/disciplinary action for act of sexual harassment, dated August 23, 1993

P-8 (Withdrawn by the State - no exhibit)

P-9 Apology letter from respondent concerning Sandra Mahoney Still, dated October 31, 1994

On behalf of the Respondent:

R-1 Materials from the personnel file of respondent

WITNESSES

On behalf of the Petitioner:

George Burgos, EEOC/AA Investigator, Department of Human Services

Ella Tenant

Peggy Lee DeShields

Sandra Mahoney Still

Donald Mangus, Assistant Director of Employee Relations Department, Department of Human Services

On behalf of the Respondent:

Robert Dayton

Mark Chiappini

Alvin Herron

Sylvester Wade, Jr.

Lawrance Herdegem

Kathleen M. Gray

Loris Davis

Paul Ash

Susan Ash

OAL DKT. NO. EDU 6594-95

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL ASH, DIVISION	:	COMMISSIONER OF EDUCATION
OF JUVENILE SERVICES,	:	DECISION
DEPARTMENT OF HUMAN SERVICES,	:	
STATE OF NEW JERSEY.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Although respondent submitted exceptions on January 23, 1996, said exceptions were untimely filed, pursuant to both N.J.A.C. 1:1-18.4 and the Administrative Law Judge's (ALJ) instructions in the initial decision, which was mailed to the parties on January 3, 1996. Respondent did not request an extension of the time limit for filing exceptions in accordance with N.J.A.C. 1:1-18.8(b). Therefore, the exceptions are not considered herein.

Upon careful and independent review of the record, the Commissioner concurs with the findings and credibility determinations set forth by the ALJ, together with her conclusion that the Department of Human Services presented compelling evidence to support the tenure charges brought against respondent. Thus, the conduct alleged in the specification of tenure charges having been established (Initial Decision at p. 7), the Commissioner determines that respondent's 60-day suspension and concomitant reduction in salary imposed by the Division of Juvenile Services were warranted under the circumstances and authorized pursuant to N.J.S.A. 18A:6-14.

Accordingly, the initial decision of the Office of Administrative Law affirming the decision of the Division to impose a 60-day unpaid suspension is adopted for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 7, 1996

DATE OF MAILING FEBRUARY 7, 1996

48-96

48-96E

DEC ELECTRIC, INC.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY, AND USA ELECTRICAL CONTRACTORS, INC.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

FEBRUARY 8, 1996

OAL DKT. NO. EDU 10833-95

DEC ELECTRIC, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY, AND USA ELECTRICAL CONTRACTORS, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

For Petitioner, Richard W. Hunt, Esq. (Almeida & Hunt)

For the Board, Charles R. Iannuzzi, Esq.

For USA Electrical Contractors, Inc., Matthew A. Zabel, Esq. (Zabel & Associates)

This matter has come before the Commissioner of Education by way of a Motion for Clarification filed by petitioner on January 5, 1996. In this motion, petitioner seeks an explicit statement from the Commissioner as to his intention, in his decision of December 26, 1995, in affirming the ALJ's order denying emergent relief for the reasons expressed therein. Specifically, petitioner seeks an express affirmation of the ALJ's finding that the disputed contract between respondents, Board of Education and USA Electrical Contractors, Inc. ("USA"), was null and void from the outset due to USA's lack of qualification under applicable bidding laws. The ALJ had, in his initial decision, made such a finding, but gone on to deny emergent relief on other grounds; this decision was adopted by the Commissioner for the reasons expressed by the ALJ. Seeing that work continued on the disputed contract notwithstanding the ALJ's (and Commissioner's, by affirmance) finding of contractual nullity, petitioner attempted to have the Commissioner's decision enforced in Superior Court. This attempt, however, was thwarted by the judge's unwillingness to infer from the Commissioner's decision an explicit intent to declare the contract null and void notwithstanding his denial of emergent relief. Hence petitioner's motion for clarification.

Replies to petitioner's motion were timely filed by the Board and USA, in accordance with established briefing schedules. In its reply, the Board argues that the Commissioner's decision was

limited to the emergent relief aspect of the matter only, that petitioner's request for such relief was denied, and that the matter is being scheduled for a hearing on the merits, all of which must lead to a conclusion that the validity of the contract is still at issue and that there is no impediment to proceeding with performance. The Board further argues that substantial time and money would be lost by the Board if the electrical project were to cease at this point. In its own papers, USA also argues that substantial time and money would be wasted if the electrical phase of the project were to be rebid, and that the ALJ's determination on motion should have been limited to the emergent relief aspect alone and not to the qualification of USA as a bidding party. Further, USA renews its contention that it was a properly qualified bidder, in that the prequalification renewal process was strictly an extension of existing prequalification and did not materially change nor affect the bidding process.

Upon review of the record and the arguments of the parties on motion, the Commissioner determines, under the particular circumstances of this matter, to treat petitioner's Motion for Clarification as a Motion for Reconsideration. Having so determined, the Commissioner finds that, under the standards established in Crowe v. DeGioia, 90 N.J. 126 (1982), emergent relief must be granted and that no further work may ensue in furtherance of performance of the disputed contract.

The Commissioner so finds because the ALJ's recommendation to deny emergent relief, affirmed by the Commissioner, was clearly predicated on his belief that the Board would *rebid* the contract if emergent relief were denied. Indeed, having found the USA/Board contract a nullity, the ALJ expressly denied emergent relief because petitioner, which could not facially demonstrate an absolute entitlement to the contract at issue, was unable to show that it would be irreparably harmed *by a rebid.* However, the record on motion has now made it plain that, contrary to the Board's representations to the ALJ, initial decision at p. 10, that it would rebid the project if emergent relief were denied, the Board *did not rebid* the project upon such denial but instead proceeded to pursue its contract with USA and allow it to begin electrical work at Delsea High School. Thus, the basis for both the ALJ's recommendation and the Commissioner's decision to affirm it has been so substantially altered that the Commissioner has reconsidered petitioner's claim of irreparable harm, and finds that petitioner now succeeds in such a showing, as it is well established that damages or other comparable remedy are not available to petitioner should it ultimately succeed on the merits of its case. See, for example, M.E. Stephen Construction Constr. Co. v. Borough of Rumson, 125 N.J. Super. 67, 75 (App. Div. 1973)

As to those merits, the record clearly establishes USA's *facial* lack of qualification on the date its bid was submitted. While the *effect of that lapse under the circumstances* remains to be

determined on the merits, for purposes of emergent relief, petitioner has plainly demonstrated a sufficient likelihood of success to succeed on the second prong of the Crowe analysis.

Finally, upon weighing the equities, the Commissioner finds that, under the unique circumstances herein, more harm would inure to the public than would to the Board and USA if petitioner were not awarded a stay. Although the Board will undoubtedly lose valuable time and incur cost in rebidding this project or discontinuing work pending final determination, as both it and USA argue, the Commissioner concurs with the ALJ that part of the problem was created by a Board which,

> ***knew, or reasonably should have known, that by accepting USA's bid it was assuming a significant risk that if USA's bid resulted in a contract there would be a strong likelihood that it would be challenged***." (Initial Decision at p. 8)

More importantly, and more disturbingly, the Board in this matter has also proceeded to act contrary to the representations it made before the ALJ, representations upon which he, and subsequently, the Commissioner, relied in denying petitioner's request for restraints. The public can have no confidence in the force and integrity of the bidding laws, or in the fundamental fairness and validity of the appeal process, if a situation such as has occurred herein is allowed to pass without impunity.

Accordingly, upon reconsideration, petitioner's Motion for Emergent Relief is GRANTED for the reasons expressed above and this matter shall duly proceed to a prompt hearing on the merits at the Office of Administrative Law.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The Commissioner notes that, should the parties and ALJ so determine pursuant to N.J.A.C. 1:1-9.4, in the interest of resolving this matter so as to delay the Board's construction work as little as possible, the Commissioner consents to accelerated proceedings in this matter.

FEBRUARY 8, 1996
DATE OF MAILING, FEBRUARY 9, 1996

49-96

BERNARD HARTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 9, 1996

OAL DKT. NO. EDU 10159-94

BERNARD HARTMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 9, 1996

DATE OF MAILING FEBRUARY 9, 1996

50-96

IN THE MATTER OF THE TENURE	:	
HEARING OF CONSTANT MONTILUS,	:	COMMISSIONER OF EDUCATION
CITY OF ORANGE TOWNSHIP SCHOOL	:	DECISION
DISTRICT, ESSEX COUNTY.	:	

February 9, 1996

IN THE MATTER OF THE TENURE	:	
HEARING OF CONSTANT MONTILUS,	:	COMMISSIONER OF EDUCATION
CITY OF ORANGE TOWNSHIP SCHOOL	:	DECISION
DISTRICT, ESSEX COUNTY	:	

For the Board, Joseph R. Morano, Esq.

This matter having been opened before the Commissioner of Education on November 15, 1995 through certification of tenure charges of unbecoming conduct a teacher staff member, insubordination, abandonment of position and other just cause against respondent, a tenured teaching staff member in the employ of the Board of Education of the City of Orange Township; and

The Commissioner having directed respondent by two notices[1] and by letter dated December 22, 1995 sent via regular and certified mail to file an Answer to the charges against him; and

The certified mail notices dated November 17, 1995 and December 22, 1995 having been returned unclaimed, yet there being no indication that the notices sent via regular mail did not reach respondent; and

As of this date, neither respondent nor any attorney on his behalf having filed an Answer to the tenure charges against him and each count of the charges against respondent having been deemed to be admitted; now therefore

[1] Dated November 17, 1995 and December 12, 1995.

IT IS ORDERED this 9th day of February 1996 that summary judgment shall be granted to the Board and that respondent shall be dismissed from his tenured position as a teacher in the district's employ as of the date of this decision.

IT IS FURTHER ORDERED that, pursuant to N.J.A.C. 6:11-3.6, this matter shall be forthwith referred to the State Board of Examiners for review and action as it deems appropriate.

COMMISSIONER OF EDUCATION

February 9, 1996
Date of Mailing, February 9, 1996

55-96

55-96

PATRICK ROUSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 15, 1996

OAL DKT. NO. EDU 7610-95

PATRICK ROUSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 15, 1996

DATE OF MAILING FEBRUARY 15, 1996

51-96

51-96

NANCY MACHADO, on behalf of her minor child, H.J.M.

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

February 9, 1996

OAL DKT. NO. EDU 6580-95

NANCY MACHADO, on behalf of her minor child, H.J.M.

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 9, 1996
Date of Mailing, February 9, 1996

52-96

52-96E

N.C., on behalf of minor niece, M.C., :

PETITIONER, :

V. :

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

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

FEBRUARY 9, 1996

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FEB 6 1 48 PM '96

YOUNG, DIMIERO & SAYOVITZ, P.C.
A Professional Corporation
Skyline Plaza
414 Eagle Rock Avenue
West Orange, NJ 07052
(201) 736-5200
Attorneys for Respondent South Orange/Maplewood Board of Education

N.C. on behalf of his minor minor niece, M.C., Petitioner	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. 1257-96** **AGENCY REFERENCE NO. 10-1/96**
v.	**ORDER**
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Respondent	

THIS MATTER having come before the Court on February 5, 1996 upon the application of Bell, Adubato & Ligham, P.C., counsel for Petitioner, seeking an Emergent Relief Order requiring the Respondent South Orange/Maplewood Board of Education to admit the pupil, M.C., into District schools pending the Commissioner's determination regarding a Petition filed pursuant to N.J.S.A. 18A:38-1, and Joanne L. Butler, Esq. of Young, Dimiero & Sayovitz, P.C., counsel for Respondent, appearing, and the Court having considered the submissions of the parties, and having heard oral arguments of counsel and limited testimony, and f good cause shown;

IT IS ON THIS 6th day of February, 1996;

ORDERED that the Petition for Emergent Relief be and hereby is granted; and

IT IS FURTHER ORDERED that, at the plenary hearing relative to the Petition, Petitioner shall be responsible for obtaining an interpreter to enable testimony from A.C., the parent of the pupil, at Petitioner's sole cost and expense.

THIS ORDER on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education who, by law, is authorized to make a final decision in this matter. The final decision shall be issued without undue delay but no later than forty-five days following the entry of this Order. If the Commissioner of Education does not adopt, modify or reject this Order within forty-five days, this recommended Order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Ken R. Springer

KEN R. SPRINGER ALJ

OAL DKT. NO. EDU 1257-96

N.C., on behalf of minor niece, M.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

For Petitioner, Jeffrey I. Bronson, Esq. (Bell, Adubato & Ligham)

For Respondent, Joanne L. Butler, Esq. (Young, Dimiero & Sayovitz)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on January 12, 1996, contesting the Board's decision to exclude M.C. from attendance in the South Orange-Maplewood School District on the basis of her failure to meet the residency requirements set forth in N.J.S.A. 18A:38-1. Counsel for the Board responded with a written objection to said Petition of Appeal, asserting that the petition was untimely filed in accordance with N.J.S.A. 18A:38-1. On January 18, 1996, petitioner filed a Motion for Emergent Relief before the Commissioner, seeking that M.C. be immediately reinstated as a full-time pupil in the District, pending a final determination as to petitioner's claim that M.C. was improperly removed from school on the basis of residency. The Board's brief in opposition to the motion was filed the same day. The matter was thereafter transmitted to the Office of

Administrative Law. On February 5, 1996, oral arguments were heard before the ALJ; on February 6, 1996, the ALJ issued an Order granting petitioner's request for emergent relief.

Exceptions to the Order were filed by the Board on February 8, 1996. The Board contends that the ALJ's granting of emergent relief in this matter effectively waives the 21-day statute of limitations contained in N.J.S.A. 18A:38-1. The Board argues,

> ***By ordering readmission of the pupil, the Court has acknowledged that the late-filed Petition is valid; that the pupil should be readmitted during the pendency of the matter; and that the twenty-one day statute of limitations has been waived. The statute of limitations is intended to require prompt action and bar review to those who violate it.*** (Board's Exceptions at p. 2)

Upon careful and independent review of the record in this matter, which included the audio cassette tape of the oral arguments by the parties, and in consideration of the appropriate standard for granting emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), the Commissioner determines to affirm the Order of the ALJ granting petitioner emergent relief.

Temporary relief may be granted where necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where petitioner demonstrates a likelihood of success on the merits and where the relative hardship to petitioner favors granting such relief. Crowe, supra. The Commissioner concurs with the ALJ's judgment that the potential for irreparable harm to M.C. is the most compelling aspect of petitioner's argument for emergent relief. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Here, as the ALJ noted, M.C. has been out of school since mid-December. Every day that she is barred from attending school constitutes a loss which can never be compensated by

merely awarding damages. M.C.'s educational needs weigh heavily in favor of granting the relief herein.

Additionally, relief should only be granted where the legal rights underlying the claim are settled and where there is a likelihood of success on the merits. Here, the ALJ determines, and the Commissioner so affirms, that although there are weaknesses as to petitioner's position at this stage of the proceedings, these weaknesses are not so great as to deny petitioner the relief he seeks. As Crowe instructs,

> ***[T]o prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.*** That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the *status quo*. (Crowe, supra at 133)

As the ALJ observes, the only way to maintain the status quo is to keep M.C. in attendance at school.

Finally, the equities weigh on petitioner's side. As the ALJ comments, the Board is not prejudiced by M.C.'s attendance in the District. Should the Board ultimately prevail, it has an adequate remedy at law; the Board may assess the petitioner for tuition for M.C., prorated to the time of her ineligible attendance in the School District. N.J.S.A. 18A:38-1. In contrast, there is no such remedy for a child who is improperly denied access to her education.

Accordingly, the Commissioner affirms the Order of the ALJ granting petitioner's Motion for Emergent Relief. The Commissioner notes that granting such relief does not prevent the Board from raising its contention as to the statute of limitations at the hearing on the merits.

The Commissioner directs the Board to immediately readmit M.C. to its public school system during the pendency of proceedings before the Commissioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 9, 1996
DATE OF MAILING FEBRUARY 9, 1996

53-96

53-96

MICHELE DE MAIO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,

RESPONDENT,

AND

MARIANN HELFANT, FRANCIS DELA SANDRO AND LOIS CAPOBIANCO,

INTERVENORS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, former Supervisor of English/Social Studies, alleged she was assigned to and performed the duties of her supervisory position in June 1990 and throughout the summer prior to her technical appointment date of September 1, 1990, and, as such, acquired tenure in this position before the Board rescinded her appointment in June 1992. Petitioner claimed entitlement to ten positions awarded to others subsequent to the rescission of her appointment.

ALJ concluded that the supervisory work performed in the summer of 1990 was not required by the Board but was, rather, voluntarily performed and, therefore, did not count towards tenure in the position of Supervisor of English/Social Studies. Thus, the ALJ found petitioner's RIF was proper and petitioner was not entitled to appointment with back pay to any of the positions at issue in this matter. Petition was dismissed.

Commissioner adopted initial decision with clarification. Commissioner concurred with the ALJ's determination that petitioner did not meet the requisite time period for achieving tenure in her supervisory position pursuant to N.J.S.A. 18A:28-6. Therefore, the Commissioner found it unnecessary to reach to the ALJ's subsequent discussion with respect to petitioner's "entitlement" claims to the ten positions at issue or the timeliness of such claims.

FEBRUARY 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7612-92
AGENCY DKT NO 436-9-92

MICHELE DEMAIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,
Respondent,
v.
MARIANN HELFANT, FRANCIS DELASANDRO AND LOIS CAPOBIANCO,
Intervenors.

Richard J. Kaplow, Esq., for petitioner

Martin R. Pachman, Esq., for respondent
Board of Education of New Providence and Intervenor Lois Capobianco

Robert M. Schwartz, Esq., for intervenors
Mariann Helfant and Francis Delasandro
(Lake and Schwartz, attorneys)

David A. Steffan, participant, *pro se*

Record closed: August 14, 1995 Decided: November 14, 1995

BEFORE **MUMTAZ BARI-BROWN**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 14, 1992, petitioner, Michele DeMaio filed a petition before the Commissioner of Education contesting the action of the New Providence Board of Education (Board or respondent). Petitioner alleged that she acquired tenure in the position of Supervisor English/Social Studies and that Board's action to rescind her appointment to the position through a "reduction in force" (RIF) violated her tenure and seniority rights. Petitioner also alleged that respondent's failure to give her "Rice" notice of the RIF violated her due process rights. Petitioner claimed entitlement to the positions of Supervisor English/Social Studies, Coordinator of Curriculum and Instruction, and Pupil Personnel Services.

The matter was transmitted to the Office of Administrative Law (OAL) on October 1, 1992, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to-15 and *N.J.S.A.* 52:14F-1 to -13. Prehearing conferences were held in the above-entitled matter on December 2, 1992 and April 4, 1995.

On June 2, 1994, the Board moved for summary decision alleging that as a matter of law, petitioner did not acquire tenure in the position of Supervisor English/Social Studies. Further, petitioner was not entitled to an individual notice of the Board meeting at which the Board rescinded her appointment to the position of supervisor.

Petitioner argued that she was assigned to and performed the duties of the Supervisor English/Social Studies in June 1990 and throughout the summer. Therefore, she had acquired tenure in the position before the Board rescinded her appointment to the position on June 18, 1992, for the 1992-93 school year.

On October 5, 1994, I granted the Board partial summary decision. However, I concluded that factual issues existed. If petitioner was required to perform the duties of the supervisor position during the summer of 1990, she may be entitled to tenure credit

2. Did petitioner have seniority rights to the positions described above and, if so, were those rights violated by granting the positions to other persons?

3. Is petitioner entitled to appointment to one of the positions described above with back pay?

FINDINGS OF FACT

Based on the evidence, the following relevant facts are adopted as **FACT;**

1. Petitioner, Michele DeMaio, possesses two educational certificates; an instructional certificate and an administrative certificate. She has been issued endorsements for English, social studies and mathematics on the instructional certificate and endorsements for principal and supervisor on the administrative certificate.

2. DeMaio began her employment with the Board as a teacher in 1966.

3. On June 28 1990, the Board promoted DeMaio to the position of Supervisor English/Social Studies effective September 1, 1990.

4. DeMaio's predecessor in the Supervisor English/Social Studies position did not officially vacate that position until June 30, 1990.

5. The position of Supervisor English/Social Studies is a ten-month position from September through June.

6. On April 28, 1992, the Board voted to grant tenure to DeMaio in the position of Supervisor English/Social Studies effective September 1, 1992.

7. On April 28, 1992, the Board abolished the position of Director of Curriculum and Pupil Personnel Services, held by Dorothy Grandey, effective July 1, 1992, and replaced the position with two new coordinator positions; Coordinator of Curriculum and Instruction, and Coordinator of Pupil Personnel Services/Psychologist.

8. On June 4, 1992, Dr. Grandey, notified Dr. David A. Sousa, Superintendent, that she was asserting a tenure claim to the position of Supervisor English/Social Studies held by DeMaio. Grandey's claim to the position was based on her status as a tenured supervisor in the district. DeMaio was the only nontenured supervisor at the time Dr. Grandey asserted her claim to the position.

9. At the Board's meeting on June 18, 1992, Sousa recommended that the Board appoint Grandey to the position of Supervisor English/Social Studies for the 1992-93 school year instead of the DeMaio because Grandey was tenured as a supervisor and the petitioner was not a tenured supervisor. During the public session of that meeting, the Board rescinded DeMaio's appointment as Supervisor English/Social Studies for the 1992-1993 school year and appointed Grandey to the position of Supervisor English/Social Studies. Also, the Board appointed DeMaio to her former tenured position as teacher for the 1992-1993 school year.

10. On June 17, 1992, DeMaio applied for one of the new coordinator positions, Coordinator of Curriculum and Instruction and Coordinator of Pupil Personnel Services/School Psychologist. She was not offered either position.

11. James Hyers was granted the position of Coordinator of Curriculum and Instruction, and Gerald McCaffrey was granted the position of Coordinator of Pupil Personnel Services/School Psychologist.

12. The position of Coordinator of Curriculum and Instruction required a school administrator endorsement.

13. The position of Coordinator of Pupil Personnel Services/School Psychologist required a supervisor and school psychologist endorsement.

14. In March 1993, the Board renamed the title of Coordinator of Curriculum and Instruction to Director of Curriculum and Instruction; the new title also required a school administrator endorsement.

15. The Board terminated James Hyers in December 1993, effective January 1994. Hyers duties were redistributed among the superintendent, school principals and the Coordinator of Pupil Personnel Services/School Psychologist.

16. In November 1992, Dr. Grandey resigned from the position of Supervisor English/Social Studies and she was replaced by a tenured supervisor chosen from a preferred eligibility list of staff members who had been subject to RIF.

17. The Board renamed the position of Supervisor English/Social Studies to Supervisor of Foreign Languages and Language Arts and added responsibility for foreign languages to the position. The position was granted Charles Zucker.

18. The Board transferred supervisory responsibilities for social studies from the position of Supervisor English/Social Studies to Delasandro, middle school vice

principal/supervisor. Delasandro was also assigned to supervise special education.

19. In April 1993, the position of Middle School Principal was posted at the middle school where DeMaio was assigned.

20. In May 1993, Francis Delasandro was appointed to the position for the 1993-94 school year. The appointment was announced in the *Superintendent's Byline*, a document distributed throughout the school district. The position required a principal's endorsement.

21. In July 1993, Lois Capobianco was appointed to the position of Administrative Assistant for Curriculum and Instruction; the position required a principal's endorsement. Capobianco's appointment was announced in the *Superintendent 's Byline*.

22. In September 1993, the position of Administrative Assistant was renamed Coordinator of Educational Services. The position required a principal's endorsement.

23. Hyers, who held the position Director of Curriculum and Instruction was terminated in December 1993. He was not replaced and the duties were redistributed among several other positions including school principals and Capobianco's position as Coordinator of Educational Services.

24. In November 1994, the Board changed Capobianco's position to Director of Educational Services. The position required a school administrator's endorsement.

25. In September 1994, the Board appointed David Steffan as principal of the high school. DeMaio applied for, but was not offered, the position. The position required a principal's endorsement.

26. DeMaio applied for the position of Salt Brook School Principal no later than October 1994. She was not offered the position.

27. In November 1994, Capobianco's title was changed from Coordinator of Educational Services to Director of Educational Services. This position required either a principal or school administrator endorsement.

28. In February 1995, notice was provided that the Salt Brook School Principal was to be named. Mariann Helfant was appointed in February 1995. The position required a principal's endorsement.

DISCUSSION

I

Whether petitioner was granted tenure or conditional tenure in the position of Supervisor English/Social Studies:

Petitioner stated in her certification that she was "actually assigned and performed all of the supervisory duties required of [her] position beginning in June of 1990 and throughout the entire summer." Thus, for purposes of tenure she commenced employment more than two consecutive calendar years prior to the Board's June 18, 1992 resolution rescinding her employment or more than two academic years within a three year period.

Petitioner testified that she began performing the supervisor's duties on June 13, 1990. A substitute teacher was assigned to take over her class to allow petitioner to interview teacher candidates. Petitioner believed that she had been directed to leave her classroom and conduct the interviews. DeMaio interviewed several candidates in June, including Barbara Balsam and Lisa Capone. In July and August, DeMaio performed various administrative tasks. For example, she updated a reading list and wrote letters and memorandum concerning the 1990-91 school year. She met with Victor Bucossi about curriculum, and had several meetings with Barbara Balsam about curriculum and book orders. Joan Goncznik and Joyce Kenny are secretaries who either worked with or observed DeMaio during the summer. DeMaio conceded, however, that she did not perform certain supervisory duties prior to September 1990. DeMaio claimed that between June 13 to September 1, 1990, she spent 195.5 hours in the position of Supervisor English/Social Studies.

Testimony about DeMaio's duties between June and September 1, 1990, was also presented by Delasandro and Grandey. Delasandro testified that DeMaio was not directed by Robert Lachenauer, the district's former superintendent, to participate in the interviews. When petitioner chose to participate in the process, Lachenauer arranged for a substitute to cover her class until the last day of school, June 21, 1990. Grandey corroborated Delasandro's testimony that Lachenauer did not specifically direct

DeMaio to participate in the interview process. Indeed, when Lachenauer requested DeMaio to interview the candidates she sought Grandey's advice about Lachenauer's request. Grandey also acknowledged that it was common practice for teachers to interview candidates and that it was very difficult to refuse a request made by your boss. Grandey maintained that supervisors were ten-month employees. If they failed to complete their assignments between September and June, the work was done during the summer. Although the work done in the summer was voluntary, supervisors received compensation time for their service.

Lachenauer also provided testimony about DeMaio's duties between June and September 1, 1990. He approved DeMaio's compensation time in lieu of payment for "several days of additional time--some to get acquainted with the job and other days at my request for interviews and attending a 2-day conference." P-2. Although Lachenauer told DeMaio to do whatever she had to do to get ready for the new position, he was "surprised" and "alarmed" to learn that she put in 195 hours during the summer. Many of the tasks performed by petitioner during the summer. For instance, memorandums to language arts/social studies staff which DeMaio prepared on August 3, and 29, could have waited until after school began in September 1990. (P-4, P-16-, P-17). Also, DeMaio's response to a memorandum regarding a mentorship program for new teachers was not due until September 15; DeMaio responded on August 28, 1990. (P-5). Lachenauer acknowledged that DeMaio was a dedicated employee and at times volunteered to assume extra duties during the school year. Further, it was common practice for ten month administrators and teachers to voluntarily complete certain tasks during the summer. Lachenauer maintained that the work petitioner performed during the summer of 1990 was voluntary, not a condition of her employment to the position of Supervisor English/Social Studies.

Petitioner has the burden of proof by a preponderance of the credible evidence. *Atkinson v. Parsekian* 37 *N.J.* 143 (1962).

> The term "burden of proof" refers to the "burden of persuasion"... The burden of persuasion entails more than merely producing evidence which would tend to put the court's mind in a state of equilibrium with respect to whether a certain fact exists or not and if, at the close of the evidence, this is the situation, then the decision must go against the

> party who has the burden of persuasion on the particular issue in question.
>
> [*Johnson v. Barton,* 251 *F. Supp.* 474, 476 (W.D. Va 1966).]

I am persuaded by the credible evidence that DeMaio mistakenly believed that her work during the summer was required by the Board as a condition to the appointment of Supervisor English/Social Studies. Several employees testified that teachers and administrators participate in the interview process. Additionally, ten-month employees often perform administrative tasks during the summer to prepare for the school term. Thus, petitioner's summer work was not necessarily conditioned on her new position as supervisor. I am mindful that the credibility of some witnesses' testimony may be influenced by interest, motive or biases. "A trier of fact may reject testimony because it is inherently incredible, or because . . . it is overborne by other testimony." *Congleton v Pura-Tex Stone Corp.,* 53 *N.J. Super.* 282, 287 (App. Div. 1958). Of all the witnesses who testified about the scope of duties which petitioner performed from June to September 1, 1990 and nature of the supervisory position, I am more persuaded by the testimony of Grandey and Lachenauer. They were knowledgeable about the duties performed by teachers and ten-month supervisors. Moreover, these former employees appeared to have had a positive working relationship with petitioner and held no interest in her claim to the positions sought in this matter. Petitioner's testimony that she was required to perform the duties of the supervisor during the summer of 1990 is overborne by the credible testimony that the work was voluntary.

Based on the evidence, I **CONCLUDE** that petitioner's work in June through the summer of 1990 was not required by the Board. Instead, she chose to participate in interviewing candidates in June and volunteered to perform certain administrative tasks in July and August. I **CONCLUDE** therefore, that petitioner's appointment to the title of Supervisor English/Social Studies was effective on September 1, 1990. I also **CONCLUDE** that the work performed by petitioner prior to September 1, 1990 did not count towards tenure in her position of Supervisor, English/Social Studies. *See, Flood v. Jersey City Bd. of Ed.,* 1984 *S.L.D.* 74 (when summer service is required by the board of education as a condition of regular employment and when the employee does

not receive any additional compensation beyond his annual salary, such time is countable toward tenure); *Mihatov v. Bd. of Ed. of Boro. of Woodcliff Lake,* 1977 *S.L.D.* 1 (neither short summer seminars and workshops nor voluntary summer work performed by a teacher in preparation for the important duty of teaching count toward obtaining tenure).

Additionally, I **CONCLUDE** that the Board's vote on June 18, 1992, to rescind petitioner's appointment to the position of supervisor for the 1992-93 school year, which would have been her third year in the supervisory position, precluded petitioner from acquiring tenure as a supervisor. Further, I **CONCLUDE** that the rescission of petitioner's appointment was based on a reduction in force in the school district effective July 1, 1992. Dr. Grandey, a tenured supervisor whose position as Director of Curriculum and Pupil Personnel Services was abolished by the RIF, claimed entitlement to petitioner's position of Supervisor English/Social Studies. Because petitioner would not acquire tenure in the position before the effective date of the RIF, the rescission effectuated a "bumping" of petitioner in favor of Grandey's superior tenure claim. Therefore, I **CONCLUDE** that the Board's vote to rescind petitioner's appointment was appropriate.

I further **CONCLUDE** that the only tenure accrued by the petitioner is in the position of teacher. Petitioner was appropriately reappointed to her tenured teacher position when the Board rescinded her appointment as supervisor on June 18, 1992, due to the tenure claim asserted by Dr. Grandey, a tenured supervisor. Thus, I **CONCLUDE** that the Board has not violated any tenure rights relative to the ten[1] positions petitioner has claimed entitlement to in this matter.

Petitioner's Entitlement Claims

Petitioner claims she should have been appointed to one of the following positions:

a. Supervisor English/Social Studies held by Dr. Grandey
b. Coordinator of Curriculum and Instruction,held by James Hyers

[1] Based on petitioner's Petition of Appeal and her post-hearing brief dated June 12, 1995, she claimed entitlement to ten positions, three more than the seven indicated in the Amended Pre-Hearing Order dated April 5, 1995.

c. Director of Curriculum and Instruction held by James Hyers

d. Coordinator of Pupil Personnel Services/School Psychologist held by Gerald McCaffrey

e. Administrative Assistant for Curriculum and Instruction, held by Lois Capobianco

f. Coordinator of Educational Services held by Lois Capobianco

g. Director of Educational Services held by Lois Capobianco

h. Middle School Principal held by Francis Delasandro

i. New Providence High School Principal held by David Steffan

j. Salt Brook School Principal held by Mariann Helfant

Petitioner's Seniority Rights

Seniority is a right which only applies to tenured personnel. *Camilli v. Bd. of Ed. of the Northern Highlands Reg. High Schl. Dist.,* 1985 *S.L.D.* 1, 6. A reduction in force provides a mechanism for ranking all tenured teaching staff members in an equitable fashion and in accord with sound educational policies. *Capodilupo v. W. Orange Twp. Bd. of Ed.,* 218 *N.J. Super.* 510, 514 (App. Div. 1987)

When there has been a RIF, as in the present matter, one's right to a preference in reemployment is predicated on her status as a tenured employee. "Chapter 28 of Title 18A *** does not purport to create employment rights for non-tenured employees." *Kaprow v. Bd. of Ed. of Berkeley Twp.,* 131 *N.J.* 572, 585 (1993). Because petitioner did not acquire tenure in the supervisor position she had no right to seniority nor to a place on the preferred eligibility list for such a position. *See, Kaprow, supra,* 131 *N.J.* at 586. Petitioner has only acquired tenure as a teacher. Thus, she had no right to be placed on a preferred eligibility list for any of the positions to which she has claimed an entitlement. The Board, therefore, had no duty to notify petitioner of vacancies in the positions listed above. Therefore, adequate notice which commences the running of the 90-day limitation is that which is sufficient to inform an individual of some fact that the communicating party has a duty to communicate. *Id.* at 587.

I **CONCLUDE** that because petitioner has not accrued tenure in any of the positions she has claimed entitlement to, she also has no seniority rights in those positions.

The Board's and Intervenors' Motion To Dismiss Petitioner's Claims Against Capobianco and the Principals:

Board and intervenors have moved to dismiss the claims against Capobianco and the principals. Respondent and intervenors contend that petitioner is time barred by *N.J.A.C.* 6:24-1.2. Further, it is asserted that the petitioner's claims to a majority of the positions were never properly filed. Thus, the Board and intervenors submit that petitioner's claims to the positions held by Capobianco and the principals must be dismissed.

Petitioner argues that the Board has raised the "90 day rule" at the eleventh hour and thus, the defense is disingenuous and without merit. There has been no showing of surprise or prejudice. Further, petitioner avers that pursuant to an administrative reorganization in 1993, the supervisor positions were abolished and the supervisory job functions were assigned to various principals (intervenors) after the petition was filed. Therefore, the "90 day rule" does not apply to positions created or placed in controversy after the initial petition was filed timely and before the proceeding concluded.

The regulation provides, in pertinent part, that in order to initiate a contested case "a petitioner shall serve a copy of a petition upon each respondent," *N.J.A.C.* 6:24-1.2(a), and that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
>
> [*N.J.A.C.* 6:24-1.2(c).]

Moreover, *N.J.A.C.* 6:24-1.2 requires that a petition of appeal be filed within 90 days of notice of a ruling affecting a petitioner. Formal notice of the school board's action is not necessary to raise a claim. Indeed, the Commissioner has held that a letter from the local board secretary which provided clear and unambiguous notice of the local board's final action triggered the 90-day limitation. K*aprow v. Board of Educ. of Berkeley Twp.*, 255 *N.J. Super.* 76 (App. Div. 1992), *cert. granted,* 130 *N.J.* 16, *aff'd,* 131 *N.J.* 572 (1993). The 90- day rule is to be strictly applied, *Gordon v. Passaic Twp. Bd. of Ed.*, 1985 *S.L.D.* 1929, *aff'd*, No. A.-3294-84 (App. Div. May 27, 1986), *cert. den.,* 105 *N.J.* 534 (1986). The Commissioner has the authority, however, under *N.J.A.C.* 6:24-1.15 to relax the rule; but such authority is rarely invoked. See *Kaprow v. Board of Educ. of Berkeley Twp., supra.*(where court held discretionary waiver of limitations period was not appropriate where the petition was not filed in timely manner). Moreover, relaxation of the regulation is generally unsuccessful unless there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice would occur, *Gordon, supra,* 1985 *S.L.D.* at 1931.

There are no compelling reasons in the present matter to justify a waiver or relaxation of the 90-day limitations period of *N.J.A.C.* 6:24-1.2(c). DeMaio had been actively employed in respondent's school district when the Board made the appointments to which she claimed entitlement. Petitioner interviewed for some of the positions and others were announced and distributed in the school. Thus, she knew about the appointments of Capobianco and the principals. Although petitioner's initial petition was filed and transmitted for hearing to the OAL in 1992, she must timely assert her claim to positions created subsequent to the initial petition. Informal and unofficial notice of the Board's action is sufficient to trigger the 90-day limitation. *Kaprow v. Board . of Educ. of Berkeley Twp., supra.*

I **CONCLUDE** that under the circumstances of this matter, the 90-day period for commencing an action to assert a claim of tenure entitlement to these positions was triggered by the date on which the appointments were made.

I have also considered the Board's and intervenors' allegations that petitioner has not amended her Petition of Appeal nor filed a new petition which includes these claims. Petitioner did not amend her Petition of Appeal nor file a new petition claiming tenure entitlement to Capobianco's and the three principals' positions. *N.J.A.C.* 6:24-1.3 requires that "the name and address of each petitioner, the name and address of or a description sufficient to identify each party respondent, and a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws," must be included in the petition and verified by oath. The regulation also proposes the form of the of the petition. *Ibid.*

Here, in the form of a letter dated February 24, 1995, DeMaio asserted a superior tenure claim to the positions of Middle School Principal held by Francis Delasandro, New Providence High School Principal held by David Steffan and Salt Brook School Principal held by Mariann Helfant. Petitioner contended that the positions and or titles did not exist at the time of the initial petition, but they were successor positions/titles or congruent positions to those which were named in the initial petition. Further, the Board made the appointments after the initial petition was filed. Consequently, petitioner claimed seniority and entitlement to the principal positions and the positions held by Capobianco.

I am persuaded by petitioner's argument that filing a formal amended petition is essentially a technical deficiency under the circumstances. Petitioner has claimed entitlement to several positions "which are successor positions/titles or which are congruent positions to those which are specifically named in the Petition." Petitioner's letter, dated February 24, 1995. Form and procedure should be relaxed when sufficient notice has been given to the affected persons. Indeed, failure to amend a petition to comply with the caption and format requirements of the regulation may prevent an otherwise legitimate claim to go forward. Under the circumstances a formal amended pleading to the initial petition for each separate claim was not fatal. Respondent and intervenors and participant were "sufficiently on notice regarding full scope of the

petitioner's claims, based upon a fair reading of the language of the Petition, as well as the notice and opportunity to respond which the [ALJ] has afforded the respondent repeatedly throughout the discovery and hearing phases of this case." Petitioner's Brief at 2, June 26, 1995. Thus, I **CONCLUDE** that petitioner's failure to serve "a specific and discrete written amendment" to the initial petition regarding her claim to each title and position while the proceedings were pending does not warrant the claims defective.

Petitioner's claims of tenure entitlement to positions a. through j. are disposed of as follows:

a. Supervisor English/Social Studies held by Dr. Grandey

Dr. Grandey was appointed to the position of Supervisor English/Social Studies at the public session of the Board's meeting on June 18, 1992. Petitioner's appointment to this position was rescinded that same day. In her September 14, 1992 petition, petitioner claimed entitlement to the supervisor position. This petition was filed within 90-days of Grandey's appointment to the position. Thus, petitioner's claim to the position of Supervisor English/Social Studies was timely.

Petitioner did not, however, accrue tenure as a supervisor in the position of Supervisor English/Social Studies before it was rescinded on June 18, 1992. Therefore, I **CONCLUDE** that when Dr. Grandey asserted entitlement to the supervisor position for the 1992-93 school year subsequent to the abolishment of her position, the Board's appointment of Grandey to that position instead of petitioner was in accord with the tenure laws.

Furthermore, when Dr. Grandey resigned from the supervisor position in November 1992, petitioner's claim to the position remained insupportable. Petitioner did not possess tenure as a supervisor. Therefore, I **CONCLUDE** that the Board acted appropriately when it replaced Grandey with another tenured supervisor chosen from a preferred eligibility list of staff members who had been subjected to a RIF.

b. Coordinator of Curriculum and Instruction held by James Hyers

The position Coordinator of Curriculum and Instruction was one of two positions created by the Board to replace the position of Director of Curriculum and Pupil Personnel Services; the latter position was abolished on April 28, 1992. The new position was effective July 1, 1992, and was held by James Hyers.

Petitioner claimed entitlement to the position of Coordinator of Curriculum and Instruction in her September 14, 1992 petition. For purposes of the 90-day rule, her claim was timely because the date from which compliance should be calculated was the rescission of petitioner's appointment as supervisor on June 18, 1992.

This position of Coordinator of Curriculum and Instruction required a school administrator endorsement which the petitioner does not possess. Therefore, I **CONCLUDE** that she was not qualified for the position and her claim of entitlement to this position is **DENIED**.

c. Director of Curriculum and Instruction

In March 1993, the position of Coordinator of Curriculum and Instruction was renamed Director of Curriculum and Instruction. The position continued to require a school administrator endorsement. Petitioner does not possess a school administrator endorsement. Therefore, I **CONCLUDE** that she was not qualified for the position and her claim of entitlement to this position is **DENIED**.

d. Coordinator of Pupil Personnel Services/School Psychologist

The second position created by the Board to replace the position of Director of Curriculum and Pupil Personnel Services was Coordinator of Pupil Personnel Services/ School Psychologist. Petitioner claimed entitlement to this position in her September 14, 1992 petition. Therefore, I **CONCLUDE** the petition was timely under the 90-day

rule because the date from which compliance is calculated was the rescission of petitioner's appointment as supervisor, June 18, 1992.

The position of Coordinator of Pupil Personnel Services/School Psychologist required a supervisor and school psychologist endorsement. Petitioner holds the supervisor endorsement, but she is not tenured. Moreover, she does not hold an endorsement as school psychologist, and therefore, she does not meet all of the qualifications for the position. Accordingly, I **CONCLUDE** that her claim of tenure entitlement to the position is **DENIED**.

e. Administrative Assistant for Curriculum and Instruction
f. Coordinator of Educational Services
g. Director of Educational Services

Petitioner has claimed tenure entitlement to three positions held by Lois Capobianco: Administrative Assistant for Curriculum and Instruction; Coordinator of Educational Services and Director of Educational Services. These claims were first asserted by petitioner on at the hearing on November 21, 1994, and then reiterated in petitioner's February 24, 1995 letter.

Capobianco was appointed to the position of Administrative Assistant for Curriculum and Instruction in July 1993 The position was renamed Coordinator of Educational Services in September 1993. The Board changed Capobianco's position to Director of Educational Services in November 1994. Therefore, petitioner's claim on November 21, 1994, goes well beyond the 90-day limitation for the positions of Administrative Assistant for Curriculum and Instruction and Coordinator of Educational Services. Indeed, Capobianco's appointment to these positions in July 1993, and September 1993, respectively, precedes petitioner's claim by more than one year. Petitioner's claim to the position of Director of Educational Services is not time-barred because that appointment occurred in November 1994. Nevertheless, on the merits petitioner has no tenure entitlement to any of the positions held by Capobianco.

Each of Capobianco's positions required a principal's endorsement. The requirements for the Director of Educational Services would also have been satisfied by a school administrator endorsement. Petitioner does possess a principal's endorsement, however, she has not accrued tenure in the position. The same result applies even if petitioner was a tenured supervisor because supervisors and principals are separately tenurable positions under *N.J.S.A.* 18A:28-, and require actual work experience in the position to acquire tenure. *See, Ellicott v. Frankford Twp. Bd. of Ed.,* 1990 *S.L.D.* 1714, *aff'd,* 251 *N.J. Super.* 342 (App. Div. 1991); *Nelson v. Bd. of Ed. of the Twp. of Old Bridge*, 95 *N.J.A.R.*2d (Vol. 4B) 257 (Dept. of Ed.). Thus, I **CONCLUDE** that petitioner has no tenure entitlement to the positions held by Capobianco.

h. Middle School Principal
i. New Providence High School Principal
j. Salt Brook School Principal

Petitioner asserted a superior tenure claim to the Middle School Principal position held by Francis Delasandro, the New Providence High School Principal position held by David Steffan and the Salt Brook School Principal position held by Mariann Helfant by letter dated February 24, 1995.

Delasandro was appointed in May 1993 and Steffan was appointed in September 1994. Consequently, I **CONCLUDE** that petitioner's claim to these two principal's positions is time barred. I **CONCLUDE** that petitioner's claim to the Salt Brook School Principal position was timely because Mariann Helfant was appointed to the position in March 1995. However, petitioner is not tenured as a principal for the same reasons discussed regarding Capobianco, *supra*. Therefore, I **CONCLUDE** that her claims of entitlement to the principals' positions must be **DENIED**.

ORDER

For the reasons discussed above, I have concluded that petitioner did not accrue tenure in the position of supervisor. She possesses tenure rights only in the position of teacher which she achieved prior to her appointment as Supervisor English/Social Studies and to which she was reappointed by respondent upon rescission of the supervisor position. Thus, I further **CONCLUDE** that petitioner is not entitled to appointment with back pay to any of the positions at issue herein.

Accordingly, it is **ORDERED** that each of petitioner's claims of tenure entitlement be **DENIED** and the petition **DISMISSED**.

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

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

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

November 14, 1995
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

11/17/95
DATE

DAG
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
ADMINISTRATIVE LAW JUDGE

NOV 21 1995
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witness List

Petitioner

Michele DeMaio
Victor Bucossi
Barbara Balsam
Joan Goncznik
Joyce Kenny
Stephanie Andrus
Lisa Capone
Dorothy Gandey

Respondent, and Intervenors

Robert A. Lachenauer
Frances Delsandro
John Gaffga

Exhibits:

P-1 Letter to Demaio from Lachenauer dated April 16, 1991.

P-2 Memo to Jean Juris from Lachenauer regarding DeMaio Attendance dated March 27, 1991.

P-3 Memo to DeMaio from Jean Juris dated September 21, 1991.

P-4 Memo to Staff from DeMaio regarding Curriculum dated August 29, 1990.

P-5 Memo to Lachenauer from DeMaio regarding Mentor System dated August 28, 1990.

P-6 Memo to Administrators from Lachenauer regarding New Employees dated August 22, 1990.

P-7 Lettter dated August 1990 (Not in Evidence).

P-8 Lettter dated August 1990 (Not in Evidence).

P-9 Memo to Social Studies Staff from DeMaio regarding Geography dated August 17, 1990.

P-10 (Not in Evidence)

P-11 Memo to Banta and Gross from DeMaio regarding Student Ocean Challenge dated August 17, 1990.

P-12 (Not In Evidence)

P-13 (Not in Evidence)

P-14 (Not in Evidence)

P-15 Letter to Diane Wah from DeMaio dated August 3, 1990.

P-16 Memo to Lachenauer/Middle School Social Studies Staff from DeMaio dated August 3, 1990.

P-17 Memo to 4th Grade S.S. Staff from DeMaio.

P-18 Student Ocean Challenge dated August 3, 1990.

P-19 Letter to Shape of the World from DeMaio dated August 1, 1990.

P-20 Letter to Karen by DeMaio dated August 1, 1990.

P-21 (Not in Evidence)

P-22 Memo (Handwritten) regarding Mods dated June 26, 1990.

P-23 Memo to English/Social Studies Staff from DeMaio dated June 22, 1990.

P-24 Memo to Lachenaurer from DeMaio regarding Junior Achievement dated June 15, 1990.

P-25 Memo to Bowker, Muller, Sinnot from DeMaio regarding Course Proficiency dated June 15, 1990.

P-26 1990-91 School Calendar.

P-27 Performance Evaluation - DeMaio School Year 1990-91 -Final.

P-28 Performance Evaluation - DeMaio's 1st Evaluation with Input.

P-29a List of Novels - Grade Levels 6-12 dated August 2, 1990.

P-29b List of Novels by Abbel Order Texts dated August 2, 1990.

P-29c List of Novels taught in School dated August 2, 1990.

P-30 Language Arts Handbook.

P-31 Correspondence from Harcourt Brace Jovanovich, Inc. dated August 20, 1990.

P-32 Coordination of Pupil Personal Services/School Psychologist - Job Description.

P-33 Coordinator of Curriculum/Instruction - Job Description.

P-34 Affidavit of David Sousa dated May 31, 1994.

P-35 Supervisor Language Art/Social Studies - Job Description.

R-1 Employment Absence Record for DeMaio.

R-2 Minutes of Board of Education Meeting dated March 29, 1990.

R-3 Senority List dated July 1, 1991.

R-4 Employee Absence Card for S. Hayes dated June 1990.

R-5 Union County Supervisor of Schools - Approval of Titles dated July 6, 1992.

R-6 DeMaio Certification.

R-7 Memo from Sousa regarding Middle School Principal Vacancy for dated April 26, 1993.

R-8 Job Description of Middle School Principal.

R-9 Superintendent Byline dated May 27, 1993.

R-10 Memo to Middle School Teachers from Delasandro dated June 8, 1993.

R-11 Memo to Middle School Teachers from Delasandro dated June 9, 1993.

R-12 Job Description of Vice-Principal/Supervisor Social Studies/Special Education dated November 19, 1992.

R-13 Job Description of Director of Educational Services.

R-14 Job Description of Director of Curriculum/Instructor.

R-15 Job Description of Coordinator of Educational Services.

R-16 Approval of Unrecognized Title dated August 24, 1993.

R-17 Draft of Job Description for Administrative Assistant.

OAL DKT. NO. EDU 7612-92

MICHELE DE MAIO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
AND	:	
MARIANN HELFANT, FRANCIS DELA SANDRO AND LOIS CAPOBIANCO,	:	
INTERVENORS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the reply thereto of the Board and Intervenor Lois Capobianco were timely filed pursuant to N.J.A.C. 1:1-18.4. On December 15, 1995, petitioner filed an additional submission entitled "Supplemental Letter Exceptions." As there is no statutory or regulatory authority for such a submission, it will not be herein considered. Finally, on January 2, 1996, Intervenors Mariann Helfant and

Frank DelaSandro submitted a letter memorandum urging the Commissioner's adoption of the initial decision as it relates to petitioner's claim to the position of principal.*

Petitioner's exceptions essentially recast and reiterate her assertion, advanced before the Administrative Law Judge (ALJ), that she was assigned to and performed the duties of Supervisor of English/Social Studies in June 1990 and throughout the summer and, therefore, acquired tenure in this position before the Board rescinded her appointment. In this regard, petitioner asserts that her characterization of the nature and extent of the duties she performed during this period was borne out by her testimony and that of her witnesses. She avers that such testimony underscored the depth and duration of her supervisory activities that summer and confirmed her presence, availability and supervisory responsibilities during this time. Petitioner further objects to the ALJ's portrayal of hearing testimony averring

> ***[Superintendent Robert Lachenauer] did not state that the work performed by Petitioner during the Summer of 1990 was voluntary, but merely conceded that she was not compensated during the months of July and August. Likewise, there is simply no factual basis in the record [for] the ALJ's conclusion that "DeMaio mistakenly believed that her work during the summer was required by the Board as a condition to the appointment as Supervisor of English/Social Studies." (Initial Decision at page 10). Neither Dr. Grandey nor Superintendent Lachenauer challenged the preponderance of detailed testimony by the Petitioner and other independent corroborating witnesses regarding her functioning as a supervisor during the summer in question. (Petitioner's Exceptions at p. 4)

* Given the Commissioner's ultimate determination in this matter, it is unnecessary to consider or address the timeliness of this memorandum.

In reply, respondents Board and Ms. Capobianco argue that petitioner's claim that she accrued tenure as a supervisor, a 10-month position with service beginning in September 1990 and extending to the following June, because she commenced her duties in the summer of 1990 is without foundation. Respondents maintain that testimony proffered by Mr. Lachenauer and corroborated by that of Mr. DelaSandro, is clear that petitioner was not requested or directed to perform whatever preparatory tasks she undertook during the summer at issue but rather performed them voluntarily. As such, respondents urge the adoption of the initial decision.

Upon a careful and independent review of the record in this matter, the Commissioner finds that the ALJ fully considered and addressed petitioner's exception arguments at pages 8-11 of the initial decision, where she concluded that the work performed by petitioner during the summer of 1990 was not a condition of her appointment to the position of Supervisor of English/Social Studies but, rather, performed voluntarily. As such, the ALJ determined that petitioner did not acquire tenure in this supervisory position. The Commissioner concurs with this determination.

With respect to petitioner's assertions regarding testimony advanced at the hearing, the Commissioner notes that without a review of the hearing transcripts in this matter, which were not a part of the record before him, it is not possible to reconcile the parties' claims regarding such testimony. (See In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987).) However, it is clear that the existing record provides insufficient cause to challenge any of the factual determinations or credibility assessments made by the ALJ.

Given that the Commissioner has found that the within petitioner did not meet the requisite time period for achieving tenure in her supervisory position pursuant to N.J.S.A. 18A:28-6, he finds it unnecessary to reach to the ALJ's subsequent discussion with respect to petitioner's "entitlement" claims to any of the ten positions at issue or the timeliness of such claims.

Accordingly, with the clarification noted above, the Commissioner affirms the decision of the OAL dismissing the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 15, 1996
DATE OF MAILING FEBRUARY 15, 1996

53-96

EDU #7612-92
C # 53-96
SB # 20-96

MICHELE DE MAIO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY AND MARIANN HELFANT, FRANCIS DELA SANDRO AND LOIS CAPOBIANCO,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, February 15, 1996

For the Petitioner-Appellant, Richard J. Kaplow, Esq.

For the Respondents-Respondents, Martin R. Pachman, Esq.

For the Intervenors, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

For the Participant, David A. Staffan, pro se

After a thorough review of the record, including the transcripts of the hearings held in the Office of Administrative Law, the State Board of Education affirms the decision of the Commissioner of Education to dismiss the petition in this matter. We find nothing in the transcripts, which were not included in the record before the Commissioner, to alter the Administrative Law Judge's determination that the work performed by petitioner in the summer of 1990 was not required as a condition of her

12/4/96

10-month supervisory assignment. Consequently, we agree that petitioner did not achieve tenure as a supervisor pursuant to N.J.S.A. 18A:28-6.

December 4, 1996

Date of mailing DEC 06 1996

54-96

54-96E

BOARD OF EDUCATION OF BERNARDS TOWNSHIP, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C.M., individually and as parent of minor child, E.M.,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

February 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 261-96
AGENCY DKT. NO. 24-1/96

BOARD OF EDUCATION OF
BERNARDS TOWNSHIP,
SOMERSET COUNTY,
Petitioner,

v.

C.M., INDIVIDUALLY AND AS
PARENT OF MINOR CHILD, E.M.,
Respondent.

Louis R. Franzese, Esq., for petitioner (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

C.M., respondent, *pro se*, on behalf of minor child, **E.M.**

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of an application for emergent relief filed with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9. The matter was transmitted to the Office of

Administrative Law pursuant to *N.J.S.A.* 52:14F-1 through -13. Oral argument was heard on January 29, 1996.

The pertinent facts are undisputed. E.M. is a thirteen-year-old student attending eighth grade at the William Annin Middle School in Basking Ridge. On January 2, 1996, the principal of the middle school, Joan Tonnarelli, implemented a policy barring backpacks in the classrooms, in the hallways, and in the school cafeteria. Students may bring backpacks into the building, but then the backpacks must be placed in school lockers. There are three minutes between periods for students to retrieve any books they need from their lockers. Ms. Tonnarelli feels that backpacks pose a danger to students and teachers and create a potential fire hazard. There are affidavits in the record which indicate that a few teachers have been struck with backpacks or have tripped over backpacks in the classrooms. James S. Buist, a guidance counselor at William Annin, certifies that he has observed large numbers of backpacks on the floor in the rear of the cafeteria, which cause jams of students when they need to exit. This could exacerbate an emergency.

E.M. has refused to abide by the rule since its implementation. Her parents were informed of this by the school, but they support her position. Each day that E.M. arrives to class with her backpack she is given a detention slip for disobedience; she refuses to serve detention. In his certification, superintendent of schools Dr. Dalen Showalter expresses "grave concerns" that this continued open defiance will undermine the school's authority.

On January 15, 1996, petitioner convened a hearing to review the matter. At the conclusion of the proceeding, it supported the rule and upheld the ongoing discipline being imposed. The ruling has not altered E.M.'s conduct. This is the substance of the record.

To establish entitlement to emergency relief, petitioner must show a reasonable likelihood of success on the merits, that there is no adequate remedy at law, that it will suffer greater hardship if relief is denied than will E.M. if relief is granted, and that in the absence of redress, it will be irreparably harmed. *Crowe v. De Gioia*, 90 *N.J.* 126, 132-34 (1982). I do not believe that petitioner has established irreparable harm. A few injuries at the school have been attributed to backpacks and there are some references in the record to petitioner's fire safety concerns. This

latter question would seriously join the issue, but petitioner has not supported its assertion with an affidavit from an appropriate fire prevention official. C.M. placed into the record reports of recent fire safety inspections conducted at William Annin which note egress violations, but say nothing of backpacks as the source of the problem.

Petitioner argues finally that open defiance of school policy threatens a broader breakdown of discipline. There is nothing in the record to support such foreboding. This is a case about an eighth grader resisting authority over a minor school rule. I am not persuaded that immediate and total conformity is urgently required. If other parents and children do not understand, then it is the kind of learning opportunity that civics teachers pray for.

Based on the foregoing, it is my conclusion that petitioner has failed to establish the prerequisites for emergency relief and it is **ORDERED** that this petition be **DENIED**. An expedited plenary hearing will be scheduled for March 12, 1996.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

2/1/96
DATE

SOLOMON A. METZGER, ALJ

/cat

OAL. DKT. NO. EDU 261-96

BOARD OF EDUCATION OF BERNARDS TOWNSHIP, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C.M., individually and as parent of minor child, E.M.,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter and the initial decision and Order of the Office of Administrative Law (OAL) have been reviewed. By letter dated February 1, 1996, the Director of the Bureau of Controversies and Disputes accorded the parties until February 7, 1996 and February 8, 1996, respectively, for the filing of exceptions and reply exceptions to the Administrative Law Judge's (ALJ) decision and Order. Exceptions of petitioner Board (hereinafter Board) were timely filed as were replies thereto by respondents.

The Board's exceptions urge that the ALJ erred in categorizing the issue herein as a student's infraction of a "minor" rule, thereby denying the within motion on the basis of the Board's failure to establish irreparable harm. In reaching this conclusion, the Board asserts that the ALJ failed to accord proper consideration to the certifications, included in its emergent application, attesting to the injuries which have occurred and the hazards created by students' use of backpacks in the school. The Board asserts that such certifications substantiate its contention that permitting E.M.'s continued use of her backpack compromises the Board's ability to assure the safety and well-

being of the students entrusted to its care. The Board further argues that, contrary to the apparent belief of the ALJ, irreparable harm has been established in that permitting E.M.'s continued defiance of a Board rule seriously jeopardizes the Board's ability to preserve school authority which is essential to the effective operation of its school. It contends

> ***this is not simply a case about an eighth grader resisting authority over a minor school rule. This is a case about an eighth grader undermining the entire spectrum of school authority by both refusing to obey the school rule and by refusing to accept the discipline for such resistance. This blatant defiance extends beyond the parameters of one "minor" rule and impacts the overall ability of the school to maintain authority. At the very least, the principal's ability to discipline its students becomes questioned by the students and ultimately weakened. (Petitioner's Exceptions at p. 4)

As such, the Board maintains that it has satisfied the standards required for the granting of its requested relief and, therefore, urges the Commissioner to overturn the ALJ's Order.

In reply, respondents contend that the Board has not established irreparable harm in that the one backpack involved here can hardly constitute the injury risk alleged by the Board or "exacerbate an emergency" by blocking exits. (Respondents' Reply Exceptions at p. 2); and, although the Board asserts that respondents' position has impaired the principal's ability to discipline its students, it presents no specific instances where this has occurred. Moreover, E.M.'s certification "also indicates that school authority has not been eroded." (Id. at p. 3) Respondents further continue to challenge the foundational validity of the research and basis for the rule and object to E.M. currently being inappropriately disciplined in violation of Board policy.

Upon consideration of the record in this matter, including the audiotape of the proceedings before the ALJ, and the standards for granting of emergent relief as set forth in Crowe v.

DeGioia, 90 N.J. 126 (1982), the Commissioner determines to reverse the Order of the ALJ and grant the Board's request for relief for the reasons set forth below.

Initially, with regard to the threshold question of the establishment of irreparable harm in this case, beyond which the ALJ did not reach, the Commissioner disagrees with the ALJ's conclusion that such harm has not been demonstrated. Rather, the Commissioner finds that categorization of this matter as simply "a case about an eighth grader resisting authority over a minor school rule" (Initial Decision at p. 3) unduly minimizes the situation which actually exists herein. Indeed, the Commissioner determines that, under the particular circumstances of this matter, irreparable harm is inherent and continuing and concludes that to find otherwise imposes an undue injustice upon the Board and the other students in the school and would be violative of the strong public interest in the fair administration of justice.

Specifically, the Commissioner observes that it is axiomatic that local boards of education have the authority and obligation to establish and maintain rules and regulations to assure the orderly operation of their schools. Further, students are expressly required to comply with such rules and to "submit to the authority of the teachers and others in authority over them." (See N.J.S.A. 18A:37-1.) Moreover, it is also axiomatic that duly promulgated board rules are entitled to a presumption of correctness, unless and until they are successfully challenged. In this regard, it is specifically noted that there is an established administrative mechanism in place for individuals who wish to challenge a board rule as unnecessary, unjust, or unfairly applied through the filing of a Petition of Appeal before the Commissioner of Education pursuant to N.J.A.C. 6:24 et seq.

In the instant matter, rather than utilizing the available procedures in place to challenge a board determination with which they disagreed, respondents, instead, simply elected to defy the rule and further refused to accept the disciplinary consequences of such defiance. The

Commissioner finds that to allow such acts of willful disobedience to continue creates an inherent irreparable harm in that it seriously compromises the Board's legitimate interest in assuring that rules, which it deems essential to the maintenance of order and the fulfillment of its duty to provide an environment conducive to teaching and learning, are obeyed by all students until such rules are found arbitrary, capricious, or unreasonable on legitimate challenge through proper processes.

Further, the Commissioner concludes that to ignore the continued violation by this one student exacerbates the inherent irreparable harm in that such failure is inequitable and unjust to the other students in the school who are conscientiously abiding by the rule. The Commissioner notes that if a substantial number of other students were to follow the example being set by the behavior of respondent and unilaterally decide to disregard this or any other school rule with which they are displeased, the resultant effect for the District would be chaos.

Finally, public interest in the fair administration of justice further confirms the existence of inherent irreparable harm necessitating the enjoining of respondents' behavior. As previously noted, administrative remedies of review are clearly available providing respondents with an acceptable method of challenging the Board's restriction of conduct. As such, it is not unreasonable to expect compliance with the established rule herein unless and until it is successfully challenged through the appropriate procedures. (See Matter of Felmeister, 95 N.J. 431, 446.)

With respect to the remaining requirements under Crowe, supra, necessary to the granting of emergent relief in this matter, i.e., the probability of succeeding on the merits and the balancing of the equities, the Commissioner finds and determines that these have also been satisfied in the case at bar. Specifically, in order to succeed on the merits, the within Board is required to prove that the rule at issue was within its discretionary power, duly adopted, and not arbitrary, capricious or unreasonable. The Commissioner concludes that, for purposes of emergent relief, the

certifications submitted by the Board in support of its emergent application made a sufficient facial showing that this rule was duly promulgated and has a rational basis. As such, the Board has established a significant probability of prevailing on the merits of this matter.

A weighing of the equities involved here demonstrates that a greater harm would inure to the Board by permitting respondents' conduct to continue during the period prior to an ultimate determination on the merits of this matter than that which would accrue to respondent, E.M., by being enjoined from the freedom to carry her backpack throughout the school during this period.

Accordingly, the recommended Order of the ALJ is reversed and the Board's Motion for Emergent Relief is granted. Respondents are hereby ordered to immediately comply with the rule herein at issue. It is further directed that this matter move forward for the scheduled expedited hearing at the OAL on the underlying merits of the Board's claims.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* The Commissioner notes that the matter of discipline imposed between the time the rule here was under appeal to the Board of Education up to the time of the Commissioner's decision, raised by respondents in their reply exceptions, is a matter to be heard on the merits and is not appropriately addressed in this emergent application.

56-96

C.L.N. AND W.N., on behalf of their minor children, E.L. AND J.N.,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parents and natural guardians of E.L. and J.N. appealed Board's determination that the children were not entitled to attend the Berlin District's schools free of charge.

Having considered the evidence and testimony presented in this matter, the ALJ concluded that petitioners were at all times domiciled in Berlin although for a period of time the father resided in Lindenwold to protect that residence from vandals. ALJ concluded E.L. and J.N.were entitled to attend the public schools in Berlin free of charge, pursuant to N.J.S.A. 18A:38-1(a).

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5219-95

AGENCY DKT. NO. 86-4/95

CAROL LOMBARDO NORCROSS AND
WILLIAM NORCROSS,

Petitioners,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF BERLIN,
CAMDEN COUNTY,

Respondent.

Carol Lombardo Norcross and **William Norcross,** petitioners, pro se

William R. Powers, Jr., Esq., for respondent (Moss, Powers & Posternock, attorneys)

Record Closed: October 16, 1995 Decided: January 5, 1996*

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter commenced on April 10, 1995, when Carol Lombardo Norcross and William Norcross, as parents and natural guardians of E.L. and J.N., (hereinafter petitioners) filed a petition of appeal with the Commissioner of Education contesting the March 20, 1995

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* An extension of time pursuant to N.J.S.A. 52:14B-10(c) was requested and granted.

determination of the Board of Education of the Borough of Berlin (hereinafter respondent) that E.L. and J.N. were not entitled to attend the public schools of the district free of charge. An answer was filed on behalf of respondent on May 9, 1995. On May 19, 1995, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on July 19, 1995 at which time the following were identified as issues for determination at hearing:

1. Have petitioners been domiciled continuously in respondent's school district from September 1994 through the present?

2. If the answer to the previous question is no, were petitioners' children nevertheless entitled to attend the schools in respondent's district free of charge, pursuant to N.J.S.A. 18A:38-1d or otherwise?

3. If the answers to issues number one and two are no, what is the amount of tuition payments owed by petitioners for the time of their students' ineligible attendance in the schools?

A hearing was scheduled for September 12, 1995 at the Trenton office of the Office of Administrative Law and took place as scheduled. Following the close of testimony respondent submitted the certification of Robert Stead, Board Secretary and Business Administrator for respondent. No objection having been received to the certification, the document was marked as R-6 in evidence on October 16, 1995, whereupon the record closed.

FINDINGS OF FACT

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

Carol Ann Lombardo and William A. Norcross were married on June 18, 1988. Ms. Norcross is the mother of E.L., who was born on March 2, 1984. She is also the mother of J.N., who was born on July 27, 1988. William Norcross is the father of J.N. Prior to 1992, Mr. & Mrs. Norcross and the two children resided at 32 New Freedom Road, with Mrs. Norcross's mother, Marion Lombardo, who is the owner of that property. In or about 1990, Marion Lombardo had purchased another property at 2119 Brighton Avenue, Lindenwold, New Jersey. That property was purchased as an investment; the purchase price was $52,000 and the intention was to fix up the house and to sell it and make money. At first the property was not habitable and Mr. Norcross would travel back and forth from the house in Berlin to work on the property. After the property became habitable, a friend of Mrs. Norcross and the friend's two children stayed in the property; Mr. Norcross continued to work on improving it. When Mrs. Norcross's friend and her children moved out of the property, Mr. Norcross moved in to protect the property from vandalism while he continued to work on the improvements. Shortly thereafter, Mrs. Lombardo listed the property for sale with a real estate broker. Mr. Norcross continued to reside in the property to protect it from vandals.

Commencing with the time Mr. Norcross first moved into the Brighton Avenue property, Mrs. Norcross would pick the children up after school in Berlin and take them to the Brighton Avenue property where Mr. Norcross would watch them while she continued to work at her job as a travel agent. After work Mrs. Norcross would join her husband and children for dinner at the Brighton Avenue property; after dinner she returned the children to the house in Berlin. Sometimes Mrs. Norcross would spend the night in Berlin and sometimes she would spend the night in Lindenwold. The children never slept at the house in Lindenwold nor did they have any clothes there. Petitioners continued to support their children; Mrs. Lombardo did not contribute to their support. At sometime during 1992 Mrs. Norcross had the Brighton Avenue address put on her driver's license. Her automobile registration remained at the New Freedom Road address in Berlin. The telephone at the Brighton Avenue property was listed in the name C.A. Lombardo from approximately 1992 to 1994. Mr. and Mrs. Norcross each received mail at both addresses. Although the property has been listed for sale with real estate brokers for quite some time, it remains unsold.

By letter dated December 22, 1993, Carolyn Baechtle, Ed. D., Superintendent of respondent's school district, wrote to petitioners as follows:

> It has been brought to our attention that your family does not live in Berlin Borough. As you know, only legal residents of the Borough can attend Berlin Community School. We can assist you in the transfer process providing transfer cards and discussing the academic programs with the staff in the proper school district. Should you have any questions regarding this matter, please do not hesitate to contact me.

Petitioners responded with a certification of Marion Lombardo dated January 6, 1994, which provided:

> This is to verify Carol Ann Lombardo Norcross family, mother to E.L. and J.N., have always and do reside with me at 32 New Freedom Road, Berlin, New Jersey 08009

Apparently there was no further inquiry on behalf of respondent until December 7, 1994 when Dr. Baechtle again wrote to petitioners questioning their residence. The December 7, 1994 letter was sent to petitioners at the Brighton Avenue address. The certified mail return receipt card was signed Carol Ann Norcross on December 19, 1994. On February 22, 1995, counsel for respondent wrote to petitioners at the Brighton Avenue address and advised them that respondent would be considering the issue of their residency at a meeting on March 16, 1995. The certified mail return receipt card for that letter was signed on February 23, 1995. Petitioners did not attend the March 16, 1995 meeting. Thereafter by letter dated March 20, 1995, sent to petitioners at the Brighton Avenue, Lindenwold address, respondent's counsel advised that petitioners' children were no longer entitled to attend respondent's schools free of charge. The within matter followed. This concludes the recitation of uncontested facts.

Carol Ann Lombardo Norcross testified that the property at Brighton Avenue, Lindenwold, is still for sale. Because of the within proceedings, however, her husband no longer stays in that house; it is vacant and it has been vandalized, she said. She testified that she and her husband never intended to live in the house; the arrangement was one merely to protect the property until it was sold. She offered as P-10 in evidence a copy of a Bell Atlantic telephone bill for a telephone she had installed at 32 New Freedom Road in her name in May 1995. She also offered copies of her driver's license which has listed her residence again as 32 New Freedom Road since December 19, 1994. She also indicated that she had registered to vote from 32 New Freedom Road in May 1995; prior to that time she had not been registered to vote anywhere. She noted that R-4 in evidence, the letter from respondent's counsel dated March 20, 1995, erroneously recites that she had admitted to Dr. Baechtle that she was living in Lindenwold. She indicated that this was not an accurate statement of fact, that after she had received either Dr. Baechtle's December 19, 1994 letter or Mr. Powers' February 1995 letter she had gone to Dr. Baechtle's office but it was to show her that her current driver's license listed her address as 32 New Freedom Road.

William A. Norcross testified that he moved out of the home in Lindenwold in May 1995 and since that time he has always stayed at the 32 New Freedom Road address. He indicated that it had never been his intention to remain in the house in Lindenwold on any permanent basis; he said he did not even like the house. He indicated that he had listed the Brighton Avenue address on his driver's license at the advice of his insurance agent, and he acknowledged that in fact his license still says Lindenwold because he has not changed it yet. Finally, he indicated that in January or February 1995 all of the insurance records had been changed back to reflect 32 New Freedom Road as his address.

Both Carol Ann Lombardo Norcross and William A. Norcross were candid, sincere and credible witnesses. Respondent offered no evidence to controvert either of their testimony. I therefore **FIND** the facts set forth in their testimony as additional relevant facts in this matter.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:38-1, the statute relevant to a determination in this matter, provides in pertinent part:

> Public schools shall be free to the following persons over 5 and under 20 years of age:
>
> (a) Any person who is domiciled within the school district;
>
> . . .
>
> (b)(2) If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent of administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. . . .
>
> . . .

Respondent contends that William A. Norcross was domiciled in Lindenwold during the 1994-95 school year. Respondent then concludes that petitioners' daughter J.N. was therefore also

domiciled in Lindenwold regardless of where she actually lived, citing Mansfield Twp. Bd. of Ed. v. State Bd., 101 N.J.L. 474 (Sup. Ct. 1925) for the proposition that "(t)he permanent residence of the father is that of the child, until the latter is emancipated and chooses a place of residence of its own." Respondent also cites Lea v. Lea, 18 N.J. 1 (1955) and argues that E.L.'s domicile was also Lindenwold even though Mr. Norcross is not his father because he would take his domicile from his mother and the "domicile of a wife and children is that of her husband, in the absence of a marital offense which would create in her a right to a separate domicile." Respondent also cites, inter alia, Kowalski v. Wojtkowski, 19 N.J. 247 (1955), wherein the Court stated, "The domicile of origin 'comes into being as soon as the child becomes at birth an independent person; and if the child is legitimate the domicil is that of the father,' but if the child is illegitimate it takes its mother's domicile; . . ." Id. at 258. It is petitioners' position, on the other hand, that at all times they have been domiciled at 32 New Freedom Road, Berlin, although for a time period preceding May 1995, Mr. Norcross did reside at 2119 Brighton Avenue, Lindenwold, and Mrs. Norcross occasionally resided there also. The uncontroverted evidence in this matter clearly supports petitioners' position.

An individual may have many residences, if he or she is financially able to do so, but can have only one domicile. Miller vs. U.S. Fidel. & Guar. Co., 127 N.J. Super. 37, 42 (App. Div. 1974); Continos v. Parsekian, 68 N.J. Super. 54, 58-59 (App. Div. 1961); DiFiore v. Erie-Lackawanna R.R. Co., 67 N.J. Super. 267 (Law Div. 1961).

> "The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. . . . Home is the place where a person dwells and which is the center of his domestic, social and civil life. . . . Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence." Matter of Unanue, 255 N.J. Super. 362, 374-5 (Law Div. 1991); See also, In re Jaffe, 74 N.J. 86, 90-91 (1977).

Although petitioners' burden in this matter requires them to establish entitlement to attend the public schools free of charge only by a preponderance of the competent and credible evidence, the evidence in this matter clearly and convincingly demonstrates that petitioners never intended to make 2119 Brighton Avenue, Lindenwold their home; the purpose of Mr. Norcross's temporary residence was merely to keep the property safe while it was being improved and pending sale. The fact that petitioners used 2119 Brighton Avenue, Lindenwold, as a temporary residence does not deprive their children of the right to a free public education from the district in which they are domiciled. As the Court explained in State v. Benny, 20 N.J. 238, 251 (1955):

> "Residence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a 'home' according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile. Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile."

Because I have **CONCLUDED** that William Norcross and Carol Ann Lombardo Norcross have at all times been domiciled at 32 New Freedom Road, Berlin, it is not necessary to address the cases cited by respondent which set forth rules for determining a child's domicile. I note, however, that extreme care should be exercised in citing those "rules;" wives and children are no longer considered property of the husband and in fact those rules are generally useful only when the child actually resides with neither parent. As Judge LeFelt commented in V.R. On Behalf of A.R. v. Bd. of Ed. of Boro. of Hamburg, 2 N.J.A.R. 283 (1980):

> The law establishing an infant's domicile seems based on the rationale that an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location. E.g., Commonwealth ex. rel Human v. Hyman, 64 (1949); Commonwealth ex. rel Welsh v. Welsh, 96 Pa. Super. 426 (1929); Pieretti v. Pieretti, 13 N.J. Misc. 98 (Ch. Div. 1935). Changing times should, therefore, affect the domicile law only when

> the factual situation presented undercuts this rationale. For example, the rising recognition of women's independence is reflected in the Conflict of Law Restatement, Second Sec. 21 (1971) where a wife, under special circumstances, may have a different domicile from her husband, even if she is living with him. Thus, in cases where a child lives with either parent who is separated from a spouse, the rationale that custody, support and maintenance rests with the father in all cases may be undercut by the facts. Walton v. Board of Education of the City of Brigantine, 51 S.L.D. 39 (1950-51). (Sic) . . .

See also, M.A.M., as Parent and Natural Guardian of M.M., v. Board of Education of the Black Horse Pike Regional School District, 1974 S.L.D. 845 for an excellent discussion of the difference between domicile and residence as it applies to the right of children of a father who is temporarily residing elsewhere to attend the schools of their actual domicile free of charge. In that case the children were even residing with the father temporarily elsewhere while the mother remained in the domicile.

For all of the foregoing reasons, I **CONCLUDE** that petitioners' children are entitled and at all times relevant have been entitled to attend the public schools in respondent's district free of charge, pursuant to N.J.S.A. 18A:38-1(a).

For the reasons expressed herein, respondent is **ORDERED** to permit E.L. and J.N. to continue to be enrolled in their schools free of charge.

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

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

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

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

Jan 5, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

1/10/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioners:

P-1 Letter from Millard Wilkinson, Mayor, Borough of Berlin, addressed, "To Whom it May Concern," dated September 6, 1995

P-2 Marriage certificate for William A. Norcross and Carol Ann Lombardo

P-3 Photo copies of vehicle registration and operator's license for Carol A. Lombardo

P-4 Letter from Carolyn Baechtle, Ed. D., Superintendent, to petitioners, dated December 22, 1993, with handwritten letter from Miriam Lombardo attached (2 pages)

P-6 Explanation of benefits from Pennsylvania Blue Shield addressed to William A. Norcross, 32 New Freedom Road, Berlin, New Jersey

P-7 Dental bill from Central Orthopedic Associates, addressed to E. L., 32 New Freedom Road, Berlin, New Jersey

P-8 Envelope from Moss, Powers & Posternock to Mr. & Mrs. William Norcross, 32 New Freedom Road, Berlin, New Jersey

P-9 Residential listing agreements for 2119 Brighton Avenue (3 pages)

P-10 Bell Atlantic bill to Ms. C.A. Lombardo, 32 New Freedom Road, Berlin, New Jersey, dated July 26, 1995

For respondent:

R-1 Copy of certified mail return receipt, dated 12/24/93 with 12/22/93 letter from Carol Baechtle, Ed. D., attached (2 pages)

R-2 Letter from Carol Baechtle, Ed. D., Superintendent, to petitioners at 2119 Brighton Avenue, Lindenwold, New Jersey, dated December 7, 1994 (3 pages)

R-3 Letter from William R. Powers, Jr., Esquire, to petitioners at 2119 Brighton Avenue, Lindenwold, New Jersey, dated February 22, 1995 (2 pages)

R-4 Letter from William R. Powers, Jr., Esquire, to petitioners at 2119 Brighton Avenue, Lindenwold, New Jersey, dated March 20, 1995 (2 pages)

R-5 Photocopy of page from telephone directory showing listing for C.A. Lombardo at 2119 Brighton Avenue, Lindenwold, New Jersey

R-6 Certification of Roger Stead, Board Secretary and Business Administrator, dated September 13, 1995 (2 pages)

EXHIBITS FOR IDENTIFICATION ONLY

P-5 Letters dated February 28, 1995 and May 22, 1995 sent to New Freedom Road address

WITNESSES

For petitioners:

Carol Ann Lombardo Norcross
William A. Norcross

For respondent:

None

OAL DKT. NO. EDU 5219-95

C.L.N. AND W.N., on behalf of their minor children, E.L. AND J.N.,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings of the Administrative Law Judge in the initial decision, and further agrees that petitioners, satisfying the criteria of N.J.S.A. 18A:38-1 et seq., have established eligibility for E.L. and J.N. to attend the respondent school district.

Accordingly, the recommended decision of the (OAL) is adopted as the final decision in this matter, and the Board is hereby ordered to permit E.L. and J.N. to continue to be enrolled in their schools free of charge.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 16, 1996
DATE OF MAILING FEBRUARY 16, 1996

57-96

57-96-DHP

IN THE MATTER OF THE :

DISQUALIFICATION FROM COMMISSIONER OF EDUCATION

SCHOOL EMPLOYMENT OF : DECISION

JUNE A. SEIFRED.

:

FEBRUARY 16, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8639-95

AGENCY DKT. NO. DHP #68-95

JUNE A. SEIFRED,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

June A. Seifred, petitioner, pro se

New Jersey State Department of Education, respondent, appearing pursuant to N.J.A.C. 1:1-5.6(a)

Record Closed: November 22, 1995 Decided: January 5, 1996

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

This matter concerns the appeal of the petitioner, June A. Seifred, from her disqualification from employment as a school bus driver pursuant to N.J.S.A. 18A:6-7.1 and 18A:39-19.1.

By letter dated May 12, 1995, the Department of Education (Department) determined that the petitioner was disqualified from employment as a school bus driver. The petitioner filed an appeal and on August 2, 1995, the State Board of Education remanded the matter to the Commissioner of Education (Commissioner) for a hearing. On September 25, 1995, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing took place on November 22, 1995, and the record closed on that date.

FINDINGS OF FACT

I **FIND** the facts in this matter are not in dispute.

In December 1994, the petitioner got a job as a school bus driver with the George Dapper Bus Company. Pursuant to N.J.S.A. 18A:6-7.1 and 18A:39-19.1, school bus drivers are subject to a criminal history record check. Through this check, the Department was informed that the petitioner was arrested for the possession of narcotic equipment and dangerous drugs on March 22, 1985, and was ordered on January 14, 1986, to pay a $1,750 fine. On October 5, 1985, the petitioner was arrested for the possession of marijuana and was sentenced on March 6, 1986, to one year of probation and a $175 fine. On November 23, 1985, the petitioner was arrested for the possession of dangerous drugs and was sentenced on May 30, 1986, to five years of probation and a $150 fine. By letter dated October 30, 1995, Florence Caporaso stated that she was a probation volunteer and that Ms. Seifred reported to her while on probation. Ms. Caporaso stated that while on probation, Ms. Seifred got married and had a daughter, and that she demonstrated that she is well-organized and a devoted mother. According to Ms. Caporaso, the petitioner's excellent attitude resulted in the early termination of her probationary period (three years instead of five). Also, the petitioner presented a certificate of rehabilitation with a declaration that the petitioner's employment as a school bus driver would not be incompatible with the welfare of society, signed by Dennis W. Beyes, chief of probation (R-1p).

By letter dated February 10, 1995, the Department notified the petitioner that its check had revealed a criminal record and gave the petitioner the opportunity to challenge the accuracy of the criminal record or to establish rehabilitation.

In response to the Department's letter, the petitioner admitted the convictions but argued that she has been rehabilitated. As stated, the Department decided that the petitioner was disqualified due to the drug convictions and that she had not shown rehabilitation. The petitioner filed an appeal with the State Board of Education. In its decision, the State Board of Education concluded that the petitioner's written submission presented significant evidence of rehabilitation; however, the board remanded the matter for a hearing so that the petitioner would have ample opportunity to present a record to support her representation of rehabilitation.

Ms. Seifred filed a request for a stay which was granted by the Department by letter dated May 31, 1995. Ms. Seifred is still employed by George Dapper Inc. Margaret McGinness, the assistant manager of the company, in a letter dated August 11, 1995, wrote that Ms. Seifred is a good worker and there have been no complaints regarding her driving. Also, Russell H. Mancino, a fellow employee and friend, wrote that Ms. Seifred acts in a professional manner while at work and that he has seen no indication that she uses any drugs.

At the hearing, Ms. Seifred stated that she is thirty-four years old, divorced and supports her eight-year-old daughter. According to Ms. Seifred, in 1985 she was using drugs and had friends who used drugs. She said that since then, she has completely changed her life; she has new friends who do not use drugs, and she has devoted her life to being a good mother and participating in her daughter's school-related activities. Ms. Seifred introduced into evidence a certificate documenting her involvement in a workshop conducted by the Effective Parenting Information for Children group and a certificate of appreciation for service during the 1994-95 school year issued by the Woodbridge Township Board of Education.

For several years prior to getting a commercial driver's license and becoming a bus driver, Ms. Seifred worked as a baby-sitter for a number of people. Three parents submitted letters attesting to her competency and responsibility as a baby-sitter. In addition, two of her neighbors submitted letters indicating that Ms. Seifred is a good mother and does not now use drugs.

Carmel and Robert Garrone, the petitioner's parents, testified that the petitioner was involved in drugs and associated with drug users in 1985. They both testified that she has changed her life-style, now has different friends and is an excellent mother. The petitioner currently lives with her parents, and they both testified that she no longer uses drugs.

CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:6-7.1(e), a person with a criminal record will not be disqualified from being a school bus driver if said person shows clear and convincing evidence of his or her rehabilitation. This section sets forth a number of factors to be considered in determining whether the person had affirmatively demonstrated rehabilitation. These factors are:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense:

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

Having reviewed the testimony and the documents admitted into evidence, I **CONCLUDE** that the petitioner has affirmatively demonstrated rehabilitation.

Although Ms. Seifred had three drug convictions, the criminal activity occurred during one year - 1985, and she has had no arrests or convictions since then. She has successfully completed her probationary period and she no longer uses drugs. Since 1985, the petitioner has become a mother and has shown her commitment to being an excellent mother. She has also shown that she was a responsible baby-sitter for several years and now is a competent school bus driver.

Therefore, I **ORDER** that the petitioner is not disqualified from employment as a school bus driver.

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

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

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

January 5, 1996
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

1/10/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 17 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

P-1a Letter from Richard A. DiPatri to June A. Seifred, dated May 31, 1995

P-1b Certified letter from Florence Caporaso, dated October 30, 1995

P-1c Letter from Shirley Palfi

P-1d Letter from Russell H. Mancino

P-1e Letter from Margaret McGinness, dated August 11, 1995

P-1f Certificate of Appreciation issued to June Seifred by the Effective Parenting Information for Children groups

P-1g Certificate of Appreciation issued to June Seifred for service during the 1994/95 school year by the Woodbridge Township Board of Education

For the Respondent:

R-1a Letter from Roslynne Novack to Deborah Antanaitis, dated August 8, 1995

R-1b Letter from Leo Klagholz to June A. Seifred and Arlene G. Lutz, dated August 4, 1995

R-1c State Board of Education Decision dated August 4, 1995

R-1d Letter from Roslynne Novack to June A. Seifred and Arlene G. Lutz, dated July 21, 1995

R-1e Letter from Arlene G. Lutz to Roslynne Novack, dated June 21, 1995

R-1f Consent Order signed by June A. Seifred and Arlene G. Lutz

R-1g Letter from June A. Seifred to the Legal Committee, dated June 10, 1995

R-1h Letter from James E. McGreevey to Leo Kalgholz, dated June 2, 1995

R-1i Letter from Arlene G. Lutz to Roslynne Novack, dated June 15, 1995

R-1j Letter from Rosylnne Novack to Nancy Kaplen, dated June 7, 1995

R-1k Letter from June A. Seifred to the Legal Committee, dated June 1, 1995

R-1l Letter from Richard A. DiPatri to June A. Seifred, dated May 31, 1995

R-1m Letter from June A. Seifred to Richard DiPatri, dated May 23, 1995

R-1n Letter from June A. Seifred to Richard DiPatri, dated May 23, 1995

R-1o Letter from Richard A. DiPatri to June A. Seifred, dated May 12, 1995

R-1p Certification issued regarding June Garrone Seifred by the Middlesex County Probation Office

R-1q Letter from Hope R. Blackburn to June A. Seifred, dated March 30, 1995

R-1r Letter from the Bureau of Controversies and Disputes to the Office of Criminal History Review, dated March 14, 1995, with attachments

R-1s Letter from Paul H. Carabelli to Hope Blackburn, dated March 3, 1995

R-1t Certified letter from Patricia Turco to the New Jersey Department of Education

R-1u Letter from Charlotte G. Weber to the New Jersey Department of Education, dated February 27, 1995

R-1v Certified letter from Bobbi Kimowitz, dated February 20, 1995

R-1w Certified letter from Susan Dubin, dated February 27, 1995

R-1x Certified letter from June A. Seifred to the New Jersey Department of Education, dated February 27, 1995

R-1y Certified letter from Carmel Garrone to the New Jersey Department of Education, dated February 27, 1995

R-1z Letter from Carl H. Carabelli to the Union County Court Clerk, dated February 14, 1995

R-1aa Letter from Carl H. Carabelli to the Rahway Municipal Court, dated February 14, 1995

R-1bb Letter from Carl H. Carabelli to the Rochelle Park Municipal Court, dated February 14, 1995

R-1cc Letter from Carl H. Carabelli to the Edison Township Board of Education, dated February 10, 1995

R-1dd Letter from Carl H. Carabelli to June A. Seifred, dated February 10, 1995

R-1ee Applicant Authorization and Certification signed by June A. Seifred

WITNESSES:

For the Petitioner:

June A. Seifred

Carmel Garrone

Robert Garrone

For the Respondent:

None

OAL DKT. NO. EDU 8639-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM		COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
JUNE A. SEIFRED.		
	:	

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

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusion of the Administrative Law Judge that Ms. Seifred has demonstrated rehabilitation by clear and convincing evidence in accordance with N.J.S.A. 18A:39-19.1 et seq. and is, therefore, qualified for school employment within the intent of the criminal history record check laws.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter. Ms. Seifred is deemed qualified for school employment as a bus driver for the reasons articulated in the initial decision. This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of August 2, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 16, 1996

DATE OF MAILING FEBRUARY 16, 1996

58-96

58-96DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
ERNEST W. CHESTER, JR.	:	
_____	:	

FEBRUARY 16, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8585-95

AGENCY DKT. NO. DHP #28-95

ERNEST W. CHESTER, JR.,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Ernest W. Chester, Jr., petitioner, pro se

New Jersey State Department of Education, respondent appearing pursuant to N.J.A.C. 1:1-5.6(a)

Record Closed: November 22, 1995 Decided: January 5, 1995

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

This matter concerns the appeal of the petitioner, Ernest W. Chester, Jr., as to his disqualification from school employment pursuant to N.J.S.A. 18A:6-7.1.

By letter dated March 2, 1995, the Department of Education (Department) determined that the petitioner was disqualified. The petitioner filed an appeal and on July 7, 1995, the State

on July 7, 1995, the State Board of Education remanded the matter to the Commissioner of Education (Commissioner) for a hearing. On September 20, 1995, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing took place on November 22, 1995, and the record closed on that date.

FINDINGS OF FACT

I **FIND** the facts in this matter are not in dispute.

In 1991, the petitioner got a job as a counselor/teacher aide with the Family Guidance Center Corporation (Center), a private school for handicapped students. Mr. Chester was an assistant group leader for boys from ages eight to twelve. The school is under the supervision of the Department and pursuant to N.J.S.A. 18A:6-7.1, all employees of the school are subject to a criminal history record check. This check revealed that the petitioner had been arrested for the possession of marijuana in July 1989 and pled guilty to the offense on June 12, 1991. He was ordered to pay fines and costs totaling $605 and his driver's license was suspended for six months. The petitioner did not pay the $605, and a warrant was issued against him on January 16, 1992.

By letter dated July 11, 1994, the Department notified the petitioner that its check had revealed a criminal record and it gave the petitioner thirty days in which to challenge the accuracy of the criminal record or to establish rehabilitation. Mr. Chester did not respond within thirty days, and in September 1994 the Center was notified of his disqualification from school employment. The Center terminated Mr. Chester's employment due to the disqualification letter and his use of drugs during the period he was employed by the Center.

Mr. Chester submitted a letter to the Department dated October 25, 1994, in which he admitted that he had been arrested for the possession of marijuana and pled guilty, and that initially he was financially unable to pay the fine. According to the petitioner, he was not aware that a warrant had been issued against him and he paid the fine on October 12, 1994. Also in his

letter, the petitioner stated that he was almost twenty-four years old at the time of his arrest and that he "was not in the habit of abusing substances on a regular basis" and had "not been in any trouble with drugs or any other dangerous substance" (R-1h). Along with his letter, Mr. Chester submitted a letter from Princeton House dated November 14, 1994, stating that he was in its Intensive Outpatient Program for chemical dependency, and a letter from the Center dated November 23, 1994, stating that any future employment was conditioned on the completion of his rehabilitation program and the outcome of the disqualification appeal.

As already stated, the Department decided that the petitioner was disqualified from school employment due to the drug conviction pursuant to N.J.S.A. 18A:6-7.1(b), and that he had not shown rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e). While the petitioner's appeal was pending before the State Board of Education, Deputy Attorney General Geraldine Callahan submitted a brief in which she argued that the disqualification should be upheld since the petitioner did not present clear and convincing evidence of rehabilitation. She noted that Mr. Chester had a recent drug conviction and that as a teacher aide he would work closely with young students. Also, Ms. Callahan noted that while the letter Mr. Chester submitted from Princeton House clearly states that he has a chemical dependency problem, in his October 25, 1994 letter to the Department Mr. Chester denied being a substance abuser.

At the hearing, Mr. Chester stated that he is now thirty years old, single and helps support his three-year-old daughter. According to Mr. Chester, he had to leave college during his second year and slowly started to use drugs because of his disappointment about not completing college. At the time, all of his friends were using drugs. He said that up until his suspension from the Center, he had been in denial; he had refused to admit that he had a problem. He went to Princeton House in November of 1994 for an evaluation of his drug problem and Princeton House recommended its Intensive Outpatient Program for twelve weeks. Mr. Chester was unable to complete the program because his insurance ran out; however, he now attends Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings and goes to a Trenton detox center.

According to Mr. Chester, he has been drug-free for about one year, and he has changed his life. He no longer associates with friends who use drugs. Currently he is working for a temporary employment service, and he would like to get his job back with the Center, which he

said was the best job he ever had. Mr. Chester feels that he can help the students entrusted to him.

Mae Chester-Hall, the petitioner's mother, testified that she initially did not know that her son had a drug problem. She said that her son has recognized his problem and has changed his life-style. He is about to become a father for the second time, and his desire to be a good father and to work with children at the Center prompted this behavior change.

CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:6-7.1(e), a person with a criminal record will not be disqualified from school employment if said person shows clear and convincing evidence of his or her rehabilitation. This section sets forth a number of factors to be considered in determining whether the person had affirmatively demonstrated rehabilitation. These factors are:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense:

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

Having reviewed the testimony and the documents admitted into evidence, I **CONCLUDE** that the petitioner has not affirmatively demonstrated rehabilitation at this time.

Although Mr. Chester's only conviction for possession of drugs was several years ago, he admittedly continued to use drugs until 1994, including times he was working with children at the Center.

Mr. Chester did not complete the chemical dependency program at Princeton House; however, he states that he has been drug-free for one year and that he is still getting help by attending AA and NA meetings. He claims that he has stopped associating with friends using drugs and recognizes that he needs to be drug-free to be a good father and to get another job working with children. Although Mr. Chester has shown that he has taken affirmative steps towards rehabilitation, insufficient time has past since he stopped using drugs for him to show rehabilitation by clear and convincing evidence. This is true especially since Mr. Chester wants a job counseling children.

Therefore, I **ORDER** that the petitioner is disqualified from school employment.

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

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

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

January 5, 1996
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

1/10/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 17 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

R-1a Letter from Roslynne Novack to Hope Blackburn, dated July 10, 1995

R-1b Decision of the State Board of Education, dated July 7, 1995

R-1c Letter from Roslynne Novack to Ernest W. Chester, Jr., and Deputy Attorney General Geraldine Callahan, dated June 29, 1995

R-1d Letter brief from Deputy Attorney General Geraldine Callahan, dated May 4, 1995

R-1e Letter from Richard A. DiPatri to Ernest W. Chester, Jr., dated March 2, 1995

R-1f Letter from Sharon Stockwell of Princeton House regarding Ernest Chester, dated November 14, 1994

R-1g Letter from James M. Rigel of the Family Guidance Center Corporation regarding Ernest Chester, dated November 23, 1994

R-1h Letter from Ernest W. Chester, Jr., to Carl H. Carabelli, dated October 25, 1994

R-1i Letter from Geraldine Callahan to Roslynne Novack, dated April 20, 1995

R-1j Letter from Ernest W. Chester, Jr., to Rosylnne Novack, dated April 17, 1995

R-1k Letter from Rosylnne Novack to Nancy Kaplen, dated April 3, 1995

R-1l Letter from Ernest W. Chester, Jr., to the Department of Law and Public Safety, dated March 30, 1995

R-1m Letter from Ernest W. Chester, Jr., to the Legal Committee, dated March 30, 1995

R-1n Letter from Carl H. Carabelli to Hope Blackburn, dated February 15, 1995, with attachment

R-1o Letter from Ernest W. Chester, Jr., to Mr. Challender, dated January 13, 1995

R-1p Letter from James M. Rigel to Jim Challenden, dated October 4, 1994

R-1q Letter from Connie L. McCalla to Carl H. Carabelli, dated January 31, 1995

R-1r Letter from Carl H. Carabelli to Ernest W. Chester, dated January 10, 1995

R-1s Letter from Carl H. Carabelli to Dr. Bernice Venable, dated January 10, 1995

R-1t Letter from Carl H. Carabelli to James Rigel, dated September 27, 1994

R-1u Letter from Connie L. McCalla to Carl H. Carabelli, dated September 22, 1994

R-1v Letter from Carl H. Carabelli to Dr. Bernice Venable, dated September 2, 1994

R-1w Letter from Carl H. Carabelli to Ernest W. Chester, Jr., dated July 11, 1994

R-1x Applicant Authorization and Certification for criminal history review, signed by Ernest W. Chester, Jr., on April 21, 1994

WITNESSES:

For the Petitioner:

Ernest W. Chester, Jr.

Mae Chester-Hall

For the Respondent:

None

OAL DKT. NO. EDU 8585-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
ERNEST W. CHESTER, JR.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions submitted by Mr. Chester were timely filed pursuant to N.J.A.C. l:1-18.4.

Mr. Chester's exceptions request the Commissioner to overturn the Administrative Law Judge's (ALJ) decision disqualifying him from school employment. He states that he is currently attending counseling sessions at the Catholic Charities in Trenton and advises that he would agree to be tested for drugs at any time in order to remain in his school position which challenges him in so many creative ways.

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusion of the ALJ that Mr. Chester has not demonstrated rehabilitation by clear and convincing evidence in accordance with N.J.S.A. 18A:6-7.1 and is not, therefore, qualified for school employment within the intent of the criminal history record check laws. In so concluding, the Commissioner was particularly cognizant of the nature of the position

Mr. Chester seeks to occupy, i.e., counselor/teacher aide, one with direct responsibility for the care, supervision or instruction of students with behavioral problems. Further, the observation made by the ALJ on page 5 of her initial decision "Although Mr. Chester's only conviction for possession of drugs was several years ago, he admittedly continued to use drugs until 1994, **including times he was working with children at the Center**." (emphasis added) was particularly troubling given the Commissioner's obligation to ensure that the students of this state are provided with school environments which are safe and free of alcohol and drugs.

Accordingly, the initial decision of the OAL sustaining Mr. Chester's disqualification from school employment is affirmed for the reasons stated therein. This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of July 5, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 16, 1996

DATE OF MAILING FEBRUARY 16, 1996

(SB) 58-96

DHPL #324-96
SB # 58-96

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT : DECISION
OF W.M.M.B. :

Decided by the Deputy Commissioner of Education, July 26, 1996

For the Petitioner-Appellant, W.M.M.B., pro se

W.M.M.B. (hereinafter "petitioner"), who was employed as a teacher's aide at a private, non-profit school for autistic children, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that she had been arrested in March 1988 and subsequently convicted for possession of cocaine. The record review also revealed convictions following arrests for several nondisqualifying offenses: larceny/forgery in 1987, larceny in 1988, and shoplifting in December 1991. Petitioner sought to overturn her disqualification on the basis of rehabilitation.

In a letter decision dated July 26, 1996, the Deputy Commissioner of Education upheld the disqualification,[1] concluding that petitioner had failed to demonstrate clear

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

11/6/96

and convincing evidence of her rehabilitation as required by N.J.S.A. 18A:6-7.1. The Deputy Commissioner found that petitioner's evidence of rehabilitation was "significantly less persuasive...given your recent and subsequent nondisqualifying conviction which occurred in 1991."

Petitioner filed the instant appeal to the State Board of Education.

After a thorough review of the record, we reverse the decision of the Deputy Commissioner. We find that petitioner has demonstrated clear and convincing evidence of her rehabilitation.

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

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

Petitioner's submissions to the Deputy Commissioner include a letter from the Director of Education at the school in which she had been employed prior to her disqualification, who indicates that petitioner "has been a responsible, caring and dependable worker. She has demonstrated patience and commitment to her students. I feel she is an asset to our program and hope she can continue to work for us." The teacher in whose classroom petitioner had served as an aide praises her as "a very conscientious and hard-working person. In the classroom [petitioner] has shown empathy and caring towards my students....[Petitioner] was and is an asset to my classroom."

The owner of a restaurant in which petitioner had been employed for four years commencing in 1990 lauds her as "a very hard and dedicated worker." He notes that "[petitioner] has worked very hard to be where she is today despite what troubles she had gone through in the past."

Petitioner's supervising probation officer indicates that she was compliant while on probation following her cocaine conviction and satisfied her obligations. He also confirms that petitioner successfully completed an outpatient substance abuse program at Children's Psychiatric Center in Eatontown.

In addition, petitioner's submissions to the Deputy Commissioner reveal that she received an associate degree from Brookdale Community College in May 1994. One of petitioner's professors underscores her academic achievements and commends her as exhibiting "maturity and understanding of the mistakes she had made in her life." Petitioner indicates that she is continuing her education at Monmouth University and expects to graduate next year. There have been no further arrests since December 1991.

Petitioner acknowledges the "poor judgments" and "bad choices" she made after moving out of her parents' house at the age of 16 in order to escape a physically abusive father. In her appeal brief, petitioner explains the shoplifting conviction by indicating that a friend, unbeknownst to her, had placed some merchandise under the seat of her stroller while they were out shopping with petitioner's child.

While the gravity of petitioner's offenses is apparent, we find that further penalization of this individual is neither a just result nor warranted under the terms of the statute. Given the uncontradicted evidence in the record, including the recommendations of petitioner's supervisors, her successful completion of a substance abuse program and her efforts to obtain a college education and work experience, we conclude that petitioner has convincingly demonstrated her rehabilitation under N.J.S.A. 18A:6-7.1(e). We note further that the drug and larceny charges occurred while petitioner was 19- and 20-years-old, and that the evidence of rehabilitation submitted by petitioner covers the period subsequent to her 1991 shoplifting arrest. We note, in addition, that, as a teacher's aide, petitioner would be under the supervision of a classroom teacher.

Accordingly, in view of our finding that petitioner has demonstrated clear and convincing evidence of her rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e), we reverse the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey as a teacher's aide.

November 6, 1996

Date of mailing NOV 08 1996

59-96

59-96

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
E.J.B. AND J.H.B.,	:	
RESPONDENTS.	:	
_____	:	

FEBRUARY 20, 1996

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
E.J.B. AND J.H.B.,	:	
RESPONDENTS.	:	
	:	

For the Board, Gloria L. Buxbaum, Esq.

This matter having been opened before the Commissioner of Education by way of Petition of Appeal filed on November 3, 1995, seeking tuition reimbursement pursuant to N.J.S.A. 18A:38- 3; and

The Commissioner having directed respondents by notices dated November 9, 1995, December 12, 1995 and January 2, 1996 to file an Answer to the charges against them; and

The certified mail notice, dated January 2, 1996, having been returned unclaimed, yet there being no indication that the notices sent via regular mail did not reach respondents; and

As of this date, neither respondents, nor any attorney on their behalf, having filed an Answer to the charges against them, and each count of the charges against respondents having been deemed to be admitted; now therefore

IT IS ORDERED on this 20th day of February 1996 that summary judgment shall be granted to the Board of Education and that respondents shall pay tuition in the amount of $1,950 due the Board for the period of April, May and June of 1995 when respondents' daughter, M.B.,

attended free public school in Livingston as a nonresident pupil. There being no provision for the grant of attorney's fees or costs within the Commissioner's authority, said fees and costs are not herein granted. Pascack Valley Regional High School District v. Kwon, 93 N.J.A.R. 2d (EDU) 897, 898, citing Balsley v. North Hunterdon Board of Education, 117 N.J. 434 (1990).

COMMISSIONER OF EDUCATION

FEBRUARY 20, 1996

DATE OF AMILING FEBRUARY 20, 1996

61-96

CHRISTINE WEERHEIM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 21, 1996

OAL DKT. NO. EDU 12482-94

CHRISTINE WEERHEIM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 21, 1996
DATE OF MAILING FEBRUARY 21, 1996

62-96

62-96

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

FEBRUARY 21, 1996

OAL DKT. NO. EDU 11488-94

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 21, 1996

DATE OF MAILING FEBRUARY 21, 1996

63-96

63-96

J.C.,
PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioning student-athlete appealed action of NJSIAA prohibiting him from playing in a state championship football game to Superior Court, Chancery Division, which accepted jurisdiction of the matter and denied emergent relief. Petitioner then appealed to Superior Court Judge Michael P. King, who ordered a stay of the NJSIAA regulation and set the matter for a full appellate panel. J.C., who was disqualified for "flagrant unsportsmanlike conduct," played in the state championship game and contributed significantly to the victory. The following week, Judge King transferred the case to the Commissioner of Education for review as a controversy and dispute under school laws.

Commissioner found that petitioner failed to demonstrate by substantial credible evidence that the disqualification rule was arbitrary, capricious or unreasonable or that the rule was improperly applied in this case. Petition was dismissed.

FEBRUARY 22, 1996

J.C.,
PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, : DECISION

RESPONDENT. :

For Petitioner, Henry G. Broome, Jr., Esq. (Broome & Bellucci)
Harry E. Franks, Jr., Esq. (Franks & Tripician)

For Respondent, Steven P. Goodell, Esq. (Picco Herbert Kennedy)

This matter has come before the Commissioner of Education by way of an Order of Transfer from Superior Court with cover letter, supporting brief and record of court proceedings, including pleadings, on December 15, 1995, following the issuance of a stay of a New Jersey State Interscholastic Athletic Association (NJSIAA) ruling by Judge Michael P. King, Superior Court of New Jersey, issued on December 8, 1995, restraining the NJSIAA from prohibiting a minor athlete, J.C. (Petitioner), from playing in a state championship football game. The NJSIAA decision was based on a finding that J.C. violated Special Sport Regulation set forth at Rule 2, Note 4, which states:

> a. Any Student-Athlete or coach disqualified before, during or after an interscholastic event for unsportsmanlike and flagrant verbal or physical misconduct will be disqualified from the next two (2) regularly scheduled games/meets, ***with the exception of football which will carry a one (1) game disqualification, at that level of competition and all other game(s)/meet(s) in the interim at any level in addition to any other penalties which the NJSIAA or a league/conference may assess.***

> *CL Once a coach/player has been disqualified, NO appeals will be honored from the player, coach, official or any other party. Disqualification is a judgement call and officials must be certain the act warrants disqualification. All complaints against an official must be directed to the official's Chapter Secretary and the NJSIAA.* (emphasis added) (NJSIAA Handbook, 1995-6 at 81-82)

Petitioner argues that the above-stated rule (hereinafter disqualification rule) is arbitrary and capricious, thereby prohibiting the NJSIAA from imposing any suspension thereunder without first providing for an appeal process.

NJSIAA seeks for the Commissioner to uphold the disqualification rule as applied, finding that J.C. was ineligible to participate in the state championship game.

Upon careful consideration of the briefs of counsel, the videotape of December 1, 1995, Mainland-Ocean City football game, the requirements set forth in N.J.A.C. 6:24-1.1 et. seq., and the Commissioner's established standard of review in NJSIAA matters, the Commissioner determined to decide this matter on the papers submitted. Upon review, the Commissioner determines that the NJSIAA's decision to deny J.C.'s eligibility did not exceed the reasonable interpretation of NJSIAA's Bylaws.

FACTUAL BACKGROUND

On December 1, 1995, Mainland Regional High School played Ocean City High School in the NJSIAA South Jersey, Group III Semi-Final Championship game. Larry McKeever, one of the game officials, issued a penalty against J.C. for allegedly punching another player. J.C. was then disqualified. The game was won by Mainland, qualifying them for the state championship game the following week against Camden Woodrow Wilson High School.

Because J.C. was disqualified for reason of "flagrant unsportsmanlike conduct," J.C. was declared ineligible to play in the following week's state championship under the NJSIAA disqualification rule. (NJSIAA'S Brief at p. 5)

J.C. appealed this disqualification directly to Superior Court, Chancery Division, which accepted jurisdiction of the matter and denied emergent relief. Plaintiff then appealed to Superior Court Judge Michael King, who conducted an evening hearing where he reviewed the videotape and heard oral argument and entered a stay of the NJSIAA regulation. Judge King then set the matter for decision by a full appellate panel.

The following day, J.C. played football and, according to published reports, contributed significantly to Mainland's ultimate victory. The following week, Judge King remanded the case to the Commissioner of Education for decision.

APPLICABLE LAW

The NJSIAA is a voluntary association. The Commissioner's scope of review in NJSIAA determinations is an appellate one. N.J.S.A. 18A:11-3; Board of Education of the City of Camden v. NJSIAA, 92 N.J.A.R. 2d (EDU) 182, 188. The Commissioner may not overturn an action by the NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. B.C. v. Cumberland Regional School District, 220 N.J. Super. 214, 231-232 (App. Div. 1987). Further, the burden of proof that an action was so deficient rests with the person challenging the decision. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 297 (App. Div. 1960). In such cases, the Commissioner may not substitute his judgment for that of the Association, even when he

might judge otherwise in a *de novo* review. Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 S.L.D. 259.

ARGUMENTS OF THE PARTIES

In his papers, J.C. first argues that the disqualification rule is arbitrary and capricious. J.C. requests that in reviewing this rule, the Commissioner remain mindful that it evolved from the National Federation Soccer Rules, which fact is critical, in that soccer officials utilize a yellow card warning system, which provides individuals with a warning *prior* to issuance of a red card ejection. In NJSIAA's application of the rule, no warning was issued and there is no provision for any yellow card warning system or its equivalent under NJSIAA rules. (Petitioner's Brief at pp. 3-4)

J.C. further avers that game officials are provided with no objective criteria in applying the rule to determine whether to eject a student-athlete. The rule only requires that "prudent judgment" be exercised, which was not utilized in the present case. (Id. at p. 4) J.C. argues that the rule proscribes "a right without a remedy" which is disfavored in the law.

NJSIAA argues that the Commissioner of Education has jurisdiction over this matter, pursuant to N.J.S.A. 18A:11-3, and that Superior Court should not have accepted jurisdiction.

NJSIAA next argues that the disqualification rule has been consistently upheld by the Commissioner as reasonable and that it was created for several important purposes which are set forth below along with petitioner's arguments to invalidate such reasons.

NJSIAA's first stated reason is that the rule discourages unsportsmanlike conduct and warns players and coaches "upfront" of possible problems if they don't govern themselves accordingly, thus, preventing dangerous or harmful acts from occurring in the first place. (NJSIAA's Brief at p. 10) Petitioner states that there is no indication that J.C. even participated in unsportsmanlike conduct and, therefore, the rule is not applicable. Further, J.C. argues that the rule does not differentiate between offenses and this alleged conduct should not be equated with the more serious conduct of instigating a melee or possession of a weapon. (Petitioner's Brief at p. 5)

NJSIAA next argues that the rule helps insulate officials from pressure by partisan fans to change or reverse a judgment call since all disqualification decisions are "hotly contested." NJSIAA's Brief at p. 10) Petitioner, in contrast, argues that while the aforementioned argument may apply to the game in which alleged unsportsmanlike conduct occurred, it certainly does not apply to subsequent games. Moreover, petitioner argues that the pressure must be balanced against the harm to student-athletes. (Petitioner's Brief at p. 5)

Thirdly, NJSIAA avers that the rule allows for the game to be decided on the field -- not in the courts, so that the game results are final and not subject to revision. (NJSIAA's Brief at p. 10) Contrarily, petitioner argues that the disqualification rule should only apply in the game where the alleged unsportsmanlike conduct occurred and not to subsequent games. It is J.C.'s contention that an independent review should be conducted *before* subsequent game suspension. (emphasis in text) (Petitioner's Brief at p. 5) J.C. further argues that NJSIAA's contention that games should be decided on the field is disingenuous in that NJSIAA's director has stated

his intention to institute legal action to strip Mainland Regional of its championship -- a position clearly at odds with any claim that games be "*decided on the field.*" (emphasis in text) (Petitioner's Brief at p. 6)

Fourth, NJSIAA argues that the rule prevents second guessing of judgment calls by people who were not in a position to see what the official saw at the time. Videotapes are invariably inconclusive as they do not show the event from the same perspective that the game official had. (NJSIAA's Brief at p. 11) Petitioner contends this argument is arbitrary in that it assumes the game official was in the position to know the tenor and atmosphere of the contest at the time of the ejection. J.C. avers, rather, that officials should be able to revise their determinations upon further review. (Petitioner's Brief at p. 7)

The NJSIAA's fifth and sixth reasons in support of the rule are that providing hearings for each of the 732 yearly disqualifications is burdensome and costly. (NJSIAA's Brief at p. 11) Petitioner, however, disagrees and proposes a balancing test. J.C. says the Court must first look at the burden upon the student wrongfully barred from participating in the state championship game because it is hurtful -- a student is being denied the opportunity to perform before college scouts, etc. Furthermore, J.C. contends the cost factor should not relieve NJSIAA from providing hearings as it contends discovery would discount NJSIAA's claim that it has insufficient funds to provide hearings (Petitioner's Brief at p. 8) J.C. further argues that the cost of hearings would not bankrupt the NJSIAA if it changed its rule to require each member school to provide a representative to conduct two reviews of automatic suspensions per year. This would create only a minimal burden on representatives and no cost to NJSIAA. (Id. at p. 9)

Seventh, NJSIAA says the rule prevents the imposition of harsher and more severe penalties for improper conduct because in some instances a student could be expelled for unsportsmanlike conduct rather than simple suspension from subsequent athletic contests. (NJSIAA's Brief at p. 12) It also argues that the rule is essential and has been soundly endorsed by its member schools. It argues that when J.C. and other interscholastic athletes and coaches voluntarily participate in NJSIAA contests, they do so with full knowledge of the disqualification rule. (Id.)

NJSIAA continues by citing several cases wherein the Commissioner upheld the validity of the NJSIAA disqualification rule. Petitioner distinguishes the cases discussed by NJSIAA as inapplicable in this case. Petitioner argues, in the instant case, the facts are contested, in that J.C. did not participate in the alleged unsportsmanlike conduct whereas, in the cases presented by NJSIAA students did undertake the alleged unsportsmanlike conduct.

NJSIAA summarizes stating that the disqualification rule must be enforced since a camera is unable to go where the game official is able to go and that the game films show that the official was positioned to make his call. Moreover, it argues that the official's position had not changed after viewing the films. (NJSIAA's Brief at p. 17) Thus, the NJSIAA argues that the disqualification rule was properly applied against J.C. on December 1, 1995. (Id.)

COMMISSIONER'S DETERMINATION

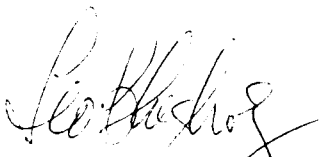
Upon careful consideration of the arguments presented and review of the record, the Commissioner finds that the record herein is sufficient to establish that the NJSIAA's

determination was not arbitrary, capricious or otherwise improper and that the Association's reasons set forth for enacting the disqualification rule are rational and purposeful.

In so finding, the Commissioner notes that it is not his position to determine whether the unbecoming conduct occurred, as the NJSIAA rule delegates this determination to game officials and therefore, no review is warranted, or proper, in this forum.

Accordingly, for the reasons set forth herein, the Commissioner finds that petitioner has failed to demonstrate by substantial credible evidence that the disqualification rule is arbitrary, capricious or unreasonable or that the rule was improperly applied in the instant case. Thus, the Commissioner adopts as his own those findings and conclusions of the NJSIAA in this matter and dismisses the Petition of Appeal.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

FEBRUARY 22,, 1996

DATE OF MAILING FEBRUARY 22, 1996

64-96

64-96

R.D. AND V.D., on behalf of C.D., a minor; AND M.H. AND M.H.,on behalf of M.H. AND S.H., MINORS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, ADRIENNE O'NEILL, SUPERINTENDENT OF SCHOOLS, AND HARRY EVANS, ASSISTANT SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners, residents of the District and parents of pupils attending nonpublic schools, sought a determination that the Board failed to provide a reasonable, safe bus stop for their children who were transported by the Board pursuant to N.J.S.A. 18A:39-1. Matter was opened before the New Jersey Superior Court, Law Division and transferred to the Commissioner of Education who transmitted the matter to OAL.

ALJ found that under the circumstances of this matter, the transportation policy of the Board was discriminatory on its face. No public school pupil in the District was forced to walk on an unsafe county highway as the nonpublic pupils were. Although safety is the responsibility of the municipality, not the school district, the Board should have known when it established the bus stops that there was no safe way to walk to those stops. ALJ concluded the Board must provide safe transportation to qualifying nonpublic school pupils or reimburse the parents in the amount of $675 per pupil per year or the amount determined pursuant to Section 2 of P.L. 1981, c. 57 (N.J.S.A. 18A:39-1a), effective September 1, 1995.

Commissioner modified the initial decision and remanded the matter to OAL for further proceedings. Commissioner found that the Board did not violate N.J.S.A. 18A:39-1 and did not act in bad faith with respect to its statutory obligations. Commissioner reiterated that the provision for safe conditions of travel to and from the bus stops is a municipal function. Commissioner did remand matter to OAL for resolution as to the scope of the issue(s) remanded by the Superior Court, and, specifically, for a determination of whether petitioners' constitutional claim as to differential treatment of nonpublic pupils was properly before the ALJ.

FEBRUARY 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3474-95

AGENCY DKT. NO. 64-3/95

R.D. AND V.D., ON BEHALF OF C.D., A MINOR; AND M.H. AND M.H., ON BEHALF OF M.H. AND S.H., MINORS,

Petitioners,

v.

BERNARDS TOWNSHIP BOARD OF EDUCATION, ADRIENNE O'NEILL, SUPERINTENDENT OF SCHOOLS; AND HARRY EVANS, ASSISTANT SUPERINTENDENT OF SCHOOLS,

Respondents.

Dennis T. Kearney, Esq. and **Loryn P. Riggiola,** Esq., for petitioners (Pitney, Hardin, Kipp & Szuch, attorneys)

Michael R. Speer, Esq., for respondents (Hurley & Vasios, attorneys)

Record Closed: November 27, 1995 Decided: January 11, 1996

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

The petitioners, residents of Bernards Township and parents of pupils attending nonpublic schools, seek a determination that the respondent Board of Education has failed to provide a reasonable, safe bus stop for their children who are transported by the respondent Board pursuant to *N.J.S.A.* 18A:39-1 and regulations adopted to further the legislative intent.

This matter was opened before the New Jersey Superior Court, Law Division, the Honorable Katherine R. Dupuis, JSC, presiding. Judge Dupuis transferred the matter to the Commissioner of Education. *N.J.S.A.* 18A:6-9. The Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. The matter was heard on October 26, 1995 in the Bridgewater Municipal Court. Counsel timely filed posthearing submissions and the record closed on November 27, 1995.

PAROL AND DOCUMENTARY EVIDENCE

Virginia Darche, one of the petitioners, testified. She has resided at 50 Butternut Lane since June 1993. She and her husband have five children ranging in age from six months to nine years. In June 1993, her oldest child finished first grade. Before the family moved into the development, the witness called the district's transportation supervisor and asked where her children's bus stop would be. She was informed that it would be at the corner of Childs and Hardscrabble Roads. The witness believed the area was unsafe and drove her child to school for the last three weeks of the term.

In August 1993, the witness applied for transportation services for her children. She received a bus pass in the mail. The bus stop for 1993-94 was designated as Childs Road and Lakeside Slope. This is further from the petitioner's home than the originally designated bus stop. The new bus stop is approximately 1.1 miles from the petitioner's home.

The petitioner traced the path a child would walk from her home to the designated bus stop (P-1). There are no sidewalks in the development and none on the county road upon which

the children would have to walk. Hardscrabble Road is narrow, winding, wooded and has no real shoulder on either side.

The island formed at Childs and Hardscrabble Roads is surrounded by paved roads and has a utility pole on it. The witness advised the Board and stated at hearing that an automobile cannot safely stop to let off a child at the small triangle which is perhaps four feet on a side.

The area at the next assigned stop, Lakeside Slope at Childs Road, has a small island area formed where Lakeside Slope splits to meet the county highway. There are no curbs or sidewalks in the immediate area. To the right side of the triangle is a pond and there are three homes nearby on Hardscrabble Road. Lakeside Slope is unpaved at that point. To the left there are newspaper and mailboxes. Again, the witness did not use the assigned bus stop because she believed it to be unsafe. She would not let her children walk to that point nor would she drop them off at that point. Visibility is poor at a bend in the road. There is no supervision and there is no place for an automobile to wait safely.

Throughout the 1993-94 and 1994-95 school years, the witness continued to drive her children to school. In summer 1994, she again applied to the Board for transportation. The same bus stop was designated and the witness again refused to use it.

In the 1993-94 school year, the witness tried to get the location of the bus stop changed. She was advised that the designated stop was within one and one-half miles of her home and that it satisfied legal requirements. The witness than called Assistant Superintendent Evans. She asked for information such as route data and says the information was not supplied.

Other school children in the neighborhood are picked up in the neighborhood. See P-2 through -2c. There is a cement slab approximately ten feet by twelve feet on Butternut Lane that serves as the neighborhood school bus stop.

The witness again contacted the transportation supervisor and asked why a van for children being transported to the local parochial school could not be provided. The witness says she was told that vans were full with the exception, perhaps, of one seat. It would be too

expensive to bring in a van for the parochial pupils. The witness further testified that the assistant superintendent told her that the district may not lawfully exceed a cost of $675 per child per year and that bringing in a van to transport the parochial school pupils would exceed that amount.

In August 1984, the witness met with the assistant superintendent who said he could not help. The witness asked what would happen if one or more public school pupils moved into the development. The assistant superintendent said he would have to provide transportation irrespective of the cost. The witness could recall no discussion of minibus capacity.

In the prior summer, the witness had requested that the bus that serves parochial pupils on Childs Road come into the neighborhood. She was told that the bus was too big to negotiate the area. The witness has seen "regular" school buses on Hardscrabble Road, but not in the development.

Mary Hobin, also a petitioner, testified similarly. She has two children who attended parochial school grades two and three at the time she moved into the area. She recalls receiving no mailed notice of her children's school bus stop. She believes she was told orally that it would be at the island where Childs and Hardscrabble Roads meet. She has never used that bus stop because she believes it to be unsafe. Children cannot walk there and there is no place to park. The triangle is at best ten feet by eight feet.

At the end of the 1992-93 school year, the witness spoke to the district's transportation supervisor concerning minibuses. She was told that they were full, but that the supervisor would see what she could do for the 1993-94 school year. The witness filled out and submitted transportation forms for 1993-94. She received word that the bus stop assignment was at Hardscrabble and Childs Road. She immediately called Board offices.

The witness was angry because her children would be picked up at a place she considered both remote from the development and unsafe. She spoke to the assistant superintendent, explained the situation and asked for a safer stop. The assistant superintendent either wrote or called her and notified her that the bus stop would be at 236 Childs Road, which is the foot of a

private driveway. The witness did not use this stop for the reasons she had already stated. Hardscrabble Road is unsafe for walking.

The witness made one attempt to use the 236 Childs Road designated spot. She parked in front of the home, but her automobile blocked traffic. It was difficult for a child to exit the car on either the left or the right side. The witness never used that stop again.

The witness again contacted the Board. A Board agent said that they would work on it. The witness also called county and state offices and asked that the situation be looked into. At this point, the $675 cap had not yet been mentioned to the witness.

The witness drove her children to school for the balance of the year. She did receive a letter from the Board standing by the assistant superintendent's decision.

The witness contacted local police and asked an officer to walk to route to the designated spot. He said that would be unnecessary because the route is plainly unsafe. The witness received a letter from the Chief of Police dated June 15, 1993 (P-4) that verifies that the area that the children would walk and the areas of the two designated stops are clearly unsafe. The witness sent a copy to the Board.

The witness later learned from the assistant superintendent and the State Department of Education that there is a $675 per pupil cap on nonpublic school pupil transportation. District officials said it would cost more than $675 per child per year to operate a minibus.

A series of letters followed. On August 28, 1992, the assistant superintendent wrote to the witness (R-1) stating it is not possible for a bus to enter Butternut Lane and that he was at that time willing to consider only a relocation of the bus stop. On October 30, the assistant superintendent again wrote stating that Township Police had confirmed that the assigned stop at 236 Childs Road is safe. If the witness did not chose to use that bus stop, no transportation reimbursement would be possible. In or about August 1993, the witness contacted the State Department of Education and expressed safety concerns. She also wrote to the Commissioner of Education. By letter dated August 18, 1993 (R-3), the State Director of Pupil Transportation

appeared to agree with the District. A letter from an assistant commissioner dated September 22, 1993 (R-4), stated that safety was a concern but that the Bernards Township Board of Education was acting within the law.

The witness than wrote to the Township Engineer. A draft of her letter (R-5) was produced. She stated that for about a year and a half, her children had been assigned to an unsafe bus stop. The Board had no intention of using a small van to serve these children. In accordance with *N.J.S.A.* 40:48-2, the Engineer had the right to make sidewalks and street lamps available to the children for safety reasons.

The district presented its former assistant superintendent of schools. Among his duties were public and nonpublic pupil transportation. Remote pupils are eligible for transportation if they are in elementary grades and live two miles or more from school or if they are in secondary grades and live two and a half miles or more from school. There is no obligation to transport pupils under those limits. The district did have a courtesy busing program. It transported pupils within the limits, but for safety concerns. This was changed from a courtesy to a subscription program. Courtesy busing is not reimbursed by the State.

Under an agreement with the municipality, the Township pays half and the interested parents pay half of the costs of subscription busing.

Bus stops were assigned before the petitioners' case was brought. The designated stops were Lakeside at Childs and Hardscrabble at Childs. The stops were based on the number of children in an area, the time it took to reach school and safety considerations, although Board powers are limited in these areas. The Board has no control over roadways, traffic or road shoulders. It does have an obligation to bus the petitioners' children.

Transportation provided had to be within the $675 per pupil cap. There is no such limit on public pupil transportation costs.

In 1992-93, the witness became aware of complaints concerning the stop at Hardscrabble and Childs Roads. There is no place to park and wait. According to policy, the Board asked

Township Police to view the area and make recommendations. Police agreed that the stop was safe. The same applied to the Lakeside at Childs stop.

A home on Lakeside Road was approved as a stop. The transportation supervisor had secured the homeowner's agreement to use that driveway.

The second location was chosen after complaints about the first. He and two other staff went to the spot and determined it to be feasible. A parent could pull in and park. Other children used that spot as a bus stop.

Minibuses serving the Butternut Lane development cost more than $675 per pupil per year. This figure is used as the basis or cost of a contracted minibus serving the area. The annual cost is divided by the number of pupils.

Board-owned vans (two) already are in use on established routes. It would be a matter simply of moving costs from one line of the budget to another. The district also advertised the route for nonpublic school pupils, but received no bids.

The witness conceded that "regular" buses are not used in the development because of their size. One end of Hardscrabble Road contains a sharp, steep turn. At the other of the road is the triangular island at which pupils would be picked up. It is not appropriate to a large bus. The witness asked the township engineer about removing the island. He took the engineer, police personnel and board employees to the area. It could not be negotiated with a 54-passenger bus. The witness asked the Township to have the island removed. This apparently created a furor as there is some historical significance to the island. In short, the Township declined to remove it.

The witness wrote to the township engineer concerning the problem on September 1, 1993 (R-6). He wrote again on the next day (R-7) concerning an emergency access lane that links Lakeside Slope and Butternut Lane. Although the road exists on paper, building material waste has been dumped in this area. The witness pointed out that it is a potential walking path to the bus stop on Childs Road. It would be beneficial and cost effective if this became a safe walkway.

On September 7, 1993, the assistant superintendent wrote to the Mayor (R-8). He recites the basic difficulties, mentions his conversations with the township engineer and states that using a shared van to transport pupils to the parochial school and the public school appears to be a reasonable arrangement. There were then three parochial pupils who would benefit from the service. The assistant superintendent estimated the annual cost of the transportation would be $520 per pupil, "more than the Board can legally spend." (R-8 at p. 2). The assistant superintendent asked that Township to consider subsidizing the difference. An arrangement along the lines of the current subscription program might serve these circumstances.

The assistant superintendent spoke to the County School Bus Administrator. He was advised he could not spend more than $675 per pupil and that the distance to the assigned bus stop was satisfactory. An in lieu payment of transportation costs to the parents of parochial pupils would be possible only if the Board could not do the job for $675 per pupil per year or less. The administrator pointed out that there were one or more parochial pupils living on Childs Road.

The district transportation supervisor called the State Department for advice. The advice offered by the County administrator was reaffirmed. The Board cannot pay the parents of parochial pupils an in lieu payment if the Board can provide appropriate transportation.

The assistant superintendent emphasized that he would have put the parochial pupils on minivans if he could do it for a cost of $675 per pupil per year or less. Money was the only question. He did not expect the petitioners' children to walk to assigned stops. He knows Hardscrabble Road and, in his opinion, it is unsafe for walking. He anticipated that pupils would be driven to and from the stops. The witness also discussed bid information and calculation of costs with staff.

The witness identified exhibit P-11, the 1993-94 route V data. It is consistent with his understanding. It advertises a pick up of three parochial school pupils at the entrance to Butternut Lane. It specifies a van is to be used. No bids were received. Exhibit P-12 is a communication from the County School Business Administrator to all transportation supervisors in the county. It states, among other things, that transportation shall not be provided when the

cost of the lowest bid exceeds the per pupil allowance ($675 for 1993-94). However, transportation shall be provided when the per pupil cost of the lowest bid is equal to or less than the per pupil allowance. The memorandum also suggests that transportation supervisors refer to the memorandum and follow the guidelines as they solicit bids for nonpublic transportation services.

The memorandum also states at paragraph 2 "While the bid specification must include the route description, the number of students to be transported should not be part of the bid data provided by the board." The witness stated he was not aware of this provision until testifying today.

The witnesses' staff had calculated nonpublic pupil transportation costs based on $12,000 to $15,000 per year for a 14-seat van/bus. A 14-seat van is the most common configuration. The witness located no 14-seat vans on exhibit P-7. The witness repeated that only 54-pupil capacity buses serve the parochial school and he is convinced he could not serve the parochial school pupils in the area at or below the $675 per year figure.

He and staff discussed the possibility of using a Board-owned 19-seat van. Either a 19- or 54-seat vehicle would work out to approximately $675 per pupil or less. A calculation does not tell the entire story. Availability of vehicles and location of pupils must also be considered. The district does have a 19-seat van (P-7). There are three subscription bus pupils.

The transportation coordinator decides what pupils go on what buses. The factors include safe egress. The witness relied on his experienced staff. He trusted the judgment of both and relied on them as a matter of course.

The district called a licensed professional engineer. He specializes in traffic engineering and safety. He does, among other things, traffic impact studies, traffic investigations and traffic engineering plans. He performed a safety analysis for the Board and exhibit R-9 is his report. He describes both intersections. His report also states:

> Of critical importance to the safety of a school bus stop location is the availability of safe sight distance in either direction approaching the bus stop location. Although Childs Road is on an curve through the intersection with Lakeside Slope, the bus stop location is located on the outside of the curve.

This, in his opinion, gives good visibility.

The report also states:

> Observations indicate that there is more than adequate room to park a vehicle on Lakeside Slope Road such that it would not interfere with traffic entering or exiting . . . or interfere with traffic along Childs Road. The 24 foot wide width of gravel area on either side of the island enables a vehicle to easily make a U-turn solely within Lakeside Slope Road, even if a vehicle is parked on Lakeside Slope Road.

The witness concludes there is enough room to allow more than one vehicle to park there and that the road is a very low volume roadway serving only about six homes. In his opinion, parents could safely stop and park their vehicles on Lakeside Slope Road to drop off their children at the designated bus stop.

The final paragraph in the report states:

> It is approximately one mile from Butternut Lane traveling along Hardscrabble Road and Child's Road to the subject school bus stop location. Both Hardscrabble Road and Child's Road are narrow two lane roadways approximately 18 feet in width providing no curb, sidewalk, or shoulder area for pedestrians to walk. Both roadways also carry commuter traffic traveling towards Route 202 and Interstate 287 during the morning peak periods when school children are normally present. Along these roadways, there are a number of obstructions, i.e., fences, trees, undergrowth, etc. in close proximity to the paved roadway which did not permit a pedestrian to walk in an area other than the traveled way of these roads. Given these conditions, it is my opinion these routes are considered unsafe for school age children.

ARGUMENT SUMMARIES

The petitioners state there are no crossing guards and no supervision at any of the Board-designated bus stops. Neither family would use the bus stops because they believed the stops to be unsafe. The former assistant superintendent agreed that safety was a factor in assigning bus stops and providing transportation. It is undisputed that safe egress was considered for the public school children, but not the nonpublic school children. Joint stipulations 68, 93. The respondents, including the former assistant superintendent, represented to the parents that their children could not be bused in the same manner as public school children because they attended nonpublic schools and there was a $675 per pupil per year cap. The assistant superintendent was not clear as to how the Board calculated that it could not bus the nonpublic school children for $675 per year or less. He was led to believe that the Board estimated the cost at $15,000 and it divided the cost by 14 seats for a minivan and established a per pupil cost of more than $1,000.

The assistant superintendent conceded that the majority the Board's minivans contains 19 seats, not 14. He was not sure where the number 14 came from. He believed he obtained it from his transportation supervisor and that it represented the number of seats in a majority of the minivans.

Safe transportation on the minivans could have been provided to the subject children for less than $675 per year. The Board owns two minivans that can provide that transportation, although they presently are assigned to other routes.

Bus route 6001, which travels into the Butternut Lane development, had a per pupil cost of $603.38. The assistant superintendent conceded there are four public school pupils bused on route 6001 who are not entitled to busing under the statute, but are subscription pupils.

The Board's engineer testified that none of the assigned bus stops were safe for the children to walk to. He also stated it was unsafe to have a child walk to the bus stop or to drop the child off and leave the child unattended.

There is no evidence that the Butternut Lane minivans are dedicated to special needs children. The route document demonstrates that the van used had 19 seats and traveled into the Butternut Lane neighborhood to pick up public school children. The corresponding transportation cost document established that the per pupil cost for the 6001 bus route was $603.38. The transportation cost document also confirmed that there were four empty seats on the route 6001 van and that the Board decided to give the seats to public school children that were not statutory entitled to busing, rather than to assign them to the nonpublic school children who are entitled to statutory busing.

The Board treated the subject pupils differently simply because they are nonpublic school children. The Board admits that if these children attended public school, they than would receive safe transportation to school irrespective of cost.

The Board states that the full Board has been unable to agree regarding resolution of the matter. Therefore, it is necessary for the parties to seek the Commissioner's and judge's intervention. The appropriate standard is not whether the Board made a perfect decision regarding the subject transportation or even the best decision under the circumstances. The standard is whether the actions were arbitrary or capricious or both. Given the many attempts made by the Board to solve this problem, it cannot be said that the Board was arbitrary or capricious. The development in which the petitioners live was a new housing development. The petitioners children were the first nonpublic school pupils in the neighborhood. The roadway leading to the petitioners' homes winds and at the intersection of Hardscrabble and Childs Road there is a large island that prohibited a full-size school bus from negotiating a turn to gain access to the neighborhood. These facts left the Board with two choices: they could attempt to put the nonpublic school children on smaller minivans that could negotiate the neighborhood roads or they could assign the children to the traditional, full-size school buses that had established routes and bus stops within a mile of this neighborhood. The Board sought bids and conducted a cost analysis. There was no acceptable manner in which to place the petitioners' children on the minivans without exceeding the $675 cap. Therefore, the Board made the only logical choice. It assigned the established bus stop at the intersection of Lakeside and Childs. This decision can not be disturbed under the circumstances and does not rise to the level of arbitrary and capricious.

The Board owned two minivans that were used primarily for special needs children throughout the entire area of the District. The two minivans, obviously, had limited seating. The petitioners insist that they should have placed on these vans. The Board made a determination that they were not going to disrupt numerous other established bus routes and the needs of many other children throughout the entire school district. The only bus stop at issue in this matter is located at the intersection of Lakeside and Childs Roads. The matter transferred from the Superior Court complains only with regard to the 1993-94 school year. The petitioners allege that the Board violated *N.J.S.A.* 18A:39-1 in assigning a stop a Childs and Lakeside. The petitioners also allege that the assignment violated their equal protection and other constitutional rights. The plaintiffs allege in a notice of claim filed November 2, 1993 that the bus stop assigned to them was dangerous and at the actions of the Board violated their constitutional rights as well as the statute. However, the petitioners have presented no evidence that the bus stop at Lakeside and Childs is unsafe. The assistant superintendent testified at hearing that each bus stop assigned to the petitioners had been reviewed by the local police department and found safe. Admittedly, the roads between the petitioners' homes and the bus stops were not desirable for school children to traverse. The safety of roadways, the question of crossing guards and other municipal safety issues are not the obligation of the Board of Education. The petitioners have established nothing with regard to the only relevant bus stop to show that it was anything other than safe.

Given these facts, the evidence produced at hearing shows no violation has occurred.

DETERMINATION

The law is clear that transportation of public and nonpublic school pupils living remote from school appears to mandatory. See, *West Amwell Board of Education v. State Board of Education of New Jersey,* 5 N.J. Misc. 152 (Sup. Ct. 1927); *Woodbury Heights Board of Education v. Gateway Reg'l High School,* 104 *N.J. Super.* 76 (Law. Div. 1968); *West Morris Reg'l Bd. of Ed. v. Sills,* 58 *N.J.* 464 (1971), *cert. den.* 404 U.S. 986 (1971). This busing is required by *N.J.S.A.* 18A:39-1. In *West Morris*, the New Jersey Supreme Court construed *N.J.S.A.* 18A:39-1 and held that a school district must transport public school pupils living more than remote and, if such transportation is thus required, the district then also must provide

transportation for pupils living within the district who attend a remote nonprofit, private school. The Supreme Court pointed out in *West Morris* that a private pupil will or will not receive transportation depending on the district of his residence. If a district does not transport remote public school pupils, it has no obligation to transport remote nonpublic school pupils. It must be noted that *West Morris* did not deal with the issue of courtesy busing; that is, transporting children living not remote to private schools nor did it deal with an interpretation of *N.J.S.A.* 18A:39-1a.

To limit transportation of nonpublic school pupils situated similarly to public school pupils is discriminatory on its face. *Donlyn v. Merchantville Board of Education,* 1979 S.L.D. 140. A district must apply its transportation policies evenhandedly and provide nonpublic school pupils within the district with transportation similar to that provided its own pupils. Essential to interpreting classification such as public school versus nonpublic school is the absence of invidiously disparate treatment between or within classifications of pupils similarly situated. Treating similarly situated pupils differently is a violation of the equal protection clause of the Fourteenth Amendment. I **FIND** and **CONCLUDE** that under the peculiar circumstances of this matter, the transportation policy of the Bernards Township Board of Education is discriminatory on its face. No public school pupil is forced to walk on an unsafe county highway. Only those pupils living in the Butternut Lane development and attending nonpublic schools are required to do so. Reason dictates that it violates the Fourteenth Amendment Equal Protection Clause to treat public school pupils differently from similarly situated remote nonpublic school pupils. Nothing in the statutes or the cases interpreting them indicates a different result.

It is true that unsafe conditions such as the absence of safe walkways is the responsibility of the municipality, not the school district. Yet neither may a board turn a blind eye to such situations when establishing school bus stops. The short answer is that if the nonpublic school pupils could safely walk to either of the bus stops established by the Board, the Board would be entitled to judgment. That is not the case.

The Board knew or certainly should have known when it established the school bus stops that there was no safe way for the nonpublic school pupils to walk to those stops. It is entirely reasonable for a Board to exclude a full size school bus from an area, such as Butternut Lane, in

which narrow streets would make operation potentially unsafe or might require that the bus be turned around. *Mandaglov v. Mendham Township Board of Education*, 1990 S.L.D. 1380. This clearly is a safety consideration and should be paramount in Board decisions affecting the types of vehicles used to provide pupil transportation to and from a given residential area.

There seems to be no dispute in this matter concerning the general requirements for nonpublic school transportation. *N.J.A.C.* 6:21-2.1 through -2.7. What remains is purely and simply a safety issue. The Bernards Township Board of Education, much like every other political subdivision of the State, no doubt is experiencing budget problems. Bodily safety of pupils is not a budgetary issue. Having reviewed the entire record, I **FIND** that pupils resident in the Butternut Lane development cannot safely walk to either school bus stop discussed in this case. Accordingly, I **CONCLUDE** that the Board must provide transportation to qualifying nonpublic school pupils from the intersection of Butternut Lane with Hardscrabble or some point within the Butternut Lane development. In the alternative, the Board may reimburse the parents of qualifying, nonpublic school pupils in the amount of $675 per pupil per year or the amount determined pursuant to section 2 of P.L. 1981, c. 57 (*N.J.S.A.* 18A:39-1a), which ever is the smaller amount. This matter having been filed in March 1995, this decision shall apply as of September 1, 1995 unless the Commissioner of Education shall establish some other day. It is so **ORDERED**.

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

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

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

1/11/96
DATE

Bruce R Campbell
BRUCE R. CAMPBELL, ALJ
by

Receipt Acknowledged:

1/11/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 18 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

LIST OF WITNESSES

For Petitioners:

Virginia Darche
Mary Hobin

For Respondents:

Harry Evans
Frank Miskovich

LIST OF EXHIBITS

For Petitioners:

P-1	Map Segment, portion of Butternut Lane development
P-2 A-C	Photographs of bus stop provided in development at base of circle and of school minivans in neighborhood
P-3 A-F	Photographs of intersection of Hardscrabble and Childs Roads, portions of Hardscrabble Road, intersection with Butternut Lane and island at intersection of Hardscrabble and Childs Road
P-4	Letter, Fortenbacher to Hobin, June 15, 1993, 2pp.
P-5	Omitted
P-6	Transportation routes 1992-93 and data
P-7	Transportation routes 1993-94 and data
P-8	Pupil Route List, route 7001, March 1, 1994
P-9	Pupil Route List, route 1002, October 24, 1994
P-10	Pupil Route List, route 6001, 1994-95
P-11	Nonpublic Route V, 1993-94
P-12	Memorandum, County School Business Administrator to School District Personnel, July 23, 1993

For Respondents:

R-1	Letter, Evans to Hobin, August 28, 1992
R-2	Letter, Evans to Hobin, October 30, 1992
R-3	Letter, Wells to Hobin, August 18, 1993
R-4	Letter, Davis to Hobin, September 22, 1993
R-5	Letter draft, Hobin to Messina, undated
R-6	Letter, Evans to Messina
R-7	Letter, Evans to Messina
R-8	Letter, Evans to Haycock, September 3, 1993, 2pp.
R-9	Letter Report, Abbington Associates per Miskovich to Speer, November 28, 1994, 3pp.

OAL DKT. NO. EDU 3474-95

R.D. AND V.D., on behalf of C.D., a minor; AND M.H. AND M.H.,on behalf of M.H. and S.H., minors,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, ADRIENNE O'NEILL, SUPERINTENDENT OF SCHOOLS, AND HARRY EVANS, ASSISTANT SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were timely filed by petitioners, as was the Board's reply thereto, in accordance with N.J.A.C. 1:1-18.4. Although petitioners submitted on February 5, 1996 a reply to the Board's submission, there is no provision for such a reply in either statute or regulation. Accordingly, petitioners' submission of February 5, 1996 is not herein considered.

Petitioners stress that the initial decision rendered by the ALJ should apply to all bus stops assigned by the District from August 1992 to the present, as raised in their pleadings, inasmuch as each of these stops was deemed unsafe by the Court, as well as the Board and its expert. (Petitioners' Exceptions at p. 1) Here, petitioners recount the bus stops which were assigned by the District for the 1992-93 and 1993-94 school years, asserting that the Hardscrabble/Childs Road triangle stop was determined to be "at best ten feet by eight feet" and deemed by the Board's expert witness to be unsafe to walk to or to use; that the 236 Childs Road stop was deemed unsafe by the Chief of Police

and was also deemed by the Board's expert to be unsafe to walk to or to use; and that the Lakeside Slope/Childs Road stop was found by the Board's expert as unsafe to walk to and unsafe "***if the child stood on the island or in the front of the island." (Id. at pp. 2, 3) It is the latter stop at Lakeside Slope/Childs Road which petitioners warrant was determined unsafe by the ALJ, and which was also assigned for the 1994-95 school year. Petitioners note that for the 1995-96 school year, they were assigned use of either the Lakeside/Childs stop or the Hardscrabble/Childs Road triangle stop. (Id. at p. 3)

Petitioners conclude,

> Since Judge Campbell found both bus stops to be unsafe as applied in 1995, it is unquestionable that the same bus stops were also unsafe in 1992-1994. No one disputes that all bus stops are too unsafe for children to walk to, even the Respondents' expert admits that the bus stops are unsafe to access. As the Judge recognized, each bus stop can only be accessed by using Hardscrabble Road which is an unsafe road. Since 1992, the public school children on Butternut Lane have been provided safe transportation (some of whom were not even entitled to statutory bussing), while the Parochial School Children could only receive statutory bussing by accessing unsafe roadways. Despite their complaints, the Petitioners did not receive safe transportation or the $675 stipend.*** (Id. at p. 5)

Petitioners further point to the assistant superintendent's admission that there were four public school pupils being bussed on the 6001 route who were not entitled to statutory bussing. Thus, petitioners attest that there were available seats for their nonpublic school children who were denied those seats. Petitioners urge the Commissioner to extend the initial decision rendered by the ALJ to include all bus stops from 1992 to present, and to deem such stops unsafe for the reasons set forth in the initial decision.

The Board excepts to the ALJ's finding that its bussing policy is discriminatory on its face. Rather, the Board warrants that the evidence adduced at the hearing establishes that the Board could not contract to transport petitioners' children by minivan without exceeding the statutorily imposed

$675 cap. Additionally, while the Board considered the possibility of using one of its two minivans for that purpose, the Board states,

> ***The availability of these vehicles and their ability to make only limited runs is acknowledged by all parties.***The Board measured available possibilities, found that there were established bus routes within two miles of petitioners' homes and determined to assign the petitioners to those routes rather than upsetting already established and available bus routes. (Board's Exceptions at pp. 1-2)

The Board cites Walters v. Board of Education of Mendham, 1977 S.L.D. 854, for the proposition that the Commissioner should not interfere with the management of local boards of education where those boards are not violating the law or acting in bad faith. Further, the Board cites a 1965 decision rendered by the Commissioner of Education, Livingston v. Bernards Township Board of Education, 1965 S.L.D. 29, which upheld the Board's determination to change petitioners' bus service "***from a stop at the bottom of their driveway to a location which required their travel over heavily travelled roadways without sidewalks." (Board's Exceptions at p. 2) In Livingston, the Commissioner found that petitioners' allegation that their children were being treated differently from other similarly classified students failed to reach the magnitude of improper classification. The Commissioner observed,

> ***it is obviously impossible to schedule a school bus route so that every child has the same walking distance over exactly similar terrain and other like conditions in order to arrive at the bus stop. If this idea of discrimination were to prevail, it would render the selection of a bus route impossible as a practical matter. (Id. at p. 3, citing Livingston, supra)

Here, the Board maintains there is no evidence of discrimination on its part, so as to permit the ALJ's finding and conclusion. Rather, the Board argues that it was faced with a difficult decision and elected to "***refrain from upturning established bus schedules." (Id. at p. 3)

Moreover, the Board excepts to the ALJ's reaching in his decision to the very issue of discrimination, inasmuch as this matter was transferred from Superior Court for decision by the Commissioner of one issue: "whether the Bernards Township Board of Education violated the New Jersey Pupil Transportation Statute, N.J.S.A. 18A:39-1.***" (Id.) The Board asserts that all parties to this matter understood that the scope of the issue to be decided in this forum was whether the Board violated the Pupil Transportation Statute; all other issues, argues the Board, were stayed in the Law Division of Superior Court. The Board concludes, therefore, that the ALJ exceeded his jurisdiction when he decided the issue of discrimination. It reasons that it will be severely prejudiced if the ALJ's decision were allowed to stand, in that the Board did not brief, nor present evidence on, the issue of discrimination and petitioners' constitutional claims. "***To rise to the level of a constitutional violation," the Board contends with respect to its policies, "evidence of discriminatory intent must be shown given that plaintiffs are not within a suspect classification. No such evidence was established.***" (Id. at p. 4)

Finally, the Board takes exception to the ALJ's conclusion regarding the safety of the route between the assigned bus stop and petitioners' homes. The Board argues,

> ***In essence, Judge Campbell makes the determination that if the roadways between a child's home and an established bus stop are unsafe, a Board of Education must pick that child up at the bottom of his or her driveway and/or on the exact street in which he or she resides. Not only is such a finding legally incorrect, the ramifications are astounding. (Id.)

Here, the Board cites Schrenk v. Ridgewood Board of Education, 1949-1961 S.L.D. 185 (1961) and underscores the Commissioner's determination therein that provisions for safe conditions of travel are a municipal function. The Board, paraphrasing Schrenk, warrants, "***A Board of Education *** does not have the authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols or to meet the requirements of safe travel for school children.***" (Id. at

pp. 4,5) Thus, the Board concludes that the ALJ's determination violates established precedent, and if enforced, would affect "hundreds of children:"

> ***Bernards Township is a growing area where new developments and roadways are common. Enforcement of Judge Campbell's decision would require the Bernard Township Board of Education to ensure that every student, whether public or non-public, has safe transport from their home to their assigned bus stop. A Board of Education in a growing municipality could not shoulder such a burden; nor are they obligated to do so under Schrenk v. Ridgewood Board of Education, [Supra], and the various other Commissioner decisions. (Id. at p. 5)

Upon careful and independent review, the Commissioner determines to modify the initial decision of the ALJ, and to remand this matter to the OAL for further proceedings, as set forth below. Initially, the Commissioner observes that the Pupil Transportation Statute, N.J.S.A. 18:39-1 et seq., obligates the local board to provide transportation to remote pupils in "other than a public school"[1] when it provides transportation to its remote public school students, "***provided the per pupil cost of the lowest bid received does not exceed $675 for the 1992-93 school year ***." There is no finding that the Board failed to meet its statutory obligation to provide nonpublic school students with access to transportation, nor that the Board's provision of services, which employs established routes used by public school students, as well as nonpublic, violates the intent of the legislation.

Further, the Commissioner is not persuaded that the record supports the conclusion that the assigned *bus stops* are unsafe. While the record does support the conclusion that the travel to and from the assigned stops may be considered hazardous, as the Board correctly instructs, and the ALJ affirms, the provision for safe conditions of travel to and from the bus stops is a municipal function, and not the responsibility of the local Board. (Initial Decision at p. 14) Thus, there being no finding that the Board violated N.J.S.A. 18A:39-1, and there being no showing that the dispute herein is the

[1] Where, inter alia, the "other than a public school" is "***not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil***" N.J.S.A. 18A:39-1

result of actions taken by the Board which were arbitrary, capricious, unreasonable or otherwise taken in bad faith with respect to its statutory obligations, the Commissioner determines that the Board of Education acted in compliance with N.J.S.A. 18A:39-1.

The Commissioner further finds, however, that the record of this matter with respect to the scope of the remand ordered by the Superior Court is unclear. Therefore, the Commissioner remands this matter to the OAL for resolution as to the scope of the issue(s) remanded by the Superior Court, and, specifically, for a determination of whether petitioners' constitutional claim as to differential treatment of nonpublic students was properly before the ALJ. If the Court's remand did, in fact, encompass petitioner's constitutional claim, the Commissioner directs that the parties be provided opportunity for additional argument and briefing on this issue before the ALJ, who shall then make such findings and conclusions as he deems appropriate.

Accordingly, the initial decision of the ALJ is modified, as set forth above, and this matter is remanded to the OAL for further proceedings consistent with the directions herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 22, 1996

DATE OF MAILING FEBRUARY 22, 1996

64-96

EDU #3474-95
C # 64-96
SB # 14-96

R.D. AND V.D., on behalf of C.D., a minor, :
AND M.H. AND M.H., on behalf of M.H.
and S.H., minors, :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF BERNARDS, SOMERSET
COUNTY, ADRIENNE O'NEILL, SUPERIN-:
TENDENT OF SCHOOLS AND HARRY
EVANS, ASSISTANT SUPERINTENDENT :
OF SCHOOLS,
:
RESPONDENTS-RESPONDENTS.
:

Decided by the Commissioner of Education, February 22, 1996

For the Petitioners-Appellants, Pitney, Hardin, Kipp & Szuch (Dennis T. Kearney, Esq. and Loryn Riggiola, Esq., of Counsel)

For the Respondents-Respondents, Hurley & Vasios (Michael R. Speer, Esq., of Counsel)

In March 1994, petitioners, residents of Butternut Lane in Basking Ridge, New Jersey, located within the Bernards Township school district, instituted an action in Superior Court, Law Division, against the Board of Education of the Township of Bernards (hereinafter "Board"), claiming that the Board had violated their rights under N.J.S.A. 18A:39-1 and the state and federal Constitutions by failing to provide a safe bus stop for their children, students at a nonprofit private school, as it had done for

4/2/97

similarly situated public school children.[1] In February 1995, the Court denied the Board's motion for summary judgment, but referred this matter to the Commissioner of Education and placed the case on the inactive list.

Petitioners are the parents of children attending a nonprofit private school approximately four miles from their homes. The Board's former acting superintendent indicated that the Board considered safety as a factor in assigning a bus stop to public school children, including the route the children were required to take in getting to and from the bus stop. Stipulation of Facts, at 5-6; tr. 10/26/95, at 174. He indicated that egress safety concerns were not considered by the Board in assigning a bus stop to petitioners' children. Stipulation of Facts, at 6. He further indicated that several minibuses travel from Hardscrabble Road into the Butternut Lane neighborhood to pick

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[1] N.J.S.A. 18A:39-1 provides in pertinent part:

> Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2½ miles from their public school of attendance, the district shall provide transportation to and from school for these pupils.
>
> When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil...provided the per pupil cost of the lowest bid received does not exceed $675 for the 1992-93 school year or the amount determined for subsequent years pursuant to section 2 of P.L.1981, c.57 (C.18A:39-1a), and if such bid shall exceed that cost then the parent, guardian or other person having legal custody of the pupil shall be eligible to receive $675 for the 1992-93 school year or the amount determined pursuant to section 2 of P.L.1981, c.57 (C.18A:39-1a) for subsequent years toward the cost of his transportation to a qualified school other than a public school, regardless of whether such transportation is along established public school routes.

up nonremote public school children.[2] Stipulation of Facts, at 7. He asserted that the minibuses pull into Butternut Lane because of heavy traffic and safety egress concerns on Hardscrabble Road. Stipulation of Facts, at 7, 14-15; tr. 10/26/95, at 153.

Petitioners' children have never been assigned to those minibuses. Instead, they have been assigned several different bus stops since 1992, ranging in distance from approximately one-half mile to one mile from their homes. In each case, petitioners' children would be required to walk down Hardscrabble Road, a heavily traveled road with no sidewalks or shoulders, to get to the bus stop.

The Bernards Township Chief of Police indicated in a letter dated June 15, 1993, exhibit P-4, in evidence, that it was not safe for petitioners' children to walk from their homes to the bus stop established for them by the Board. He stated that:

> Hardscrabble Road is narrow, there are no sidewalks, and the shoulders are not hard packed. Children would have to walk along the edge of the roadway and taking into account the commuter traffic that would be present at the time children would be walking to the bus stop, I consider the route unsafe.

He indicated that Hardscrabble Road was also not safe for full-sized school buses due to the road's "twisting and turning." As a consequence, the Board uses minibuses to pick up public school children on Butternut Lane.

Petitioners made repeated requests to the Board to allow their children to be transported on the minibuses which pick up public school children on Butternut Lane. The former acting superintendent indicated that the Board had declined to provide

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[2] We note that the Board provides "subscription" busing for pupils who do not meet the distance requirements for remote transportation under N.J.S.A. 18A:39-1. Under such arrangement, the Township and the parents share the cost for such transportation.

petitioners' children with the same travel accommodations as public school children because of the existence of the $675 cap in N.J.S.A. 18A:39-1. Stipulation of Facts, at 16-17, 21; tr. 10/26/95, at 135, 149. He testified that if petitioners' children were public school children, he would have put them on one of the minibuses or gotten another minibus, if necessary. Stipulation of Facts, at 21. He claimed that his hands were tied since the estimated cost of transportation for use of the minibuses was approximately $1,000 per pupil. Id. at 16. Consequently, petitioners' children were assigned to a bus stop utilizing a full size school bus, which, as noted, were not permitted to use Hardscrabble Road due to safety concerns. The former acting superintendent acknowledged that the walk from petitioners' homes to the existing bus stop is unsafe. Tr. 10/26/95, at 154.

On January 11, 1996, an Administrative Law Judge ("ALJ") found that, under the particular circumstances herein, the Board's policy was discriminatory on its face. The ALJ observed that the transportation of public and nonpublic school pupils living remote from school was mandatory. West Amwell Board of Education v. State Board of Education of New Jersey, 5 N.J. Misc. 152 (Sup. Ct. 1927); West Morris Reg. Bd. of Ed. et al. v. Sills, 58 N.J. 464 (1971), cert. den. 404 U.S. 986 (1971). The ALJ stressed that a district must apply its transportation policies evenhandedly and provide nonpublic school pupils residing within the district with transportation similar to that provided to public school students. He found that no public school pupil was forced to walk on an unsafe public highway. Only those pupils living in the Butternut Lane neighborhood and attending nonpublic schools were required to do so.

While acknowledging that unsafe roadway conditions were the municipality's function, the ALJ stressed that "neither may a board turn a blind eye to such situations when establishing school bus stops." Initial Decision, slip op. at 14. The ALJ found that students residing in the Butternut Lane neighborhood could not safely walk to the bus stops established by the Board for petitioners' children. Accordingly, he concluded that the Board was required to provide transportation to qualifying nonpublic school pupils from some point within the Butternut Lane neighborhood or to reimburse the parents of qualifying nonpublic school students in the amount of $675 per pupil per year or the amount determined pursuant to N.J.S.A. 18A:39-1a.[3]

On February 22, 1996, the Commissioner modified the ALJ's decision and remanded to the Office of Administrative Law ("OAL") for further proceedings. The Commissioner observed that there had been no finding that the Board had failed to meet its statutory obligation to provide nonpublic school students with access to transportation or that the Board's provision of such services violated the intent of the legislation. The Commissioner was "not persuaded that the record supports the conclusion that the assigned bus stops are unsafe. While the record does support the conclusion that the travel to and from the assigned stops may be considered hazardous...the provision for safe conditions of travel to and from the bus stops is a

[3] N.J.S.A. 18A:39-1a provided, at all times relevant hereto:

> Beginning in the 1993-94 school year and in each subsequent year, the maximum amount of nonpublic school transportation costs per pupil provided for in N.J.S. 18A:39-1 shall be increased or decreased in direct proportion to the increase or decrease in the State transportation aid per pupil in the year prior to the prebudget year compared to the amount for the prebudget year. As used in this section, State transportation aid per pupil shall equal the total State aid payments made pursuant to section 16 of P.L.1990, c.52 (C.18A:7D-18) divided by the number of pupils eligible for transportation.

municipal function, and not the responsibility of the local Board." Commissioner's Decision, slip op. at 22. Consequently, the Commissioner concluded that the Board had acted in compliance with N.J.S.A. 18A:39-1.

However, since he found the record unclear with respect to the scope of the remand ordered by Superior Court, the Commissioner remanded this matter to OAL for resolution of the scope of the issues remanded by the Court and, specifically, for a determination of whether petitioners' constitutional claim as to differential treatment of nonpublic school students was properly before the ALJ.

Petitioners filed the instant appeal to the State Board.

After a thorough review of the record, including the transcript of the hearing held in the Office of Administrative Law in this matter,[4] we reverse the decision of the Commissioner. We agree with the ALJ that petitioners have demonstrated that the Board's action in this instance was arbitrary and capricious.

As we stated in Peary v. Board of Education of the Township of Barnegat, 93 N.J.A.R. 2d (EDU) 798:

> Although district boards have wide discretion to promulgate pupil transportation policies, including school bus routes and stops, they may not discriminate or act in a manner that is arbitrary, capricious or unreasonable. Our review of the Board's action herein is not limited to the relative safety of the school bus stop...or the Board's jurisdiction over safety conditions of sidewalks and roadways within the Township. Rather, the broader issue is whether the Board abused its discretion in denying petitioner's request to reestablish the former bus stop...in this particular case.

See also Board of Educ. v. Kraft, 139 N.J. 597 (1995) (the State Supreme Court recognized the relevance of student safety in determining whether a walkway could be

[4] We note that the hearing transcript was not provided to the Commissioner.

included in calculating remoteness from school); Nichols v. Board of Education of the Township of Wayne, Docket #A-3526-93T5 (App. Div. 1995), cert. denied, 142 N.J. 449 (1995) (where the route marked for measurement of remoteness had existing sidewalks and marked crosswalks, then the measurement must be based on the assumption that the children should use them).

Thus, our review herein is not limited to the safety of the existing bus stop or the Board's jurisdiction over safety conditions on the Township's roads. Rather, the standard is whether the Board abused its discretion in refusing petitioners' request to relocate their children's bus stop or, in lieu thereof, to pay them for their transportation costs in accordance with N.J.S.A. 18A:39-1 and 18A:39-1a.

N.J.S.A. 18A:39-1, as previously noted, provides that whenever a school district provides transportation for public school pupils, it must also provide transportation or payment in lieu of transportation to nonpublic pupils in the school district residing remote from their nonprofit private school of attendance. There is no dispute herein that the Board provides transportation for public school pupils. Nor is it disputed that petitioners' children live remote from their nonprofit private school and are therefore also entitled to transportation. Rather, it is the Board's failure to provide those nonpublic students with transportation comparable to that provided to similarly-situated public school students that is at issue.

In the landmark case of Everson v. Board of Education of Ewing Tp., 133 N.J.L. 350 (E. & A. 1945), aff'd, 330 U.S. 1, 18, 67 S. Ct. 504, 91 L. Ed. 711 (1947), the United States Supreme Court observed that New Jersey's school transportation statute, "as applied, does no more than provide a general program to help parents get their

children, regardless of their religion, safely and expeditiously to and from accredited schools." "The Legislature chose to extend to the private school student a right to transportation on the same basis upon which transportation would have been available if he attended public school in his district, i.e., remoteness from the school, and in that way to deal evenly with him and the public school student within that district." West Morris Reg. Bd. of Ed., supra, at 479. In Bd. of Ed. Woodbury Hts. v. Gateway Reg. H.S., 104 N.J. Super. 76, 86 (Law Div. 1968), the Court observed that "the Legislature has deemed it to be an essential public purpose to benefit children living remote by guarding them against the hazards attendant upon traveling to school. The Legislature...did not choose to distinguish between whether a child had to travel to a public school or a nonpublic school, for a child is a child and the hazards of travel do not depend upon the school which the child attends."

Under the particular facts in the record before us, we agree with the ALJ that petitioners have demonstrated that the Board's action in this case was arbitrary and capricious. The record reveals that the Bernards Township Board does not allow public school children to enter or exit minibuses on Hardscrabble Road due to safety concerns and yet, citing the $675 cap in N.J.S.A. 18A:39-1, exposes nonprofit private school students to the dangers of walking on Hardscrabble Road to a bus stop. Given the history and purpose of the statute, the $675 cap in N.J.S.A. 18A:39-1 cannot reasonably be viewed as permitting district boards to treat nonprofit private school students in a manner which denies them the same basic safety considerations afforded similarly-situated public school students. In the event the costs of providing such considerations to nonpublic students exceeds $675 per child, then the parents of such

children are entitled to payment in the amount of $675 per pupil per year or the amount determined pursuant to N.J.S.A. 18A:39-1a.

We therefore reverse the decision of the Commissioner and direct the Board to establish a bus stop for petitioners' children within the Butternut Lane neighborhood or, in the event the cost to do so would exceed $675 per pupil, to pay petitioners $675 per pupil per year or the amount determined pursuant to N.J.S.A. 18A:39-1a.

Given our determination herein under N.J.S.A. 18A:39-1, we find no need for the remand directed by the Commissioner regarding petitioners' constitutional claims.

April 2, 1997

Date of mailing _____

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NINA WALZER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TINTON FALLS, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 23, 1996

OAL DKT. NO. EDU 2151-95

NINA WALZER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TINTON FALLS, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 23, 1996

DATE OF MAILING FEBRUARY 23, 1996

66-96

66-96

WILLIAM BETAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 23,, 1996

OAL DKT. NO. EDU 10602-94

WILLIAM BETAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 23, 1996

67-96

67-96

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF KINGSWAY :
REGIONAL HIGH SCHOOL, GLOUCESTER :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 23, 1996

OAL DKT. NO. EDU 04711-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF KINGSWAY :
REGIONAL HIGH SCHOOL, GLOUCESTER :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 23, 1996

DATE OF MAILING FEBRUARY 23, 1996

68-96

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF LAKEWOOD, :
OCEAN COUNTY. :
:
:

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 23, 1996

OAL DKT. NO. EDU 4701-95

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF LAKEWOOD, :
OCEAN COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 23, 1996

DATE OF MAILING FEBRUARY 23, 1996

(SB) 68-96

C #339-96L
SB # 68-96

KENNETH LUDVIKSEN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 2, 1996

For the Petitioner-Appellant, Kenneth Ludviksen, pro se

For the Respondent-Respondent, Fogarty & Hara (Dennis J. Madigan, Esq., of Counsel)

On August 2, 1996, the Commissioner of Education dismissed a petition of appeal filed by Kenneth Ludviksen (hereinafter "appellant") challenging the North Arlington Board's denial of his request to attend North Arlington High School.[1] The Commissioner found that appellant had failed to allege a violation of school law or regulation, stressing that the decision to admit pupils over 20 years of age was discretionary with each district board. The Commissioner further observed that appellant had failed to file his petition within 90 days after he had received notice of the Board's action, as required by N.J.A.C. 6:24-1.2(c). Consequently, he also found that

[1] The Board based its denial upon the fact that appellant exceeded the age for which it was required to provide high school admission.

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any claim appellant was making based upon the Board's alleged abuse of discretion was untimely.

On September 18, 1996, appellant, acting pro se, filed a notice of appeal to the State Board of Education. Since his notice of appeal was filed more than 30 days after the filing date of the Commissioner's decision, appellant also filed an explanation for that late filing. By letter dated September 24 from the Counsel to the State Board, appellant was advised that his statement explaining the reasons for his late filing was being referred to our Legal Committee for consideration of the effect of his failure to file his notice of appeal in a timely manner. Appellant was also directed to provide proof of service of his filing on the Board by October 3. Appellant provided such proof on September 30.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App.

Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

We conclude that the statutory filing requirement with which appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on August 2, 1996 and mailed to appellant on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on August 5, 1996, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), appellant was required to file his notice of appeal to the State Board on or before September 4, 1996. Appellant's notice of appeal was not filed until September 18.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Appellant acknowledges in his letter explaining his late filing that when the Commissioner dismissed his petition, he was told that he could file an appeal to the State Board. Appellant indicates that he then "appealed" to the

Governor to "override" the State Board's requirement that parties file 17 copies of all briefs, motions, applications and exceptions. N.J.A.C. 6:2-1.10(b). While we are mindful of appellant's pro se status, his request to the Governor does not excuse his failure to comply with the statutory requirement, which provides that a notice of appeal must be filed with the State Board within 30 days of the Commissioner's decision.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

November 6, 1996

Date of mailing NOV 08 1996

71-96

71-96

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

FEBRUARY 26, 1996

OAL DKT. NO. EDU 9851-94

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 26, 1996
DATE OF MAILING FEBRUARY 26, 1996

(SB) 71-96

DHP #120-95
SB # 71-96

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

CATION FROM SCHOOL EMPLOYMENT : DECISION

OF TRAVIS HANKS. :

Decided by the Deputy Commissioner of Education, December 15, 1995

Decision on reconsideration by the Deputy Commissioner of Education, February 20, 1996

For the Petitioner-Appellant, Travis Hanks, pro se

On December 15, 1995, the Deputy Commissioner of Education affirmed the determination of the Office of Criminal History Review disqualifying Travis Hanks (hereinafter "appellant") from school employment as a substitute teacher following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1.[1] The Deputy Commissioner determined that appellant had failed to affirmatively demonstrate his rehabilitation by clear and convincing evidence. On February 20, 1996, the Deputy Commissioner declined to reconsider this matter and reaffirmed his decision of December 15, 1995. The Deputy Commissioner expressly indicated in both decisions that an appeal could be taken to the State Board pursuant to N.J.A.C. 6:2-1.1 et seq.

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

11/6/96

On September 27, 1996, appellant, acting pro se, filed a notice of appeal to the State Board of Education, along with an explanation for his late filing. Appellant stated therein that:

> The reason I waited so long to send my appeal letter was because [the Deputy Commissioner] stated in his denial letter that one of the reason [sic] for his decision was because my simple assault misdemeanor charge was so resent [sic]. I thought if I waited a considerable amount of time, while making some positive advancement with myself as well as in my community, which I've done, I would stand a better chance of having [the] decision overturned by your Board.

By letter dated October 7, 1996 from the Counsel to the State Board, appellant was advised that his appeal had been due within 30 days of the filing date of the Commissioner's decision, and that his letter explaining the late filing was being referred to our Legal Committee for consideration of the effect of his failure to file timely notice.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of

the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

We conclude that the statutory filing requirement with which appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Deputy Commissioner's decision was rendered on December 15, 1995 and mailed to appellant on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on December 18, 1995, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), appellant was required to file his notice of appeal to the State Board on or before January 17, 1996. Appellant's notice of appeal was filed on September 27, 1996, more than eight months after the filing deadline.[2]

[2] We note that while appellant's request for reconsideration to the Deputy Commissioner did not stay his obligation to file a notice of appeal to the State Board within 30 days after the December 15, 1995 decision, the Deputy Commissioner's decision on appellant's request for reconsideration was rendered on February 20, 1996, and appellant still did not file his notice of appeal to the State Board until more than seven months thereafter.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. While we are mindful of appellant's pro se status, his decision to wait for additional time to pass before filing a notice of appeal with the State Board does not excuse his compliance with the statutory requirement, which was made clear to him by the Deputy Commissioner.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations. In so doing, we note that appellant can reapply to the Office of Criminal History Review and, given the passage of additional time since his last offense, seek a determination from the Commissioner that he is now qualified for school employment on the basis of rehabilitation.

November 6, 1996

Date of mailing NOV 08 1996

72-96

72-96

SHARON CANTONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11617-94
AGENCY DKT. NO. 450-11/94

SHARON CANTONE,
Petitioner,
v.
BOARD OF EDUCATION, CITY OF HOBOKEN
HUDSON COUNTY
Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Llinda Sabat, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: November 22, 1995 Decided: November 30, 1995

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 1, 1994, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have consented to a settlement and have prepared an agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

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

November 30, 1995
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 6 1995
DATE

OFFICE OF ADMINISTRATIVE LAW

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Petitioner

SHARON CANTONE,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	AGENCY REF. NO. 450-11/94 O.A.L. DOCKET NO. EDU 11617-94N
HOBOKEN BOARD OF EDUCATION,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

Sharon Cantone (hereinafter "Ms. Cantone"), residing at 18 Old Jug Court, Harrington Park, New Jersey 07640, and the Hoboken Board of Education (hereinafter the "Board"), with offices at 1115 Clinton Street, Hoboken, New Jersey 07030-3201, hereby stipulate and agree as follows:

1. In return for compliance with this Agreement, Ms. Cantone agrees to the dismissal of the above-captioned litigation, with prejudice.

2. The Board agrees to:

(a) Pay Ms. Cantone back salary in the amount of One Thousand Four Hundred Fifty-Seven and 04/100 ($1,457.04) for the 1994-95 school year. Said money shall be subject to all normal payroll deductions. The net amount shall be paid within 30 days of the approval of this Agreement by the Commissioner of Education; and

(b) Retroactively credit Ms. Cantone's seniority for the 1994-95 school year in the elementary category to include service for September 1 through 11, 1994. This is based on a conclusion that Ms. Cantone has more seniority than an employee recalled before her for the 1994-95 school year.

3. Ms. Cantone acknowledges that she has hereby been advised in writing that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Agreement and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the terms enumerated herein.

4. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

5. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

6. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Ms. Cantone.

7. This Agreement is subject to the approval of the Office of Administrative law and the Commissioner of Education. If not so approved, it will be null and void.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Gregory T. Syrek, Esq.

Dated: 11/22/95

Sharon Cantone

HOBOKEN BOARD OF EDUCATION

Linda Sabat, Esq.

Dated: 11/22/95

By: _____
Edwin Duroy, Superintendent

By: _____
Anthony M. Curko,
Board Secretary

OAL DKT. NO. EDU 11617-94

SHARON CANTONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 26, 1996

DATE OF MAILING FEBRUARY 26, 1996

(SB) 72-96

C #428-96E
SB # 72-96

THOMAS HOPEWELL,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, WARREN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 20, 1996

For the Petitioner-Appellant, Klausner & Hunter (Stephen B. Hunter , Esq., of Counsel)

For the Respondent-Respondent, Broscious & Glynn (James W. Broscious, Esq., of Counsel)

Thomas Hopewell (hereinafter "petitioner"), a tenured teaching staff member employed by the Board of Education of the Township of Franklin (hereinafter "Board"), filed a petition of appeal and petition for declaratory judgment, along with a request for emergent relief, with the Commissioner of Education. In so doing, petitioner challenged the Board's action in placing him on an involuntary administrative leave in May 1996 and, subsequently, on involuntary medical leave. The Board took this action following a psychiatric examination it ordered petitioner to undergo pursuant to N.J.S.A. 18A:16-2. Petitioner claimed that the education laws precluded the Board from taking such action

11/6/96

without filing tenure charges against him, and he sought emergent relief in the form of immediate reinstatement to a paid teaching position.[1]

On September 20, 1996, the Commissioner denied petitioner's request for emergent relief, concluding that petitioner had failed to satisfy the standards for such relief set forth in Crowe v. De Gioia, 90 N.J. 126 (1982). However, the Commissioner transmitted the petition of appeal to the Office of Administrative Law for further proceedings on the merits of the matter.

Petitioner thereupon filed the instant motion for emergent relief with the State Board pursuant to N.J.A.C. 6:2-2.4, alleging that the Franklin Township Board has "de facto suspended a teaching staff member without pay for purported conduct unbecoming a teacher without initiating tenure charges against the Petitioner, pursuant to N.J.S.A. 18A:6-10 et seq."

We have carefully reviewed the submissions of counsel. While petitioner maintains that the Board was precluded from placing him on leave and continuing that leave once his accumulated sick leave was exhausted without bringing tenure charges against him, our own review of the applicable law leads to a result contrary to that urged by the petitioner. Initially, we find that N.J.S.A. 18A:16-4, rather than the Tenure Employees Hearing Law, governs this matter. That statute provides that:

> If the result of any such [psychiatric] examination [directed by the district board pursuant to N.J.S.A. 18A:16-2] indicates mental abnormalities...the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of his contract, if he is under

[1] We note that the Board paid petitioner his accumulated sick leave until it was depleted at the beginning of the 1996-97 school year.

> contract, or be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years. (Emphasis added.)

In this case, petitioner submitted to a psychiatric examination by Dr. Alvin Friedland on February 19, 1996. By letter to the District dated March 6, 1996, Dr. Friedland reported the results of his examination, indicating that petitioner was presenting signs of depression with an underlying personality disorder requiring treatment and that petitioner's condition was not being controlled medically in that he was taking a number of medications with contradictory effects. As embodied in its letter of May 13,1996, the Board placed petitioner on administrative leave on the basis of further allegations by faculty members concerning his behavior, as well as on the basis of Dr. Friedland's report and his response to the District's subsequent inquiry, in which he indicated that petitioner should not be in contact with children.

By letter dated July 31, 1996, petitioner's counsel submitted to the Board a letter from Dr. Corazon Guerra, petitioner's treating physician. That letter indicated that Dr. Guerra had modified petitioner's medication and that petitioner had started individual therapy with Dr. David Veleber. Dr. Guerra expressed the opinion that petitioner had made sufficient progress and that he saw no problem with his being reinstated to a full-time teaching position in September 1996.

In response, counsel for the Board wrote that a reevaluation would be conducted expeditiously if Dr. Friedland felt that such reevaluation was in order. At the same time, counsel for the Board stated that the Board did not intend to jeopardize the safety of the District's children, "unless and until it is satisfied that there is a return to normal health."

Petitioner's Exhibit J, dated August 9, 1996. On August 26, 1996, counsel for the Board provided petitioner with the results of Dr. Friedland's review of Dr. Guerra's report. Dr. Friedland expressed concerns as to the contents of that report, observing that it did not indicate petitioner's condition and that the behavior which had caused him difficulties in the classroom had not been addressed. Dr. Friedland concluded that he would need further information regarding petitioner's mental status and treatment before he could consider recommending that he be returned to his teaching position. Petitioner's Exhibit K.

In essence, petitioner is contending that he has recovered and that, in the absence of tenure charges, he must be permitted to return to work. However, as we stated In Bybel v. Board of Education of the City of Englewood, decided by the State Board, March 6, 1985, slip op. at 5-6:

> ...where a board, as here, grants a leave of absence to a tenured teaching staff member for medical reasons, the board may not permit him to return to work until it is satisfied that the staff member has recovered. Once the board has reached a decision as to whether or not recovery is satisfactory, it will be presumed sound and may be disturbed on appeal only if found to be arbitrary or capricious....We further emphasize that when a board assesses a teacher's fitness, it is under a duty to protect students from a significant danger of harm, whether physical or otherwise. Gish v. Bd. of Ed. of Paramus, 145 N.J. Super. 96, 104-105 (App. Div. 1976), cert. denied, 74 N.J. 251 (1977), cert. denied, 434 U.S. 879 (1977).

Quite simply, the Board is not satisfied that petitioner has recovered, and we find nothing in petitioner's submissions to convince us that its conclusion is arbitrary. Given that N.J.S.A. 18A:16-4 clearly provided the Board with the authority to place petitioner on leave and to continue such leave even after he had exhausted his accumulated sick

leave, we find that petitioner has failed to demonstrate a likelihood of prevailing on the merits of his claim that the Board improperly placed him on leave without filing tenure charges. Furthermore, in that any entitlement petitioner has under N.J.S.A. 18A:16-4 to return to work is predicated on the Board's satisfaction as to the sufficiency of his recovery, and because petitioner has not demonstrated to us that the Board acted in an arbitrary and capricious manner in requiring further proof of recovery before returning him to the classroom, petitioner has failed in these proceedings to show a likelihood of succeeding on the merits of this claim. Nor has petitioner demonstrated that continuing his leave will cause him to suffer irreparable harm outweighing that which his students may suffer were he to return prematurely. Thus, for the reasons expressed herein, and given the public interest in avoiding harm to students, we deny petitioner's motion for emergent relief. Crowe v. De Gioia, supra.

November 6, 1996

Date of mailing NOV 08 1996

73-96

CONSTANCE BAUDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OFTHE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher alleged Board did not enforce N.J.S.A. 26:3D-17 and the school district's smoking policy, resulting in medical problems for her.

ALJ concluded the enforcement of the statute against a district is not within the jurisdiction of the Commissioner of Education since it does not arise under the school laws. N.J.S.A. 26:3D places enforcement squarely within the responsibility of the Department of Health or a local board of health with jurisdiction over the proceedings vested in the municipal court. Petition was dismissed before the Commissioner of Education for lack of jurisdiction.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRAT . LAW

INITIAL DECISION

OAL DKT. NO. EDU 8807-94

AGENCY DKT. NO. 299-7/94

CONSTANCE BAUDER,

Petitioner,

v.

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

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Andre Schramenko, Esq., for respondent (Fitzpatrick & Waterman, attorneys)

Record Closed: November 6, 1995 Decided: November 30, 1995

BEFORE **EDITH KLINGER**, ALJ:

On July 21, 1994, petitioner, Constance Bauder, a tenured teacher in the science department at Rahway High School, filed a Verified Petition with the Commissioner of Education alleging that the Rahway Board of Education was not enforcing *N.J.S.A.* 26: 3D-17 and the Rahway school district smoking policy promulgated thereunder. She claims that the Board's failure to prevent smoking in and

around the school building to which she is assigned has resulted in the creation of medical problems for her and the exacerbation of her existing ones.

Respondent filed its answer on August 31, 1994 and on September 13, 1994, the Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held with the parties on December 2, 1994, and it was determined that the following were the issues to be resolved at hearing:

a. Has the board failed to enforce its no smoking policy and take all reasonable measures to insure that there is no smoking in or around the high school building?

b. If not, to what relief, if any, is petitioner entitled?

c. Is the enforcement of no smoking laws within the jurisdiction of the Commissioner of Education pursuant to *N.J.S.A.* 26:3D-21?

d. Does petitioner have standing to enforce the law prohibiting smoking in educational institutions?

A hearing was scheduled for April 6 and 7 1995, but was adjourned several times because of the unavailability of the parties. The hearing was held on November 6, 1995, and the record closed on that date.

The Board raised as an affirmative defense the threshold issue of the jurisdiction of the Commissioner of Education to render a decision on the subject matter of this petition. On the date of hearing, petitioner was allowed to present a portion of her case in order to determine whether any of her allegations were encompassed within the authority delegated to the Commissioner pursuant to *N.J.S.A.* 18A:6-9, as follows:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

N.J.S.A. 26:3D-17b requires the board of education of each school district to make and enforce regulations to prohibit the smoking of tobacco anywhere in its buildings except as part of a classroom instruction or a theatrical production. This statute supersedes any other statute, ordinance, rule or regulation relating to smoking on the premises of schools with certain exceptions, not applicable here. *N.J.S.A.* 26:3D-19b.

Enforcement of the statute against the administration of a school is the responsibility of the State Department of Health or the local board of health or its equivalent. *N.J.S.A.* 26:3D-20b. In fact, no one except the Commissioner of Health or the local board of health may bring an action against a school district to enforce the statute. *N.J.S.A.* 26:3D-21. *N.J.S.A.* 26:3D-20c further states that such an enforcement action shall only be brought in the municipal court.

Based upon a review of the statutory framework of the control of smoking in public places, I **CONCLUDE** that the enforcement of the statute against a district is not within the jurisdiction of the Commissioner of Education since it does not arise under the school laws. *N.J.S.A.* 26:3D places enforcement squarely within the responsibility of the Department of Health or a local board of health with jurisdiction over the proceedings vested in the municipal court.

Petitioner testified as to instances when she smelled smoke in the school building or observed people smoking. She also testified as to the adverse impact the second-hand smoke had on her health and her attempts to make the district enforce its smoking policy. When it became apparent that none of her complaints were cognizable under the school laws, a request was made for a proffer of the content of the remainder of her testimony. After confirming from the proffer that Bauder intended to continue to

offer evidence only as to other incidents of smoking, or perceived smoking, their effect upon her, and the alleged failure of the district to enforce its policy, the record was closed. No findings were made as to the merits of her complaints against the district since this was not the appropriate forum in which to litigate them. The motion of the respondent to dismiss the petition because the Commissioner of Education lacked jurisdiction over the subject matter was then granted.

Based upon the above, I **CONCLUDE** that the petition of Constance Bauder before the Commissioner of Education should be **DISMISSED** for lack of jurisdiction.

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

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

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

December 30, 1995
DATE

Ellen Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 6 1995

DATE

OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 8807-94

CONSTANCE BAUDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OFTHE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge's conclusion that the within matter is properly dismissed, inasmuch as enforcement of the smoking ban statute against a local district is not within his jurisdiction.

Accordingly, the Commissioner adopts the initial decision for the reasons expressed therein, and dismisses the matter with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 26, 1996

DATE OF MAILING FEBRUARY 26, 1996

(SB) 73-96

DHP #142-96DHPL
SB # 73-96

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF TONI WILLIAMS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, April 12, 1996

For the Petitioner-Appellant, Toni Williams, pro se

In a letter decision dated April 12, 1996, the Deputy Commissioner of Education affirmed the determination of the Office of Criminal History Review disqualifying Toni Williams (hereinafter "appellant") from school employment as an instructional assistant following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1.[1] The Deputy Commissioner determined that appellant had failed to affirmatively demonstrate her rehabilitation by clear and convincing evidence. The Deputy Commissioner advised appellant that an appeal could be taken to the State Board of Education pursuant to N.J.A.C. 6:2-1.1 et seq.

On October 10, 1996, appellant, acting pro se, filed a notice of appeal dated September 17, 1996 with the State Board. By letter dated October 21, 1996, the

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

12/4/96

counsel to the State Board advised appellant that her appeal had been due within 30 days of the filing date of the Commissioner's decision, and that this matter was therefore being referred to our Legal Committee for consideration of the effect of her failure to file timely notice. Appellant was given until November 4, 1996 to provide a written explanation of the reasons for her late filing.

On November 4, appellant filed her explanation, in which she indicated that she had come to the Department of Education in person on September 18, 1996, and had given her appeal papers to an unidentified employee.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

We conclude that the statutory filing requirement with which appellant failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Deputy Commissioner's decision was rendered on April 12, 1996 and mailed to appellant on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on April 15, 1996, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), appellant was required to file her notice of appeal to the State Board on or before May 15, 1996. Appellant's notice of appeal was dated September 17, 1996 and filed on October 10.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. While we are mindful of appellant's pro se status, we emphasize that her notice of appeal was dated September 17, 1996 and that, even accepting appellant's contention that she had brought her appeal papers to the Department of Education on September 18, she was still more than four months past the filing deadline at that time.

We therefore dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

December 4, 1996

Date of mailing DEC 06 1996

74-96

74-96

RAYMOND MC LOUGHLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teaching staff member, alleged the Board had violated the provisions of N.J.S.A. 6:29-3.3 by failing to appoint him to the position of Boys' Basketball Head Coach for the 1993-94 school year.

ALJ concluded that pursuant to regulations and the job description, the Board was permitted, after advertising, to hire the person it deemed to be best qualified for the position as long as that person was also the holder of a valid certificate issued by the New Jersey State Board of Examiners. Moreover, ALJ concluded that since no allegations of proscribed conduct were set forth in the petition, no right to a hearing existed under the school laws. Petition was dismissed.

Commissioner adopted findings and determination in initial decision with modification. Commissioner found it unnecessary to reach to the conclusions of the ALJ concerning the hearing rights of petitioner. Petition was dismissed.

FEBRUARY 28, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 2367-94

AGENCY DKT. NO. 18-2/94

RAYMOND MCLOUGHLIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Respondent.

Kenneth I. Nowak, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Howard M. Newman, Esq., and **Francis J. Campbell,** Esq., for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: December 4, 1995 Decided: January 12, 1996

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on February 7, 1994, when Raymond McLoughlin (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that the Middletown Township Board of Education (hereinafter respondent) had violated the provisions of N.J.A.C. 6:29-3.3 by failing to appoint him to the position Boys' Basketball Head

Coach for the 1993-94 school year. An answer on behalf of respondent was filed on February 24, 1994. On March 14, 1994, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F- 1 to -13. A prehearing conference was conducted on June 13, 1994 at which time the following was identified as the issue for determination at hearing:

> Did respondent violate N.J.S.A. 6:29-3.3(a) or (b) by failing to appoint petitioner to the position Boys' Basketball Head Coach?

A hearing was scheduled for October 25, 26 and 27, 1994 at the Trenton office of the Office of Administrative Law. However, prior to that date, on September 19, 1994 respondent filed a notice of motion for summary decision with supporting papers. On October 11, 1994 petitioner filed a response and notice of cross-motion for summary decision with supporting papers. On October 28, 1994 respondent filed a letter memorandum in response to petitioner's cross-motion for summary decision. By letter dated December 8, 1994 the undersigned wrote to the parties advising that the record was being reopened for the purpose of permitting counsel to comment upon the effect of an Appellate Division opinion issued on December 6, 1994 in Krupp v. Board of Educ. of Union Cty. Reg. High Sch. District No. 1, Union County, 278 N.J. Super. 31 (App. Div. 1994), certif. den. 140 N.J. 273 (1995). Counsel for respondent replied by letter dated January 6, 1995, advising that Krupp had been approved for publication and arguing that it was therefore a binding precedent in favor of respondent's position. Petitioner replied by letter dated January 17, 1995, advising that a petition for certification had been filed in Krupp and noted that the effect of Krupp would depend upon the outcome of that appeal. By letter dated March 6, 1995 the undersigned requested that the parties advise, inter alia, whether this matter should be placed upon the inactive list pending a determination by the Supreme Court. Respondent replied by letter dated March 13, 1995 agreeing that the case should be held in abeyance pending the Supreme Court's determination of the cross-petitions for certification in Krupp, but arguing that even in the event that the petitions were denied, respondent is entitled to summary decision. Petitioner filed a letter memorandum on April 19, 1995, addressing the questions posed in my March 6, 1995 letter. The cross-petitions for certifications were each denied on March 22, 1995.

Thereafter oral argument was conducted on the cross-motions in the within matter by telephone conference call on April 19, 1995. At that time it was agreed that petitioner could file an amended petition adding allegations concerning the 1994-95 school year. Petitioner filed an amended petition on May 19, 1995, together with a letter memorandum in support of the allegations in the petition. Respondent filed an answer to the amended petition on June 12, 1995, together with a letter memorandum addressing petitioner's arguments concerning the amended petition. By letter dated July 25, 1995, the undersigned transmitted a copy of the State Board of Education decision, dated June 9, 1995, remanding the Krupp case "to the Commissioner of Education pursuant to the Appellate Division's decision in order for him to determine in the first instance whether petitioner satisfied the standards for appointment to the coaching position he sought and for a decision on the merits of his claim that he would have been entitled to the position on that basis." The undersign's July 25, 1995 letter requested that the parties advise whether the within matter could still be decided on cross-motions for summary decision. No reply from either party having been received in response to the July 25, 1995 letter, the undersigned wrote again on November 8, 1995 directing that any further written submission concerning the effect of Krupp should be filed no later than November 27, 1995. Respondent replied by letter dated November 22, 1995, received the same day. Petitioner replied by letter dated November 30, 1995, received on December 4, 1995, whereupon the record closed.

FINDINGS OF FACT

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

Petitioner has been employed full time as a teacher in respondent's district since 1976. From the 1978-79 school year through 1984-85, he coached freshmen boys' basketball. From 1985-86 through 1988-89, he coached the junior varsity boys' basketball team at High School North. Beginning in 1989-90 school year and continuing through 1992-93 school year, he was the Boys' Basketball Head Coach at High School North. On April 27, 1993 respondent posted Administrative Bulletin #61, requiring applications for all extracurricular positions, including

Boys' Basketball, High School North, to be submitted no later than Monday, May 10, 1993. Petitioner applied for the position Boys' Basketball Head Coach High School North.

The job description prepared by respondent for the position Head Coach lists the following qualifications:

1. Full time teaching assignment in Middletown Township Public Schools.

2. At least five years of successful coaching experience in his/her chosen coaching area.

3. Such alternatives to the above qualifications as the Board may find appropriate and acceptable.

Respondent did not appoint petitioner to the position he had applied for. Instead respondent re-posted the position on October 21, 1993 and advertised to fill the position by placing an advertisement in the Newark Star Ledger on Sunday, October 24, 1993. Petitioner reapplied for the position. One other certified teacher employed by respondent, John DeGenito, also applied. Respondent hired Edward H. Leibowitz, the holder of a valid Instructional Certificate with a social studies endorsement issued by the State Board of Examiners in June 1975, who had applied by letters dated October 8, 1993 and October 18, 1993 in response to the Star Ledger advertisement. Although the dates on both letters pre-date the October 24, 1993 advertisement, Mr. Leibowitz's October 24, 1994 certification explains that the application letter he sent is a form letter which is in his computer and which he sends to all school districts and although he had changed the inside address to respondent's address, he had not changed the dates on the previous letters which he had sent to other districts. At the time he was hired Mr. Leibowitz was not a full-time teacher in respondent's district or in any other district. He was also not employed as a full-time teacher in any district during the 1993-94 school year while he was employed by respondent as Boys' Basketball Head Coach.

After respondent had posted and advertised the position of Boys' Basketball Head Coach for the 1994-95 season, petitioner again applied for the job. Respondent employed instead a teacher who held a valid certificate issued by the New Jersey State Board of Examiners but who was employed full time as a teacher in a parochial school. On May 19, 1995 petitioner filed an amended petition challenging respondent's hiring of a head coach for the 1994-95 season who was not employed full time as a teacher in a public school district.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was recently modified in Brill v. Guardian Life Insurance Company of America, and KRA Insurance Agency, Inc., --- N.J. --- decided October 24, 1995. Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

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

> matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Slip. opinion pp. 25-26.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves. In the present matter petitioner has offered no facts to contradict respondent's logical explanation for the dates on the application letters sent by Mr. Leibowitz in response to the Star Ledger advertisement. I therefore **CONCLUDE** that there is no genuine issue of material fact concerning Mr. Leibowitz's application and since there are no other facts in dispute, this matter is ripe for summary decision.

N.J.A.C. 6:29-3.3, the regulation governing a determination of the within matter, provides:

> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.
>
> (b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.
>
> (c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:
>
> 1. The district chief school administrator demonstrates to the county superintendent that:
>
> i. The vacant coaching position had been advertised; and
>
> ii. There was no qualified applicant based on the written standards of the district board of education;

2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.4(i) shall not apply to such coaching situations.

Until December 1994 the above quoted provisions had been consistently interpreted by the Commissioner and the State Board of Education to mean that if any teaching staff member within a district applied for a coaching position, then an employee of the district would have to be appointed and only if no in-district employee had applied could an out-of-district applicant be considered. See, e.g., Chambers v. Board of Education of the Township of Neptune, 1985 S.L.D. 1363; Norcross v. Board of Educ. of Hunterdon Regional High Sch. Dist., 1991 S.L.D. 1154. On December 6, 1994, however, the Appellate Division decided Krupp v. Board of Edu. of Union Cty Regional High School, 278 N.J. Super. 31 (App. Div. 1994) wherein it determined that the Commissioner and State Board had been misinterpreting the 1983 amendments to N.J.A.C. 6:29-3.3 (then designated N.J.A.C. 6:29-6.3). The court in Krupp reviewed the regulatory history of the 1983 amendments to the regulation and concluded that the amendments were intended to remove the absolute preference for an in-district employee. The court noted that subsection (b) of the amended regulation is clear on its face and permits districts to "employ any holder of a New Jersey teaching certificate" provided that the local board has advertised the vacant position. Explaining its conclusion, the court said:

Until November 7, 1983, N.J.A.C. 6:29-3.3(b) provided that:

> Every person appointed subsequent to June 1, 1960, to coach, teach or train individual pupils or school teams for inter-school athletic competition shall be a certified member of a school faculty *in that school district and shall be employed full-time during the regular day when classes are in session.*
> [15 N.J.R. 1152(b), 1153 (July 18, 1983)].

> This language was deleted and replaced with the language in subsection (b), quoted supra (at pp. 38-39, 650 A.2d at p. 370), which contains no intra-district hiring preference. Generally, the deletion of a specific requirement and substitution of broader language is considered a clear indication of intent to eliminate the excised restriction. Moreover, the clear contrast with the language of N.J.A.C. 6:29-3.3(c), as well as the pre-1983 language in subsection (b), indicates that a distinction can be clearly made when so intended.

The Court then makes the following statements which have given rise to the issue herein whether all athletic coaches hired for the inter-scholastic athletic program must also be employed in some school district:

> Subsection (a) of N.J.A.C. 6:29-3.3 as amended, requires that all athletic coaches be: (1) certified teachers; and (2) employed by a school district in New Jersey. Subsection (a) of N.J.A.C. 6:29-3.3 does not state that coaches must be certified teachers employed by *"the"* school district in which they are employed. Use of the article "a" in this case, therefore, is akin to using the word "any." Under this "reasonable reading," the employment of Hennessy by the Johnson School was authorized in subsection (a) and the employment of Krupp was not mandated by that section. Id. at 41-42.

> Subsection (a) of necessity must be read in context with subsection (b). As noted, after the 1983 amendment, subsection (b) permits districts to "employ *any* holder of a New Jersey teaching certificate," provided that the local board has advertised the vacant position. See N.J.A.C. 6:29-3.3(b), supra.

Petitioner argues that paragraph a and paragraph b, when read together, require athletic coaches hired to work in the inter-scholastic athletic program to be (a) certified teachers and (b) employed by some school district in New Jersey. Since it is undisputed that the parochial school

teacher was not employed by "a school district" and that Mr. Leibowitz was not employed by any school district either at the time he was hired by respondent or at any time during his 1993-94 coaching duties, petitioner claims that he is entitled to judgment as a matter of law, reimbursing him for the stipends which should have been his. Respondent points out, however, that paragraph (a) and paragraph (b) address two entirely different situations; paragraph (a) regulates persons who "organize public school pupils during school time or during any recess in the school day for purposes of . . . coaching . . ." and paragraph (b) specifically addresses the inter-scholastic athletic program which invariably is conducted during hours other than school time or recesses during the school day. As noted by the court in Krupp, an administrative agency in construing its regulations must apply the same rules of construction as those guiding statutory construction by the courts. Also as noted by the Krupp court, the language of the regulation is not ambiguous. There is, therefore, no reason to resort to rules of construction. N.J.A.C. 6:29-3.3(a) was not amended in 1983 when the other subsections, (b) through (f), were replaced. A careful reading of subsection (a) reveals that it applies only to persons who coach or conduct instruction or athletic activities "during school time or during any recess in the school day." It would therefore appear that subsection (a) had nothing to do with the hiring of either Arthur Krupp or Walter Hennessy since the position in question, Head Girls' Basketball Coach, did not involve activity during school time or during any recess in the school day; Walter Hennessy taught full-time in a different district, and therefore the duties of Head Girls' Basketball Coach could not have been performed during school time or during any recess in the school day. Clearly, the position in Krupp was one in the Inter-Scholastic Athletic Program. Prior to the 1983 amendments to this regulation subsection (b) through (f) governed hiring in the Inter-Scholastic Athletic Program. The pre-1983 regulations are the source of the requirement that an athletic coach be employed full-time during the regular school day in some school district. That language was completely eliminated in the 1983 amendments. After 1983 the only requirements imposed by the regulation are that a coach in the Inter-Scholastic Athletic Program be the holder of a New Jersey Teaching Certificate and that the job be awarded only after the position has been advertised.

Subsection (c) of the amended regulation applies only if "no qualified and certified applicant" exists. In the within matter it is undisputed that both the parochial school teacher and

Mr. Leibowitz are the holders of a New Jersey Teaching Certificate. Petitioner argues that Mr. Leibowitz was not "qualified" because he did not satisfy the requirements in respondent's job description. As respondent accurately points out, however, pursuant to paragraph #3 in the job description (quoted hereinabove), respondent has the ability to waive the requirements set forth in paragraphs #1 and #2. Accordingly, I **CONCLUDE** that pursuant to the regulations and its own job description, respondent was permitted, after advertising, to hire the person it deemed to be best qualified for the position as long as that person was also the holder of a valid certificate issued by the New Jersey State Board of Examiners. Petitioner had no right pursuant to the regulations to be reemployed in the position.

It is possible that petitioner may have had some right to reemployment in the position pursuant to the negotiated agreement between the Middletown Township Education Association and respondent. N.J.S.A. 34:13A-23, effective January 4, 1990, provides:

> All aspects of assignment to retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations. If the negotiated selection procedures fail to produce a qualified candidate from within the district the employer may employ from outside the district any qualified person who holds an appropriate New Jersey teaching certificate. If the employer is unable to employ a qualified person from outside of the district, the employer may assign a qualified teaching staff member from within the district.

Whatever rights, if any, petitioner has/had to the position would arise under this statute. Which brings us to the one remaining issue in the within case, whether the Krupp decision somehow creates the right to a hearing before the Commissioner of Education for unsuccessful applicants for coaching positions in the Inter-Scholastic Athletic Program. The Appellate Division in Krupp did remand the case to the State Board of Education "for a determination on the merits not inconsistent with the construction of the regulation set forth herein." As previously noted, the

State Board has remanded the matter to the Commissioner of Education for a hearing. These remands are puzzling in light of the holding that a board of education has discretion to employ any holder of a New Jersey teaching certificate after the position has been advertised. Perhaps there was something unique about the facts in Krupp which caused the court and the State Board to remand the matter for a hearing. Since coaches in the Inter-Scholastic Athletic Program do not earn tenure in those positions, I **CONCLUDE** that whatever rights to a hearing might exist arise under N.J.S.A. 34:13A-23 and not under the school laws, unless, of course a petitioner provides adequately-detailed allegations of proscribed conduct, i.e., unlawful discrimination, deprivation of constitutional rights, etc. See Nasuti v. Bd. of Ed. of West Amwell, 1979 S.L.D. 11, 18. There have been no such allegations set forth in the petition in this matter.

For all of the foregoing reasons, I **CONCLUDE** that respondent is entitled to the relief which it seeks as a matter of law. Accordingly, respondent's motion for summary decision is **GRANTED**. Petitioner's motion for summary decision is **DENIED** and the petition of appeal herein is **DISMISSED WITH PREJUDICE**.

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

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

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

January 12, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

1/17/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 18 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

RAYMOND MC LOUGHLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that petitioner is entitled to the position of Boys' Basketball Head Coach over those appointed by the Board to coach in 1993-94 and in 1994-95. Specifically, petitioner argues that he is entitled to the position in that the other appointees are not employed in *any* school district. Petitioner argues that such employment must be a qualification for the position which is consistent with the decision in *Krupp, supra.* Petitioner further argues that to find otherwise, as did the ALJ, would be incorrect in that it would allow boards to operate on "pure whim," or "legalized anarchy." (Petitioner's Exceptions at p. 9)

In its reply, the Board argues that the ALJ's initial decision was correct and should be adopted in its entirety. The Board avers that the ALJ's construction of applicable regulation,

Accordingly, for the reasons expressed therein, as modified above, the Commissioner affirms the initial decision of the Office of Administrative Law and dismisses the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 28, 1996

DATE OF MAILING FEBRUARY 28, 1996

74-96

EDU #2367-94
C # 74-96
SB # 15-96

RAYMOND MC LOUGHLIN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN. MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 28, 1996

For the Petitioner-Appellant. Zazzali, Zazzali, Fagella & Nowak (Kenneth I. Nowak, Esq., of Counsel)

For the Respondent-Respondent. Kalac. Newman. Lavender & Campbell (Howard M. Newman, Esq. and Francis J. Campbell, Esq., of Counsel)

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

June 5, 1996

Date of mailing JUN 07 1996

(SB) 76-96

DHPBL #474-96
SB # 76-96

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

CATION FROM SCHOOL EMPLOYMENT : DECISION

OF J.J.G. :

Decided by the Deputy Commissioner of Education, October 18, 1996

For the Petitioner-Appellant, J.J.G., pro se

The decision of the Deputy Commissioner of Education disqualifying petitioner from school employment as a bus driver following a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 is affirmed for the reasons expressed therein. We add only that petitioner's May 1996 conviction for violation of a local ordinance resulted from an arrest in March 1996 on charges of lewdness.

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

1/8/97

78-96

78-96-SEC

IN THE MATTER OF	:	
	:	COMMISSIONER OF EDUCATION
JOHN HARRISON.		
	:	DECISION
	:	
	:	

MARCH 6, 1996

IN THE MATTER	:	
		STATE OF NEW JERSEY
OF	:	
		SCHOOL ETHICS COMMISSION
JOHN HARRISON	:	
		DECISION
_____	:	**DOCKET NO: C13-94**

PROCEDURAL HISTORY

This case comes before the School Ethics Commission (Commission) by way of Complaint filed by Ronald Ungarini against Ewing School Board Member John Harrison on August 24, 1994. Mr. Harrison filed his Answer and Certification on September 19, 1994. The Complaint alleges that Mr. Harrison violated the School Ethics Act by voting for a 48-day penalty-free extension for the construction of a new Parkway School while he was concurrently a partner in a firm subcontracted as the consulting structural engineer by the architect on the same project. Mr. Harrison denies having received any benefit as a result of that vote and denies that the extension was penalty-free to anyone other than the general contractor and thus, neither he nor the architect gained any financial benefit from the granting of the extension.

The matter was placed on the agenda of the Commission for December 1994. After considering the allegations in the Complaint, the responding affidavits and the exhibits submitted in support of both, the Commission determined at its November 16, 1994 meeting that there was probable cause to find that the School Ethics Act, specifically N.J.S.A. 18A:12-24a, b, and c, had been violated. The Commission further determined that the material facts were not in dispute and thus there was no need for a factual hearing. The Commission set forth its findings in a letter dated November 23, 1994. In that letter, the Commission invited the parties to submit briefs setting forth their positions as to the applicability of N.J.S.A. 18A:12-24a, b, and c and the appropriate penalty. The parties were to file their briefs no later than December 13, 1994 and their reply briefs no later than January 4, 1995; however, due to staff shortages, the matter was not placed on the Commission's agenda again until December 14, 1995.

A final decision was rendered on that date, finding that respondent violated N.J.S.A. 18A:12-24(c) and (a). The Commission recommends to the Commissioner of Education that a censure be imposed as the appropriate penalty.

FINDINGS OF FACT

The Commission has determined from the pleadings, affidavits and exhibits that the following facts are undisputed:

- The Ewing Township Board of Education entered into a design contract with an architect in 1990 for the design of the new Parkway Elementary School.

- The Architect for the project was Faridy Thorne Fraytak. The Architect subcontracted the structural engineering design work to Harrison-Hamnett, P.C.

- John Harrison is a partner in Harrison-Hamnett, P.C.

- John Harrison was elected to the Ewing Township Board of Education and took office on April 25, 1994. Thus, the contract between the Architect and Harrison-Hamnett was entered into before Mr. Harrison became a board members.

- When John Harrison filed his personal/relative disclosure statement, he answered the question, "Are you or any relative employed by or receiving compensation from any business which is a party to a contract with the school district in which you hold office or employment?" by saying "Yes" and providing the name Faridy Thorne Fraytak, P.C. as the name of the business from which he received compensation.

- The contract between the owner, the Mercer County Improvement Authority, and the Construction Manager provides in Article 2 that:....

  > The Architect shall visit the site not less than twice per week while work is in progress, and as often as necessary and appropriate to the stage of construction, to inspect the site and work; to familiarize himself with the progress and quality of the work; to determine for the owner's benefit and protection if the work is proceeding in accordance with the intent of the contract documents and construction schedule. On the basis of his on-site observations and inspections as an Architect, the architect shall keep the Owner informed of the progress and quality of the work he shall use reasonable care to guard the owner against defects and deficiencies in the work and against the Contractor's failure to carry out the work in accordance with the intent of the construction documents and the construction schedule. [Agreement @ 2.6.5].

- The Construction Manager for the project was Lehrer McGovern Bovis. The general contractor had sought an extension of time to complete the project for 70 days, and that request was reviewed by the Construction Manager. The Construction Manager (Lehrer McGovern Bovis) recommended granting a 48-day extension.

The Commission finds that the action of Mr. Harrison to vote for the construction extension creates an impression among the public that he cast this vote in self-interest rather than the interest of the public, especially in light of the fact that the extension would cause the school to not be completed by the start of the school year. It was also a vote in which Mr. Harrison had an indirect personal and financial involvement that could reasonably be expected to impair his objectivity and independence of judgment. The contract between the owner and the construction manager provides that the architect "shall use reasonable care to guard the owner against defects and deficiencies in the work and against the contractor's failure to carry out the work in accordance with the intent of the construction documents and the construction schedule." Thus, the contract indicates that the architect could be held accountable for delays by the contractor and therefore, the penalty free extension to the contractor benefited the architect with whom the board member has a financial and personal involvement.

Based on foregoing, the Commission finds that Mr. Harrison's conduct would not be acceptable to the public nonallowable under N.J.S.A. 18A:12-24(c).

Mr. Harrison, through his attorney, strenuously denies having violated N.J.S.A. 18A:12-24(b) which prohibits board members from "using their official positions to secure unwarranted privileges for themselves, members of their immediate family, or others." The Commission disagrees with Mr. Harrison's assertion that there was no benefit to the architect from the vote to extend the deadline. This disagreement is due to the contract language set forth above that indicates that if litigation ensued between the contractor and the owner because the extension was denied, the architect could easily be named in the litigation for failing to adequately guard the owner against the contractor's failure to comply with the contract schedule. Nevertheless, the Commission is persuaded that it does not have sufficient evidence before it to determine that the privilege was "unwarranted" in light of the facts presented.

The determination as to whether the extension was an unwarranted privilege would turn on whether the factors which lead to the need for an extension had actually occurred and whether they fell within the contractual language setting forth what reasons for delay would be excusable. While the Commission agrees that it does not have adequate expertise or evidence in this particular case to find a violation of N.J.S.A. 18A:12-24(b), it does not agree that it does not have jurisdiction to form an opinion as to whether the general contractor was entitled to the extension of time. As long as the determination was made in the context of deciding whether a violation of a provision of the School Ethics Act occurred, the Commission could make such a ruling. However, it would need an expert report and witness testimony to do so and the Commission is not so prepared at this time.

Mr. Harrison, through his attorney, also denies that his action in voting for the extension violated N.J.S.A. 18A:12-24(a). He states that in prior cases before the Commission, the Commission has ruled that the provision was not violated in cases in which abstaining from the vote would cure the conflict. Thus, he argues that he should

- On July 25, 1994, the Board unanimously approved an extension of 48 days from August 1, 1994 to October 7, 1994 "for the substantial completion of the new Parkway School" as set forth in the Board minutes.

- Mr. Harrison seconded the motion to approve the extension of time and voted for it.

- The Architect's performance has never been raised as an issue with respect to any extension of time request.

- When a question was raised shortly after the July 24 meeting as to whether Mr. Harrison should have participated in the vote, Mr. Harrison asked the board attorney for a legal opinion. The board attorney orally rendered an opinion at the next Board meeting on August 22, 1994 advising that Mr. Harrison should have abstained and recommended de novo action by the Board. The Board voted de novo on the matter without any participation by Mr. Harrison and the extension was unanimously reaffirmed. The Board attorney's oral opinion was later reduced to writing and is included in the record.

- Mr. Harrison has ever since abstained on all matters dealing with the district's ongoing construction projects.[1]

DECISION:

Mr. Harrison, through his attorney, admits that his voting for the 48-day extension is a violation of N.J.S.A. 18A:12-24(c). that section sets forth:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The Commission finds that N.J.S.A. 18A:12-24(c) was violated when Mr. Harrison seconded the motion and cast a vote in favor of granting a 48-day extension to substantially complete the construction on the new school, based on his partnership with a firm subcontracted by the architect on the project. In considering this case, the Commission examined pertinent sections of N.J.S.A. 18A:12-21 et seq. as well as the facts of this case and relevant case law.

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[1] The contractual relationships were actually a further step removed from the Board, in that none of the construction or consultant contracts were with the Board, but rather were with the Mercer County Improvement Authority (MCIA), which bid, advertised, financed and directly managed the project under a lease purchase arrangement.

not be disqualified from acting on other matters that come before the board because of his interest in Harrison-Hamnett. We find his argument to miss the point. Subsection (a) provides as follows:

> No school official or member of his immediate family shall have an interest in a business organization or engage in any business transaction or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

The Commission agrees that from this point forward respondent's abstention from voting in matters involving Harrison-Hamnett will cure his conflict of interest. However, that determination does not in any way absolve respondent of the violation of subsection a that already occurred. The Commission must look at the fact that in the matter presently before the board, respondent did not abstain from the vote as his own counsel recognizes he should have. Rather he voted in a matter in which his business interest and the board's interest were in substantial conflict. Mr. Harrison's activity as partner in Harrison-Hamnett was in "substantial conflict" with the proper discharge of his duties as school board member when he voted on the extension and indeed, when he votes on any matters which involve his company's contract with the board, whether directly or indirectly. Thus, only as applied to the particular facts that are presently before the board, the Commission finds that N.J.S.A. 18A:12-24(a) was violated.

SANCTION

Respondent submits that a reprimand is the logical penalty given his lack of experience on the school board and thus, his lack of intent to violate the Act. However, the School Ethics Commission believes that a higher penalty is in order based on the nature of the violation and the fact that his answer to the personal/relative disclosure statement showed that he recognized the connection between his business and the architect. Therefore, the Commission recommends to the Commissioner of Education that Mr. Harrison be publicly censured for his action.

Censure is "a formal public action read into the record of the School Ethics Commission to rebuke a school official..." N.J.A.C. 6:3-9.2. This sanction is stronger than a reprimand because the sanction is publicly announced. The Commission is of the opinion that Mr. Harrison's actions warrant such public declaration. His vote created the situation where the public could reasonably perceive that he was acting for his own interest rather than that of the public he serves. He also created a situation in which his two roles as partner in a structural engineering firm and board member were in substantial conflict. The public should be aware that the Commission will not allow such a situation to exist.

The complainant has requested that Mr. Harrison be removed from the board; however, because Mr. Harrison was a new board member and had not yet attended his

orientation for new board members, the Commission does not feel that his conduct warrants such severe punishment. As set forth above, the Commission will not allow the fact that he was recently elected to the board to absolve him completely, but it is a factor taken into account in determining that a censure is the most appropriate penalty.

For the foregoing reasons, the Commission recommends to the Commissioner of Education that the penalty of censure be imposed.

C13-94

Resolution Adopting Decision - C13-94

Whereas, the School Ethics Commission has considered all papers in C13-94, and has considered all arguments raised by both parties; and

Whereas, the Commission has found probable cause of a School Ethics Act violation against respondent John Harrison; and

Whereas, the Commission has reviewed the draft proposed decision by Executive Director Lisa James-Beavers;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini
Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 14, 1995

Lisa James-Beavers
Lisa James-Beavers
Executive Director
School Ethics Commission

LJB/C1394res

IN THE MATTER OF	:	
	:	COMMISSIONER OF EDUCATION
JOHN HARRISON.	:	
	:	DECISION
	:	
	:	

The initial decision of the School Ethics Commission, together with the recommended sanction adopted by the Commission, has been reviewed. This matter comes before the Commissioner of Education to impose a sanction, pursuant to N.J.S.A. 18A:12-29(c), upon John Harrison (Harrison), member of the Board of Education of Ewing Township (Board) based upon a finding by the School Ethics Commission that Harrison violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq.

BACKGROUND

After finding probable cause of a violation of the School Ethics Act by John Harrison, the School Ethics Commission determined not to transmit this matter to the Office of Administrative Law, in that the Commission found that no material facts were in dispute, and an evidentiary hearing was, therefore, not warranted. At its meeting on December 14, 1995, the Commission determined that Harrison violated the School Ethics Act, N.J.S.A. 18A:12-24(a) and (c), by voting for a 48-day penalty-free extension for the construction of a new Parkway School while he was concurrently a partner in a firm subcontracted as the consulting structural engineer by the architect on the same project. The Commission recommends that censure is the appropriate penalty in this matter. After the issuance of the

Commission's decision, the parties were provided an opportunity to submit comments to the record regarding the Commission's proposed sanction for the Commissioner's consideration in his determination of an appropriate penalty herein. Comments on behalf of Harrison were filed on January 29, 1996.[1]

CONCLUSIONS OF LAW

The School Ethics Commission found that Harrison violated N.J.S.A.18A:12-24(c)[2] when he seconded the motion and cast a vote in favor of granting a 48-day extension to substantially complete the construction on the new school, based on his partnership with a firm subcontracted by the architect on the project.[3] The Commission determined such action created a public impression that such vote was cast in self-interest rather than in public interest. Further, it found that Harrison also "had an indirect personal and financial involvement that could reasonably be expected to impair his objectivity and independence of judgment." (School Ethics Commission Decision at p. 4) It noted that the contract existing between the owner and the construction manager placed an obligation on the architect to guard against defects and deficiencies in the work performed and against the contractor's failure to complete work in accordance with construction documents and the construction schedule. Thus, the Commission concluded

[1] On January 5, 1996, counsel for John Harrison advised the Director of the Bureau of Controversies and Disputes that he did not receive a copy of the Commission's December 19, 1995 decision until January 3, 1996. He, therefore, requested and was granted an extension of time within which to file his comments.

[2] This provision specifies: "No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment."

[3] The Commission noted that Harrison admitted that his action was violative of N.J.S.A. 18A:12-24(c).

> ***the contract indicates that the architect could be held accountable for delays by the contractor and therefore, the penalty free extension to the contractor benefited the architect with whom the board member has a financial and personal involvement. (Id.)

The Commission further found Harrison's actions violative of N.J.S.A. 18A:12-24(a).[4] The Commission noted that

> Mr. Harrison's activity as partner in Harrison-Hamnet was in "substantial conflict" with the proper discharge of his duties as school board member when he voted on the extension and indeed, when he votes on any matters which involve his company's contract with the board, whether directly or indirectly. (School Ethics Commission Decision at p. 5)

Although the Commission found that for any future board matters which involve Harrison's company, abstention from voting would cure his conflict of interest, it held that this determination does not absolve him of the instant violation.

Finally, the Commission declined to find that Harrison's actions violated N.J.S.A. 18A:12-24(b) which prohibits board members from using their official positions to secure unwarranted privileges for themselves, members of their immediate family, or others. The Commission saw potential benefit to the architect from the vote which extended the deadline in that if such deadline had not been extended the architect might incur liability pursuant to the contract between the contractor and owner which obligated him to guard against failure of the contractor to comply with the construction schedule. Notwithstanding this, the Commission

[4] This provision states: "No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest."

determined that "it does not have sufficient evidence before it to determine that the privilege was 'unwarranted' in light of the facts presented." (School Ethics Commission Decision at p.4)

With respect to penalty, the Commission recommends that Harrison be publicly censured for his actions. It believes that the nature of the violation and the fact that Harrison's answer to the personal/relative disclosure statement recognized the connection between his business and the architect warrant such public declaration.

COMMENTS TO THE COMMISSION'S DECISION

Comments submitted by Harrison urge that the facts in this matter do not warrant a penalty as severe as censure. Initially, he compares this matter to Ronald Dilzer v. Karen Sweet, decided by the Commissioner November 17, 1995, a recent ethics decision wherein the Commissioner rejected the Commission's recommendation of censure and instead imposed a reprimand as the appropriate penalty. Harrison argues that in this matter, as in Sweet, "the respondent did not in any way benefit, personally or financially, from the disputed action" and "the violation was unintentional, in that neither respondent realized that their actions were violative of the Act, and both were acting in good faith." (Harrison's Comments at p. 2) Moreover, Harrison asserts that this matter is even more compelling for a mitigated penalty than that of Sweet, since at the time of the violation he had only been a Board member for three months and had not yet had an opportunity to attend the Board member training mandated by N.J.S.A. 18A:[12-33]. Sweet, on the other hand, was board vice president and had been on the board for a number of years at the time of her violation.

Further, Harrison contends that objective indicia substantiating his assertion that he acted in good faith in this matter is evident from

> the fact that he requested an objective opinion from the board attorney immediately after a question was raised about his vote. This was on his own initiative and occurred before the instant ethics complaint was filed with the Commission.*** (emphasis in text) (Harrison's Comments at p. 3)

Harrison continues, subsequent to the receipt of the Board attorney's opinion, that he should have abstained from voting, the Board took de novo action and, without his participation, voted to readopt the original resolution.

Harrison next observes that in making its penalty recommendation, the Commission cited the nature of the violation and the fact that his answer to the personal/relative disclosure statement showed that he recognized the connection between his business and the architect as justification for the severe penalty of censure. He argues:

> Granted that he knew of his firm's relationship to the Architect, but neither the Architect's performance nor the Architect's recommendation was before the Board on July 25! The matter is even further removed in that all the contracts were actually with the Mercer County Improvement Authority (MCIA) not the Board, and the Board had no direct contracts with any of the parties at the time the vote was taken. *** Moreover, the recommendation before the Board came from the Construction Manager *** not the Architect, and the extension itself involved neither of those firms' performance, but only that of the General Contractor. *** The relationship of respondent's firm to this particular action is very obscure and indirect, and these circumstances should be factors in determining the "nature of the violation" and the resulting sanction. (Harrison's Comments at pp. 3-4)

Lastly, Harrison urges the Commissioner to consider that he has already suffered as a result of this matter in that he has "been the victim of scurrilous newspaper reporting containing false allegations that I financially benefited from the Board's action which is absolutely untrue." (Id. at p. 4) He notes that counsel has advised him that he has no recourse against this particular newspaper because he is a "public figure." Harrison further proffers that

> as a volunteer board member who has pledged a substantial amount of time toward the education of children in my school district, I do not believe that I should be subject to [the] penalty [of censure] for an innocent error from which I obtained no benefit and which was righted as soon as it was brought to my attention.***
>
> (Id.)

COMMISSIONER'S DETERMINATION

Upon review of the Commission's findings of fact and conclusions of law, by which the Commissioner is bound in making his determination in this matter, the recommended penalty of the Commission and the comments of Harrison as to penalty, the Commissioner declines to accept the Commission's recommendation that censure is appropriate in this matter since censure calls for formal public action read into the record of the School Ethics Commission rebuking the school official who was determined to have violated the School Ethics Act. (N.J.A.C. 6:3-9.1 et seq.)

Rather, the Commissioner determines that the fact that Harrison was a new Board member who had not yet received the Board member training course; that he was the individual who sought and received a legal opinion with respect to this matter before the filing of the instant charges; that the Board subsequently unanimously sanctioned the July 25 vote, absent

participation from Harrison; and that the record confirms an extremely remote connection between the interests of Harrison's company and the particular vote taken at the meeting of July 25, are all relevant considerations to his obligation to fairly render a determination of the appropriate sanction in this matter. The Commissioner concludes that the totality of these considerations warrants mitigation of the penalty recommended by the Commission. Accordingly, the Commissioner finds that reprimand, which consists of a letter from the Commission rebuking Harrison for having breached the standards of conduct prescribed by N.J.S.A. 18A:12-21 et seq. (N.J.A.C. 6:3-9.1 et seq.), is the appropriate penalty to be imposed in this matter.

IT IS hereby ORDERED that John Harrison be reprimanded as a School Board Member found to have violated the School Ethics Act.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

MARCH 6, 1996
DATE OF MAILING MARCH 6, 1996

79-96

79-96-DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
RONALD N. TRISUZZI.	:	
_____	:	

MARCH 6, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11153-95
Agency # DHP #466

RONALD N. TRISUZZI,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Ronald Trisuzzi, *pro se*, petitioner

Department of Education relied on documents submitted pursuant to *N.J.A.C. 1:1-5.6*

Record Closed: December 18, 1995 Decided: January 18, 1996

BEFORE **JEFFREY A. GERSON**, ALJ

PROCEDURAL HISTORY

Ronald Trisuzzi was employed as a custodian at Chancellor Academy II in Rockaway, New Jersey. After a criminal history review by the Office of Criminal History Review of the Department of Education, Mr. Trisuzzi was notified that he was disqualified from employment in the State schools.

Mr. Trisuzzi appealed the disqualification and the Deputy Commissioner of Education on behalf of the Commissioner issued a letter decision on March 13, 1995 affirming Mr. Trisuzzi's disqualification and forwarded the matter to the State Board of Education. The State Board of Education, after a thorough review of the record, remanded the case to the Commissioner of Education in order to provide Mr. Trisuzzi with an adequate opportunity to

establish a record in support of his contention that he had satisfied the statutory standard of proof of rehabilitation pursuant to *N.J.S.A. 18A:6-7.1*

The Commissioner of Education forwarded this matter to the Office of Administrative Law for a full hearing. The hearing was conducted and concluded on December 18, 1995.

BACKGROUND

In September 1993, Ronald Trisuzzi was hired as Building Maintenance Manager and Custodian by Chancellor Academy II in Rockaway, New Jersey. Prior to commencing his employment in September, he had voluntarily worked for the Academy during the months of July and August. His successful employment during the "two month trial period" led to his hiring in September.

A routine fingerprint search conducted by the Criminal History Division of the Department of Education revealed a conviction for aggravated assault on May 5, 1990.

Subsequent investigation disclosed that the aggravated assault had been downgraded to simple assault, a simple assault in which no bodily injury occurred, and a conviction for possessing less than 25 grams of marijuana, a disorderly person's offense.

An examination of the actual complaints filed in the municipal court confirms that Mr. Trisuzzi pled guilty to simple assault and possession of less than 50 grams of marijuana.

The facts surrounding this incident which occurred on May 2, 1990, are as follows: Mr. Trisuzzi was returning from his employment as a truck driver when his motor vehicle was stopped by the Fairfield Police for having an overdue inspection sticker. After the police requested Mr. Trisuzzi's motor vehicle paperwork and license, he was asked to step out of the vehicle and he was searched. The search of Mr. Trisuzzi's person proved fruitless, but the arrival of a second police unit and a search of the vehicle resulted in the discovery of a small marijuana "roach".

The discovery of the "roach" led to Mr. Trisuzzi's arrest, an arrest which in his view was unwarranted and unnecessary. When it came time to handcuff Mr. Trisuzzi, his fear and his immaturity caused him to refuse to allow the officer to place the handcuffs on his wrists. A minor struggle ensued, at which point Mr. Trisuzzi, albeit reluctantly, submitted to the arrest.

On October 4, five months later, Mr. Trisuzzi appeared in court with an attorney, apparently provided to him by his parents, whose name he could not recall. Mr. Trisuzzi did recall pleading guilty to the amended charge of simple assault and to the amended charge of possession of less than 25 grams of marijuana. He also remembered being surprised that his license was revoked for six months.

A review of the Fairfield Municipal Court's records concerning Mr. Trisuzzi confirms his guilty pleas and, surprisingly, appear to indicate that he had requested First Offender Treatment with respect to the marijuana charge. The penalty with respect to that charge is, in fact, exactly what he would have gotten had he actually been treated as a First Offender. For some unknown reason, no notification was sent to any criminal justice agencies confirming Mr. Trisuzzi's successful completion of his six month probation.

THE LAW

N.J.S.A. 18A:6-7.1 in pertinent part states as follows:

> An individual . . . shall be disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction of any of the following crimes and offenses:
>
> (a) In New Jersey, any crime or disorderly person's offense: (1) bearing upon or involving sexual offense or child molestation as set forth in *N.J.S.A.2C:14-1. et seq.* or, (2) endangering the welfare of children or incompetence as set forth in *N.J.S.A. 2c:24-4 and N.J.S.A.2C:24-7.*
>
> (b) A crime or offense involving the manufacturer, transportation, sale, possession or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," *N.J.S.A. 2C: 24:21-1 et seq.*, or
>
> (c) (1) a crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, aggravated assault, kidnapping, arson, manslaughter and murder, or (2) a simple assault involving the use of force which results in bodily injury.

Since the simple assault to which Mr. Trisuzzi pleaded guilty did not involve the use of force which resulted in bodily injury, the only disqualifying offense which appears on his record is the possession of a "controlled dangerous substance".

N.J.S.A.18A:6-7.1(e) provides:

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

DISCUSSION

The following is an analysis of the eight factors which were addressed and considered at the time of the hearing concerning whether or not there was clear and convincing evidence of Mr. Trisuzzi's rehabilitation.

Concerning the nature and responsibility of his position, Mr. Trisuzzi as a maintenance man would have relatively little contact with the student body at the Academy. Though his responsibility for the physical condition of the building would be significant, there is little doubt from the testimony and the written submissions from personnel at the Academy that Mr. Trisuzzi has more than adequately met those responsibilities.

With respect to the nature and seriousness of the offense, one can never characterize any drug offense as something other than serious, but in the overall spectrum of possible drug offenses, possession of one small "roach" certainly falls at the very lowest level of that

spectrum. It was in fact pointed out by Mr. Trisuzzi that the "roach" itself was not found on his person, but rather in the car, and though he accepted responsibility for what the law would consider possession, he maintained that it was not he who had smoked the "roach".

Since the circumstances under which the offense occurred have already been detailed, the next element to be considered is Mr. Trisuzzi's personal circumstances at the time of the incident. When his motor vehicle was stopped and the subsequent arrest took place, Mr. Trisuzzi was no longer living at home with his parents who had recently gone through a divorce. A little more than a year prior to the incident, the relationship with his father had deteriorated to the point where Mr. Trisuzzi gave up his schooling and moved out of his father's house. He started living with various friends over the period of the next year until the apartment which he was occupying just prior to the incident was subject to an eviction action which left him basically "living out of his car". It was at this disheveled time of his life that Mr. Trisuzzi had, what he indicated was, his first and only contact with the criminal justice system.

He was only 18 at the time the offense was committed, but had suffered through hardship of a man considerably older.

In analyzing not only the factual circumstances surrounding Mr. Trisuzzi's arrest and subsequent conviction but also all of the documentation that he submitted (attached hereto) and having had the opportunity to personally see and hear his testimony, I am convinced that his offense in May 1990 was an isolated event which is unlikely to ever occur again.

Though I have already mentioned the social conditions which may have contributed to Mr. Trisuzzi's arrest, I also note that Mr. Trisuzzi, prior to becoming an employee of Chancellor Academy II, had been a student there in the middle to late 80's. Chancellor Academy II accepts students who are emotionally handicapped.

The evidence of Mr. Trisuzzi's rehabilitation is compelling, clear and convincing.

Not only did he successfully complete his six months probationary period, but he has, since the arrest and conviction, obtained his "Black Seal" license from the State which allows him to work on boilers. In order to get the license, he had to attend a training school for 12 weeks and pass a test. He did so successfully.

He is presently engaged in a home study course which will provide him with a high school equivalency diploma in June. His grades have been excellent.

Not only has Mr. Trisuzzi taken educational and employment steps to improve his plight, he has reestablished a relationship with his father which he had lost when he moved out of the house and quit school. He has unquestionably broken the pattern of disappointment which had alienated him from his father.

Undoubtedly the question of whether or not Mr. Trisuzzi had some type of drug problem is a question that should be addressed directly and has been. At least five drug tests over a period of time from his first date of employment in 1993 until this month have all come back negative. The reason these drug tests are being conducted was that Richard A. Sheridan, the Director of Chancellor Academy II, wanted to be absolutely sure that Mr. Trisuzzi would present no risk to the students of Chancellor Academy II if he was employed as a maintenance man.

Not only has Mr. Trisuzzi established himself as being drug free by way of the drug tests, but he has also been receiving "informal" counseling from Doctor James Sherwood, a licensed psychologist employed by Chancellor Academy II.

The evidence presented at the hearing clearly established that Mr. Trisuzzi has done all that could possibly be asked to ensure that the remainder of his life travels a much more beneficial path than the first 18 years did. He finds his employment as a maintenance man to be fulfilling and enjoyable and it has the added ingredient of surrounding him with professionals who have known him for several years and who not only closely monitor his activities, but also admire his dedication to his responsibilities.

CONCLUSION

Ronald Trisuzzi has, by clear and convincing evidence, established his rehabilitation. He should not be disqualified from his present employment as a maintenance man and custodian for Chancellor Academy II, a job which he has performed admirably for a period of approximately two and one-half years.

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

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

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

DATE

JEFFREY A. GERSON, ALJ

1/22/96
DATE

Receipt Acknowledged:

DNA
DEPARTMENT OF EDUCATION

JAN 23 1996
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
RONALD N. TRISUZZI.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusion of the Administrative Law Judge (ALJ) that Mr. Trisuzzi has demonstrated rehabilitation by clear and convincing evidence in accordance with N.J.S.A. 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws.

The Commissioner, however, does find a need to clarify a comment made by the ALJ on page 4 of the initial decision wherein he states "Concerning the nature and responsibility of his position, Mr. Trisuzzi as a maintenance man would have relatively little contact with the student body at the Academy." The Commissioner has been consistently mindful that, notwithstanding the fact that the custodial position Mr. Trisuzzi seeks to occupy is not one where the incumbent has direct involvement with students in that he is responsible for their care, supervision or instruction, such a position nevertheless affords an individual significant and

otherwise unsupervised access to children, a consideration which must not be minimized when examining rehabilitation pursuant to N.J.S.A. 18A:6-7.1.

Accordingly, the initial decision of the OAL is hereby adopted, for the reasons clearly articulated therein, and Mr. Trisuzzi is deemed qualified for school employment as a custodian. This matter will be transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of September 6, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 6, 1996

DATE OF MAILING MARCH 6, 1996

(SB) 79-96

DHP #456-96DHPL
SB # 79-96

IN THE MATTER OF THE DISQUALI- :
FICATION FROM SCHOOL EMPLOY- : STATE BOARD OF EDUCATION
MENT OF R.M.R. : DECISION

Decided by the Deputy Commissioner of Education, October 11, 1996

For the Petitioner-Appellant, R.M.R., pro se

R.M.R. (hereinafter "petitioner"), who was employed as a substitute custodian by the Board of Education of the Township of Edison, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been arrested in July 1989 on charges of burglary, theft and arson, and that he had subsequently entered a guilty plea. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated October 11, 1996, the Deputy Commissioner of Education upheld the disqualification,[1] concluding that petitioner had failed to demonstrate clear and convincing evidence of his rehabilitation as required by N.J.S.A. 18A:6-7.1. The Deputy Commissioner observed that petitioner had been "convicted of,

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

12/4/96

not one, but three separate crimes, and that [his] disqualifying offense of Arson was recent and of a very serious nature." Deputy Commissioner's Decision, slip op. at 2. The Deputy Commissioner concluded that insufficient time had passed since the date of petitioner's last offense to convince him of petitioner's rehabilitation.

Petitioner filed the instant appeal to the State Board.

After a thorough review of the record, we reverse the decision of the Deputy Commissioner.

We stress initially that, contrary to the finding of the Office of Criminal History Review and the Deputy Commissioner, petitioner was not convicted of arson. Rather, the record reveals that the arson charge, filed pursuant to N.J.S.A. 2C:17-1a(2), was downgraded to criminal mischief, N.J.S.A. 2C:17-3a, a crime which is not expressly listed as disqualifying in N.J.S.A. 18A:6-7.1. That statute defines disqualifying offenses to include:

> c.(1) A crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, aggravated assault, kidnapping, arson, manslaughter and murder....

Since the Deputy Commissioner proceeded on the mistaken belief that petitioner had been convicted of arson, the record was not developed in such manner as to permit a determination regarding whether petitioner's criminal mischief conviction in this particular instance was of such nature as to constitute a "crime or offense involving the use of force or the threat of force to or upon a person or property."

However, after careful review of the record, we find that no purpose would be served by remanding this matter for a determination of whether petitioner's conviction

for criminal mischief was disqualifying under the statute. Given our authority as the ultimate administrative decision-maker and fact finder in school matters, In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), we find that, even if criminal mischief constituted a disqualifying offense in this particular case, petitioner has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e).

Illustrative of petitioner's endeavors towards rehabilitation is the fact that he enrolled as an adult student at the Middlesex County Vocational and Technical High School in September 1993 and graduated in June 1995 as valedictorian of his class, receiving certificates for outstanding achievement in both science and physical education. A letter signed by the school's principal and four teachers commends petitioner as "a diligent worker...who, we believe, has become rehabilitated because of his personal desire and hard work." The head custodian at the school in which petitioner had been employed prior to his disqualification praises petitioner as "a very good worker...[who] would be welcome back in our school any time," and the service manager for a real estate company in which petitioner had been employed indicates that petitioner had "proved himself to be of excellent characture [sic], morals and an outstanding worker."

Petitioner successfully completed "with improvement" the terms of his probation, which included restitution, a substance abuse evaluation and 100 hours of community service, and there have been no further arrests since 1989, when he was 19-years-old. We note also that petitioner's convictions, although involving three separate criminal

offenses, all stemmed from a single incident. Moreover, we stress that petitioner was disqualified from employment as a substitute custodian, a position which does not include responsibility for the care, supervision or instruction of students. Given these circumstances, we find that further penalization of this individual is neither a just result nor warranted under the terms of the statute.

Accordingly, we correct the Deputy Commissioner's assertion that petitioner had been convicted of arson and, in view of our finding that petitioner has demonstrated clear and convincing evidence of his rehabilitation, we find no need to remand this matter for a determination of whether his criminal history includes a disqualifying offense. Rather, based upon our finding of rehabilitation, we reverse the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey as a substitute custodian. N.J.S.A. 18A:6-7.1(e).

December 4, 1996

Date of mailing DEC 06 1996

80-96

80-96-E

M.C., individually and on behalf of her minor son, D.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BLACK HORSE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

MARCH 6, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625
(609) 588-6633

96 FEB 22 10:40

M. Kathleen Duncan
Administrative Law Judge

February 21, 1996

Eze I. Eze, Esq.
534 Cooper Street
Suite 201
Camden, NJ 08102-1211

LETTER ORDER
DENYING EMERGENT RELIEF

John D. Wade, Esq.
1250 Chews Landing Road
Laurel Springs, NJ 08021

RE: **D.C. v. BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT**
OAL DKT. NO. EDU 577-96
AGENCY DKT. NO. 37-1/96

Dear Counsel:

I have considered petitioner's application for emergent relief and supporting papers seeking D.C.'s immediate reinstatement to classes and respondent's memorandum and affidavits in response as well as the oral argument presented by each of you on February 20, 1996.

To establish entitlement to emergent relief petitioner must demonstrate, *inter alia*, a reasonable probability of ultimate success on the merits. *Crowe v. DeGioia*, 90 *N.J.* 120 (1982). *N.J.S.A.* 18A:37-2(d) identifies "physical assault upon another pupil" as conduct which shall

constitute good cause for suspension or expulsion of a pupil from the public schools in New Jersey. The fact that D.C. physically assaulted another pupil (who was not then assaulting D.C. and who at the time was even being restrained by a teacher) is not in dispute. Respondent afforded D.C. a preliminary hearing prior to the imposition of an administrative suspension which lasted for 15 days, and a full-blown hearing before the Board was conducted prior to expelling him from school. Petitioner complains that the notice of the charges was deficient in that it did not advise petitioner of his right to cross-examine Board witnesses; this appears to be true, but the deficiency was corrected by respondent's attorney at the very beginning of the hearing before the Board (and again a little later on in the hearing.) The notice did advise petitioner of his right to call his own witnesses at the hearing, and any argument that he had insufficient time to arrange for their testimony is wholly without merit; the parties voluntarily waived their rights to a full hearing within 21 days and so D.C. had more time than usual, not less, to prepare. The argument that the sanction imposed was too harsh is not one which is likely to prevail in this kind of a case. *K.I. v. Matawan/Aberdeen High School District*, 91 *N.J.A.R.* 2d (EDU) 74.

The appropriate standard of review of the Board's action in this matter is set forth in *Kopera v. West Orange Board of Education* 60 *N.J. Super.* 28 (App. Div. 1960). Where the issue is one involving the exercise of a local board's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." *Id.* at 297. Actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *Quinlin v. Board of Ed. of North Bergen,* 73 *N.J. Super.* 40 (App. Div. 1962); *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); *K.L. v. Matawan/Aberdeen High School Dist.*, 91 *N.J.A.R.* 2d. (EDU) 74; *M.G. v. Monmouth Regional High School,* 91 *N.J.A.R.* 2d. (EDU) 38. Although it is possible that petitioner may meet this standard following a plenary hearing, it is by no means "reasonably probable" on the basis of the facts in the emergent relief papers. Accordingly, the motion for emergent relief must be **DENIED**.

Please let my secretary know if you wish to schedule the plenary hearing herein for February 29, 1996. If that is not convenient, please speak with her and arrange an alternate date.

This order on application for emergency relief may be adopted, modified or rejected by the **Commissioner of the Department of Education,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan
Administrative Law Judge

lam

c: Dept. of Education (via fax transmission)

M.C., individually and on behalf of her minor son, D.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BLACK HORSE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

The record of this matter, including the audiotape of proceedings before the Administrative Law Judge (ALJ), and the initial decision on Motion for Emergent Relief of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ denying emergent relief as petitioner failed to meet the standards for such relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and N.J.A.C. 1:1-12.6, R. 4:52-1.

Accordingly, the Motion for Emergent Relief is denied for the reasons expressed by the ALJ and this matter shall duly proceed to a hearing on its merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 6, 1996
DATE OF MAILING MARCH 6, 1996

81-96

BARBARA CONKLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, paraprofessional aide, alleged Board wrongfully charged her for use of sick time in violation of N.J.S.A. 18A:30-2.

ALJ concluded that the petition was filed out of time. ALJ found that the Board had given petitioner adequate notice of its use of her accumulated sick leave and personal day and that, pursuant to Kaprow, the initiation of negotiations did not toll the 90-day rule. Petition was dismissed as untimely.

Commissioner adopted findings and determination in initial decision as his own.

MARCH 7, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 7846-95
AGENCY DKT. NO. 228-6/95

BARBARA CONKLIN,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
OLD BRIDGE,
Respondent.

Randi Doner April, Esq., for the petitioner (Balk, Oxfeld, Mandell and Cohen, attorneys)

Francis X. Journick, Jr., Esq., for the respondent (Wilentz, Goldman and Spitzer, attorneys)

Record Closed: December 13, 1995 Decided: January 18, 1996

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

This matter concerns the petition filed by Barbara Conklin, the petitioner, alleging that she was not provided appropriate sick leave benefits pursuant to N.J.S.A. 18A:30-2.1. The respondent, the Board of Education of the Township of Old Bridge (Board), denied the

allegation. On July 27, 1995 the Commissioner of Education (Commissioner) transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14f-1 to -13.

There was a telephone prehearing conference on October 16, 1995 at which time the parties agreed that the issues in the matter are:

1. Whether the Board complied with the provisions of N.J.S.A. 18A:30-2.1.

2. Whether the petition in this matter was filed timely in accordance with N.J.A.C. 6:24-1.3(c).

During the prehearing conference, it was decided that the parties would submit briefs as to the second issue, which would be decided before any hearing in the matter. The parties have submitted briefs, and the record in the matter closed on December 13, 1995.

UNDISPUTED FACTS

The petitioner was employed as a paraprofessional aide by the Board, and on November 28, 1988, she had a work-related injury. This injury was the subject of a workers compensation settlement. In accordance with the settlement and the provisions of N.J.S.A. 18A:30-2.1, the Board paid the petitioner for the time she was out of work during the 1988-89, 89-90, 1990-91 and 1991-92 school years.

The petitioner had another injury on September 24, 1993, and she was out of work from that day to the end of the 1993-94 school year. Ms. Conklin did not file a workers compensation appeal as to this injury. Pursuant to N.J.S.A. 18A:30-2.1, the Board paid the petitioner's full salary between September 24, 1993 and January 20, 1994. The Board stopped the N.J.S.A. 18A:30-2.1 benefits on January 20, 1994 since it received a report from one of its consulting physicians stating that Ms. Conklin could return to work. Since Ms. Conklin did not return to work after January 20, 1994, the Board used her accumulated sick leave and personal days to continue her salary payments until April 30,1 994. By letter dated May 2, 1994, the Board

informed the petitioner that she would not receive any salary payments for absences after April 30, 1994.

On October 26, 1994, the petitioner had a telephone conversation with Nancy M. Mongon, a Board employee, who is responsible for maintaining the Board's records concerning workmen's compensation claims, the accumulation and use of sick leave and personal days. During this conversation, Ms. Mongon informed the petitioner that the Board had used the petitioner's accumulated sick leave and personal days for her salary payments between January 20, 1994 and April 30, 1994. In her affidavit dated November 13, 1995, Ms. Mongon indicated that the petitioner told her that the Board should not have used her sick leave and personal days for this purpose, and that she had prepared a memorandum memorializing her conversation with the petitioner.

After she got this information, the petitioner contacted Glenn R. Johnson, the then president of the Old Bridge Education Association and told him that the Board had used her sick and personal days to pay her salary during part of the 1993-94 school year. In his certification, Mr. Johnson stated that he initiated negotiations with the Board in order to get the petitioner's sick and personal days reinstated, and after 18 months of negotiations, he thought the matter was settled and that the petitioner was credited for the days. Mr. Johnson stated that neither he nor the petitioner learned that the matter was not settled until the petitioner had requested an unpaid medical leave on April 3, 1995. Mr. Johnson stated that after they determined that the matter had not been settled Ms. Conklin filed the petition with the Commissioner on June 27, 1995.

The Board decided not to rehire the petitioner for the 1995-96 school year and she did not challenge the decision.

ARGUMENTS OF THE PARTIES

The Board filed the motion to dismiss on the basis that Ms. Conklin's petition was not filed within the time period set forth in N.J.A.C. 6:24-1.2(c). This section provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of the final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case hearing.

The Board stated that on October 26, 1994, the petitioner was told that her sick leave and personal days were used to pay her salary and it agreed that the ninety day period started to run from that date. The Board argued that the information received by the petitioner from Ms. Mongon gave her sufficient and adequate notice of the Board's action. Chamings v. Rockaway Tp. Bd. of Ed., 1989 S.L.D. 2260 (Comm. Ed. Aug. 22, 1989), aff'd, 1990 S.L.D. 1706 (St. Bd. of Ed., Jan. 3, 1990), Cade v. Ewing Tp. Bd. of Ed., 1989 S.L.D. 2522 (Comm. Ed., Sept. 18, 1989), aff'd, 1990 S.L.D. 1693 (St. Bd. of Ed., Jan. 3, 1990), aff'd, Dkt. No. A-2881-89T5 (App. Div. 1990) (unreported).

The Board argued that the enforceability of the ninety day rule has been clearly established by the courts and that such a provision is necessary in order to provide a finality in educational matters. North Plainfield Ed. Ass'n v. Bd. of Ed., 96 N.J. 587 (1984); Riely v. Henderson Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980). In addition, the Board argued that the courts have recognized that attempts to resolve claims by negotiation are irrelevant and that the petitioner should have filed her petition within ninety days of her conversation with Ms. Mongon. Specifically, the Board noted that in Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 588 the courts stated:

> That notice, although it was unofficial and informal, was sufficient to trigger the ninety day limitation period. It is clear that Kaprow learned that the local board had in fact taken final and formal action. Kaprow obviously believed that his tenure status entitled him to one or both of these positions under N.J.S.A. 18A:28-12 and the notice he had received was adequate to enable him to pursue his claim . . . Kaprow's attempt to resolve his claim through negotiations with the local board is irrelevant. It does not negate the fact that he received adequate notice of February 23, nor does it toll the running of the limitations periods.

The Board recognized that the courts have held that the ninety day rule should be relaxed if its enforcement would be inappropriate, unnecessary or result in any injustice, Scotch Plains Ass'n. v. Scotch Plains Bd. of Ed., 5 N.J.A.R. 175 (Comm. Ed. August 1, 1980), Bergenfield Ed. Ass'n. v. Bergenfield Bd. of Ed., 6 N.J.A.R. 150 (Comm. of Ed., October 29, 1980). In this

matter, the Board argued that the petitioner has offered no excuse or explanation as to why she did not file the petition within the ninety days and has presented no showing of any injustice that would result from the enforcement of the ninety day rule.

On behalf of the petitioner, Randi Doner April argued that the ninety-day period did not begin to run after the October 26, 1994 conversation, since Ms. Mongon's statement did not serve as adequate notice of the Board's use the petitioner's accumulated sick leave and personal days. Ms. April argued that a secretary does not have the authority to bind the Board. Further, Ms. April argued that the petitioner was under the impression that the matter had been settled and that her petition was filed within ninety days after she found out that the Board had not agreed to the settlement.

CONCLUSIONS OF LAW

Having reviewed the arguments of the parties, I agree with the Board's argument that the ninety day period started to run after the October 26, 1994 conversation. On that date, the petitioner found out that her accumulated sick leave and personal days had been used to make her salary payments prior to April 30, 1994, and since she disputed this action by the Board she should have filed her petition within ninety days thereafter. Ms. Mongon as the person responsible for sick leave and personal day records was the appropriate person to give this information to the petitioner. Ms. Mongon was not making a policy decision but rather was telling the petitioner that her accumulated sick leave and personal days have been used. Pursuant to the holding in the Kaprow case, it is clear that the initiation of negotiations between the parties did not toll the ninety day provision. As to the petitioner's argument that she thought the matter was settled and therefore did not file the appeal, there was no persuasive showing of any agreement of settlement and further it appears that any such agreement was reached after the ninety-days had run since Mr. Johnson stated the negotiations with the Board took eighteen months. Therefore, I **CONCLUDE** that the petition in this matter was filed out of time. Therefore, I **ORDER** that the petition be **DISMISSED WITH PREJUDICE**.

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

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

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

January 18, 1996
DATE

BEATRICE S. TYLUTKI, ALJ

Jan 23, 1996
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 26 1996
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

OAL DKT. NO. EDU 7846-95

BARBARA CONKLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, inter alia, that she was not provided appropriate sick leave benefits pursuant to N.J.S.A. 18A:30-2, nor was she provided with adequate notice from the Board that her accumulated sick time was being depleted during her period of leave. (Petitioner's Exceptions at pp. 3-4) Additionally, petitioner excepts to the ALJ's decision that she should have been properly placed on notice that her sick time was being utilized after a conversation she had with a secretary in October in that, "[the secretary] had no authority to bind the Board nor were her conversations with [petitioner] intended to be binding ***." (Id. at p. 3)

The Board's reply exceptions support the conclusions of the ALJ's decision (Board's Exceptions at p. 5), asserting that petitioner was given appropriate notice that her sick leave was being counted during her period of absence. Further, the Board asserts petitioner did not act within regulatory timelines, pursuant to N.J.A.C. 6:24-1.2(c), in filing her Petition of Appeal against it. The Board asserts that, as such, enforcement of the 90-day rule in this matter would not be inappropriate, unnecessary or result in injustice. (Board's Exceptions at pp. 8-9)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the Petition of Appeal was filed out of time and that no relaxation of regulation is warranted in this instance. The Commissioner accepts the ALJ's findings that petitioner was given appropriate notification and that, pursuant to Kaprow, supra, the initiation of negotiations would not toll the 90-day rule.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL that the instant Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 7, 1996
DATE OF MAILING MARCH 7, 1996

(SB) 81-96

SB #81-96

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	
MOVANT,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT,	:	DECISION ON MOTIONS
AND	:	
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	
RESPONDENT,	:	
AND	:	
LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION,	:	
RESPONDENT.	:	

For the Board of Education of the City of Englewood, Kraemer, Burns, Mytelka & Lovell (Arnold K. Mytelka, Esq., of Counsel) and Decotiis, Fitzpatrick & Gluck (Agnes I. Rymer, Esq., of Counsel) and Paul L. Tractenberg, Esq.

For the Board of Education of the Borough of Englewood Cliffs, Fogarty & Hara (Stephen R. Fogarty, Esq., of Counsel)

For the Board of Education of the Borough of Tenafly, Riker, Danzig, Scherer, Hyland & Perretti (James S. Rothschild, Esq., of Counsel)

12/4/96

For the Commissioner of Education, Nancy Kaplen, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the National Association for the Advancement of Colored People, Bernard K. Freamon, Esq.

This matter is before us today by virtue of a motion filed by the Englewood Board of Education, seeking an order from the State Board requiring the Commissioner of Education to make his final report with respect to the regionalization study embodied in our resolution of July 3, 1991, within sixty days of the date of the order. Additionally, counsel for the Englewood Cliffs Board has filed a motion to admit William Bradford Reynolds, Esq., pro hac vice so as to permit him to represent the Englewood Cliffs Board in this matter.

In seeking Mr. Reynold's admission, Englewood Cliff's current counsel of record, Stephen R. Fogarty, has indicated that his firm, Fogarty & Hara, has a conflict in this matter in that the firm also represents several school districts implicated in the regionalization study at issue. Since the terms of R. 1:21-2 require that local counsel sign all papers filed and "be held responsible for them and for the conduct of the cause...", it would not be appropriate for us to permit Fogarty and Hara to act as local counsel for Mr. Bradford in this matter given Mr. Fogarty's statement that a conflict exists. That being the case, we deny the motion without prejudice.

Englewood's motion focuses solely on the regionalization study conducted pursuant to our resolution of July 3, 1991. However, the genesis of the directive set

forth in that resolution was the State Board's decision of April 4, 1990. Pursuant to the administrative order appended to the decision and executed on April 5, 1990, the Commissioner of Education was responsible for overseeing a series of activities and for reporting to the State Board as to the status of implementation of those activities and his recommendations for additional measures. As part of the first report to us, the Commissioner recommended, among other measures, that a regionalization study be undertaken. At that time, we acted by resolution dated July 3, 1991 to adopt the Commissioner's recommendation with some modifications. However, nothing in that action or any subsequent action taken by the State Board altered either the terms or the scope of our original order executed on April 5, 1990. It is in this context that we have considered the filings of the various parties in the instant matter.

In response to the Englewood Board's motion, Commissioner Klagholz has indicated that he intends to finalize his consideration of the regionalization study and all other options considered and will make his final report to the State Board on or before February 5, 1997. That being the case, we see no necessity for us to take further action in order to insure implementation of our order of April 1990 and resolution of July 1991, which resulted in the regionalization study at issue and the other activities upon which the Commissioner will be reporting. The State Board therefore denies the motion.

December 4, 1996

Date of mailing DEC 06 1996

(SB) 81-96

SB #81-96

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	
MOVANT,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT,	:	DECISION ON MOTION
AND	:	
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	
RESPONDENT.	:	

Decision on motions by the State Board of Education, December 4, 1996

For the Board of Education of the Borough of Englewood Cliffs, Joseph L. Mecca, Esq.

For the Board of Education of the City of Englewood, Kraemer, Burns, Mytelka & Lovell (Arnold K. Mytelka, Esq., of Counsel) and Decotiis, Fitzpatrick & Gluck (Agnes I. Rymer, Esq., of Counsel) and Paul L. Tractenberg, Esq.

For the Board of Education of the Borough of Tenafly, Riker, Danzig, Scherer, Hyland & Perretti (James S. Rothschild, Esq., of Counsel)

On December 4, 1996, we denied a motion by the Englewood Cliffs Board to admit William Bradford Reynolds, Esq. pro hac vice so as to permit him to represent the Englewood Cliffs Board in this matter.

3/5/97

In seeking Mr. Reynold's admission, the then counsel of record for Englewood Cliffs, Stephen R. Fogarty, indicated that his firm, Fogarty & Hara, had a conflict in this matter in that the firm also represented several school districts implicated in the regionalization study at issue. Since the terms of R.1:21-2 require that local counsel sign all papers filed and "be held responsible for them and for the conduct of the cause," we found that it would not be appropriate for us to permit Fogarty & Hara to act as local counsel for Mr. Reynolds in this matter given Mr. Fogarty's statement that a conflict existed. That being the case, we denied the motion without prejudice.

On February 3, 1997, Joseph L. Mecca, Jr. notified us that he had been engaged by the Englewood Cliffs Board to act as special counsel for the purpose of bringing another motion for Mr. Reynolds' admission pro hac vice. In that the Englewood Cliffs Board has cured the conflict which originally concerned us by engaging Mr. Mecca to serve as local counsel in this matter, and upon review of the papers filed, the State Board of Education grants the motion for the purpose of allowing Mr. Reynolds to represent the Englewood Cliffs Board before the State Board with respect to the current matter.

March 5, 1997

Date of mailing MAR 0 7 1997

82-96

82-96-DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
MATTHEW J. GAMBALE.	:	
_____	:	

MARCH 7, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11046-95

AGENCY DKT. NO. 59-95

MATTHEW J. GAMBALE,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Matthew J. Gambale, *pro se*

New Jersey State Department of Education, proceeding without representation pursuant to *N.J.A.C.* 1:1-5.6

Record Closed: December 6, 1995 Decided: January 18, 1996

BEFORE **RICHARD McGILL,** ALJ:

This matter stems from a determination by the New Jersey State Department of Education (respondent) that Matthew J. Gambale (petitioner) was disqualified from continued employment as a school bus driver. Respondent advised petitioner of the disqualification by letter dated April 4, 1995, and petitioner submitted additional information by letter dated April 16, 1995. Petitioner also submitted an undated letter requesting a stay of the disqualification.

Deputy Commissioner of Education Richard A. DiPatri affirmed the disqualification by letter dated May 26, 1995, and petitioner appealed to the State Board of Education by letter dated June 2, 1995. While the appeal was pending, the parties submitted a Consent Order which provided that the matter would be remanded to the Commissioner of Education for a hearing on the issue of rehabilitation with respect to the disqualification determination. By Decision dated August 2, 1995, the State Board of Education granted the request of the parties to remand the matter to the Commissioner of Education in regard to rehabilitation.

The matter was transmitted to the Office of Administrative Law on September 20, 1995 for determination as a contested case. A hearing was conducted on December 6, 1995 at the Office of Administrative Law in Newark, New Jersey, and the record closed on the date of the hearing.

It is undisputed that petitioner was convicted of simple assault in violation of *N.J.S.A.* 2C:12-1a(1), which is a disqualifying offense for a school bus driver under *N.J.S.A.* 18A:39-19.1(c). However, an individual who affirmatively demonstrates his rehabilitation by clear and convincing evidence will not be disqualified on the basis of a conviction. *N.J.S.A.* 18A:6-7.1(e). The issue in this proceeding is whether petitioner has demonstrated his rehabilitation by clear and convincing evidence.

In accordance with *N.J.S.A.* 18A:6-7.1(e), the following factors must be considered in determining whether an individual has affirmatively demonstrated rehabilitation:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under supervision.

The first factor to be considered is the nature and responsibility of the position which the convicted individual would hold. Petitioner worked as a school bus driver for Taranto Bus Company in Englewood, New Jersey from February 1994 to May 1995. Petitioner worked full-time from thirty to fifty hours per week. Petitioner picked up students in Englewood, Englewood Cliffs and Fort Lee and drove them to Horace Mann High School in the Bronx, New York. As a school bus driver, petitioner was responsible for the safety of the students.

The second factor is the nature and seriousness of the offense. Petitioner was convicted of simple assault in violation of *N.J.S.A.* 2C:12-1a(1), which is a disorderly persons offense.

The third factor relates to the circumstances under which the offense occurred. On October 19, 1992, petitioner and his brother, Vincent, were scheduled to go for a fitting in preparation for Vincent's wedding. They were waiting for Vincent's fiancee, Anna Marie Monterri, and petitioner's girlfriend, Barbara Pidi, but Monterri and Pidi did not arrive on schedule. As a result, petitioner became upset. Monterri and Pidi eventually arrived, and they all left in Pidi's car. Petitioner felt that he had to say something about the lateness of Monterri and Pidi, and an argument ensued. Petitioner asked several times to get out of the car, but Pidi would not stop until she arrived at the home of petitioner's parents. Petitioner and Pidi got out of the car and engaged in a physical confrontation. As a result, Pidi filed a complaint against petitioner, who was convicted of simple assault.

The next two factors are the date of the offense and age of the individual when the offense was committed. The incident occurred on October 19, 1992, at which time petitioner was thirty years old. Under the circumstances, the offense cannot be regarded as a youthful indiscretion. Petitioner should have known better than to engage in this type of misconduct.

The next factor is whether the offense was an isolated or repeated incident. Here, petitioner has not been convicted of any other offense. Thus, petitioner's conviction relates to an isolated offense.

The next factor is whether any social conditions may have contributed to the offense. Petitioner was born in 1961 in Brooklyn, New York, and at the age of eight, he moved with his parents to Westwood, New Jersey. Petitioner lived in West New York, New Jersey from 1987 to 1989 and in Mahwah, New Jersey from 1989 to 1990. Petitioner lived in his parent's home from 1990 to 1993. Since that time, he has lived in Bergenfield, New Jersey. Under the circumstances, it does not appear that social conditions contributed to the offense.

The last factor concerns evidence of rehabilitation. As a result of his conviction, petitioner received a fine, but he was not placed on probation. Since that time, petitioner has held various jobs. Petitioner drove a bus for County Bus Lines in Mahwah, New Jersey, for two years, but he left that job due to unacceptable working conditions. Petitioner then worked as a temporary employee doing warehouse work for several months. Thereafter, petitioner worked for seven months as a permanent employee in a warehouse through September 1993. Petitioner performed construction work from October 1993 through January 1994. In February 1994, petitioner worked for Taranto Bus Company until his disqualification in May 1995. Petitioner collected unemployment benefits from May 1995 to September 1995. Petitioner then found employment with A-1 Table Cloth Company in Hackensack, New Jersey, where he is still employed. In sum, petitioner has been able to maintain employment more or less continuously since his offense.

Petitioner currently lives alone, but he speaks by telephone weekly with his parents who have retired to Florida. Petitioner also stays in touch with his four brothers who continue to live in the Bergen County area.

Petitioner presented several letters in support of his case. Robert R. Burroughs, Chief of Police in the Borough of Westwood, states that prior to the offense in 1992, petitioner was never in any trouble in Westwood, and there have not been any problems since that incident.

The Reverend Stephen S. Feehan, Pastor of St. Andrew's Church in Westwood, states that petitioner comes from a good family background and has a good sense of values. Petitioner's conviction was a one-time aberration. Rev. Feehan believes that petitioner is not a threat to anyone and that he will fulfill the responsibilities of his position without any incident.

Stephen J. Gambale, who is petitioner's brother, describes petitioner as a caring and likable person, who would not intentionally hurt anyone or anything. Further, petitioner handles his responsibilities with the utmost seriousness and integrity. Stephen Gambale feels that petitioner has suffered enough and should be allowed to continue to drive a school bus.

JoAnn Moreno, dispatcher for Taranto Bus Company, states that petitioner is a very loyal employee and that he is cooperative with his co-workers. He accepts any and all assignments that are given to him, and he performs his work in an exemplary manner.

Cindy J. Rostolder, who describes herself as a personal friend of petitioner and his family, states that petitioner is a kind individual who puts others before himself. Petitioner is an extremely hard worker who would not hesitate to help others in time of need. Petitioner would like to put the 1992 incident behind him.

Petitioner's landlord, Norman Friedman, states that petitioner is a good tenant and pays his rent on a regular basis. Petitioner has not caused any problems, and he is a very orderly type of individual.

The key consideration in this case is that petitioner's offense was an isolated incident. Petitioner is now thirty-four years old, and he has never had any other offense. Several letters submitted in this proceeding indicate that the incident that led to petitioner's conviction was out of character for him. Further, the conviction was a disorderly persons offense as opposed to a crime and evidently was the result of unusual circumstances that caused him to act out of anger. There is no indication of a calculated intention to cause injury or to violate the law. Moreover, petitioner has maintained more or less continuous employment since his offense, and the letters written in support of petitioner show confidence in his reliability, integrity and good character. Finally, at the hearing, petitioner displayed a thorough appreciation of the responsibilities of a school bus driver and the need to comply with the law. Under the circumstances, I **FIND** and **CONCLUDE** that petitioner has demonstrated his rehabilitation by clear and convincing evidence.

Accordingly, it is **ORDERED** that the disqualification of petitioner as a school bus driver is reversed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New**

Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 18, 1996
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

1/22/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 23 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

WITNESS LIST

For petitioner:
Matthew J. Gambale

For respondent:
None

EXHIBIT LIST

P-1	Letter dated June 7, 1995 from Robert R. Burroughs, Chief of Police, to Richard A. DiPatri	Evidence
P-2	Letter dated June 9, 1995 from Rev. Stephen S. Feehan to Richard A. DiPatri	Evidence
P-3	Letter dated April 21, 1995 from Stephen J. Gambale	Evidence
P-4	Letter dated April 11, 1995 from JoAnn Moreno	Evidence
P-5	Letter from Cindy J. Rostolder	Evidence
P-6	Letter dated April 14, 1995 from Norman Friedman	Evidence
A-1	Letter dated October 21, 1992 from Letitia Candeloro, Court Administrator, to Matthew Gambale	Evidence
A-2	Investigation Report dated October 20, 1992	Evidence
A-3	Continuation of Investigation Report dated February 22, 1993	Evidence
A-4	Statement of Barbara Pidi dated October 19, 1992	Evidence
A-5	Complaint of Barbara J. Pidi	Evidence

OAL DKT. NO. EDU 11046-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
MATTHEW J. GAMBALE.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that Mr. Gambale has demonstrated rehabilitation by clear and convincing evidence in accordance with N.J.S.A. 18A:39-19.1 et seq. and is, therefore, qualified for school employment within the intent of the criminal history record check laws.

Accordingly, the initial decision of the OAL is adopted for the reasons clearly articulated therein, and Mr. Gambale is deemed qualified for school employment as a bus driver. This matter will be transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of August 2, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 7, 1996
DATE OF MAILING MARCH 7, 1996

83-96

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

PETITIONER,

V.

VINCENT SAURO and MILDRED SAURO,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought tuition for respondent parents children, alleging ineligible attendance in its schools.

ALJ found that in this shared custody matter the two children were domiciled in Clifton until March 3, 1994 and, thus, they were entitled to a free public education in that school district from the first day of school in September 1993 through March 3, 1994. ALJ concluded that thereafter the children resumed living primarily with their mother in Passaic and that both parents were liable to the Board for tuition at the statutory per diem rate from March 3, 1994 to the date of their removal in June 1994. ALJ ordered that the parents were jointly and severally liable to the Board for tuition for their children from March 3, 1994 to the date of removal at the per diem rate of 1/180 of the annual per pupil cost to the local district, pursuant to N.J.S.A. 18A:38-1 et seq.

Commissioner adopted findings and determination in initial decision as his own, noting it was respondents' choice of domicile for their children during the operative time period, rather than their choice of school districts which was the determinative act herein, inasmuch as entitlement to free education flows directly from domicile.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7870-94
AGENCY DKT. NO. 302-7/94

CLIFTON BOARD OF EDUCATION,

Petitioner,

v.

VINCENT SAURO and MILDRED SAURO,

Respondents.

Anthony V. D'Elia, Esq., for petitioner

Michael P. Koribanics, Esq., for respondent Vincent Sauro
(Koribanics & Koribanics, attorneys)

Harvey R. Browne, Esq., for respondent Mildred Sauro
(Browne & Galluccio, attorneys)

Record Closed: July 24, 1995 Decided: January 22, 1996

BEFORE: KEN R. SPRINGER, ALJ:

Statement of the Case

This is a suit by the Clifton Board of Education ("Board") seeking payment of tuition for two children who attended the district's school system in the 1993-94 academic year. Mr. and Mrs. Sauro, parents of the two children, are divorced and live apart in different municipalities. The Board contends that the children were living with their mother in the City of Passaic and, therefore, were not domiciled with their father in the City of Clifton. Both respondents maintain that they had agreed to share custody and that their children spent an equal amount of time in each household. Three issues are raised by the pleadings: (1) Whether the children were domiciled in Clifton within the meaning of *N.J.S.A.* 18A:38-1(a), which obligates a school district to offer a free public education to "any person who is domiciled within the school district;" (2) Whether the Board waived its right to collect tuition by allowing the children to remain in school with full knowledge of the split living arrangements; and (3) Whether the statutory formula for calculating the amount of tuition owed violates the Eighth Amendment prohibition against excessive fines.

For the reasons that follow, the parents are only liable for tuition accruing after March 3, 1994, the date on which an ongoing custody dispute was resolved by court order.

Procedural History

On July 15, 1994, the Board filed a verified petition with the Commissioner of Education ("Commissioner") demanding assessment of prorata tuition against respondents "for the number of days of ineligible attendance." Mildred Sauro filed her answer on August 2, 1994 and Vincent Sauro filed his separate answer on September 14, 1994. Meanwhile, on August 16, 1994, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

On January 3, 1995, Vincent Sauro filed a motion to dismiss the petition for lack of jurisdiction. Thereafter, on January 10, 1995, Mildred Sauro joined in the father's

request. By order entered on April 18, 1995, the OAL denied respondents' motion. The OAL held three days of hearing on April 18, May 24 and May 25, 1995. Each of the parties filed legal briefs by July 14, 1994. The Board filed its reply on July 24, 1995.

Findings of Fact

Apart from the issue of domicile, most of the relevant facts are undisputed. Vincent and Mildred Sauro were divorced by final judgment of the Superior Court of New Jersey, Chancery Division, entered on December 11, 1990. There are two children of the marriage, Danielle, born March 3, 1980, and Vincent Jr., born April 10, 1982. Under the original court order, the wife was awarded "custody of the minor children" and the father granted "liberal and reasonable rights of visitation." It is stipulated that the divorce was "not amicable" and that the parents have been engaged in a "bitter" custody battle. Nonetheless, both parents are sincerely interested in their children's welfare and have cooperated in trying to give them the best possible education.

Seven years ago, the father moved out of the home at 11 Parkview Place in Passaic and went to live with his girlfriend and her two school-aged sons in an apartment at 271 Harding Avenue in Clifton. Although the lease and gas bill were in the girlfriend's name, Vincent Sauro contributed more than half the rent. Mildred Sauro remained in the marital home in Passaic. Mr. Sauro, who is self-employed in the bathroom-remodeling business continued to maintain a business office on an upper floor of the Passaic house. The Board does not seriously deny that the father is domiciled in Clifton. Rather, the factual dispute centers on whether the children spent more time with their father or their mother.

In spring of 1993, the mother began to experience increasing difficulty in controlling the behavior of the two children. She enrolled in a parenting-skills course in an effort to learn how to manage her children. Reportedly, behavior problems occurred

both at home and at school. As a result, the father assumed a more active parenting role, offering "to take [his children] some of the time and to help them with their school work." Realizing that the father was the stronger disciplinarian, the mother acquiesced to letting the children spend more time with him. She conceived this to be in the best interests of the children, even though she was worried about the possible adverse effect on her custody rights. Starting in late spring or early summer 1993, the children slept overnight at their father's apartment "on a regular basis." There was no fixed schedule, the number of nights per week depending on the father's work schedule and the children's needs.

During the prior school year of 1992-93, both children had attended a parochial school in Rutherford. Over the summer, the parents conferred about their children's education and agreed to send them to the Clifton public schools for the upcoming school year. According to the mother's testimony, she was under the impression that the father had made the necessary arrangements to enroll them in the Clifton school system. On the first day of classes in September 1993, the mother brought the son to attend fifth grade at School No. 3 and the father brought the daughter to the high school. When it turned out that the son was not yet registered in the Clifton school district, the mother was asked to fill out several forms, including an application for the school lunch program. In the space for the household's home address, she put down the father's address in Clifton. In the space for home telephone, however, she used her own unlisted telephone number, which has a Passaic exchange. It was this apparent discrepancy which roused the suspicions of Rita Cadorin, principal of School No. 3, and caused her to request an investigation into the family's living circumstances.

At the administrative hearing, Mrs. Sauro explained that she didn't use the father's telephone on the lunch form because "if they needed to contact me, that is the number where I could be reached." Furthermore, in the course of a telephone conversation on or about September 22, 1993, Mrs. Sauro told Mrs. Cadorin that she and her ex-husband were engaged in a custody dispute, that her son was living in Clifton, and that the telephone number on the lunch form was her own.

Much of the proof at the hearing was devoted to the amount of time which the children lived with one or the other parent.[1] Since parents do not keep time sheets and must rely on imperfect memory, the allocation of how much time a child spent with a particular parent is necessarily an estimate. Of all the witnesses, the mother was the most forthcoming and believable. Mrs. Sauro testified that when school opened in September 1993 the children "were still splitting their time between us," staying three or so days per week in Clifton and the rest of the time in Passaic. She emphasized that the specific arrangements in any one week depended on the father's business demands, but that custodial responsibility remained "pretty equal" until mid-March 1994, when the father's business "picked up."

Her testimony at the administrative hearing is consistent with her earlier statements made to the Board on June 7, 1994, when Mrs. Sauro explained that her former husband "would take Danielle and Vincent, one or two, three times a week" on weekdays. While Board counsel tried to make it appear that the children spent less than half the time with their father, it is clear from the context that Mrs. Sauro was referring to Monday through Friday only and that the children spent additional time with their father on weekends. During the regular work week, the father frequently "took the children after 3:00 [p.m.]" and "they slept overnight" at his apartment. Next morning, the father would go to his office located at Mrs. Sauro's house and would "take them to [her] and [she] would drive them to school." (Transcript of Board removal hearing, page 48).

Alleged discrepancies between Mrs. Sauro's testimony and her comments to the elementary principal, Rita Cadorin, are easily reconciled if the time frame is taken into consideration. Mrs. Cadorin recalled that Mrs. Sauro had confided that she was having

[1] Although respondents criticize the Board's failure to follow its own written procedures requiring three documents as proof of residence, that requirement is not germaine here where the fact that the father resides in Clifton is not genuinely in dispute. Instead, the critical issue is whether the children spent more time living with the father in Clifton or with the mother in Passaic.

> . . . the children share their time between the two households, spending 3 or four days at each household each week[,] making it an effective shared custody, until such a time as a court date and decision are given on the children's custody issue.

Mr. Mascari did not rely on the parents' representations alone, but ordered an independent investigation into the family's living circumstances. Significantly, the results of the Board's own investigation substantiated that Vincent Jr. was residing with his father. Richard Tuminello, an investigator working for the district, visited the Clifton address on October 2, 1993 and spoke with Mr. Sauro, who repeated his story about the shared-custody arrangements and the pending custody dispute. While touring the premises, Mr. Tuminello noted the presence of a young boy whom Mr. Sauro identified as his son.[3] Mr. Tuminello was shown a bed in either the living room or dining room, which Mr. Tuminello assumed was being used by Vincent Jr. Mr. Sauro pointed out, however, that Mr. Tuminello was somewhat confused, because Danielle slept in the bed in the dining room, whereas Vincent Jr. shared a separate bed room with the two other boys in the household. [4] Information gathered by Mr. Tuminello convinced him that Vincent Jr. must be regarded as "a resident for the purpose of attending Clifton Public Schools." Barry Mascari reviewed the investigation report and concurred with Mr. Tuminello's recommendation. Mr. Mascari decided not to uproot the children when it appeared that the father might ultimately be granted legal custody.

Unknown to the school authorities, on March 3, 1994 the Superior Court entered a consent order directing that Mrs. Sauro "retain custody of the infant children born of the marriage, subject to [Mr. Sauro's] rights to reasonable and liberal visitation" and that she be entitled "to remain in occupancy of the marital residence . . . until the youngest child born of the marriage shall attain the age of 18 years[.]" At or about the same time, Mr. Sauro's business activities increased and, by all accounts, the children

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[3] Mr. Tuminello did not look for the daughter because he was only assigned to check the residence of the son.

[4] Although Mr.Tuminello mistakenly believed that "the boy spends weekends with the mother and weekdays with the father," Mr. Sauro denies ever suggesting that Vincent Jr. spent all five weekdays at his apartment.

difficulty raising her children and that "both kids were living with her and visiting the father on weekends." Although Mrs. Cadorin recalled these conversations as having occurred in November or December 1993, she did not pinpoint the date with any degree of accuracy. Mrs. Sauro confirmed the substance of the conversations, but recalled them as having taken place "much later in April or May," by which time Mr. Sauro's work load had increased and "the kids were staying mainly with [her]." Similarly, the fact that Mrs. Cadorin had observed the mother delivering her son to and from school does not conflict with Mrs. Sauro's testimony that Mr. Sauro worked during the day and dropped the children off at her house in the morning.

Essentially, Mr. Sauro corroborated his former spouse's testimony that for most of 1993-94 the children lived with him some "two to five days per week," depending on his work schedule. He elaborated that the children spent more time with him during the winter months, when his work load is "lighter," and less time during the spring, his "busiest season." Soon after the start of the 1993-94 academic year, Mrs. Cadorin referred the matter to Barry Mascari, the supervisor responsible for residency investigations. Initially, Mr. Mascari was only aware of the son and did not realize that a daughter was also involved. On several occasions in September, Mr. Mascari met with the father, who purportedly assured him that Vincent Jr. was living with him "for a majority of the time." [2] In addition, Mr. Sauro told Mr. Mascari that he had filed formal court papers seeking a change in custody and that, in the event the court granted him legal custody, the son would remain with him in Clifton. At Mr. Mascari's request, Mr. Sauro obtained a letter from Andrew R. Bolduc, Esq., his attorney in the matrimonial litigation. That letter, dated November 9, 1993, confirmed that a custody dispute against his former spouse was pending in Passaic County and that "a final hearing in this matter shall be scheduled shortly." Mr. and Mrs. Sauro also submitted a written statement, signed by both and notarized on December 3, 1993, attesting that they had reached a voluntary agreement whereby:

[2]Mr. Sauro recalls the colloquy somewhat differently, claiming that he told Mr. Mascari that his son stayed with him "a couple days a week." It is evident from the totality of Mr. Sauro's testimony, however, that the actual number of days per week was considerably greater than two and was not limited to weekends.

began spending more time with their mother in Passaic. Neither parent informed the school district of these changed circumstances. Indeed, both parents seemed reluctant to let school officials know that the custody dispute had been resolved.[5]

Meanwhile, in mid-March 1994, the district reopened its investigation as a result of a routine review of its files. On March 14, 1994, Mr. Tuminello revisited the father's address in Clifton to look for Danielle and ascertained from a child about ten years old who answered the door that "Danielle went back to her mother's house." One day later, Mr. Tuminello proceeded to Mrs. Sauro's house in Passaic and found Danielle alone at home. Danielle told him that her parents and brother "were out." Returning on March 16, 1994, Mr. Tuminello encountered Mrs. Sauro and her son Vincent Jr. at the Passic address. Mrs. Sauro admitted to him that the children were now spending "most nights" in Passaic. When the Board adopted a resolution removing both children from the Clifton public school district in June 1994, neither Mr. nor Mrs. Sauro took an appeal to the Commissioner.

I FIND that Mr. and Mrs. Sauro voluntary agreed to the shared custody of their two children for most of the 1993-94 school year. While the division of responsibility is impossible to determine with mathematical precision, the preponderance of the credible evidence indicates that the children spent roughly equal time with their father in Clifton and their mother in Passaic until March 3, 1994. Notwithstanding the Board's efforts to cast the situation in the worst possible light, respondents' inability to trace the children's whereabouts on a day-by-day basis merely reflects the strained relationship between separated marriage partners and the chaotic nature of a broken home. More importantly, the record clearly establishes that, whatever differences they might have, both parents intended that Clifton be regarded as the children's main home and the only district in which the children would attend school. The single home visit by the

[5]Two weeks after the custody dispute had been settled, Mrs. Sauro led Mr. Tuminello to believe that the custody dispute was still pending. Mrs. Sauro insists, however, that she referred to the custody proceedings in the past tense. Several months later, in May 1994, Mr. Sauro told another investigator, Ruth Stein, that the court date for the custody hearing would be "sometime in June or July."

Board's investigator in October 1993 only served to substantiate parents' assertion that the children frequently slept overnight at their father's house in Clifton during that time period.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that respondents' two children were domiciled in Clifton until March 3, 1994 and, thus, that they are entitled to a free public education in that school district from the first day of school in September 1993 through March 3, 1994. Further, **I CONCLUDE** that thereafter the children resumed living primarily with their mother in Passaic and that both parents are liable to the Board for tuition at the statutory per-diem rate from March 3, 1994 to the date of their removal in June 1994.

N.J.S.A. 18A:30-1(a) declares that public schools shall be free to anyone over five and under twenty years of age "who is domiciled within the school district." Recently, the Legislature amended the law to enhance a school district's authority to remove students not legally domiciled within that district. *L.* 1993. *c.* 380. Most significantly, the amendment places an affirmative obligation on a parent or guardian to challenge a school board's contention that a child is not entitled to attend school in that district. In a conditional veto message of the proposed amendments ultimately enacted in revised form, Governor Florio explained that the bill specifically addresses two types of students:

> a child living in the district with a person who is not the child's parent or guardian (commonly referred to as an "affidavit student") and a child living with a parent or guardian who claims to be, but in fact is not, residing in the district (commonly referred to as a "non-domiciled student.") *Governor's Statement on Senate Bill No. 1447* (Jan. 10, 1994).

Thus, the lawmakers' attention was on students staying with friends or relatives and on parents whose claimed residence in the district is bogus. When making it easier for

school boards to remove ineligible students, the Legislature did not focus on the precise problem involved here, namely children buffeted back and forth between divorced parents, one of whom genuinely resides in the district.

"Domicile" generally is used to mean the place where a person "has his true, fixed, permanent home and principal establishment." *State v. Benny*, 20 *N.J.* 250 (1955). Put differently, domicile is "the place with which a person has a settled connection for certain legal purposes, either because his home is there or because the place is assigned to him by law." *In re Est. of Gillmore*, 101 *N.J. Super.* 77, 86 (App. Div. 1968), *certif. den.* 52 *N.J.* 175 (1968).. Essentially, domicile is "a question of residence and intention." It is the place to which, "whenever he is absent, [a person] has the intention of returning." *Benny*, at 251. Intention is the catalyst which converts a mere residence into a domicile. "Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile." *Ibid.* A very short period of residence in a given place may be sufficient to acquire domicile. Domicile is established by the "concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode." *Lyon v. Glaser*, 60 *N.J.* 259, 264 (1972).

Persons legally incapable of choosing domicile acquire domicile by operation of law. *Gillmore*, 101 *N.J. Super.* at 87. Under the common law, the domicile of an child was said to follow that of the father "until the child is emancipated and chooses a place of residence of its own." *Mansfield Twp. v. State Bd. of Educ.*, 101 *N.J. L.* 474, 478 (Sup. Ct. 1925). *See also*, *Pieretti v. Pieretti*, 13 *N.J. Misc.* 98 (Ch. 1935) and *Rinaldi v. Rinaldi*, 13 *N.J. Eq.* 14 (Ch. 1922). *Accord, Lea v. Lea*, 18 *N.J.* 1, 11 (.1935). In more modern language, a child's domicile is equated with the domicile of the parent or guardian "having legal control of the child." *Mansfield Twp.*, at 479. At least one Commissioner's decision put determinative weight on court-ordered custody and held that, in the case of the divorce of its parents, a minor child's domicile

> . . . is that of the parent to whose custody it has been legally given; and if there has been no legal fixing of custody, its domicile is that

> of the parent with whom it lives, but if it lives with neither, it retains [the] father's domicile. *C.K.F. v. Upper Twp. Bd. of Educ.*, 1975 *S.L.D.* 723, 723-24 (Comm'r Sept. 22, 1975).

Concepts of domicile, however, are not immutably fixed and the term "may have different content and shades of meaning depending upon the context in which it is used." *Gillmore,* at 86-87. Application of the these legal principles must be flexible enough to adjust to new problems not readily resolved by traditional rules conceived in a less transient society. *Gillmore*, at 93. Board witnesses recognized the tremendous stresses on a growing number of children who are the product of broken homes. Ms. Cadorin, herself a single parent, expressed empathy with the plight of a parent raising a child without a partner.

Courts also have begun to develop sensitive approaches to meet the needs of children caught between the competing pulls and tugs of separated parents. Illustratively, in *Roxbury Twp. Bd. of Educ. v. Milford Bd. of Educ.*, 283 *N.J. Super.* 505 (App Div. 1995), a father transferred physical custody of their son to the mother after she had remarried and moved to new home in a different community. Validating the choice of the parents, the Appellate Division upheld the lower court's ruling that "parents were perfectly capable of coming to an agreement as to [their child's] physical custody without court approval." *Roxbury*, at 521. Like that of any child who changes school districts during a school year, responsibility for educating a child "is placed with the district where the parent with whom the child resides moved." *Roxbury,* at 522. To prevent parents from randomly switching school districts, the court added that "divorced parents had to have a united intent to establish a district as their child's district, and their decision would be determinative if reasonable and based on good faith considerations." *Ibid.*

Generally in the area of family law, courts are reluctant to interfere where the parties have managed to resolved their differences fairly and equitably. *See, e.g.*, *Berkowitz v. Berkowitz*, 55 *N.J.* 564 (1970) (voluntary agreements between separated spouses for the purpose of settling the issue of support for the wife and child are specifically enforceable); *Lepis v. Lepis*, 83 *N.J.* 139 (1980) (same standard of

"changed circumstances" applies to modification of support and maintenance obligation reached either by consensual agreement or by court decree.)

Here too, Mr. and Mrs. Sauro have risen above any personal disagreements and presented a united front with respect to the education of their children. Their decision to enroll the children in the Clifton school district was reasonable and made in good faith. Unrefuted evidence establishes the children spent a substantial amount of time with each parent, approximating an equal sharing of custody.[6] Mr. Sauro has clearly made his home in Clifton and has the requisite links to that community to acquire domicile.[7] Both children had beds in the Clifton apartment and the district's investigator verified that the son was truly living at that address. Since the children were living with their father for much of the time and both parents intended that they attend school in the father's district, the children were properly domiciled in Clifton within the meaning of *N.J.S.A.* 18A:30-1(a).

After March 3, 1994, when the court reaffirmed the mother's custody and the children resumed living mainly with her in Passaic, Clifton's legal responsibility to educate the children ended. Respondents' argument that the Board waived its rights to collect tuition by allowing the children to remain in the district is without merit. Waiver is the intentional relinquishment of a known right. *East Orange v. Bd. of Water Comm'rs,* 41 *N.J.* 6, 17 (1963). Proofs show that Board employees reasonably relied on the parents' repeated representations that a custody dispute was pending and that the children were spending roughly half their time with the father. Soon after discovering in mid-March 1994 that the children were now living mostly with their mother in Passaic, the Board promptly initiated proceedings which led to removal of the

[6]The Board's insistence that it is not obligated to educate the children unless they spend "a majority of time" with their father is logically untenable. If the children divided their time equally between both parents, they would not spend a majority of time with either and, under the Board's reasoning, no district would be responsible for their education.

[7]Although he does not own real property in Clifton, Mr. Sauro correctly described himself as a local "taxpayer" because a portion of the landlord's property taxes are passed along in the rent which Mr. Sauro pays.

children in June 1994. No showing has been made that the Board should have known earlier that the children were not domiciled in Clifton and delayed bringing an action to remove them. *Compare Fort Lee Bd. of Educ. v. Kintos*, No. A-4944-93T5 (N.J. App. Div. Oct. 13, 1995), where a school board was barred from recovering full tuition payments because it waited two and one-half years after having reason to believe that the parents did not reside in the district.

Finally, respondents raise a constitutional attack on the facial validity of *N.J.S.A.* 18A:30-1 insofar as it relates to the relief requested by the Board. In assessing the amount of tuition due, the Board sought to apply the statutory formula that "[t]uition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance[.]"[8] Respondents contend that calculation of tuition by this method constitutes imposition of an excessive fine in violation of the Eighth Amendment to the United States Constitution. Administrative agencies lack jurisdiction to adjudicate a statute unconstitutional on its face, since that function belongs exclusively to the judicial branch of government. *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 591 (1975). The preferable procedure for a facial attack is for the challenger merely to note its constitutional claims on the record in order to preserve its right to subsequent judicial review. *Christian Bros. Inst. v. No. N.J. Interscholastic League*, 86 *N.J.* 409, 416 (1981).

[8]At the time of the hearing, the actual per-pupil costs for the 1993-94 school year were not yet available. The estimated per-pupil costs for 1993-94 were $6,108 per year at the fifth-grade level and $6,453 per year at the high-school level.

Order

It is **ORDERED** that Mr. and Mrs. Sauro are jointly and severally liable to the Board for tuition for their two children from March 3, 1994 to the date of removal at the per-diem rate of l/180 of the annual per-pupil cost to the local district.

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

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

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

Jan. 22, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

1/23/96
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JAN 24 1996
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Richard Tuminello, domicile investigator, Clifton public school district
2. Rita Cadorin, elementary school principal, Clifton public school district
3. Barry Mascari, supervisor for counseling and student services, Clifton public school district
4. Vincent Joseph Sauro
5. Mildred Sauro
6. Ruth Stein, domicile investigator, Clifton public school district

List of Exhibits

No.	Description
P-1	Copy of student registration and information record signed by Vincent Sauro, dated September 2, 1993
P-2	Application for free and reduced priced meals or free milk signed by Mildred H. Sauro, dated September 3, 1993
P-3	Copy of pupil information card, undated
P-4	Copy of transcript of the removal hearing before the Clifton Board of Education held on June 7, 1994
P-5 (a)	Copy of request for residency investigation, dated October 22, 1993

(b) Copy of residency case report, dated October 2, 1993

P-6 Copy of residency case report, dated March 14, 1994

P-7 Copy of student registration and information record

P-8 Id. Copy of letter addressed to Whom It May Concern from M. Sauro, received on September 21, 1993

P-9 Copy of letter to the Clifton Board of Education from Andrew R. Bolduc, Esq., dated November 8, 1993

P-10 Copy of notarized statement by Vincent J. Sauro and Mildred Sauro, dated December 3, 1993

P-11 Copy of document entitled estimated cost per pupil for tuition purposes 1993-94, dated February 12, 1993

P-12 Diagram of the Clifton apartment drawn by Vincent Sauro on May 25, 1995

P-13 Copy of letter to Vincent Sauro and Mildred Sauro from Anthony V. D'Elia, dated May 24, 1994

P-14 Copy of order in the matter entitled *Sauro v. Sauro,* Superior Court, Chancery Division (Family Part, Passaic County Dkt. No. FM-10152-89, entered on May 28, 1993)

P-15 Copy of residency case report, dated May 25, 1994

P-16	Id.	Copy of certification of Vincent Sauro, dated March 26, 1993
P-17	Id.	Copy of certification of Vincent Sauro, dated May 6, 1993
P-18	Id.	Copy of reply certification of Mildred Sauro, dated May 20, 1993
P-19	(a)	Copy of letter to Anthony V. D'Elia, Esq. from Karen L. Perkins, dated June 6, 1995
P-19	(b)	Copy of 1992-93 per pupil costs certified by the Department of Education on October 13, 1994
P-19	(c)	Copy of document entitled Estimated Costs per pupil for tuition purposes 1992-93, dated January 22, 1992
RV-1	Id.	Copy of request for residency investigation, dated September 22, 1993
RV-2	Id.	Copy of a request for residency investigation, dated March 11, 1994
RV-3		Board policy statement regarding residency requirements for admission to Clifton public schools, adopted February 27, 1991
RV-4		Copy of letter to Clifton Board of Education from Vincent J. Sauro, dated November 11, 1993
RM-1		Copy of memo to Barry Mascari from Rita Cadorin, dated September 21, 1993
RM-2		Copy of letter to Mildred Sauro from Rita M. Cadorin, dated September 21, 1993

RM-3 Copy of letter to Vincent Sauro and Mildred Sauro from Rita M. Cadorin, dated October 28, 1993

RM-4 Copy of memorandum to Barry Mascari from Rita N. Cadorin, dated November 11, 1993

RM-5 Copy of memorandum to Barry Mascari from Rita Cadorin, dated November 8, 1993

RM-6 Certified copy of final judgment of divorce, entered on December 11, 1990

RM-7 Copy of order modifying final judgment of divorce, entered on March 3, 1994

RM-8 Copy of P-3, with alterations

OAL DKT. NO. EDU 7870-94

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
VINCENT SAURO and MILDRED SAURO,	:	
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by the Board and by Respondent Mildred Sauro, in accordance with N.J.A.C. 1:1-18.4.

The Board initially contends that, assuming arguendo, respondents' children spent an equal period of time between September 1993 and March 1994 with Mr. Sauro (in Clifton) and Mrs. Sauro (in Passaic), domicile, for school purposes, should have been vested in Passaic. The Board avers that

> ***since the children could only have one domicile and since the parties could not establish that the children lived in Clifton a majority of the time, then one could only conclude that the children were properly "domiciled" with that parent who had sole legal custody since December of 1990 - Mrs. Sauro.*** (emphasis in text) (Board's Exceptions at p. 2)

The Board argues that the ALJ erroneously concludes that, since both parents intended that the children attend school in Clifton from September 1993 to March 1994, then the children were

domiciled in Clifton. The ALJ, the Board affirms, "re-writes a fundamental maxim of law - that one can only have one domicile at a time.***" (emphasis in text) (Id.) Moreover, the Board contends that the ALJ "[c]uriously" cites to Roxbury, supra, which affirmed that a person cannot have more than one domicile. In this matter, the Board continues, the Sauro's children could not have had more than one domicile between September 1993 and March 2, 1994.

Although the Board agrees with the ALJ's view that domicile "...may have different content and shades of meaning depending upon the context in which it is used," it asserts that the ALJ's conclusion in this case "would allow divorced parents to effectively pick and choose children's domicile regardless of which party has judicial custody of the children and regardless of whether the children live with either parent a majority of the time." (Id. at p. 3)

The Board next asserts that the ALJ's factual findings that respondents' children lived with the parties a substantially equal amount of time is unsupported by the evidence. Here, the Board contends that the ALJ "misconstrues much of the testimony and improperly dismisses the credibility of Petitioner's witnesses." (Id. at p. 4) The Board reviews the conduct of respondent Mildred Sauro in registering her son for school in Clifton and in completing the Application for Free and Reduced Priced Meals or Free Milk, as well as the testimony of Rita Cadorin, and concludes,

> In dismissing Mrs. Cadorin's testimony, [ALJ] Springer felt it was significant that Mrs. Cadorin could not pin-point the dates in November and December of 1993 with any degree of accuracy ***. In so doing, Judge Springer unfairly dismisses Mrs. Cadorin's testimony and the reasons for her specific recollection as to what was and wasn't said in October, November and December of 1993. Curiously, Judge Springer does not address the specific hearing testimony of Respondent Mr. Sauro. In his testimony, Mr. Sauro specifically was asked *** whether it was "...true that the children were with you (Mr. Sauro) in Clifton

> at least half of the time?" Mr. Sauro responded, "I couldn't say that. They were with me a couple days a week but I couldn't say that it was at least half the time.***" (Board's Exceptions at p. 5)

Thus, the Board concludes that, in light of Mr. Sauro's admission and the statements made by respondents to Ms. Cadorin between September and December 1993, the ALJ's findings of fact were not based on "sufficient or substantial credible evidence present in the record***." (Id. at p. 5)

Respondent Mildred Sauro asserts that the ALJ erroneously concluded that she and Mr. Sauro "***presented a united front with respect to the education of their children," and that, therefore, both respondents were jointly and severally liable for the school tuition from March 3, 1994 through the end of the school year. (Respondent Mildred Sauro's Exceptions at p. 1) Mrs. Sauro contends that "[t]here is simply no support for such a premise in the hearing record." (Id.) Rather, she avers that she and Mr. Sauro did not reach a mutual decision to enroll the children in Clifton schools. Mrs. Sauro claims she

> ***relied upon her former husband's representations that he had made inquiry of the school district personnel; that he had truthfully set forth the facts; that he had been informed that the children were eligible to attend the Clifton Schools; and that he had already legally enrolled them in school. She acquiesced in Vincent Sauro's decision, nothing more." (Id. at p. 2)

Mrs. Sauro further asserts that, inasmuch as she was relying on Mr. Sauro's representations, she did not know, prior to the Board meeting held at the end of the 1993-94 school year, that the District suspected any impropriety. Thus, Mrs. Sauro concludes that the record is "abundantly clear" that, contrary to the ALJ's findings, she did not act in concert with Mr. Sauro, and it is inappropriate to hold them "co-equally liable" for the tuition due. (Id. at p. 3)

Mrs. Sauro next excepts to the ALJ's determination that the School District did not waive its rights to pursue its tuition claim by permitting the Sauro children to remain in the District. Here, respondent essentially recasts her arguments as presented before the ALJ. Accordingly, said arguments are not summarized herein.

Upon careful and independent review, the Commissioner initially concurs with the ALJ that respondents' argument that the Board waived its right to collect tuition by allowing the Sauro children to remain in school throughout the 1993-94 school year is without merit. (Initial Decision at p. 13) Further, the Commissioner agrees that respondents' constitutional claims with respect to N.J.S.A. 18A:38-1 are not properly considered in this forum.

Based on the ALJ's findings of credible testimony and evidence adduced at the hearing, the Commissioner concurs that the Sauro children were domiciled in Clifton from the first day of school in September 1993 through March 3, 1994. (Initial decision at p. 9) In so finding, the Commissioner notes that an analysis of domicile need not necessarily be guided by a "majority of time" paradigm, as argued by the Board. See Fort Lee Board of Education v. Kintos, 93 N.J.A.R. 2d (EDU) 837 (Commissioner, October 14, 1993), affirmed 94 N.J.A.R. 2d (EDU) 316 (State Board, April 13, 1994), affirmed with modification by Appellate Division, October 13, 1995, A-4944-93T5. Additionally, the Commissioner rejects the Board's contention that the ALJ's analysis permits the conclusion that the Sauro children were effectively granted two domiciles. (Board's Exceptions at p. 2) Moreover, as to the factual findings and credibility determinations of the ALJ which the Board calls into question, the Commissioner recognizes that he cannot properly reject the ALJ's findings of fact without reviewing those portions of the transcript(s) relevant to the Board's exceptions. Rowley v. Board of Education of Manalapan-

Englishtown, 205 N.J. Super. 65, 75 (App. Div. 1985); In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987). Inasmuch as it was the Board's duty to provide the Commissioner with such portions of the transcript, Morrison at 158, and the Board did not do so, no obligation arises for the Commissioner to review them before rendering a final decision regarding the findings and recommendations of the ALJ.

The Commissioner, therefore, concurs that respondents are jointly and severally liable to the Board for tuition for their two children from March 3, 1994 to the date of removal, at a per diem rate of 1/180 of the annual per pupil cost to the local District[1], notwithstanding Mrs. Sauro's allegation that the decision to enroll the Sauro children in the Clifton schools was not mutually reached. Here, the Commissioner confirms that it is respondents' choice of domicile for their children during the operative time period, which Mrs. Sauro does not dispute, rather than their choice of school districts, which is the determinative act herein, inasmuch as entitlement to free education flows directly from domicile.

Accordingly, the initial decision of the Office of Administrative Law is adopted for the reasons expressed therein and as amplified above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The Board noted in its exceptions that a supplemental certification clarifying the per diem cost for each student would be forthcoming. (Board's Exceptions at p. 5) The Board filed supplemental certifications on February 22, 1996 (cover letter dated February 13, 1996), demonstrating the actual per diem cost for grades one through five and for grades nine through twelve for the 1993-94 school year. A copy of the certifications was duly submitted to respondents' counsel. On the basis of said certifications, the Commissioner determines the actual amount due and owing by respondents is $5,214.40.

(SB) 83-96

EDE # 3962-93N
SBE #195-12/92-60
SB # 83-96

IN THE MATTER OF THE REVOCATION :

OF THE TEACHING CERTIFICATES OF : STATE BOARD OF EDUCATION

ANN MERY (CHARLTON) BY THE STATE: DECISION

BOARD OF EXAMINERS. :

Decided by the State Board of Examiners, September 6, 1996

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Ann Mery (Charlton), pro se

The decision of the State Board of Examiners is affirmed for the reasons expressed therein.

March 5, 1997

Date of mailing MAR 0 7 1997

(SB) 85-96

DHPL #480-96
SB # 85-96

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION
CATION FROM SCHOOL EMPLOYMENT : DECISION
OF W.W. :

Decided by the Deputy Commissioner of Education, November 1, 1996

For the Petitioner-Appellant, W.W., pro se

W.W. (hereinafter "petitioner"), who was employed as a custodian for a private school operated by Cerebral Palsy of New Jersey, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 revealed three convictions following arrests between June 1991 and May 1993 for possession and distribution of controlled dangerous substances. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated November 1, 1996, the Deputy Commissioner of Education upheld the disqualification,[1] concluding that petitioner had failed to

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

1/8/97

demonstrate clear and convincing evidence of his rehabilitation as required by N.J.S.A. 18A:6-7.1. The Deputy Commissioner stressed in so doing that petitioner's criminal history was "extremely serious and relatively recent."

Petitioner, acting pro se, filed the instant appeal to the State Board.

We note initially that petitioner has submitted letters in support of his appeal which were not included in the record before the Deputy Commissioner. Although petitioner has not filed a motion to supplement the record on appeal, N.J.A.C. 6:2-1.9, given petitioner's pro se status, we have supplemented the record sua sponte and have considered those letters in determining this matter. While those submissions reveal that petitioner is making significant progress towards rehabilitation, we affirm the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey, particularly in light of the fact that his recent convictions include Possession with Intent to Distribute Controlled Dangerous Substances Within 1,000 Feet of School Property and that the drugs at issue in that case were heroin and cocaine. Given the recent nature and extreme seriousness of petitioner's disqualifying offenses, see N.J.S.A. 18A:6-7.1(e)(2), we are unable to conclude at this time that petitioner has affirmatively demonstrated clear and convincing evidence of his rehabilitation.

Accordingly, we affirm the decision of the Deputy Commissioner disqualifying petitioner from service as a custodian in the schools of New Jersey. We note in so doing that nothing in our decision herein precludes petitioner from reapplying to the Office of Criminal History Review once additional time has passed and seeking a

determination from the Commissioner that he is qualified for school employment on the basis of rehabilitation.

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

86-96

86-96-DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
BRADLEY D. BUTLER.	:	
	:	

MARCH 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8586-95

AGENCY DKT. NO. DHP #24-95

BRADLEY D. BUTLER,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Bradley D. Butler, petitioner, pro se

State Department of Education, respondent, appearing pursuant to N.J.A.C. 1:1-5.6(a)

Record Closed: December 13, 1995 Decided: January 29, 1996

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter concerns the appeal of Bradley D. Butler (hereinafter petitioner) from the determination of the New Jersey State Department of Education (hereinafter respondent) that he is disqualified from employment as the result of a criminal history record check conducted pursuant to N.J.S.A. 18A:6-7.1. Petitioner was advised of respondent's determination by letter dated January 11, 1995. He responded by letter dated February 14, 1995, asserting that he was rehabilitated and enclosing a confirmation of attendance at a rehabilitation program at East

Orange General Hospital, a letter of personal reference from a welfare representative for the Township of Irvington, a letter attesting to petitioner's rehabilitation from the Founder and Director of the Friends of the Lifer's Youth Corp. and two letters of character reference from personal friends. On March 6, 1995 Richard A. Di Patri, Deputy Commissioner, issued a determination on the appeal which provided as follows:

> Having reviewed your appeal of disqualification from school employment which resulted from a Department of Education criminal history record check conducted pursuant to N.J.S.A. 18A:6-7.1 et seq., Bradley D. Butler v. New Jersey State Department of Education, DHP #24-95, I determine you are not qualified for employment as a school custodian.
>
> The record indicates that in September, 1992 you were convicted of possession of narcotic equipment, for which you were sentenced to 91 days confinement, a $650 fine and a six-month suspension of your driver's license. Although you present letters attesting to your personal achievement from a welfare representative, the Director of the Friends of the Lifer's Youth group and two long-standing acquaintances, I nonetheless conclude that insufficient time has transpired since your conviction to find clear and convincing evidence of your rehabilitation.
>
> Accordingly, pursuant to applicable law, your disqualification from school employment is affirmed. Any appeal of this determination must be filed with the State Board of Education pursuant to N.J.A.C. 6:2-1.1 et seq.

Petitioner filed an appeal from the determination by letter dated April 1, 1995. Thereafter, the parties executed a Consent Order agreeing to a remand of the matter to the Commissioner of Education for a plenary hearing on the issue of rehabilitation. The Consent Order was received by the State Board of Education on May 22, 1995, and on July 7, 1995, the State Board issued a decision remanding the matter to the Commissioner for a plenary hearing. On September 20, 1995, the matter was transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13. The plenary hearing was scheduled for November 29, 1995 and was conducted as scheduled. At the conclusion of testimony petitioner

requested that the record remain open for two weeks for him to obtain and submit additional written recommendations. Nothing further having been received, however, the record closed on December 13, 1995.

FINDINGS OF FACT

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

Petitioner was employed as a substitute school custodian by the West Windsor-Plainsboro Regional Board of Education from October 1994 until January 17, 1995. His employment there was interrupted because of the initiation of the within proceedings. The criminal history record check which is required to be done for any employee of a board of education who has direct contact with students under the age of eighteen revealed convictions for the following offenses:

2/28/80	Possession of Marijuana Sentenced 5/27/80 to sixty days suspended confinement and $100.00 fine.
3/31/82	Possession of Cocaine Sentenced 3/18/83 to four years suspended confinement and three years probation
2/9/86	Heroin Sentenced 8/25/86 to two years probation.
9/13/92	Possession of Narcotic equipment Sentenced 9/13/92 to 91 days confinement Hudson County Penitentiary; jail time credit four days, $650.00 fine and driver's license suspended six month.

The letters of recommendation and character reference which petitioner had forwarded to the Commissioner of Education in February 1995 in support of his appeal were included in the file

which respondent forwarded pursuant to N.J.A.C. 1:1-5.6(a) in the within matter. They provide as follows:

January 20, 1995

This letter is to confirm that Bradley Butler has attended RAFT/PRIDE from April 18, 1994 to May 13, 1994. To our knowledge the client has followed treatment recommendations.

George L. Cook, ADC, AC
East Orange General Hospital

February 3, 1995

I have only known Mr. Butler for a short time, but I have found him to be trustworthy, reliable individual. He's independent and is determined to achieve, whatever goals he's set for himself to succeed. He would be an asset to any company that hires him.

If there is any other information that you need please contact me at (201) 399-6661.

Artis M. Jones
Welfare Representative
Township of Irvington

This letter serves as a reference on the behalf of Bradley D. Butler. Bradley has taken the necessary steps to rehabilitate himself and become a productive, responsible member of society. Through the mentoring program we offer at the FRIENDS OF THE LIFERS' YOUTH CORP. I've personally watched this young man grow through this program for the past two years. I hope that you have a conscious and realize that some people do change and become better citizens for it.

Harvey George
Founder & Director
Friends of the Lifers' Youth Corp.

I have known the above referenced individual for approximately sixteen years, and I can honestly say that it is a pleasure to recommend him for a position with the Board of Education.

Because individual character and the ability to handle important decisions are all important in considering an applicant, I feel that Mr. Butler is the prime candidate for any position.

During the years, Mr. Butler has proven himself to be an overcomer, strong-minded and has shown determination in accomplishing tasks; decisions that have been placed in his path have been carefully and intellectually handled. And above all, his responsibility as a husband and father shows true maturity and leadership.

If you are in need of further information, or would like to discuss this any further you can contact me at the address listed above. And I do remain, sincerely,

Angela Perkins

I swear under penalty of perjury, that all the information provided by me is true and correct to the best of my knowledge.

February 2, 1995

I have known Mr. Bradley Butler for approximately twelve years; and I feel, very strongly, that he deserves "the second chance" to prove his commitment to self-reform.

Over the years, Mr. Butler has proven himself to be a: responsible human being (and father), a motivated problem solver, and one that possesses appropriate behavior and attitude. These are my reasons for considering him a prime candidate for a position with the Board of Education.

In addition to the strengths listed above, Mr. Butler has successfully completed a detoxification, and substance abuse program.

If you have any questions, concerning this matter, please contact me by calling my service at (212) 586-6300. Thank you for your valued time.

Keith Perkins

This concludes the recitation of uncontested facts.

Petitioner testified on his own behalf. He testified that his employment as substitute custodian required him to vacuum, wash chalk boards, clean the cafeteria and take out the garbage; he worked at night after school was closed. In addressing the statutory factors for consideration in assessing rehabilitation, petitioner testified concerning the particulars of each offense. He testified that in 1980 and 1982 he was using drugs off and on and hanging with the wrong crowd. In February 1986 he was experimenting with heroin, he said. The 1992 offense was the result of being in the wrong place at the wrong time; petitioner testified that he did not have drug paraphernalia on him but those who were with him did and the arresting officer had said he was just as guilty as they were. He testified that he was sentenced to 91 days for contempt of court as the result of an outburst in the courtroom when he was trying to explain.

Petitioner further testified that he has been drug-free since the end of 1993, a period of almost two years at the time of the hearing. He attributed his past mistakes to hanging with the wrong crowd. He has learned in recovery that it is necessary to change people, places and things. For the past one and one half years he has lived in Plainsboro with his parents. Prior to that he had moved out of Jersey City to Irvington to live with his sister. It was at that time that he had attended the rehabilitation program at East Orange General Hospital. He currently attends meetings two times per week, either there or at one of the other locations at Essex County College or in Plainsboro. For the past six months he has been working with a company, BFI, which repairs 40-yard dumpsters. Petitioner operates a bulldozer for the company. Petitioner further testified that he is positive there will be no sliding back in in his future. He feels that God is on his side; he now gets high on exercise, he said, and he even quit smoking cigarettes about a year ago.

Curiously, petitioner did not mention that he has a wife who lives in Jersey City until after his father, Charles Butler, testified. Mr. Butler testified that the wife and two children were in

Jersey City because she works there and petitioner is staying in Plainsboro because his job is there. Charles Butler further testified that his son is trying to turn his life around. He indicated that petitioner has been going to church with them while he has been staying in Plainsboro. Mr. Butler indicated that he has not observed any involvement with drugs during this time period.

Petitioner's date of birth is November 6, 1955. Accordingly, the criminal offenses described hereinabove occurred when he was twenty-four, twenty-six, thirty-two and thirty-seven, respectively.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:6-7.1, the statute relevant to a determination of the within matter, provides in pertinent part:

. . .

> An individual other than a school bus driver shall be disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction of any of the following crimes and offenses:
>
> . . .
>
> b. A crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," P.L. c. 226 (C.24:21-1 et seq.); or
>
> . . .
>
> e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an

individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

The phrase "clear and convincing evidence" means more than a preponderance. State v. Cale, 19 N.J. Super. 397, 400 (App. Div. 1952). Under the standard the fact finder must be reasonably certain or have a firm belief or conviction that the contested factual assertion is true. Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 161 (App. Div. 1960). What is clear in this matter is that petitioner was convicted of several offenses which are listed as disqualifying offenses under the statute: four drug-related offenses, occurring in February 1980, March 1982, February 1986 and September 1992. In 1993 he began to take steps to turn his life around. The evidence indicates that he is having some success in this regard. However, I am concerned that he failed to mention his wife and children in Jersey City until after his father's testimony, and the absence of

any input herein from his wife, even after petitioner was given an additional two weeks after the hearing to submit supplemental references, also raises questions. Petitioner's father appeared as a candid, sincere and credible witness, but his testimony projected cautious optimism with respect to his son's rehabilitation rather than clear conviction. Considering petitioner's many years of drug involvement, I am not persuaded that two years of being drug-free clearly and convincingly establishes that petitioner has achieved his goal, although he certainly seems to be working toward it.

If the standard of proof of rehabilitation which petitioner is required to meet in these proceedings were a preponderance of the competent and credible evidence, I might be inclined to agree that petitioner is probably rehabilitated. The legal standard I must apply to the facts in this matter, however, is clear and convincing and because of the doubts and reservations I have expressed I am unable to find that petitioner has established his rehabilitation as required by the statute. The Legislature has made a policy determination that convictions for certain kinds of offenses disqualify persons from employment which involves direct contact with school children. That disqualification can only be lifted where the evidence makes it clear and reasonably certain that rehabilitation has occurred. The proofs in this case do not rise to that high standard.

For all of the foregoing reasons, I **CONCLUDE** that petitioner is disqualified from employment in the public schools pursuant to N.J.S.A. 18A:6-7.1.

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

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

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

Jan. 29, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

1/29/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 02 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

Petitioner's exhibits were included in respondent's submissions and have been described in the text of the decision hereinabove.

For respondent:

R-1 The Department of Education file in regard to disqualification from school employment of Bradley D. Butler (51 pages)

WITNESSES

For petitioner:

Bradley D. Butler
Charles Butler

For respondent:

None

OAL DKT NO. EDU 8586-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
BRADLEY D. BUTLER.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that Mr. Butler has not met his burden of establishing rehabilitation by clear and convincing evidence as required by N.J.S.A. 18A:6-7.1 and is, therefore, not qualified for school employment within the intent of the criminal history record check laws.

Accordingly, Mr. Butler's disqualification from school employment is sustained for the reasons clearly articulated by the ALJ in her initial decision. This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of July 5, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 8, 1996
DATE OF MAILING MARCH 8, 1996

87-96

87-96

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF RAMAPO	:	COMMISSIONER OF EDUCATION
INDIAN HILLS REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, BERGEN COUNTY.	:	

SYNOPSIS

Petitioner, defeated candidate for Board membership, alleged there were improprieties and violations of law in the conduct of the school election.

ALJ found that as to the allegations in the petition, as a matter of law there was no citation of a statutory violation nor was there any allegation in the petition the statements in question were attributable to the Board or to those under its direct supervisory control nor by the other candidate Mr. Crystal. ALJ concluded the petition did not allege actions which would give rise to a cause of action within the jurisdiction of the Commissioner of Education and that the petition in this case must be dismissed.

Commissioner determined that petitioner failed to meet his burden of establishing a direct nexus between the alleged improprieties and the specific outcome of the election. Petition was dismissed.

MARCH 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 4705-95
AGENCY DKT. NO. 116-4/95

INQUIRY IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF RAMAPO INDIAN HILLS REGIONAL, BERGEN COUNTY

John J. Segreto, Esq., for petitioner

Allen Dzwilewski, Esq., for respondent,
Ramapo Indian Hills Regional High School District

Steven B. Crystal, *pro se,* respondent

Record Closed: December 18,1995 Decided: January 19, 1996

BEFORE: **MARYLOUISE LUCCHI-McCLOUD**, ALJ:

This motion for summary decision comes by way of motion papers filed by the respondent school district on August 4, 1995. Response in opposition by the petitioner was received on September 15, 1995. Although that submission indicated that a copy of a video tape was being served upon both the respondent school district as well as respondent Steven Crystal (Crystal) a telephone conference was conducted at the request of the parties on October 2, 1995 at which time respondents indicated that they had not received the videotape and that it would be forwarded via overnight mail. On

October 17, 1995 a letter was received by respondent Crystal indicating that the videotape had not yet been received.

Subsequently the videotape was produced for the parties and oral argument, as well as a viewing of the videotape for the purposes of uniformity, was set for December 18, 1995. On that date the record closed for the purposes of this motion for summary decision.

The original matter had been filed by petitioner Joseph A. Medici by way of letter dated April 21, 1995. The matter had been transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 on May 10, 1995. Initially, the parties consisted of petitioner Medici and respondent school district. It became apparent that respondent Crystal was a necessary party in this matter and respondent Crystal consented to his addition as a party in this case and as such was added.

A bench decision was given on January 19, 1996 which is memorialized by this written decision.

Statement of Facts

Solely for the purposes of the motion for summary decision filed by respondents both sides agree that even if all of the allegations set forth in the petition are deemed to be material facts they do not state a cause of action. As a result, for this motion only, those facts are deemed true and uncontested. They are as follows:

1. The regional board has local cable TV access, which transmits Franklin Lakes matters on behalf of the regional board and are required to be cleared and authorized by the local superintendent of schools. A candidate's night taped TV program was taped for broadcast with the authorization of the superintendent. The mayor of Franklin Lakes,

Thomas Donch, taped a six-minute address in which he attacked the candidacy of Joseph A. Medici, making partisan false accusations and fraudulently untrue statements. The mayor had prior thereto publicly endorsed the candidacy of the other candidate. The tape attacking the candidacy of petitioner was broadcast on local cable access TV the day before the election. It ran for several hours until it was removed from broadcast by the superintendent upon the complaint of petitioner Medici. The superintendent indicated that the mayor's taped address had, unknown to the superintendent and without his authorization, been broadcast and had been included on the tape of the candidate's night. Someone had taken the candidate's nights tape which had been authorized to be broadcast and edited into the tape the aforementioned comments of the mayor. After the superintendent ordered the removal of the mayor's comments from the tape, someone then, without authorization, removed the candidate's night tape from further broadcast.

2. On election day candidate Joseph A. Medici pursuant to the provisions of *N.J.S.A.* 18A:14-15 acted as challenger and wore and displayed his challenger's badge at the polling area.

3. While petitioner was present at the polling place on election day, George Katz, a supporter of the other candidate, made accusatory statements in a loud, audible and offensive manner asserting that petitioner was acting illegally and unethically in being at the polling place and fraudulently asserting that he was a supporter of petitioner. Katz made other statements regarding petitioner in the presence of a number of voters who were then assembled. The business administrator was called and he explained to Katz that petitioner had a right to serve as a challenger. The county superintendent's officer further confirmed the advice of the business administrator. Katz, despite being informed of the views of the business administrator and the county superintendent's office continued the conduct complained of. Subsequently the local police arrived at the

polling place in the presence of voters and accusing comments were made by Mr. Katz and Mr. White in a voice audible to those voters present.

4. For the purposes of this motion only these facts are accepted. They are accepted to determine only whether or not a cause of action is stated and accepted as true for that purpose and that purpose alone. In addition to these facts, a copy of the videotape was entered into evidence for the purpose of this motion only and marked RM-1. That also was considered and forms a part of the record in this case.

Legal Discussion

This matter arises in the posture of a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5. The moving party in such case must demonstrate that there exists no genuine issue of material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. *Judson v. Peoples Bank and Trust Co.*, 17 N.J. 67 (1954). It must be noted that summary decision should be granted only with extreme caution when underlying facts essential to the decision are not disputed and a determination can be made as a matter of law. In this case the facts are stipulated to **only** for the purposes of this motion with the respondent's position being that even if every fact alleged is true no cause of action lies within this forum nor would these actions vitiate this election as having thwarted the will of the people.

With respect to the first allegation dealing with the videotape, it was conceded by all that the tape was edited and displayed on cable TV. No allegation has been made either by way of the petition or during the course of this matter that this was done under the auspices of the school board itself or Mr. Crystal. In point of fact, the petition itself indicates that the superintendent gave information that the mayor's taped address had, unknown to the superintendent of schools and without his authorization, been broadcast and included with the tape of the candidate's night. In the same petition in

this case it states that after the superintendent **"ordered"** the removal of the mayor's comments from the tape, "someone" then, without authorization, removed the candidate's night tape from further broadcast.

It is clear from the allegations in the petition that nothing, as a matter of law is alleged to be linked to the school district itself and to Mr. Crystal. The Commissioner of Education specifically is limited to jurisdiction in matters arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. In this case we are talking about a school election but the actions alleged in the petition are beyond the scope with which either the school district and the board, nor its authorized representatives, have the authority to deal.

Additionally, there is no reference to the statutorily prescribed procedure about which is being complained. Pursuant to *N.J.S.A.* 18A:14-63.12 the Commissioner of Education shall inquire into alleged violation of statutorily prescribed procedures for school elections. As a result the first allegation in the petition must hereby be dismissed as failing to state a cause of action cognizable in this forum and by the Commissioner of Education.

With respect to the second allegation the petitioner alleges that while lawfully acting as a challenger pursuant to *N.J.S.A.* 18A:14-15 and present at the polling place certain individuals who are alleged to be supporters of another candidate made statements audible to the public which were untrue, for the purposes as alleged, of discrediting the petitioner. These individuals were both named. Even though in the second paragraph of the petition it indicates that respondent Crystal arrived at the polling place when the police did, the last sentence shows clearly that the statements complained of, alleged to be "accusatory" regarding the petitioner, were made by Mr. Katz and Mr. White in the presence of other voters.

As with the first allegation in this petition, as a matter of law there has been no citation of a statutory violation nor has there been any allegation in the petition itself

that these statements are attributable to the board or to those under its direct supervisory control nor by respondent Crystal.

No motion to amend the petition was ever made in this case and as a result the case cannot expand beyond the allegations in the petition. Any misconduct or fraud which is alleged and, for the purposes of this motion **only,** the facts are not disputed, must be on the part of election officers and must, in turn, thwart the free expression of the popular will. *In re Wene,* 26 *N.J. Super.* 363, 376 (Law Div. 1953), aff'd *sub nom. Wene v. Meyner*, 13 *N.J.* 185 (1953) at 196.

Taking this case in the broadest possible context as delineated in the petition it is impossible to conclude that, even proving all of the acts alleged, a cause of action exists for the reasons stated above.

It is unnecessary to reach the question of whether or not those actions had, were or might have reasonably had any effect on the outcome of the election due to the fact that no cause of action that is cognizable in this forum is cited. It should be pointed out that even in cases where irregularities are shown it is well established that elections are to be given effect whenever possible and are not to be set aside unless it can be shown that the will of the people was thwarted, was not properly expressed, or could not fully be determined. *In the Matter of the Annual School Election held in the Township of Pitsgrove, Salem County*, 1976 *S.L.D.* 585 at 589.

Conclusion

Based upon the foregoing, I **CONCLUDE** that the petition in this case does not allege actions which would give rise to a cause of action within the jurisdiction of the Commissioner of Education and that the petition in this case must be dismissed.

Order

It is hereby **ORDERED** that the petition be and hereby is dismissed for the reasons expressed above as articulated in the oral decision.

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

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

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

1/19/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Jan. 23, 1996
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 23 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al(FV)mxl

OAL DKT. NO. EDU 4705-95

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF RAMAPO	:	COMMISSIONER OF EDUCATION
INDIAN HILLS REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, BERGEN COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner, as was the reply thereto, in accordance with N.J.A.C. 1:1-18.4.

Petitioner initially argues that, contrary to the Administrative Law Judge's (ALJ) statement, he never agreed or stipulated that, for the purposes of the Motion for Summary Judgment filed by the Board, "***even if all of the allegations set forth in the petition are deemed to be material facts they do not state a cause of action.***" (Initial Decision at p. 2) Petitioner asserts this finding is "clearly erroneous." (Petitioner's Exceptions at p. 1)

Petitioner also challenges the ALJ's findings that petitioner made no allegation either in his petition or during the course of proceedings that the mayor's taped commentary was edited into the candidate's night broadcast tape under the auspices of the Board or Mr. Crystal (Initial Decision at p. 4), and that "***nothing, as a matter of law is alleged to be linked to the school district itself and Mr. Crystal.***" (Id. at p. 5) Rather, petitioner contends that he submitted arguments which allege, inter alia, that access to the cable television station "***is controlled by the Franklin Lakes Schools' Superintendent, Dr. Edward J. Sullivan," and that "***Respondent

Crystal [publicly] admitted that the editing of the debate tape was done at his direction and with his approval, and that the edited tape was in fact produced by him." (Petitioner's Exceptions at pp. 2, 3)

Petitioner next contends that the ALJ erred in finding that his allegations concerning the incident at the polls were not attributed to Respondent Crystal. (Id. at p. 8) Petitioner challenges,

> ***It was Respondent Crystal himself who summoned the police. ***Respondent Crystal had to have been in contact with Katz and White and had to have known about their protestations. Petitioner specifically alleges that Respondent Crystal orchestrated these events for the purpose of discrediting Petitioner in the presence of a large gathering of voters. To find and conclude that Respondent Crystal was not involved in these incidents, particularly without the benefit of a plenary hearing was in error. (Id. at pp. 8, 9)

Petitioner maintains that he was unable to substantiate his allegations as to the videotape, the addition of the mayor's address on the videotape, and the incident at the polls by way of interrogatories to Respondent Crystal, since Crystal refused to answer such interrogatories. Thus, petitioner reasons, "It is clear that where critical facts are peculiarly within the moving party's knowledge a grant of summary judgment is improper. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988)." (Id. at p. 10) Similarly, petitioner asserts it was erroneous for the ALJ to deny his request to depose Mayor Donch. (Id. at p. 15)

Finally, petitioner reasserts his arguments as to the differential voting procedures employed in Districts 4, 5 and 6, as well as to his purported entitlement to a recount of the absentee ballots. (Id. at pp. 12-14)

The Board counters that "[petitioner's] exceptions are disingenuous in that they attempt to create factual disputes when, solely for purposes of the Motion for Summary Decision, none

exists." (Board's Exceptions at p. 1) The Board urges the Commissioner to recognize that the ALJ's initial decision "***was simply a summary of the factual background. It does not and was not intended to find facts different than the above stipulations." (Id.) Moreover, the Board affirms there is no showing that petitioner's allegations affected the outcome of the election, or thwarted the will of the electorate, as is required for petitioner to set aside the election results. The Board incorporates by reference its brief before the ALJ which "***details the standards adopted and approved by the Commissioner of Education regarding jurisdictional issues and burdens of proof for anyone trying to overturn a school election result.***" (Id. at pp. 1, 2) Inasmuch as petitioner has failed to meet his burden of proof, the Board urges that the Commissioner adopt the initial decision of the ALJ dismissing the petition herein.

Upon careful and independent review, the Commissioner first observes that the ALJ properly declined to address petitioner's allegations as to differential voting procedures and a recount of absentee ballots, inasmuch as said allegations were nowhere contained in the Petition of Appeal, and the petition was never amended to include those allegations. (Initial Decision at p. 6) The Commissioner further adds with respect to a recount of absentee ballots that he is without jurisdiction to authorize such a recount. N.J.S.A. 19:57-24.

However, the Commissioner finds and determines that, even if each of petitioner's allegations is accepted as true and correct, nowhere on record does petitioner proffer, or state his intent or ability to proffer, specific evidence which would demonstrate that the will of the electorate was thwarted by the casting of illegal votes which would not have been cast but for respondent's improper conduct, or by the influencing of a sufficient number of specific votes in a

way that caused them to be cast differently from the way they would have been cast, had the conduct complained of not occurred.

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.*** In re Wene, 26 N.J. Super 363, 383 (Law Div. 1953), aff'd *sub nom.* Wene v. Meyer, 13 N.J. 185 (1953).

Thus, the Commissioner finds that, inasmuch as it is petitioner's burden to establish a direct nexus between the alleged improprieties and the specific outcome of the election, he has failed to meet his burden and the petition is properly dismissed.[1]

Accordingly, the Commissioner adopts the initial decision granting the Board's Motion for Summary Decision for the reasons expressed herein, and dismisses the within petition.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] While petitioner is correct that the Commissioner has historically considered matters relating to the conduct of elections which are not alleged to be in specific violation of school election statutes, this observation does not alter the outcome of this decision.

MARCH 8, 1996
DATE OF MAILING MARCH 8, 1996

88-96

88-96

J.R. TRANSPORTATION COMPANY, INC. and A&A CHARTER SERVICE, INC.

PETITIONERS,

V.

BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MARCH 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 11618-94

AGENCY DKT. NO. 443-11/94

AND

OAL DKT. NO. EDU 11619-94

AGENCY DKT. NO. 442-11/94

CONSOLIDATED

J.R. TRANSPORTATION COMPANY, INC.

and

A&A CHARTER SERVICE, INC.

Petitioners,

v.

BOARD OF EDUCATION OF THE STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Michael F. O'Connor, Esq., for Petitioner (Fitzpatrick & Fitzpatrick, attorneys)

Patricia A. Taylor, Assistant General Counsel, for Respondent
(Charlotte Kitler, General Counsel)

Record Closed: January 10, 1996 Decided: January 19, 1996

BEFORE **STEPHEN G. WEISS**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

These consolidated cases were transmitted by the Department of Education to the Office of Administrative Law on December 1, 1994 and a motion by respondent for summary decision dismissing the petitions of appeal has been made on the ground that the petitions were not filed in a timely fashion under *N.J.A.C.* 6:24-1.2. At the prehearing conference conducted by former Administrative Law Judge James A. Ospenson on June 9, 1995, the Board was directed to file such a motion in connection with its affirmative defense that the cited regulation applied and the petitioners were given twenty days within which to respond. *See,* Prehearing Order, June 9, 1995, Para. 13.

Respondent's letter brief and attachments in support of its motion were filed on December 20, 1995, and I am advised by counsel for the respondent that certified mail service was made upon counsel for petitioners on December 19, 1995. Accordingly, since more than twenty days have elapsed since service of the motion, and neither I nor counsel for respondent have received either reply papers or a request for an extension of time, the matter is ripe for summary determination.

DISCUSSION

The petitions in these consolidated cases alleged that the respondent Board of Education of the State Operated School District of Jersey City had violated certain transportation contracts entered into between each petitioner and the Board in September 1992 respecting their provision of pupil transportation services for the 1992-93 school year. In particular, it was alleged that in violation of those contracts, and without providing petitioners with notice or opportunity to be heard, the respondent imposed penalties by withholding certain payments due each petitioner under the contracts - $8,331 in the case of J.R. Transportation and $14,252 in A&A Charter Service's case.

However, according to undisputed information attached to respondent's letter brief, notice of the alleged infractions and the Board's intended action was provided to both companies and a meeting was held in September 1993 between representatives from A&A Charter Service and Board representatives to discuss the situation. See Exhibits R-4, R-6 and R-7 attached to respondent's brief.

Despite the adverse action taken by the Board in the Fall of 1993, neither company petitioned the Commissioner of Education for relief until more than one year later. In particular, both the J.R. Transportation and A&A Charter petitions were stamped as "filed" at the Department of Education on November 3, 1994, well beyond the ninety day period set forth in *N.J.A.C.* 6:24-1.2(c). Thus, they clearly were untimely and unless extraordinary circumstances exist to explain or justify that delay, the petitions should be dismissed.

As noted by Board counsel in her letter brief, case law clearly suggests that the applicable regulation must be construed strictly. *See, e.g., North Plainfield Education Association v. Bd. of Ed.,* 96 *N.J.* 587 (1984); *Bernards Twp. Bd of Ed. v. Bernards Twp. Ed. Association,* 79 *N.J.* 311 (1979); *Riely v. Bd. of Ed. of Hunterdon Central High School District,* 173 *N.J. Super.* 109 (App. Div. 1980). In the circumstances of this case, of course, no explanation of any sort, justified or not, has been provided by the petitioners with respect to the delay. Thus, given what appears to be undisputed facts as to the untimely filing, the respondent's motion to dismiss will be granted. Plainly, the petitions were filed well beyond the ninety day time limit in N.J.A.C. 6:24-1.2(c) and no facts have been provided to justify that I recommend either relaxation or waiver of the rule.

Accordingly, for the reasons set forth herein, and based upon the absence of any disputed facts, respondent's motion for summary decision will be **GRANTED** and the consolidated petitions should be **DISMISSED**.

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

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

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

January 19, 1996
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

January 23, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 23 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

\mh

OAL DKT. NOS. EDU 11618-94 AND EDU 11619-94 (CONSOLIDATED)

J.R. TRANSPORTATION COMPANY, INC. and A&A CHARTER SERVICE, INC.	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the Petition of Appeal was filed out of time and that no relaxation or waiver of N.J.A.C. 6:24-1.2(c) is warranted in this instance.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL that the instant Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 8, 1996

DATE OF MAILING MARCH 8, 1996

90-96E

90-96

R. B., individually and on behalf of her minor son, K.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

MARCH 11, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING APPLICATION FOR TEMPORARY EMERGENT RELIEF

OAL DKT. NO. EDU 376-96

AGENCY DKT. NO. 28-1/96

R.B., INDIVIDUALLY AND ON BEHALF OF HER MINOR SON K.B.,

Petitioner,

v.

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

Respondent.

David G. Sciarra, Esq., for petitioner (Education Law Center, Inc., attorneys)

Louis J. Greco, Esq., for respondent

Record Closed: February 13, 1996 Decided: February 14, 1996

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was opened before the undersigned on an application for temporary emergent relief. R.B., on her own behalf and on behalf of her minor son, K.B. (hereinafter petitioner) filed a

petition for a declaratory ruling with the Commissioner of Education on January 26, 1996, together with a motion for emergent relief seeking an order requiring respondent immediately to admit K.B. to regular classes at Absegami High School, and enjoining respondent from conducting any hearing concerning exclusion of K.B. from attending the public schools in respondent's district. On January 31, 1996, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case and for scheduling pursuant to N.J.A.C. 1:1-12.6. Respondent filed an answer to the petition and papers responding to the motion on February 6, 1996. The return date for oral argument on the motion for temporary emergent relief, originally scheduled for February 7, 1996, was adjourned at the request of respondent's attorney and was rescheduled for February 13, 1996 at the Trenton office of the Office of Administrative Law. On February 9, 1996, petitioner filed a supplemental letter memorandum and affidavit in reply to respondent's memorandum and affidavits in opposition to the motion for emergent relief. Oral argument took place as scheduled on February 13, 1996, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of the motion for temporary emergent relief are not in dispute and I therefore **FIND** the following as uncontested facts.

K.B. is 16 years old and is domiciled in respondent's district. On December 21, 1995, K.B. was arrested at Holy Spirit High School, the private parochial school he was then attending, and was later charged with possession of marijuana with intent to distribute. Criminal charges concerning this incident are currently pending in the Superior Court Family Division. Disposition of the charges is anticipated to take place during the week of February 19, 1996. As the result of the arrest and pending criminal charges, K.B. was required to withdraw from Holy Spirit High School. On January 3, 1996 petitioner went with her son K.B. to enroll him in Absegami High School. School officials at Absegami had already been informed by Holy Spirit and/or the local police department about K.B.'s arrest for possession with intent to distribute, and, accordingly, when petitioner attempted to enroll him she and K.B. were referred to two vice principals in the

high school, Raymond E. Dolton and John Gilly, for an interview. After petitioner declined, several times, to explain why K.B. left Holy Spirit High School, Mr. Dolton revealed that they were already in possession of the information and asked petitioner to explain. During the interview K.B. acknowledged that he had in fact possessed marijuana at school at Holy Spirit. Whether K.B. actually said anything else is in dispute. Petitioner then repeated to Mr. Dolton what she had heard about the facts of the incident. Mr. Dolton advised petitioner that he was not certain whether K.B. would be admitted to Absegami High School because there was a new superintendent in the district and he was not familiar with his attitude toward "these cases." Petitioner's request for home instruction was declined.

By letter dated January 5, 1996, Lynn Basner, Principal of Absegami High School, advised petitioner as follows:

> Please be advised that the Board of Education of the Greater Egg Harbor Regional High School District has scheduled a hearing for Wednesday evening, January 24, 1996 at 8:00 P.M. in the Multi Purpose Room of Oakcrest High School to determine if your son, K., should be excluded from attending school in this district. He is not to attend school in this district until after the Board of Education makes a decision in this matter.
>
> The charge against your son is as follows:
>
> 1. That on or about December 20, 1995, K.B., a student at Holy Spirit High School, was in possession and did intend to distribute a controlled dangerous substance.
>
> At the time of the hearing the Board will hear the witnesses and consider the anticipated testimony described below:
>
> 1. It is anticipated that David Phifer, administrator at Holy Spirit High School, will testify about the discipline record of K.B., a student, including the withdrawal from school on December 20, 1995 for possession and distribution of a controlled dangerous substance within the drug free school zone

2. It is anticipated that a Detective Ronald Faisst, Absecon Police Department, will testify that on December 20, 1995 at Holy Spirit High School, he observed K.B., a student, in possession of a controlled dangerous substance with intent to distribute within the drug free school zone.

At the time of this hearing, the Board may also consider your son's academic and disciplinary record from Holy Spirit High School. If the charges against your son are sustained to the satisfaction of the Board, they may recommend that he not be admitted to school.

The hearing will be conducted in a closed session of the Board.

Thereafter, by letter dated January 23, 1996, petitioner's attorney wrote to respondent's attorney as follows:

This letter is to advise you that the Education Law Center is representing R.B. and her son, K.B., concerning the refusal of the Greater Egg Harbor School District to admit K.B. to Abegami High School. We intend to promptly file a Petition for Declaratory Ruling with the Commissioner of Education to challenge the School District's decision, and seek an emergency order directing that the District admit K.B. As a result, I request that the School District refrain from conducting the hearing, presently scheduled for January 24, concerning K.B.'s application for admission until such time as the Commissioner has had the opportunity to consider the Petition.

Thank you for your attention to this matter.

Accordingly, the January 24, 1996 hearing scheduled before the Board did not take place Counsel for respondent again wrote to counsel for petitioner on January 29, 1996, advising that respondent would provide K B with home instruction pending completion of litigation and offering to reschedule a hearing before the Board promptly upon request. Petitioner originally declined the home instruction offer, but reconsidered and later accepted. Home instruction had commenced prior to the date of the oral argument.

APPLICABLE LAW AND DISCUSSION

Petitioner seeks an order requiring respondent immediately to enroll K.B. and to permit him to attend classes in the district. She also seeks an order enjoining respondent from conducting any hearing regarding K.B.'s alleged conduct at Holy Spirit High School on December 21, 1995. It is petitioner's position that respondent is without legal authority to discipline K.B. for conduct which occurred at a time when K.B. was not a public school pupil. Respondent takes the position that because K.B. is sixteen years old, beyond the age of compulsory attendance, that it may preclude him from enrolling in the district and attending classes in the district as long as it complies with the requirements of due process. It is respondent's position that the conversation which took place in the office of Mr. Dolton on January 3, 1996, provided petitioner with notice and an opportunity to be heard preliminarily. Respondent notes that the plenary hearing was scheduled within 21 days of January 3, 1996 and asserts that principal Basner's letter satisfied the remaining due process requirements.

N.J.S.A. 18A:38-1 provides that the public schools shall be free to persons over five and under twenty years of age who are domiciled within the school district. K.B., who is sixteen years old and is domiciled in the district, is entitled to enroll in respondent's school district pursuant to this statutory provision.* Enrollment of someone who is clearly domiciled within the district is a

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* Note that the Board's obligation to provide free education continues until the student turns 20 years old; the parents' obligation to send a child to school stops when the child turns 16, (N.J.S.A. 18A:38-25) but that does not relieve the Board of its obligations if a student over 16 wishes to continue to attend. In this regard see N.J.S.A. 18A:38-20 which provides:

> Such regular attendance shall be during all the days and hours that the public schools are in session in the district, unless it is shown to the satisfaction of the board of education of the district that the mental condition of the child is such that he cannot benefit from instruction in the school or that the bodily condition of the child is such as to prevent his attendance at school, but nothing herein shall be construed as permitting the temporary or permanent exclusion from school by the board of education of any district of any child between the ages of five and 20, except as explicitly otherwise provided by law

ministerial act required to be done by the local board of education; where domicile is clear, the board is not called upon to make any determination concerning enrollment. Even where domicile is unclear, if the child is then currently enrolled in the district, he or she is not to be removed from school during the 21 day period in which a resident may contest the board's decision nor during the pendency of proceedings before the Commissioner. Where the board in its discretion determines to deny admission based upon its judgment concerning domicile, the child may not be denied admission during the pendency of the proceedings before the Commissioner. I **CONCLUDE** that pursuant to the requirements of N.J.S.A. 18A:38-1, respondent's administrators acted improperly when they refused on January 3, 1996 to enroll K.B. in the district.

Whether respondent may suspend K.B. from attending classes immediately upon enrollment, however, is a different issue. Once K.B. is listed as a pupil on respondent's roles, respondent is responsible for providing the thorough and efficient education required by the New Jersey Constitution. Petitioner argues that this means respondent has no alternative but to permit K.B. to attend classes in the high school and to provide whatever counseling services, etc., might be appropriate to ensure that K.B.'s behavior will not endanger other pupils or interfere with respondent's obligation to maintain order and discipline in the school. Petitioner takes the position that this would be the legal requirement regardless of what criminal charges might be pending against the youngster as a result of conduct which occurred prior to his enrollment in school. N.J.S.A. 18A:37-2(c), however, identifies "conduct of such character as to constitute a continuing danger to the physical well being of other pupils" as conduct which shall constitute good cause for suspension or expulsion of a pupil from the public schools in New Jersey. The statute does not say that the conduct referred to in this section must have occurred during school time or on school property, or even when the student was enrolled as a pupil in the district; it requires only that the conduct have been of such character as to constitute a continuing danger to other pupils. In R.R. v. Bd of Ed., Shore Reg. Hs., 109 N.J. Super. 337, 344 (Ch. Div. 1970), Judge Lane explained that school authorities have a right to expel or suspend a pupil for conduct occurring away from school grounds where "such is reasonably necessary for the student's physical or emotional safety and well being, or for reasons relating to the safety and well being of

other students, teachers or public school property." Although all of the facts related to the circumstances of K.B.'s arrest in this matter are not known, K.B. is currently facing criminal charges for possession of marijuana with intent to distribute. Depending upon the circumstances and upon all facts relevant to whether such behavior, if it occurred, would be likely to occur again, it could be reasonable to conclude that K.B.'s presence in the classroom and the school building would present a danger to the well being of others. N.J.S.A. 18A:37-4 and case law permit public school officials who have reasonable cause to believe that danger will be present if a student is permitted to remain on school grounds pending a decision following a full hearing to impose an interim suspension. R.R. v. Bd. of Ed., Shore Reg. Hs., supra at 347-348. Prior to the imposition of such a suspension, the student is entitled to a preliminary hearing which may be completely informal. All that is really required here is notice and an opportunity to be heard. "The student should be given the opportunity to persuade the authority that there is a case of mistaken identity or that there is some other compelling reason why he should not be suspended pending a full hearing." Id., at 348. A suspension imposed administratively may continue for a period not to exceed 21 days. A suspension beyond the 21-day period may be imposed only after a full blown due process hearing before the Board of Education. Tibbs v. Bd. of Ed. of Franklin Tp., 59 N.J. 506 (1971).

In the present matter, petitioner contends that the interview in the vice principal's office on January 3, 1996 did not comport with the requirements for a preliminary hearing. Petitioner's complaints in this regard are apparently based upon her sense that Mr. Dolton and Mr. Gilly were not being fair when they failed to disclose immediately that they were already aware of the criminal charges. Even accepting, for the purpose of this motion, all of petitioner's factual assertions concerning what transpired at that meeting as true, I **CONCLUDE** that respondent did not in any way violate petitioner's procedural due process rights. Petitioner had an opportunity to explain and either did so or chose not to do so, depending upon which version of the facts is accepted. Nothing which transpired on January 3, 1996 provides a basis for ordering that K.B. be immediately admitted to regular classes in respondent's district.

With respect to the notice of charges and scheduling of the plenary hearing as indicated in principal Basner's January 5, 1996 letter quoted hereinabove, petitioner's point that certain crucial information is missing from the letter is well taken. Respondent did schedule a full hearing to take place within 21 days. It did set forth the charges and proposed witnesses, but not the grounds which would justify expulsion or suspension. The notice should have been more explicit concerning the nature of the hearing, i.e., to determine whether K.B.'s December 21, 1995 conduct was of such character as to present a continuing danger to himself or to others such as to warrant suspension or expulsion from school. The notice should also have advised petitioner of her rights to be present, to be represented by counsel, to present evidence on her own and K.B.'s behalf, and to cross-examine Board witnesses. It should also have advised her of the Board's subpoena power to compel the attendance of any witnesses she might wish to call on K.B.'s behalf.

Based upon all of the foregoing, it is hereby **ORDERED** that respondent immediately enroll K.B. in its district if that ministerial function has not already be accomplished. It is also **ORDERED** that a full blown due process hearing before the Board of Education be conducted as soon as possible to determine whether K.B. should continue to be suspended from attending class because his presence would present a danger to himself or others either pending resolution of the criminal charges or some other specified period of time or whether he should be expelled. Until such a hearing takes place, there is nothing further for the Commissioner to review in this matter, since actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis, or induced by improper motives Quinlan v. Board of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), affirmed 46 N.J. 581 (1966); K.L. v. Matawan/Aberdeen High School Dist., 91 N.J.A.R. 2d. (EDU) 74; M.G. v. Monmouth Regional High School, 91 N.J.A.R. 2d. (EDU) 38.

It is further **ORDERED** that respondent continue to provide home instruction to K.B. pending a determination following the full hearing on the merits before the Board of Education. and finally, it is **ORDERED** that respondent is hereby enjoined from precluding other students

from enrolling in the district and from precluding their attendance except in accordance with the procedures set forth hereinabove. The parties will immediately advise the undersigned upon conclusion of proceedings before the Board of Education whether any issues remain for determination in the within matter and additional proceedings will then be scheduled herein or the matter will be withdrawn. Petitioner's application for temporary emergent relief is otherwise **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Feb. 14, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

OAL DKT. NO. EDU 376-96

R. B., individually and on behalf of her minor son, K.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the audiotape of the emergent relief hearing, and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, *inter alia,* that petitioner is entitled to attend regular classes in the Board's School District pursuant to N.J.S.A. 18A:38-1 and that the Board's action to suspend and initiate an expulsion hearing for K.B. for conduct which occurred prior to his enrollment in a public school is clearly erroneous and must be reversed. (Exceptions at p. 4) Petitioner further avers that there is no explicit provision in law allowing the Board to exclude K.B. from school on the stated grounds and that the Board's policy to admit K.B. and then immediately suspend him from school based on an interview of the type conducted herein is violative of his due process rights. (Exceptions at p. 8) In that petitioner raised these arguments before the ALJ at hearing and the Commissioner is satisfied that the ALJ addressed them sufficiently in the initial decision, they are not more fully set forth herein.

Upon a careful and independent review, the Commissioner adopts the ALJ's determination for the reasons expressed therein. Specifically, the Commissioner adopts the orders that K.B. be enrolled in the District and given home instruction pending a full Board hearing on the merits of his case and that emergent relief be denied in all other respects in that petitioner failed to meet the standards for such relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

The Commissioner further adopts the ALJ's order enjoining the Board from precluding other students from being enrolled in the School District under similar circumstances and from precluding their attendance at school except in accordance with the due process procedures set forth above. The Commissioner concurs that a board may not decline to enroll a student whom it believes to constitute a possible threat to student safety and welfare but may impose an interim suspension for a period not to exceed 21 days following a preliminary hearing. Once preliminary findings are made, however, the board must conduct a full due process hearing as soon as possible to determine whether the student should continue to be suspended from attending classes. (See N.J.S.A. 18A: 37-4 and Initial Decision at p. 7.)

In so ruling, the Commissioner is mindful that these findings reach to the merits of this matter, not merely to the application for emergent relief. However, in that the ALJ effectively addressed and analyzed the arguments concerning the validity of the Board's enrollment policy in her initial decision, the Commissioner construes the within proceedings as a ruling on the merits of petitioner's general contention regarding Board authority to discipline or otherwise remove a student from the regular education program based on conduct occurring prior to enrollment in the public school. Therefore, inherent in the Commissioner's adoption of the ALJ's conclusion is an express rejection of the Board's current policy as *null and void.* The Board is hereby directed to develop a new policy consistent with applicable law as set forth in this decision.

Accordingly, the ALJ's determination is adopted as clarified above and this matter shall duly proceed for a hearing on any remaining issues pursuant to the ALJ's recommendation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 11, 1996

DATE OF MAILING MARCH 11, 1996

(SB) 86-96

EDU # 7696-92
SBE #189-07/92-61
SB # 86-96

IN THE MATTER OF THE REVOCATION :

OF THE TEACHING CERTIFICATES OF : STATE BOARD OF EDUCATION

MARY ANN BAUER. : DECISION

Decided by the State Board of Examiners, September 26, 1996

For the Petitioner-Respondent, William C. Brown, Deputy Attorney General
(Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, John C. Caufield, Esq.

On September 26, 1996, the State Board of Examiners issued a decision in which it revoked the teaching certificates of Mary Ann Bauer (hereinafter "appellant") for unbecoming conduct. That decision was mailed to the parties on October 23.

On November 22, 1996, counsel for appellant filed an unsigned notice of appeal with the State Board. On December 10, 1996, the counsel for the State Board advised appellant's counsel that he was required to file a substitution of attorney since he had not been the attorney of record below, along with a signed notice of appeal. On December 17, appellant's counsel filed a substitution of attorney and a signed notice of appeal. On December 23, the briefing schedule was placed in abeyance at the request of appellant's counsel in order to allow him the opportunity to obtain the record in this matter. On April 22, 1997, the counsel for the State Board notified appellant's counsel that since he had had sufficient time to secure the record, the briefing schedule was

7/2/97

being reestablished and his appeal brief was due on May 14. At the request of appellant's counsel, the due date was extended to May 21.

Appellant, however, failed to file a brief by that date. By letter dated May 27, 1997, the counsel for the State Board notified appellant's counsel that no appeal brief had been filed and that this matter was therefore being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal. Counsel for appellant has still failed to file a brief in support of the appeal, 1½ months after the extended deadline for such filing and more than five weeks after he was notified of such failure. Nor did counsel for appellant respond to that notice or provide any explanation for his failure to file a brief until late yesterday afternoon when he indicated in a certification addressed to the State Board of Examiners that he had recently married and purchased a home "which needed substantial improvement prior to occupancy." He explains that "but for the foregoing there could have been a satisfactory brief completed and filed."

An attorney who is "of counsel" to the firm representing appellant indicates in a certification that "the cases cited by the Attorney General's Office and the Administrative Law Judge were not readily available in the public law school libraries available to counsel....The precedent cases were not only difficult to locate–or even to locate libraries with sufficient professional longevity to be of assistance–as there is not only no index but several (at least three) different types of compilation series." He adds that he was "severely hobbled by the ongoing relocation of [his] office and dispatch of closed files for which there was no longer room to storage in transit and then to a more permanent site....If the foregoing were not bad enough, I was struck by two debilitating

but separate viruses during February-March and March-April before finally being felled for five weeks by a severe (despite medication) series of out of season allergy problems."

We conclude that the belated explanation offered by counsel for the appellant does not in any way excuse or justify his failure to file an appeal brief for 1½ months after the filing deadline–which had been extended at his request–or to request a further extension for such filing. Consequently, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

July 2, 1997

Date of mailing JUL 08 1997

87-96

EDU #4705-95
C# 87-96
SB # 25-96

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL DISTRICT : STATE BOARD OF EDUCATION
OF RAMAPO INDIAN HILLS REGIONAL HIGH : DECISION
SCHOOL DISTRICT, BERGEN COUNTY. :

Decided by the Commissioner of Education, March 8, 1996

For the Petitioner-Appellant, Segreto & Segreto (John J. Segreto, Esq., of Counsel)

For the Respondent-Respondent, Allen Dzwilewski, Esq.

For the Respondent-Respondent, Steven B. Crystal, pro se

This matter was initiated by Joseph Medici (hereinafter "petitioner"), who had been an unsuccessful candidate in the 1995 annual school election for the Board of Education of the Ramapo Indian Hills Regional High School District (hereinafter "Board"). The election results indicated that petitioner had lost the election to respondent Crystal by a total of 38 votes. Petitioner then sought a recount of the election results and also instituted an inquiry into the conduct of the election. The Commissioner's representative conducted a recount which, as set forth in a decision by the Commissioner dated June 7, 1995, did not change the results.

In his petition to the Commissioner initiating the inquiry, petitioner alleged various conduct relating to the inclusion of remarks by the mayor in a tape that was

7/10/96

broadcast on cable television, and to conduct at the polling place. The Board moved for summary decision, contending that even if the facts were as petitioner alleged, he had not stated a cause of action within the Commissioner's jurisdiction.

The Administrative Law Judge (ALJ) recommended granting the Board's motion, finding that petitioner had not alleged any conduct for which the Board or the successful candidate would be held responsible and that petitioner had not indicated any violation of statutorily prescribed procedures for school elections. Concluding that the petition had not alleged conduct which presented a cause of action within the jurisdiction of the Commissioner of Education, the ALJ found it unnecessary to consider whether the alleged conduct had any effect on the outcome of the election, and recommended that the petition be dismissed.

The Commissioner adopted the ALJ's recommendation and dismissed the petition on the grounds that petitioner had failed to offer any evidence that any of the alleged conduct, even if true, had affected any votes so as to influence the outcome of the election. Petitioner then appealed to the State Board, essentially restating the arguments he had made before the ALJ and Commissioner.

After reviewing the conduct as alleged by petitioner and considering all of the submissions in the record, we affirm the Commissioner's determination substantially for the reasons expressed by the ALJ and the Commissioner. Based on careful examination of the record, we find that the ALJ correctly concluded that petitioner failed to present facts which would constitute a violation of the statutorily prescribed procedures for school elections. Moreover, as the Commissioner concluded, petitioner has failed to offer or to provide any evidence to show that the alleged irregularities

affected the results of the election. In re Wene, 26 N.J. Super. 363 (Law Div.), aff'd sub nom, Wene v. Meyner, 13 N.J. 185 (1953). Hence, summary disposition in the Board's favor was the proper disposition of this matter. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995); Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954).

July 10, 1996

Date of mailing _____

(SB) 89-96

SEC # C12-94
EEC #2458-96
SB # 89-96

SCHOOL ETHICS COMMISSION,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
MICHAEL J. KILMURRAY,	:	DECISION ON MOTION
RESPONDENT-APPELLANT.	:	

Decided by the School Ethics Commission, November 26, 1996

For the Petitioner-Respondent, Arlene G. Lutz, Deputy Attorney General
(Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Lawrence Silver, Esq.

This matter was initiated by an individual who filed a complaint with the School Ethics Commission alleging that Michael J. Kilmurray (hereinafter "respondent") had violated the School Ethics Act. The Ethics Commission determined that there was probable cause to credit certain of the allegations in the complaint and transmitted the matter to the Office of Administrative Law for hearing. Respondent moved to dismiss, challenging the Ethics Commission's authority to prosecute the case. Although the Administrative Law Judge ("ALJ") did not grant dismissal, she agreed that the Commission did not have the authority to prosecute the underlying matter, finding that only the individual who filed the complaint could prosecute. Consequently, she directed his reinstatement as the complainant.

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The Deputy Attorney General assigned to prosecute the matter on behalf of the Ethics Commission sought interlocutory review by the Commission. The Commission granted such review and rejected the ALJ's determination, finding that it had the implied power under the statutory framework to prosecute such matters following its investigation of the allegations set forth in the complaint and a probable cause determination. Respondent has now filed a motion with the State Board seeking leave to file an appeal from the Commission's interlocutory determination.

After reviewing respondent's arguments, the State Board of Education denies his motion for leave to appeal. The effect of our decision is that the Commission's determination will govern further proceedings in the matter. We stress, however, that the Commission's determination may be subject to review by the State Board in the event of an appeal from the final decision disposing of the merits of the case. N.J.A.C. 1:1-14.10.

February 5, 1997

Date of mailing FEB 07 1997

90-96 (E)

EDU #376-96
C # 90-96E
SB # 27-96

R.B., individually and on behalf of her minor son, K.B.,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 11, 1996

For the Petitioner-Appellant, Education Law Center (David G. Sciarra, Esq., of Counsel)

For the Respondent-Respondent, Louis J. Greco, Esq.

This is an appeal from a decision of the Commissioner of Education holding that the Greater Egg Harbor Regional High School District's refusal to enroll petitioner's son K.B. in the school district was in violation of N.J.S.A. 18A:38-1, but which denied to petitioner the emergency relief she was seeking.

Petitioner had attempted to enroll K.B. in Absegami High School after the parochial school he had been attending required that he withdraw following his arrest at that school for possession of marijuana. Following an interview with two of Absegami High School's vice-principals on January 3, 1996, the principal notified petitioner by

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letter of January 5 that the Board had scheduled a hearing for January 24 to determine whether K.B. should be excluded from school on the basis of the charge that he had possessed and intended to distribute a controlled dangerous substance while he was a student at the parochial school. The letter also notified petitioner that K.B. would not be permitted to attend school in the District until the Board had made a decision in the matter. By letter of January 23, counsel for petitioner requested that the Board refrain from conducting the hearing until the Commissioner had the opportunity to decide the petition which counsel intended to immediately file. Hence, the hearing was not held, although petitioner then accepted the Board's offer to provide K.B. with home instruction until the litigation was completed.

The Administrative Law Judge (ALJ) found that the school's administrators had acted improperly when they refused to enroll K.B., but that under the circumstances, it would have been reasonable for them to have immediately placed him on short-term administrative suspension for up to twenty-one days pending a full hearing before the Board. Tibbs v. Bd. of Ed. of Tp. of Franklin, 59 N.J. 506 (1971); R.R. v. Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337 (Ch. Div. 1970). The ALJ rejected petitioner's contention that the January 3 interview did not conform with due process requirements applicable to the informal preliminary hearing that must be afforded before a short-term interim suspension can be imposed. The ALJ concluded that nothing had transpired at the interview to provide a basis for granting emergency relief to petitioner in the form of directing K.B.'s immediate admission to regular classes in the District.

The Commissioner concurred with the ALJ's determination, denying emergency relief and directing that K.B. be immediately enrolled in the District and given home instruction pending a full hearing before the Board on the merits of his case. The Commissioner also adopted the ALJ's conclusion that the Board should be enjoined from precluding other students in similar circumstances from enrolling in the District or from attending classes unless it had followed the applicable due process procedures. Based on this conclusion, the Commissioner rejected the Board's policy as null and void and directed it to develop a new policy that was consistent with applicable law. Commissioner's Decision, at 11.

Petitioner has appealed, seeking a determination by the State Board that the Board's policy is beyond the scope of the disciplinary statute and that the policy violates a school district's duty to prevent exclusions or expulsions whenever possible. Petitioner also seeks a determination that the January 3 interview violated "basic procedural due process" required in the case of a preliminary hearing prior to suspension.

We do not agree with petitioner. Initially, for the reasons expressed by the ALJ and Commissioner, we fully concur with the Commissioner's declaration that the Board's previous policy is null and void, and we are in accord with his directive that it must now develop a policy which conforms with applicable law. We find that this determination properly disposes of all the issues relating to the Board's past policy that are pertinent to the matter before us, and we reject petitioner's appeal to the extent that it would reopen those issues.

We find no merit to petitioner's claim that K.B.'s right to due process was violated because the school's administrators did not inform them at the outset of the January 3 interview as to the precise nature of the conduct that gave rise to the possibility of K.B.'s exclusion from school. Although it is not disputed that the school administrators did not initially confront petitioner with their knowledge of K.B.'s arrest when the interview commenced, they did reveal that they possessed this information during the course of the meeting, and K.B. acknowledged that he had in fact been in possession of marijuana at the parochial school. Even considering the events in the light most favorable to petitioner, it is clear that K.B. had the opportunity to explain his conduct at that point. Consequently, it is disingenuous for petitioner to now claim that K.B. is entitled to emergency relief because he did not do so. Moreover, the principal's letter of January 5 which notified petitioner that the Board was providing K.B. with a full hearing set forth in detail exactly what information the District had about the incident that had resulted in his arrest. Given these circumstances, we reject petitioner's contention that an interim suspension was in violation of due process requirements. Goss v. Lopez, 419 U.S. 565 (1975).

Wendel E. Daniels opposed.

July 10, 1996

Date of mailing JUL 12 1996

91-96

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL POWERS,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF WOODBRIDGE,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct and insubordination against respondent janitor.

ALJ found that respondent, a volunteer fireman, violated Board policy and regulation regarding employee response to fire calls, which violations constituted, collectively, insubordination. Moreover, ALJ found that respondent's serving as a volunteer fireman while on workers' compensation leave constituted unbecoming conduct.

Commissioner concurred with ALJ's conclusion that the charges were sufficient to warrant respondent's termination from employment as a tenured custodian as of the date of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2869-95

AGENCY DKT. NO. 31-2/95

IN THE MATTER OF THE TENURE HEARING OF DANIEL POWERS, BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE

Carl J. Palmisano, Esq., for petitioner (Palmisano & Goodman, attorneys)

Nancy I. Oxfeld, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 11, 1995 Decided: January 23, 1996

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

The Woodbridge Township Board of Education (petitioner) filed tenure charges against Daniel Powers, respondent, charging him with acting contrary to Board policy despite warnings. The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13.

A prehearing conference was held by telephone on May 22, 1995. Among other things, it was settled that the issue to be decided in this case is whether the charges against Daniel Powers are true in fact, and, if true in fact, sufficient to support reduction in salary or termination of employment. In addition, the matter was set down for hearing on September 22, October 27 and November 1, 1995. Counsel filed a stipulation of facts and the matter was heard on November 1 and 13, 1995, in the North Brunswick Municipal Court. Counsel timely filed posthearing submissions and the record closed on December 11, 1995.

STATEMENT OF CHARGES

The Board charged the respondent with conduct unbecoming a tenured employee. Specifically, the Board alleges Powers, while on workers' compensation leave, reported for duty and served as a volunteer fireman. The Board also charged that Powers, while on duty as a janitor at Colonia High School, violated Board policy no. 952, regulation number 9520 and verbal direction regarding response to emergency fire calls.

The Board filed a Certificate of Determination and an affidavit of service of the written charges and statement of evidence with the Commissioner of Education on February 21, 1995. On March 1, 1995, the respondent filed an answer generally denying all charges.

STIPULATION OF FACTS

The following are stipulated by the parties and I adopt them as FACTS in this matter:

1. Respondent Daniel Powers was initially employed by the petitioner as a substitute custodian on September 1, 1987 and was employed as a full-time custodian on December 1, 1987.

2. Respondent having been employed continuously by the petitioner since December 1, 1987 acquired tenure in the position of janitor.

3. On February 8, 1994, respondent was injured on the job and filed a report with the building principal on February 10, 1994.

4. Respondent was on workers' compensation leave from February 8, 1994 until June 24, 1994.

5. Charges of conduct unbecoming a tenured employee were certified to the Commissioner [of Education] on January 27, 1995.

6. The [respondent] filed a timely response denying the charges.

7. Board policy no. 592 and regulation no. 9520 are duly adopted as official policy and regulation of the Board of Education.

PAROL AND DOCUMENTARY EVIDENCE

The chairperson of the Board Safety Committee testified. He is an employee, not a Board member. The committee discussed Powers' case and reviewed the weekly workers' compensation list. On June 29, 1994, a committee member said to the witness, "If you really want to see abuse, come with me." The two proceeded to the intersection of Green Street and Saint Georges Avenue. At 8:15 and 8:16 a.m., respectively, the witness took photographs of Powers in full fire fighting gear and his automobile bearing a volunteer fireman placard at the fire scene (P-1, P-2).

The witness notified his own immediate supervisor, the Board secretary. He was directed to contact the Board's compensation insurance carrier, New Jersey Manufacturers Insurance Company. The witness did so and met with Anthony Manto, an investigator. They discussed the photographs and the circumstances. Powers was out on workers' compensation leave yet appearing in full gear at a fire scene. The investigator secured the firehouse log. The witness' only further involvement was telephone calls from the investigator. He received documentation from the investigator and passed it on to his superior.

Exhibit P-11 is a letter of January 10, 1995 to him from the supervisor of the insurer's special investigation unit. In pertinent part, the letter states:

> This letter is to inform you that in regard to the above stated claim our company has made a New Jersey Insurance Fraud referral. Based on the information received that Mr. Powers was actively fighting fires while receiving temporary disability benefits, a referral to the NJ IFD was made. It is our company's position that since the petitioner was actively fighting fires he was not eligible to receive the temporary disability benefits paid to him.
>
> A referral to the NJ IFD was made on 10/17/94. I have had contact with State Investigator Mark Cafone and have discussed the case with him. Mr. Cafone subsequently contacted me on 12/8/94 to inform me that Mr. Powers has signed a consent agreement. Please keep in mind that a consent agreement does not admit that a fraud was perpetrated and does not in any way reflect any guilt on the part of the signee. Mr. Powers had signed for a civil fine in the amount of $3,500.00 in addition to promising to pay $50.00 per month in the form of restitution to New Jersey Manufacturers Insurance Company until the entire amount of $8,280.00 has been satisfied. The figure is the total amount of temporary disability benefits paid to the petitioner.

The Board called a New Jersey Manufacturers Insurance Company Special Investigator. He had seven years' prior experience with the company as an adjuster. In or about January 1993, he was transferred to the Special Investigation Unit to deal with any suspected fraud. Specifically, he deals with insurance fraud as it relates to workers' compensation fraud. The New Jersey Department of Law and Public Safety, headed by the Attorney General, has an Insurance Fraud Division (IFD).

The witness identified exhibit P-3, a standard first report of accidental injury. The report states that Powers, while walking to his car, fell on ice and injured his back. Medical treatment reports must be filed periodically in follow-up of such a claim. Exhibits P-4, P-5, P-6, P-7, and P-8 were admitted into evidence by stipulation of counsel.

They are reports of treating physicians and summaries of treatment for the period February 23 - June 16, 1994. In exhibit P-8, the physician states he believes Powers capable of light work.

In this circumstance, the witness contacts the insured entity and determines if they have light duty available. If so, he would contact the employee and direct the employee to resume light work. The subject injury has some components of a soft tissue injury, but there could have been some disc involvement. The reports are all consistent with a compensation claim and all are based on subjective complaints. Because of the physicians' reports, there was no reason to question the validity of the claim.

Exhibit P-9 is a compensation claim payment card generated February 1, 1995. It shows a total of $10,070 paid. $1,840 was medical expenses and $8,230 was paid in lost wages. The latter figure represents 70 percent of gross earnings in the 26 weeks prior to injury.

The investigator met with the Board's safety committee chairperson. As a result, he began an investigation on or about July 1, 1994. He did not interview the respondent, but did interview some fire fighters. He reviewed the fire department log sheets. Exhibit P-13 is the Woodbridge Fire Company Number 1 roll call chart for the period February 8 - July 6, 1994. He received this information after a subpoena was issued to the Fire Department. The copies are certified true copies by a Commissioner of the Fire District. Each sheet covers one fire call. Powers is number 45 on each roll sheet. His name appears on every sheet.

Exhibit P-12 is a summary of the responses from Exhibit P-13. In the span February 8 - July 7, 1994, the time of Powers' temporary disability, there were 300 calls. The insurer paid Powers through at least May 18, 1994 and Powers was under medical care into June 1994.

The witness identified exhibit P-17, a termination notice of temporary compensation benefits. This is a record kept in the ordinary course of the insurer's business. It shows that the last payment to Powers was made on June 15, 1994, but does not determine when he returned to work. The witness did some surveillance of Powers and took some videotape on July 5, 1994. The investigation continued beyond the final payment to Powers.

There were thirteen fire calls after June 15, 1994, the date compensation benefits ceased. However, Powers responded to 150 calls while receiving compensation. The acceptance of compensation is inconsistent with certain other activities. Other activities would have to be consistent with a physician's orders. Powers could not, while receiving compensation benefits, function as a fireman. This is inconsistent with a compensation claim. The witness so reported to his supervisors.

Exhibit P-10 is a referral to the New Jersey IFD signed by Richard A. DiMaggio. The insurer sought to recover money. Exhibit P-11 is the disposition letter set forth above. Exhibit P-14 consists of photocopies of checks drawn by Powers to New Jersey Manufacturers Insurance Company.

The witness also stated that fire fighters check their own names upon reporting to the firehouse in response to an alarm. He received this information from a commissioner of the Fire District.

The board's assistant superintendent for personnel services testified. He has been with the district for 26 years. Powers' last assignment was at Colonia High School. He had janitorial responsibilities such as sweeping, dusting, wiping and moving student furniture. There are presently ten or eleven janitors at Colonia High School. There were probably twelve janitors at the school when Powers was assigned there. He would have a specific area to cover, but would not be alone.

Exhibit P-15, Board policy no. 952, is entitled Cooperation with Fire Departments/First Aid Squads. The policy was adopted on February 15, 1990 and revised on September 17, 1992. The policy sets forth that the district will allow non-certified personnel, whose absence would not hinder or impede the education process, to respond to emergency calls as members of volunteer fire departments or first aid squads should a major emergency arise during working hours. The policy goes on to explain that "major" means the emergency is so significant that the Supervising Fire Officer, the Captain and/or President of the First Aid squad classified the event as such an emergency. At no time would the only janitor in a building with a black seal boiler license or

someone supervising students be permitted to leave a building. Further, the final arbiter of whether or not an individual non-certified employee could leave the building to respond to a call would be the principal of the building or the supervisor of the department where the employee works. It is clearly stated that any abuse of the policy by an emergency volunteer-employee shall be reviewed by the school administration and Board of Education with the intention of determining suspension of the privilege.

The witness also identified Board regulation no. 9520, adopted September 1992. Also entitled Cooperation with Fire Departments/First Aid Squads, the regulation states that non-certified personnel employed by the school district may be requested in emergency situations to participate in providing assistance at a fire or an accident. Employees of the district may only be permitted to participate in such an emergency if approved by the principal or the immediate supervisor. A janitor may not be permitted to participate in an emergency if he/she is the only individual with a black seal boiler license in the building. Anyone permitted to participate in an identified emergency must return to work immediately upon completion of the emergency. In the event of any deviation, an employee shall be reported to the Superintendent or his/her designee.

The witness testified that he is familiar with the policy and the regulation. Both have officially been adopted by the Board. They permit non-certified staff members to assist fire departments and fire aid squads in dire emergencies. The intent is to address major emergencies when departments and squads are shorthanded. The policy and regulation were adopted in response to requests from local organizations. The service organization determines when an emergency is of an appropriate nature. The procedure is for the supervising fire officer to first classify the event as a major emergency. He would contact the building principal or the supervisor of buildings and grounds and advise of the emergency and the need for personnel.

The second tenure charge is a result of failure to comply with this policy. The witness met with Powers on January 5, 1994 to discuss the issue. Slightly before the winter recess, the witness had received a complaint about Powers from the supervisor of buildings and grounds. Powers carried a fire radio/scanner on his person. He was leaving the building to fight fires without going through the procedure described above.

The head janitor and the night foreman at the high school spoke to Powers. He became offensive. He used some mildly offensive language and stated, "I'll leave when I want to."

The assistant superintendent/board secretary and the witness met with Powers. Powers denied that his offensive language was directed to any person. The administrators advised Powers of the policy and the need for Powers' superiors to approve Powers' leaving the building during work hours. Powers' union representative was present. The policy was clearly discussed. Powers knew that the procedure had to be initiated by a fire supervisor. No discipline was invoked at the time.

In the witness' judgment, Powers needed to know and did know what the policy requires. The next day, January 6, 1994, Powers called the high school and said he would be late reporting to work because he was going to a fire. He arrived two hours late and his explanation was that he attended a fire. He was immediately reminded of the prior day's meeting. Powers stated that the fire department does not need notes and telephone calls. The head high school janitor and night foreman were both present and heard this exchange.

As to charge one, the witness stated that an employee reports to the district by telephone when free to return to work from compensation leave.

It is impossible to cover all janitorial absences. Powers was substituted for on occasion. If the treating physician said that Powers was released effective June 16, the witness would expect Powers to resume work the next day or the following Monday. However, Powers actually returned on July 7, 1994. The Board secretary advised the witness on or about July 2 that Powers was seeking pay for the week leading up to July 7. Under the union bargaining agreement, an employee is allowed to use compensatory time for overtime. This must be taken within sixty days of accrual. An employee cannot elect unilaterally to take compensatory time. The employee must request the time and, if the employer agrees, that is the building principal approves, then the employee can take the compensatory time. There was no such agreement in this case. Powers simply told the head high school janitor that he wanted to use compensatory time for the week

leading up to July 7. The head high school janitor is not authorized to approve such an arrangement.

Powers successfully grieved the denial (P-18). He received pay for compensatory time accrued. As part of that outcome, the witness considered Powers on compensation leave until July 7, 1994.

A member of the Woodbridge Fire Company Number 1 testified. The department is a combination of paid and volunteer members. He served as chief for a period that covered the span February 8 through June 1994. He has known Powers approximately four years as a volunteer fire fighter. He also knows that Powers is a custodian for the Board of Education. The witness identified the roll call sheets taken at the end of each call (P-13). The on-duty captain in charge is responsible to see that each person is accounted for. On each sheet, Powers name is number 45.

These records are kept in the ordinary course of fire company business. A volunteer could receive credit for answering a call if he stayed at the fire house. The witness recalled that Powers attended some fires and stayed at the fire house at other times. District one includes industrial, residential and semi-rural areas. Each fire fighter answers each call prepared to fight a fire. He may be directed to pull hose, direct traffic, erect ladders or get and set up lights. He must wear a helmet, turnout coat and pants and bunker boots.

The witness identified Powers, fully dressed in exhibit P-1. The required equipment weighs approximately 24 pounds. A person "can't go in in regular clothes." In addition, a fire fighter might wear self-contained breathing apparatus weighing fourteen to eighteen pounds. Powers was a serious fire fighter. He was all business at fires and did not seem to observe any restrictions, such as handling ladders.

The former chief also testified about Board of Education policy (P-15). The witness is familiar with the policy and knows that the township allows employees to attend emergencies when needed. The district fire commissioners asked the Board of Education for this arrangement. The understanding is that the officer in charge must notify the principal or head custodian or other

responsible person of a need. That person will approve or not. The request would usually be honored.

The witness also understands that there must be a black seal fireman on the premises of each school operating a low pressure boiler. An employee cannot release himself.

Fire fighters need physical ability. If someone is out sick from employment, it is an unwritten policy in the company that the person must say, "Don't mark me in. I'm out sick [from my job]."

The witness stated he at no time knew that Powers was on compensation leave from his Board job. He observed no physical disability and Powers never gave any indication of disability although the witness did not see Powers in strenuous circumstances.

The witness identified several specific sheets in exhibit P-13 showing Powers as attending. A mark showing attendance could mean that an individual was at the fire house while other fire fighters reported to the fire scene. However, on sheet 35-S, the witness knows Powers was at the scene. He testified similarly as to several other events. He had few specific recollections of Powers presence at fire scenes, but Powers was there for some. Fire company policy requires that, for the first seven years of membership, a fire fighter must attend sixty percent of calls to qualify for tax exemption. Powers had been a member for approximately four years. In addition, if a fire fighter does not make the required percentage of calls, he cannot qualify for the death benefit. The witness has never heard of any leniency as to these requirements. Each chief certifies attendance to the State of New Jersey Firemen's Exempt Association. The officer in charge has the discretion to decide to mark a person present or not if the person appears at the fire house in response to an alarm, but not at the fire scene.

The supervising janitor at Colonia Senior High School for thirteen years testified. Powers came to the school under the witness' supervision and the night foreman's supervision. As head janitor, he was responsible for assigning Powers' duties.

He remembers a Board-Township conference and the resulting policy for fireman and first aid squad members. The witness identified P-15. He also heard the former fire chief testify. He agrees that the policy requires a fire officer to call the supervisor at a given building. This would normally be the principal or, in the evening, the janitor foreman. That person would make the decision as to whether or not a janitor could be released.

The witness stated that Powers was handed a copy of the Board policy by him. Another employee who also is a fire fighter was given a copy of the policy at the same time. The witness advised Powers to read and abide by the policy. On "a couple of occasions" he reminded Powers to abide by the policy. Powers wore a scanner or pager. He asked to leave to go on calls. The witness and other supervisors explained to Powers the need to adhere to the policy.

On one occasion, a dispatcher called and Powers was released. However, each time Powers became aware of a fire, he asked to leave and expressed a desire to report to the fire scene.

In January 1995, Powers called in to a day janitor, not a supervisor, and said he was going to a fire. This was on a Friday. Powers reported to work approximately two hours late. On Monday, the witness asked Powers why he was late and Powers stated he had gone to a fire. The witness asked for some validation. Powers was upset and said he did not need to produce validation: "The fire department doesn't work that way." "Maybe the Board works that way." The witness also stated that no fire official had called any agent of the Board on the previous Friday asking that personnel be released under the policy.

The respondent testified. He began work as a custodian on December 1, 1987, assigned to the high school. The job includes cleaning, trash removal and the like. In February 1994 he was out of work because he had injured his back when falling on ice. He went to the Board's compensation physician. He was out of work from late February through early June.

He has been a member of the Woodbridge Volunteer Fire Department for approximately four years. While he was out of work on compensation leave, he reported to calls and got credit

for reporting. He knows that in his first seven years of membership, he must report to sixty percent or more of calls in order to receive benefits.

The witness stated he did not fight fires. He either acted as fire police or just watched at the scene. He could also report to the fire house and get credit. He did nothing he remembers as physically difficult while he was on compensation leave. He agreed to pay a fine to the State in settlement of an insurance fraud charge, but insists that was a family decision made in fear of imprisonment.

The witness stated he knows the Board policy and knows that an officer of an emergency unit must call the Board. He heard the head custodian testify about the January 1995 incident. He explained that he went to a call before his shift began. He called the head of buildings and grounds, spoke to a secretary and advised that he would late. The secretary advised him to call his school. He did so and spoke to a day janitor. He and the high school head janitor spoke soon afterward. The head janitor wanted some kind of note. The witness stated that he told the head janitor the fire department "doesn't do that."

The witness acknowledged the fire call sheets (exhibit P-13). He appeared at many calls. He appeared in uniform at some calls. He never told the former chief that he was on compensation leave from his regular job. He appeared to protect his exemption and death benefit. The officer in charge at a particular call makes a decision concerning attendance.

A fire fighter can do other things than fight a fire and qualify. If he is in gear, he can direct traffic. The witness stated that if he had to move a hose, he would get on his hands and knees to do it. While on his school job, he could have asked another janitor for help in lifting.

The witness explained the circumstances of the accident that led to his disability and disability leave. It occurred late on the night of February 8, 1994. He fell on ice in the school parking lot and complained of low back and left leg pain. He landed on the left side of his lower back and left buttock. He felt pain radiating downward. From February 8, 1994, to the day on which he testified, Powers had "serious problems." He also reported to fire calls in this period.

He was injured but reporting beginning February 10, 1994. He answered several calls during the chronic period of his injury.

He was in acute pain with marked muscle spasms and limited motion. He could do heel and toe standing, but leg raises were painful. Physicians accepted his report of pain and authorized compensation.

Exhibit P-13 shows that the witness reported to a fire incident on February 14. Only five fire fighters appeared. The witness stated that if there were a fire, he would excuse himself and perform other duties. He then testified that he cannot brush a broom, erase chalkboards or empty trash.

Powers continued seeing physicians. Exhibit P-5 is a report approximately eight weeks post injury. It states, among other things, that the patient still complains of severe pain. Powers said he was doing nothing during the entire period from February 8 through June 16 at the fire house that would aggravate his condition. He testified that he acted only as fire police at fire scenes. He cannot recall doing anything to hurt himself, but he "probably did."

Exhibit P-14 is comprised of photocopies of checks his wife wrote to the New Jersey Manufacturers Insurance Company, the Commissioner of Insurance and the IFD. The witness stated he was not familiar with these checks until this hearing. He further stated he has no idea why the moneys were paid. The witness does recall entering into a consent agreement with the IFD in connection with workers' compensation benefits having to do with the period he was on compensation leave and receiving benefits (P-19). He recalls that he neither admitted nor denied fault.

Powers stated his wife writes all checks. They were paying a consent judgment. He viewed the consent judgment as "a fine for a attending fire calls" while he was on compensation leave.

When the witness returned to work, he was contacted by a person "from the state," whose name he cannot recall. He did not keep a copy of what he signed. He did not consult an attorney. He told the state representative he believed he did nothing wrong.

In connection with the present tenure charges, his union advised him that he had legal representation. There was no such promise made concerning the fraud investigation. Powers states he was promised secrecy if he signed the agreement. The money he paid was a civil penalty, not repayment of benefits received.

The witness also stated he does not recall an arrangement to repay New Jersey Manufacturers Insurance Company. His recollection is that one thing had nothing to do with the other.

When he was able to return to work, he had some accrued compensatory time. He wrote and asked for it. It is not his responsibility to notify the Personnel Department of such a request. He makes the request to his superior and it goes through channels.

The witness has had compensation leave before. He knows a physician's note is necessary prior to return to duty. In this case, he was released by the physician on or about June 16, and took that certificate to work. He put it on the head janitor's desk with a written request for vacation or sick leave. He kept no copies of any documents.

Powers did not return to work until July. He filed a grievance because the Board believed he was not entitled to his compensatory time. He did receive his compensatory time in the form of fifty-six hours of overtime pay.

Concerning the policy discussion with superiors, the witness stated he knew the policy. He wore a fire department pager. He states he never left work to go to a fire. The head janitor lied when he said so. The witness appeared late for work one time. The call began before his shift began. The incident concerned a propane leak. He stayed to secure the area. However, he could have been replaced and reported to work. Nevertheless, he believed he did the right thing. He called the head of buildings and grounds and spoke to a secretary. He did not call his school

principal. When he was dismissed from the call at approximately 5:00 p.m., he returned to work. He decided it was more important to stay on the call than to report to work on time.

ARGUMENTS

The Board asserts, concerning charge one, that it has clearly shown Powers was present at one or more fire scenes during his period of alleged disability. The district's workers' compensation insurance carrier commenced an investigation. It was established that the respondent had been under medical treatment from February 23 - June 16, 1994 for alleged injuries that arose during the course of his employment (P-4, P-5, P-6, P-7 and P-8). The investigator met with Woodbridge Fire District No. 1 officials and ascertained that Powers during his disability leave attended calls as a volunteer fireman. The investigator testified that response to fire calls, regardless of the day or hour were inconsistent with the claimed disability and were, in his opinion, a fraud upon the workers' compensation system.

After conferring with his superiors, the investigator referred the case to the New Jersey Department of Law and Public Safety, IFD (P-10). The results of the fraud investigation by the IFD were forwarded by New Jersey Manufacturers Insurance Company to the petitioner by letter of January 10, 1995 (P-11). The investigator also testified that Powers entered into a Consent Order whereby he agreed to pay a civil fine and to reimburse New Jersey Manufacturers Insurance Company at a rate of $50 per month. Photocopies of pertinent checks were produced (P-14). A reference number on the checks was the reference number for the IFD file concerning Powers.

School personnel also testified regarding the required notification after compensation leave by a treating physician authorizing the employee to return to work. Powers' file did not contain notification. Therefore, when Powers returned to duty on July 7, 1995, he did so without formal notification although the Board did eventually receive notification.

The same witness also testified that the physical demands of the job could be defined as light work. He stated that because the respondent was one of several janitors on his shift, he

would never be required to exert himself and was able to secure either relief from the work or assistance from other janitors.

A former fire chief testified and identified the roll call sheets as records maintained in the ordinary course by the volunteer fire company. It was his testimony that the sheets correctly identify the respondent and correctly identified him as appearing at fire scenes. The former chief could not testify that Powers actually worked at each of the fires, but he did state that he was present at some fires at which the respondent also was present.

In addition to the requirements for exemption, the former chief also testified that when one is called, one has no idea what the call will involve and must be prepared to respond to defend lives and property. Fire equipment alone weighs in excess of twenty pounds. There are strenuous activities for which a fireman must be prepared. The witness also testified that Powers was a dedicated, conscientious fire fighter who also responded to fire calls. Finally, the former chief testified that he had no knowledge that Powers was on compensation leave or otherwise injured or disabled because it is the rule and practice of the fire company for individuals on disability to be ineligible to report for fire calls. The roll call sheets in evidence reflect not only that the respondent signed in for fire calls, but in fact on several occasions was the fireman in charge (P-13) and therefore for responsible for completing the roll call sheets.

As to the second charge, Powers clearly violated the school district's policy permitting employee volunteer fireman to leave the job for emergencies in certain circumstances. The procedures established are clear and are in the record. The practice requires the fire chief to communicate with the building principal or a janitor supervisor in order to request that a fireman be present. Powers disregarded this policy and in fact attended fire calls at his own option. At a hearing conducted within the district, Powers was advised of the requirements of the policy and cautioned about not violating it in future or disciplinary action could flow. The assistant superintendent testified that, notwithstanding this caution, Powers choose to violate the policy the next day by indicating via a telephone call to a secretary that he would late for work because he was going to attend a fire. Powers insisted that his attendance at fires was needed and that he complied with the policy.

Powers' testimony concerning settlement of the IFD matter is inconsistent and not credible. His settlement of the matter was merely the result of his decision to get the matter over with. Similarly, his testimony that he wanted only to sign in to qualify for exemption and insurance benefits and that the decision to allow him to sign in was made by the officer in charge is self-serving at best and at worst is inadequate.

The respondent argues that there has been a rush to judgment here. The second charge, particularly, arises out of the fact that the Board developed a policy concerning fire calls which it adopted after Powers began employment. Yet, the Board expected Powers to know of that policy prior to its development.

Charge one alleges that Powers reported for duty and served as a volunteer fire fighter while on workers' compensation leave. This arises from conduct that occurred between February and June, 1994.

Powers was, indeed, on compensation leave due to his injury on the job. The Board complains that a fraud was committed by Powers against the school district and, presumably, that is because Powers reported to duty as a volunteer fire fighter. In the Board's view this constitutes misrepresenting his physical condition. All physician's reports support Powers' contention that he was unable to work. These physicians were the carrier's, not Powers'. Not a single physician claims Powers could not do the duties which he did as a volunteer fire fighter. Second, while Powers did report for duty and receive credit for duty, there is no evidence he actually did any work inconsistent with his physical disabilities.

The medical evidence is quite clear that Powers was in a severe state (P-4). He was not ready to return to work in April (P-5) or in early June (P-6). Only in mid-June was Powers capable of light work (P-8).

Two physicians found Powers unable to work during the time he was on compensation leave. If the Board claims he was able to work from February through June, this is negated by its own experts' reports.

Powers was able to report to work as a volunteer fire fighter and receive credit for working, even if he did no work which was physically inconsistent with the physicians' reports. The Board did not produce any witness who observed Powers act in a manner inconsistent with the medical reports during the period.

The Board's chief witness, a former fire chief, actually supported Powers' contentions. He explained that one did not have to physically fight a fire in order to receive credit. Powers could receive credit on the incident log sheet if he merely appeared for the call. Credit is given to a fire fighter if present at the call or even if the fire fighter does not leave the firehouse. The chief testified that even if one goes to a call, it is possible to be at the call doing only non-strenuous work such as directing traffic. To the best of the chief's recollection, during the subject period, there were many calls but no active calls requiring fire fighting. The Board's witness in fact confirmed Powers' contention that while he was out on disability, he did not actively fight a fire.

The insurance investigator was not assigned until July 1, 1994, after Powers had returned to work. At no time did he observe Powers so much as appear at the volunteer fire department. The Board's Safety Committee chairman testified that he took pictures of Powers in fire fighting gear on June 29, 1994. There is no dispute that at the time these pictures were taken, Powers had already returned to work from compensation leave (Stipulation No. 4). That testimony, therefore, cannot support the Board's allegations.

The assistant superintendent confirmed that Powers was returned to work by physicians on June 16, 1994. The assistant superintendent was not a witness to any fact concerning the time between February and June 1994.

The respondent's own testimony simply expanded upon and corroborated the fire chief's testimony. Powers testified that because he received credit for fighting fires if he showed up for a call, even if not physically active, he continued to respond to fire calls while he was on compensation leave. He wanted to preserve his exempt status and his insurance benefit. The Board is unable to point to any instance in which Powers, while on compensation leave, acted physically in a manner inconsistent with the findings of the physicians in the period February -

June 1994. The Board can show that Powers received credit for responding to fire calls. It cannot show a single instance in which Powers actually acted in a manner inconsistent with his compensation claim.

The settlement that Powers entered into, without advice of counsel, contained no admission of any type of liability on Powers'' part. No finding can be based on the settlement. Nothing can be read into the settlement except that Powers' explanation for entering into the settlement was to get the matter off his family's back and to give some peace of mind to his wife.

Charge two alleges that Powers violated Board policies and verbal directions concerning response to emergency fire calls while on duty at Colonia High School. This charge is based on the Board not issuing a policy which it wished it had written, and punishing Powers for that. The respondent does not dispute that the Board had an ongoing and clear policy as to how an employee on duty was to be summoned to a volunteer fire call. Volunteer fire fighters such as Powers could not be released from duty unless the school's supervisor was notified by the chief that a fire fighter's presence was needed. When such notification was given, it was up to the supervisor to determine whether or not to release the employee. Although there were vague allegations that Powers had some how violated this policy, none of the witnesses against him were able to give a single exact instance of this happening. The night supervisor did testify without specifics that there were occasions when Powers, who carried a fire department beeper wanted to leave. On those occasions, the supervisor directed Powers to follow the policy and there was no testimony to show that on any occasion Powers did in fact violate the policy.

The event that gave impetus to this charge involves the situation not contemplated by the Board policy. Powers was working from 3:00 p.m. to 11:00 p.m. Prior to shift starting time, Powers was called to a fire. At that time, there was no need for supervisors to be notified by the fire chief that it would appreciated if Powers could be released from work because Powers was on his own time. When it became clear to Powers that the call would not be over by 3:00 p.m., he telephoned the head of buildings and grounds. He spoke to a secretary. The secretary requested that Powers call his school. Powers called the school and spoke to the day janitor, the only individual in his department he was able to reach. Powers concededly arrived at work two hours late.

The existing policy refers to determining whether or not an individual should leave a building to respond to a call. It does not refer to a situation in which the individual is not yet on duty because the individual has many hours to go prior to his reporting time. The policy refers to emergencies arising during work hours, not emergencies before work hours. Unfortunately, Powers was viewed negatively by supervisors because he was interested in the fire department and wanted to provide help in fire emergencies. The fact that he wore a beeper was viewed negatively. Nevertheless, no witness could identify an instance in which Powers had responded to a call while at work without permission and without procedures being followed. No Board witness testified that any policy had ever been developed as to how to handle a situation in which an employee was already responding to a fire call at the time working hours began.

This charge has not been proven. The Board has shown only that it failed to develop a policy to apply to a situation where an individual volunteer fire fighter was already fighting a fire at the time working hours commenced.

DETERMINATION

The settlement Powers entered into is not appropriately under consideration in this matter.

In support of charge one, that Powers while on workers' compensation leave reported for duty and served as a volunteer fireman, the Board offers the fact that Powers reported to approximately 150 fire calls. This is not contested. The appropriate question is whether what Powers did while on compensation leave was inconsistent with the injuries described in related medical reports. The record is clear that Powers is more dedicated to fire fighting than to janitoring. That is not a basis for a tenure charge. The record also supports the inference that Powers has seized every opportunity to respond to a fire call. The sworn statement of the Colonia High School head janitor is that he had advised Powers on more than one occasion that the Board had a policy governing the release of janitors to report to fire calls. Powers was aware of the written policy because the head janitor had handed him a copy of the policy as soon as it was adopted by the Board.

The petitioner and respondent presented testimony tending to show that on January 6, 1995, Powers advised a day janitor that he would be late for work because he was reporting to a fire. Powers was scheduled to begin duty as 3:00 p.m. He arrived at 5:00 p.m. according to the night foreman. On Monday, January 9, the next work day, in the presence of the night foreman, the head janitor asked Powers for some sort of confirmation from the fire chief that the chief in fact called Mr. Powers to the fire. Powers stated that the fire department was not like the Board of Education and did not "need notes all the time. They [the fire department] don't operate like that." Powers also stated that all he had to do was call the head of buildings and grounds and he was free to respond to fire calls. This is not an exact quote. The parties agree that this was the substance of Powers' statement. The head janitor advised the supervisor of buildings and grounds of these facts on the following morning. He also advised the supervisor that he had to remind Powers of the Board policy on many occasions during the two years Powers worked at Colonia High School.

The respondent was warned and counseled several times concerning the policy governing leaving school during work hours. His response indicates a disregard for the procedure and constitutes insubordination. His statement, "All I have to do is call Anthony D'Orsi [supervisor of buildings and grounds] and I can go," simply does not square with the facts. The respondent is not unintelligent. He knew what the policy required, yet felt free to disregard it. This is the essence of insubordination.

Taken as a whole, the incident of January 6-9, 1995 constitutes intolerable behavior. The policy had been in place for more than two years, the respondent had been counseled and warned about the policy and its application, yet he still replied in a manner showing disregard for and deliberate misunderstanding of the policy. His statement that all he had to do was call the supervisor of buildings and grounds before leaving his duties is simply wrong.

Viewed as a whole, I **FIND** that these facts and circumstances warrant a **FINDING** that Daniel Powers while on duty at Colonia High School violated Board policy no. 952, regulation no. 9520 and verbal directions regarding response to fire calls. I further **FIND** that this

constitutes insubordination. Accordingly, I **CONCLUDE** that charge number two is true in fact having been demonstrated by a preponderance of the credible evidence in the record.

The charge that Powers reported for duty and served as a volunteer fireman while on workers' compensation leave also has been demonstrated by a preponderance of the credible evidence in the record. The respondent testified that, after his injury, he had and continues to have severe pain. He stated he could not push a broom, erase chalkboards or empty trash. Yet, he also testified that he could put on more than twenty pounds of fire gear and direct traffic at a fire scene. Common sense and common experience dictate that Powers' testimony and actions are inconsistent.

Powers' absence caused other janitors to cover his area or, on a few occasions, the Board to pay a substitute. It appearing that Powers was capable of performing most, if not all duties and it appearing that, with the help of other janitors could have performed all duties, the Board had to accept requiring those janitors who did report to work to cover additional areas or had to hire and pay substitutes. In this case, both happened, although not on the same days. This affronts the public good and constitutes unbecoming conduct.

The respondent's testimony was unconvincing. The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. This tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." *Jackson v. D.L. and W.R.R.*, 111 *N.J.L.* 487, 490 (E.&A. 1933). One factor that must be considered in a determination as to which party's version of an incident has the "reasonable probability of truth" is that "the interest, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952), Certif. den. 10 *N.J.* 316 (1952).

In summary, this decision concludes that the Woodbridge Township Board of Education had proven both tenure charges against Daniel Powers by a preponderance of the credible evidence in the record. The charges being true in fact, it is **ORDERED** that Daniel Powers be

terminated from his position with the Woodbridge Township Board of Education effective on the date of final decision in this matter.

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

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

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

23 JANUARY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1/25/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 30 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

LIST OF WITNESSES

For Petitioner:

Jonathan Treibwasser
Anthony Manto, Jr.
Kenneth Kuchtyak
John C. Kenny
Paul Meyler

For Respondent:

Daniel Powers

LIST OF EXHIBITS

For Petitioner:

P-1 Photo of Daniel Powers taken June 29, 1994 at fire scene
P-2 Second Photo of Daniel Powers taken June 29, 1994 at fire scene
P-3 Accident Report of February 8, 1994 dated February 10, 1994
P-4 February 23, 1994 report of treating physician Dr. Shutello
P-5 April 22, 1994 report of treating physician Dr. Shutello
P-6 June 2, 1994 report of treating physician Dr. Gross
P-7 June 2, 1994 report of treating physician Dr. Shutello
P-8 June 16, 1994 report of treating physician Dr. Gross
P-9 New Jersey Manufacturers Workers' Compensation Payment schedule dated February 1, 1995
P-10 Referral of Powers' file by New Jersey Manufacturers to New Jersey Department of Insurance Fraud Division
P-11 Disposition letter of Richard DiMaggio of New Jersey Manufacturers dated January 10, 1995 to Jonathan Triebwasser
P-12 Summary of Powers' responses to fire calls from February 8, 1994 to July 6, 1994
P-13 Woodbridge Fire Department Roll Call Chart from February 8, 1994 to July 6, 1994
P-14 Series of checks of Bankers Savings Account #2-4767-7 i/n/o Daniel and Maureen Powers payable as follows:

Commissioner of N.J. Dept. of Ins.

No.	Date	Amount	Reference
2950	7/25/95	$50.00	#94-17928-33
2922	6/9/95	50.00	#94-17928-33

2842	1/23/95	50.00	#94-17928-33

Commissioner of N.J.

No.	Date	Amount	Reference
2822	12/27/94	$50.00	#94-17928-33

N.J. Ins. Fraud

No.	Date	Amount	Reference
2880	4/9/95	$50.00	#94-17928-33

N.J. Manufacturers Ins.

No.	Date	Amount	Reference
2823	12/27/94	$50.00	-

P-15 Woodbridge School District Policy #952
P-16 Woodbridge School District Regulation #9520
P-17 Notice of Termination of temporary compensation benefits, November 1, 1994, effective June 15, 1994
P-18 Letter, Smith to Collins, November 7, 1994, with attachment
P-19 Letter, Parisi to DiMaggio, March 7, 1995

For Respondent:

None

OAL DKT. NO. EDU 2869-95

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL POWERS,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF WOODBRIDGE,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

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

Respondent's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ) in post-hearing briefs, again contending, inter alia, that although respondent admittedly responded to fire calls while on disability, respondent did not take any action inconsistent with his physical disabilities. (Respondent's Exceptions at p. 3) Further, he contends that the Board's policy and corresponding regulation which respondent was said to have violated were inapplicable to the fact pattern at issue. (Id. at p. 10)

Likewise, in its reply, the Board supports the conclusions of the ALJ by essentially recasting arguments previously considered by the ALJ in its post-hearing briefs. Accordingly, said arguments are not summarized herein.

Upon careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that respondent violated Board Policy No. 952 and Regulation No. 9520 and verbal directions regarding employee response to fire calls, which violations constitute, collectively, insubordination. The Commissioner further concurs with the

ALJ's finding that the Board has proven, by a preponderance of the credible evidence, that respondent served as a volunteer fireman while on workers' compensation leave, thus, engaging in unbecoming conduct. In so ruling, the Commissioner finds no cause in the present record to disturb the ALJ's evidentiary rulings or credibility determinations in this matter.

Finally, the Commissioner concurs with the ALJ's conclusion that these charges, as credited, are sufficient to warrant respondent's termination from employment, pursuant to N.J.S.A. 18A:6-10 and 11.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the Office of Administrative Law and hereby orders that respondent be dismissed from his position as tenured custodian as of the date of this decision.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

MARCH 11, 1996

DATE OF MAILING MARCH 11, 1996

(SB) 91-96

DHPL #507-96
SB # 91-96

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

CATION FROM SCHOOL EMPLOYMENT : DECISION

OF D.W. :

Decided by the Deputy Commissioner of Education, November 15, 1996

For the Petitioner-Appellant, Rusignola, Pugliese & Rusignola (Carmen Rusignola, Esq., of Counsel)

D.W. (hereinafter "petitioner") was disqualified by the Office of Criminal History Review of the Department of Education from continued employment as a substitute teacher in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 revealed four convictions arising from arrests for drug offenses between June 1989 and January 1992. Petitioner sought to overturn her disqualification on the basis of rehabilitation.

In a letter decision dated November 15, 1996, the Deputy Commissioner of Education upheld the disqualification,[1] finding that, while petitioner was progressing toward rehabilitation, she had failed to demonstrate clear and convincing evidence of her rehabilitation as required by N.J.S.A. 18A:6-7.1.

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

3/5/97

Petitioner filed the instant appeal to the State Board.

After a through review of the record, we affirm the decision of the Deputy Commissioner. Although the record reveals that petitioner is making impressive progress towards rehabilitation, it also indicates that her convictions included charges of Distribution of Controlled Dangerous Substances and Possession with Intent to Distribute Controlled Dangerous Substances, and that the drugs at issue included cocaine and heroin. In view of the recent and extremely serious nature of petitioner's disqualifying offenses, see N.J.S.A. 18A:6-7.1(e)(2) and (4), we are unable to conclude at this time that petitioner has affirmatively demonstrated her rehabilitation by clear and convincing evidence. Moreover, as required by 18A:6-7.1(e)(1), we have considered the "nature and responsibility" of the position petitioner would hold in the public school system. In this respect, we stress that petitioner was disqualified from employment as a substitute teacher, a position which includes responsibility for the care, supervision and instruction of students. Given these circumstances, petitioner faces a heavy burden in attempting to demonstrate her rehabilitation. In the Matter of the Disqualification from School Employment of William R. Palumbo, decided by the State Board, February 7, 1996, aff'd, Docket #A-4065-95T3 (App. Div. 1996). See Application of Matthews, 94 N.J. 59 (1983).

Accordingly, we affirm the decision of the Deputy Commissioner disqualifying petitioner from service as a substitute teacher in the schools of New Jersey. We note in so doing, however, that nothing in our decision herein precludes petitioner from reapplying to the Office of Criminal History Review once additional time has passed and

seeking a determination from the Commissioner that she is qualified for school employment on the basis of rehabilitation.

March 5, 1997

Date of mailing MAR 07 1997

(SB) 91-96

DHPL #507-96
SB # 91-96

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

CATION FROM SCHOOL EMPLOYMENT : DECISION ON MOTION

OF D.W. :

Decided by the Deputy Commissioner of Education, November 15, 1996

Decided by the State Board of Education, March 5, 1997

For the Petitioner-Appellant, Rusignola, Pugliese & Rusignola (Carmen Rusignola, Esq., of Counsel)

D.W. (hereinafter "petitioner") was disqualified by the Office of Criminal History Review of the Department of Education from continued employment as a substitute teacher in the State's schools after a criminal history review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed four convictions for drug offenses following arrests between June 1989 and January 1992. Petitioner sought to overturn her disqualification on the basis of rehabilitation.

In a letter decision dated November 15, 1996, the Deputy Commissioner of Education upheld the disqualification, finding that while petitioner was progressing toward rehabilitation, she had failed to demonstrate clear and convincing evidence of her rehabilitation as required by N.J.S.A. 18A:6-7.1. On March 5, 1997, we affirmed the decision of the Deputy Commissioner. We found that petitioner was making impressive progress towards rehabilitation, but stressed that her convictions had included

6/4/97

Distribution of Controlled Dangerous Substances and Possession with Intent to Distribute Controlled Dangerous Substances, and that the drugs at issue had included heroin and cocaine. In view of the recent and extremely serious nature of petitioner's disqualifying offenses, and the fact that she had been disqualified from employment as a substitute teacher, a position which included responsibility for the care, supervision and instruction of students, we were unable to conclude at that time that petitioner had affirmatively demonstrated her rehabilitation by clear and convincing evidence.

Petitioner has filed the instant motion seeking reconsideration of our decision. Petitioner contends that although her criminal record includes convictions for distribution and possession with intent to distribute, all controlled dangerous substances in her possession had been for her personal use. Petitioner alleges that she never had "more than 8 vials in [her] personal possession which was entirely consistent with an amount that [she] routinely consumed at that point and time." Petitioner has also submitted documents attesting to her academic achievements in recent years.

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

After a careful review of the record, we deny petitioner's motion. Although petitioner denies that she had been involved in the distribution of controlled dangerous substances, we cannot disregard the Judgment of Conviction entered following her March 1991 arrest, in which the Court expressly indicated that petitioner "was a dealer of drugs." We note, moreover, that in a letter dated October 9, 1996 to the manager of

the Office of Criminal History Review, petitioner acknowledged that she had decided to try to sell drugs to support her habit.

Consequently, while it is evident that petitioner is making great strides towards rehabilitation, we find that she has failed to provide good cause for reconsidering our decision of March 5, 1997.

S. David Brandt abstained.

June 4, 1997

Date of mailing JUN 06 1997

92-96

92-96

IN THE MATTER OF THE TENURE	:	
HEARING OF JOAN NORRIS, BOARD	:	
OF EDUCATION OF THE ATLANTIC	:	COMMISSIONER OF EDUCATION
COUNTY VOCATIONAL TECHNICAL	:	DECISION
SCHOOL, ATLANTIC COUNTY.	:	
	:	

MARCH 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
APPROVING WITHDRAWAL
OAL DKT. NO. EDU 8034-95
AGENCY DKT. NO. 204-6/95

IN THE MATTER OF THE TENURE HEARING OF JOAN NORRIS, BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL TECHNICAL SCHOOL, ATLANTIC COUNTY.

James F. Ferguson, Esq. for petitioner (Roger C. Steedle, attorney)

Ned P. Rogovoy, Esq. for respondent (Waltman, Reilly & Rogovoy, attorneys)

Record Closed: January 22, 1996 Decided: January 23, 1996

BEFORE **CAROL F. LASKIN**, ALJ t/a:

This matter was transmitted to the Office of Administrative Law on August 7, 1995, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to -13, after petitioner filed tenure charges seeking to dismiss Ms. Joan Norris, herein respondent, from her position as a secretary based upon physical inability to perform in accordance with *N.J.S.A.* 18A:10-6.1 *et seq.*

The prehearing telephonic conference held on October 11, 1995, resulted, *inter alia*, in an order issued on October 17, 1995, setting the hearing for December 15 and 16, 1995.

Due to their good faith and in the best interest of the respective clients, the parties agreed to cooperate and prepare a job description to present to medical professionals evaluating respondent's ability to perform.

On December 12, 1995, petitioner informed the undersigned that upon receipt of the orthopedic examination, a resolution of the matter was forthcoming. Accordingly the hearing was postponed.

By letter received December 22, 1995, petitioner advised that it met on December 18, 1995, and approved Resolutions authorizing the withdrawal of the charges proffered against Ms. Norris and reinstating her to a secretarial position as of January 2, 1996. On January 22, 1996, respondent confirmed that she was indeed returned to work on January 2, 1996.

Based upon these representations, I **CONCLUDE** that the parties voluntarily resolved the matter and that petitioner's Resolutions of withdrawal and reinstatement of respondent fully disposes of all issues in controversy, consistent with the law. Accordingly, I **ORDER** that the tenure charges of physical incapacity are hereby **WITHDRAWN**.

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

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

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

January 23, 1996
DATE

Carol F Laskin
CAROL F. LASKIN, ALJ t/a

Receipt Acknowledged:

1/26/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 01 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lam

RECEIVED
STATE OF N.J.
DEC 22 10 46 AM '95
OFFICE OF ALJ LAW

LAW OFFICES
OF
ROGER C. STEEDLE

ROGER C. STEEDLE
CHARLES E. WOOLSON, JR. (N.J. AND VA.)
JAMES F. FERGUSON (N.J. AND PA.)
ANN-DEE LIEBERMAN (N.J. AND PA.)

OF COUNSEL
WM. GODDARD LASHMAN

SUITE 700
1125 ATLANTIC AVENUE
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(609) 345-2500

122 NEW JERSEY AVENUE
ABSECON, NEW JERSEY 08201
(609) 641-6800

FAX: (609) 641-2325

OF COUNSEL
ROBERT H. STEEDLE
(1986-1993)

PLEASE REPLY TO:
ATLANTIC CITY ___
ABSECON ___

December 19, 1995

The Honorable Carol Laskin,
Administrative Law Judge
State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
CN - 049
Trenton, New Jersey 08625

RE: Matter of the Tenure Hearing of Joan Norris vs. Board of Education of the Atlantic County Vocational Technical School, Atlantic County
OAL Docket No.: EDUTH-08034-95S
Our File No.: M-2324-S2

Dear Judge Laskin:

As a result of Dr. Cavalier's report of his orthopedic examination of Joan Norris in which he concludes that she is capable of returning to her position as secretary to the alternative school, the Atlantic County Vocational Technical Board of Education met on December 18, 1995 and approved a Resolution authorizing the withdrawal of the charges that had been proffered against her before the Commissioner of Education.

Please allow this letter, therefore, to serve as our formal withdrawal of the pending charges. The Board also at that time adopted a Resolution reinstating the respondent to her position as secretary at the alternative school with a return to work date of January 2, 1996.

Thank you for Your Honor's attention and consideration in this matter.

Respectfully submitted,

JAMES F. FERGUSON

JFF:cla
cc: Ned P. Rogovoy, Esquire
Paul D. Trivellini, Board Secretary

Laskin

LAW OFFICES
WALTMAN, REILLY & ROGOVOY
23 N. HIGH STREET
POST OFFICE BOX 520
MILLVILLE, N. J. 08332-0520

609-825-2228
FAX: 609-327-3845

ALBERT R. WALTMAN
WILLIAM F. REILLY, JR.
NED P. ROGOVOY

HARRY R. WALTMAN (1891-1968)

January 22, 1996

The Honorable Carol Laskin
Administrative Law Judge, t/a
State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, NJ 08625

ATTENTION: Ms. Joanne Restivo

Re: Tenure Matter of Joan Norris
OAL DOCKET NO. EDU 8034-95

Dear Judge Laskin:

The issue as to whether Ms. Norris, an employee of the Atlantic County Vocational Technical School, was physically able to perform her function, pursuant to N.J.S.A. 10:6-1, et seq., has been resolved after an agreed upon orthopedic examination. I can advise the Court that Joan Norris reported to work on January 2, 1996 and that all issues at the present time are therefore satisfied.

Very truly yours,

NED P. ROGOVOY

NPR/dmg
cc: James F. Ferguson, Esquire
Ms. Joan Norris

OAL DKT. NO. EDU 8034-95

IN THE MATTER OF THE TENURE	:	
HEARING OF JOAN NORRIS, BOARD	:	
OF EDUCATION OF THE ATLANTIC	:	COMMISSIONER OF EDUCATION
COUNTY VOCATIONAL TECHNICAL	:	DECISION
SCHOOL, ATLANTIC COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. After such review, the Commissioner determines to approve the withdrawal of the within charges of physical incapacity. Accordingly, the matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 12, 1996
DATE OF MAILING MARCH 12, 1996

93-96

93-96-DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
ROGER E. MARSHALL.	:	
	:	

MARCH 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8584-95

AGENCY DKT. NO. DHP #465

ROGER E. MARSHALL,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Roger E. Marshall, petitioner, pro se

State Department of Education, respondent, appearing pursuant to N.J.A.C. 1:1-5.6(a)

Record Closed: December 13, 1995 Decided: January 26, 1996

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter concerns the appeal of Roger E. Marshall (hereinafter petitioner) from the determination of the New Jersey State Department of Education (hereinafter respondent) that he is disqualified from employment as the result of a criminal history record check conducted pursuant to N.J.S.A. 18A:6-7.1. Petitioner was advised of respondent's determination by letter dated May 13, 1994. He responded by letter dated June 2, 1994 and certified on June 31, 1994,

wherein he asserted that he was rehabilitated. On January 30, 1995 Richard A. Di Patri, Deputy Commissioner, issued a determination on the appeal which provided as follows:

> Having reviewed your appeal of disqualification from school employment which resulted from a Department of Education criminal history record check conducted pursuant to N.J.S.A. 18A:6-7.1 et seq., Roger Marshall v. New Jersey State Department of Education, DHP #465, I determine you are not qualified for such employment.
>
> The record indicates that you were sentenced on December 14, 1970 to 90 days confinement and one year of probation for possession of narcotic equipment. On January 3, 1973, you received a suspended confinement of five years and three years probation for robbery. Again, on January 6, 1974, you were sentenced to 15 years confinement for Robbery/Intimidation. Additionally, you were sentenced on April 21, 1989 to serve 364 days in Atlantic City Jail and were ordered to pay a $1,080 fine for Possession of Heroin.
>
> Your appeal consists of statements from you and your wife attesting to your rehabilitation, together with a general statement about your good work performance. From what you have presented, I am unable to be persuaded, as I must by law, that your rehabilitation has been demonstrated by clear and convincing evidence. In making this determination, I have also considered the Statement of Reasons presented by the judge upon your sentencing in 1989, indicating that the aggravating factors outweighed the mitigating factors in imposing the recommended sentence.
>
> Accordingly, pursuant to applicable law, your disqualification from school employment is affirmed.

Petitioner filed an appeal from the determination by letter dated March 3, 1995, wherein he enclosed a number of letters of reference dated February and March 1995. Thereafter, the parties executed a Consent Order agreeing to a remand of the matter to the Commissioner of Education for a plenary hearing on the issue of rehabilitation. The Consent Order was received by the State Board of Education on May 11, 1995, and on July 7, 1995, the State Board issued a decision remanding the matter to the Commissioner for a plenary hearing. On September 20, 1995, the

matter was transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13. The plenary hearing was scheduled for November 29, 1995 and was conducted as scheduled. At the conclusion of testimony petitioner requested that the record remain open for two weeks for him to obtain and submit additional written recommendations. Nothing further having been received, however, the record closed on December 13, 1995.

FINDINGS OF FACT

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

Petitioner was employed as a school custodian by the Atlantic City Board of Education at Richmond Avenue School in Atlantic City from March 1994 until February 1995. His employment there was interrupted because of the initiation of the within proceedings. The criminal history record check which is required to be done for any employee of a board of education who has direct contact with students under the age of eighteen revealed convictions for the following offenses:

12/11/70	Possession of Narcotic Equipment Sentenced 12/14/70 to ninety days confinement, one year probation.
5/10/72	Robbery Sentenced 1/3/73 to five years State Prison suspended, one year probation.
2/24/83	Robbery/Intimidation Sentenced 1/6/84 to fifteen years confinement NJ State Prison, $50.00 fine.
10/12/88	Possession of Heroin Sentenced 4/21/89 to 364 days confinement Atlantic City Jail, $1,080.00 fine, six months loss of driver's license.

The letters of recommendation and character reference which petitioner had forwarded to the Commissioner of Education in March 1995 in support of his appeal in the within matter were marked as exhibits P-1 through P-7 in evidence. They provide as follows:

To Whom it May Concern: February 17, 1995

Mr. Roger Marshall was employed at Richmond Avenue School from March 1994 until February 1995 as a custodian. While here he performed his job very well and did his best to carry out any requests made by members of the staff.

Mr. Marshall's conduct was always that of a perfect gentlemen while interacting with students, teachers, parents and staff. His attendance was exceptional as well as his neat appearance and careful attention to duty.

Roger Marshall's tenure as a custodian was a very pleasant experience because of his good manner and attention to duty.

Sylvia A. Williams, Principal
(P-1 in evidence)

To Whom it May Concern: February 28, 1995

This letter is my personal appeal to you to please reconsider Mr. Roger Marshall for the custodian's position at Richmond Avenue School. Having been employed at Richmond Avenue School for eighteen years as a speech/language specialist, I have been subjected to working alongside numerous custodians. I have never felt so strongly about an issue regarding the staff at my school as I do about Mr. Marshall. You see, in my opinion, the custodians are the lifeline of a school. It is their productivity in keeping the school neat and clean each day that contributed to the morale of the teachers and the students. For the past year, the morale has been higher than we've been accustomed to. Mr. Marshall is one of the most trusting, efficient, friendly, respected, dependable, professional custodians this building has ever seen. To lose him is a travesty.

I ask you to please let this man get on with his life and allow him to keep his job where he was happy and sorely needed. He was truly an asset to our school and we miss him very much.

Barbara J. Kalter, M.A. CCC
Speech/Language Specialist
Richmond Avenue School
(P-2 in evidence)

Dear Hope Blackburn, February 24, 1995

Roger E. Marshall and I have been co-workers since he came to Richmond Avenue School in March of 1994. I teach children who are three to five years old and have various handicaps.

Mr. Marshall has, to my knowledge, not missed a single day of work since he started. Mr. Marshall is always neat, friendly, professional, and willing to do what is expected of him . . . plus. During the summer months he helps to keep the teenagers, that work in the school, on track and productive. Mr. Marshall does this in a manner that uses respect as the reward.

Mr. Marshall is an employee that can be counted on to stay with a task until that task is finished to the highest standard. I hope that Mr. Marshall's case will be reviewed so that a vital member of our school family can return to work.

Chuck Salomon-Lowden, Teacher
Richmond Ave. School
Atlantic City, NJ 08401
(P-3 in evidence)

To Whom it May Concern: February 28, 1995

I'm writing this letter on behalf of Mr. Roger Marshall. My name is Christine McGaffney and I'm the fourth grade teacher at Richmond Avenue School. I've been teaching at Richmond for ten years now. We're a relatively small school, so everyone needs to work together to make our school a viable learning center. Mr. Marshall was a very positive addition to our team. He was someone I could trust

and rely on when something needed to be done. He was such a pleasant part of our school. When I heard that Mr. Marshall was dismissed, I felt very sad and disappointed. He was a positive role-model for the students, and someone I felt very good about working with. I'm hoping that this situation will be reviewed and rectified, and Mr. Marshall will be back at Richmond where he is missed and very much needed.

Christine McGaffney,
4th Grade Teacher
(P-4 in evidence)

To Whom it May Concern: March 1, 1995

As secretary to the principal at Richmond Avenue School for twenty-two years, I have worked along with many custodians. I have seen many retire and a few pass away.

I would like to say a few words in regard to Roger Marshall. As far as Mr. Marshall is concerned, I have found him to be a very respectful person. He has always been very cooperative and cordial in anything I have asked him to do for me. If it was cleaning up a mess from a child who has gotten sick or giving me an extra shot of heat in the office to make it comfortable, Mr. Marshall always came through with a smile. There are many good things I can say in regard to Mr. Marshall's character but the letter would be too long.

I do hope that Roger will be able to return to his position as a Richmond Avenue School Custodian immediately.

Rose Giannantonio,
Educational Secretary
(P-5 in evidence)

To Whom it May Concern: March 1, 1995

I am a kindergarten teacher at Richmond Avenue School. I have worked in the Atlantic City, Public Schools for eleven years.

We have seen many custodial workers come and go. Most of them are quickly forgotten in the course of busy days. However, Roger

Marshall is truly a different story. I am not aware of the circumstances that caused Roger to lose his job. I can only attest to the fact that he has been one of the best workers we have had at Richmond. He is very helpful, polite and wonderful to the children. I hope that his situation can be re-evaluated. We really miss him here at school.

Linda Jordan,
Kindergarten Teacher
(P-6 in evidence)

Dear Ms. Blackburn: February 27, 1995

I am writing to you in regard to Roger Marshall, who was employed at Richmond Avenue School.

My name is Theda Bradley. I am the Atlantic City Free Public Library Branch Manager assigned to Richmond Avenue School.

I have known Mr. Marshall since his employment at Richmond Avenue School in March 1994 until February 1995. He has been a helpful and courteous person to all that know him. Always willing to assist in anyway he can. He has been a faithful worker and always present on his job. It would be a grave injustice, for someone that is trying to improve his life, to be discharged. I hope that the Board will reconsider their decision.

Theda Bradley
(P-7 in evidence)

This concludes the recitation of uncontested facts.

Petitioner testified on his own behalf. He testified that his employment as custodian required him to keep the third floor of the building hallways clear, classrooms clean, chalk boards washed, trash emptied and minor repairs and maintenance done so that the building would at all times be safe and clean for children. Petitioner testified that he also opened the school building in the morning and closed it at night. He testified, "I loved everybody there and they loved me." In addressing the statutory factors for consideration in assessing rehabilitation, petitioner testified

concerning the particulars of each offense. The December 1970 incident occurred when he was in a car with his cousin, he indicated, and his cousin had a needle. With respect to the May 1972 incident, petitioner testified that he had been with a group of guys and one of the guys had an argument with a gas station attendant. He said the argument could have been construed as attempted robbery. In February 1983, he was working at a casino in Atlantic City. He was on his way to work and stopped to use the bathroom at a service station in Pleasantville. Petitioner testified that after he got the key, someone shoved him into the bathroom and put a gun in his back. According to petitioner, he was the victim in the February 1983 incident, not the perpetrator. Nevertheless, he served 37 months of a 15 year sentence as a result of his convictions for armed robbery and terroristic threats. On October 12, 1988, petitioner was working as a bartender at a casino restaurant in Atlantic City. When he came out of the casino for a break he gave a beggar who had asked him for money, fifty cents. He was then picked up by the police who demanded to know about the drugs he had just purchased or sold. The police kept him for quite a while driving around in the police car and asking him for information about others who were allegedly involved in drugs; petitioner denied that he knew any of the alleged drug dealers. At the time of this incident petitioner was on parole for the February 1983 offense; he indicated that his public defender had told him if he pled guilty, it would not be a parole violation. This, petitioner concluded, was a trick since he did thereafter serve fifteen months for a parole violation.

After petitioner was released from jail in June 1990, he came home and got married to his girlfriend, he said. Since that time he has been a working, productive member of society. From June 1990 to December 1992 he worked in a local hardware store where he had gone to purchase paint upon his release. The owner had asked him about the bracelet he was wearing (related to his early release from jail) and their conversation resulted in petitioner's immediate employment. In December 1992, he was laid off. Petitioner concludes that this was as a result of negotiations to purchase the hardware store which had been concluded with a determination on petitioner's part that he did not wish to purchase the store. He collected unemployment insurance benefits for a while and in December 1993, according to petitioner's testimony, started employment with the Board of Education of Atlantic City as a school custodian. (Note that the letters of

recommendation say March 1994). This employment continued until February 10, 1995, when it was interrupted by the commencement of the within proceedings. At that point petitioner was again unemployed for approximately one and a half months. Since that time he has been working as a manager trainee at Sylva's Department store, although he is anxious to return to his job with the Atlantic City Board of Education, he said.

Petitioner's date of birth is April 28, 1950. Accordingly, the criminal offenses described hereinabove occurred when he was twenty, twenty-two, thirty-two and thirty-eight, respectively. Petitioner attributes his past mistakes to hanging around with the wrong people. He indicates that since he has been released from jail in 1990, he has resided with his wife, her granddaughter and two great-grandchildren. When asked by the undersigned why he had no recommendation from his parole officer, he indicated that he thought his parole officer was probably annoyed that he stopped paying toward his one thousand dollar fine, when he got off parole in 1993. Up to that point he had paid $500, but he has not made any further payments. In response to my direct inquiry, he did say that he would finish paying.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:6-7.1, the statute relevant to a determination of the within matter, provides in pertinent part:

. . .

> An individual other than a school bus driver shall be disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction of any of the following crimes and offenses:
>
> . . .
>
> b. A crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," P.L. c. 226 (C.24:21-1 et seq.); or

c. (1) A crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, aggravated assault, kidnapping, arson, manslaughter and murder;

. . .

e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

The phrase "clear and convincing evidence" means more than a preponderance. State v. Cale, 19 N.J. Super. 397, 400 (App. Div. 1952). Under the standard the fact finder must be reasonably certain or have a firm belief or conviction that the contested factual assertion is true. Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 161 (App. Div. 1960). What is clear in this matter is that petitioner was convicted of several offenses which are listed as disqualifying offenses under the statute: two drug-related offenses, one occurring in December 1970, the other occurring in October 1988, and two offenses involving robbery, the second of which occurred on February 24, 1983 and resulted in conviction after a jury trial. The specific charges on which the jury returned guilty verdicts were armed robbery, 2C:15-1 and terroristic threats, 2C:12-3.*

Although the convictions in 1973 and 1989 appear to have resulted from guilty pleas, petitioner's testimony in the within matter indicates that he does not accept responsibility or admit guilt for any of the offenses. His attitude in this regard concerns me, since it is unbelievable that all four offenses were the result of some sort of mistake. It also concerns me that petitioner has not felt it necessary to complete payment of the $1,080 fine imposed as part of the sentence for the 1988 conviction. Although petitioner was granted an additional two weeks following the close of the hearing in this matter to provide documentation from his parole officer, no such documentation was ever forthcoming. On the other hand, the recommendations and letters of support from his co-workers in the Atlantic City school system are nothing less than enthusiastic about petitioners' dedication and abilities. (Note, however, it appears that at least one writer was unaware of the circumstances which caused the termination of petitioner's employment). If the standard of proof of rehabilitation which petitioner is required to meet in these proceedings were a preponderance of the competent and credible evidence, I might be inclined to agree that petitioner is probably rehabilitated. The legal standard I must apply to the facts in this matter, however, is clear and convincing and because of the doubts and reservations I have expressed I

* The July 5, 1995 State Board decision remanding this matter for a plenary hearing before the Commissioner specified that the Commissioner's review should include a determination of whether any criminal history record information pertaining to petitioner exists on file in the Federal Bureau of Investigation. The file transmitted to OAL as respondent's case pursuant to N.J.A.C. 1:1-5.6(a) contains no such information, however.

am unable to find that petitioner has established his rehabilitation as required by the statute. The Legislature has made a policy determination that convictions for certain kinds of offenses disqualify persons from employment which involves direct contact with school children. That disqualification can only be lifted where the evidence makes it clear and reasonably certain that rehabilitation has occurred. The proofs in this case do not rise to that high standard.

For all of the foregoing reasons, I **CONCLUDE** that petitioner is disqualified from employment in the public schools pursuant to N.J.S.A. 18A:6-7.1.

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

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

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

Jan 24, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

1/26/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 01 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

All of petitioner's exhibits have been described in the text of the decision hereinabove.

For respondent:

R-1 The Department of Education file in regard to disqualification from school employment of Roger E. Marshall (57 pages)

WITNESSES

For petitioner:

Roger E. Marshall

For respondent:

None

OAL DKT. NO. EDU 8584-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
ROGER E. MARSHALL.	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that Mr. Marshall has not met his burden of establishing rehabilitation by clear and convincing evidence as required by N.J.S.A. 18A:6-7.1 and is, therefore, not qualified for school employment within the intent of the criminal history record check laws.

Accordingly, Mr. Marshall's disqualification from school employment is sustained for the reasons clearly articulated by the ALJ in her initial decision. This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of July 5, 1995.

IT IS SO ORDERED

COMMISSIONER OF EDUCATION

* It is noted that the Federal Bureau of Investigation record on Mr. Marshall, submitted to the record of this matter on February 15, 1996, discloses no additional disqualifying convictions subsequent to those herein.

MARCH 12, 1996
DATE OF MAILING MARCH 12, 1996

(SB) 93-96

SB #93-96

ARLENE MILLER,	:	
PETITIONER,	:	
V.	:	
LEO F. KLAGHOLZ, COMMISSIONER, DEPARTMENT OF EDUCATION, COMMITTEE	:	STATE BOARD OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
BOARD OF EDUCATION OF THE TOWN SHIP OF NEW HANOVER, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

Decided by the Commissioner of Education, November 25, 1996

For the Petitioner, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent Leo F. Klagholz, Nancy Kaplen, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the Respondent Board of Education of the Township of New Hanover, Hulse & Germano (Dennis Germano, Esq., of Counsel)

Arlene Miller (hereinafter "petitioner") was employed as a school psychologist by the Board of Education of the Township of New Hanover (hereinafter "Board") and was a member of the Board's basic child study team. Petitioner had achieved tenure when the Board abolished her position effective June 30, 1996 pursuant to N.J.S.A.

MAY 3, 2000

18A:28-9.[1] She challenged that action by filing a petition to the Commissioner of Education, and the matter was transmitted to the Office of Administrative Law.[2]

Subsequent to that filing, the petitioner was advised by letter dated December 9, 1996 from the Board's counsel that the Board had applied for and been granted a waiver of N.J.A.C. 6:28-1.1(f) and N.J.A.C. 6:28-5.1(c) so as to provide all basic child study team services by contracting with a private vendor.[3] The petitioner then appealed to the State Board of Education, challenging both the application and the grant of the waiver.

Petitioner contends that the waiver is invalid because basic child study team services required by N.J.S.A. 18A:46-5.1 cannot be provided by a district solely through a contractual arrangement with a private vendor. Petitioner argues that the Commissioner and the Board are creatures of the Legislature and, therefore, possess only the authority delegated to them by that body. Petitioner maintains that the waiver

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[1] N.J.S.A. 18A:28-9 provides in pertinent part that:

> Nothing in...any...law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy....

[2] We note that the matter is still pending before the Office of Administrative Law.

[3] N.J.A.C. 6:28-1.1(f) provides that:

> Each district board of education, independently or through joint agreements, shall employ child study teams, speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.

N.J.A.C. 6:28-5.1(c) provides that:

> Services which may be contracted shall be restricted to the following:
>
> 1. For public school pupils:
>
> i. Independent child study team evaluations and/or child study team diagnostic services to supplement existing local district services;
>
> ii. The related services of occupational and physical therapy; and
>
> iii. Home instruction.

in question exceeds that authority because it conflicts with the underlying statutory scheme set forth in N.J.S.A. 18A:46-1 et seq. Petitioner claims that the language of N.J.S.A. 18A:46-5.1 requires boards of education to provide basic child study team services only through its own employees or by combining with other districts to provide such services through authorized public entities.

After careful review of the statutory framework and the underlying policy, we conclude that the petitioner's view is correct. Hence, the grant of the waiver in question was not a valid exercise of the authority which we delegated to the Commissioner in his capacity as the chief executive and administrative officer of the Department of Education, N.J.S.A. 18A:4-22, to grant administrative waivers pursuant to N.J.A.C. 6:3A-1.1 and N.J.A.C. 6:3A-1.5. Accordingly, for the reasons that follow, we declare that waiver to be invalid.

N.J.S.A. 18A:46-5.1, entitled "Basic child study team services; provision by boards of education and state operated programs," provides that:

> Each board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services. The basic child study team shall consist of a school psychologist, a learning disability teacher consultant and a school social worker, and for the purposes of evaluation and classification shall include pertinent information from certified school personnel making the referral....

N.J.S.A. 18A:46-5 specifies the functions of child study teams. These include:

> a. identification and diagnosis of children needing special educational services,
> b. development and approval of public school programs for handicapped pupils,

c. supervision and coordination of public school programs for handicapped pupils,
d. reporting and referral of children with handicaps,...
e. social case work and psychological evaluation,
f. remedial instruction,
g. cooperative action with other state and county departments and lay professional organizations, and
h. additional responsibilities as determined by the commissioner with the approval of the state board.

N.J.S.A. 18A:46-14 mandates that:

> The facilities and programs of education required under this chapter shall be provided by one or more of the following:
>
> a. A special class or classes in the district...;
> b. A special class in the public schools of another district...;
> c. Joint facilities...to be provided by agreement between one or more school districts;
> d. A jointure commission program;
> e. A State of New Jersey operated program;
> f. Instruction at school supplementary to the other programs in the school...;
> g. Sending children capable of benefiting from a day school instructional program to privately operated day classes...;
> h. Individual instruction at home....

It is axiomatic that, as creatures of the Legislature, both this agency and district boards of education must act within the authority delegated to them by that body. E.g., In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980); Remedial Educ. & Diagnostic Servs. v. Essex Cty. Educ. Servs. Commn., 191 N.J. Super. 524, 527 (App. Div. 1983). This means that an administrative waiver cannot legitimize an outcome that is not authorized by the applicable statutory scheme and that a district board cannot rely upon such waiver to assume authority not granted to it by the statutes or properly delegated to it by this agency.

Quite simply, the clear and unambiguous language of the applicable statutes precludes a district from providing basic child study team services solely by contracting with a private vendor. In re Jamesburg High School Closing, supra. As set forth above, N.J.S.A. 16A:46-5.1 provides the authority under which district boards must provide basic child study team services, and the terms of that statute require that such services must be provided through its own employees, in combination with another board of education, or by another public entity. See Impey v Board of Educ of Borough of Shrewsbury, 142 N.J. 388 (1995); Vicenzino v. Bedminster Twp. Bd. Of Educ., 312 N.J. Super. 243 (App. Div. 1998). Since the Legislature did not authorize the provision of basic child study team services through a contract with a private vendor, we cannot contradict the terms of the statute by attempting to provide such authority by waiving the administrative regulations which purport to implement the statute.

We therefore declare the waiver in question to be invalid.

Attorney exceptions are noted.

May 3, 2000

Date of mailing MAY 05 2000

94-96

94-96-DHP-B

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
NORMAN S. MARCELLE.	:	
	:	

MARCH 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10827-95

AGENCY DKT. NO. DHP #114-95

NORMAN S. MARCELLE,

Petitioner,

v.

NEW JERSEY STATE

DEPARTMENT OF EDUCATION,

Respondent.

Norman S. Marcelle, petitioner, pro se

Respondent, appearing pursuant to *N.J.A.C.* 1:1-5.6(a)

Record Closed: January 19, 1996 Decided: January 31, 1996

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 15, 1995, the Department of Education transmitted to above appeal to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The basis of the transmission was a determination that the Commissioner of Education had before him a record which was insufficient to render a

determination as to whether the petitioner, Mr. Marcelle, was rehabilitated pursuant to *N.J.S.A.* 18A:6-7.1(e), following his criminal conviction, which disqualified him from school employment. Mr. Marcelle had obtained employment with a private transit service which, among other contracts, would occasionally operate school buses. Following the transmission, the matter was heard at the Office of Administrative Law, Mercerville, New Jersey on January 19, 1996 at which time the record closed.

ISSUE AND BURDEN OF PROOF

The sole issue to be determined in these proceedings is whether pursuant to *N.J.S.A.* 18:6-7.1(e) the petitioner can demonstrate that he should not be disqualified from school employment on the basis of his criminal record in that he has been rehabilitated. In respect to this issue, the burden rests exclusively on the petitioner: Mr. Marcelle must affirmatively demonstrate by clear and convincing evidence that he has been rehabilitated.

THE FACTS

The facts in this matter are not in dispute. I **FIND:**

On April 20, 1990, while serving in the military, Mr. Marcelle was convicted in a criminal court of wrongful use of cocaine. As a consequence of a finding of guilt, while Mr. Marcelle was not incarcerated, he was discharged from the Army on May 30, 1990. He was not dishonorably discharged; rather, he received a general discharge under honorable conditions. Marcelle is currently seeking to upgrade that discharge to honorable and he has submitted a variety of letters confirming that he has continued to make this effort. Those letters include a confirmation that he has received from his congressman and the Congressional Coordinator, Congressional Inquiry Division of the Department of the Army. As yet, no determination has been made which would upgrade his discharge.

The conviction of wrongful use of cocaine in 1990, was the only criminal conviction ever imposed upon Mr. Marcelle. He testified that it resulted from a random urinalysis taken while he was in the service immediately before he and his unit were sent to the Persian Gulf as part of the

United States involvement in what has come to be known as the "Gulf War." He testified that he did indeed consume cocaine and that he did so because of the stress related to the impending military action and to ongoing domestic problems which resulted in a separation, but which has ended in reconciliation. Mr. Marcelle is currently employed by Laidlaw Transit, a private company, which on occasion transports handicapped individuals, including children. Laidlaw, accordingly to Mr. Marcelle, acquired Mayflower to contract services, the company under which he was originally employed in the capacity of a school bus driver, in June 1995. Laidlaw has been so satisfied with Mr. Marcelle's employment that once it received information that he was not qualified to operate a bus which transported school children, it transferred him and continues to employ him in an administrative capacity. Nevertheless, he has pursued this appeal for a variety of reasons, including his desire to operate a bus.

Marcelle had a good military career. He was decorated and served as mess sergeant at Fort Campbell Kentucky. He is 37 years of age, and has been married for 13 years. His wife is a teacher in the Trenton Public School system and has been teaching pre-school children in that system for 3 years. Mr. Marcelle is a college graduate, having received a bachelor of arts degree from the State University of New York at Old Westbury in 1981. He has a history of teaching in the City of New York and in "Head Start" and is licensed by the New York Board of Education and the National Teachers Association as a teacher for K through 6. It was explained to Mr. Marcelle that even were to be certified as teacher in New Jersey, the disposition in this matter, were it favorable to him, would only relate to his rehabilitation for purposes of being a school bus driver. Since 1990, when the incident occurred, Mr. Marcelle has had no problems of any kind, pursuant to his testimony, with using any unlawful substances and has had no involvement in the criminal justice system. He resides with his wife in a rented house in Trenton.

I was impressed with Mr. Marcelle's earnest and his sincere efforts to demonstrate his rehabilitation as well as his intelligence and his articulateness.

Several letters were submitted on his behalf which are part of the file transmitted to the Office of Administrative Law by the Department of Education. A friend of 20 years wrote on November 8, 1995 about Marcelle's courtesy, dignity and leadership abilities. In addition, she notes that he is well liked and respected because of his ability to relate effectively with children

and adults. She also observes his intelligence, conscientiousness and ability to function as a role model. A letter submitted by a representative of Laidlaw Transit in September 1995, indicates that Marcelle has demonstrated his willingness to "do what it takes to get a task completed." The director of regional operations affirms that Marcelle has a positive attitude, is punctual and has received no complaints from co-workers or passengers. The director of regional operations also indicates that once he was apprised of Marcelle's criminal history, he directed the manager of the Mercer County section to remove him from the position of bus driver and to have him do alternative work. In my judgment, that is a significant testament to the quality of Mr. Marcelle's work performance; in addition as an aside, it is also testament to the loyalty of an employer for its employees.

The Division Manager of Mayflower Services also has written a letter, dated September 8, 1995, indicating that during Marcelle's employment history the latter was professional with customers and employees. He was also dedicated to the company and demonstrated a very positive attitude. The manager concludes "if I had more drivers like Mr. Marcelle, my job would be much easier." Similar letters were submitted by other employers of Mr. Marcelle making it unequivocally clear that based upon his character as well as his military training and experience, Marcelle is fine employee.

In order for an individual to demonstrate that he has been rehabilitated he must meet the criteria set forth at *N.J.S.A.* 18A:6-7.1.

Subdivision (e) of that statue provides as follows:

> Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
> (1) The nature and responsibility of the position which the convicted individual would hold;
> (2) The nature and seriousness of the offense;
> (3) The circumstances under which the offense occurred;
> (4) The date of the offense;

> (5) The age of the individual when the offense was committed;
> (6) Whether the offense was an isolated or repeated incident;
> (7) Any social conditions which may have contributed to the offense;
> (8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendations of persons who have had the individual under their supervision.
> [*N.J.S.A.* 18A:6-7.1(e)]

In my judgment, Mr. Marcelle has met the criteria set forth above. His only conviction was one occurring while he served with honor in the military some 5 years ago. Since then all of the testimony and evidence would point directly to an individual who may have made a mistake under highly stressful circumstances and who has, even before that and through to this day, led a productive, meaningful life. He is well educated, articulate, and married. He is by all accounts a fine worker. Little if any risks in my judgment are to be encountered by permitting this man to, when necessary, drive a school bus. Accordingly, I **CONCLUDE** that the petitioner has affirmatively demonstrated by clear and convincing evidence and pursuant to the criteria set forth at *N.J.S.A.* 18A:6-7.1 that he has been rehabilitated. It is therefore **ORDERED** that the petitioner's criminal history no longer disqualifies him from school employment as a school bus driver.

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

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

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

1/31/96
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/2/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 07 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On behalf of petitioner:

Norman S. Marcelle

On behalf of respondent:

None

EXHIBITS

On behalf of petitioner:

P-1 "Packet" submitted by the Department of Education upon transmission of Mr. Marcelle's appeal

P-2 Letter, Congressman Christopher Smith to petitioner, December 18, 1995

P-3 Letter from Michelle Y. Cromwell to Congressman Smith, undated

On behalf of respondent:

None

OAL DKT. NO. EDU 10827-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
NORMAN S. MARCELLE.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that Mr. Marcelle has demonstrated rehabilitation by clear and convincing evidence in accordance with N.J.S.A. 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws.

Accordingly, the initial decision of the OAL is adopted for the reasons articulated therein, and Mr. Marcelle is deemed qualified for school employment as a bus driver.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 12, 1996

DATE OF MAILING MARCH 12, 1996

95-96

JESSE ROSENBLUM,

PETITIONER,

V.

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

RESPONDENT.

: COMMISSIONER OF EDUCATION

: DECISION

SYNOPSIS

Petitioning taxpayer sought determination, inter alia, that Board's contract procedures in awarding construction contracts were not in compliance with the Public Schools Contracts Law, N.J.S.A. 18A:18A-1 et seq.

ALJ concluded that the Board properly followed the directives of the statute by achieving the lowest available price from responsible bidders and by giving the former bidders an opportunity to participate in the negotiations. Moreover, as required by statute, the modifications made to the specifications were placed in the resolution awarding the contract, which was adopted by 2/3 vote of the Board. ALJ concluded that the Board was not required to advertise the revised specifications for public bidding. Summary judgment was granted to the Board. ALJ noted statute does not provide for the recovery of fees and costs in an administrative proceeding.

Commissioner adopted findings and determination in initial decision as his own, emphasizing that he is without authority to award attorney fees.

MARCH 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6343-95

AGENCY DKT. NO. 207-6/95

JESSE ROSENBLUM,

Petitioner,

v.

CLOSTER BOARD OF EDUCATION,

Respondent.

Jesse Rosenblum, , *pro se*

Jane Gallina Mecca, Esq., for respondent Closter Board of Eduation
(Fogarty & Hara, attorneys)

Record Closed: November 14, 1995 Decided: January 30, 1996

BEFORE **IRENE JONES**, ALJ:

PROCEDURAL HISTORY

Petitioner, Jesse Rosenblum ("Rosenblum"), filed a verified petition and motion for a stay with the Commissioner of Education ("Commissioner") which was received on

December 29, 1994. The petitioner challenged the procedures under which the respondent, Closter Board of Education ("Board"), awarded construction contracts relating to proposed improvements at the town's Hillside Elementary School ("Hillside") and the Tenakill Middle School ("Tenakill"). An answer and separate defenses were filed by the Board on or about January 18, 1995. Petitioner responded to the Board's counterclaims alleged in the answer on or about January 23, 1995.

Thereafter having received no response from the Commissioner, petitioner filed a motion for leave to appeal in the Appellate Division on February 14, 1995. This motion was denied on April 4, 1995. On or about June 19, 1995 the Commissioner transmitted the matter Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On September 20, 1995, a prehearing conference was held before the undersigned wherein the issues were set and a procedural schedule was established. On September 26, 1995, a prehearing order was issued. Pursuant to said order a briefing schedule was entered. Also pursuant to the order petitioner amended his petition to dismiss the allegations of trespass and violation of the Wetlands Act as contained in Count VIII of the petition. Moreover certain issues with respect to discovery were resolved and therefore relief in Count V is no longer in dispute.

By fax transmission dated November 9, 1995, the Order of the Honorable Peter F. Boggia, J.S.C. dated May 4, 1995, was received by the undersigned. This order directs that the Office of Administrative Law is enjoined from accepting any complaints from the petitioner unless same is preapproved by the presiding assignment judge of Bergen County. On November 14, 1995, petitioner by letter to Administrative Law Judge Masin, then acting director, requested that this matter proceed since the instant petition was filed on December 24, 1994, prior to May 4, 1995 Order. The undersigned was directed by the Acting Director to decide this matter. A copy of this decision will be submitted to the presiding judge of Bergen County.

I **FIND** the following to be the undisputed facts and thus are adopted as the **FACTS** herein.

On or about February 25, 1993, the Board resolved to undertake construction projects at the Hillside and Tenakill schools within the Closter School District.[1] The Board hired the Vitetta Group ("Vitetta") an architectural consulting firm to prepare cost estimates, along with plans and specifications. (Dunn Affidavit ¶ 3; Boettcher Affidavit ¶ 3) On or about March 24, 1993, Vitetta submitted cost estimates reports for each school. The estimates totaled $8,910,000.00 (Hillside $2,744,500.00 + Tenakill $6,165,500.00), inclusive of construction contingency costs, with $8,100,000.00 earmarked for construction costs (Hillside $2,495,000.00 + Tenakill $5,605,000.00). (Tenakill Middle School Schematic Plan Submission, Exh. A, Dunn Aff. ¶ 3; Hillside Elementary School Schematic Plan Submission, Exh. A, Dunn Aff. ¶ 3) The total construction cost of the two projects, including architectural and attorneys fees, was estimated by Vitetta at $10,125,000.00 (Tenakill $7,006,250.00 + Hillside $3,118,750.00).

Using the cost estimates prepared by Vitetta, the Board held a special school election on May 18, 1993, seeking approval from the voters to issue bonds and for the acquisition of loans. (Special School Election Proposal, Exh. B, Dunn Aff. ¶ 4) The voters subsequently approved the bond referendum, thereby authorizing the Board to spend up to $10,125,000.00 for the project. Thereafter, Vitetta proceeded to prepare plans and specifications for the construction project, while also obtaining the requisite approval from the New Jersey State Department of Education, Bureau of Facilities Planning on June 29, 1994. (Final Approval Notice of Dep't of Ed., Exh. C, Dunn Aff. ¶ 4)

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[1] The following affidavits were submitted by the Board as part of the record: Joan Dunn, Board Secretary/Business Administrator; Frances Boettcher, Project Manager from the Vitetta Group; David Tillou , Vincentsen Consulting, Inc.; M. Jockers Vincentsen, President of Vincentsen Consulting, Inc.; and Jeffrey P. Feifer,Superintendent of Schools for the Closter Board of Education.

In April 1994, the Board engaged Vincentsen Consulting, Inc. ("VCI") as a consultant on the school projects. (Agreement for Construction Consulting Services, Exh. D, Dunn Aff. ¶ 6) On or about May 16, 1994, the Board advertised for bids on the Tenakill and Hillside construction projects. (Dunn Aff. ¶ 7) Thereafter, the Board received sealed bids on July 5, 1994; however, the lowest responsible offer received was determined to be $9,827,000.00, which exceeded the cost estimates as projected by Vitetta.[2] ("Review of Bids" Spreadsheet from VCI, Exh. E, Dunn Aff. ¶ 7; Tillou Aff. ¶ 8) Thus, the Board rejected all bids by resolution dated July 7, 1994. (Exh. F, Dunn Aff. ¶ 8)

On July 7, 1994 and July 21, 1994, discussions were conducted with the Superintendent, Vitetta and VCI in order to formulate cost revisions to the original construction project. (Dunn Aff. ¶ 9; Boettcher Aff. ¶ 9; Tillou Aff. ¶ 9) Vitetta recommended that the bids be separated in order to attract additional bidders, along with a number of other modifications, all of which were designed to reduce the cost of the project. (Dunn Aff. ¶¶ 8, 9; Boettcher Aff. ¶¶ 11, 12; Vincentsen Aff. ¶ 15) These recommendations were shared with the Board and the proposed modifications were subsequently approved by them on July 21, 1994. (Vincentsen Aff. ¶ 16)

On or about August 1, 1994, the Board advertised the construction projects for bids, this time based upon the revised specifications recommended by Vitetta. (Dunn Aff. ¶ 10) Bids were received and opened on September 20, 1994, with the lowest being $9,468,000.00 for both schools. (Bid Spreadsheet, Exh. G, Dunn Aff. ¶ 10) On September 22, 1994, the Board rejected all bids on the basis that they were unreasonable as to price, since the lowest bid exceeded the original cost estimates by approximately $1,368,000.00. (Exh. H, Dunn Aff. ¶ 11; Boettcher Aff ¶ 13; Tillou Aff. ¶ 12)

[2] The lowest bid exceeded the construction cost estimate of Vitetta by $1,727,000.00.

After attempting to secure a bid for the construction plan on the two prior occasions, both times with unsatisfactory results, the Board again advertised for bids on or about September 26, 1994. (Dunn Aff. ¶ 12) The advertisements were based upon the identical plans and specifications that were previously bid on September 20, 1994. On October 6, 1994, the Board received sealed bids from a total of thirty four separate contractors, with the lowest base bid totaling $9,745,000.00, or approximately $1,645,000.00 more than provided in the original cost estimates prepared by Vitetta. (Exh. I, Dunn Aff. ¶ 12; Boettcher Aff. ¶ 15; Tillou Aff. ¶ 13) On the same date, the Board rejected all bids received, and pursuant to *N.J.S.A.* 18A:18A-5, resolved to negotiate with the responsible bidders in an effort to obtain contracts within the original cost estimates. (Exh. J, Dunn Aff. ¶ 13) The petitioner was then a member of the BOE and voted in favor of this action.[3]

Thereafter, David G. Tillou ("Tillou") of VCI notified all interested bidders that the Board intended to negotiate contracts for the construction project. (Exh. P, Tillou Aff. ¶ 15) Tillou also indicated that a negotiations meeting would be held on October 17, 1994, and he requested that each interested contractor register its intent to negotiate at the meeting. Furthermore, procedures for conducting the relevant contract negotiations were developed by the Board and distributed to the contractors involved. ("Exh. R, Tillou Aff. ¶ 16)

After contractors submitted their new price estimates and cost savings suggestions to Tillou on October 22, 1994, it became apparent that none of the proposals were reduced enough to fit within the original cost estimates of the project. (Tillou Aff. ¶ 16) As a result, the Board, at its October 24, 1994 meeting, directed VCI and Vitetta to formulate a suggested cost savings plan for the negotiating contractors when preparing their proposals. (Dunn Aff. ¶ 17) Following this meeting, Vitetta and VCI recommended a plan which involved the elimination of various features contained

[3] As reflected in the minutes of the Board meeting attached to the affidavit of Joan Dunn as Exhibit J.

in the original drawings and specifications.[4] (Tillou Aff. ¶ 19) The revised cost savings plan was reviewed and approved by Frances H. Boettcher ("Boettcher"), the architect and project manager of the construction plan, and it was subsequently distributed to the negotiating contractors at individual meetings held with Tillou where the prospect of reducing each contractor's prices was discussed. (Tillou Aff. ¶ 20) Thereafter, the changes designed to eliminate costs were incorporated into Addendum No. 4 of the original specifications, and the Board proceeded to pursue negotiations in lieu of advertising the "revised" specifications for public bidding.[5] (Exh. K, Dunn Aff. ¶ 18 ; Tillou Aff. ¶ 19).

During the week of November 21, 1994, each negotiating contractor submitted its lowest price estimate. (Tillou Aff. ¶ 21) A special executive session was held by the Board on December 1, 1994, where M.J. Vincentsen ("Vincentsen") of VCI outlined a proposed budget consistent with the original cost parameters set forth by Vitetta. (Tillou Aff. ¶ 22) Vincentsen then informed the Board that the contractors' proposed modifications which were received would reduce the cost of the project to fit within the original outlined cost estimates. Nevertheless, the Board took no action, but instead waited for the next regularly scheduled public meeting to act on the recommendations. However, the Board informally accepted a recommendation to allocate additional contingency money, approximately $400,000.00, to the general construction budget, thereby raising the budget to approximately $8,500,000.00.

Prior to acting on the recommendations of Vitetta and VCI, the Board received an offer from Electro-Es, Inc., which allegedly offered to complete the electrical work on both schools for less than the two contractors to whom the electrical contracts were

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[4] The recommended alterations included, but were not limited to, changes to the interior and exterior wall finishes, along with modifications to the roof and HVAC controls at both schools. (Tillou Aff. ¶ 19).

[5] Prior to incorporating the recommended changes into the specifications, the Board apparently invited another construction manager to discuss the Board's dilemma, *i.e.* having twice received bids in excess of the cost estimates, at an open public meeting on November 2, 1994. (Feifer Aff., Exh V, ¶ 11). Apparently, the individual was a volunteer who essentially concurred with the recommended changes to the specifications.

ultimately awarded. (Exh. M; Dunn Aff. ¶ 25) However, Vincentsen recommended that the Board not consider this proposal, because he was unable to determine whether the offer complied with the specifications adopted by the Board. Moreover one could not ascertain whether the purported cost-savings would be realized. (Dunn Aff. ¶ 25) Furthermore, Vincentsen told the Board that Electro-Es' bid was submitted late. The Board rejected Electro-Es' offer by letter dated December 16, 1994. (Exh. N, Dunn Aff. ¶ 26)

On December 15, 1994, the Board acted upon the recommendations of Vitetta and VCI, and by a two-thirds majority vote of the full membership of the Board, awarded contracts to the contractors who had submitted the lowest negotiated offers. (Exh. L, Dunn Aff. ¶ 21) The combined total of the contracts awarded totaled $8,516,944.00, (Dunn Aff. ¶ 23), and the appropriate amendments to the specifications which were the subject of the competitive bidding were included in the resolution awarding the contracts. (Exh. L. Dunn Aff. ¶ 21) Petitioner then filed a nine count petition with the Commissioner of Education dated December 24, 1994, seeking to maintain the status quo pending a plenary hearing on the merits.

The Department of Education approved the modifications on the Tenakill School on or about January 20, 1995, and approval for the Hillside School was secured on January 30, 1995. (Exh. U, Feifer Aff. ¶ 3) Since site work revisions concerning the project affected the abutting county roads, the Board sought, and subsequently received, approval from the Bergen County Planning Board. (Feifer Aff. ¶ 4) Construction commenced during the week of May 15, 1995.

DISCUSSION

In a letter brief dated July 31, 1995, petitioner moved for summary decision with respect to Count I of the petition filed with the Commissioner of Education. Respondent opposed the motion and supported its own cross-motion for summary disposition with

respect to the entire petition. In addition, the Board claimed that the petition filed in this matter is frivolous and seeks an award of attorneys fees on that basis.

When considering a motion for summary decision, this tribunal must determine whether the pleadings, answers to interrogatories, admissions, and affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to an order as a matter of law. *N.J.A.C.* 1:1-12.5(b); *R.* 4:46-2. In addition, "[i]t is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954). "All inferences of doubt are drawn against the movant in favor of the opponent of the motion." *Id.* at 75. However, to prevail, the opposing party must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b). Thus, an evidentiary hearing in a contested case is not necessary in the absence of disputed issues of fact. *Frank v. Ivy Club*, 120 *N.J.* 73 (1990), *cert. denied*, 498 *U.S.* 1073, 111 *S. Ct.* 799, 112 *L. Ed.* 2d 860 (1991). The parties do not disagree as to the facts. Indeed both seek summary decision. Thus the only issue in this respect is who is entitled to summary judgment.

Petitioner contends that the Board's award of construction contracts was arbitrary and capricious since it did not advertise the negotiated changes in the construction plan specifications. Thus, the award should be negated as being contrary to the plain meaning of the Public Schools Contract Law, *N.J.S.A.* 18A:18A-1 to -59, as well as against the overall legislative intent. Petitioner complains that the Board should have proceeded with a fourth advertised competitive bid after it modified the specifications before negotiating with the ultimate contractors. The Board responds that it scrupulously adhered to the statutory directive outlined in the Public Schools Contract Law.

The issue, simply put, is whether the Board complied with the Public Schools Contract Law, *N.J.S.A.* 18A:18A-1 to -59. (LAW)

The Public School Law (Law) requires that school contracts in the amount of $7,500.00 or higher be made and awarded through public bidding and advertising. *N.J.S.A.* 18A:18A-4. The Law was enacted to impose similar requirements on purchasing procedures utilized by local boards of education to those required by the Local Public Contracts Law[,] *N.J.S.A.* 40A:11-1 to -49. *F.S.D. Industries, Inc. v. Board of Education of Paterson,* 166 *N.J. Super.* 330, 334 (*App. Div.* 1979). *N.J.S.A.* 18A:18A-4 requires that every contract which is to be paid from school funds, and is not included within the terms of *N.J.S.A.* 18A:18A-3,[6] "shall be made and awarded only by the board of education after public advertising for bids and bidding therefor, *except as is provided otherwise in this chapter or specifically by any other law.*" (emphasis added). The exceptions eluded to in *N.J.S.A.* 18A:18A-4, namely *N.J.S.A.* 18A:18A-5 provides:

> Exceptions to requirement for advertising. Any purchase, contract or agreement of the character described in N.J.S. 18A:18A-4 may be made, negotiated or awarded by the board of education by resolution at a public meeting without public advertising for bids and bidding therefor if
>
> * * *
>
> d. The board of education has advertised for bids pursuant to N.J.S. 18A:18A-4 on two occasions and has rejected such bids on each occasion because the board of education has determined that they are not reasonable as to price on the basis of cost estimates prepared for the board of education prior to the advertising therefor or have not been independently arrived at in open competition, but no such contract or agreement may be entered into after such rejection of bids, unless:
>
> (1) Notification of the intention to negotiate and a reasonable opportunity shall have been given by the board of education to each responsible bidder;

[6] That section sets a bid threshold amount of $7,500.00, subject to adjustments made every two years according to the Consumer Price Index.

> (2) The negotiated price is lower than the lowest rejected bid price of a responsible bidder who bid thereon and is the lowest negotiated price offered by any responsible supplier and is a reasonable price for such work, materials, supplies or services;
>
> (3) Any amendment or modification of the terms, conditions, restrictions and specifications which were the subject of competitive bidding pursuant to *N.J.S.A.* 18A:18A-4 shall be stated in the resolution awarding the contract; and
>
> (4) The negotiated price is lower than the price of the same or equivalent materials or supplies available from the State, county or municipality in which the board of education is located.
>
> * * *
>
> Any such contract or agreement entered into pursuant to subsection d . . . may be made, negotiated or awarded only upon adoption of a resolution by the affirmative vote of two-thirds of the full membership of the board of education at a meeting thereof authorizing such a contract or agreement.
>
> [*N.J.S.A.* 18A:18A-5d].

It is undisputed that the Board first advertised the initial specifications outlined by Vitetta on three separate occasions before resolving to negotiate with responsible bidders in an effort to obtain contracts within the original cost estimates. Thus it complied with the bidding procedures as contained in the statute. When the Board determined that the public bids were unreasonable and thus not in the public interest , the Law permits the Board to "abandon" public bidding requirements after having thrice advertised and received unreasonable bids. Thereafter, the Board invoked its right pursuant to *N.J.S.A.* 18A:18A-5d to negotiate with the responsible bidders. Once the negotiation exception was invoked, I **FIND** and **CONCLUDE** that the Board properly followed the directives of the statute by achieving the lowest available price from responsible bidders and by giving the former bidders an opportunity to participate in the negotiations. As required by the statute, the modifications made to the specifications

were placed in the resolution awarding the contract, which was adopted by a two-thirds vote of the Board.

Petitioner fails to recognize that once a school board invokes its right under *N.J.S.A.* 18A:18A-5d, it no longer is subject to the rigid bidding procedures outlined by the Law. Instead, the negotiation provision is simply an alternative method which permits the board to employ procedures which are necessary to procure the lowest available contract price when the it is unable to obtain a reasonable price through competitive bidding. *Interstate Waste Removal Co. v. Board of Commissioners of the City of Bordentown*, 140 *N.J. Super.* 65, (App. Div. 1976). *Interstate* involved the interpretation of the Local Public Contract Law's negotiation exception, *N.J.S.A.* 40A:11-5(3), which essentially parallels the public bidding exception invoked by the Board in the present matter, *N.J.S.A.* 18A:18A-5d.[7] There the court observed

> [w]here negotiation is permissible under the statute the municipality has great flexibility and may use *any conceivable business method to accomplish the salutary goal of obtaining the lowest available price*. There is no magic or uniform procedure which must be utilized. *So long as it is structured to accomplish the purpose of the legislation, namely, to achieve the lowest available price from a responsible bidder, and the former bidders are given an opportunity to participate, the municipal officials have fully complied with their statutory duty.*
>
> [*Id.* at 70 (emphasis added)].

Thus I **FIND** and **CONCLUDE** that there is no merit to petitioner's contention that the Board was required to advertise the revised specifications for public bidding.

[7] Again it is noted that the Public Schools Contract Law was enacted to impose similar requirements on the purchasing procedures utilized by local boards of education to those required by the Local Public Contracts Law. *F.S.D. Industries, Inc. v. Board of Education of Paterson*, 166 *N.J. Super.* 330, 334 (App. Div. 1979). Thus, although *Interstate* deals with a separate statute, it still bears relevance to the instant matter as the underlying principles with respect to the Public Schools Contract Law and the Local Public Contract Law are extremely similar.

Contrary to petitioner's assertions the procedures pursued by the Board here, namely modifying the original specifications after public bidding failed, did not offend the intent or spirit of the legislation. *Interstate* indicates that the Board is empowered to use any conceivable business method to accomplish the statutory goal of obtaining the lowest available price. *Interstate*, *supra,* 140 *N.J. Super.* at 70. The Board's business method essentially amounted to a change in the specifications; this procedure not only finds support in the general language of *Interstate,* but *N.J.S.A.* 18A:18A-5d(3) also makes abundantly clear that a local board is empowered to modify the original specifications when entering into negotiations subsequent to public bidding which has failed.[8] Thus, the Board's contract awards was in compliance not only with the Public Schools Contract Law but complied with the spirit and intent of the law. As such, the Board is entitled to summary judgment as a matter of law with respect to Count I of the petition.

The Board moved, by way of cross-motion, for summary decision on the remaining issues raised in petition. Petitioner must set forth specific facts showing that genuine issues of material fact exist with respect to the claims made by the Board to defeat the motion.

Petitioner claims that the school construction projects must be submitted again to the public by referendum and re-opened to public bidding. Petitioner claims that many of the building fixtures which were removed from the original specifications will become items for inclusion in future school budgets. I **FIND** and **CONCLUDE** that this claim is grounded in sheer speculation as it calls for one to speculate about a future harm that has not yet materialized.

Petitioner further contends that the modified plan specifications upon which the contracts were awarded are not what the public authorized through the referendum.

[8] That section clearly contemplates that a school board may choose to modify the contract specifications that were at least twice the subject of competitive bidding.

The uncontroverted facts are that on May 18, 1993, the Board held a special school election pursuant to *N.J.S.A.* 18A:14-3 and presented a proposal to the voters. The proposal as set forth in Exh. B, of the Dunn affidavit sought a general authorization to modify the Hillside and Tenakill schools without reference to any particular plan. The proposal was very general in nature, as no representations were made to the public with respect to the quality or size of the project, or the types of materials which were to be utilized. (*See* Feifer Aff. ¶ 9) Indeed the only specific information set forth in the proposal was the amount of the requested expenditures and the purpose for the request.

The Law affords a school board wide latitude when reasonable contract prices cannot be obtained; therefore, a school board is empowered to alter specifications as a "business means" to obtain a contract price which is satisfactory, provided that the voters have approved the underlying project. As long as the changes made to the specifications brought the project within the authorized budget sanctioned by the voters, the Board cannot be deemed to have overstepped its authority. See *Kearby v. Board of Education of the Borough of Watchung*, 1963 *S.L.D.* 73 wherein the Commissioner stated:

> the legislative scheme in New Jersey is to give first to the voters the right to pass upon the general outline of a school building project and to set limits on the amount of money to be expended for it, and then, once approved by the electorate, to rely on the judgment of the board of education to decide and execute the specific details of the facilities, subject always to the standards for approval of the State Board of Education.
>
> [*Id.* at 75].

Here, the voters approved the general outline of the construction project and set the limits on the amount of money to be expended for it. The Board then used its judgment, as authorized by *N.J.S.A.* 18A:18A-5d to execute the details of the program. The modified specifications were approved subsequently by the State Board of Education. (Exhs. C and U). Thus, so long as the construction project upon which the

Board awarded contracts did not represent a "substantial change" from that which the voters approved, the plan need not be resubmitted to the public. *Cf.* "B*orough of Farmingdale v. Board of Education of the Borough of Farmingdale*, 1981 *S.L.D.* 130, 135.

Petitioner failed to set forth facts beyond mere naked allegations that the Board utilized any preliminary plans to induce the voters into voting for the project. Moreover petitioner failed to show that a substantial change was made. Petitioner does not allege nor does the record support that the actions of the Board constituted a breach of faith with the taxpayers. Indeed the Board procured a lower contract price than that which could have been obtained through public bidding. Thus on this count of the petition summary decision is entered in favor of the respondent.

Petitioner challenged the Board's decision to reject a proposal submitted by Electro-Es, Inc. to perform electrical work without first affording the contractor a hearing. *Armitage v. Newark*, 86 *N.J.L.* 5, 8 (Sup. Ct. 1914); *Sellitto v. Cedar Grove*, 132 *N.J.L* 29, 32 (Sup. Ct. 1944); *Arthur Venneri Co. v. Paterson Housing Authority*, 29 *N.J.* 392, 402 (1959). Petitioner presumes that Electro-Es submitted the lowest bid.

I **FIND** that Electro-Es did not have a right to be heard since the Board abandoned the public bidding procedures and proceeded to attempt to procure a contract through negotiations. Thus, Electro-Es was not a bidder, and therefore not entitled to a hearing. Once the negotiation exception to public bidding was invoked, the school board is entrusted with great flexibility in setting forth the procedures which will govern the negotiation process. See *Interstate*, *supra*. I further **FIND** that Electro-Es did not comply with the procedures promulgated by the Board, as its proposal did not conform to the specifications, nor was it submitted by November 28, 1994, the deadline for submissions during the negotiation process. (Tillou Aff.¶25) Furthermore, the Board determined that Electro-Es' proposal was not actually lower than the lowest negotiated price because Electro-Es apparently failed to include site electrical work.

Accordingly, petitioner has failed to raise facts which indicate the presence of a genuine issue of material fact with respect to the Board's failure to afford Electro-Es a hearing. Therefore, respondent is entitled to summary judgment on this count of the petition.

Count IV of the petition alleged that the Board violated the Open Public Meetings Act, (Act) *N.J.S.A.* 10:4-6 to -21. Petitioner asserts that the Board invited an "unpaid advisor" at the November 2, 1994. Furthermore, petitioner avers that the Act was violated because the Board refused to invite the members of the former citizens' School Advisory Committee to a meeting for consultation. Respondent disputes any violation of the Act.

The Act, also referred to as the "Sunshine Law," embodies a legislative preference "that the right of the public to be present at all meetings of public bodies." *N.J.S.A.* 10:4-7. The "`Open Public Meetings Act' is in keeping with a strong tradition both in this State and in the nation favoring public involvement in almost every aspect of government." *Polillo v. Deane*, 74 *N.J.* 562, 569 (1977). An integral component of public involvement is the requirement that adequate notice regarding the meeting of a public body be afforded. The Open Public Meetings Act therefore provides:

> no public body shall hold a meeting unless *adequate notice* thereof has been provided to the public.
>
> [*N.J.S.A.* 10:4-9a (emphasis added)].

Since it is undisputed that the Board is a public body, *see N.J.S.A.* 10:4-8, we need only consider whether adequate notice was properly afforded.

The Act mandates that notice be "mailed, telephoned, telegrammed or hand delivered to at least two newspapers," and that this must be at least forty eight hours

prior to the meeting. *N.J.S.A.* 10:4-8d. In addition, the notice shall be "prominently posted in at least one public place reserved for such or similar announcements."

The affidavit of the Superintendent of Schools, claims that the subject meeting was "properly advertised in accordance with the Open Public Meetings Act." (Feifer Aff. ¶ 11) The Board also provided a copy of the purported "Notice of Meetings" agenda. (Exh. V) The record is however devoid of any evidence with respect to whether this notice was "mailed, telephoned, telegrammed or hand delivered to at least two newspapers," as the Act mandates.

However pursuant to *N.J.S.A.* 10:4-18 where notice of a regularly scheduled meeting has been given no further notice to the newspapers or anyone else is required. Thus, if the November 2, 1994 meeting was a regularly scheduled meeting and previously noticed no further notice is required, unless the municipality has imposed such requirements through its own ordinances or bylaws. Based on the record herein, I am unable to determine whether the November 2, 1994 meeting was a previously noticed regularly scheduled meeting.

Assuming de arguendo, that the meeting was not noticed, what relief, if any, is the petitioner entitled to under the statute. *N.J.S.A.* 10:4-15 provides in its pertinent part that any action taken by a public body in violation of the Act shall be voidable in a proceeding in the Superior Court. However the action must be taken within forty-five days after the action sought to be voided has been made public. Petitioner did not file such a complaint in the Superior Court within the required forty-five days. Moreover, any request for relief at this time would be untimely. Since construction on the schools commenced in May 1995. Thus the action cannot be voided. *N.J.S.A* 10:4-15 further provides that any action taken by a public body which is voidable shall not be voidable solely for failure to conform with the notice requirements contained in the Act. Having concluded that the respondent has in all other respects complied with the Law, I hereby dismiss Count IV of the petition.

In Counts VI and VII, petitioner contends that the Board should be compelled to investigate whether a conflict of interest exists because a board member, Michael Bergman, is apparently engaged in the sale or distribution of materials used in the construction industry. Petitioner alleges that Bergman cast the pivotal vote on the Board's resolution for the Tenakill School project. Further it is alleged that the superintendent had a conflict of interest in the negotiations due to the fact that his wife teaches in a neighboring public school district.

This tribunal does not have jurisdiction at this juncture to hear allegations of improper ethical conduct. The Legislature has prescribed a code of ethics embodied in the School Ethics Act, and "and created a School Ethics Commission specifically for the purpose of enforcing those ethical standards." See *N.J.A.C.* 6:3-9.1(b). Thus, allegations of improper ethical conduct, such as, an improper conflict of interest are to be addressed to the Commission in the form of a complaint. *N.J.A.C.* 6.3-9.16. It is only after the Commission determines that probable cause exists will the matter be referred to the Office of Administrative Law for a hearing. *N.J.A.C.* 6:3-9.18(f).

Thus Counts VI and VII are hereby **DISMISSED** for the aforesaid reasons.

Likewise Count IX of the petition is untimely and it too is **DISMISSED.** Petitioner seeks relief from the Board's resolution of October 21, 1993, that prohibited him from representing himself as a member of the Board. (Feifer Aff., Exh X, ¶ 16). *N.J.A.C.* 6:24-1.2(c) requires that a petition be filed no later than the 90th day from the date of receipt of the notice of a action by the district board of education. The petition in this matter was filed on December 24, 1994 after the 90-day deadline. Therefore, summary disposition is hereby granted to the respondent.

Respondent claims that the instant petition filed is frivolous without any reasonable basis in law and intended for the purpose of harassment. Thus respondent

seeks reasonable attorneys fees, reimbursement for all costs and expenses related to this action.

The general rule is that attorney fees and costs should not ordinarily be awarded in the absence of a statutory grant to do so. *Alyseka Pipeline Service Co. v. Wilderness Society*, 421 *U.S.* 420, 95 *S.Ct.* 1612, 44 *L.Ed.* 2d 141 (1975); *State Department of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983). The New Jersey Administrative Code (*N.J.A.C.*) does not expressly provide for the award of attorney fees in the case of a frivolous lawsuit.

Rule 4:42-9(8) of the New Jersey Court Rules, permits the awarding of attorney fees in all cases where counsel fees are permitted by statute. *N.J.S.A.* 2A:15-59.1 expressly provides for the award of attorney fees and costs to the prevailing party in a civil action when the sitting judge determines that the complaint was frivolous. The statute does not provide for the recovery of fees and costs in an administrative proceeding. *Balsley v. North Hunterdon Reg. High School*, 225 *N.J. Super.* 221 (App. Div. 1988). Proceedings before the OAL are administrative actions and not civil actions. Thus this tribunal lacks jurisdiction to award fees and costs herein. This is indeed unfortunate because the I find that complaint in this action is frivolous.

CONCLUSION

For the aforementioned reasons, petitioner's request for summary decision with respect to Count I of the petition is hereby **DENIED** and summary decision is **GRANTED** in favor of the respondent. On the remaining counts of the petition I hereby **GRANT** respondent's cross-motion for summary decision.

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

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

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

1/30/96
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

2/1/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 6343-95

JESSE ROSENBLUM, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF CLOSTER, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

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

Petitioner asserts that the Board's actions in this matter were not in compliance with the Public Schools Contracts Law. In this regard, petitioner cites Terminal Construction v. Atlantic City Sewerage, 67 N.J. 403, 409 (1975) for the proposition that contracts "of significant size" must be awarded to the lowest bidder subsequent to a public bidding, "***in order to guard against corrupting influences, local discretionary acts, and secure the benefits of unfettered competition." (Petitioner's Exceptions at p. 2) Petitioner maintains, however, that the Board acted outside the statute and against the good of the public in that it "chose to effect impromptu private alterations through negotiations with *** one or two interested contractors per trade." (Id. at p. 3) Petitioner warns, "***the contract entered into must match the terms and specifications as set forth in the private advertisement.***" (Id. at p. 5, citations omitted) Citing

Palamar Construction v. Township of Pennsauken, 196 N.J. Super. 241, 252 (App. Div. 1983), petitioner adds that even post-bid negotiations "may be conducted in such a manner as to violate the principles of competitive bidding." (Id., citing Palamar at 252)

Petitioner further argues that the Board's reliance on Interstate, supra, is misplaced inasmuch as the ultimate contract price secured in Interstate, following a negotiation session conducted by the municipality after two unsuccessful attempts to obtain an acceptable price via competitive bidding, "resulted in a saving of public funds." (Id. at p. 4, citing Interstate at 70) In this matter, petitioner challenges, "the prices negotiated by the Board are NOT lower than the lowest rejected formal bid due to the extensive reduction in the size and specification of the school project." (emphasis in text) (Id.) Thus, petitioner urges that the initial decision be reversed.

The Board argues that it complied with both the letter and the spirit of N.J.S.A. 18A:18A-1 et seq., as determined by the ALJ. The Board continues

> As reflected in petitioner's exceptions, it is abundantly clear that petitioner either selectively omits the fact that this project had been bid on three (3) separate occasions or he has selected this action as a means of voicing his disagreement with the Legislature's exception to competitive bidding, as outlined in N.J.S.A. 18A:18A-5(d).*** (Board's Reply Exceptions at p. 2)

The Board maintains that the ALJ was correct in determining that, once a board invokes its right under N.J.S.A. 18A:18A-5(d), the board is no longer subject to the statutorily prescribed bidding procedures, (Board's Reply Exceptions at p. 2) and that the Board was, therefore, acting in accordance with the plain language of the statute. (Id. at p. 4) Petitioner's contention, therefore, as to the Board effectuating improper private alterations by way of negotiations "***not only flies in the face of the uncontroverted facts but is entirely disingenuous." (Id. at p. 3)

The Board further asserts that its reliance upon Interstate, supra, is appropriate in that it is "***the only decision which addresses the situation where the public entity had repetitively sought bids and was unsuccessful.***" (Id. at p. 2) Further, the Board contends

> *** the decisions cited by petitioner, in his exceptions, such as Palamar Constr. v. Tp. of Pennsauken *** are entirely unavailing, as those decisions addressed improprieties which arose during or following the bidding process. In contrast, the instant action arose out of an exception to the bidding process as ordained by the Legislature." (Id. at p. 4)

The sole portion of the initial decision to which the Board takes exception is the ALJ's determination that the Commissioner is without jurisdiction to award attorney fees. (Initial Decision at p. 18) The Board argues,

> in circumstances where, as here, the petition is frivolous *** the salutary goal evinced by the Legislature in enacting N.J.S.A. 2A:15-59.1 will not only be furthered, but the public interest will be served in allowing the public entity to recoup its precious and limited resources. Moreover, the right of an individual to preserve the public interest must be tempered where, as here, that privilege has been abused.*** (Board's Reply Exceptions at pp. 4, 5)

Thus, the Board urges that the Commissioner affirm the initial decision with respect to the Board's compliance with the Public Schools Contracts Law, and "follow the Superior Court" by awarding the Board reasonable attorney fees, thereby "***deterring repetitive and frivolous litigation***." (Id. at p. 5)

Upon careful and independent review, the Commissioner finds petitioner's exceptions to be unpersuasive and, thus, concurs with the findings and conclusions of the ALJ in her initial decision. As to the Board's request for attorney fees in this matter, the Commissioner underscores the ALJ's instruction that he is without authority to award such fees, notwithstanding that an appeal may be particularly vexatious and/or costly to defend.

Accordingly, the initial decision of the Office of Administrative law is adopted for the reasons expressed therein

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 13, 1996
DATE OF MAILING MARCH 13, 1996

95-96

EDU #6343-95
C # 95-96
SB # 24-96

JESSE ROSENBLUM,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLOSTER, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 13, 1996

For the Petitioner-Appellant, Jesse Rosenblum, pro se

For the Respondent-Respondent, Fogarty & Hara (Jane Galina Mecca, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We add only that we have carefully reviewed the record in this matter and find that petitioner, a former member of the district Board, has failed to set forth the existence of genuine issues of material fact which would preclude the grant of summary decision to the Board. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

July 10, 1996

Date of mailing JUL 12 1996

96-96

96-96

YOLANDA GWATHNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8579-95
AGENCY DKT. NO. 305-7/95

YOLANDA GWATHNEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE PINELANDS REGIONAL DISTRICT, OCEAN COUNTY,
Respondent.

James M. Blaney, Esq., for petitioner (Starkey, Kelly, Blaney & White, attorneys)

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

Record Closed: January 25, 1996 Decided: January 29, 1996

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

Petitioner, a health/physical education teacher and the holder of requisite teaching certificates, contends that the Board's actions on April 28, 1995, reducing her from a full-time to a part-time position effective December 18, 1995, amounted to a demotion and violates her tenure and seniority rights, pursuant to *N.J.S.A.* 18A:28-5. This matter was transmitted to the Office of Administrative Law (OAL) on September 20, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was

held on November 29, 1995, and a hearing was scheduled for January 24 and 25, 1996. After the commencement of the hearing, the parties agreed to settle this matter and set forth the following settlement terms on the record:

1. Petitioner agrees to withdraw the filed petition with prejudice.

2. Petitioner will be reinstated to a full-time position as a physical education teacher in the Pinelands Regional School District as of December 18, 1995.

3. Petitioner understands that her position will be abolished as of June 30, 1996. The petitioner agrees not to contest this abolishment of this position in any legal manner.

4. This settlement does not create any priority seniority rights for the petitioner.

5. The petitioner will be given a letter of recommendation commensurate with her evaluations, acknowledging that, to date, these evaluations have been good.

The attorneys for the respective parties stated that they have fully discussed the terms of this settlement agreement with their respective clients, and their clients have consented to the terms and conditions of the settlement. In addition, petitioner indicated on the record that she agrees to the terms of the settlement. Respondent's representative also indicated on the record his agreement to the settlement terms.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their agreement to the representations made by their counsel on the record.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive their right to file exceptions and cross-exceptions in this matter

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

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

January 29, 1996
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

2/1/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 06 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 8579-95

YOLANDA GWATHNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PINELANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

MARCH 13, 1996
DATE OF MAILING MARCH 13, 1996

(SB) 96-96

DHPL #534-96
SB # 96-96

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

CATION FROM SCHOOL EMPLOYMENT : DECISION

OF A.D. :

Decided by the Deputy Commissioner of Education, November 22, 1996

For the Petitioner-Appellant, A.D., pro se

The decision of the Deputy Commissioner of Education disqualifying petitioner from school employment following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed for the reasons expressed therein. We agree with the Deputy Commissioner that petitioner has failed to affirmatively demonstrate her rehabilitation by clear and convincing evidence.

March 5, 1997

Date of mailing MAR 07 1997

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97-96

K.F. on behalf of her minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

MARCH 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625
(609) 588-6525

STEVEN C. REBACK
ADMINISTRATIVE LAW JUDGE

RULING AND ORDER
GRANTING PETITIONER'S
MOTION FOR EMERGENT RELIEF

George M. Holland, Esquire
Law Office of Herbert D. Hinkle
Route 206
2651 Main Street, Suite A
Lawrenceville, New Jersey 08648

Thomas W. Sumners, Jr., Esquire
Sumners Council George & Dortch, P.C.
120 Sanhican Drive
Trenton, New Jersey 08618

Re: K.F., on behalf of minor child S.F. v. Board of Education of the City of Trenton, Mercer County - OAL DKT. NO. EDU 799-96

Dear Counsel:

This is a ruling and order issued in response to the motion instituted by K.F., on behalf of her minor child, S.F., for emergent relief taking the form of compelling the respondent (Trenton) to undertake the responsibility to provide round-trip transportation of S.F. to attend the Marine Academy of Science and Technology (MAST) located in Sandy Hook, County of Monmouth, New Jersey. For the following reasons the petitioner's motion is **GRANTED.**

I

On or about February 27, 1996, the petitioner, through counsel, requested emergent relief by way of letter to the Commissioner of Education who on the following day, February 28, 1996,

transmitted the matter to the Office of Administrative Law for disposition. Oral argument, testimony, and Trenton's brief were submitted on March 4, 1996, at which time the record closed. I advised the parties that I would render a decision on the emergent relief issue as soon as possible.

II

The facts upon which I have relied for purposes of this motion are contained in the certification submitted by K.F. and the various moving papers and exhibits submitted by the parties.

The Marine Academy of Science and Technology, located at the tip of Sandy Hook in Monmouth County, New Jersey, is a 4-year secondary school with a high school curriculum designed to accommodate the needs of students interested in marine science technology. For the 1995-96 school year it has an enrollment of 233 students from 39 school districts from throughout Monmouth County and other counties in New Jersey (of the 233 full-time students, 20 are out-of-county). MAST has stringent admission requirements and a rigorous curriculum. In its 1995-96 school profile MAST indicates that "the Marine Academy of Science and Technology is opened to male and female students throughout the State of New Jersey. Daily transportation is provided by the resident districts." (at page 8). S.F. has demonstrated high grades at MAST, scoring into the mid-high 90s in several of his courses, and receiving comments indicating "outstanding performance" in these as well as "doing well" in a variety of his other courses. The guidance counselor of MAST in a letter directed to respondent, dated February 13, 1996, describes S.F. as:

> a bright young man who went through an extremely competitive application process. . . He has flourished here as evidenced by his academic record. In spite of having to deal with difficult and trying family issues, [S.F.] is well adjusted, focused and diligent. S.F. is a dedicated student who wants very much to continue his education here. To the best of my knowledge, [MAST] is the only public school in New Jersey that can offer him the specialized curriculum and it would be sad to deny him this opportunity. [Letter, Ann Marie Klecak, Guidance Counselor, MAST, February 13, 1996.]

Last year, when S.F. was a freshman at MAST, he and presumably his mother and father, resided in the Freehold School District, located in Monmouth County, and presumably Freehold undertook all the obligations imposed upon it to pay for S.F.'s attendance at MAST. S.F.'s parents are divorced and have joint custody of S.F. S.F. continued to live with his father in Freehold until January 14, 1996, when he was compelled to leave that residence because of parental abuse. He currently resides with his mother in Trenton, New Jersey, where on January 18, 1996 he was enrolled in the school district.[1]

In spite of informal efforts to have Trenton undertake the responsibility of transporting S.F. to MAST and back to his home, the district maintains it has no obligation to do so. That decision was apparently arrived as of January 22, 1996. As a consequence, and since that date, K.F. has undertaken the obligation to transport her son to MAST. She has done so by personally taking time off from her employment and has driven him part-way and then has paid someone to drive him the rest of the distance and return him to a location near Trenton where K.F. returns him home. Her certification and testimony were that the cost of transporting her son in this fashion has been $200 per week. As of March 1, 1996, K.F. indicated that she was no longer able to afford to pay for transportation and that as a consequence, her son would no longer be able to attend MAST after that date. She also indicates that the Freehold Board of Education terminated S.F.'s transportation to MAST effective January 18, 1996.

Petitioner now seeks an emergent decision ordering Trenton to undertake the responsibility of transportation to and from MAST for S.F. as well as being reimbursed for the money expended by K.F. from January 22, 1996 until she no longer was able to pay for those costs. The January 22 date is based upon the date that the transfer should have been effective following Freehold's termination of its obligation to transport S.F. It should also be noted that S.F. was in attendance at the hearing in full uniform. It is clear that he would have much preferred to be at MAST.

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[1] No issue was raised in this proceeding in respect to S.F.'s residency in the district.

III

The standards that must be met in order for an individual to qualify for emergent relief is not in dispute. Pursuant to well established case authority and rules governing emergent relief matters at OAL, *N.J.A.C.* 1:1-12.6, a moving party must establish the following in order to be granted emergent relief: (1) the applicant must demonstrate a reasonable probability of ultimately prevailing on the merits of the appeal; (2) the applicant must establish that irreparable and immediate harm will result should the motion be denied; (3) the applicant must demonstrate that the relief requested must be narrowly defined so as to not cause unreasonable expense and substantial inconvenience to the party opposing the motion.

Addressing the second prong of the emergent relief test, it is clear that the moving party has prevailed. K.F.'s testimony, affirmed by her son's presence in the courtroom, clearly demonstrates that she has exhausted her funds and effective March 1, 1996, S.F. has been deprived of the opportunity to continue to attend MAST and to continue to thrive and receive a thorough and efficient education. This is particularly disturbing given that he is performing so well, at a time when he is also suffering from the consequences of parental abuse. It is also clear that by Trenton's own admission, neither it nor presumably any other school district in the State of New Jersey can provide S.F. with the unique kind of educational experience offered at MAST and which S.F. so desperately wants. Clearly, he cannot make up the time that he has already missed in respect to attending class, everyday that goes by without his being in attendance, is a day lost. Accordingly, it is clear that the moving party has demonstrated that if the relief requested is denied, S.F. will continue to suffer immediate and irreparable harm.

In respect to the third issue, concerning the nature of the relief as being narrowly defined, in my judgment the movant simply has asked that Trenton undertake the obligation to transport S.F. to MAST and return him to his home in Trenton in as reasonably an efficient manner as possible. She is not in any way requesting anything special or anything more than other students deserve in respect to a right to be transported to a public school. Obviously, because of the unique circumstances of S.F., the cost of transporting him may very well be significantly higher

than the cost borne for any other student.[2] In any event, it is Trenton that is the repository of any knowledge required to fashion the remedy as cost-efficient as possible. The only requirement sought by K.F., presumably, is that transportation be safe, clean and reliable. Beyond that K.F. simply wants her son to get to class on time and to be returned safely to her home. Thus, in my judgment, the moving party has satisfied the third prong of the emergent relief test.

The final prong, often the most difficult to establish, is the case in this matter as well. In my judgment, however, K.F. has demonstrated a reasonable probability of ultimately prevailing on the merits in this matter. A review of the relevant statutes and the Commissioner's decision in *R.H. and E.H. v. Bd. of Educ. of the Freehold Reg. High Schl. Dist.*, 1985 *S.L.D.* 282, makes this apparent.

The legislation which established a Marine Academy of Science and Technology was enacted in 1982 and is codified at *N.J.S.A.* 18A:54C-1 to -7. The Act provides that

> [u]pon the request by a board of education of a regional school district ..., the State Board of Education is authorized to establish a Marine Academy of Science and Technology under the local area vocational-technical school for the purpose of providing education to students throughout the State of New Jersey in the fields of marine sciences, marine trades, marine technologies and related courses, as well as academic courses.
>
> [*N.J.S.A.* 18A:54C-1.]

The State of New Jersey currently has only one MAST which is located in Sandy Hook, Monmouth county. It operates "under the auspices" of the Monmouth County Vocational-Technical School (MCVTS). *N.J.S.A.* 18A:54C-4. The board of education of the MCVTS determines the admission policies of the MAST. *N.J.S.A.* 18A:54C-6. Pupils who attend the MAST must be provided transportation "by the district in which the pupil resides." *N.J.S.A.* 18A:54C-7.

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[2] A preliminary inquiry done by representatives of Trenton suggested to them that the cost of transporting S.F. could run as high as $27,000 annually. This is presumably based upon a bus or van hired exclusively to take him back-and-forth from MAST. The issue of course has not yet been carefully assessed.

Contrary to the Respondent's position in the present matter, it appears that the legislation requires all school districts to provide transportation for its students who attend a MAST. The plain language of *N.J.S.A.* 18A:54C-7, *supra,* makes no distinction between pupils who reside in the same county where a MAST has been established and those who live out-of-county.

The statewide nature of the MAST program was recognized by the Commissioner in *R.H. and E.H., supra,* in which he adopted the ALJ's conclusion that "the resident school board's authority over the attendance of a pupil accepted at MAST on a full-time basis has been preempted by statute and, thus, the residential board of education is without jurisdiction over the MAST program." *R.H. and E.H., supra,* 1985 *S.L.D.* at 295 (resident school board could not require its resident pupil to enroll in its local school program for the academic courses of study while also enrolled in and attending the MAST program for the marine sciences and technologies on a shared-time basis). The Commissioner emphasized the availability of the program to all New Jersey pupils in the reasons set forth for his adoption of the ALJ's decision.

> The enabling legislation enacted relative to the Marine Academy of Science and Technology (MAST) is clear and unambiguous in its intent to establish a full-time instructional program available to New Jersey pupils. Admission procedures and operation of the MAST program fall under the jurisdiction of the Monmouth County Vocational-Technical School. Hence, there is no statutory authorization in N.J.S.A. 18A:54C-1 et seq. granting local boards the power to establish their own admission/attendance policies for those pupils in their districts who desire to attend this unique educational program.
>
> A board policy which would serve to unilaterally restrict pupils' attendance merely to a shared-time program would contravene clear legislative intent to have a full-time program available to New Jersey's pupils. If such a policy were allowed to be enacted by the Freehold Regional High School Board of Education or other boards of education, it would unquestionably undermine the legislative intent and purpose for a full-time instructional program to be operated... A board policy which prevents access to the MAST program on a full-time basis would serve to deprive those pupils of a statutory entitlement created by N.J.S.A. 18A:54C-1 et seq. Therefore, it is determined that any policy of the Freehold Regional Board restricting a pupil's attendance in the MAST program to shared-time is hereby declared null and void.
>
> Petitioner's son was accepted for full-time attendance in the MAST program. Therefore, there can be no impediment raised by the Board which precludes his right to attend a full-time educational program established by

> legislation, irrespective of how cost effective the rationale may be from the Board's perspective.
>
> [*Id.* at 297-98.]

The Commissioner ordered that the Board be permanently restrained from restricting the pupil's attendance at MAST and that it provide transportation pursuant to *N.J.S.A.* 18A:54C-7. *Id.* at 298. This decision was affirmed by the State Board of Education. *Ibid.*

Even though *R.H. and E.H.* involved a school district located within the same county as the MAST, like the language of the MAST legislation nothing in the Commisioner's decision can be read to limit its application to within county school districts. The language of the decision clearly speaks to *all New Jersey pupils and school districts*. Respondent's determination that it is not obligated to provide transportation for S.F. to attend the MAST has no other effect but to "preclude his right to attend" this educational program established by legislation. Accordingly, that determination must be declared null and void.

In support of its position, Trenton relies to a great extent upon the 1990 amendment to *N.J.S.A.* 18A:54C-4, *L.*1990, *c.* 52, which transferred the assets of a MAST to the county vocational school board it operates under and directed that the costs for operating the program "be paid in the same manner as the costs are paid for other county vocational school programs pursuant ot the provisions of chpter 54 to Title 18A." *N.J.S.A.* 18A:54C-4. Citing a section in the referenced title, *N.J.S.A.* 18A:54-20.1, the Respondent concludes that the "intertwining" of the MAST and county vocational school statutes exempts out-of-county local school districts from the obligation to provide transportation for its students who attend the MAST.

Respondent's interpretation is not supported. The impetus for changing the manner in which costs are paid for operating a MAST was the Quality Education Act of 1990 (QEA), *N.J.S.A.* 18A:7D-1 to -37. *See, N.J.S.A.* 18A:54C-4; *N.J.S.A.* 18A:54-20.1; *Committee statement to Senate, No.* 272l, L.1990, c. 52, *N.J.S.A.* 18A:7D-1. The purpose of the QEA was to establish a new system for distributing state aid to the school districts. The 1990 amendment to the MAST legislation is more accurately characterized as housekeeping in that it was part of the Legislature's

effort to fit the many funding statutes in Title 18A within the new system established by the QEA. The amendment does not reduce a school district's obligations to a student who is accepted and attends a MAST.

As the Commissioner stated in *R.H. and E.H.*, the MAST is a unique educational program available to all New Jersey pupils. There is no language in that decision or the relevant statutes that would exempt a local school district from the requirements of the MAST legislation.

It is my view that the Legislature never anticipated the circumstances that are presented in this case, i.e., wherein a student seeks application to MAST who is located in a school district which is significantly off-shore and geographically far from MAST's location. Nevertheless, that the Legislature may have failed to anticipate such circumstance cannot and does not change the clear and express mandate of the statute. It is not the ALJ's job to rewrite the legislation; should the Legislature determine that the circumstances in this matter, which may very occur in other instances as well, were never intended to be embraced by the statute at issue, then it is left to it to amend the legislation to reflect its intentions.

It is also my judgment, as an aside, that it ostensibly seems to be an unfair burden to place upon a local school district, such as Trenton, to bear the costs of transporting a student to MAST - a school opened to those qualified and interested on a statewide basis - when the costs could reasonably be considered greater than tuition to a university for a full year. The consequence in my view, is an additional result of the Legislature failing to assume that a scenario such as the current one would occur. Perhaps those in authority should apprise the Legislature of these circumstance and perhaps the appropriate resolution would be to provide some additional or other sources of funding for transportation rather than placing the burden exclusively on a local school district which typically is already short of funds.

Nevertheless, it is clear that based upon the foregoing analysis, the moving party has demonstrated a reasonable likelihood of prevailing on the merits in these proceedings.

It is therefore **ORDERED** that the petitioner's application for emergent relief is **GRANTED.** Trenton shall forthwith provide an appropriate form of transportation for S.F from his home to MAST and back. It shall in addition reimburse K.F. for the cost borne by her in transporting S.F. from January 22, 1996 through to when she was no longer able to undertake that obligation. Counsel shall advise me when and if the emergent relief issue has been administratively finalized and I shall confer with them in respect to addressing these matters upon a full plenary basis.

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

3/06/96
DATE

STEVEN C. REBACK, ALJ

tmp
c: Dr. Leo Klagholz, Comm.

END

OAL DKT. NO. EDU 799-96

K.F. on behalf of her minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision on Motion for Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. Upon the Commissioner's receipt of the OAL decision, the parties were accorded until close of business Monday, March 11, 1996 to submit exceptions to the Administrative Law Judge's (ALJ) Order and until close of business on Tuesday, March 12, 1996 for the submission of reply exceptions. The Board's exceptions and petitioner's reply thereto were timely filed.*

Initially, the Board's exceptions provide a detailed recitation of the findings and conclusions of the ALJ. The Board then argues that inherent in the ALJ's determination was "an assumption that S.F. has a legal right to attend MAST." (Board's Exceptions at p. 3). The Board

* It is noted that petitioner requested an extension of time, beyond the Department's official close of business (4:15 P.M.), within which to file reply exceptions. Such extension was granted, with the clear understanding that the reply must be received on March 12,1996.

proffers that S.F. has no such "legal right" to attend an out-of-county vocational program. It asserts that neither the relevant statutes nor the decision relied on by the ALJ mandate "that all students throughout the State of New Jersey have an absolute, unqualified right to participate in a MAST program" (Id. at p. 3), nor does N.J.S.A 18A:54C-1 require that all local school districts provide its students with a MAST program. The Board, therefore, argues that absent a specific mandate requiring all districts to provide a MAST program, "a student in a district without such a program has no legal right under the school laws to participate." (Id. at p. 5).

The Board further advances that the ALJ's reliance upon R.H. and E.H. v. Board of Education of the Freehold Regional High School District, et. al., Monmouth County, 1985 S.L.D. 282 in reaching his determination was erroneous, as the facts in that matter are clearly distinguishable from those existing herein. "In R.H., the local district in which the student was enrolled, is located in the same county as MAST. Since in R.H. the student resided in the same county as the MAST program, there was a clear obligation to send him to MAST." (Id. at p. 6). The Board advances that R.H. does not stand for the proposition that all students in the State have a right to participate in such a program where their local district does not provide one.

Lastly, the Board argues that if districts are required to accommodate every non-special education student who wishes to participate in an out-of-county special program, the resultant financial implications for the district would be considerable. As such, it asserts that absent a clear mandate from the Legislature, the Board cannot be obligated to provide transportation or tuition for S.F.

In reply, petitioner maintains that the Board's interpretation of the legislative intent in creating the MAST program is without merit. She avers that the language of the relevant statute, N.J.S.A. 18A:54C-1, stating "the Marine Academy of Science & Technology is created under the local area vocational-technical school for the purpose of providing education to students throughout the state of New Jersey...(emphasis added), is clear on its face that upon acceptance to MAST a student from any county (has) a right to attend such program." (Petitioner's Exceptions at p. 2).

Petitioner further insists that, notwithstanding the Board's contentions to the contrary, the ALJ's decision does not stand for the proposition that all students who want to attend MAST have an "absolute" right to do so. Rather, it argues, a student must satisfy admissions standards and there must be an available place in the program for the student. "Therefore, only a student, like (S.F.), who has successfully competed for admission to MAST and is successfully meeting MAST's standards for continuing attendance, has the right to be transported there by his school district of residence, pursuant to N.J.S.A. 18A:54C-7." (Id. at p. 3). Petitioner additionally contends that the Board's argument with respect to the applicability of R.H. and E.H. v. Board of Education of the Freehold Regional High School District, supra., is specious in that the students' county of residence had no bearing whatsoever on the outcome of the case in R.H.

Finally, petitioner insists that arguments with respect to the cost of transporting S.F. are immaterial to this matter. She asserts that the relevant statute, N.J.S.A. 18A:54C-7, unambiguously requires that transportation for students attending MAST be provided by the

district where the student resides, and is not conditioned by geographic distance or the cost of such transportation.

Upon a careful and independent review of the record and the arguments advanced by the parties, the Commissioner concurs with the findings and conclusion of the ALJ granting emergent relief in this matter in that he determines that petitioner has satisfied the standards qualifying her for such relief including, for purposes of this motion, a facial showing of prevailing on the merits.

Accordingly, the Motion for Emergent Relief is granted for the reasons expressed by the ALJ and this matter shall duly proceed to a hearing on its merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 15, 1996
DATE OF MAILING MARCH 15, 1996

98-96

98-96 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
DEBORAH S. KALAPOS.	:	
_____	:	

March 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8574-95

AGENCY DKT. NO. DHP #60-95

DEBORAH S. KALAPOS,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Michael T. Barrett, Esq., for the petitioner (Bergman and Barrett, attorneys)

New State Department of Education, the respondent, appearing pursuant to N.J.S.A. 1:1-5.6(a)

Record Closed: December 20, 1995 Decided: February 5, 1996

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

This matter concerns the appeal of the petitioner, Deborah S. Kalapos, from her disqualification from school employment, pursuant to N.J.S.A. 18A:6-7.1 et seq., due to a criminal conviction for the possession of a controlled dangerous substance. The provisions of this statute are applicable to new employment after the effective date of the statute (1986).

By letter dated March 29, 1995, the Department of Education (Department) determined that the petitioner was disqualified from school employment, pursuant to N.J.S.A. 18A:6-7.1 et seq. (R-1u). The petitioner filed an appeal (R-1h), and on September 20, 1995, the Commissioner of Education (Commissioner) transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing took place on November 22, 1995, and after receipt of a brief from Michael T. Barrett, Esq., on behalf of the petitioner, the record closed on December 20, 1995.

FINDINGS OF FACT

I **FIND** the facts in this matter are not in dispute.

The petitioner is a certified and tenured hearing disability consultant employed by the Trenton Board of Education for about 25 year, and in that capacity she works as a child study team member. The petitioner has regular contact with students and their parents. Bruce W. Gunther, the Supervisor of Special Pupil Services and Child Study Teams, testified that he has supervised the petitioner for two years and has worked with her on a child study team for 15 years. Mr. Gunther stated that the petitioner has had excellent evaluations for her work performance with the Trenton School District and that if she is terminated, it will be a serious loss for the Trenton school system. According to Mr. Gunther, the petitioner is a team leader and is assigned to the more difficult cases because of her knowledge and ability. Mr. Gunther was aware that the petitioner had a problem in 1993 which could affect her employment and stated that there was no problems with her job performance during the 1993-94 school year. Also, Mr. Gunther felt that the petitioner's recognition of her alcohol dependency problem and her efforts to overcome the problem have helped her grow as a person and that the experience will help her to be a better person and employee. In his letter, Mr. Gunther states that the petitioner has not consumed alcohol since 1993 (R-1e).

According to the petitioner, she applied in 1994 for a part-time consulting position with a private firm in Monmouth Junction. To the best of her knowledge, this firm does not get any state aid. The firm required a criminal record check and the petitioner agreed to the check. According to the petitioner, the Trenton Board of Education has never done a criminal check as to its current long-term employees.

The criminal check requested by the private firm showed that the petitioner had been arrested for driving under the influence of alcohol and the possession of a controlled dangerous substance (methamphetamine) on February 18, 1993, and that she pled guilty to the offenses on June 23, 1993 (R-1x). She was ordered to pay fines and costs, sentenced to 30 days in jail and ordered to attend a 12-week Pennsylvania alcohol program. The jail sentence was converted to 15 weekends of home arrest and 30 days of community service, which the petitioner has completed. She also was required to meet with a probation officer once a month until August 1994. By letter dated April 12, 1995, Leo F. McDonald, Jr., a probation officer in Hunterdon County, whose office undertook the supervisor of the petitioner for Pennsylvania, states that the petitioner has completed her probationary period and that he saw no reason why "Ms. Kalapos should be barred from future employment." (R-1j). Robert D. Pollack, a Pennsylvania probation officer, by letter dated April 11, 1995, confirmed that the petitioner has completed her probationary period (R-1w). James S. Carpenter, by certified letter dated April 20, 1995, states that the petitioner competed the 30 days of community service (R-1l). Also, the petitioner attended a alcohol rehabilitation program at Princeton House. By letter dated April 11, 1995, Thomas W. Perrin, indicates that the petitioner had received treatment from him for alcohol abuse after she attended the Princeton House program (R-1d). She now regularly attends Alcoholics Anonymous (AA) meetings.

At the time of her arrest in 1993, the petitioner was 45 years old and she had an alcohol abuse problem, and the drunk driving offense was her second such violation. The petitioner stated that she no longer drinks any alcoholic beverages. As to the drug offense, the petitioner admitted she had an empty baggie which had contained an illegal drug in her possession at the time of the arrest. She denied being a drug user, and stated that she had gotten the baggie and used the drug to help keep her awake when she drove her daughter to college in Colorado.

According to the petitioner, this trip took place in 1992 and she forgot to throw away the baggie. The petitioner stated that the baggie only had a trace of drugs in it.

The petitioner thought she had only pled guilty to the drunk driving offense and that the drug charge was dismissed because there was only a drug residue in the baggie. She admitted that she was wrong since the documents clearly establish that she pled guilty to both charges.

By letter dated March 29, 1995, the Department notified the petitioner that its check had revealed a criminal record and it gave the petitioner thirty days in which to challenge the accuracy of the criminal record (drug offense conviction) or to establish rehabilitation. The Department also notified the Trenton School District about the drug offense conviction (R-1v). The petitioner did not dispute the accuracy of the criminal record but argued that she was rehabilitated. In addition, the petitioner requested the Trenton Board of Education to stay any action it might take pending a decision in this matter. The Board agreed to the stay.

The petitioner submitted a number of letters in support of her representation of rehabilitation. A certified letter from Nettie Robinson-Logan, dated April 11, 1995, stating that she works with the petitioner, is aware of her 1993 arrest and that the petitioner has not had any alcohol beverages since the arrest (R-1m). Certified letters from Evelyn J. Jackson-Allen and Nancy J. Knight, who are friends and co-workers, stating that the petitioner is an excellent employee of the Trenton School District (R-1n, R-1r). A certified letter from John T. Guadagno, dated April 19, 1995, stating that as a friend he is aware of the 1993 arrest and that the petitioner should not be punished by losing her job for making one mistake in 1993 (R-1o). Certified letters from Cheryl D. Whiting, June A. O'Hare and Bill Luciana, attesting to the petitioner's good character (R-1p, R-1q and R-1s).

CONCLUSIONS OF LAW

On behalf of the petitioner, Mr. Barrett stated that the petitioner has an excellent employment record with the Trenton School District, that the 1993 incident was her only drug conviction, and that she has completed the sentence for the 1993 violation. Mr. Barrett argued

that the petitioner is not a drug user but has admitted that she was an alcohol abuser, and that the petitioner continues to seek help for her alcohol problem.

Pursuant to N.J.S.A. 18A:6-7.1(e), a person with a criminal record will not be disqualified from school employment if said person shows clear and convincing evidence of his or her rehabilitation. This section sets forth a number of factors to be considered in determining whether the person had affirmatively demonstrated rehabilitation. These factors are:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

Having reviewed the testimony and the documents admitted into evidence, I **CONCLUDE** that the petitioner has affirmatively demonstrated rehabilitation.

The petitioner was a mature person who was arrested for drug possession in 1993 and she admitted she used the drug the previous year while driving. According to the petitioner, it was the only time she used an illegal drug and there is no evidence to dispute her statement. The petitioner has completed the sentence imposed on her for the 1993 offense. Although a drug conviction is a serious violation, it was an isolated offense and it occurred a few years ago.

A substantial part of the record does not deal with the drug offense, which constitutes the statutory disqualification, but rather with the petitioner's recognition after her 1993 arrest that she had an alcohol abuse problem and with her ongoing efforts to stop drinking alcohol. The petitioner has competed a alcohol abuse program and she is attending AA meetings, and she no longer drinks alcohol.

The petitioner holds a position with the Trenton School District and applied for an additional position relating to education, and both of these positions would place her in regular contact with students and their parents. It is obviously important that a person in such positions not be involved with drugs. In this case, the petitioner's drug use occurred outside the school environment, was an isolated incident, and there is no indication that she used drugs or for that matter was under the influence of alcohol while working. Under these circumstances, I **CONCLUDE** that the petitioner should not be disqualified from any new school employment. As to her current position with the Trenton School District, the provisions of N.J.S.A. 18A:6-7.1 et seq. are not applicable; however, the District was notified of the petitioner's conviction and it will have to decide whether to initiate tenure or other disciplinary proceeding.

Therefore, I **ORDER** that the petitioner not be disqualified from school employment, pursuant to N.J.S.A. 18A:6-7.1 et seq.

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

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

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

February 5, 1996
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

2/16/96
DATE

D. N. Contaxis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 09 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent

R-1a Letter from Michael T. Barrett to Hope R. Blackburn, dated June 12, 1995

R-1b Letter from Hope R. Blackburn to Michael T. Barrett, dated June 7, 1995

R-1c Letter from Michael T. Barrett to Department of Education

R-1d Letter from Thomas W. Perrin, dated April 11, 1995

R-1e Letter from Bruce Gunther, dated April 20, 1995, with attachments

R-1f Letter from Carl H. Carabelli to Hope Blackburn, dated April 27, 1995

R-1g Letter from Michael T. Barrett, dated April 21, 1995

R-1h Verified Petition of Appeal signed by Michael T. Barrett and Deborah S. Kalapos

R-1i Letter from Deborah S. Kalapos to Carl H. Carabelli, dated April 14, 1995

R-1j Certified letter from Leo F. McDonald, dated April 12, 1995

R-1k Certified letter from Robert D. Pollack, dated April 11, 1995

R-1l Certified letter from James S. Carpenter

R-1m Certified letter from Nettie Robinson-Logan, dated April 11, 1995

R-1n Certified letter from Evelyn J. Jackson-Allen, dated April 11, 1995

R-1o Certified letter from John T. Guadagno, dated April 19, 1995

R-1p Certified letter from Cheryl D. Whiting, dated April 13, 1995

R-1q Certified letter from June A. O'Hare, dated April 19, 1995

R-1r Certified letter from Nancy J. Knight, dated April 17, 1995

R-1s Certified letter from Bill Luciana, dated April 15, 1995

R-1t Letter from Michael T. Barrett to Carl H. Carabelli, dated April 12, 1995

R-1u Letter from Carl H. Carabelli to Deborah S. Kalapos, dated March 29, 1995

R-1v Letter from Carl H. Carabelli to Dr. Bernice Venable, dated March 29, 1995

R-1w Letter from Carl J. Carabelli to Bucks County District Attorney, dated April 3, 1995

R-1x Information regarding criminal record of Deborah Kalapos

R-1y Applicant Authorization and Certification for criminal history review, signed by Deborah S. Kalapos, on November 28, 1994

WITNESSES:

For the Petitioner:

Deborah S. Kalapos
Bruce W. Gunther

For the Respondent:

None

OAL DKT. NO. EDU 8574

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
DEBORAH S. KALAPOS.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that the within petitioner has demonstrated rehabilitation, in accordance with N.J.S.A. 18A:6-7.1, from the specific disqualifying offense of possession of a controlled dangerous substance and is, therefore, qualified for school employment within the intent of the criminal history record check laws.*

Accordingly, the initial decision of the OAL is adopted for the reasons articulated therein, and petitioner is deemed qualified for school employment.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* In so ruling, the Commissioner notes his specific concurrence with the ALJ's determination that other matters alluded to herein, as well as petitioner's present employment, do not fall within the purview of the Criminal History Disqualification Laws.

March 19, 1996
Date of Mailing, March 20, 1996

104-96

104-96

JANINE BARNA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, teacher who was assaulted by 7th grade student, alleged Board acted improperly in not holding an expulsion hearing following the assault.

ALJ concluded the Board acted properly when it canceled the pending expulsion hearing. Board was following regulations, then in effect, that before an expulsion hearing could be held, the child study team had to conduct an evaluation of the noneducationally disabled pupil. (N.J.A.C. 6:28-2.8(g)) Since the pupil's behavior was determined to be caused by the pupil's educational disability, the District was prevented by regulation from disciplining the pupil. Petition was dismissed for failure to state a claim for which relief may be granted.

Commissioner adopted findings and determination in initial decision as his own.

March 18, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 2073-95
AGENCY DKT. NO. 10-1/95

JANINE BARNA,

Petitioner,

v.

IRVINGTON BOARD OF EDUCATION,

Respondents.

Janine Barna, *pro se*

Joseph R. Morano, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: January 29, 1996 Decided: January 29, 1996

This is a transcript of the administrative law judge's oral decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE: KEN R. SPRINGER, ALJ:

Statement of the Case

This is a claim by a teacher who challenges the failure of a local board of education to hold an expulsion proceeding for a student who assaulted her at an elementary school. The narrow issue is whether the Irvington School Board's failure to conduct an expulsion proceeding violated *N.J.S.A.* 18A:37-2.1 or, in the alternative, whether the Board fully complied with the applicable procedures for a child study team evaluation of disruptive students prior to any expulsion proceeding. *N.J.A.C.* 6:28-2.8

Procedural History

Presently this matter comes before the Office of Administrative Law ("OAL") on respondent's motion to dismiss the petition on the following three grounds: (1) failure to state a claim on which relief can be granted; (2) mootness; or (3) lack of standing. On December 13, 1995, respondent filed a notice of motion for dismissal, together with a supporting certification and legal brief. Subsequently, on December 28, 1995, respondent submitted a certification by a school principal with personal knowledge of the facts. Petitioner has not filed any papers opposing the motion. The OAL held oral argument on January 29, 1996. For the reasons which follow, respondent's motion to dismiss must be granted.

Findings of Fact

All of the relevant facts are undisputed and set forth in the certification of James Washington, principal of Chancellor Avenue School. I **FIND** the following facts:

1. On or about November 30, 1994 A.M., a thirteen-year-old student attending the Chancellor Avenue School of the Irvington School District, was involved a physical assault against Ms. Barna, who is an art teacher employed by the Board at the Chancellor Avenue School.

2. As the result of that incident, on or about December 9, 1994 Mr. Washington immediately suspended A.M. from school.

3. Mr. Washington also recommended to the Board that A.M. be expelled or permanently removed from the Irvington School District in accordance with *N.J.S.A.* 18A:37-1 *et seq.* and *N.J.S.A.* 18A:37-2.1.

4. As a result of his recommendation, an expulsion hearing was scheduled for December 21, 1994.

5. Simultaneously, and in accordance with *N.J.A.C.* 6:28-2.8, Mr. Washington referred the matter to the district child study team for an evaluation of A.M. to determine if her behavior was a manifestation of her disability.

6. Thereafter, on or about December 15, 1994, before the expulsion hearing was to be held, Mr. Washington was notified by the child study team that it had determined that A.M. should be classified as emotionally disturbed and that her behavior on November 30, 1994 was a manifestation of her handicap.

7. Accordingly, Mr. Washington was also advised that the Board through the superintendent had determined to terminate expulsion proceedings based on the fact that the Board was legally prohibited from expelling the pupil pursuant to *N.J.A.C.* 6:28-2.8, *et seq.*

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Irvington Board of Education acted properly when it cancelled the pending expulsion hearing.

Petitioner relies on *N.J.S.A.* 18A:37-2.1 which provides, in pertinent part:

> Any pupil who commit an assault . . . upon a teacher . . . acting in the performance of his duties and in a situation where his authority to so act is apparent . . . shall be immediately suspended from school *consistent with procedural due process* pending expulsion proceedings before the local board of education. Said proceedings shall take place no later than 21 calendar days following the day on which the pupil is suspended. (Emphasis added).

This statute must be read together with the procedural requirements set forth by federal law and state regulation. In particular, *N.J.A.C.* 6:28-2.8(g) provides, "Before a noneducationally disabled pupil can be considered for expulsion by a district board of education, the district board of education shall obtain consent from the parent or adult pupil for evaluation and the child study team shall conduct an initial evaluation according to *N.J.A.C.* 6;28-3.4 to determine eligibility."

Here the record clearly shows that before an expulsion hearing could be held, the principal referred the student to the child study team for an initial evaluation. At the time of the incident, the student was not classified as eligible for special education services. However, the child study team determined that A.M. should be classified as emotionally disturbed and issued an opinion that her behavior at the time of the incident "was primarily caused by her educational classification disability." *N.J.A.C.* 6:28-2.8(d) further mandates that "if the pupil's behavior is determined to be primarily caused by the pupil's educational disability, the district may not discipline the pupil." Of course this does not mean that the child is immune from consequences as a result of her misbehavior. The district may obtain the consent of the parent for a change of placement and, in the event that the parent refuses to consent, the district may request a due process hearing to change the child's placement. Such state regulations are consistent with the prevailing federal case law that a disruptive handicapped child may not be disciplined for conduct which is a manifestation of the child's handicapping condition. *Honig v. Doe*, 484 *U.S.* 305, 108 *S.Ct.* 592, 98 *L.Ed.*2d 686 (1988); *S-1 v. Turlington,* 635 *F.* 2d 342 (5th Cir. 1981), *cert. den.* 454 *U.S.* 1030 (1981). *See also,*

Sch. Bd. of Prince William Cty. v. Malone, 762 *F.* 2d. 1210 (4th Cir. 1985); *Kaelin v. Grubbs,* 682 *F.* 2d 595 (6th Cir. 1982); *Doe v. Koger*, 480 *F. Supp.* 225 (N.D.Ind. 1979).

It should be noted that the Commissioner of Education recently expressed concern about inflexibility in dealing with the disruptive conduct of pupils and has proposed amending the rules to eliminate the requirement of conducting a child study team evaluation of every nondisabled pupil prior to expulsion proceedings. 27 *N.J.R.* 3263 (Sept. 5, 1995). But this suggested revision is only a proposal and does not change the law as it existed at the time of the Board's action.[1] When the Board decided not to proceed with the expulsion proceeding, it was merely complying with the dictate of *N.J.A.C.* 6:28-2.8(g) that a child study team evaluation must occur "before a noneducationally disabled pupil can be considered for expulsion." Consequently, the Board had no choice in this matter but to follow the current binding regulations.

In light of this ruling, it is unnecessary to address the alternate grounds for dismissal raised by respondent, namely mootness and lack of standing.

Order

It is **ORDERED** that respondent's motion to dismiss the petition for failure to state a claim for which relief may be granted is hereby granted.

[1] After delivery of the oral decision, it was learned that the Commissioner had indeed adopted an amendment eliminating the requirement to evaluate every nonclassified pupil prior to initiating expulsion proceedings. However, the new rule only took effect on December 4, 1995 and, therefore, does not apply to a prior incident which occurred on November 30, 1994. 27 *N.J.R.* 4887(a) (Dec. 24, 1955).

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

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

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

END OF TRANSCRIPT

I Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Ken R. Springer's oral decision (as edited by the administrative law judge for form but not substance), rendered in the above matter on January 29, 1996.

DATED JAN 30 1996

Anna M. Leggett

ANNA M. LEGGETT, SECRETARY

Receipt Acknowledged:

2/1/96

DATE

DNA

DEPARTMENT OF EDUCATION

FEB 5 1996

DATE

Mailed to Parties:
Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 2073-95

JANINE BARNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, *inter alia*, that the Board should have held an expulsion hearing following an assault by a student upon petitioner pursuant to N.J.S.A. 18A: 37-2.1. Petitioner further excepts to the ALJ's decision in that she was denied discovery documents that would have demonstrated that the above-cited laws "***and N.J.A.C. 6:28-2.8 were bent, side-stepped and interpreted in a way that would create the illusion of [the Board's] following the proper procedures." (Petitioner's Exceptions at p. 1) Additionally, petitioner

contends that she has stated a claim upon which relief should be granted in that she was seeking Board compliance with N.J.S.A. 18A:37-2.1. (Petitioner's Exceptions at p. 3)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the Board acted pursuant to law and applicable regulation in effect at the time of its actions* in determining not to proceed with an expulsion proceeding after conducting a child study evaluation of the pupil in question and determining that she was emotionally disturbed and that her behavior at the time of the incident was primarily caused by her educational classification disability, thus, insulating her from discipline.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law recommending that the instant Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 18, 1996
Date of Mailing, March 18, 1996

* See discussion, ante and Footnote 1, ante.

105-96

105-96

IN THE MATTER OF THE TENURE :

HEARING OF JOSE JIMENEZ, COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL : DECISION

DISTRICT OF THE CITY OF

PATERSON, PASSAIC COUNTY. :

SYNOPSIS

Board certified tenure charges of neglect of duty, insubordination and attendance-related incidents against respondent custodian.

In light of a series of incidents that established respondent's pattern of unsatisfactory job performance and inappropriate behavior, ALJ concluded that tenure charges were proven and warranted respondent's termination from employment.

Commissioner adopted findings and determination in initial decision as his own and directed respondent's dismissal from employment as of date of this decision.

March 18, 1996

Within a few short months of Jimenez's hiring, he started to receive oral warnings from Manuel Artero, the Chief Custodian. Chief Artero was Mr. Jimenez's supervisor and had been working at School No. 15 for approximately 15 years. On December 8, 1989, Chief Artero authored a memo to Jimenez in which he advised him that he would pursue further action if Jimenez continued to neglect his work. (See P-16). On March 23, 1990, another memo from Chief Artero to Jimenez once again pointed out that his job performance was unsatisfactory and in need of immediate improvement. (See P-18).

Jimenez was evaluated on January 23, 1991 by the principal of School No. 15, Glenn J. Lagatol. The evaluation was completely unsatisfactory and Principal Lagatol recommended that Jimenez be terminated. (See P-19). The next evaluation by Lagatol on March 23, 199l, reflected some improvement on the part of Jimenez but still only rated him as a "marginal employee. (See R-1).

On June 14, 1991, Chief Artero sent a memorandum to Louis Milone, Supervisor of Operational Maintenance, indicating that Jimenez's performance had shown no improvement and that complaints from administrators and teachers had been received concerning areas that had not been properly cleaned. Chief Artero recommended that Jimenez be transferred out of School No. 15. (See P-20).

A memo from Erving Ruiz, Supervisor of Custodians, authored on September 30, 1991 to Mr. Milone, concerning Jimenez, indicated that Mr. Ruiz spoke to Jimenez regarding the complaint emanating from School No. 15 and warned Jimenez that if performance did not improve "some form of corrective action would [sic] be taken." (See P-24).

Mr. Milone responded to Mr. Ruiz's memo by notifying Jimenez on October 1, 1991 that his job performance and lack of cooperation had resulted in Mr. Milone placing Jimenez on a 60-day notice, which meant that during that time his performance and attitude must improve. Jimenez had to be further advised that if no improvement occurred, termination would be sought. (See P-25).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1240-95
Agency # 2-1/95

JOSE JIMENEZ,

Petitioner,

v.

NEW JERSEY STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Gregory T. Syrek. Esq., represented petitioner
(Bucceri & Pincus, attorneys)

Gregory G. Johnson, Esq., represented respondent

Record Closed: December 18, 1995 Decided: January 23, 1996

BEFORE **JEFFREY A. GERSON**, ALJ

STATEMENT OF CASE

This matter involves tenure charges filed against Jose Jimenez, custodian for the Paterson Public Schools. Jimenez is charged with neglect of duty, insubordination, and attendance related charges.

BACKGROUND

Jose Jimenez was hired by the Paterson Public Schools on May 10, 1989, and was assigned to be one of the custodians at Public School No. 15.

Despite these rather clear and ominous warnings, Jimenez once again was warned in writing on November 25, 1991 by Chief Artero concerning his failure to properly perform his duties. (See P-22).

On January 14, 1992 Chief Artero, upon receiving more complaints from administrators and teachers at School No. 15, sent a memo to Jimenez once again delineating the complaints of shortcomings and overtly warning Jimenez that the content of the memo required immediate improvement or Jimenez's termination would be requested.

One week later on January 21, 1992, Principal Lagatol wrote to Dr. Emmajean Stepherson, Assistant Superintendent of Schools, requesting Jimenez's termination. Lagatol's letter indicate "all efforts have been expended over the last two years to provide the resources and direction fro Jimenez's improvement with his job responsibilities. As of this date, his performance is seriously inadequate and termination is highly recommended". (See P-27). Principal Lagatol's request to Dr. Stepherson was quickly followed by a memo to Jimenez on January 22, 1992, advising him that his termination had been requested as a result of his inadequate performance. (See P-28).

Despite the serious warnings that Jimenez received from Artero, Lagatol and Milone, very little, if any, improvement was noted. Surprisingly, all of these rather seriously critical evaluations and memos did not result in Jimenez's termination, but rather his transfer out of School No. 15 to Rosa Parks High School. Clearly, this transfer was a last ditch effort to give Jimenez an opportunity to prove he could perform at an acceptable level.

Less than one month after the transfer, Jimenez was evaluated by the principal of Rosa Parks High School, T. K. Wells. The evaluation was less than satisfactory and indicates that Jimenez "has been counseled to carry his share of the workload . . ." and "has been encouraged to become a team player". (See P-2). Jimenez was evaluated again by Keith Andrews, Supervising Custodian at Rosa Parks High School on March 22, 1993. The face of the evaluation (see P-3) could not be construed as a satisfactory evaluation. Exhibits P-4 and P-5, Custodian Evaluation Forms, for March 1993 and School year 93-94, though acceptable for the most part, still depict areas of performance that are less than satisfactory.

Jimenez's job performance from the time of his hiring until September 1994 was established by a preponderance of the evidence to be less than satisfactory. There could well have been a very strong tenure case established against Jimenez prior to his transfer to Rosa Parks High School. Despite the thin ice on which Jimenez must have known he was traveling, his job performance at Rosa Parks High School did not improve and on September 23, 1994, an incident occurred at the school which resulted in Jiminez leaving the building unattended and failing to take rudimentary steps in response to what he perceived as an emergency situation.

On September 23, 1994, Jimenez and Ronald Bridges, a fellow custodian were working the 3 to 11 p.m. shift at the high school. While Bridges was on a break, Jimenez noticed a cracked or broken window in a door and became concerned that illicit activity may be taking place. He inexplicably left the building to drive to his supervisor's house to report the incident. He did not try to telephone his supervisors for he said he did not have their phone numbers. He did not try to call the police because he did not know that phone number either. When questioned as to why he did not simply dial "911" he responded that he had no knowledge of that number. Only two conclusions can be reached from the statement of Jimenez that he had no knowledge of the "911" number: the first is that he is so completely out of touch with the every day world that he could not possibly respond adequately to any situation which would require some common sense or secondly, that he is not telling the truth. I choose the latter, and find as a matter of fact, that Jimenez's testimony was incredible and not truthful.

Considering both Jimenez's long history of unsatisfactory, or at best, marginal performance, and, his complete and utter failure to respond appropriately to the situation that arose on September 23, 1994, termination based on insubordination, and, though not so characterized by the District, incompetence, is warranted

The last charge against Jimenez was that he failed to call in his intended absences from work on several occasions between July 1992 and October 1994.

The policy in the Paterson School District was for a custodian to call his chief custodian and/or the supervisor of custodians to report his intended absence. The call was required to be made 45 minutes prior to the start of the shift from which the absence was about to occur.

Joseph Vacca, Supervisor of Custodians for Rosa Parks High School testified that he had warned Jimenez several times about not calling in his intended absences. Mr. Vacca testified that on at least three occasions, Jimenez did not call in and he was warned.

Donna Doling, school secretary, maintained the records for the custodians and teachers. She would be notified by Chief Andrews whether or not an absent custodian called in. This notification usually took place at the end of the day. According to Ms. Doling's records, she personally made entries indicating that on September 20, 1993 and May 19, 1994, Jimenez failed to call in.

The critical aspect of the charge against Jimenez of failing to call in his absences revolve around the dates October 3, 5, 6, 7 of 1994. Principal Lyde testified that on October 3, 1994 when Jimenez failed to call in, she wrote him a letter quoting the custodial and maintenance association contract with the school district and indicating that Jimenez was to be suspended two days. On October 4, 1994, Principal Lyde handed the letter of October 3, 1994 (P-10) to Jimenez and asked why he did not call in. Ms. Lyde indicated that Jimenez admitted that he knew that he did not call in.

On October 5, 1994, only one day later, Jimenez was absent again and Principal Lyde once again wrote a letter dated October 5, 1994 suspending Jimenez for three days because he failed to follow established policy and procedures.

On October 7, Jimenez was absent again and this time the letter authored on that date from Principal Lyde indicated that his salary increment for the year was under consideration to be withheld.

On his return to work on October 11, 1994, Jimenez brought with him two doctor's notes indicating the reason for his absences.

Jimenez contended that his wife had made the required calls on his behalf because of his difficulty with speaking the English language. Though a call was made on October 3, I find as a matter of fact that there were no calls made for the other dates for which Jimenez was absent during the course of that week.

ORDER

It is **ORDERED** that Jose Jimenez's employment be terminated, as a custodian for Paterson Public Schools.

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

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

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

1/23/96
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

1/31/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 31 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

/g

ADDENDUM

Exhibits:

P-1 Memo by T.K. Wells, dated September 16, 1992
P-1 Evaluation b Principal Wells, dated March 6, 1992
P-3 Evaluation by Chief Andrews, dated March 22, 1993
P-4 Evaluation by Andrews/Wells, dated March 25, 1993
P-5 Evaluation by Andrews/Wells, dated March 25, 1994
P-6 Memo by Chief Andrews, dated September 23, 1994
P-7 Memo by Principal Lyde, dated September 26, 1994
P-8 Memo by Principal Lyde, dated September 27, 1994
P-9 Letter to respondent, dated October 3, 1994
P10 Letter from Principal Lyde, dated October 3, 1994
P-11 Letter from Principal Lyde, dated October 5, 1994
P-12 Letter from Principal Lyde, dated October 7, 1994
P-13 Letter from Principal Lyde, dated October 11, 1994
P-15 Absence Record
P-15a Absence Record
P-16 Memo to respondent from Chief Artero, dated December 8, 1989
P-17 Evaluation by Principal Lagatol, dated February 14, 1990
P-18 Memo to respondent by Chief Artero, dated March 23, 1990
P-19 Evaluation by Principal Lagatol, dated January 23, 1990
P-20 Memo by Chief Artero, dated June 14, 1991
P-21 Memo by Vice Principal Garibell, dated June 20, 1991
P-22 Memo by Chief Artero, dated June 14, 1991
P-23 Evaluation by Principal Lagatol, dated September 30, 1991
P-24 Memo by Supervisor Erving Ruiz, dated September 30, 1991
P-25 Memo by Supervisor Milone, dated October 1, 1991
P-26 Memo by Chief Artero, dated January 14, 1992
P-27 Letter to Dr. Stepherson, dated January 21, 1992
P-28 Memo by Vice Principal Garibell, dated January 22, 1992
P-29 Evaluation by Chief Artero, dated March 28, 1995
P-30 Evaluation by Chief Artero, dated October 29, 1991
P-31 Letter to Milone, dated September 16, 1992

R-1 Evaluation by principal Lagatol, dated March 23, 1991

R-2 Evaluation by Vice Principal Ruiz, dated October 29, 1991

R-3 Evaluation by Vice Principal Ruiz, dated January 6, 1992

R-4 Letter by Jiminez, dated September 25, 1991

R-5 Letter to union president Corlese, dated January 16, 1991

R-6 Letter by Jiminez, dated September 26, 1994

OAL DKT. NO. EDU 1240-95

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSE JIMENEZ,		COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF		
PATERSON, PASSAIC COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ) in post-hearing briefs, again contending, inter alia, that the Board did not sufficiently prove tenure charges and that the charges, if credited, do not warrant termination in the instant case.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the Board has proved its charges of insubordination, neglect of duty and attendance-related incidents against respondent.[1] Further, the Commissioner concurs with the ALJ that the tenure charges, as proven, based on a series of incidents which establish respondent's pattern of unsatisfactory, or at best, marginal job performance, *and* inappropriate behavior, are sufficient to warrant his termination from employment, pursuant to N.J.S.A. 18A:6-10 and 11.

[1] The Commissioner finds that notwithstanding the ALJ's characterization that the Board made a showing of respondent's incompetence, the Commissioner does not so conclude in that the Board did not frame its charges in this manner.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and hereby orders that respondent be dismissed from his position as tenured custodian as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 18, 1996
Date of Mailing, March 18, 1996

105-96

EDU #1240-95
C # 105-96
SB # 29-96

IN THE MATTER OF THE TENURE :

HEARING OF JOSE JIMENEZ, STATE- : STATE BOARD OF EDUCATION

OPERATED SCHOOL DISTRICT OF THE : DECISION

CITY OF PATERSON, PASSAIC COUNTY.:

Decided by the Commissioner of Education, March 18, 1996

For the Petitioner-Respondent, Gregory G. Johnson, Esq.

For the Respondent-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

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

September 4, 1996

Date of mailing SEP 06 1996

106-96

106-96 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
RODERICK PRUDEN.	:	
_____	:	

March 18, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10834-95

AGENCY DKT. NO. DHP #125-95

RODERICK PRUDEN,

Petitioner,

v.

NEW JERSEY STATE

DEPARTMENT OF EDUCATION,

Respondent.

Roderick Pruden, petitioner, pro se

Respondent, appearing pursuant to *N.J.A.C.* 1:1-5.6(a)

Record Closed: January 19, 1996 Decided: January 30, 1996

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 21, 1995, the Department of Education transmitted to above appeal to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The Department concluded that the Commissioner of Education had an insufficient record to render a determination as to whether the petitioner, Roderick A. Pruden,

was rehabilitated pursuant to *N.J.S.A.* 18A:6-7.1(e), following his conviction of crimes such that he would no longer be disqualified from school employment. The matter was heard at the Office of Administrative Law, Mercerville, New Jersey on January 19, 1996, at which time testimony was elicited and additional documents separate from the file which was transmitted to the OAL were presented by Mr. Pruden.

ISSUE AND BURDEN OF PROOF

The sole issue to be determined in these proceedings is whether pursuant to *N.J.S.A.* 18:6-7.1(e) the petitioner can demonstrate that he should not be disqualified from school employment on the basis of his criminal record in that he may demonstrate that he has been rehabilitated. In respect to this issue, the burden rests exclusively on the petitioner: Mr. Pruden must affirmatively demonstrate by clear and convincing evidence that he has been rehabilitated.

THE FACTS

I FIND:

On August 29, 1995, Mr. Pruden completed an application for authorization and certification of his criminal record as an incident to his seeking employment as a custodian with the Atlantic City School system. Indeed, Mr. Pruden commenced employment with Atlantic City for approximately 1 month. Thereafter, the latter was constrained to terminate his employment as a result of a criminal investigation which determined Mr. Pruden's prior criminal record. Based upon the testimony of Mr. Pruden and a review of the case file, the following is a summary of the petitioner's criminal convictions.

On November 7, 1981, the petitioner was found guilty of possession of a controlled dangerous substance, marijuana, and sentenced to a conditional discharge. On August 3, 1985, Pruden was found guilty of criminal sale of marijuana as well as its possession and was sentenced to 30-days confinement. On June 1, 1990, Pruden was again found guilty of possession of marijuana, and was sentenced to 45-days confinement and 18-months probation. The most serious conviction, and presumably the one upon which the question of rehabilitation and

qualification for school employment emanates, is the conviction of Mr. Pruden on October 2, 1992 for felony possession of cocaine. For this conviction he was sentenced to 3-years confinement, 12-months suspension of his drivers license and an $1100 fine. Pursuant to a letter submitted by his parole officer dated October 19, 1995, which was entirely consistent with Mr. Pruden's testimony, the latter was released on parole after serving approximately 8-months of the 3-year sentence. During his parole Pruden, accordingly to his senior parole officer, showed no signs of drug use or criminal activity and reached his adjusted maximum of November 18, 1994 without incident. Because however, Pruden was unable to satisfy the fine which was imposed upon him, which at the time of the writing of the letter had reached $1,850, his file remained open with the year of parole until the obligation was fulfilled. Significantly, the parole officer notes "it is the opinion of this writer that stable employment will not only insure fulfillment of Mr. Pruden's revenue obligation, but greatly enhances his changes [sic] for a complete reintegration." Letter Herman Rinaldi, Senior Parole Officer, to "To Whom It May Concern," October 19, 1995.

Various documents provided by the petitioner demonstrates that since his release from prison all of his actions and inter-action both on a social and on a work-related basis were positive and productive. Bernard Reynolds is the head coach for the Central Junior High School football team in Atlantic City. Reynolds, in an October 21, 1995 memorandum, indicates that Pruden has been a volunteer assistant basketball and football coach with the high school for the past 3 years. Reynolds describes Pruden as having excellent communicative skills and as possessing expertise as a coach. Further, he was described as being honest, dependable, and conscientious, earning the respect of players by showing concern for them and by demonstrating leadership abilities.

By letter of October 20, 1995, William C. Steele, the principal of Atlantic City High School also sends a recommendation letter on petitioner's behalf. The principal had consulted with the facility manager and the second shift supervisor of the schools, presumably those individuals for whom Mr. Pruden worked as a custodian for the brief period of time of his employment. Following those conversations, the principal indicates that he is "not in the least bit reluctant to recommend him for a position of employment with the Atlantic City Board of Education." The principal found Mr. Pruden to be a man of few words who goes about doing his work in a methodical manner. Steele apparently was fully aware of Pruden's criminal history and notes at the conclusion of his memorandum that these "incidents have in no way deterred his work

ethics." Another letter is submitted by a Vincent Dozier, dated October 20, 1995. Dozier does not identify himself in the letter but he must be officially connected to Atlantic City High School. he indicates that he has known Pruden for about a year and that the latter has demonstrated exemplary character qualities such as responsibility and dependability. Dozier has found Pruden to be a concerned and helpful person who has been an asset to the high school. He also identifies his leadership and role model presence.

Charles Totoro is Director of facilities of the Atlantic City public schools. In a notarized statement, Mr. Totoro describes Pruden as having been a loyal and valued employee, noting that his attendance, his performance, and his attitude during his brief stint with Atlantic City were excellent. He indicates that he had received high praise by his supervisors and had created a very positive relationship with other custodians.

The head custodian of Atlantic City High School, Mr. Richard Johnson, also submitted a letter, dated October 19, 1995, which is equally as salutary as the previous documents. Johnson also notes that Mr. Pruden's past record should not be a factor in his future employment and that in his judgment, Pruden has been rehabilitated and is working hard to make a new, better life for himself and his family.

A teacher from Atlantic City High School, Ms. Sylvia Reynolds, also submitted a letter, dated October 20, 1995. She has known Pruden all her life and describes him as outgoing, caring and generous. She unequivocally indicates that in her judgment the petitioner has "been fully rehabilitated" and can face any obstacle with a positive outlook. It ends with a plea that her letter would help to permit Pruden to continue to maintain his employment as a custodian with the Atlantic City public school system.

At the hearing Mr. Pruden submitted 2 additional documents. On October 27, 1995, the vice-principal of Central Junior High School, Atlantic City, Mr. Charles D. Greg, submitted a letter on the petitioner's behalf. He indicates that he has known Mr. Pruden for 3 years and that the latter had "a tremendous positive effect on our students." The reference is to the fact that Pruden had volunteered his time after school hours to assist coaches at the junior high school.

Mr. Greg notes that he was very much impressed with Pruden's dedication and that he would be an asset to the school system.

The final document addressed is one which was executed by the Supervisor of Adult and Community Education for the Atlantic City Alternative School, Mr. Wilbert L. Royal. Mr. Royal notes that he has known Pruden for a decade and during that time he has worked for him in another venue and has his highest recommendations. Mr. Royal is fully aware of what he describes as Pruden's "past transgressions," but affirms that in his judgment Pruden has reformed.

Mr. Pruden testified on his own behalf at the hearing. He is an impressive, articulate and sincere man. Of course, as I noted to him on the record, a fact-finder can always be duped in assessing an individual's credibility and I am no different from any other fact-finder. However, Mr. Pruden's representations are consistent with the record that he was able to provide in respect to his behavior and conduct since his 1992 conviction, which reinforces his credibility and, in my view, diminishes the possibility of his credibility being in doubt.

Mr. Pruden is 35 years of age and left school after the eleventh grade. He has been unable to find employment since he was released from prison. His only source of income is general assistance and food stamps. He has had a 6-year relationship with a woman, Ms. Donna Smith, who was present at the hearing and who is described as his fiancée. He considers himself the stepfather to her children and 1 grandchild. Mr. Pruden owned up to his prior criminal record and also indicated that he had attended narcotics anonymous and alcoholics anonymous. He seemed earnest in respect to his efforts to get his life together, particularly to find gainful employment. Ms. Smith, who also testified on his behalf and who was a most impressive witness, noted his "dramatic" change since his release from prison, reiterating the volunteer work that he has done, which has already been documented, as well as other changes in his life such as his efforts to read.

ANALYSIS

In order to demonstrate that he has been rehabilitated for purposes of school employment, the petitioner must establish that he has met the applicable criteria set forth at *N.J.S.A.* 18A:6-7.1.

Subdivision (e) of that statue provides as follows:

> Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
> (1) The nature and responsibility of the position which the convicted individual would hold;
> (2) The nature and seriousness of the offense;
> (3) The circumstances under which the offense occurred;
> (4) The date of the offense;
> (5) The age of the individual when the offense was committed;
> (6) Whether the offense was an isolated or repeated incident;
> (7) Any social conditions which may have contributed to the offense;
> (8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendations of persons who have had the individual under their supervision.
> [*N.J.S.A.* 18A:6-7.1(e)]

In my judgment, based upon the evidential record as well as the testimony and demeanor of the petitioner, he has met the criteria set forth above. The position of custodian is one which has a tenuous relationship at best in respect to interacting with students. Ironically, of course, Mr. Pruden through his volunteer work has already interacted with students and based on his character and personality and perhaps as well upon his own prior criminal record that interaction has proved positive. The offense of which Mr. Pruden was found guilty, possession of cocaine is indeed a serious offense. However, that was the first offense involving felony possession of a controlled dangerous substance and as far as I can determine the only such offense of which he has been convicted. All of his other offenses, while not to demean their significance, involved either possession of or possible sale of cannabis.

Two aspects of the case are of some concern. The first is that the offense and conviction occurred 3 years ago. While some might argue that a 3-year period is not a sufficient one in

which to conclude that an individual has been rehabilitated, in my view, the issue of the relationship between the time between when an offense is committed and when an individual is rehabilitated is subjective. On occasion, an individual may be rehabilitated immediately upon his release from prison. In other instances, an individual may never be rehabilitated. In this case, in my judgment, the 3 years since his release has demonstrated that Pruden is conducting his life in a manner inconsistent with criminal conduct and consistent with an individual who is making a concerted effort to find a job, earn a living, and make a life for himself, his fiancee and her family.

The other concern I have is that Mr. Pruden may still be frequenting places and making social contact with people with whom he should not. He indicated that on occasion he will see friends in bars (Pruden is not an alcoholic) and they will occasionally, smoke marijuana. Pruden indicated that "in respect" for him they will leave the facility and smoke elsewhere. He describes these individuals as "friends" and my response to him was to find new friends. I think on the whole, however, that Pruden's honesty in this regard and his uncontradicted testimony in respect to his being entirely clean since his release, diminishes the concern that I have for this aspect of his life.

The reality is that Pruden is a man who is making a concerted effort - merely by fighting in court for the position of custodian - to escape the cycle of drugs and criminality, which apparently has consumed much of his early life. I fear that were he denied that opportunity eventually and notwithstanding his efforts he might be sucked right back into that cycle and remain as a nonproductive member of our society. On the other side of the issue is the question of his impact on the student body of the school in which he is employed. In my view, his 3 years of drug free living, his wholesome relationship with Ms. Smith and her family, and the significant and productive volunteer work that he has done with students under the supervision of academics and professionals send a message that whatever risks exist in respect to the students when he is in the capacity of custodian, is either non-existent or minimal. Under any circumstances, in my view this case cries out for us as a society to give Pruden the opportunity that he is so desperately seeks and to take that risk.

Accordingly, I **CONCLUDE** that the petitioner has affirmatively demonstrated by clear and convincing evidence and pursuant to the criteria set forth at *N.J.S.A.* 18A:6-7.1 and

consistent with the conclusion arrived at by the Board that he has been rehabilitated. It is therefore **ORDERED** that the petitioner's criminal history no longer disqualifies him from school employment as a custodian.

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

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

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

1/30/96
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/2/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 07 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On behalf of petitioner:

Roderick Pruden

Donna Smith

On behalf of respondent:

None

EXHIBITS

On behalf of petitioner:

P-1 Letter from the vice-principal of Central Junior High School, Atlantic City, October 27, 1995

P-2 Letter from supervisor, Adult Community Education, Atlantic City Alternative School

P-3 "Packet" of documents transmitted by the Department of Education as an incident to the petitioner's appeal

On behalf of respondent:

None

OAL DKT. NO. EDU 10834-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
RODERICK PRUDEN.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusion of the Administrative Law Judge (ALJ) that the within petitioner has demonstrated rehabilitation by clear and convincing evidence in accordance with N.J.S.A. 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws. It is observed that in reaching this decision, the Commissioner had no cause to question the ALJ's assessment of petitioner's credibility, as such assessment is not belied by the record. Moreover, it was the ALJ who had the opportunity to hear petitioner's sworn testimony and observe his demeanor, so that he was in the optimum position to make such determination.

The Commissioner's conclusion herein was also significantly influenced by the large number of Atlantic City school personnel, e.g., high school principal, vice principal, teachers, director of facilities, head custodian, football team coach, and supervisor of adult and community education, who supplied written recommendations for Mr. Pruden attesting to his exemplary good character, praising him highly as a worker, and urging that he has been fully rehabilitated.

The Commissioner does find it necessary, however, to elaborate on and clarify a comment of the ALJ made on page 6 of the initial decision wherein he states "The position of custodian is one which has a tenuous relationship at best in respect to interacting with students." Notwithstanding the fact that the custodial position this petitioner seeks to occupy is not one where the incumbent has direct involvement with students in that he is responsible for their care, supervision or instruction, the Commissioner has been consistently mindful that such a position nevertheless affords an individual significant and otherwise unsupervised access to children, a consideration which must not be minimized when examining rehabilitation pursuant to N.J.S.A. 18A:6-7.1.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter. The within petitioner is deemed qualified for school employment as a custodian.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Mailing: March 18, 1996

107-96

107-96

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SPRING LAKE	:	DECISION
HEIGHTS, MONMOUTH COUNTY.	:	
	:	

March 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4713-95

AGENCY DKT. NO. 96-4/95

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF SPRING LAKE HEIGHTS

Thomas Isherwood, Esq., for petitioner (Magee, Pagano and Isherwood, attorneys)

Francis J. Campbell, Esq., for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: January 29, 1996 Decided: February 1, 1996

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

A defeated candidate for school board membership alleged improprieties and violations of law in an annual school board election.

This matter was transmitted to the Office of Administrative Law on May 10, 1995 for a hearing pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through-13.

The parties conferred at some length with the consent of the judge assigned.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

3. The settlement will have a salutary effect on the school election process in the district.

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

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

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

1 FEBRUARY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL ALJ

Receipt Acknowledged:

2/5/96
DATE

D. N. Contaxakis
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 08 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

MAGEE, PAGANO AND ISHERWOOD
1937 HWY 35 @ ALLAIRE ROAD
P. O. BOX 1200
WALL TOWNSHIP, NEW JERSEY 07719
(908) 449-2500
Attorneys for Petitioner

ANNUAL SCHOOL BOARD ELECTION	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUEL 04713-95S AGENCY REF. NO. 96-4/95
DIST./SPRING LAKE HEIGHTS	:	
	:	STIPULATION OF SETTLEMENT

This matter having been commenced upon petition of Raoul C. Cordeaux pursuant to N.J.S.A. 18 A:14-63.12 alleging violations of statutorily prescribed procedures for school elections, and the parties having conducted discovery relative to the annual school election of the Borough of Spring Lake Heights held on April 18, 1995 and having agreed upon a resolution of the matters in controversy between them, it is hereby stipulated and agreed as follows:

1. During the election campaign of the Spring Lake Heights School Board, student information and mailing materials were utilized for distribution of partisan literature pertaining to the campaign.

2. The annual school election conducted on April 18, 1995, entailed significant problems and difficulties in permitting all voters wishing to vote to cast their ballots. Such problems were largely due to an unprecedented number of voters attempting to vote at the annual school election, resulting in crowded conditions at the polling place and long waits for persons wishing to cast their votes. The following conditions are noted as having contributed to the problems at the polling place or

evidence the confusion which occurred:

(a) Although the election campaign was actively contested and a larger than customary voter turnout was expected, the polls were open only during the minimum permissible hours of 5:00 p.m. and 9:00 p.m.

(b) Only two voting machines at one polling place were provided for five (5) voting districts.

(c) The Board possesses no copies of Certificates of Qualification for the election officials serving in the April 18, 1995 School Board Election.

(d) The voting procedure utilized in the April 18, 1995 election had voters receive and sign their voting authorities first, then go to a table where there was maintained the Signature Copy Register and the Poll List for their voting district and thereafter sign the Poll List, whereas in accordance with N.J.S.A. 18 A:14-50,51, voters are required to enter their name and address on the Poll List, to be compared with the voter's signature in the Signature Copy Register and then receive the appropriate voting authority.

(c) Several elderly and disabled voters reported inconvenience and hardship relative to the ease of access to the polling place.

(f) Several irregularities appeared in the election

documents, including poll lists and voting authorities and in the post election handling of such documents as described and set forth in the June 27, 1995 letter of the County School Business Administrator of the Department of Education. Same is annexed hereto as Exhibit "A" and is incorporated herein.

(g) The Poll List submitted to the County School Business Administrator after the election exhibits several instances where signatures were entered for two individuals in the same handwriting and at least two instances where the Poll List numbers do not correspond to the number of the signature authority issued to those voters.

(h) A recount of the votes cast in the election was conducted at the request of petitioner, and the result of that recount was reported in the Decision of the Commissioner of Education, dated August 14, 1995. A copy of said Decision is annexed hereto as Exhibit "B" and is incorporated herein.

WHEREAS, the parties acknowledge and agree that the diffculties encountered by many voters at the annual school election conducted on April 18, 1995 could erode the confidence of the public in the school election process, and

WHEREAS, the parties stipulate and agree that no official misconduct occurred at the annual school election and the parties are satisfied that there is no evidence that any election official improperly attempted to affect the

outcome of the 1995 school election, the parties further stipulate as follows:

I. The petitioner hereby agrees to withdraw the petition filed in this matter, with prejudice, in consideration of the terms and conditions expressed herein.

II. The Board will consider the adoption of policies that address the following concerns in future elections:

(A) Limitation of access to any information or materials concerning past or present students in the district, to school personnel or parent support organizations/ groups for school purposes only;

(B) Avoidance of inconvenience and delays to voters by pre-election consideration of the number and location of polling places for each election and the appropriateness of providing additional voting machines;

(C) Avoidance of hardship and inconvenience to disabled and elderly voters by consideration in the selection of voting places and by procedures at such polling places for identification of elderly or disabled voters attempting to enter polling places and by assistance to such voters in registering their votes. The Board shall also consider difficulties which parents of young children have when attempting to vote. Finally the Board will consider appropriate procedures to alert voters of the

availability of any aid or assistance in the voting process.

(D) The need that the election officials who will serve in elections shall have previously been trained and certified in the operation of the voting machines and in their duties at the election place in accordance with N.J.S.A. 18A:14-6.1, and the appropriateness of maintaining in Board's records copies of the Certificate of Qualification of each voting official.

III. The Board will further address proposed policies designed to help facilitate the school election process in the Borough of Spring Lake Heights and the concerns outlined in the memorandum from Special Counsel dated August 16, 1995 (Exhibit "C") and will adopt or amend appropriate policies to effect a reasonable accommodation of the voting public at future school elections in a fashion that is legal, efficient and appropriate. The consideration of appropriate policies to be adopted by the Board of Education shall not be limited to issues addressed in the memorandum of August 16, 1995.

Based on the terms and conditions stipulated by the parties as set forth herein, the petitioner voluntarily withdraws his petition filed in this matter challenging the annual school election conducted on April 18, 1995, and joins the respondent Board of Education in a request that the election results of the April 18, 1995 annual school election conducted in the School District of the Borough of Spring Lake Heights be ratified and confirmed by the Commissioner of Education.

DATED: 31 JANUARY 1996

Bruce R. Campbell
BRUCE R. CAMPBELL, A.L.J.

The undersigned counsel represent that the terms and conditions of the settlement stipulated herein are dispositive of all issues in controversy and they hereby consent to form and entry of the Stipulation of Settlement. The parties also request that judgment be issued in an initial decision incorporating the terms set forth in this Stipulation of Settlement and approving the same.

MAGEE, PAGANO & ISHERWOOD
Attorney for Petitioner
Raoul C. Cordeaux

By _____
THOMAS ISHERWOOD

DATED: Jan 23 1996

KALAC,NEWMAN,LAVENDER & CAMPBELL
Attorneys for Respondent
Board of Education of the
Borough of Spring Lake Heights
Monmouth County

By _____
FRANCIS J. CAMPBELL

DATED: 23 January, 1996

Exhibit "A"

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
MONMOUTH COUNTY OFFICE
3435 HIGHWAY 9
P.O. BOX 1284
FREEHOLD, NEW JERSEY 07728 - 1284
908 / 431 - 7810 * FAX 908 / 577 - 0679

CHRISTINE TODD WHITMAN, GOVERNOR

LEO KLAGHOLZ, COMMISSIONER
MICHAEL MADDALUNA, COUNTY SUPERINTENDENT

June 27, 1995

Raoul C. Cordeaux
2209 Windsor Terrace
Spring Lake Heights, N.J. 07762

Dear Mr. Cordeaux:

As I advised you via our telephone conversation, the original sealed ackage received from the district after the election contained 376 of the stub part of the two-part voting authorities; none of the signature part were in that envelope.

Since it was apparent that my office did not receive all parts of all the voting authorities from this election, I spoke with Mrs. Amabile, the district's board secretary. She indicated to me that there may have been a package which had not been sent and that she would see that it was delivered to my office when it was located.

A package containing 368 of the stub part and 745 of the signature part of the used two-part voting authorities from this election was delivered two days later, June 8th; it was not sealed. Since the signature part of the voting authority verifies the poll list signatures, I must conclude that a total of 743 (745 less 2 voids) voted in this election.

The voting authority numbers of the two voting authorities which were voided were #365 and #736. Voting authority #365 displays a very different name and signature than is displayed on the poll list under that number; perhaps this is why it was voided. Voting authority #736 is not listed at all on the poll list.

Ex A

Although the signature part of the voting authorities indicates that 745 individuals voted in this election, there were only 739 clean signatures on the poll lists (740 if you include a signature which has a line drawn through it and is included in the signed voting authorities). The form A33 Regular/Combined Statement of Result of School Election signed and submitted by the election workers at the polls indicated that there were 742 ballots counted and 2 ballots voided.

These documents are part of the official record of this election and as such are available for inspection to anyone who has an interest in them. As official records, however, I cannot permit them to be removed from this office unless so ordered by the court. If, for any reason, you would be interested in reviewing them, please do not hesitate to contact my office to make an appointment at your convenience.

Very truly yours,

Barbara A. Pieszczynski
County School Business Administrator

c: Michael Maddaluna, County Superintendent
Suzanne Amabile, District Board Secretary
Hope Blackburn, Director, Bureau of Controversies & Disputes

Exhibit "B"

IN THE MATTER OF THE ANNUAL SCHOOL :
ELECTION HELD IN THE SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE BOROUGH OF SPRING LAKE : DECISION
HEIGHTS, MONMOUTH COUNTY. :
:

The announced results of the balloting for two (2) members of the Board of Education for full terms of three (3) years each at the annual school election held on April 18, 1995 in the School District of the Borough of Spring Lake Heights were as follows:

Three-Year Term

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Theresa Styslinger Casagrande	398	62	460
Susan Ciallella	338	56	392*
Raoul C. Cordeaux	341	49	390
Annette Kohler-Smith	320	51	371

*This tally is given as reported on the Combined Statement of Result, and may be attributed to either an error in recording the at-poll tally or an error in addition; in either case, the outcome of the election was not affected by the error.

The announced results of the balloting for one (1) member of the Board of Education for an unexpired term of two (2) years at the annual school election held on April 18, 1995 in the School District of the Borough of Spring Lake Heights were as follows:

Two-Year Term

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Colette Hayes-Labruto	276	53	329
Vernon L. Henderson	227	25	252
Eileen Eilenberger	169	34	203

Ex B

Pursuant to a letter request from Raoul C. Cordeaux dated April 19, 1995, the Commissioner directed his representative from the Office of the Monmouth County Superintendent of Schools to conduct a recount of machine ballots cast for members of the Board for three-year terms pursuant to N.J.S.A. 18A:14-63.2. The machine recount was conducted on May 15, 1995 at the Monmouth County Voting Machine Warehouse in Freehold. A request for a recount of absentee ballots was made to Superior Court pursuant to N.J.S.A. 19:57-24, and the recount was eventually conducted on August 3, 1995.

On recount, the results of the election were as follows:

Three-Year Term

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Theresa Styslinger Casagrande	398	62	460
Susan Ciallella	336	56	392
Raoul C. Cordeaux	341	49	390
Annette Kohler-Smith	320	51	371

*Two-Year Term**

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Colette Hayes-Labruto	276	53	329
Vernon L. Henderson	227	25	252
Eileen Eilenberger	169	34	203

*No separate request was made for a recount of ballots cast for the two-year seat. However, these ballots were recounted as part of the proceedings initiated by Mr. Cordeaux and are accordingly reported herein.

This concludes the report of the Commissioner's representative.

* * * * *

The Commissioner has reviewed the report of his authorized representative and adopts as his own the findings and conclusions therein.

Accordingly, the Commissioner finds and determines that, as originally announced, Theresa Styslinger Casagrande and Susan Ciallella were elected to full terms of three

years each, and Colette Hayes-Labruto to an unexpired term of two years, on the Board of Education of the Borough of Spring Lake Heights.

The Commissioner further directs that a copy of this decision be forwarded to the Office of Administrative Law for inclusion in the record of the inquiry presently pending into the conduct of the above-captioned election.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 14, 1995
Date of Mailing, August 15, 1995

Exhibit "C"

KALAC, NEWMAN, LAVENDER & CAMPBELL
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
1115 GREEN GROVE ROAD
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PETER P. KALAC
HOWARD M. NEWMAN
DENNIS LAVENDER
FRANCIS J. CAMPBELL

PHILIP J. BLANDA, JR.
OF COUNSEL

MEMORANDUM

TO: Evelyn Condello, President
Spring Lake Heights Board of Education

FROM: Francis J. Campbell, Special Counsel

RE: Recommendations to improve the school election process

DATE: August 16, 1995

* * * * *

You indicated to me that you would like the Board of Education to address a plan for improving the school election process. As you and Board Secretary Suzanne Amabile explained to me, there were some problems experienced during the school election that took place on April 18, 1995. As I understand it, these procedural problems were largely unanticipated because school elections in Spring Lake Heights had run rather smoothly in the past.

It seems that the election held in 1995 had unprecedented interest and participation on the part of the voters of the Borough because a majority of board seats were to be filled in this year's election.

As I recall, the most significant problems experienced at the annual school election were the following:

1. Because of the relatively large turn out, voters had to wait on line for relatively long periods of time before they could cast their votes.

2. Complaints were heard that poll workers were not as familiar with election procedures as they should be. This fact slowed up the voting process.

Ex C

3. Some voters complained that electioneering was actually taking place at the polls or in the immediate vicinity of the Spring Lake Heights School.

4. The actual time that the polls were open for the annual school election in Spring Lake Heights (from 5:00 p.m. to 9:00 p.m.) was too short to accommodate the number of voters who came to vote.

5. Too few voting machines were provided for the number of votes cast in the four-hour election time.

Most of the answers to the questions raised in the problems cited above, are contained in the school elections statutes that appear in N.J.S.A. 18A:14-1 et seq. These statutes provide the School Board with authority to address these concerns.

Because you posed the question to me regarding the appropriate timing for the Board to address the concerns with the school election procedures, I want to assure you that I have no strategic objection to these concerns being addressed by the Board of Education, even though the school election challenge filed by an unsuccessful candidate for election to the School Board is still pending.

I have outlined below a list of recommended changes to the school election procedures which the Board should consider. Some of the listed changes are the same as those that you discussed with me. Others are new recommendations or variations on some of the ideas that you or the Board Secretary expressed to me.

Recommendations

1. Extending school election polling hours from 3:00 p.m. to 9:00 p.m. should go a long way to help accommodate the increased number of voters.

2. Holding school elections in two locations at the Spring Lake Heights Elementary School (e.g. two machines in the library and two machines in the gymnasium) may greatly accelerate the speed with which voters can be processed at the polling places.

3. The Board of Education has the authority pursuant to N.J.S.A. 18A:14-4.1 and N.J.S.A. 18A:14-5 to establish polling places at a location other than at the Spring Lake Heights Elementary School. Another public building located on the other side of the Borough would be an optimum site for making voting more convenient to the electorate. It seems to me that at least two different polling places within the Borough should be established for every annual school election or any special school election.

4. N.J.S.A. 18A:14-4 specifically charges the Board of Education with considering polling places that are accessible to elderly and physically disabled persons. Any efforts that the Board of Education can implement in that regard would be helpful to encouraging greater participation by many voters.

5. N.J.S.A. 18A:14-6.1 specifically provides that election officials are to be instructed prior to the annual school election. I know that the Monmouth County Board of Elections conducts instructional classes for poll workers. There is no question that the instruction provided is quite helpful to having poll workers understand the election process and how things should run at the polling places on election day.

6. The Board should ensure that it is paying its poll workers enough money pursuant to N.J.S.A. 18A:14-8, so that the Board can recruit a sufficient number of qualified poll workers, especially if the Board decides to increase the number of machines and the number of polling places where the school election will be conducted in the future.

7. The Board should be able to obtain some paper or cardboard signs from the Monmouth County Clerk of Elections' office which will read that electioneering is prohibited within 100 feet of any polling place on election day. A number of those types of signs could be obtained from that office at the time of the general election in November. The Board could then have the signs posted around the parking lot of the school and in the school vicinity on the date of the annual school election. They could also be posted at any other designated polling place. In addition, N.J.S.A. 18A:14-46 prohibits electioneering in the building in which the election is being conducted and that statute specifically empowers poll workers to take action to prevent such electioneering from occurring at the polls.

8. On the annual school election day the signature copy registers containing the signatures of all registered voters are sent to the particular polling places. Those books are used for comparison of the signature of the person wishing to cast his or her vote with the signature that the voter makes on the polling list pursuant to N.J.S.A. 18A:14-48, or on the voting authority slip, which is signed by voters using voting machines pursuant to N.J.S.A. 19:52-2.1. That process ensures the integrity of the school election by providing verification that only registered voters are permitted to vote. Also, if any voter has obtained an absentee ballot, that fact is documented on the voter's signature page so that he cannot also cast a machine vote at the same school election.

It seems to me that by providing longer polling hours and additional locations for more voting machines, the Board of Education will be taking action that will greatly increase the accommodation of the voters of the Borough of Spring Lake Heights. The expense that any or all of the recommendations cited above would entail would be minimal, especially in consideration of the greater participation that would be encouraged on the part of the electorate.

If you have any questions about the recommendations contained in this memorandum or if you would like me to appear at the Board meeting where this issue may be discussed, in order to answer any questions or to participate in the Board's discussion of this proposed plan, please let me know and I will be more than happy to assist the Board in any way that I can.

FJC/dd
c: All Board Members
c: William V. Smith, Superintendent
c: Suzanne E. Amabile, Board Secretary

OAL DKT. NO. EDU 4713-95

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SPRING LAKE	:	DECISION
HEIGHTS, MONMOUTH COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. Such approval, however, is contingent upon Term II(A) being interpreted and applied in a manner which complies with the express provisions of N.J.A.C. 6:3-6.1 et. seq., regarding pupil records, and upon the understanding that nothing in the settlement agreement shall act to impede or contravene newly enacted law governing school elections, P.L. 1995, c. 278.

The matter is hereby dismissed, subject to compliance with the terms of the settlement as clarified herein.

COMMISSIONER OF EDUCATION

March 19, 1996
Date of Mailing, March 20, 1996

108-96

108-96

JOHN GETZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON-VOORHEES REGIONAL SCHOOL DISTRICT AND CHARLES J. MURPHY, HUNTERDON COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, nontenured teacher of mathematics, alleged he was arbitrarily and wrongfully denied a fourth-year employment contract and, therefore, denied tenure.

ALJ concluded that the Board's determination not to renew petitioner's employment did not exceed the reasonable use of the Board's broad discretionary authority and that petitioner failed to demonstrate any reason why this determination should be overturned. Moreover, the ALJ concluded that the Board discharged its responsibilities under N.J.A.C. 6:3-4.2, and petitioner, by rejecting the two dates offered by the Board, effectively waived his right to an informal appearance before the Board.

Commissioner adopted findings and determination in initial decision as his own. Petition was dismissed.

March 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6667-95

AGENCY DKT. NO. 176-5/95

JOHN GETZ,

Petitioner,

v.

NORTH HUNTERDON-VOORHEES REGIONAL DISTRICT BOARD OF EDUCATION AND CHARLES J. MURPHY, SUPERINTENDENT,

Respondents.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk attorneys)

David B. Rand, Esq., for respondents (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: December 22, 1995 Decided: February 5, 1996

BEFORE **MARY ANN BURGESS,** ALJ t/a

STATEMENT OF THE CASE

During the 1994-95 school year, John Getz was a third-year non-tenured teacher in the North Hunterdon-Voorhees regional school district. At its meeting of April 4, 1995, the Board of Education, based on the recommendation of its Superintendent, Charles J. Murphy, voted to deny John Getz a fourth year employment contract and tenure in the school district. In accordance with

New Jersey law, Mr. Getz was provided with a written Statement of Reasons for this decision. However, Mr. Getz's informal appearance before the Board of Education, originally scheduled for May 10, 1995, never occurred. In the present matter, John Getz challenges these actions taken by the North Hunterdon-Voorhees Board of Education.

PROCEDURAL HISTORY

On May 23, 1995, John Getz filed a Petition before the Commissioner of Education. At the same time, he moved for emergent relief seeking the vacation of the Board's decision not to grant him a fourth year employment contract. In the alternative, the petitioner sought: (a) to restrain the Board from hiring a teacher to replace him; (b) to order the Board to issue a written statement of reasons for its decision not to re-employ him and (c) to schedule an informal appearance during the week of June 5, 1995.

The Board of Education filed its Answer on May 30, 1995. At the same time, the Board opposed the motion for emergent relief while filing its own motion to dismiss the present petition. The Board filed an Amended Answer on June 5, 1995.

By letter dated June 6, 1995, Commissioner of Education Leo Klagholz denied the motion for emergent relief finding petitioner failed to establish the standards for emergent relief set forth in Crowe v. De Gioia, 90 N.J. 126 (1982). Commissioner Klagholz also denied the Board's motion to dismiss by transmitting the Getz matter to the Office of Administrative Law as a contested case.

A prehearing conference, conducted herein on August 25, 1995, resulted in an Order dated September 8, 1995. Included therein as the issues to be resolved were:

1. Whether the Board of Education complied with the legal requirements of providing John Getz with (a) a written statement of reasons for non-reemployment and (b) with the opportunity for an informal appearance before it;

2. Whether John Getz effectively waived his entitlement to an informal appearance before the Board of Education.

A Substitution of Attorney, on behalf of petitioner was filed with the Office of Administrative Law on September 19, 1995. Telephone conferences were conducted herein on November 15 and December 4, 1995 concerning various discovery issues. A stipulation was reached during the December 4, 1995 conference amending the Statement of Issues contained in the Prehearing Order as follows:

1. Did the Board of Education act unreasonably, arbitrarily or capriciously in not granting John Getz a fourth year employment contract and therefore denying him tenure?

2. Did John Getz effectively waive his right to an appearance before the Board of Education?

The administrative hearing in this matter was conducted on December 14 and 15, 1995. Prior to the commencement of the hearing, counsel stipulated to a series of correspondence between petitioner's prior counsel and respondent's counsel concerning the issue of whether there was a waiver of petitioner's right to appear before the Board. Upon the conclusion of testimony, both counsel presented oral summations. The record in this matter was held open until December 22, 1995 to receive all exhibits including those stipulated to by counsel.

SUMMARY OF TESTIMONY

The first witness called on behalf of petitioner was his father, Edward Getz. The senior Mr. Getz testified that he is a Certified Public Accountant, a resident of Lebanon Township and was a member of the respondent Board of Education from 1966 through 1975.

At about 7:30, on the morning of April 5, 1995, as he was going out to open his garage door, Mr. Getz testified that he saw the car of Philip Evans. The witness stated that he knew Mr. Evans, then a member of the respondent Board of Education, for approximately eighteen years. Mr. Evans stopped his car and shouted to Mr. Getz, "What do you think?" Mr. Getz stated that he understood that Mr. Evans was referring to the previous night's Board meeting which resulted in the denial of tenure to his son, John. In response, Mr. Getz asked Mr. Evans why he had abstained from voting on John's contract. When Mr. Evans stated that he had a conflict of

interest, Mr. Getz asked what it was. Mr. Evans explained that Mr. Getz had done his income tax returns for many years.

According to Mr. Getz, Mr. Evans then stated that since North Hunterdon-Voorhees had been considered a dysfunctional Board, the members decided to support the new Superintendent on this issue. When pressed to disclose what was really behind the decision, Mr. Getz recalled that Mr. Evans stated that the Board wanted to give notice to the union that it was going to play hardball. This witness further remembered Mr. Evans saying that if Nancy Dontzin, the head of the teachers union, had not been running the district for years, this would not have happened to John. It was Mr. Getz's understanding that his son was simply a pawn in the struggle between the union and the Board.

On cross-examination, Mr. Getz explained that he and Mr. Evans were neighbors and that he had acted as Mr. Evan's accountant until four years ago. Mr. Getz estimated that his conversation with Mr. Evans lasted approximately fifteen minutes. Following this conversation, Mr. Getz telephoned his son's attorney and then faxed him some notes. Although this witness did not have the faxed document with him, he testified that it is still in existence and that he would produce it before the conclusion of the hearing.

When questioned about interrogatories served upon the petitioner, Mr. Getz stated that he had no involvement in the preparation of the answers but had only looked at them briefly three weeks earlier. This witness further testified that he did not know there were interrogatories concerning his conversation with Mr. Evans. With regard to that conversation, Mr. Getz conceded that Mr. Evans did not admit that the Board was dysfunctional but only that it was accused of being so. Mr. Getz also acknowledged that Mr. Evans never said to him that the denial of John's contract "had nothing to do with John; was not personal . . .". Rather, that was how the senior Mr. Getz recalled and understood the conversation with Mr. Evans.

With regard to Dr. Murphy, Mr. Getz testified that he had never met the new superintendent nor communicated with him over the telephone. Mr. Getz stated he had heard that there were not many applicants for the position since most superintendents did not want to give up tenure for a contract. This witness also conceded that Mr. Evans had never said that Dr.

Murphy had been brought in to break the union. When showed the supplemental answers to interrogatories which set forth:

> Phil Evans stated to Ed. Getz on April 5, 1995 that Murphy was brought in to break the union. (R-1)

Mr. Getz admitted that he had not read the material carefully.

This witness was also questioned as to allegations in his son's Petition that Board member William Clark" . . . had a long standing feud with Mr. Getz's father arising from Mr. Getz's many years on the Board . . . which resulted in many conflicts." Petition, para 19. Mr. Getz acknowledged that he had never served on the Board at the same time as Mr. Clark; indeed, he had never met Mr. Clark. This witness testified that he had no knowledge of a feud with Mr. Clark and does not know how this information came to he included in his son's Petition which was filed before the Commissioner of Education. Mr. Getz also stated that although he may have glanced at the petition, he had never read it.

The senior Mr. Getz was later recalled to identify the handwritten notes which he faxed to his son's former attorney, Glenn Williams (R-15).[1]

The next witness called was petitioner, John Getz, who testified that he was first employed by the North Hunterdon-Voorhees regional school district in 1989 as a substitute teacher and coach. While working in this capacity, he finished his education as a mathematics major at Rutgers. Mr. Getz testified that he continued working at North Hunterdon-Voorhees through January 1992, when he left to fulfill his student teaching requirement in the Bridgewater school district. When he completed this requirement, he was appointed as a long term substitute in mathematics on May 6, 1982. Mr. Getz testified that he is certified as a teacher of mathematics.

Mr. Getz testified that he was hired full-time for the 1992-93 school year; his first contract year for the purpose of the present matter. During that year, he taught algebra, basic skills and coached football, wrestling and track/field at Voorhees High School. The petitioner was

[1] Only the top half of the page, which contains the notes faxed to Glenn J. Williams, were entered into evidence as R-15.

thereafter offered a contract for the 1993-94 school year as a part-time mathematics teacher. Mr. Getz explained that since he had the least seniority, he was given a partial load of three classes during the first semester. During the second semester of that school year, Mr. Getz returned to full-time status as a mathematics teacher in Voorhees High School. During this school year, he continued as coach of football, wrestling and track and field. During the summer of 1994, Mr. Getz worked in the Board sponsored summer fitness program and worked in the Voorhees weight room. Mr. Getz testified that he was offered his third employment contract for the 1994-95 school year as a full-time mathematics teacher and coach of football and track/field.

With regard to his evaluations, petitioner stated that during his three years at Voorhees High School, Jean Beavers was his supervisor in Mathematics while Ernest Kovacs was interim principal at Voorhees High during the 1994-95 school year. This witness identified the "Tenure Recommendation" made by Mr. Kovacs to Mary Majewski, the head of personnel for the school district (P-1). In this memorandum, Mr. Kovacs recommended that ". . . John Getz be granted tenure in the North Hunterdon-Voorhees High School District." (P-1). Mr. Getz thereafter identified the March 2, 1995 Evaluation Report Form prepared by Jean Beavers (P-2). Ms. Beavers concluded therein that the lesson presented by Mr. Getz ". . . meets the expectations of our third year non-tenured teachers." (P-2).

Despite Mr. Kovacs' positive recommendation and Ms. Beavers' positive evaluation, Mr. Getz learned that he was not being recommended for tenure. On March 23, 1995, the petitioner met with Dr. Murphy to discuss the evaluation form prepared by him (R-4). Mr. Getz testified that he did not agree with the evaluation because he did not believe it reflected what took place in his classroom. Following this initial evaluation by Dr. Murphy, the petitioner was evaluated by Dr. Murphy on April 11, 1995 and May 25, 1995. Following each, Mr. Getz met with Dr. Murphy to discuss his evaluations.

Upon learning that he would not be awarded tenure, petitioner requested a written Statement of Reasons. This request resulted in a memorandum from Dr. Murphy to Mr. Getz, dated April 27, 1995, which set forth the reasons why he was not recommended for tenure (P-3). Mr. Getz testified in great detail concerning his disagreement with each of the reasons articulated by Dr. Murphy. The first reason given by Dr. Murphy was that Mr. Getz failed to meet the

district's standard of excellence in the area of planning. Responding to this reason, the petitioner pointed to the January 11, 1995 evaluation prepared by Jean Beavers in which she noted among Mr. Getz's strengths "Teacher preparation" (P-6). Mr. Getz further testified that he planned his lessons and complied with school instructions with regard to lesson plans.

The second reason given for not awarding Mr. Getz tenure was his failure to meet the district's standard of excellence in the area of organization. Once again petitioner pointed to the January 11, 1995 evaluation by Jean Beavers in which she noted among Mr. Getz's strengths 'Classroom organization" (P-6). This witness also noted that in his February 28, 1995 evaluation, Ernest Kovacs listed "Lesson Organization" as one of his strengths (P-8). Mr. Getz further testified that he did not recall ever being told he was lacking in organizational skills.

Addressing his next noted deficiency in the area of "Structuring" (P-3), Mr. Getz stated that he had never been criticized for failure to properly structure lessons by anyone but Dr. Murphy. With regard to his noted deficiency in the area of "Expectations for Students", Mr. Getz testified that in her June 10, 1994 evaluation, Jean Beavers observed that petitioner "Explores student expectations" (P-4). Mr. Getz further stated that he had a very good relationship with his students and that there were very positive student reactions in his classes. As to his noted failure in the area of "Student Involvement", Mr. Getz testified that Jean Beavers, in her June 10, 1994 evaluation, observed that the petitioner "Absolutely!" involved students in his lesson (P-4). Similarly, in her November 14, 1994 evaluation, Jean Beavers listed as one of Mr. Getz's strengths, "Student involvement" (P-5).

In his memorandum, Dr. Murphy also set forth Mr. Getz's failure in the area of "Use of material" (P-3). Responding to this criticism, Mr. Getz again pointed to Jean Beavers' June 10, 1994 evaluation in which she noted that petitioner "identifies and sets-up special resources for the lesson" and that he ". . . has made use of the computers (P-4). Mr. Getz also testified that, Ernest Kovacs, in his February 28, 1995 evaluation, stated that the "Level of material was appropriate for the students". In this same evaluation, Mr. Kovacs observed that Mr. Getz demonstrated "Strong classroom management skills" contrary to Dr. Murphy's observation that petitioner is deficient in the area of "Timing and Time Management" (P-7 and P-3).

Petitioner next addressed Dr. Murphy's statement that he failed to meet the district's standards in the area of "Techniques" (P-3). Mr. Getz testified that in her June 10, 1994 evaluation, Jean Beavers observed that petitioner "Includes a variety of instructional techniques in planning". Ms. Beavers also "commended" Mr. Getz "for his ability to do this daily" (P-4).

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The final deficiency listed by Dr. Murphy was in the area of "Closure" (P-3). Mr. Getz testified that Dr. Murphy had discussed this comment with him. Dr. Murphy explained that at the end of the class, a summary should be given of what took place during the class. It was petitioner's understanding that his end-of-class summary of one minute was too short. It should have been between two and three minutes in duration. Mr. Getz stated that he did not recall previous criticism concerning closure of his classes.

Petitioner admitted that during his three years of employment in the North Hunterdon-Voorhees school district, he was given a number of suggestions for improvement as noted in Dr. Murphy's April 27, 1995 memorandum to him (P-3). However, Mr. Getz testified that there was never any follow-up with regard to his failure to comply with these suggestions. Petitioner stated that Dr. Murphy gave him no explanation of the categories of deficiencies listed in the Statement of Reasons (P-3).

Mr. Getz testified that he was generally aware of a series of correspondence between his previous attorney, Glenn Williams and Board counsel, David Rand (J-1 through J-15). Specifically, Mr. Getz knew that the Board had scheduled an informal appearance for him on May 10, 1995 and that his counsel had requested an adjournment. Petitioner confirmed that he has never had his informal appearance before the North Hunterdon-Voorhees Board of Education.

Upon cross examination, Mr. Getz testified that he continues to seek an informal appearance before the Board. The petitioner acknowledged that within a week of first requesting an appearance before the Board, he was offered one. Mr. Getz confirmed that he was notified by his principal and also by letter of the appearance scheduled for him on May 10, 1995. He also recalled that it was his former counsel, Glenn Williams, who requested an adjournment of that date. It was the petitioner's understanding that Mr. Williams had other obligations and that

certain witnesses were not available on that date. Although Mr. Getz knew his counsel requested his appeareance not he scheduled before May 22, 1995, he did not know why that date was chosen (J-7). This witness further confirmed that the Board denied the request to adjourn the May 10, 1995 hearing and reschedule it for the last week in May. However, the Board did offer to reschedule the hearing for June 22, 1995 or any date thereafter. Mr. Getz stated that he would still he employed by the Board on June 22, since his contract with the Board would not expire until June 30, 1995. Therefore, petitioner conceded that he had the opportunity for an informal appearance on either May 10, 1995, or during the period immediately following June 22, and that he took advantage of neither opportunity. Mr. Getz denied that he wanted his appearance while school was in session so it could attract the largest crowd and the greatest public outcry. Mr. Getz did acknowledge that following his non-renewal, two student demonstrations took place at Voorhees high school. The first occurred on April 5, 1995 when the entire student body of approximately 700 students left their classrooms and congregated in the gym. On April 6, 1995, Mr. Getz estimated that between 200 and 300 students walked out and refused to go to class. The petitioner agreed that if his informal appearance were held in early June 1995, it could cause further student demonstrations and might interfere with the Voorhees high school graduation ceremonies.

With regard to his education, Mr. Getz testified that he completed his degree requirements at Rutgers University in five years, graduating in June 1992. Petitioner, therefore, worked for the North Hunterdon-Voorhees school district as both a coach and substitute teacher before receiving his degree. Mr. Getz testified that he did not specifically take courses at Rutgers in test and measurement but that the importance of developing appropriate devices to measure achievement was discussed in various courses.

Petitioner acknowledged that the secretaries at Voorhees high school told him that Dr. Murphy had pulled his schedule. Although it crossed his mind that Dr. Murphy would come to observe and evaluate him, he did not think it would happen. On March 22, 1995, Dr. Murphy did come to Mr. Getz's freshman Honors Geometry class, a forty minute period from 10:19 through 10:59. Mr. Getz was in his classroom when Dr. Murphy arrived before the start of class.

Mr. Getz was specifically questioned concerning the quiz which he gave on March 22, 1995 to his freshman Honors Geometry class, the class observed by Dr. Murphy. The students in this class are superior geometry students; they are better students attuned to geometric concepts. In developing the quiz, Mr. Getz looked to the curriculum and developed an instrument to determine whether his students had mastered the subject matter taught. Mr. Getz denied that if his quiz failed to give students information necessary to answer the questions, that it would he a bad quiz. Petitioner identified R-2 as a copy of the actual test, consisting of four questions, administered by him on March 22, 1995. The first question directed the students:

Find the area of a decagon with perimeter 80 cm.

Mr. Getz conceded he failed to include in this question the fact that the decagon was regular. Without that information, the students would be unable to answer this question. Petitioner acknowledged that his students were confused and asked questions about the first problem. Mr. Getz admitted his failure to include the fact of "regularity" was a mistake, an oversight, an error. He explained that the textbook allows students to assume regularity but that he tells his students not to do so. With regard to the third question, Mr. Getz testified that he omitted a dimension necessary to calculate the area of the segment which appeared on the quiz. The first student who reached this question realized that the radius had been omitted. At this point Mr. Getz provided the missing information. Once again, Mr. Getz conceded that he had not provided information sufficient to answer the third question on the quiz. However, although two of four questions were missing critical information, Mr. Getz contended that the quiz itself was not poor. Petitioner opined that the test was properly constructed since it quizzed students on material covered.

Mr. Getz admitted, however, that because of the problems with the two questions, the quiz took longer than the fifteen minutes allotted to it in his lesson plan. This witness explained that there was some discussion among the students and with him because of the confusion caused by the missing information in questions one and three. Mr. Getz estimated that the quiz took twenty-five minutes rather than the fifteen minutes he had scheduled. He also determined not to count the test because of the confusion surrounding questions one and three. In fact, Mr. Getz did not grade the test because he felt it did not fairly test the students on the material they had been taught.

Once the quiz was completed, Mr. Getz stated that he spent ten to fifteen minutes presenting new material. Petitioner admitted that he rushed the balance of his class and he did not bring closure to it; he did not sum up the newly presently material. In fact, when the bell rang, Mr. Getz was still going over homework with his students. With regard to closure, Mr. Getz acknowledged that Dr. Murphy's evaluation was correct: Petitioner did not properly summarize the newly presented material. Mr. Getz recognized that he has had a problem with lesson pacing and time management which occasionally prevents him from having proper closure of a class. This difficulty was observed by Jean Beavers in her October 28, 1992 evaluation of Mr. Getz wherein she noted:

> Twenty minutes were devoted to six review problems, while the new material was presented in the last four minutes. In the future:
> A) State the objective and activities of the lesson at the beginning of the period.
> B) Set up a timeline to aid in lesson preparation (R-5).

Mr. Getz explained that this evaluation took place during his first year of teaching and that with experience he had made progress in pacing his lessons thereby permitting proper introduction of new material as well as appropriate closure of lessons.

Following his observation, Dr. Murphy met with Mr. Getz to discuss his evaluation. He specifically addressed that portion of the class following the quiz. Dr. Murphy criticized Mr. Getz's presentation, pointing out that there was a lack of connection between the new material and old. Mr. Getz disagreed with Dr. Murphy's comments. Although he did not have a full introduction to the new material, he did have a brief "lead-in". Mr. Getz indicated that he submitted a written "Addendum" or response to Dr. Murphy's evaluation (R-3) and that Dr. Murphy provided him with an answering memorandum dated April 6, 1995 (R-6).

Mr. Getz testified that he was next evaluated by Dr. Murphy on April 11, 1995. As in his prior evaluation, Dr. Murphy was again concerned with the pacing of the class since the petitioner had to close after the bell. Mr. Getz disputed, however, that he taught to the bell. Rather, he stopped teaching before the bell and gave a proper closure after the bell rang. Mr. Getz identified his May 3, 1995 Addendum to Dr. Murphy's evaluation (R-8). Petitioner explained that although Mrs. Dontzin wrote this response, he provided her with the substance.

Dr. Murphy's final evaluation of Mr. Getz occurred on May 25, 1995. His written evaluation noted:

> The lesson observed was not as poor as the first session. I observed, but did not reach the performance of the second.
>
> Mr. Getz is still performing at the stage that I would expect of a first year teacher. The lessons are still not complete (R-9).

Mr. Getz was next cross-examined as to the substance of the Petition which was filed by him before the Commissioner of Education. Mr. Getz testified that he was involved in drafting this document and that he read the Petition before signing it. He conceded, however, that he had no personal knowledge of a secret meeting of the Board as alleged in Paragraph 14 of the Petition. This witness asserted that Paragraph 14 was based on a conversation between his father and Board member, Philip Evans. Mr. Getz admitted, however, that there was no mention of a secret meeting of the Board in his father's testimony before this tribunal nor in any discovery provided to respondent. Mr. Getz was next asked for the basis of the allegations contained in Paragraph 19 that Board member William Clark may have withheld unfavorable information concerning Dr. Murphy. Petitioner stated that the source of this allegation was a news article and opinion column relating to disciplinary charges filed against a tenured principal in Eastchester, New York in 1984 (R-11 and R-13). In that matter, the New York Commissioner of Education concluded that there was insufficient evidence to sustain the charges against the principal (R-12). Mr. Getz reluctantly conceded that none of the material submitted contained any assertion that Dr. Murphy was responsible for preparing "trumped up" charges against the principal as stated in Paragraph 19 of his Petition. Mr. Getz also acknowledged that Paragraph 19 erroneously attributes an uncomplimentary remark concerning Dr. Murphy to the president of the Board of Education in Glen Cove where Dr. Murphy was employed. Petitioner admits that the remark was made by the president of the Glen Cove Teachers Association. Petitioner also admitted that he had no knowledge that Dr. Murphy knew anything about him before his March 22, 1995 evaluation nor that Dr. Murphy was acting pursuant to any Board agenda.

On redirect, Mr. Getz confirmed that he did not give the Board permission to release information to the public from his personnel records. Petitioner further stated that he first learned of the Board's press release containing this information when he was contacted by a reporter. Mr. Getz further explained that as a result of the student protests, Dr. Murphy agreed to perform additional evaluations of his teaching. The last evaluation occurred on the same day that the Board of Education received a copy of the Petition filed with the Commissioner of Education. Mr. Getz also denied that Ms. Beavers told him that he was to be observed by the new Superintendent of Schools. The Petitioner also gave his view that the purpose of observation and evaluation was to critique a teacher's performance so that the teacher improves his performance.

On re-cross, Mr. Getz denied that by requesting the Board of Education "discuss matters pertaining to my employment in public session", he gave permission for the release of information from his personnel records (R-14).

The respondent commenced its case by calling Jean Beavers who testified that she has been teaching at Voorhees high school for nineteen years. The parties stipulated that during the term of Mr. Getz's employment at Voorhees, Ms. Beavers was his direct supervisor and that she was fully certificated to fulfill her responsibilities in this capacity.

Ms. Beavers testified that responding to Dr. Murphy's request, on Monday, March 20 1995, Mr. Kovacs faxed to the new Superintendent copies of the schedules for non-tenured teachers. This witness stated that she was told to let Mr. Getz know that Dr. Murphy had a copy of his schedule and he would be in to see him. Mr. Kovacs' words were to the effect that "John should dot all his i's."

Ms. Beavers testified that when she met Mr. Getz after the lesson he told her he thought it went well. However, his reaction was quite different when she discussed the lesson with Mr. Getz after his conference with Dr. Murphy. Ms. Beavers agreed with Dr. Murphy's assessment that it was not a good lesson. She told Mr. Getz that if she had seen the same things, she would have written up the evaluation the same way.

Ms. Beavers confirmed that during Mr. Getz's first year at Voorhees, she had a number of concerns about his teaching. Among those concerns were his lack of ability to control his classroom; to pace his lessons; to keep his students in task. She recalled that Mr. Getz was doing a great deal of work instead of involving his students in the process. Because she considered Mr. Getz to be a mediocre teacher, she asked that his position at Voorhees be opened to other candidates. Ms. Beavers related that Mr. Berry, then principal, refused. It was his view that so long as Mr. Getz is "workable" and improved, he would stay. Ms. Beavers also confirmed that Mr. Berry referred to John Getz as "my boy".

This witness testified that Mr. Getz had a good year during the 1993-94 school year, his second at Voorhees high. Ms. Beavers explained that she tried to help him work on his problem areas. To this end, she reviewed his lesson plans every Thursday to insure that he included more activities to keep his students in task. Ms. Beavers kept very close contact with him and with that support, he improved and did a good job.

In the spring of 1994, Ms. Beavers admitted she had a conversation with Mr. Berry during which she expressed her frustrations at efforts to improve the Math Department. It was her impression that although the district speaks of excellence, it does not support it. During this conversation, Ms. Beavers also expressed frustration with the association which, at times, seemed to resist efforts to improve the school.. These remarks, however, were not directed at Mr. Getz, who, at this time, was improving.

On cross-examination, Ms. Beavers could not recall whether she told Mr. Gets directly that he was to be observed by Dr. Murphy or whether she asked Nancy Hodgkins, one of the secretaries, to give him that message. She was certain, however, that he was informed that the new Superintendent would he in to observe him.

With regard to the press release issued by the Board concerning John Getz, Ms. Beavers testified that she saw it minutes after it had been faxed. This witness stated that she gave her information to Dr. Murphy and Board counsel. She acknowledged that she knew there would be a press release but never questioned anyone about the statements in it nor discussed the issue of confidentiality with anyone.

Ms. Beavers confirmed the accuracy of the "Tenure Teacher Annual Performance Report" which she prepared for John Getz in June 1995 (P-9). She further testified that she takes her responsibilities very seriously and never considered withdrawing her observations or evaluations of John Getz.

This witness explained that it was not a regular practice to review the lesson plans of teachers. She had done it during Mr. Getz's second year to assist him with his problems. Ms. Beavers stopped the weekly review during his third year in order to see how Mr. Getz would do on his own. This witness testified that without direct, ongoing supervision, Mr. Getz began to revert, during his third year, to some of his first year mistakes.

On redirect, Ms. Beavers confirmed that the Tenure Teacher Annual Performance Report contained a checklist of items. Her notations on this form merely indicated that Mr. Getz was fulfilling these tasks. The form in no way indicated Mr. Getz's level of competence. The form specifically indicated that he had to work on beginning and ending his class on time and in an orderly fashion and on directing learning activities which involved his students and kept them on task (P-9). Ms. Beavers confirmed that it was her habit to proof Mr. Getz's evaluation tools and suggest corrections to him which he would then incorporate in the test. This witness asserted that a third year teacher should not be in need of such ongoing supervision.

The respondent's next witness was Ernest Kovacs who testified that he was acting principal of Voorhees high school during the 1994-95 school year and, in that capacity, recommended John Getz for tenure. Considering Mr. Getz's overall ability, Mr. Kovacs characterized him as an "average" teacher; an individual who did what was necessary. This witness testified that at no time did he consider Mr. Getz's teaching ability and performance to he anything but average. The other teachers under consideration for tenure, were described by Mr. Kovacs as "above average."

On cross-examination, Mr. Kovacs testified that he did not make the decision lightly to recommend John Getz for tenure. This witness stated that he had discussed Dr. Murphy's observations with him and he was well aware that Dr. Murphy was not pleased with Mr. Getz's

performance. With regard to the information contained in the press release, Mr. Kovacs confirmed Ms. Beavers account of their meeting with Dr. Murphy and Board counsel. This witness first knew of the issuance of the press release when shown a copy of it by Ms. Dontzin.

The respondent's third witness was Philip W. Evans who testified that he is a resident of Lebanon Township and has been a member of the North Hunterdon-Voorhees Board of Education for approximately seven years, with a brief interruption, and that he went off the Board in May 1995. This witness estimated that he knew the senior Mr. Getz and his three sons for twenty years. Mr. Evans would pass the Getz home on his way to work.

At the time John Getz was under consideration for tenure, Mr. Evans was a member of the Board. He indicated that since he had had business dealings with Mr. Getz over the years, he had discussed the possibility of a conflict of interest with the Board president and with Dr. Murphy. It was suggested that Mr. Evans abstain from voting on the Getz matter and he followed this advice.

This witness confirmed that the Board voted to deny John Getz tenure at its meeting on Tuesday, April 4, 1995 and that he encountered Edward Getz the following morning at approximately 7:30 a.m. Mr. Evans explained that as he was approaching the Getz house on his way to work, he noticed Edward Getz standing in front of the house staring at him. He decided to stop and speak to Mr. Getz, asking him how he was. M. Getz responded "Not well" and Mr. Evans understood that comment in light of the Board's vote of the previous evening. However, Mr. Evans did not feel at liberty to discuss with Mr. Getz certain aspects of the Board's action. This witness specifically denied that there was any Board meeting, either open or closed, to discuss John Getz before the April 4, meeting.

On cross-examination, Mr. Evans acknowledged that he has served on the Board for sometime with William Clark and that the two socialized occasionally and had discussed the Getz matter outside of Board meetings. This witness specifically recalled discussing the conduct of various members of the public during the April 4, 1995 Board meeting. Although he understood the rights of people to comment at public meetings, he was very surprised by the language used at the April 4 meeting. Mr. Evans described the meeting as tumultuous, that there seemed to be a lack of control. He was disturbed by the number of children present who appeared to he used by

their parents at this proceeding. Mr. Evans reiterated that he abstained from voting on the Getz matter because the Board President and Dr. Murphy suggested he should since he might have a conflict of interest. He explained that he sought advice since he thought he might have a conflict. This witness conceded that he did not seek legal advice on this issue.

Mr. Evans was briefly recalled to identify a member of the public who had spoken at the April 4 meeting. This witness testified that he was 99% sure that the individual who held up a copy of John Getz's evaluation at the school Board meeting was William Mammen. When Mr. Mammen was asked whose permission he had to circulate these evaluations, he responded "John Getz."

The fourth and final witness called by respondent Board was its new Superintendent, Charles J. Murphy. This witness testified that he is a resident of West Nyack, New York and that until he assumed his post at North Hunterdon-Voorhees on March 20, 1995, he had been Superintendent of the Glen Cove, New York school system.

Prior to receiving his name from Acting Principal Kovacs, Dr. Murphy had never heard of John Getz and did not know that he was employed in the district. He simply had an idea how many teachers were up for tenure. Before beginning employment in North Hunterdon-Voorhees, he had met with the Board and the members were quite insistent that he personally evaluate each teacher under consideration for tenure. During these meetings, there was no discussion of breaking the union and no one suggested that he get rid of Nancy Dontzin. Dr. Murphy testified he did not recall when he first knew of her. The Board members did not discuss or make any recommendations as to any particular employee.

As soon as he, Dr. Murphy, came to the district, he asked for the names and schedules of the teachers up for tenure. He wanted to observe these teachers as soon as possible because decisions as to tenure had to be made. The "Class of '95", as they were called, was comprised of three teachers at North Hunterdon and two at Voorhees. Dr. Murphy did not direct that the teachers be alerted to his pending visits since he wanted to observe them without notice. Following his observations of this group, Dr. Murphy recommended that four be granted tenure and one, John Getz, not he awarded tenure.

Dr. Murphy testified that he observed Mr. Getz during the morning of March 22, 1995. He arrived before class and looked at the room; he thought it was nicely decorated for a high school classroom. When the students started to come in, they were loud and their teacher settled them down. Mr. Getz announced that they were going to have a quiz; he then gave it out and the children started to take the test. After the class started, Dr. Murphy asked for the planbook explaining that he did not want to be intrusive. In the planbook, Mr. Getz allotted fifteen minutes for the quiz. As the students began taking it, there was whispering and eye contact among them and some started asking questions about the first problem. Mr. Getz then realized that he had failed to include in the first question the fact that the decagon was "regular' and orally supplied that information. As the students progressed to the third problem, they again started asking questions. At that point, Mr. Getz saw that he had neglected to supply the radius and gave the students that information. Because of the confusion surrounding the first and third questions, the quiz consumed twenty-five minutes of a forty minute period rather than the fifteen minutes allotted for it. Dr. Murphy testified that he also had problems with the manner in which the test was administered. The students who turned in the papers first conversed among themselves even though others were still working on the quiz.

After all the papers were handed in, the students started asking Mr. Getz whether the quiz would count. Petitioner indicated that he would probably change the point structure since he didn't want "to kill." At that point, Mr. Getz started writing the aim for the day on the blackboard -- the formulas he planned to present to the class. He tried to get the children interested but there was no tie-in; they were not motivated. He continued writing on the board and lecturing; there was very little dialogue between the teacher and students. Mr. Getz gave the homework assignment and the bell rang. Dr. Murphy observed that there was no effort to pull the lesson together.

After the class, Dr. Murphy testified that he did not have a conversation with Mr. Getz but went downstairs to Mr. Kovacs' office. There he contacted the Board attorney to find out what New Jersey law was concerning the grant of tenure. This witness confirmed that he did have a face-to-face conversation with Mr. Kovacs and Ms. Beavers before meeting with Mr. Getz. He demanded to know how this kind of situation had developed. What he saw in Mr. Getz's

classroom was the performance of a first year teacher. He was told that the district always dealt with "satisfactory." In Dr. Murphy's opinion "satisfactory" is a "C"; it is just getting by. A third year teacher should be an "A." "B," or "B-" depending on growth potential. Dr. Murphy was of the opinion that Mr. Getz did not meet that standard.

On March 23, 1995, Dr. Murphy met with Mr. Getz in his office. He began the conference by asking the petitioner how he thought the class went. Mr. Getz responded "O.K." Dr. Murphy then discussed each part of the class including the test. Dr. Murphy could not recall Mr. Getz's response to his criticism concerning the errors in two of the four questions on the quiz. Mr. Getz did not mention that the Superintendent's presence had disrupted his class. It was Dr. Murphy's opinion that it had not. Dr. Murphy testified that Mr. Getz returned a signed copy of his evaluation on March 28, 1995 (P-4).

On March 29, 1995, Mr. Getz was informed that his employment for the 1995-96 school year would be considered at the April 4, 1995, Board meeting. Mr. Getz requested that his employment be discussed in public session (R-10). Dr. Murphy testified that the were no prior meetings to discuss Mr. Getz's employment; that there were no discussions how the Board would act when discussing Mr. Getz; that he, Dr. Murphy, had made his decision concerning Mr. Getz on his own and that no Board member suggested it to him.

At the April 4, 1995 Board meeting Dr. Murphy made his recommendation that Mr. Getz not receive a fourth year contract and thus not be granted tenure. The Board voted in accordance with its Superintendent's recommendation. Dr. Murphy described this action as very controversial. There were a large number of speakers who addressed the Board in Mr. Getz's behalf some of whom appeared to have copies of his evaluations.

Dr. Murphy testified that he observed Mr. Getz for a second time later in April. Mr. Getz implemented some of the suggestions which the Superintendent had made during his March 23 conference. The petitioner wrote the aim on the blackboard, his lesson plan and materials were better and he moved around the classroom giving help. However, it was Dr. Murphy's opinion that he still had major problems. He did not make smooth transitions; his timing was poor; he did not get everything in and he was unable to give a summary or closure to the lesson before the bell

rang. He did try to give a quick summary after the bell rang but by that time he had lost his students who were already packing up and moving on to the next class.

The third and final observation was conducted by Dr. Murphy on May 25, 1995. On that day, Mr. Getz had a better lesson plan, the aim of the class was on the board, as well as a "Do Now" assignment for the students to work on as they came in to the classroom and he developed his lesson from homework. However, Mr. Getz's problems remained. His timing was not satisfactory, there was insufficient follow-through and he did not involve his students in a variety of activities to keep their interest and to keep them on track.

Dr. Murphy, based on his own observations and evaluations and from his discussions with Mr. Kovacs and Ms. Beavers, gave his opinion that Mr. Getz did not meet the minimum requirements for tenure in the North Hunterdon-Voorhees school district. Dr. Murphy testified that he continues to maintain that opinion.

On cross-examination, Dr. Murphy explained that he made his tenure recommendation based on Mr. Getz's performance on May 22, 1995. He did not consider the performance of his students. Student performance is not entirely based on teacher instruction. Sometimes students will "act up" when a supervisor is in the room if they do not like the teacher or, conversely, be on good behavior to help a teacher they like.

Dr. Murphy acknowledged that after observing Mr. Getz he called Board counsel to find out what his options were under New Jersey law. He conceded that he was rather angry when he met with Mr. Kovacs and Ms. Beavers and communicated his displeasure to them. With regard to these two individuals, Dr. Murphy explained that it is his responsibility to evaluate Mr. Kovacs while Mr. Kovacs evaluates Ms. Beavers.

Finally, Dr. Murphy reiterated that at the April 4, 1995, Board meeting he had observed members of the public with copies of records from Mr. Getz's personnel file. Dr. Murphy explained that he knew this material was from Mr. Getz's file because some members of the public read from Mr. Getz's evaluations when addressing the Board. Since Dr. Murphy was new to the district, he was unable to identify, by name, the individuals who had copies of Mr. Getz's

records. It was also Dr. Murphy's recollection that when the students walked out of class on April 5 or 6, 1995, some were holding copies of Mr. Getz's evaluations. Dr. Murphy did not know how the students came into possession of this material.

FINDINGS OF FACTS

Having carefully considered the testimony of the witnesses presented by both the petitioner and the respondent, and having had the opportunity to view the demeanor of those witnesses as they gave their testimony, and having fully reviewed the exhibits entered into evidence herein, I **FIND** the following:

1. John Getz was first employed in 1989 by the North Hunterdon-Voorhees Regional High School District as a substitute teacher and coach. He continued in this capacity until May 1992 when he received his degree from Rutgers - the State University. He thereafter received his certificate as a teacher of mathematics.

2. Mr. Getz was given a contract as a full-time teacher by the North Hunterdon-Voorhees school district for the 1992-93 school year. He was assigned to Voorhees high school and taught algebra and basic skills; he also coached football, wrestling and track/field.

3. During his first year at Voorhees high school, Mr. Getz was supervised by Ms. Jean Beavers who was properly certificated to discharge these supervisory functions. Ms. Beavers was concerned about Mr. Getz's teaching particularly his inability to control his classroom; to properly pace his lessons and to keep his students on task by providing a variety of activities. Because of those deficiencies, M. Beavers asked Principal Berry to open up Mr. Getz's position to other candidates. Mr. Berry refused indicating that Mr. Getz would stay so long as he was "workable" and improved.

4. Mr. Getz was offered a contract for the 1993-94 school year as a part-time mathematics teacher. He was given a partial load of three classes during the first semester because he had the least seniority in the mathematics department. He also coached football, wrestling and track/field. During the second semester, Mr. Getz returned to full-time status as a mathematics teacher.

5. During his second year at Voorhees high school, Ms. Beavers worked very closely with Mr. Getz to improve his problem areas. On a weekly basis, she would review his lesson plans to insure that he included more activities to keep his students on task. This weekly review of lesson plans was not a regular practice among supervisors in the school district. Ms. Beavers would also routinely proof Mr. Getz's evaluative tools to make certain that all necessary information was included in his tests and quizzes. When she discovered mistakes or omissions, she would return the test or quiz to Mr. Getz who would make the noted corrections. As a result of Ms. Beavers' close supervision and on-going support, as well as his lightened work-load during the first semester, Mr. Getz showed signs of improvement during his second year at Voorhees high school.

6. Mr. Getz was offered his third employment contract for the 1994-95 school year. During this year, Ms. Beavers stopped her weekly review of Mr. Getz's lesson plans in order to determine how he would do on his own. She also did not review and proof all of his evaluative tools since a third year teacher should not be in need of such direct on-going supervision.

7. During the 1994-95 school year, Mr. Getz was evaluated by Ernest Kovacs, the acting principal of Voorhees high school, who, in a memorandum dated March 2, 1995, recommended Mr. Getz for tenure. Mr. Kovacs made this recommendation despite his characterization of Mr. Getz as an average teacher, a teacher who did what was necessary. The four other teachers under consideration for tenure were described by Mr. Kovacs as above average in teaching ability and performance.

8. Mr. Getz recognized that during his three years in the North Hunterdon-Voorhees school district, he was given a number of suggestions for improvement. He believed he followed these suggestions and did make progress as a teacher.

9. During Mr. Getz's third year at Voorhees high school, the North Hunterdon-Voorhees school district was in the process of selecting a new Superintendent of Schools. Charles J. Murphy, then Superintendent of the Glen Cove, New York school district, was chosen and assumed his duties on March 20, 1995. Prior to coming to the district, Dr. Murphy met with the Board members who insisted that he personally evaluate those teachers in the district who were under consideration for tenure. Dr. Murphy was given no other direction concerning tenure decisions.

10. On March 20, 1995, his first day of employment in the district, Dr. Murphy called for the schedules of the five non-tenured teachers: three at North Hunterdon high school and two at Voorhees high. In response to this request, Mr. Kovacs provided Dr. Murphy with a copy of Mr. Getz's schedule. Until he received Mr. Getz's schedule, Dr. Murphy had not heard of John Getz and did not know that he was employed by the district. Mr. Kovacs directed Ms. Beavers to alert Mr. Getz to Dr. Murphy's impending visitation. This notice was given to Mr. Getz either by Ms. Beavers or by Nancy Hodgkins, a secretary at Voorhees high.

11. Dr. Murphy observed Mr. Getz's freshman honors geometry class on the morning of March 22, 1995. Mr. Getz began the class by administering a four problem quiz which, according to his class plan, should have taken fifteen minutes. As a result of Mr. Getz's oversight, two of the four questions were missing information necessary to their resolution. As a result of the confusion caused by these flawed questions, the quiz consumed twenty-five minutes of a forty minute period and was eventually not counted in determining the students' overall grade. During the remainder of the class period, Mr. Getz rushed to present new material but failed to make any transition, to involve or motivate his students, or, prior to the end of class, to provide any summary or closure to the lesson.

12. Following his observation of Mr. Getz's class, Dr. Murphy met with Acting Principal Kovacs and Ms. Beavers. He was told that under prior administrations, tenure would be given to a teacher if that teacher was satisfactory. Both Mr. Kovacs and Ms. Beavers described Mr. Getz as a satisfactory or average teacher. Dr. Murphy rated a satisfactory teacher as a "C". In Dr. Murphy's opinion, a third year teacher, to be eligible for tenure, should be an "A", "B+" or "B-." Based upon his evaluation, Dr. Murphy determined that Mr. Getz did not meet that standard; indeed, Mr. Getz's performance in the class observed was that of a first year teacher.

13. After completing his evaluations of the five non-tenured teachers in the district, Dr. Murphy recommended to the Board that four be granted tenure and one, John Getz, be denied tenure.

14. On March 23, 1995, Dr. Murphy met with Mr. Getz and discussed with him his evaluation. He provided Mr. Getz with a written copy of it which petitioner signed and returned on March 28, 1995. Ms. Beavers also met with Mr. Getz and told

him if she had observed what Dr. Murphy had, she would have written the evaluation the same way.

15. Mr. Getz learned that he would not be recommended for tenure. He requested that the Board discuss the matters pertaining to his employment in public session at its meeting of April 4, 1995. This meeting was well attended by supporters of Mr. Getz many of whom addressed the Board on his behalf. Several members of the public read statements from earlier, favorable evaluations of Mr. Getz. These evaluations from Mr. Getz's personnel file were not released by the district. After hearing from the public, the Board voted to adopt its Superintendent's recommendations. It granted tenure to four teachers and denied it to one -- John Getz.

16. On the morning following the April 4, 1995 Board meeting, Board member Philip W. Evans was driving to work when he noticed Edward Getz, petitioner's father, standing in front of his garage. When Mr. Evans stopped, the senior Mr. Getz asked why he had not voted on his son's contract. Mr. Evans explained that because of their previous business dealings, it had been suggested that he abstain to avoid a conflict of interest. According to Mr. Evans, Mr. Getz pressed him for information concerning the Board's reasoning which he refused to supply. For his part, Mr. Getz recalls Mr. Evans stating that the Board wanted to support its new Superintendent and to send a message to the union. Recognizing , Mr. Getz's natural desire to advance his son's interest and his inclination to recall Mr. Evans' words in the light most favorable to those interests, I **FIND** unpersuasive Mr. Getz's account of the April 5, 1995 conversation with Mr. Evans.

17. The record is clear that John Getz was a popular teacher and that the Board's decision not to grant him tenure was highly controversial. On the day following this decision, the entire student body of approximately 700 students left their classrooms and congregated in the gym. On April 6, 1995, between 200 and 300 students walked out and refused to go to class. As a result of these protests, Dr. Murphy agreed to perform additional evaluations of John Getz. The next evaluation took place on April 11, 1995, at which time Dr. Murphy observed that Mr. Getz had implemented some of his suggestions but that he still had major problems in making transitions, pacing his lessons and in summing up or bringing closure to his class. Dr. Murphy evaluated Mr. Getz for a third and final time on May 25, 1995. Although Mr. Getz had improved in some areas, his problems remained particularly with regard to his timing, his follow

through and his ability to keep his students' interest and to keep them on task.

18. On April 12, 1995 a press release was issued by the Board. This release was prepared by the Superintendent and Board Counsel with input from Acting Principal Ernest Kovacs and Ms. Beavers. It was issued after Mr. Getz requested that his employment be discussed in public session and after selective portions of his personnel file were released to his supporters. It is unclear from the record who was responsible for the release of this material from Mr. Getz's personnel file to his supporters. However, I **FIND** that the Board was in no way involved in the dissemination of this material. I **FIND** further that the preparation and issuance of the press release under these circumstances was not improper..

19. During the same period that Dr. Murphy was conducting his additional evaluations, he also provided Mr. Getz with a statement of "Reasons for Not Recommending Tenure" which had been requested by petitioner. This statement provided in pertinent part:

> . . . You certainly have not met the standard of excellence that the Board of Education has directed that the district must have.
>
> * * *
>
> Those areas where you have not met the standard of excellence are:
>
> 1) Planning
> 2) Organization
> 3) Structuring
> 4) Expectations for Students
> 5) Student Involvement
> 6) Use of material
> 7) Timing and Time Management
> 8) Techniques
> 9) Closure (P-3)

Mr. Getz disagreed with these reasons pointing to other evaluations particularly those of Ms. Beavers. However, Ms. Beavers candidly admitted that she asked the then principal Mr. Berry to open up Mr. Getz's position because she thought the Math Department could do better. Mr. Berry refused because Mr. Getz was "workable." It was also Ms. Beavers' view that petitioner improved during his second year because of intensive supervision and support. However, when left on his own during his third year, he reverted to many of his first year problems.

Indeed, even in his third year, Ms. Beavers found it necessary to proof his evaluative tools to prevent errors. The need for such review is underscored by the March 22, 1995 quiz which was not proofed and which contained two seriously flawed questions out of four. Consistent with Ms. Beavers' assessment is that of Mr. Kovacs, the Acting Principal. Mr. Kovacs characterized Mr. Getz as an average teacher. a teacher who did what he had to.

20. In addition to the Statement of Reasons, petitioner also requested an informal appearance before the Board in accordance with N.J.A.C. 6:3-4.2(a). This appearance was scheduled by the Board for May 10, 1995. By letter dated May 8, 1995, petitioner's former attorney requested that the matter be adjourned to a date no earlier than May 22, 1995 and no later than the first week in June 1995 (J-7). Mr. Getz knew of this request. The Board refused to adjourn the appearance to that time frame fearful that it might result in the disruption of graduation activities. The Board offered to have the appearance either on May 10, 1995 or schedule it after June 21, 1995 so that the administration could have additional time to evaluate Mr. Getz (J-9). Mr. Getz, through his former counsel, did not accept this offer. Instead, on May 23, 1995, the instant Petition was filed with the Commissioner of Education. Simultaneously, a motion for emergent relief was submitted seeking, in part, the scheduling of an appearance before the Board during the week of June 5, 1995. The Commissioner denied the motion for emergent relief in all respects. Thereafter, the parties discussed the possibility of settlement. The petitioner offered to withdraw his Petition "without prejudice" if an appearance would be conducted prior to July 30, 1995 (J-12). The Board would only agree to schedule the appearance at that time if the Petition of Appeal was dismissed "with prejudice (J-13). No settlement was reached and the present hearing went forward.

21. The Petition of Appeal filed herein contained a number of allegations extraneous to the teaching performance of John Getz. These allegations were intended to demonstrate the bad faith of the Board in denying Mr. Getz tenure in the North Hunterdon-Voorhees school district. The only evidence presented to substantiate these allegations were the recollections of petitioner's father of a conversation with Board member Philip W. Evans. This tribunal has already found that particular evidence unpersuasive. Finding of Fact No. 16. In addition, there were three items entered into evidence: (1) a news article, (2) an opinion column and (3) a decision from the Commissioner of the New York Education Department of Education, all

relating to the filing of charges against a principal in the Eastchester, New York school district in 1984 (R-11, R-12 and R-13). At that time, Charles J. Murphy was the Superintendent of Schools. I **FIND** those items to have no relevance to the present proceeding.

22. All individuals involved in this case recognize the importance of the tenure decision not only to the teacher and the school district but ultimately to the children served by that district. In the present matter, the Superintendent of Schools Charles J. Murphy personally observed and evaluated John Getz; he also reviewed his records and spoke to his supervisors. It was his firm opinion that as a candidate for tenure he rated a "C", he was an average teacher and failed to attain that standard of excellence which the Board seeks among its tenured faculty. He, thereafter, recommended to the Board that John Getz not be granted tenure. The Board, after considering the comments from the public at its April 4, 1995, meeting, voted to accept the recommendation of its Superintendent and denied Mr. Getz tenure.

LEGAL DISCUSSION AND CONCLUSIONS

The Legislature, in a process commencing almost ninety years ago, has created and extended the protections of tenure for teachers.

> Moreover, the cases make it clear that the institution of tenure is much more than a mere labor relations device. Tenure laws were designed to protect teachers in their positions, Downs v. Board of Educ. of Hoboken, 13 N.J. Misc. 853 (Sup. Ct. 1935), and by virtue of the security they engender to promote a "competent and efficient" school system, Viemeister v. Board of Educ. of Prospect Park, 5 N.J. Super. 215 (App. Div. 1949). The fundamental and overriding purpose of tenure is to benefit children by furthering the constitutional and legislative goal of a thorough and efficient education. See, N.J. Const. (1947), Art. VIII, § IV, par. 1; N.J.S.A. 18A:7A-2, -5, -15. (Emphasis Added)
>
> In Re Jamesburg High School Closing, 83 N.J. 540, 557 (1980).

The system, as established by the Legislature, contemplates that local **B**oard of Education shall have broad discretionary authority in the granting of tenure. Of course, that discretion, although broad, is not without limit. A Board's decision could be set aside if it were arbitrary,

capricious, unreasonable or otherwise improper. The burden, however, is on the teacher to establish the grounds for reversing the Board's action. The bare allegation of arbitrariness is insufficient to overturn the Board's decision. Further, the reviewing authority will generally not engage in a re-evaluation of the teacher's classroom performance and teaching competence but rather defer to the supervisor's professional judgment. Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236, 247 (1974). Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982).

There is no statute or regulation which dictates the criteria to be used by Boards of Education when making tenure decisions. Recognizing that a Board has no obligation to renew the contracts of all non-tenured teachers who do a "good job," the Appellate Division found that tenure decisions based in the "ranking" of teachers is both logical and in accordance with the Board's commitment to provide a "thorough and efficient" education to the children of the district. Bd. of Ed., Tp. of Wyckoff v. Wyckoff Ed. Assoc., 168 N.J. Super. 497, 501 (App. Div. 1979).

In the present matter the burden is on the petitioner, John Getz, to demonstrate that the Board of Education of North Hunterdon-Voorhees Regional High School District acted improperly when it denied him tenure. The petitioner has made bare allegations that the Board acted in bad faith, that it had secret meetings and hidden agendas, but has offered no competent evidence to substantiate those allegations. The Board, for its part, demonstrated that it directed its newly appointed Superintendent, Charles J. Murphy, to personally evaluate each of the teachers in the district who were under consideration for tenure. Dr. Murphy, upon coming to the district on March 20, 1995, immediately complied with that direction. He found four of the five non-tenured teachers to be above-average, rating them either an A or B, and recommended them for tenure. Mr. Kovacs, Acting Principal of Voorhees High, concurred that the four teachers recommended for tenure were "above average." The fifth, John Getz, was found by Dr. Murphy to be deficient in many areas; at best, an average teacher; at times, reverting to first-year mistakes. Concerned, Dr. Murphy reviewed Mr. Getz's records and conferenced with his supervisor's who confirmed that petitioner was an average teacher who did what was necessary and who needed on-going supervision and support. Based on these evaluations, Dr. Murphy rated Mr. Getz a "C" or average teacher and did not consider his performance up to the level of excellence required of

tenured teachers in the North Hunterdon-Voorhees school district. He, therefore, did not recommend that Mr. Getz be granted tenure and the Board accepted his recommendation. I **CONCLUDE** that this decision represents a sound educational judgment based on the Superintendent's professional expertise. It is a decision which seeks to assure that the tenured teachers in the North Hunterdon-Voorhees school district have a level of competence which will provide the students with a "thorough and efficient" education as is promised them under the New Jersey Constitution. I **CONCLUDE** further that petitioner has failed to demonstrate any reason why this decision should be overturned.

The final issue is to be addressed is whether petitioner, by his actions, waived his right to an informal appearance before the Board. This entitlement is found in N.J.A.C. 6:3-4.2 which provides:

> (a) Whenever a nontenured teaching staff member has requested in writing and has received a written statement of reasons for nonemployment pursuant to N.J.S.A. 18A:27-3.2, he or she may request in writing an informal appearance before the district board of education. Such written request must be submitted to the board within 10 calendar days of receipt of the board's statement of reasons.
>
> (b) Such an informal appearance shall be scheduled within 30 calendar days from receipt of the board's statement of reasons.
>
> (c) Under the circumstances described in this section, a nontenured teaching staff member's appearance before the board shall not be an adversary proceeding. The purpose of such an appearance shall be to permit the staff member to convince the members of the board to offer reemployment.

It is fundamental that waiver involves the intentional relinguishment of a known right. It implies an election by a party to dispense with something of value or to forego some advantage that might otherwise be demanded. Petrillo v. Bachenberg, 263 N.J.Super. 472, 480 (App. Div. 1993). Our Supreme Court has emphasized that issues of waiver "are usually questions of intent, which are factual determinations." Shebar v. Sanyo Business Sys.. Corp.111 N.J.276, 291 (1988).

In the present matter, petitioner requested the informal appearance to which he was entitled udder N.J.A.C. 6:3-4.2. The Board responded promptly by scheduling the appearance on May 10, 1995. Since the purpose of the appearance is "to convince the members of the Board to offer reemployment" N.J.A.C. 6:3-4.2(c), it is generally scheduled as expeditiously as possible before the board engages in a search for, or must commit to, a replacement for the teacher not awarded tenure. Despite the benefits of an early appearance, petitioner, through his counsel, informed the Board that "we are unable to accommodate the Board on that date." Petitioner requested that the appearance be scheduled no earlier than May 22, 1995 and no later than the first week of June 1995.

The Board refused to reschedule the appearance during the time frame specified by petitioner. It had genuine concerns, whether they would have materialized is not the issue, that an appearance during that time frame would lead to student demonstrations, as had occurred on April 5 and April 6, 1995 and might disrupt the district's graduation activities. The Board, therefore, continued to offer May 10, 1995 for Mr. Getz's appearance. In the alternative, the Board offered to reschedule the appearance on June 22, 1995, while Mr. Getz was still in the employ of the Board and a reemployment decision was still viable. Petitioner refused both offers filing the instant Petition with the Commissioner of Education and seeking emergent relief. Mr. Getz specifically requested the Commissioner to order the Board to schedule an informal appearance during the week of June 5, 1995. The Commissioner, in a letter dated June 6, 1995, refused the emergent relief requested.

It is clear from the record developed herein, that the Board offered the petitioner two separate dates to appear before it and petitioner rejected both. Mr. Getz elected instead to seek a directive from the Commissioner, by way of emergent relief, for a date of his choice. The Commissioner refused and permitted the instant proceeding to go forward. These facts demonstrate that the petitioner knew his entitlement under N.J.A.C. 6:3-4.2 and rejected the dates offered by the Board electing to seek relief before the Commissioner.

The remaining correspondence concerning the scheduling of an informal appearance before the Board was exchanged following the pendency of the present administrative matter. I **CONCLUDE** that such correspondence represented attempts to resolve the present controversy and are not relevant to the issue of whether petitioner's acts, during the 1995-96 school year,

constituted a waiver of his right to an informal appearance before the Board. I **CONCLUDE** that the Board discharged its responsibilities under N.J.A.C. 6:3-4.2 and petitioner by rejecting the two dates offered by the Board effectively waived his right to any further appearances before it.

It is, therefore, **CONCLUDED** that the decision of the North Hunterdon-Voorhees Regional High School district not to grant John Getz a fourth year employment contract and thus to deny him tenure, should be **AFFIRMED.**

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

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

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

February 5, 1996
DATE

Mary Ann Burgess
MARY ANN BURGESS, ALJ t/a

Receipt Acknowledged:

2/6/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 09 1996
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

km

WITNESS LIST

For Petitioner:

Edward Getz

John Getz

For Respondent:

Jean Beavers

Ernest Kovacs

Philip W. Evans

Charles J. Murphy

EXHIBITS

J-1 Letter to David B. Rand, Esq., dated April 17, 1995, from Glenn J. Williams, Esq.

J-2 Letter to Glenn J. Williams, Esq., dated April 18, 1995, from David B. Rand, Esq.

J-3 Letter to David B. Rand, Esq., dated April 19, 1995, from Glenn J. Williams, Esq.

J-4 Letter to Glenn J. Williams, Esq., dated April 21, 1995, from David B. Rand, Esq.

J-5 Letter to David B. Rand, Esq., dated April 26, 1995, from Glenn J. Williams, Esq.

J-6 Letter to Glenn J. Williams, Esq., dated April 28, 1995, from David B. Rand, Esq.

J-7 Letter to David B. Rand, Esq., dated May 8, 1995, from Glenn J. Williams, Esq.

J-8 Letter to David B. Rand, Esq., dated May 9, 1995, from Glenn J. Williams, Esq.

J-9 Letter to Glenn J. Williams, dated May 9, 1995, from David B. Rand, Esq.

J-10 Letter to Glenn J. Williams, dated May 9, 1995, from David B. Rand, Esq.

J-11 Letter to Glenn J. Williams, Esq., dated May 16, 1995, from David B. Rand, Esq.

J-12 Letter to Robert M. Tosti, dated June 27, 1995, from Michael S. Selveggi, Esq.

J-13 Letter to Glenn J. Williams, Esq., dated July 19, 1995, from David B. Rand, Esq.

J-14 Letter to David B. Rand, Esq., dated July 19, 1995, from Glenn J. Williams, Esq.

J-15 Letter to Glenn J. Williams, Esq., dated July 21, 1995, from David B. Rand, Esq.

P-1 Memorandum from Ernie Kovacs, dated March 2, 1995, to Mary Majewski

P-2 Evaluation Report Form of John Getz, dated March 2, 1995, prepared by Jean Beavers

P-3 Memorandum from C.J. Murphy, dated April 27, 1995, to John Getz

P-4 Evaluation Criteria - Teaching of John Getz, dated June 10, 1994, prepared by Jean Beavers

P-5 Evaluation Report Form of John Getz, dated November 14, 1994, prepared by Jean Beavers

P-6 Evaluation Report Form of John Getz, dated January 11, 1995, prepared by Jean Beavers

P-7 Evaluation Report Form of John Getz, dated February 28, 1995, prepared by Ernest Kovacs

P-9 Tenure Teacher Annual Performance Report of John Getz, dated June 21, 1995, prepared by Jean Beavers

R-1 Letter to David B. Rand, Esq., dated November 21, 1995, from Arnold M. Mellk, Esq.

R-2 Photocopy of Quiz 11.5 - 11.6 given by John Getz to math class on March 2, 1995

R-3 Addendum to Evaluation of March 22, 1995, prepared by John Getz

R-4 Evaluation Report Form, dated March 22, 1995, prepared by C. Murphy

R-5 Evaluation Report Form, dated October 28, 1992, prepared by Jean Beavers

R-6 Memorandum from C. Murphy, dated April 6, 1995, to John Getz

R-7 Evaluation Report Form of John Getz, dated April 27, 1995, prepared by Charles Murphy

R-8 Addendum to Evaluation, dated May 3, 1995, prepared by John Getz

R-9 Evaluation Report Form of John Getz, dated May 25, 1995, prepared by Charles Murphy

R-10 Petitioner's Answers to Interrogatories, dated November 6, 1995

R-11 Copy of Article from East Chester Record, dated September 29, 1988

R-12 Decision of the Commissioner of the New York State Education Department, in the appeal of the East Chester Union Free School District, No. 12,649, dated February 6, 1992

R-13 Copy of Inside Education column from the East Chester Record, dated October 25, 1984

R-14 Letter from Charles J. Murphy, dated March 29, 1995, to John Getz

R-15 Handwritten notes prepared by Edward Getz.

OAL DKT. NO. EDU 6667-95

JOHN GETZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON-VOORHEES REGIONAL SCHOOL DISTRICT AND CHARLES J. MURPHY, HUNTERDON COUNTY,	:	DECISION
RESPONDENTS.	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the Respondent Board's actions not to renew petitioner's employment may not be upset unless it can be demonstrated to be patently arbitrary, capricious or unreasonable. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). The Commissioner further concurs with the ALJ that the Board's determination not to renew petitioner's employment did not exceed the reasonable use of the Board's broad discretionary authority.

The ALJ is correct in that a local board has virtually unlimited discretion in hiring or renewing nontenured teachers and may only litigate that question if the facts he alleges, if true, would constitute a violation of constitutional or legislatively conferred rights. Guerriero v. Board of Education of the Borough of Glen Rock, decided by the State Board of Education February 5, 1996, aff'd DKT. NO. A3316-85T6 (App. Div. 1986). See, also, John Kufel, Jr. v. Board of Education of the Union County Vocational-Technical School District, Union County, decided by the Commissioner April 19, 1995, decided by the State Board of Education February 7, 1996. Petitioner has made no such claim, nor upon review of the record, which includes the ALJ's findings, is it revealed that petitioner has made such a showing.

Additionally, the Commissioner accepts the ALJ's conclusion that petitioner waived his entitlement to a hearing under N.J.A.C. 6:3-4.2 in that petitioner rejected two hearing dates offered by the Board, electing instead to seek emergent relief before the Commissioner. In so ruling, the Commissioner finds that the ALJ effectively addressed and analyzed petitioner's actions and the regulatory requirements for a nonreemployment hearing.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the Office of Administrative Law and finds that the within Petition of Appeal must be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 19, 1996
Date of Mailing, March 20, 1996

111-96

111-96

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
HILLSBOROUGH TOWNSHIP,	:	DECISION
SOMERSET COUNTY.	:	
_____	:	

SYNOPSIS

Petitioners, 10 qualified voters, alleged that there were improprieties and violations of law in the conduct of the special school election for a bond referendum.

ALJ determined that no irregularity which could have changed the outcome of this election occurred in the within matter and that any directives which might otherwise have been placed upon the Board for prospective alteration of its election practices have been rendered moot by the enactment of P.L.1995, c. 278.

Commissioner concurred with findings and determination of the ALJ. Petition was dismissed.

MARCH 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10099-95

AGENCY DKT. NO. 404-10/95

IN THE MATTER OF THE SPECIAL ELECTION HELD IN THE SCHOOL DISTRICT OF HILLSBOROUGH TOWNSHIP

Linda P. Snyder, petitioner, *pro se*

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: January 30, 1996 Decided: February 6, 1996

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

On Tuesday, October 10, 1995, the Hillsborough Township Board of Education held a referendum on the issuance of bonds to fund a capital project, construction of a new high school .

On October 13, 1995, ten registered voters of the district filed a petition pursuant to *N.J.S.A.* 18A:14-63.12 with the Commissioner of Education alleging violations of statutorily prescribed election procedures. The matter was transmitted to the Office of Administrative Law for inquiry and determination. *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

An inquiry was scheduled for January 8, 1996. A winter storm caused cancellation of the inquiry and it was rescheduled for January 30, 1996. The matter was heard on that day in the Hillsborough Municipal Court. Six persons testified and nine exhibits were admitted in evidence.

Linda P. Snyder, an employee of the Board of Education and a registered voter testified. She is secretary to the Board Secretary and helped secure poll workers for the special election. On the basis of complaints and comments received from the public, the Board Secretary directed her to check the number of signatures in books and tallies on machine printouts. The numbers did not match. She and nine other registered voters filed the petition mentioned above.

Virginia R. Hutson testified that she worked at districts two and four during the election. She has a notarized statement of five registered voters who conducted a count of signatures and authorization slips on December 27, 1995, in the office of the county superintendent of schools. Each book was counted twice. A polling district and a voting district are not the same thing.

Workers at the October election had no training in the "new system." They were not aware that voters were required to sign the new registers supplied by the County Board of Elections.

There was a five vote discrepancy. Some voters came in early and did not sign the registers before casting their ballots. Others were not in the registration books but were approved to vote by the county board of elections via telephone. There was overcrowding, there was no crowd control and, after 6:00 p.m., there was no telephone available to the poll workers.

The voting machines were checked throughout the day. The public counter equaled the number of voting authority slips at all times. When a machine is opened, the protective counter reading is noted. The same counter is read when the machine is closed. The difference must equal the number of votes cast.

The witness emphasized that workers were not instructed to have voters sign in the new, computer-generated registers provided by the county board of elections. The witness could not

recall having a polling list at a Board election. A county official set up the machine, explained its use and informed the witness that the workers had to have voters sign the registration book. As soon as workers were aware of the requirement, all subsequent voters were required to sign.

Overcrowding is a perennial problem at board elections. Poll workers have made the Board Secretary aware of the situation. All persons who chose to wait were allowed to vote; no one was turned away. All persons in line at 9:00 p.m., the stated closing hour, were allowed to vote. Despite the large crowd, there were no signs, designated aisles or other aids. The signatures on voting authority slips were not always clear. Late in the evening, the witness experienced difficulty when machine two malfunctioned. There was no telephone available to her with which to call the County Board of Elections. She and her husband went to Board offices and told of the problem. The Board secretary went to the school and could not rectify the problem. The witness knew how many votes were cast, however, because that number could be derived by reading the protective counter.

The witness has seven years' experience with the County Board of Elections and five years' experience working in school board elections. The Board Secretary met with judges before the election and went over procedures. The polls were opened at 7:00 a.m. at polling district two, which shared a room with polling district four. The witness became aware of unusually long lines, the worst of these from approximately 4:00 p.m. on. She and the judge were aware of the problem. At one point, the poll judge told workers from district two to assist workers at district four where lines were especially long. At approximately 6:30 p.m., a voter noted particular problems. She later memorialized her observations in a letter to the witness. Exhibit C.

The witness stated she has attended poll worker training classes every two years and, on a few occasions, has attended on the in between years. She carries two reference books and the County Board of Elections' telephone number. When the school office closed, polling places two and four had no telephone access because the public telephone outside the building was out of order.

Stephen Scannell testified. He is employed by the Somerset County Board of Elections. Mrs. Hutson contacted him several times since the election. This election used a new procedure.

The regular registration books were not used but computer-generated smaller books carrying four or five voters' names and information on each page were employed for the first time.

On the morning of October 10, he worked with the Board to assist the election process. Board members and the Board Secretary could not enter the polls except for the express purpose of casting ballots. He and his staff opened polls for the Board. In each case, a Board of Elections employee entered the building, opened the machines, retrieved what is known as the zero report, which verifies that there are no tallies on the machine before the first vote is cast and set up the machines to run. In each case, this was accomplished by 7:00 a.m. At the municipal complex, the witness himself opened machines and gave brief instructions on the procedures to employ. He mentioned the new register books and that voters must sign the books before voting. Workers appeared not to know this until he told them of the requirement.

He then went to the Hillsborough School on Route 206 where districts two and four were located. They had opened their machines. He noticed, however, that the poll workers were not requiring voters' signatures in the registration books. He instructed them and the workers agreed that they would get signatures from that point forward. He and a coworker went to Sunnymead School. Workers there had not required signatures. He instructed them to require signatures from that point forward. Some persons did vote without signing the register books. The witness' coworker opened the Amsterdam and Woods Road voting locations.

Election workers are certified by the County Board of Elections. The witness prepares a list of eligible workers and presents it to the Board conducting an election. He conducts classes for workers. The procedure in effect in November was a new procedure. There was no instruction to Board workers until they came to the polls on October 10, 1995 in the new procedure. The witness stated he went over the procedure at the municipal complex before the polls opened. He and his coworker were on call all day. A machine can be left in condition such that the next voter cannot use it. Thus, he and his coworker remained through the day.

The kinds of things Mrs. Hutson noted are common in all elections, especially board elections. Crowding is something that all polls deal with and workers can usually find a way to work through the problems.

Walter Pieleck was a judge at polling places two and four. The workers' instructions had a new cover sheet. Exhibit E. The Board Secretary announced that a new registration book would be used. The witness cannot recall the secretary saying that voters had to sign the new registration book. When the older large registration books were used, the were used for signature comparison only. Voters did not sign the books at school board elections.

The witness stated several persons were in line before polls opened. Polls closed at 9:00 p.m. and anyone in line by 9:00 p.m. was given the opportunity to vote. The witness has been an election worker for nine years and a judge for five or six years. He and six other judges met with the Board secretary the day before the election and were given instructions. They discussed voting hours and the new books.

The witness stated that as judge he declares the polls open and oversees paperwork at the close. He knew County Election Board people were available if there were machine problems.

At some time after 6:00 p.m., he asked a Mrs. Morgan to call the Board secretary because he believed help was needed with the numbers of persons crowding into the polls. He could not get to a telephone in the school and the telephone outside the school was not working. The polls began to become crowded at about 6:00 p.m. and stayed crowded until polls closed. Finally, the witness stated he could recall no telephone call from the Board Secretary about numbers not balancing.

Charles Hutson testified that he alone handled two machines. He left the polls only for approximately 45 minutes to take a late lunch. He checked voter authority slips throughout the day. There was a discrepancy of one; a voter who should have used another machine used his. The protective counter and the public counter are not the same thing. The public counter is sealed before you see the machine. Voting authority slips come in books, the voter signs and prints his or her name and address. A voting authority slip is handed to a poll worker and authorizes the voter to enter the booth.

The witness stated that voter authority slips equaled the public counter number minus one. He counted signatures in the register booklets and this number equaled the public counter number minus two.

Harold P. Brown testified that on October 10 he voted at the Hillsborough School at approximately 10:00 a.m. He signed the registration book, saw no long lines and saw nothing extraordinary. The election was run by the Board which hired trained workers. There were more "No" votes in October than in an earlier special election in March. There is much talk of length of lines and waiting is not unusual in life, including elections. The appeal was filed October 13, 1995 by ten registered voters. The signers said they saw long lines. This is disturbing to him. He saw only proponents of the referendum involved in the inquiry.

Thomas M. Venanzi, the Board Secretary/School Business Administrator for eight years testified. He plans elections. The Board designates polling districts (Exhibit D), appoints workers and sets hours. Seven districts were established for the October referendum. He prepares by meeting with the poll judges before the election. He did so on October 9, 1995. Each judge was given a copy of the poll workers' check list. Exhibit E. He reviewed procedures with the judges. He pointed out that for the first time the County Board of Elections would send a smaller, computerized voter registration book. He provided each judge a sample page. The actual new registers were locked inside the voting machines when the machines were delivered. The witness told the judges of the signature requirement. The voter had to sign both the register and the voting authorization slip.

Election workers were chosen from a list of persons certified by the County Board of Elections. His office sends out letters inviting persons to serve. Responses are received and workers are appointed on a first-come, first-served basis. All other training is provided by the County Board of Elections.

On October 10, 1995, the witness received a call from Mrs. Morgan at approximately 7:00 p.m. She reported long lines and he believes she told him at the municipal building. He called the County Board of Elections because he cannot go into the polls except to cast his own ballot.

While he was voting at approximately 3:30 p.m., he was third in line to vote in District four. He heard a poll worker in District four speak to a person in the District two line. Ms. Petrock, the worker, spoke to Mr. Mellenchuck, who was standing in line. She said, "What are you doing here again?" Mellenchuck did not respond. When the statement was made, Mr. Hutson stared at the Board Secretary. The witness voted and left. Mr. Mellenchuck also left the poll at that time.

Challengers are provided for in school election law, but no one filed to be a challenger at this election. The only persons who should be in a poll are the poll workers, the voters, whether voting or waiting to vote, challengers if any and County Board of Elections personnel.

There was a problem closing the machine used in District four. He was in his office at about 9:30 p.m. and received results from all locations accept District four. He called the County Board of Elections and received no answer. He went to District four and found the machine jammed. He could not correct the problem.

On the next morning, he had to combine results and prepare a statement. All materials were then signed and sent to the County Superintendent of Schools. Exhibit G. While compiling the combined statement, he had his secretary review signature registers for Districts two and four based on what he had seen on October 10. He was concerned, after hearing the poll worker's remark to Mr. Mellenchuck, with the integrity of the election. He asked Mrs. Snyder to compare the signature numbers on books with the numbers of voter authorization slips. The number of persons who signed registration books in Districts two and four numbered 55 fewer than those who signed authorization slips. He was shocked and disappointed at this fact and promptly informed the Superintendent and Board.

His secretary marked signatures that did not seem to match and, in addition to the 55 persons who had not signed the registration books, there were perhaps 60 signatures that appeared not to match.

The Superintendent and Board were concerned with the integrity of the election and expressed the need for an inquiry. He filed on behalf of the Board, but his appeal was rejected. He was advised by the Bureau of Controversies and Disputes that a petition for inquiry had to bear the signatures of ten register voters. He gave the petition to his secretary and asked her if she would get the ten necessary signatures. She agreed to do so and did.

On October 10, he contacted the District two judge, Mrs. DeCanto, and the District four judge, Mr. Pieleck. Mrs. DeCanto said that some persons did not sign the registers at the outset and that that was a mistake. Mr. Pieleck was at a loss for words and stated he could not understand how it happened.

Concerning the Mellenchuck incident, the Secretary spoke to Mrs. Petrock by telephone. She asked if he knew Mr. Mellenchuck and she replied that she did. She stated she recalled seeing him at the polls once or twice during the day.

In other districts, signatures in the register books varied from voting authorization slips by from zero to four. The County Board of Elections stated that a variance of zero to four is not unusual, but that 25 to 30 is inexplicable.

The Board Secretary also testified that he received no calls from poll workers in Districts two and four on October 10. He had no conversation with Mrs. Hutson before the referendum. After the election, Mrs. Hutson stated through Mr. Pieleck that she wanted to speak with the secretary. He scheduled a meeting with her on October 16 at 10:00 a.m. At the meeting she stated that the reason for the discrepancy in numbers was that people did not sign registers at the beginning of the election at 7:00 a.m. She also expressed concern with long lines and thought that arrangements could be improved. She also mentioned the need for access to a telephone.

Perhaps three or four persons called the Board Secretary and said they could not vote because of long lines. In most cases, these were persons who had small children with them.

More persons voted in October than in March, but not in districts two and four. The witness tallied the ballots at each referendum. Exhibit H.

The witness was not aware why Mr. Mellenchuck was at the polls more than once. It is irrelevant why he was there more than once. The concern was why he was there at all.

DETERMINATION

Polls must be open between the hours of 5:00 and 9:00 p.m. and during such additional time as the Board may designate between the hours of 7:00 a.m. and 9:00 p.m., and as much longer as is necessary to permit those present to vote. *N.J.S.A.* 18A:14-45. In this case, the Board chose to have polling hours from 7:00 a.m. to 9:00 p.m. Despite the polls being open for fourteen hours, there were periods at which some or all of the polls were crowded. That is hardly an unusual event.

There clearly was come confusion at the polls. It is also clear that the confusion was in great part caused by a misunderstanding as to new requirements, specifically having the voters sign the new computerized registers in addition to voting authorization slips. Some persons cast ballots but did not sign the registers. I **FIND** that this is an irregularity. Even though it constitutes an irregularity, it would have had to be the producing cause of illegal votes which would not otherwise have been cast or the cause of defeating legal votes which would have been counted but for the irregularity, and to such an extent as to change the result of the election. Alternatively, the irregularity would have to be shown to have influenced the election in some other way so as to repress a full and free expression of the popular will. *In re Wene*, 26 *N.J. Super.* 363 (Law Div. 1953).

The referendum lost by 374 votes. The number of votes cast by persons who signed voter authorization slips, but not the registers does not even approach 100. Thus, the "full and free expression of the popular will" has not been thwarted. I so **FIND**.

This finding does not mean that there are no problems. To the extent possible, boardd of education have a responsibility to anticipate voter turnouts and to provide sufficient polling places, voting machines and poll workers to accommodate the anticipated numbers. In the past, it has often been directed that the Board Secretary consult the County Superintendent of Schools

concerning voting procedures. It is also been directed that the Board insure that voting machines are adequately staffed and that sufficient space be provided so that voting machines may be physically separated. On December 15, 1995, Chapter 278 of the Laws of 1995 was approved. This places school elections under district boards of election. Thus, the traditional advice may be moot.

In consideration of the foregoing, I **CONCLUDE** as a result of this inquiry that no irregularity that could have changed the result of this election occurred. Accordingly, this inquiry is **ADJOURNED**.

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

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

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

6 FEBRUARY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

2/8/96
DATE

DNA
DEPARTMENT OF EDUCATION

FEB 13 1996
DATE

Mailed to Parties:
Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

/cat

LIST OF WITNESSES

Linda P. Snyder
Virginia R. Hutson
Stephan Scannell
Walter Pieleck
Charles R. Hutson
Thomas M. Venanzi

EXHIBITS

A Notarized statement of five registered voters who conducted a count of signatures and authorization slips on December 27, 1995

B Notarized statement of Helen H. Haines, January 5, 1996

C Letter, Morgan to Hutson, January 3, 1996, 2 pp.

D Board-designated polling places for special school election of October 10, 1995

E Election workers' check list, October 10, 1995 special election

F List of potential poll workers, 2 pp.

G Combined statement of election results, 14 pp.

H Tally of ballots, March 28 and October 10, 1995

OAL DKT. NO. EDU 10099-95

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	
SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
HILLSBOROUGH TOWNSHIP,	:	DECISION
SOMERSET COUNTY.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that no irregularity which could have changed the outcome of this election occurred in the within matter, and that any directives which might otherwise have been placed upon the Board for prospective alteration of its election practices have been rendered moot by the enactment of P.L. 1995, c. 278.

Accordingly, the initial decision of the OAL is adopted for the reasons articulated therein, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 25, 1996
DATE OF MAILING MARCH 26, 1996

112-96

112-96

J.B., on behalf of her grandchild, R.H., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY, : COMMISSIONER OF EDUCATION

: DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning grandparent contested Board's determination that her grandson, R.H., was not domiciled in the District and, thus, not entitled to a free public education in the District's schools.

ALJ found that petitioner, a domiciliary of Ocean Township, established that R.H. was kept in her home and was supported by her *gratis* as if he were her child and she assumed all personal obligations for him relative to school requirements. However, the ALJ found that petitioner failed to establish that the parents of R.H. were not capable of supporting or providing care for R.H. due to a family or economic hardship as required by N.J.S.A. 18A:38-1b(1). ALJ concluded that petitioner was not legally entitled to have R.H. admitted to respondent's schools. ALJ found that for the period of time that R.H. attended respondent's schools the District was entitled to payment of tuition calculated as set forth in statute. Petition was dismissed.

Commissioner reversed the ultimate conclusion of the ALJ, finding that the unique and compelling circumstances present in this case constitute family hardship, sufficient to meet the standard of the pertinent statute. N.J.S.A. 18A:38-1b(1).

MARCH 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8770-95

AGENCY DKT. NO. 347-9/95

J.B., ON BEHALF OF HER GRANDCHILD, R.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

Honora O'Brien-Kilgallen, Esq., for respondent (Kramer, Kramer & Kilgallen, attorneys)

Record Closed: December 29, 1995 Decided: February 6, 1996

BEFORE **JOSEPH F. MARTONE**: ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner contests respondent's determination that her grandson, R.H., is not domiciled in the school district and is not entitled to a free public education in the district schools. The matter was transmitted to the Office of Administrative Law (OAL) on September 28, 1995, for hearing

as a contested case. The matter was scheduled for a hearing on November 15, 1995. On that date, a hearing was held and concluded. After the receipt of written submissions from the parties, the record closed on December 29, 1995.

FACTUAL DISCUSSION

The following is not intended to be a verbatim statement of the testimony in this matter. It is a summary of the testimony and evidence which was found by the undersigned to be relevant to the issues in this matter.

The first witness to testify was the petitioner, J.B., who is the grandmother of R.H., the student seeking a free public education in respondent's school district. J.B. testified that she resides in Ocean Township and has resided there for 16 years. Her home has five bedrooms, three baths and contains approximately 3,000 square feet. R.H. is her grandson. J.B. has three grown children, L.H., the mother of R.H., I.B., a son who lives in the area and J.J.B., a son age 28 who lives with her and is co-owner of the home.

J.B. testified that her daughter L.H. lives in Deal, New Jersey. Beside R.H., L.H. has three other children, age 12, 8 and 6. J.B. testified that she works part-time approximately 25 hours a week at a retailer of lady's swimwear and sportswear in Eatontown, New Jersey. She has income from investments and her son J.J.B. contributes to the household expenses.

J.B. explained why she applied to have R.H. enrolled in respondent's school district. R.H. first attended the Hillel Yeshiva and later the schools in Deal school district but was not happy at home. Hillel Yeshiva is a private school where the parents pay tuition, and R.H. attended there from first grade until fifth grade. While in attendance he was taught Hebrew in the mornings and English and other regular education subjects in the afternoon. However, she indicated that it was too much for R.H. to handle. R.H. then transferred from Hillel Yeshiva to the Deal school which he attended for the past three years. J.B. indicated that R.H. could not meet his father's expectations and that he felt pressured. He threatened to do various things, including running away from home and other, more serious things. As a result, J.B. suggested to his parents that R.H. move in with her in her own home. This was agreed to and R.H. has been given his own

bedroom where he has taken down her photographs and decorations and placed his own pictures up. He is now doing very well in school.

J.B. testified that R.H. is classified as visually impaired. She indicated that she is supporting him free of charge and that no one is paying any money towards his keep and support. She has assumed all personal obligations and responsibilities for R.H. For example, she attended back to school night during which she spoke to R.H.'s teachers to determine his progress in school. She intends to assume all obligations and responsibilities for R.H. into the future.

J.B. testified that R.H. lives with her for the entire week, but that on Friday night they sometimes go to R.H.'s parents to observe the Sabbath. They would leave her home and travel to R.H.'s parent's home where R.H. would stay until Sunday. J.B. indicated that she is not overly religious and that on some occasions she would drive back home and stay there, and on other occasions she would stay at her daughter's home. Otherwise, R.H. lives with J.B. full-time and comes back to her home on Sunday.

With respect to providing clothing and other supplies for R.H., J.B. testified that her daughter, R.H.'s mother, recently bought him a new winter jacket. However, she supplies all other necessities for R.H. including food, school supplies and other similar necessities. However, she indicated that R.H. is still covered under his parent's health insurance.

J.B. testified that she is responsible for getting R.H. to school. She explained that it is difficult to wake him in the morning. Because she works she is not at home after school and he has a key to her house. He also has a moped which he sometimes drives to school or to visit his friends. She cooks his meals most of the time but, on occasion, he helps himself to food in the house.

J.B. testified that she and her grandson understand each other and they get along very well. There are occasions when R.H.'s mother takes him places, but most times it is her responsibility to drive R.H. to the places he needs to go.

J.B. testified that R.H. is doing very well in school. He is 15 years old and is in grade 9 and he is much happier than when he was at his parent's home. He is not feeling the pressure from his father. She indicated that he was thinking very nasty thoughts when he was at home, but since he has been living with her he is much happier. He has made a lot of friends and he simply wants to do well in school.

On cross-examination, J.B. testified that she is R.H.'s legal guardian. However, it was stipulated by counsel that there are no court papers appointing J.B. as R.H.'s legal guardian. J.B. admitted that during the summer of 1995, she rented her home for a total of two months from the end of June until September. During these two months she lived with her married son I.B. She spent most of her time at her son's home, but was at her daughter's home for part of the time.

J.B. admitted that when she filled out the affidavit on May 22, 1995 (J-1) seeking to have R.H. enrolled in the district schools, that R.H. was not living with her at that time because he was still in school in Deal and living with his parents. She also admitted that she did not move back into her home until mid-September, just before the commencement of school. She also admitted that if R.H. lived with his parents in Deal, he would be attending Asbury Park High School.

J.B. testified that her daughter and her husband have many arguments and fights and do not get along, and that there is pressure on R.H. from his father to do better in school. They go to R.H.'s parents on weekends because it is an opportunity to visit and to see R.H.'s brother and sister. Otherwise, R.H. does not visit his parents on his own. R.H.'s father does not often inquire as to his progress in school or his well-being. R.H.'s mother, her daughter, did not attend R.H.'s back to school night. However, R.H.'s mother is in daily contact with her about his well-being. She indicated that her daughter bought R.H.'s school clothes, but this consisted of just a jacket. J.B. bought him school supplies costing approximately $100 and she gives him about $2 each day for lunch. She indicated that she eventually intends to apply for legal guardianship of R.H. She also indicated that R.H. will be living with her in the summer.

J.B. testified that at R.H.'s parent's home, he had a bedroom and that he has removed some of his clothes and his personal belongings, but that the room remains his. She indicated that R.H. was unhappy at home while he attended Hillel School and that he has been very unhappy for

the past two years. He was happier after transferring to the Deal School, but he was still unhappy because of his father's pressure and because his father compared him to his brother. She also indicated that her daughter has asked her husband to leave their home but subsequently asked him to stay, and that they are attempting to work out their marriage problems.

Respondent called L.H., R.H.'s mother, as a witness. L.H. testified that she has lived in Deal, New Jersey for 13 years. She has been married for 15 years. Her husband manages an import-export infant wear company. She recently obtained a part-time job. All of her three other children attend the Hillel Yeshiva. Hillel consists of an elementary school and a high school. R.H. left Hillel at the end of fifth grade.

L.H. testified that she has no concerns about sending R.H. to Asbury Park High School. She decided that it was best for him to move in with his grandmother when he said that he was going to run away from home. She also explained that R.H. was living with her mother in her brother's home during the summer. The majority of R.H.'s time is spent with his grandmother, although he does come home on Friday night through Saturday for the Sabbath. On Sunday he usually goes out with his friends.

L.H. testified that it was best for R.H.'s emotional growth for him to move out of the home. She indicated that whenever she and her husband fought, R.H. became very emotional and withdrawn. He threatened to kill himself and has threatened to run away. R.H. went to a psychologist for one year when he was in fifth or sixth grade. When her mother, R.H.'s grandmother, suggested that R.H. move in with her, R.H. was happy with the idea and they felt that it was in his best interest. She does not expect R.H. to come home for the summer. She is still trying to work things out with her husband. However, she does not intend to terminate her parental rights to R.H. and is hopeful that he will eventually be able to return home.

L.H. testified that R.H. took his clothes, radio, books and other personal belongings with him to his grandmother's, but that his bedroom is still furnished. During the summer, he would spend a weekend at home with her once and a while.

On cross-examination by petitioner's attorney, L.H. testified that R.H. lives with his grandmother on a full-time basis. She indicated that she pays nothing to her mother for R.H.'s support. She has bought him a winter coat, some jeans and shirts and some dress clothes for his Synagogue attendance. Otherwise R.H.'s grandmother is fully responsible for his upkeep and support.

Douglas A. Deicke, testified for respondent. He has been Superintendent of Schools since July 1, 1995. Robert J. Mahan was the prior superintendent. Mr. Deicke testified that he first heard about R.H. sometime in June 1995, while he was the assistant superintendent. He indicated that he received a letter from J.B. on July 18, 1995 (J-5) indicating that she is the legal guardian of R.H. and that he lives with her in Ocean, New Jersey. He also indicated that anytime he tried to contact J.B., he would call either her Ocean Township phone number or the phone number of her daughter's in Deal. He indicated that he has never received any formal guardianship papers for R.H. naming J.B. as his legal guardian. Mr. Deicke testified that the tuition for Ocean Township High School is calculated at $45.84 per day.

Mr. Deicke admitted on cross-examination that he has no present evidence to challenge the statements of J.B. and L.H. that R.H. resides with J.B. and is fully supported by her.

Rose Hlatky, Attendance Officer for the school district for the past 17 years, also testified. The former superintendent, Robert J. Mahan asked her to go to J.B.'s home to find out if R.H. was living there. She went there on approximately June 16, 1995. When she rang the doorbell a maid answered and indicated that she was employed by new people who had rented the home and were just moving into it that day. She indicated that J.B. was living at her daughter's home and the maid gave the daughter's Deal home as the place where J.B. could be reached. On cross-examination, Ms. Hlatky admitted that June 16, 1995, was during the 1994-95 school year. She also admitted that she did not visit J.B.'s home after June 16, 1995.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:38-1 provides that public school shall be free to: *a.* any person who is domiciled within the school district; *(b)1.* to any person who is kept in a home of another person

domiciled within the school district and is supported by such other person gratis as if he was such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so as to keep and support the child gratuitously for a longer time then merely through the school term. It does on to provide that upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the residents of the district solely for the purpose over achieving a free public education within the district. It requires that these statements be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that directly pertains to the support to nonsupport of the child.

If admission is still denied, on a hearing before the commissioner, the petitioner has the burden to prove by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student's attendance.

In his post-hearing submission, attorney for petitioner argues that nothing in the controlling statute requires that a formal legal guardianship arrangement be entered into between the student's natural parents and the individual who is supporting the child *gratis*. He also points out that in *G.C. v. Board of Education of Union City,* 1986 *S.L.D.* 2219, it was held that the grandmother of a minor child satisfied the applicable statutory requirements even though the child's father contributed money each week for care and clothing, the child was covered under the father's health insurance policy, an aunt also assisted the grandmother economically, and the child spent weekends, holidays and portions of the summer with his father. The stated reason for staying with the grandmother was that the grandmother's care and supervision were needed since the parents were divorced and the father worked during the day, although the child's two younger siblings lived with the father.

Attorney for the petitioner argues that petitioner intended to keep and support R.H. gratuitously beyond the school year because of the extremely hostile environment that R.H. was facing in his parent's home which had so adversely affected his self-esteem that he had threatened to run away as well as to harm himself. He argues that the purchase of school clothes and the retention of R.H. on the father's health insurance is not dispositive, and shows the truthfulness of petitioner and R.H.'s mother. He points out that the one visitation made by respondent to the petitioner's home was during the prior school year at which time it was determined that the petitioner's home would be rented for the summer.

Attorney for petitioner argues that the placement of R.H. with the petitioner was not intended solely to provide him with a free education, but was designed to positively affect a child who had undergone psychological counseling and who had been scarred by serious marital discord involving his parents and a contentious relationship with his father, who could not overlook his learning disabilities. The living arrangement has not only resulted in improvements in R.H.'s performance in school but may also have saved his life.

Attorney for respondent argues that petitioner admitted that she did not even reside within the school district when she applied to have R.H. attend school therein. She points out that if R.H. began to have problems in the sixth grade, why was it not until the commencement of high school that R.H. moved in with his grandmother. She points out that R.H.'s parents have all three of their other children living at home, and that R.H.'s mother stated that she has no intention of terminating her parental rights to R.H. L.H. also testified that R.H. comes home every weekend, that his bedroom has not changed, and that many of his personal items and clothing remain at home. R.H. is covered under his father's health insurance and L.H. has bought clothing for him.

Attorney for respondent argues that this situation is nothing but a facade to allow R.H. to attend Ocean Township High School rather that Asbury Park High School, for which Deal is a sending district. She also points out that the documentation required by the applicable statute was not provided by petitioner.

Based on the provisions of the applicable statute, the initial question is whether R.H. is domiciled within the Township of Ocean so as to be entitled to a free public education therein. It was not seriously contended at the hearing that R.H. is a domiciliary of the Township of Ocean. His parents reside in the Borough of Deal. As a minor child, he remains in the custody of his parents. His mother testified that she does not intend to terminate her parental rights and she indicated that she hopes that at some future time R.H. will be able to return to their parental home. It is clear from the testimony of both J.B., R.H.'s grandmother, and of L.H., R.H.'s mother, that the present situation in which R.H. is residing with his grandmother is a temporary situation which they declare was brought about because of pressures in the home, the inability of R.H. to get along with his father, marital discord and other related reasons. There was no indication in the record that R.H. intended to make his grandmother's home his permanent residence. in any event, as a minor child, his domicile is the same as his parents. Accordingly, I **FIND** that R.H. is not a domiciliary of the Township of Ocean so as to entitle him to a free public education in the schools of that district.

The next issue is whether R.H.'s situation entitles him to a free public education under the provisions of *N.J.S.A.* 18A:38-1b(1). The testimony of J.B. is that R.H. is her grandson and he resides with her in her home. Despite the testimony provided by the respondent and J.B.'s own admission that she rented her home for three months during the summer of 1995, it is not disputed that J.B. is a domiciliary of the Township of Ocean. J.B. testified that she is keeping R.H. in her home as if he was her own child and that she supports R.H. *gratis* as her child. J.B. made it clear that she has assumed all personal obligations for R.H. relative to school requirements and that she intends to keep and support R.H. gratuitously for a longer time than merely through the school term. However, it was also established that R.H. is maintained on his parent's health insurance, that he visits his parent's home every weekend, and that a bedroom is maintained for him in his parent's home. In addition, R.H.'s mother, L.H., also made it clear that she does not intend to terminate her parental rights and she hopes that he will be able to return home.

An additional requirement specified by *N.J.S.A.* 18A:38-1b(1), which was added thereto and took effect on January 11, 1994, is the requirement that the child's parent or guardian file with the secretary of the board of education a sworn statement that the parent or guardian is not capable of supporting or providing care for the child due to a family or economic hardship and

that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. It is also required that this statement be accompanied by documentation to support the validity of the sworn statements. It is with respect to this requirement that petitioner's case falls short. Petitioner has failed to establish in any way that R.H.'s parents are not capable of supporting or providing care for him because there is a family or economic hardship. Indeed, there is no question that the only reason enunciated by petitioner for R.H. not living with his parents is because of family discord and because R.H. is much happier living with his grandmother. This is not a legally sufficient reason for providing a free public education to a nonresident under the above statutory provisions.

Based upon the foregoing I **FIND** that petitioner, a domiciliary of the Township of Ocean, has established that R.H. is being kept in her home and is supported by her *gratis* as if he were her child and she has assumed all personal obligations for R.H. relative to school requirements. However, I **FIND** that petitioner has failed to establish that the parents of R.H. are not capable of supporting or providing care for R.H. due to a family or economic hardship as required by *N.J.S.A.* 18A:38-1b(1). Accordingly, I **CONCLUDE** that petitioner is not entitled to have R.H. admitted into the schools of the Township of Ocean. As a result, I further **FIND** that for that period of time that R.H. has attended the schools of the Township of Ocean that the school district is entitled to payment of tuition calculated as set forth in *N.J.S.A.* 18A:38-1b(2).

DECISION AND ORDER

Based upon the foregoing it is hereby **ORDERED** that petitioner's petition to have R.H. admitted into respondent's school district is hereby **DENIED** and petitioner's appeal is hereby **DISMISSED.** It is further **ORDERED** that petitioner shall pay to respondent tuition computed in accordance with the provisions of *N.J.S.A.* 18A:38-1b(2).

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

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

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

February 6, 1996
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

Feb. 9, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 15 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lam

APPENDIX

LIST OF WITNESSES

For petitioner:

J.B.

L.H.

For respondent:

Douglas A. Deicke

Rose Hlatky

LIST OF EXHIBITS

J-1 Affidavit of J.B. dated May 22, 1995

J-2 Statement of L.H. (undated)

J-3 1993 Final Tax Bill and 1994 Preliminary Tax Bill for premises owned by petitioner and her son J.J.B.

J-4 Superintendent of School's letter dated June 20, 1995

J-5 J.B. letter to Superintendent of School (undated)

J-6 Superintendent of Schools letter of July 19, 1995

J-7 J.B. letter of appeal to the Board of Education, dated August 8, 1995

J-8 Superintendent of Schools letter dated August 16, 1995, with attachments

J-9 Letter of petitioner's attorney dated August 25, 1995

J-10 Department of Education acknowledgment of petition of appeal dated September 6, 1995

J-11 Attorney for respondent's letter to attorney for petitioner dated September 19, 1995

OAL DKT. NO. EDU 8770-95

J.B., on behalf of her grandchild, R.H.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner avers that the Administrative Law Judge (ALJ) failed to properly apply the relevant statute in this matter in that he found petitioner failed to establish that R.H.'s parents are not capable of supporting or providing care for R.H. due to a family or economic hardship. (Initial Decision at p. 10) Petitioner asserts that the ALJ's reading of the prescriptions of N.J.S.A. 18A:38-1b(1) was improperly restrictive inasmuch as he concluded that, since R.H.'s parents were financially capable of providing care for R.H., he was not entitled to a free education within respondent's District. (Petitioner's Exceptions at pp. 1, 2)

Rather, petitioner contends, the pertinent statute references a parent's inability to support or provide care for a child "*due to a family* ... hardship." (emphasis in text) (Id. at p. 3) Petitioner argues,

> ***it was uncontroverted *** that R.H. had expressed suicidal thoughts, had threatened to run away from home, and had been severely depressed in light of the marital discord involving his parents. ***
> Certainly it is averred that the record conclusively established that R.H.'s parents were not capable of providing adequate care for R.H. because of the existence *of a family hardship*; i.e., the disintegration of a marriage that had resulted in the emotional evisceration of R.H. (emphasis in text) (Id.)

Thus, petitioner reasons there is ample factual support for the ALJ to have concluded petitioner proffered a legally sufficient reason to permit R.H. to obtain a free public education in respondent's District. Petitioner urges the Commissioner, therefore, to reverse the initial decision of the ALJ.

In reply, the Board asserts "***that there is no 'family' hardship which would require the taxpayers of Ocean Township to bear tuition costs for the Petitioner's grandson." (Board's Reply at p. 1) In support of its position, the Board incorporates by reference the brief it presented before the ALJ.

Upon careful and independent review, the Commissioner determines to reverse the ultimate conclusion of the ALJ. Initially, the Commissioner concurs with the ALJ that petitioner, a domiciliary of the Township of Ocean, has established, by a preponderance of evidence, that R.H. is being kept in her home and is supported by her *gratis*, as if he were her child, and that petitioner has assumed all personal obligations for R.H. with respect to school requirements. (Initial decision at p. 10) Further, the Commissioner finds no evidence in the

record that petitioner has entered into the present arrangement to fraudulently obtain a free public education for R.H. On the remaining issue of whether petitioner has shown that R.H.'s parents "***are not capable of supporting or providing care for the child due to a family or economic hardship***" N.J.S.A. 38-1b(1), the Commissioner notes,

> In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter. *** Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy. *** (Citations omitted)
>
> The amendments to N.J.S.A. 18A:38-1 *** were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. ***
>
> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme***. Gunderson v. Board of Education of the City of Brigantine, Atlantic County, 95 N.J.A.R. 2d (EDU) 39, 42.

The unique and compelling circumstances present in this matter, in the view of the Commissioner, rise to the level of constituting family hardship sufficient to meet the standard of the pertinent statute. "To hold otherwise harms a party the Legislature never meant to penalize *** and overlooks the substantial State interest in ensuring the education of all its children.***" Gunderson, supra, at 42.

Accordingly, the initial decision of the Office of Administrative Law is reversed to the extent that the Commissioner finds petitioner has demonstrated that R.H.'s parents are not

capable of providing care for him due to family hardship, thereby establishing R.H.'s entitlement to a free public education in the School District of the Township of Ocean.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 25, 1996
DATE OF MAILING MARCH 26, 1996

112-96

EDU #8770-95
C # 112-96
SB # 32-96

J.B., on behalf of her grandchild, R.H., :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION ON MOTION
SHIP OF OCEAN, MONMOUTH COUNTY, :

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, March 25, 1996

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

For the Respondent-Appellant, Kramer, Kramer & Kilgallen (Honora O'Brien Kilgallen, Esq., of Counsel)

The State Board of Education grants the motion for leave to appear as amicus curiae made in this matter by the New Jersey School Boards Association pursuant to N.J.A.C. 6:2-2.1. The School Boards Association is directed to submit its brief within ten days of the date of this decision.

October 2, 1996

Date of mailing OCT 04 1996

112-96

EDU #8770-95
C # 112-96
SB # 32-96

J.B., on behalf of her grandchild, R.H.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 25, 1996

Decision on motion by the State Board of Education, October 2, 1996

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

For the Respondent-Appellant, Kramer, Kramer & Kilgallen (Honora O'Brien Kilgallen, Esq., of Counsel)

For the amicus curiae New Jersey School Boards Association, Donna M. Kaye, Esq.

J.B. (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education challenging the determination of the Board of Education of the Township of Ocean (hereinafter "Board") that her grandson, R.H., who was living with her within the District, was not entitled to a free public education in the District's schools.

On February 6, 1996, an Administrative Law Judge ("ALJ") concluded that petitioner had failed to establish that R.H.'s parents were not capable of supporting or providing care for him due to a family or economic hardship, as required by N.J.S.A.

12/4/96

18A:38-1(b). The ALJ found that "the only reason enunciated by petitioner for R.H. not living with his parents is because of family discord and because R.H. is much happier living with his grandmother." Initial Decision, slip op. at 10. The ALJ concluded that "this is not a legally sufficient reason for providing a free public education to a nonresident under the...statutory provisions." Id. Accordingly, the ALJ recommended dismissing the petition and directing petitioner to pay tuition to the Board for R.H.'s attendance in the District's schools.

On March 25, 1996, the Commissioner rejected the ALJ's recommended decision. While agreeing with the ALJ that petitioner had established that R.H. was being kept in her home and supported by her gratis and that petitioner had assumed all personal obligations for R.H. with regard to school requirements, the Commissioner found that "[t]he unique and compelling circumstances present in this matter, in the view of the Commissioner, rise to the level of constituting family hardship sufficient to meet the standard of the pertinent statute." Commissioner's Decision, slip op. at 15. Accordingly, he concluded that "petitioner has demonstrated that R.H.'s parents are not capable of providing care for him due to family hardship, thereby establishing R.H.'s entitlement to a free public education in the School District of the Township of Ocean." Id. at 15-16.

The Board filed the instant appeal to the State Board.

On October 2, 1996, we granted the motion of the New Jersey School Boards Association to appear as amicus curiae in this matter.

After a thorough review of the record, we remand this matter to the Commissioner for further proceedings consistent with our decision herein.

N.J.S.A. 18A:38-1(b) provides that a child kept in the home of another person domiciled within the district is entitled to a free public education in that district if, inter alia, the parent or guardian of the child "is not capable of supporting or providing care for the child due to a family or economic hardship."

In this case, the ALJ found that petitioner had failed to establish that R.H.'s parents were not capable of providing care. In rejecting that recommended finding, the Commissioner indicated, without reference to the record, that the circumstances in this matter rose to the level of family hardship sufficient to satisfy the statutory standard. However, N.J.A.C. 1:1-18.6(b) requires that:

> An order or final decision rejecting or modifying the findings of fact in the initial decision shall be based upon substantial evidence in the record. Any order or final decision rejecting or modifying the initial decision shall specify in clear and sufficient detail the nature of the rejection or modification, the reasons for it, the specific evidence of record at hearing and interpretation of law upon which it is based and the precise changes in result or disposition caused by the rejection or modification.

The Commissioner's failure to specify in clear and sufficient detail his reasons for rejecting the ALJ's recommendation creates an additional problem in this instance. The express language of N.J.S.A. 18A:38-1(b) requires more than simply a finding of family hardship in order for a child kept in the home of another person domiciled within the district to be entitled to a free public education in that district. Rather, the hardship must be of such nature that the parents or guardian are not capable of supporting the child or providing care as a result of that hardship. The Commissioner found that the circumstances herein "[rose] to the level of constituting family hardship sufficient to meet the standard of the pertinent statute," Commissioner's decision, slip op. at 15, but

only indicated that R.H.'s parents were not capable of providing care to him as a result of that hardship in conclusory fashion in the last line of his decision. Consequently, it is unclear to us whether the Commissioner applied the proper standard in determining this matter.

As a result, we find it necessary to remand this matter to the Commissioner for a determination, under the specific standard set forth in N.J.S.A. 18A:38-1(b), of whether R.H. is entitled to a free public education in the schools of Ocean Township, as well as for an articulation of his reasons for any rejection or modification of the ALJ's recommendation in conformity with the requirements of N.J.A.C. 1:1-18.6(b). Under these circumstances, we further direct that, in order to avoid any unnecessary disruption to R.H., he may continue to attend public school in Ocean Township free of charge pending a final determination on remand by the Commissioner.

We do not retain jurisdiction.

December 4, 1996

Date of mailing DEC 06 1996

113-96

SUZETTE M. FAGAN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOMS RIVER SCHOOL DISTRICT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, nontenured full-time school bus driver, alleged that she was wrongfully terminated from her position for a criminal charge which did not result in a conviction.

ALJ found that petitioner as a nontenured employee was not entitled to continued employment with the Board. Citing Dore, the ALJ found that subject to constitutional constraints, a local board of education has an almost complete right to terminate an employee who is nontenured and whom the board regards as undesirable. Moreover, her criminal charge was a reasonable basis for the termination of her employment.

Commissioner adopted findings and determination in initial decision as his own, citing Gillison and Paladino.

MARCH 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5218-95

AGENCY DKT. NO. 76-4/95

SUZETTE FAGAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOMS RIVER SCHOOL DISTRICT,

Respondent.

Robert Gasser, Esq., for petitioner

Thomas Monahan, Esq., for respondent (Gilmore & Monahan, attorneys)

Record Closed: January 5, 1996 Decided: February 7, 1996

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

STATEMENT OF THE CASE

Petitioner Suzette Fagan, a former school bus driver employed by respondent Toms River Board of Education (BOE), possessed cocaine, a controlled dangerous substance (CDS), in violation of N.J.S.A. 2C:35-10a(1), and possessed CDS paraphernalia, in violation of N.J.S.A. 2C:36-2. Criminal charges were brought against the petitioner; after learning of the charges, the BOE suspended her without pay; and, later, the BOE terminated her employment. The petitioner entered and successfully completed the Pre-Trial Intervention (PTI) program and the charges

were dismissed. N.J.S.A. 2C:43-12; R. 3:28. Given the petitioner's misconduct, although she was not the subject of a judgment of conviction, the BOE refused to reinstate her.

The petitioner alleges that she was merely "holding" the CDS for her "boyfriend" and contends that the penalty imposed by the BOE is excessive. The petitioner also contends that she is situated similarly to another BOE school bus driver whom the BOE continued to employ after he was charged with a criminal offense and had successfully completed PTI. That is, the petitioner contends that the BOE's action was arbitrary, capricious and unreasonable and that it is unlawfully discriminatory. The petitioner demands that the termination of her employment be vacated and that the BOE be ordered to reinstate her.

The BOE points out that, unlike the petitioner, the school bus driver to whom she has alluded always maintained his innocence of the charges, and it submits that given the nature of petitioner's misconduct, its actions were reasonable, justifiable and within its discretion and that it should not be ordered to reinstate her.

PROCEDURAL HISTORY

On April 6, 1995, the petition was filed with the Commissioner and, on April 28, 1995, the BOE's answer to petition was so filed. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on May 19, 1995, it was received and filed as a contested case. N.J.S.A. 52:14B-2(b). After a conference, on December 6, 1995, the parties' attorneys set forth stipulated facts on the record. At the parties' request, the record was left open until January 5, 1996, to allow the filing of written summations.

FINDINGS OF FACT

In 1984, the petitioner, whose date of birth is March 4, 1962, began employment as a part-time bus driver with the BOE. In December 1987, she became a full-time bus driver for the 1987-88 school year. Thereafter, she was employed as a full-time bus driver for the 1988-89, 1989-90, 1990-91, 1991-92, 1992-93 and 1993-94 school years.

On June 3, 1994, in Dover Township, law enforcement officers found the petitioner in possession of cocaine, a CDS, and in possession of CDS paraphernalia, and they charged her with violations of N.J.S.A. 2C:35-10a(1) and N.J.S.A. 2C:36-2. Based upon the charges, on June 28, 1994, the BOE suspended the petitioner without pay.

During the BOE's meeting of March 7, 1995, which was attended by the petitioner and her attorney, the BOE considered whether it would again employ her. The petitioner did not deny that she had violated N.J.S.A. 2C:35-10a(1). The petitioner also did not deny the report that she had provided to law enforcement officials the names of persons she knew to be engaged in CDS activities in return for her November 10, 1994, admission into the PTI program. The petitioner's attorney addressed the BOE on her behalf. Then the BOE decided not to reinstate or re-employ the petitioner. There is no evidence of bad faith in the BOE's decision in this regard.

The petitioner successfully completed the PTI program and, on October 30, 1995, the charges against her were dismissed. P-1; P-2. The petitioner has no other criminal record.

During or about 1991, BOE bus driver Tony Raymond was the subject of criminal charges relating to an allegation of sexual assault upon a child; he entered and successfully completed PTI; and the charges against him were dismissed. Unlike the petitioner, Mr. Raymond consistently denied that he was guilty of the charges, including during a 1992 appearance before the BOE. Given these circumstances, the BOE reinstated Mr. Raymond.

CONCLUSIONS OF LAW

The BOE has questioned whether the Commissioner of Education has jurisdiction of this case.

School laws govern a local board of education's powers and duties generally and govern employment of a local board of education's school bus drivers in particular. N.J.S.A. 18A:13-6; N.J.S.A. 18A:39-17, -18, -19.1.

The commissioner has "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner" and, in this regard, the commissioner's jurisdiction may extend to a case wherein a local board of education is charged with invidious discrimination in employment. N.J.S.A. 18A:6-9; N.J.S.A. 10:5-1 to -42; Balsley v. North Hunterdon Reg. High Sch. Bd. of Educ., 225 N.J. Super. 221, 227-28 (App. Div. 1988). Consequently, there appears to be jurisdiction under N.J.S.A. 18A:6-9.

Subject to constitutional constraints, a local board of education has an almost complete right to terminate an employee who is untenured and whom the board regards as undesirable. Dore v. Bedminster Tp. Bd. of Educ., 185 N.J. Super. 447, 453-56 (App. Div. 1982).

Relative to the petitioner's contention that the BOE has been arbitrary, capricious and unreasonable, a determination of a public entity, such as a local board of education, is presumed to have been lawful, reasonable and made in good faith and should not be approached with suspicion. Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958); Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966). Further, anyone interested in the welfare of society and, in particular, of children, knows of the harm that can result from the availability and use of controlled dangerous substances. A school system employee has opportunities for contact with school children and he or she should constitute a model for such children. Therefore, when a school system employee possesses a CDS, in violation of the law, as a way of demonstrating to school children the repercussions of such misconduct, it is not arbitrary, capricious or unreasonable for a board of education to remove that employee. A school system employee, particularly a school bus driver, also has opportunities for control over school children, who are isolated from parents and others who might protect them and who are dependent upon his or her judgment. Therefore, when a school bus driver possesses a CDS, in violation of the law, it is not arbitrary, capricious or unreasonable for a board of education to terminate that employee's employment as a way of insulating school children from the possibility of harm and as an example to others. That is to say, relative to a school system employee's, particularly a school bus

driver's, involvement with a CDS, a local board of education may reasonably set a "zero tolerance" standard.

Relative to the petitioner's contention that the BOE has been unlawfully discriminatory, given the petitioner's admission of criminal CDS violations and, given the other employee's denial of guilt and the absence of a conviction of that other employee, the BOE's termination of her employment and its refusal to terminate the other employee's employment was not unreasonable, invidious or unlawful.

The petitioner alleges that she was merely "holding" the cocaine for her "boyfriend" and she points out that her conduct was not the subject of a criminal judgment. However, the petitioner's conduct was, in fact, criminal; it was inexcusable; and it presented a reasonable basis for the termination of her BOE employment.

ORDER

I **ORDER** the petitioner removed and her claims **DISMISSED WITH PREJUDICE**.

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

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

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

Feb 7, 1996
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

2/9/96
DATE

D N Contomatteo Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 15 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Petitioner's exhibits

P-1 Letter from Superior Court of New Jersey, Ocean Vicinage, to petitioner, dated October 30, 1995

P-2 Order of Dismissal under R. 3:28(c)(1), dated October 26, 1995

Respondent's exhibits:

None

OAL DKT. NO. EDU 5218-95

SUZETTE M. FAGAN,	:	
PETITIONER,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOMS RIVER SCHOOL DISTRICT, OCEAN COUNTY,	:	
RESPONDENT.	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that petitioner, a nontenured employee, is not entitled to continued employment with the Board. It has been held that a board has wide discretion to discontinue the services of a nontenured employee absent a constitutional or statutory infirmity, neither of which was present herein. See Gillison v. Board of Education of the City of Newark, Essex County, 95 N.J.A.R. 2d (EDU) 157 (1993) and Paladino v. Lacey Township Board of Education, Ocean County, decided by the State Board of Education February 1, 1989.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL and finds that the within Petition of Appeal must be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 25, 1996
DATE OF MAILING MARCH 26, 1996

114-96

114-96

ALI SALAAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5214-95
AGENCY DKT. NO. 151-4/95

ALI SALAAM,
Petitioner,
v.
MONTCLAIR BOARD OF EDUCATION,
Respondent,

Patricia A. Mack, Esq., for petitioner

Brenda C. Liss, Esq., for respondent
(McCarter & English, attorney)

Record Closed: February 5, 1996 Decided: February 5, 1996

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

Statement of the Case

This matter was transmitted to the Office of Administrative Law on May 19, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

Feb 5, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

2/7/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 7 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
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McCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07101-0652
(201) 622-4444
Attorneys for Respondent
Montclair Board of Education

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
CASE NO. 151-4/95

ALI SALAAM, :

Petitioner, :

v. : SETTLEMENT AGREEMENT

MONTCLAIR BOARD OF EDUCATION, :

Respondent. :
. . . . . :

WHEREAS, Petitioner Ali Salaam filed a Petition before the Commissioner of Education of the State of New Jersey dated April 21, 1995, alleging that his children Khiry Salaam and Iman Salaam are eligible to attend the public schools of the Town of Montclair without charge, and seeking a reversal of the decision of Respondent Montclair Board of Education ("Board") to exclude Khiry Salaam and Iman Salaam from attendance in the Montclair Public Schools for free; and

WHEREAS, the Board has denied Petitioner's allegations, and contends that its March 27, 1995 decision to exclude Khiry Salaam and Iman Salaam was made according to applicable law; and

WHEREAS, Khiry Salaam and Iman Salaam were enrolled in the Montclair public schools from September 1994 through June 1995, and Petitioner has not re-enrolled them in the Montclair public schools for the 1995-96 school year; and

WHEREAS, the parties desire to resolve this proceeding amicably;

NOW, THEREFORE, it is hereby agreed between the parties through their undersigned representatives, that this proceeding shall be settled in accordance with the following terms and conditions:

1. Petitioner Ali Salaam agrees to pay to the Montclair Board of Education a total of $4,200.00 representing tuition for the 1994-95 school year for Khiry Salaam and Iman Salaam, on the following payment schedule:

On or before October 15, 1995, Petitioner will pay to the Board $334.00;

On or before November 15, 1995, Petitioner will pay to the Board $333.00;

On or before December 15, 1995, Petitioner will pay to the Board $333.00;

On or before January 15, 1996, Petitioner will pay to the Board $125.00, and on the fifteenth day of each of the twenty-four (24) months thereafter, including January 15, 1998, Petitioner will pay to the Board $125.00;

On or before February 15, 1998, Petitioner will pay to the Board $75.00.

2. In the event that Petitioner fails to pay any installment by the deadlines specified in the preceding paragraph, the Board reserves the right to enforce its right to full payment under all applicable laws.

3. Neither this agreement nor any action taken by Petitioner shall constitute an admission by Petitioner that Khiry

Salaam and Iman Salaam were not entitled to attend the public schools of the Town of Montclair for free.

4. Neither this agreement nor any action taken by the Board in this matter shall constitute an admission by the Board that Khiry Salaam and Iman Salaam were entitled to be educated for free in the public schools of the Town of Montclair.

5. Petitioner and the Board agree to exchange releases which will include, but not be limited to, any and all claims that have been or may have been asserted in connection with this proceeding.

6. The parties shall request a dismissal of this proceeding by the Office of Administrative Law in accordance with the terms of this agreement.

Dated: ~~October~~ Dec. 21, 1995

ALI SALAAM

Dated: October ___, 1995

MONTCLAIR BOARD OF EDUCATION

By: _____
WILLIAM L. LIBRERA
Superintendent

Subject to approval by the
Montclair Board of Education

OAL DKT. NO EDU 5214-95

ALI SALAAM,	:	
PETITIONER,	:	
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	
	:	

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

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

The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them, and other litigants whose controverted matters have been duly transmitted to OAL, against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to N.J.A.C. 1:1-19.1.

COMMISSIONER OF EDUCATION

MARCH 25, 1996
MAILING DATE MARCH 26, 1996

115-96

115-96

ELAINE HEYLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL AND VOCATIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

MARCH 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 7550-94

AGENCY DKT. NO. 281-7/94

OAL DKT. NO. CRT 2255-95

AGENCY DKT. NO. ER14HK-37965

ELAINE HEYLER,

Petitioner,

v.

BOARD OF EDUCATION OF PASSAIC COUNTY VOCATIONAL AND TECHNICAL HIGH SCHOOL DISTRICT,

Respondent.

Joseph J. Bell, Esq., for petitioner (Joseph J. Bell and Associates, attorneys)

Stephen Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: January 29, 1996 Decided: January 31, 1996

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 5, 1994 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have prepared a Stipulation of Dismissal with Prejudice which is attached and fully incorporated herein.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/31/96
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

2/7/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 7 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JAN 29 11 54 AM '96

JOSEPH J. BELL & ASSOCIATES
60 Broadway, Suite 11
Denville, New Jersey 07834
(201) 586-6900
Attorneys for Elaine Heyler

ELAINE HEYLER	: OFFICE OF ADMINISTRATIVE LAW
	: OAL DOCKET NO. EDU 07550-94N
Plaintiff	: Agency Ref. No. 281-7/94 & CRT 2255-95
	: AGENCY DKT. NO. ER14HK-37965
v.	: Civil Action
	:
BOARD OF EDUCATION OF PASSAIC COUNTY VOCATIONAL AND TECHNICAL HIGH SCHOOL DISTRICT	: STIPULATION OF DISMISSAL WITH PREJUDICE
	:
Defendant	:

It having been agreed by and between the respective parties hereto, the matter in difference in the above entitled action is hereby dismissed with prejudice and without costs in favor of or against any party.

Fogarty & Hara, Esq.
Attorneys for Defendant

By: _____
Stephen R. Fogarty, Esq.

Joseph J. Bell & Associates
Attorney for Plaintiff

By: _____
Joseph J. Bell, Esq.

ELAINE HEYLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL AND VOCATIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. After such review, the Commissioner determines to approve the withdrawal of petitioner's charges. Accordingly, the matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 25, 1996
DATE OF MAILING MARCH 26, 1996

116-96

116-96

C.F., on behalf of minor, C.F.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent sought emergent relief on behalf of her daughter, C.F., a tenth grade student who was suspended for alleged gang involvement. Petitioner contended C.F. was suspended without notice of charges and without a hearing on the matter. The Board contended C.F. was suspended and placed on homebound instruction indefinitely pending evaluation by the child study team and subsequent expulsion hearing.

ALJ found that if a suspension lasts for more than 10 days, the student is entitled to a full hearing within 21 days from the start of the suspension and that a full record should be kept of the hearing. ALJ ordered that the Board immediately reinstate C.F. and should the Board again suspend C.F., it would provide to C.F. 1) written notice of charge; 2) written statement of factual allegation on which charge was based; 3) the name and address of any person with knowledge of relevant facts; 4) copy of any relevant document; 5) notice of a Board hearing during which C.F. may confront any witness and evidence against her and she may call any witness and offer evidence in her defense; 6) a Board hearing during which she may call any witness and offer evidence in her defense, immediately after which, the Board would issue a decision on the charge and punishment and notify C.F. of that decision.

Commissioner adopted findings and determination of the ALJ, noting that the findings reach to the merits of the matter, not merely to the application for emergent relief. Petition was dismissed as moot in that petitioner's requests for relief, in their entirety, have been addressed through the application for emergent relief.

MARCH 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
GRANTING MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 798-96
AGENCY DKT. NO. #72-2/96

C. F. ON BEHALF OF C.F.,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF WILDWOOD,
Respondent.

Douglas E. Gershuny, Esq., for petitioner, (Cape-Atlantic Legal Services)

Bruce M. Gorman, Esq., for respondent

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

STATEMENT OF THE CASE

C.F., a tenth grade student in the public school system operated by the Board of Education of the City of Wildwood (BOE), charges that school administrators wrongfully suspended her from school, i.e., without notice of charges and without a hearing on the matter.

C.F. demands, inter alia, that the BOE immediately reinstate her; that the BOE hold a hearing on the matter; and that the BOE provide to her the name of any person with knowledge of any relevant fact and provide to her a copy of any document relative to the charges, so that she can prepare for such a hearing. The BOE denies that C.F. is suspended; it submits that it has not yet determined whether to undertake suspension proceedings; and it contends that C.F. is merely on "homebound instruction," pending evaluation by its Child Study Team (CST) to determine whether C.F. is in need of special education classification and an individual education plan (IEP), so that no BOE hearing is necessary. P-1; 20 U.S.C.A. §1400 et seq.; N.J.A.C. 6:28-3.5, -3.6; N.J.S.A. 18A:37-4.

PROCEDURAL HISTORY

On February 28, 1996 the verified petition was filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on February 29, 1995, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On March 4, 1996, the motion for emergent relief was heard in the OAL Atlantic City. (Prior to the hearing, the BOE reiterated its position that it had not yet determined whether to undertake suspension proceedings and suggested that such proceedings might be avoided and that it would be in C.F.'s best interests if the CST evaluation was completed and an IEP was utilized to resolve the case. However, C.F. rejected this suggestion.)

FINDINGS OF FACT

C.F.'s date of birth is July 29, 1980. She is domiciled with her mother in the City of Wildwood and she is a tenth grade student in the public school system operated by the BOE.

During or about January 1996, a report reached administrators of the BOE's school system that a troublesome gang was being formed by some of the school system's students and that gang members were involved in an assault on a fellow student.

On January 31, 1996, school administrators accused C.F. of being a member of the above-described gang and accused her of "creating a dangerous situation;" on that basis, they suspended

her from regular classes; and they "placed her on homebound instruction indefinitely immediately." P-1. The administrators provided to C.F. no written notice of the facts supporting the charge, no document detailing the charge, no name of any person with knowledge of any relevant fact; and no notice of the date for a hearing on the suspension. During the hearing of this motion, C.F. denied the accusations.

By letter dated February 1, 1996, Nancy Ramundo, the supervisor of the school system's CST notified C.F.'s mother that C.F. had been referred to the CST and requested that she (C.F.'s mother) telephone to "discuss the evaluation procedure and home bound instruction." BOE-1.

By letter dated February 7, 1996, the school administrators notified C.F.'s mother that, "[p]ending the evaluation process of the [CST], Wildwood High School will begin proceedings for an expulsion concerning your daughter, [C.F.] for creating a dangerous situation." P-2, emphasis added. (However, the letter provided no written notice of the facts supporting the charge, no document detailing the charge, no name of any person with knowledge of any relevant fact; and no notice of the date for a hearing on the suspension.)

On February 8, 1996, C.F.'s mother met with Ms. Ramundo, who explained the CST evaluation process, classification, the IEP, etc. Ms. Ramundo explained that, pending completion of the process and implementation of an IEP, homebound instruction would be made available for C.F. and, in order to continue some education for C.F., C.F.'s mother consented to the homebound instruction (which began soon thereafter). BOE-2.

The BOE's regular meeting was held on February 15, 1996 (and there was no hearing relative to C.F.)

By letter to the school administrators, received on February 20, 1996, C.F.'s attorney made the same demands as are made in this case. P-3.

By letter, dated February 23, 1996, the BOE's attorney responded to C.F.'s attorney as follows:

> . . . the School District has mandated that your client be evaluated by the [CST]. [C.S's] parents have consented to this evaluation. During the period of evaluation (which cannot exceed 45 days), [C.S.] has been and will continue to receive home bound instruction.
>
> As such time as the [CST] completes its evaluation, a determination will be made as to whether charges will be brought against [C.S.] seeking her expulsion. In the interim, it is the intention of the [BOE] to afford your client all rights to which she is entitled, including but not limited to appropriate due process.
>
> [P-4]

The BOE's next regular meeting is to be held on March 21, 1996.

CONCLUSIONS OF LAW

C.F. is entitled to and the BOE is required to offer to her a free and appropriate public education which may include special education and related services, such as classification and an IEP. U.S. Const. amend. XIV §1, par. 1; 20 U.S.C.A. §1400(c), §1400(a)5; N.J. Const. (1947), Art. VIII, §IV, par. 1; N.J.A.C. 6:28-1.1 to -12.1.

A public school student's fellow students are also entitled to an education in a reasonably safe environment. Consequently, for good cause, including an assault upon another student, a student may be suspended and/or expelled from school, subject to due process requirements, including notice of the charge on which the demand for suspension or expulsion is based; a statement of the factual allegation on which a charge is based; discovery of the name of any person with knowledge of any relevant fact and discovery of any relevant document; and a hearing, during which the student may confront any witness against her. N.J.S.A. 18A:37-1 to -5; Tibbs v. Bd. of Ed. of Tp. of Franklin, 59 N.J. 506 (1971).

Where a school administrator has a reasonable basis for a belief that a student presents a danger t herself or to others or to school property, he may temporarily suspend the student, pending and conditioned upon notice and a hearing before the board of education. N.J.S.A.

18A:37-5. However, where a suspended student is not provided, e.g., a preliminary hearing and instruction to allow her to keep up with her class, she may be ordered readmitted to school. R.R. v. Bd. of Ed., Shore Reg. H. S., 109 N.J.Super. 337 (App. Div. 1970), where it is also held that the hearing before the board of education should be held not more than 21 days after the suspension.

Here, since January 31, 1996, i.e., for well over a month, school administrators have suspended C.F. from her regular classes and, while she has been provided with homebound instruction, contrary to the import of the administrators' February 7, 1996 letter and N.J.S.A. 18A:37-5, the school system has not provided C.F. with notice of the charge on which the suspension is based; a statement of the factual allegation on which a charge is based; the name of any person with knowledge of any relevant fact; a copy of any relevant document; and a hearing, during which she could confront any witness against her.

In deciding this motion for emergent relief, I make the following conclusions: (1) The school administrators did suspend C.F. The fact that the school system's CST may have also undertaken evaluation for possible special education services does not negate the suspension. C.F.'s mother's consent to the special education evaluation process did not waive C.F.'s rights to due process under N.J.S.A. 18A:37-1 to -5. The BOE has failed provide notice and a hearing, i.e., it has not complied with N.J.S.A. 18A:37-1 to -5. That is to say, C.F. is clearly entitled to the relief claimed. (2) As a matter of fact, the school administrators did suspend C.F. without compliance with N.J.S.A. 18A:37-1 to -5, so that it is reasonably probable that C.F. will prevail on her claim for notice, discovery and a hearing. (3) The school administrators' placement of C.F. on "homebound instruction indefinitely" will cause her immediate and irreparable harm and she has no adequate remedy at law. (4) The continuation of "homebound instruction indefinitely" will cause C.F. hardship which outweighs any hardship the BOE may experience if the emergent relief is granted. P-1; N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-134 (1982).

ORDERS

Consistent with the above, **I ORDER** the following: The BOE will immediately reinstate C.F. and, should the BOE again suspend C.F. it will (1) provide to C.F. written notice of any charge on which the suspension is based; (2) provide to C.F. a written statement of the factual allegation on which a charge is based; (3) provide to C.F. the name and address or means of contact) of any person with knowledge of relevant facts; (4) provide to C.F. a copy of any relevant document; (5) provide to C.F. notice of a BOE hearing, during which C.F. may confront any witness and evidence against her and call a witness and offer evidence in her defense; (6) provide to C.F. a BOE hearing, during which she may confront any witness and evidence against her and she may call any witness and offer evidence in her defense and, immediately after which, the BOE will issue a decision on the charge and punishment and notify C.F. of that decision.

On March 18, 1996, the attorneys and I will engage in a telephone conference to set any additional hearing days that may be necessary.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

March 5, 1996
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

EXHIBITS

Petitioner's Exhibits:

P-1 Letter from school administrators, dated January 31, 1996

P-2 Letter from school administrators, dated February 7, 1996

P-3 Letter from C.F.'s attorney, dated February 16, 1996

Respondent's Exhibits:

BOE-1 Letter from Wildwood Child Study Team, dated February 1, 1996

BOE-2 Wildwood Public Schools Comprehensive Evaluation Plan (consent), dated February 8, 1996

WITNESSES

Petitioner's witnesses:

C.F.

C.F. (C.F.'s mother)

Respondent's witnesses:

none

OAL DKT. NO. EDU 798-96

C.F., on behalf of minor, C.F.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by the parties in accordance with the established briefing schedule.

Respondent's exceptions essentially recast and reiterate arguments expressed before the Administrative Law Judge (ALJ) at the emergent relief hearing, arguing that pursuant to applicable statute, N.J.S.A. 18A:37-4, the Board was not required to conduct an expulsion hearing prior to *indefinitely* placing C.F. on homebound instruction. The Board writes,

> [N.J.S.A.] 18A:37-2.1 *** deals with assaults upon teachers, administrators, board members, or other employees of the Board of Education. That statute expressly states that expulsion proceedings must take place no later than 21 days following the date upon which the pupil is suspended. No such restriction appears in [N.J.S.A.] 18A:37-4. (Board's Exceptions at p. 2)

The Board continues by arguing that the ALJ incorrectly based his determination on R.R. v. Bd. of Ed., Shore Regional High School, supra. The Board argues that R.R., which required a board to conduct an expulsion hearing following a violation of N.J.S.A. 18A:37-4 no later than 21 calendar days

following the day on which the pupil was suspended, was limited to its particular set of facts. (Board's Exceptions at p. 2)

Petitioner's reply exceptions further recast and reiterate arguments presented in the emergent relief hearing that C.F. was entitled to an expulsion hearing pursuant to law and further concurs with the findings and conclusions of the ALJ. In that these arguments were reviewed and addressed before the ALJ, they are not summarized herein.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons expressed therein, granting emergent relief and ordering that C.F. be admitted to school in that a hearing was neither timely scheduled nor conducted pursuant to N.J.S.A. 18A:37-4.

In so ruling, the Commissioner determines that petitioner has met the criteria established in Crowe v. DeGioia, 90 N.J. 126 (1982) and is entitled to emergent relief. Petitioner has demonstrated irreparable harm in that C.F. was placed on homebound instruction indefinitely without a remedy at law. She has also demonstrated a sufficient likelihood of success on the merits based on the Board's failure to follow statute and controlling case law. Finally, upon a weighing of the equities, the Commissioner finds that, under the circumstances herein, where the Board has not provided petitioner with notice and a hearing, more harm would inure to the public than would to the Board if petitioner was not awarded emergent relief in that due process requirements apply to students enrolled in publicly funded schools and such students can have no confidence in the laws if statutory and constitutional procedures are not properly applied to them. See Goss v. Lopez, 419 U.S. 565 (1975). Moreover, if the Board believes C.F. to pose a continuing danger to school safety, there is nothing to prevent the Board from acting to suspend her consistent with applicable due process requirements.

The Commissioner reiterates that if a suspension is to last for more than 10 days, the pupil is entitled to a full hearing within 21 days from the start of the suspension, and that a full record shall be kept of the hearing. L.T., on behalf of her minor child, D.T. v. Board of Education of the City of Long Branch, Monmouth County, decided by the Commissioner of Education November 6, 1995.

In so ruling, the Commissioner is mindful that these findings reach to the merits of this matter, not merely to the application for emergent relief. However, in that the ALJ effectively addressed and analyzed the arguments concerning the validity of the Board's actions in his initial decision, the Commissioner construes the within proceedings as a ruling on the merits of petitioner's general contention that the Board may not indefinitely suspend a student without a hearing pursuant to N.J.S.A. 18A:37-4. Therefore, inherent in the Commissioner's adoption of the ALJ's decision is an express rejection of the Board's arguments concerning the application of the holding of R.R. v. Board of Education of the City of Shore Regional High School, supra. The Board is hereby directed to follow the six enumerated orders of the ALJ if in the future it seeks to again suspend C.F., or any other student, for a period beyond 10 days.

Accordingly, the ALJ's determination as clarified herein is adopted as the final decision in this matter. The within Petition of Appeal is hereby dismissed as moot in that petitioner's requests for relief, in their entirety, have been addressed through the application for emergent relief.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 25, 1996

DATE OF MAILING MARCH 26, 1996

116-96

(116-96)
490-96

C.F., on behalf of minor, C.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 12, 1996

OAL DKT. NO. EDU 798-96
AGENCY DKT. NO. 72-2/96

C.F., on behalf of minor, C.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

117-96

117-96E

DEC ELECTRIC, INC.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY, AND USA ELECTRICAL CONSTRUCTION CONTRACTORS, INC.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

MARCH 26, 1996

OAL DKT. NO. EDU 10833-95

DEC ELECTRIC, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY, AND USA ELECTRICAL CONSTRUCTION CONTRACTORS, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

For Petitioner, Richard W. Hunt, Esq. (Almeida & Hunt)

For the Board, Charles R. Iannuzzi, Esq.

For USA Electrical Construction Contractors, Inc., Matthew A. Zabel, Esq. (Zabel & Associates)

This matter has come before the Commissioner of Education by way of a Motion for Emergent Relief and Clarification filed by petitioner on March 6, 1996. In this motion, petitioner seeks 1) a finding that the Commissioner's earlier decision on motion for clarification, dated February 8, 1996, acted, contrary to respondents' understanding and subsequent actions, to prohibit respondents from rebidding the contract that is the subject of their underlying dispute, and 2) a stay of work on the rebid contract pending the outcome of the merits of that dispute, presently pending before the Office of Administrative Law.

Previously, in a decision dated December 26, 1995, the Commissioner had affirmed the ALJ's order denying petitioner's original application for emergent relief "for the reasons expressed therein." In a motion for clarification, petitioner then sought an express affirmation of the ALJ's finding that the disputed contract between respondents, Board of Education and USA Electrical Construction Contractors, Inc. ("USA"), was null and void from the outset due to USA's lack of qualification under applicable bidding laws. The ALJ had, in his initial decision, made such a finding, but gone on to deny emergent relief on other grounds; this decision was adopted by the Commissioner. Seeing that work continued on the disputed contract notwithstanding the ALJ's (and Commissioner's, by affirmance)

finding of contractual nullity, petitioner attempted to have the Commissioner's decision enforced in Superior Court. This attempt, however, was thwarted by the judge's unwillingness to infer from the Commissioner's decision an explicit intent to declare the contract null and void notwithstanding his denial of emergent relief. Hence petitioner's motion for clarification, and the Commissioner's decision on motion dated February 8, 1996.

In that decision, the Commissioner determined to reconsider his earlier determination because the ALJ's recommendation to deny emergent relief, which had been affirmed by the Commissioner, was clearly predicated on his belief that the Board would *rebid* the contract if emergent relief were denied. Indeed, having found the USA/Board contract a nullity, the ALJ expressly denied emergent relief because petitioner, which could not facially demonstrate an absolute entitlement to the contract at issue, was unable to show that it would be irreparably harmed *by a rebid.* However, the record on motion made it plain that, contrary to the Board's representations to the ALJ that it would rebid the project if emergent relief were denied, the Board *did not rebid* the project upon such denial but, instead, proceeded to pursue its contract with USA and allow it to begin electrical work at Delsea High School. Thus, the basis for both the ALJ's recommendation and the Commissioner's decision to affirm it had been so substantially altered that the Commissioner reconsidered petitioner's claim of irreparable harm, and found that petitioner had now succeeded in such a showing, thereby warranting emergent relief in the form of an express prohibition of further work on the disputed contract.

As a consequence of the Commissioner's February 8, 1996 decision, the Board rebid the disputed contract and again determined to award it to respondent USA Electrical Construction Contractors, Inc., rather than petitioner. Petitioner then applied for a Temporary Restraining Order in Superior Court, contending that the Commissioner's February 8 decision had prohibited a rebid. This request was denied. Petitioner then, through the present application, sought a "clarification" of the February 8 decision with respect to the Board's right to rebid, and a stay of any awarding and/or implementation of the contract resulting from the Board's proposed rebid. Responses to petitioner's motion were filed by both respondents.

Upon review of the record of this matter and the papers filed with the present application, it is clear that the sole basis for petitioner's motion attacking the validity of any rebid contract is the erroneous belief that the Commissioner's decision of February 8, 1996 acted to prohibit the Board from rebidding the originally disputed contract. Given the history of this matter, such an interpretation would make little sense. To the contrary, the entire basis for the Commissioner's reconsideration of his earlier denial of emergent relief was the fact that the Board had continued with

work on the contract *rather than rebidding*, as it was represented to the ALJ that the Board would, thus undercutting the underlying basis for both the ALJ's initial decision denying emergent relief and the Commissioner's subsequent affirmance thereof. Rather, the Commissioner's decision of February 8, as correctly construed by respondents, acted to give the Board a choice between a stay of work altogether *or* rebidding, the latter possibility clearly contemplated, permitted and even expected by both the ALJ and the Commissioner. That the Board chose the option of rebidding was a matter entirely within its own lawful discretion.

Accordingly, there being no basis stated in the moving papers upon which to warrant stay of any rebid contract or resulting work, petitioner's Motion for Emergent Relief is DENIED and the underlying matter shall continue to proceed on its merits at the Office of Administrative Law as directed in the Commissioner's prior decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 26, 1996
DATE OF MAILING MARCH 26,1996

118-96

118-96 SEC

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	
V.	:	
	:	COMMISSIONER OF EDUCATION
STEVEN DE PASCALE, BOARD MEMBER, BUTLER BOARD OF EDUCATION, MORRIS COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

March 26, 1997

SCHOOL ETHICS COMMISSION, PETITIONER	:	COMMISSIONER OF EDUCATION
V.	:	
		DECISION
STEVEN DEPASCALE, BOARD MEMBER, BUTLER BOARD OF EDUCATION, MORRIS COUNTY	:	
	:	

Whereas, the School Ethics Commissioner has acted pursuant to the authority granted to it by N.J.S.A. 18A:12-21 et seq. to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his/her failure to attend such training sessions; and

Whereas, pursuant to N.J.A.C. 6:3-9.3(i), on June 19, 1995, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member responded to such Order by letter dated July 7, 1995; and

Whereas, having considered such response, the Commission voted on January 23, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, and forwarded this matter to the Commissioner, pursuant to N.J.S.A. 18A:12-29; and

Whereas, on February 6, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's decision recommending removal; and

Whereas, the above-named Board member responded to said decision by letter dated February 7, 1996, therein expressing his intention to resign as a Board member; and

Whereas, it has been confirmed that the above-named Board member has in fact so resigned and is no longer a member of the Board of Education; now therefore

IT IS ORDERED that the recommended penalty of the School Ethics Commission has been rendered moot and there is no need for the Commissioner of Education to rule on its appropriateness herein.

COMMISSIONER OF EDUCATION

March 26, 1996
Date of Mailing, March 27, 1996

119-96

119-96 SEC

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CAROL KHALIFEH, BOARD MEMBER, ROCKLEIGH BOARD OF EDUCATION, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

March 26, 1996

SCHOOL ETHICS COMMISSION, :

PETITIONER, :

V. :

CAROL KHALIFEH, BOARD MEMBER, :
ROCKLEIGH BOARD OF EDUCATION,
BERGEN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by N.J.S.A. 18A:12-21 et seq. to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to N.J.A.C. 6:3-9.3(i), on June 19, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to respond to such Order; and

Whereas, the Commission voted on January 23, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, and forward this matter to the Commissioner pursuant to N.J.S.A. 18A:12-29; and

Whereas, on February 6, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's decision recommending removal; and

Whereas, no comment to the aforesaid decision was filed; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendation of the Commission; now therefore

IT IS ORDERED that the above-named Board member be removed from office as of the date of this decision.

COMMISSIONER OF EDUCATION

March 26, 1996
Date of Mailing, March 27, 1996

121-96

121-96

S.Y.H.L. AND S.Y.L., on behalf of minor, J.J.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9502-95
AGENCY DKT. NO. 315-8/95

SO YOUNG HAN LEE and SU YONG LEE,
Petitioners,
v.
FORT LEE BOARD OF EDUCATION,
Respondent,

So Young Han Lee and Su Yong Lee, *pro se*

Robert T. Tessaro, Esq., for respondent

Record Closed:February 13, 1996 Decided: February 14, 1996

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

Statement of the Case

This matter was transmitted to the Office of Administrative Law (OAL) August 29, 1995 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Agreement, indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their representatives' signatures and by petitioner's acceptance of the settlement terms at the hearing on February 13, 1996.

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

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

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

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

Feb. 14, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Feb 16, 1996
DATE

DN Antamaitis/h
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 1996
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FEB 13 1 11 PM '96

SETTLEMENT AGREEMENT

OAL DKT. NO. EDU 9502-95

AGENCY DKT. NO. 315-8/95

SO YOUNG HAN LEE and SU YONG LEE,

Petitioners,

v.

FORT LEE BOARD OF EDUCATION,

Respondent.

The parties stipulate and agree as follows in full and complete settlement of the above matter:

1. Petitioners So Young Han Lee and Su Yong Lee shall pay the sum of $5,000 in equal monthly installments of $1,000 on February 13, 1996, March 13, April 13, May 13 and June 13, 1996 as tuition for the 1995/96 school year. Failure to make any payment shall result in judgment being entered against said petitioners in the amount of $9,400, less credit for any payments made.

2. Respondent shall consider Joy Jeeyoung Han as an emancipated adult for domicile purposes for the 1996/97 and 1997/98 school years and she can attend the Fort Lee public schools without tuition; provided, however, that she remains domiciled in Fort Lee.

This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

DATED: February 13, 1996

Joy Jeeyoung Han

So Young Han Lee

Su Yong Lee

Fort Lee Board of Education

By: _____

Robert T. Tessaro, Esq.

al

OAL DKT. NO. EDU 9502-95

S.Y.H.L. AND S.Y.L., on behalf of minor, J.J.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the terms of the settlement appear to have already been effectuated through respondent's installment payments of tuition to the Board and admonishes the parties that settlements of controverted matters are of no force or effect and may not be implemented absent the Commissioner's approval pursuant to N.J.A.C. 1:1-19.1.

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

COMMISSIONER OF EDUCATION

APRIL 1, 1996

DATE OF MAILING APRIL 2, 1996

122-96

122-96SEC

SCHOOL ETHICS COMMISSION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

DECISION

MARCY MATLOSZ, BOARD MEMBER, :
MANSFIELD TOWNSHIP BOARD OF
EDUCATION, WARREN COUNTY, :

RESPONDENT. :

_____:

APRIL 2, 1996

SCHOOL ETHICS COMMISSION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

DECISION

MARCY MATLOSZ, BOARD MEMBER, :
MANSFIELD TOWNSHIP BOARD OF
EDUCATION, WARREN COUNTY, :

RESPONDENT. :

_____:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by N.J.S.A. 18A:12-21 et seq. to recommend removal of respondent from Board membership for failure to attend the Board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to respondent for her failure to attend such training sessions; and

Whereas, pursuant to N.J.A.C. 6:3-9.3(i), on June 19, 1995, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, respondent's attorney contacted the School Ethics Commission office and was informed telephonically that the Commision would be meeting on January 26, 1996, wherein he expressed his intent to submit a filing for the Commission's consideration concerning this matter on that date; and

Whereas, the Commission instead met and voted on January 23, 1996, to recommend removal of respondent for failure to attend training sessions in violation of State statute, and forwarded this matter to the Commissioner pursuant to N.J.S.A. 18A:12-29; and

Whereas, respondent contends she was not provided with notice of the January 23, 1996 meeting, nor was her Affidavit considered by the Commission in rendering its determination to remove her from her position; and

Whereas, on February 6, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's decision recommending removal; and

Whereas, respondent avers in such comments that her Affidavit was not considered by the Commission based on the Commission's failure to notify her that this matter would be considered on January 23, 1996; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and finds that the Commission's not having considered respondent's Affidavit may have affected the determination of the Commission; now therefore

IT IS ORDERED that the matter be remanded to the School Ethics Commission so that the Commission may have an opportunity to reconsider its recommendation for penalty in light of respondent's Affidavit prior to the Commissioner's ruling on said recommendation.

COMMISSIONER OF EDUCATION

APRIL 2, 1996

DATE OF MAILING APRIL 2, 1996

123-96

123-96SEC

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DEBORAH PITRE, BOARD MEMBER, MAYWOOD BOARD OF EDUCATION, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 2, 1996

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DEBORAH PITRE, BOARD MEMBER, MAYWOOD BOARD OF EDUCATION, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted it by N.J.S.A. 18A:12-21 et seq. to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to N.J.A.C. 6:3-9.3(i), on June 19, 1995, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to respond to such Order; and

Whereas, the Commission voted on January 23, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, and forward this matter to the Commissioner of Education pursuant to N.J.S.A. 18A:12-29; and

Whereas, on February 6, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's decision recommending removal; and

Whereas no response to the aforesaid decision was filed; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendation of the Commission; now therefore

IT IS ORDERED that the above-named Board member be removed from office as of the date of this decision.

COMMISSIONER ~~OF~~ EDUCATION

APRIL 2, 1996

DATE OF MAILING APRIL 2, 1996

124-96

124-96SEC

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PATRICIA M. RADFORD, BOARD MEMBER, MANCHESTER TOWNSHIP, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 2, 1996

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PATRICIA M. RADFORD, BOARD MEMBER, MANCHESTER TOWNSHIP, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted it by N.J.S.A. 18A:12-21 et seq. to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to N.J.A.C. 6:3-9.3(i), on June 19, 1995, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, on June 30, 1995, the above-named Board member responded to such Order indicating that a permanent physical handicap prevented her from attending the required training; and

Whereas, the Commission, having considered such response, voted on January 23, 1996 to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, and forwarded this matter to the Commissioner of Education pursuant to N.J.S.A. 18A:12-29; and

Whereas, on February 6, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's decision recommending removal; and

Whereas, on February 15, 1996, the above-named Board member filed a response to such decision indicating that she had sought and been refused an "alternate training program" to accommodate her handicap; and

Whereas, the Commissioner of Education has reviewed this matter and finds that the record herein is barren of information that would enable him to determine, in order to assess the appropriateness of the Commission's recommended penalty, whether reasonable accommodations were available and offered to the above-named Board member so as to enable her to obtain the required training notwithstanding her handicapping condition; now therefore

IT IS ORDERED that this matter be remanded to the School Ethics Commission for further development of the record consistent with the above and for setting forth of the Commission's findings with respect to the above-named Board member's claim that she was unable to attend training due to her handicap.

COMMISSIONER OF EDUCATION

APRIL 2, 1996

DATE OF MAILING APRIL 2, 1996

125-96

125-96

K.M., on behalf of minor, R.G., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY, :

RESPONDENT. :

:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning grandmother alleged minor student, R.G., was improperly denied admission to school due to residency dispute.

ALJ found that D.G., R.G.'s mother, was not capable of supporting or providing care for R.G. due to a family or economic hardship pursuant to N.J.S.A. 18A:38-1b(1). Thus, R.G. was not residing with petitioner solely for the purpose of receiving a free public education. ALJ determined that R.G. should be allowed to attend the Board's schools without payment of tuition.

Commissioner adopted findings and determination in initial decision as his own and ordered the Board to continue to admit R.G. into its public school system free of charge, as long as there were no change in petitioner's circumstances that would alter the entitlement.

April 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6660-95

AGENCY DKT. NO. 91-4/95

KATIE MCLEAN,

ON BEHALF OF R.G., A MINOR,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF OCEAN,

Respondent.

Katie McLean, petitioner, pro se

Honora O'Brien Kilgallen, Esq., for respondent (Kramer, Kramer & Kilgallen, attorneys)

Record Closed: January 17, 1996 Decided: February 9, 1996

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

STATEMENT OF THE CASE

The petitioner, R.G.'s grandmother, alleges that, due to the economic hardship of her daughter, R.G.'s mother, since at least August 1993 R.G. has been domiciled in her (the

petitioner's) residence in Ocean Township and she (the petitioner) has supported R.G. gratis; R.G. is not residing with her solely for the purpose of receiving a free public education in the respondent Ocean Township Board of Education's (BOE's) schools; since the 1993-94 school year, when R.G. began to attend the BOE's schools, she (the petitioner) has assumed all personal obligations for R.G. relative to school requirements; and this domicile arrangement is expected to continue for the foreseeable future. Based upon these allegations, the petitioner claims that R.G. should continue in the BOE's school system. N.J.S.A. 18A:38-1.

The BOE denies that R.G. has been domiciled in the petitioner's residence; claims that the petitioner should pay tuition for R.G.'s past attendance in its school system; and claims that R.G. should discontinue her attendance in its school system (and attend school in the Neptune system).

PROCEDURAL HISTORY

On April 17, 1995, the petitioner's petition was filed with the New Jersey Commissioner of Education. In the BOE's answer to the petition, filed with the Commissioner on June 14, 1995, the BOE stated, inter alia, that procedurally, the petition was late and should be dismissed pursuant to N.J.S.A. 18A:38-1, and, substantively, the relief claimed in the petition should be denied and the petition dismissed. The Department of Education transmitted the matter to the Office of Administrative Law where, on June 26, 1995, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On August 14, 1995, the case was assigned to me and I sent out a letter setting forth a schedule for discovery, a conference and a hearing. On January 17, 1996, the case was heard in the Freehold Township municipal building.

FINDINGS OF FACT

After a career in the United States Army, the petitioner's husband retired and he and the petitioner retired to their single-family residence located at 101 Bimbler Boulevard in Ocean Township, Monmouth County. The petitioner's husband also owns an apartment building, located at 101 Anelve Avenue in Neptune. The petitioner and her husband are the parents of a

daughter, D.G. D.G. and her husband (from whom she is now separated) are the parents of a daughter, R.G., whose date of birth is June 4, 1982, and a younger son, O.G.

Prior to the 1993-94 school year, R.G. resided with D.G. and O.G. in a two-bedroom apartment in the 101 Anelve Avenue building. D.G. used one bedroom and R.G. and O.G. used the other bedroom. The family received welfare, and R.G. and O.G. attended the Neptune public schools.

By the summer of 1993, R.G. was becoming an adolescent and it was no longer appropriate for her to share a bedroom with her brother, who was only a couple of years younger than she. (Because of the layout of the apartment, it was not practical for R.G. and D.G. to share a bedroom.) D.G., who is unemployed and receiving a monthly Aid to Families with Dependent Children (AFDC) grant of $322, was financially unable to pay for a three-bedroom apartment. Consequently, since about August 1993 R.G. has been domiciled in the petitioner's residence in Ocean Township; the petitioner and her husband have supported and cared for R.G. gratis; R.G. has sent and received mail using the petitioner's address as her own; and in non-school-related matters, e.g., when the petitioner and R.G. were involved in a motor vehicle accident, the petitioner gave her Ocean Township residence as R.G.'s address. P-1e; P-2; P-4a. These living arrangements are expected to continue for the foreseeable future. Significantly, R.G. has been off of D.G.'s AFDC grant since she moved to her grandparents' home.

About August 1993, the petitioner submitted to the Ocean Township BOE a notarized statement wherein she stated that R.G. lived with her. BOE-1. The petitioner then registered R.G. in the Ocean Township school system, and in September 1993 R.G. entered the sixth grade in the Ocean Township Intermediate School. Since the 1993-94 school year, R.G. has attended school in the Ocean Township school system, where she has excelled, and the petitioner has "assume[d] all personal obligations for [R.G.] relative to school requirements." N.J.S.A. 18A:38-1(b)(1); P-3a; P-3b. (R.G.'s brother has continued to be domiciled with D.G. and continued to attend the Neptune schools.)

The petitioner's residence and D.G.'s apartment are only a few minutes' walking or driving distance from one another and, since August 1993, R.G. and D.G. have seen one another frequently. The petitioner's husband is ill and he has been placed in a nursing home. The petitioner is usually in her residence; however, she is active in her church and, when she is out for an evening or away overnight, e.g., at a church affair, because her husband can no longer be home with R.G., R.G. has stayed overnight with her mother in the Neptune apartment. When this has occurred, the next morning D.G. has driven R.G. to the petitioner's residence and then to the school bus stop (where R.G. gets on the bus for school).

Chester Morris is a friend of the petitioner's husband. He credibly testified that, after a career in the United States Army, he is now retired and residing in Asbury Park, a few blocks from the petitioner's home. When the petitioner's husband became ill, he requested that Mr. Morris regularly stop in at his residence to confirm that his family was all right. Mr. Morris has honored the petitioner's husband's request and he has stopped in at the petitioner's residence about three times a week. He said that during those visits he frequently observed R.G. in the house doing homework, eating, getting ready for bed, etc. That is to say, Mr. Morris has observed the living arrangement in the residence and, since August 1993, he has seen that R.G. is domiciled there, i.e., in Ocean Township.

Matthew Allen, a credible witness, is an elder in the Martin Luther King Presbyterian Church and, through the church, is active in organizing worthwhile activities for children, including R.G. For a number of years, Mr. Allen has regularly provided transportation for these children; he picks them up at their homes and, after activities, delivers them back to their homes. Since August 1993, Mr. Allen has picked up R.G. at the petitioner's residence and, only infrequently, when the petitioner has instructed him to do so, has he delivered R.G. to her mother at the Neptune apartment (because, e.g., the petitioner would not be home to receive her). During this same period, Mr. Allen picked up and dropped off O.G. (who was also involved in some of the church activities) at D.G.'s Neptune apartment. That is to say, Mr. Allen has observed the living arrangement in the petitioner's residence and, since August 1993, he has seen that R.G. is domiciled there, i.e., in Ocean Township.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6660-95

AGENCY DKT. NO. 91-4/95

KATIE MCLEAN,

ON BEHALF OF R.G., A MINOR,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF OCEAN,

Respondent.

Katie McLean, petitioner, pro se

Honora O'Brien Kilgallen, Esq., for respondent (Kramer, Kramer & Kilgallen, attorneys)

Record Closed: January 17, 1996 Decided: February 9, 1996

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

STATEMENT OF THE CASE

The petitioner, R.G.'s grandmother, alleges that, due to the economic hardship of her daughter, R.G.'s mother, since at least August 1993 R.G. has been domiciled in her (the

Ocean Township property-tax payers, like those of most municipalities, are concerned about rising education costs and taxes related thereto and the BOE regularly receives anonymous telephone tips that students attending the BOE's schools are not domiciled in the township.

After receipt of an anonymous tip alleging that R.G. was not domiciled in Ocean Township, at the Ocean Township school officials' request, Detective Sergeant Phillip Miller of the Ocean Township Police Department investigated the matter. BOE-3. He observed that at approximately 7:00 a.m. on March 2 and 3, 1995, D.G., R.G. and O.G. left D.G.'s Neptune apartment and, in D.G.'s motor vehicle, they drove to the petitioner's residence. After a short period, D.G. drove R.G. to her school bus stop, where she boarded the school bus for the BOE's school system. In a written report, Detective Sergeant Miller notified the Ocean Township school officials of his observations. BOE-4. However, as noted above, the petitioner has credibly explained that R.G.'s rare overnight stays with D.G. resulted from her (the petitioner's) occasional inability to be home with R.G.

In a letter to D.G. dated March 6, 1995, the Ocean Township superintendent of schools alleged that R.G. did not reside in the district and stated that she would no longer be allowed to attend school in the BOE's system. BOE-6. Thereafter, the superintendent explained to D.G. that he would need her affidavit attesting to R.G.'s domicile in Ocean Township; however, he also advised her that signing such an affidavit might affect a custody determination. N.J.S.A. 18A:38-1(b)(1). In a letter to D.G. dated March 16, 1995, the superintendent wrote that he understood D.G.'s reluctance to "have an affidavit submitted by [the petitioner]," and that, based upon the information the school system had, R.G. should be attending the Neptune Township schools, and could not attend school in the BOE's system after March 24, 1995. BOE-7.

On March 28, 1995, during the BOE's meeting, the BOE considered the issue of R.G.'s domicile and the petitioner and D.G. were given an opportunity to address the BOE. In a letter to the petitioner dated March 29, 1995, the superintendent notified her of the following:

> After careful consideration of the information which you presented last evening it is the decision of the [BOE] to deny your request to allow your [granddaughter, R.G.] to continue in the Ocean Township School District. The factors which led to this

> decision are the [BOE's] belief that [R.G.'s] mother does not reside in Ocean Township and the absence of an appropriate affidavit on file. . . .
>
> I must advise you that the district is entitled to collect tuition for a pupil's period of ineligible attendance. The tuition rate for grades 6-8 is $43.42 per day.
>
> [BOE-5.]

As a result of the petitioner's appeal to the commissioner, R.G. continues to attend school in the BOE's system, where she continues to have academic success.

CONCLUSIONS OF LAW

N.J.S.A. 18A:38-1 states, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if [she] were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the

judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;

(2) If the superintendent . . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free

> education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.
>
> [Emphasis added.]

Procedurally, the BOE questions the timeliness of the petition. However, the BOE's March 29, 1995 letter notified the petitioner of the BOE's determination that R.G. should not be attending the BOE's school system, etc. (no record was made of the date of receipt of the letter), and the petition was filed on April 17, 1995, i.e., within the twenty-one-day filing period set by N.J.S.A. 18A:38-1. So the petition appears to be timely.

Substantively, D.G., "the parent or guardian of a child who is attending the schools of the district [R.G.]," is "not domiciled within the district." N.J.S.A. 18A:38-1(b)(2) (emphasis added). However, consistent with the testimony of the petitioner and D.G., other credible evidence, and my findings of fact, D.G. is "not capable of supporting or providing care for [R.G.] due to a family or economic hardship"; R.G. is not residing with the petitioner "solely for the purpose of receiving a free public education within the district"; R.G. has been and is "kept in the [petitioner's] home," i.e., within the district, and "supported by [the petitioner] gratis as if the child was the [petitioner's] own child"; and this domicile arrangement is expected to continue for the foreseeable future. N.J.S.A. 18A:38-1(b). (The unique circumstances of this case, including D.G.'s fears relative to the effect on custody of the affidavit she was asked to provide, excuse her failure to submit a "sworn statement" as required by N.J.S.A. 18A:38-1(b)(1), and the above "Findings of Fact" may be considered to have substituted for and satisfied that requirement.)

Consistent with the above, the petitioner is not liable for tuition to the BOE, and R.G. may continue to attend school in the BOE's system.

ORDER

I **ORDER** the BOE's determination and claim for payment of tuition **DISMISSED WITH PREJUDICE** and **GRANT** the petitioner's claim that R.G. should be allowed to attend the BOE's school without payment of tuition.

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

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

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

Feb 5, 1996
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

2/14/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Petitioner's exhibits:

P-1a	Copies of envelopes mailed to R.G. at the Ocean Township address in 1994
P-1b	Copies of envelopes mailed to R.G. at the Ocean Township address in 1995
P-1c	Copies of envelopes mailed to R.G. at the Ocean Township address in 1995
P-1d	Copies of postcards mailed to R.G. at the Ocean Township address in 1995
P-1e	Copy of envelope showing the Ocean Township address as R.G.'s return address in 1995
P-2	Copy of magazine mailed to R.G. at the Ocean Township address in 1995
P-3a	Letter from Township of Ocean Intermediate School, dated May 2, 1994
P-3b	Commendation of Township of Ocean Intermediate School, dated October 1995
P-4a	New Jersey Police Accident Report, completed June 28, 1995
P-4b	New Jersey Police Accident Report, completed October 8, 1995
P-5	Letter from Township of Ocean Intermediate School, dated December 17, 1993

Respondent's exhibits:

BOE-1	Notarized statement of petitioner
BOE-2	Petitioner's utility bill
BOE-3	Memorandum to Ocean Superintendent of Schools
BOE-4	Township of Ocean Police Department Special Report, by P. Miller, dated March 3, 1995
BOE-5	Letter from Ocean Superintendent of Schools to petitioner, dated March 29, 1995
BOE-6	Letter from Ocean Superintendent of Schools to D.G., dated March 6, 1995
BOE-7	Letter from Ocean Superintendent of Schools to D.G., dated March 16, 1995

WITNESSES

Petitioner's witnesses:

Chester Morris

D.G.

R.G.

Katie McLean

Matthew Allen

Respondent's witnesses:

Douglas Deicke

Detective Sergeant Phillip Miller

OAL DKT. NO. EDU 6660-95

K.M., on behalf of minor, R.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board filed timely exceptions pursuant to N.J.A.C. 1:1-18.4.

The Board first challenges the ALJ's determination that R.G. is domiciled in Ocean Township. Here, the Board suggests that, since petitioner filed this action before the Commissioner of Education in April 1995, some ten months ago, "the child has spent most of her time at the Ocean Township residence in contemplation of the hearing which ultimately took place *** on January 17, 1996." (Board's Exceptions at p. 2)

Additionally, the Board excepts to the ALJ's finding that petitioner has established that D.G., R.G.'s mother, is not capable of supporting or providing care for R.G. due to a family or economic hardship, pursuant to N.J.S.A. 18A:38-1b(1). The Board asserts that D.G. never testified that she was on public assistance. Yet, D.G. did testify, the Board affirms, that the apartment in which she lived was owned by her father. The Board concludes, therefore, that

"[c]learly *** there is no 'family or economic hardship' *** which would require the child to reside with her grandmother ***." (Id.)

Upon careful and independent review, the Commissioner finds the Board's exceptions to be unpersuasive and, instead, concurs with the findings and credibility determinations of the ALJ in the initial decision. The Commissioner further agrees that the ALJ's factual findings, under the unique circumstances of this case, may be considered to have satisfied the statutory purpose for requiring a sworn statement from R.G.'s mother. See Gunderson v. Board of Education of the City of Brigantine, Atlantic County, 95 N.J.A.R. 2d (EDU) 39, 42. Thus, the Commissioner accepts the ALJ's conclusion that petitioner, satisfying the requirements of N.J.S.A. 18A:38-1b(1), has established that R.G. is eligible to attend school in respondent's District.

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein, and the Board is hereby ordered to continue to admit R.G. into its public school system free of charge, as long as there is no change in petitioner's circumstances that would alter R.G.'s entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 1, 1996
Date of Mailing, April 2, 1996

125-96

EDU #6660-95
C # 125-96
SB # 31-96

K.M., on behalf of minor, R.G.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 1, 1996

For the Petitioner-Respondent, Vernon McGowen, Jr., Esq.

For the Respondent-Appellant, Kramer, Kramer & Kilgallen (Honora O'Brien Kilgallen, Esq., of Counsel)

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

August 7, 1996

Date of mailing AUG 09 1996

134-96

134-96

MONA IWASZKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11228-95

AGENCY DKT. NO. 349-8/95

MONA IWASZKO,

Petitioner,

v.

BOARD OF EDUCATION,

MORRIS HILLS REGIONAL SCHOOL DISTRICT,

MORRIS COUNTY,

Respondent.

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

Sidney A. Sayovitz, Esq., for respondent
(Young, Dimiero & Sayovitz, P.C., attorneys)

Record Closed: January 18, 1996 Decided: February 14, 1996

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

On August 29, 1995, Mona Iwaszko (petitioner) filed a petition with the Department of Education (DOE) contesting action by the Board of Education of the Morris Hills Regional School District (respondent) determining that petitioner would be serving as a replacement guidance counselor during the 1995-96 school year and therefore would not acquire tenure credit for her assignment during that school year.

Respondent filed an answer on September 21, 1995, and the DOE transmitted the matter to the Office of Administrative Law on October 2, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A telephone conference was conducted on December 11, 1995. Hearings scheduled for June 1996 were adjourned at petitioner's request, with respondent's consent. Subsequent to further communications, the parties filed an executed stipulation of dismissal on January 18, 1996, requesting that this judge issue an initial decision approving the stipulation. Attached herewith is a copy of the stipulation of dismissal. The record was closed on January 18, 1996.

The stipulation, noting that the parties have amicably adjusted their differences, states that the parties have agreed that petitioner's claims that she earned tenure status and possessed all related tenure rights on or about September 1, 1995, are dismissed without prejudice, that any other claims are dismissed with prejudice, and that costs not be assessed against either party.

I **FIND** that the matter is no longer a contested case and **CONCLUDE** that the stipulation of dismissal executed by the parties should be approved. It is **ORDERED** that petitioner's claims that she earned tenure status and possessed all related tenure rights on or about September 1, 1995, be and are hereby **DISMISSED** without prejudice, that all other claims raised by petitioner be **DISMISSED** with prejudice, and that costs not be assessed against either party.

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

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

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

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

February 14, 1996
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

Feb 21, 1996
DATE

D N Contanautis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
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ZAZZALI, ZAZZALI, FAGELLA & NOWAK
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ANDREW F. ZAZZALI (1925 1969)

ANDREW F. ZAZZALI, JR.
JAMES R. ZAZZALI (N.J., N.Y. & D.C. BAR)
ROBERT A. FAGELLA (N.J. & N.Y. BAR)
KENNETH I. NOWAK (N.J., N.Y. & D.C. BAR)
RICHARD A. FRIEDMAN
PAUL L. KLEINBAUM (N.J., PA. & MI. BAR)
KATHLEEN A. NAPRSTEK (N.J. & PA. BAR)
MICHAEL J. BUONAGURO
AILEEN M. O'DRISCOLL (N.J. & PA. BAR)
EDWARD H. O'HARE (N.J. & PA. BAR)

CHARLES J. FARLEY JR., P.A.
(CERT. CIV. TRIAL ATTORNEY)
SPECIAL COUNSEL

NEWARK OFFICE
ONE RIVERFRONT PLAZA
NEWARK, N.J. 07102-5410
(201) 623-1822
TELECOPIER: (201) 623-2209

PLEASE REPLY TO TRENTON

January 17, 1996

Hon. Diana Sukovich
Office of Administrative Law
185 Washington St.
Newark, NJ 07102

Re: Iwaszko v. Board of Education of Morris Hills Regional School District, Morris County
OAL Docket No. EDUOA 11228-95N

Dear Judge Sukovich:

Enclosed please find original and two (2) copies of stipulation of dismissal in the above matter, which should resolve the parties' dispute. The parties request that Your Honor issue an initial decision approving the stipulation.

Thank you for your attention to this matter.

Respectfully submitted,

ZAZZALI, ZAZZALI, FAGELLA & NOWAK

Richard A. Friedman
RAF:cgf
Enc.
cc: Al Ramey
John Warms
Mona Iwaszko
Sidney Sayovitz, Esq.

YOUNG, DIMIERO & SAYOVITZ, P.C.
A Professional Corporation
Skyline Plaza
414 Eagle Rock Avenue
West Orange, NJ 07052
(201) 736-5200
Attorneys for Respondent, Board of Education of Morris Hills Regional School District

MONA IWASZKO Petitioner v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF MORRIS HILLS REGIONAL SCHOOL DISTRICT Respondent	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDUOA 11228-95N** **STIPULATION OF DISMISSAL**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and is hereby dismissed with prejudice and without costs against either party, except that those claims or related defenses concerning Petitioner's claims that she earned tenure status and possessed all related tenure rights on or about September 1, 1995 are dismissed without prejudice.

Dated: December 11, 1995

ZAZZALI, ZAZZALI, FAGELLA & NOWAK

By: RICHARD A. FRIEDMAN
Attorney(s) for Petitioner

YOUNG, DIMIERO & SAYOVITZ

By: SIDNEY A. SAYOVITZ
Attorney(s) for Respondent

Mona Iwaszko
MONA IWASZKO

OAL DKT. NO. EDU 11228-95

MONA IWASZKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. After such review, the Commissioner determines to approve the settlement terms of the parties, and the concomitant joint stipulation of dismissal, as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 8, 1996
DATE OF MAILING APRIL 9, 1996

133-96

EDU #8276-95
C # 133-96M
SB # 30-96

ANGELO VELASQUEZ,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 4, 1996

For the Petitioner-Appellant, Chamlin, Rosen, Cavanagh & Uliano
(Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent-Respondent, Wayne J. Oppito, Esq.

As stipulated by the parties, Angelo Velasquez (hereinafter "petitioner") commenced his employment as a teaching staff member for the Board of Education of the Borough of Brielle (hereinafter "Board" or "Brielle Board") in September 1992. On May 3, 1995, the Superintendent of Schools recommended to the Board that petitioner not be offered an employment contract for the 1995-96 school year. As a result of the Superintendent's recommendation, petitioner's name was excluded from the list of staff members the Board voted to reappoint for 1995-96. In a letter dated May 12, 1995, the Superintendent notified petitioner that the Board had determined not to offer him a contract for 1995-96. At petitioner's request, the Superintendent informed petitioner of the reasons for his nonrenewal by letter dated June 14, 1995. On July 5, 1995,

8/6/97

petitioner was provided with an informal appearance before the Board. In a letter dated July 7, 1995, petitioner was notified by the Superintendent that the Board had determined not to reverse its earlier decision not to renew his contract for the 1995-96 school year. At no time did the Superintendent recommend to the Board that petitioner be offered a contract for 1995-96. Nor did the Board at any time take formal action on petitioner's renewal by a recorded roll call vote.

On July 31, 1995, petitioner filed a petition with the Commissioner of Education, challenging the Board's action under N.J.S.A. 18A:27-10 and N.J.S.A. 18A:27-4.1.[1]

---

[1] N.J.S.A. 18A:27-10, as amended, provides that:

> On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
>
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice from the chief school administrator that such employment will not be offered.

N.J.S.A. 18A:27-4.1, which became effective on June 19, 1995, provides, in pertinent part:

> 1. Notwithstanding the provisions of any law, rule or regulation to the contrary:
>
> a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.
>
> b. A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. Prior to notifying the officer or employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal...and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment....

The parties subsequently filed cross-motions for partial summary decision with regard to Count One of the petition, in which petitioner had requested that this matter be remanded to the Brielle Board for a vote on his request for reemployment.

On March 7, 1997, an Administrative Law Judge ("ALJ") recommended dismissing the petition. The ALJ noted that N.J.S.A. 18A:27-4.1 was enacted by the Legislature in response to the Appellate Division decision in Rotondo v. Carlstadt-East Rutherford Reg'l High School Dist., 276 N.J. Super. 36 (App. Div. 1994), in which the Court held that regulations barring a local board from appointing a teaching staff member without the affirmative recommendation of the chief school administrator were invalid because they contravened N.J.S.A. 18A:27-1. The ALJ indicated that if the amendments to N.J.S.A. 18A:27-10 were intended to remove district board consideration of reemployment of an employee not recommended by the superintendent, the intent had not been realized since all the nonrenewed employee had to do was request an appearance before the district board. The ALJ found this inconsistent with the earlier statement in the statute that a nontenured employee who was not recommended for renewal by the chief school administrator was deemed to be nonrenewed.

The ALJ concluded that "the least absurd interpretation" of the statute was that a nontenured officer or employee who was not recommended for renewal by the chief school administrator was to be deemed nonrenewed unless the employee exercised his or her right to an informal appearance before the board. If the board then disagreed with the superintendent's recommendation, an employment contract would issue notwithstanding the superintendent's recommendation. The ALJ concluded that "[n]o

matter how the present language is viewed, there is no way to harmonize the language and the apparent intent without torturing the plain meaning of the words used." Initial Decision, slip op. at 19.

Applying his interpretation of the statute to the instant case, the ALJ found that petitioner had received all the consideration he was entitled to receive. The ALJ observed that petitioner had had the opportunity to try to convince the Board to offer him reemployment, but that such attempt had been unsuccessful. Consequently, the ALJ recommended dismissing the petition.

On March 25, 1996, the Commissioner granted petitioner's request for interlocutory review of the ALJ's determination. Thereafter, in a decision dated April 4, 1996, the Commissioner agreed with the ALJ that petitioner had received all that he was entitled to receive from the Brielle Board and that there was no relief that could be granted to him with respect to Count One of the petition. However, the Commissioner disagreed with the ALJ's underlying interpretation of N.J.S.A. 18A:27-4.1, finding that the plain language of the statute did not force a result that was at odds with the overall legislative intent. The Commissioner reasoned:

> In the case of contract renewal for nontenured staff, the law specifically provides that contracts shall be renewed only upon the superintendent's recommendation and a majority vote of the full board. That the Legislature chose to amend the original bill to retain the employee's existing right to a statement of reasons and appearance before the board in the event of a nonrenewal was not intended to, and does not, alter this result. [Footnote omitted.] Rather, it simply provides a mechanism by which a staff member whose renewal has not been recommended by the superintendent can appeal to the board, on which the superintendent specifically sits as a nonvoting member pursuant to N.J.S.A. 18A:17-20, in the hope of persuading district decision makers to take favorable action on his or her renewal. In the

> case of the superintendent, that action would be a recommendation for reemployment, and in the case of the voting members of the board, an offer of reemployment based upon the superintendent's recommendation. To conclude from the statute's ultimate inclusion of this long-standing due process mechanism...that the Legislature intended, or that the statute permits, boards to offer reemployment to a staff member not recommended by the superintendent, ignores both the context of the specific language being relied upon and the overall scheme of the legislative enactment.

Commissioner's Decision, slip op. at 25-26 (emphasis in original).

The Commissioner therefore dismissed Count One of the petition and directed that the remainder of the petition proceed to disposition in the Office of Administrative Law.[2]

Petitioner has filed a motion with the State Board for leave to appeal from the Commissioner's interlocutory decision. After a review of the papers submitted, we grant petitioner's motion for leave to appeal and, after a careful review of the record, affirm the ultimate determination of the Commissioner to dismiss Count One of the petition. However, we reject the Commissioner's analysis and dismiss Count One for the reasons expressed herein.

Giving the words used in the statute their "ordinary and well-understood meaning," Great Atl. & Pac. Tea Co. v. Borough of Point Pleasant, 137 N.J. 136, 143-44 (1994); Levin v. Township of Parsippany-Troy Hills, 82 N.J. 174, 182 (1980), we agree with the ALJ that "there is no way to harmonize the language and the apparent intent [of N.J.S.A. 18A:27-4.1] without torturing the plain meaning of the words used." Initial Decision, slip op. at 19. While the statute clearly indicates that a district board

[2] In Count Two of his petition, petitioner claimed that the Board's decision not to renew his contract was arbitrary, capricious and unreasonable.

can renew an employment contract "only upon the recommendation of the chief school administrator" (emphasis added), it also expressly permits an employee whose employment contract is not renewed to request an informal appearance before the district board for the purpose of "attempting to convince the members of the board to offer reemployment" (emphasis added).[3]

After careful review, we agree with the ALJ that the statute as enacted does not effectuate an intent to remove district board consideration of reemployment of an employee not recommended by the superintendent. As noted by the ALJ, all a nonrenewed employee has to do under the statute is to request an informal appearance before the board in an attempt to convince the members of the board to offer him or her reemployment. In that context, we are unable to accept the Commissioner's attempt to reconcile the language of N.J.S.A. 18A:27-4.1 as enacted with the apparent legislative intent. We find the Commissioner's explanation, which is predicated on the fact that the chief school administrator is a nonvoting member of the board, to be a strained interpretation of the plain language of the statute.

Nonetheless, like the Commissioner, we find nothing in the statute that would require a district board to vote on a staff member's renewal after his or her informal appearance before the board. Consequently, while we disagree with the

[3] We note that the contradictory language in N.J.S.A. 18A:27-4.1 (L.1995, c. 125, § 1, eff. June 19, 1995) appears to have resulted from an amendment made to the bill by the Assembly Education Committee. The sponsor's intent was simply that an employee who was not recommended for renewal by the chief school administrator would be deemed nonrenewed. The bill required the recommendation of the chief school administrator and a simple majority vote of the board for a contract to be renewed. The provision providing an employee whose employment contract was not renewed with the opportunity to appear before the board to convince it to offer remployment was added by the Assembly Education Committee during its subsequent review of the bill. See Sponsor's Statement; Statement of Assembly Education Committee, 1994 Assembly No. 2410.

Commissioner's analysis, we reject petitioner's contention that he was entitled to a vote by the Brielle Board on his renewal.[4]

We therefore affirm the ultimate determination of the Commissioner to dismiss Count One of the petition, but do so for the reasons expressed herein.

Attorney exceptions are noted.

August 6, 1997

Date of mailing AUG 08 1997

[4] In his exceptions to our Legal Committee's report, petitioner notes that the parties had stipulated that the Brielle Board had not acted by a recorded roll call vote after petitioner's informal appearance before that Board in July 1995 "due to the understanding that the legislation...deemed petitioner nonrenewed unless the Superintendent changed his original recommendation." In view of our determination herein, petitioner requests that the Brielle Board now be provided with the opportunity to consider whether to alter the recommendation of the superintendent and to offer petitioner renewed employment. Under the circumstances, we decline to issue such a directive. It has been more than two years since petitioner's informal appearance before the Brielle Board, and there is nothing in the record that would indicate or suggest that the Board would have renewed petitioner's employment had it voted at that time.

133-96

133-96M

ANGELO VELASQUEZ,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON MOTION
V.	:	
BOARD OF EDUCATION OF BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning nonrenewed teaching staff member sought determination from Commissioner that Board had not acted in accord with controlling statute, in that it failed to take a vote following his appearance before the Board in order to persuade it to offer reemployment. Subsequent to the ALJ's ruling on cross motions for partial summary decision, petitioner sought interlocutory review pursuant to N.J.A.C. 1:1-14.10.

In his ruling, ALJ found that applicable law, P.L. 1995, c. 125, amended existing law to provide that where a superintendent does not recommend renewal of a nontenured teaching staff member's contract, a board need not actually vote unless it chooses to offer reemployment notwithstanding the superintendent's recommendation. ALJ indicated that such a reading did not appear to be in accord with overall legislative intent of requiring superintendent approval of all nontenured teaching staff contract renewals, but that plain language of actual statute compelled this result. ALJ dismissed Count One of petition.

Commissioner concurred with ALJ's ultimate determination that petitioner was not entitled to any further relief under Count One of his petition, but modified the ALJ's reading of the applicable statute. Commissioner held that plain language of statute could be harmonized with legislative intent by construing clause entitling nonrenewed staff member to an appearance before the board as a mechanism by which such staff member could attempt to persuade both the board and the superintendent, who sits on the board as a nonvoting member pursuant to N.J.S.A. 18A:17-20, to recommend, or offer, as the case may be, reemployment. Where the superintendent does not alter his earlier recommendation, however, this clause does not confer upon the board the authority to offer reemployment in the absence of the required superintendent recommendation.

April 4, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DECISION ON MOTIONS FOR
PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 8276-95
AGENCY DKT. NO. 303-7/95

ANGELO VELASQUEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE,
Respondent.

Thomas W. Cavanaugh, Jr., Esq., for petitioner (Chamlin, Rosen, Cavanaugh & Uliano, attorneys)

Wayne J. Oppito, Esq., for respondent

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

This is a request for a declaratory judgment applying recent amendment of *N.J.S.A.* 18A:27-10 to a controversy that has developed between Angelo Velasquez and the Brielle Board of Education.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. The matter is here on motions for partial summary judgment on Count I of the verified petition filed by Velasquez with the Commissioner on July 31, 1995. Upon receipt at the Office of Administrative Law, the matter was assigned to the Honorable M. Kathleen Duncan, ALJ. On January 9, 1996, Judge Duncan heard oral argument on the present motion. The record consists of the record of oral argument and the moving and responsive papers filed by the parties.

Prior to rendering her decision, Judge Duncan discovered a conflict of interest which she immediately reported to the Administrative Law Assignment Judge. Thereafter the matter was assigned to me.

FACTUAL BACKGROUND

The parties have stipulated the following facts:

1. Petitioner, Angelo Velasquez, was a non-tenured teaching staff member who was initially employed by respondent, Brielle Board of Education, for the 1992-93 school year on or about September 1, 1992.

2. Petitioner was reemployed by respondent for the 1993-94 and 1994-95 school years.

3. At its meeting on May 3, 1995, respondent discussed its staffing needs for the 1995-1996 school year.

4. At the aforesaid meeting, the Superintendent of Schools recommended to respondent that petitioner not be offered a contract of the 1995-96 school year.

5. At the aforesaid meeting, as a result of the Superintendent's recommendation, petitioner's name was excluded from the list of staff members respondent voted to reappoint for the 1995-96 school year.

6. In a letter, dated May 12, 1995, from the Superintendent of Schools, petitioner was notified that respondent had determined not to offer him a contract for the 1995-96 school year.

7. Subsequent to receiving the May 12, 1995 letter, petitioner requested a statement of reasons as to why he was not being offered a contract for the 1995-96 school year.

8. In a letter dated June 14, 1995, respondent by way of the Superintendent of Schools informed petitioner of the reasons why he was not offered a contract for the 1995-96 school year.

9. On June 19, 1995, the Governor signed into law P.L. 1995, ch. 125 supplementing chapter 27 of Title 18A and amending P.L. 1971 c. 436, also known as the "Rotondo" bill. Said bill took effect immediately.

10. Petitioner requested an informal appearance before respondent pursuant to *N.J.A.C.* 6:3-4.2 and such appearance occurred on July 5, 1995.

11. In a letter dated July 7, 1995, petitioner was notified that respondent had determined not to reverse its earlier decision not to rehire him for 1995-96 school year.

12. At no time did the Superintendent of Schools recommend to respondent that petitioner be offered a contract for the 1995-96 school year.

13. Respondent did not act by a recorded roll call vote not to offer to petitioner a contract for 1995-96. Since the Superintendent did not alter his original recommendation for non-renewal subsequent to the appearance on July 5, 1995, respondent did not act on the matter by recorded roll call vote, due to the understanding that the legislation referenced above deemed petitioner nonrenewed

unless the Superintendent changed his original recommendation. The Board's decision not to renew the employment of the Petitioner was therefore not reflected in a vote subsequent to the appearance on July 5, 1995.

Prior to its most recent amendment, *N.J.S.A.* 18A:27-10 read:

> 1. On or before May 15 in each year, every board of education in this State shall give to each nontenured teaching staff member continuously employed by it since the preceding September 30 either
>
> a. A written offer of a contract for employment for the next succeeding school year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice that such employment will not be offered.

Chapter 125 of the laws of 1995 created a new section, *N.J.S.A.* 18A:27-4.1, and amended *N.J.S.A.* 18A:27-10. The new section reads:

> 1. On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
>
> a. A written offer of a contract for employment from the board of education for the next succeeding school year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice from the chief school administrator that such employment will not be offered.
>
> 3. This act shall take effect immediately.

N.J.S.A. 18A:27-3.2 provides that "Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonreemployment which will be

given to the teaching staff member in writing within 30 days after the receipt of such request." *N.J.S.A.* 18A:27-3.3 directs the State Board of Education to establish rules to carry out the provisions of the act. Implementing this legislation, the State Board of Education adopted *N.J.A.C.* 6:3-4.2, a procedure for nontenured teaching staff members to appear before a district board of education upon receiving notice of nonreemployment. The rule provides:

> (a) Whenever a nontenured teaching staff member has requested in writing and has received a written statement of reasons for nonreemployment pursuant to N.J.S.A. 18A:27-3.2, he or she may request in writing an informal appearance before the district board of education. Such written request must be submitted to the board within 10 calendar days of receipt of the board's statement of reasons.
>
> (b) Such an informal appearance shall be scheduled within 30 calendar days from receipt of the board's statement of reasons.
>
> (c) Under the circumstances described in this section, a nontenured teaching staff member's appearance before the board shall not be an adversary proceeding. The purpose of such an appearance shall be to permit the staff member to convince the members of the board to offer reemployment.
>
> (d) Each district board shall exercise discretion in determining a reasonable length of time of the proceeding, depending upon the specific circumstances in each instance.
>
> (e) Each district Board shall provide adequate written notice to the employee regarding the date and time of the informal appearance.
>
> (f) The nontenured teaching staff member may be represented by counsel or one individual of his or her own choosing.
>
> (g) The staff member may present witnesses on his or her behalf. Such witnesses need not present testimony under oath and shall not be cross-examined by the board. Witnesses shall be called into the meeting to address the board one at a time and shall be excused from the meeting after making their statements.

(h) The proceeding of an informal appearance before the district board as described herein may be conducted pursuant to N.J.S.A. 10:4-12(b)(8).

(i) Within three days following the informal appearance, the board shall notify the affected teaching staff member, in writing, of its final determination. such notification may be delegated by the board to its superintendent or board secretary.

See also, Donaldson v. North Wildwood Bd. of Ed., 65 *N.J.* 236 (1974).

THE ARGUMENTS

The petitioner

The facts in this matter are not controverted. The relief the petitioner seeks is a procedural direction requiring the Board of Education to undertake formal action subsequent to the appearance by a nontenured employee as set forth in *N.J.A.C.* 6:3-4.2.

The Board assumes that when the recommendation of the chief school administrator, here a superintendent, is not to reemploy a nontenured employee, that ends the matter, even though *N.J.A.C.* 6:3-4.2 guarantees the employee the right to appear before the Board. This is inconsistent with the long-standing concept of authority as delegated to local boards of education. And this portion is not required by the recent amendment of *N.J.S.A.* 18A:27-10.

The amendment was a reaction to *Rotondo v. Carlstadt- East Rutherford Reg'l High School Dist.*, 276 *N.J. Super.* 36 (App. Div. 1994). The Appellate Division reversed the Commissioner and State Board of Education holding that a local board of education could reverse the recommendation of the chief school administrator not to offer a nontenured employee a new contract. The Appellate Division concluded that there was insufficient statutory language within the references to support the conclusion that a chief school administrator could essentially veto teacher reappointments in an ordinary school district. The court reviewed the evolution of the statutory background and authority delegated to local school boards by the Legislature. The court determined that the statutory language in effect in 1994 was not adequate to justify a

conclusion that the Legislature wished to empower a chief school administrator to control the reappointment of professional personnel by granting or withholding approval.

The law in 1994 required that the type of decision contested in this case was not subject to the control of the recommendation of the chief school administrator. The question in the current case is whether the legislation introduced last year is applicable to the present case, and, if so, if the amendment is sufficient to invalidate the reasoning of the Appellate Division in *Rotondo*.

The Legislature clearly attempted to address the role of the chief school administrator in school employment decisions in Assembly Bill No. 2410, which eventually became *L.* 1995, c. 125, amending *N.J.S.A.* 18A:27-10 on June 19, 1995. The petitioner initially questions whether this legislation applies to his situation because of the timing of events in this matter. The recommendation not to renew his employment occurred well before adoption of the legislation, as did the original decision not to include his name on the list of employees to receive contracts for the following school year. The petitioner's request for a statement of reasons for his nonrenewal pursuant to *N.J.S.A.* 18A:27-3.3, as well as the Board's response, also occurred before the amendment was adopted. The only thing that did not occur before adoption of the new amendment was his appearance before the Board pursuant to *N.J.A.C.* 6:3-4.2. That occurred on July 7, 1995. The petitioner questions whether the recent amendment, even if sufficient to justify the Board's position, can be applied in light of the fact that most of the process being challenged took place before the change in law.

In its original form, Assembly Bill No. 2410 provided that renewal of an employment contract would take place only upon the recommendation of the chief school administrator and would require a majority vote of the Board. The original bill also provided that the Board would provide an explanation of a disapproval of his recommendation to the chief school administrator if one were requested. The final version of the bill amended the original language requiring a simple majority vote to require a recorded roll call vote of the full membership of the Board. Also, the requirement for an explanation of disapproval of the chief school administrator's recommendation was deleted.

The legislation as enacted stipulates that an employee is entitled to and retains the right to a written statement of reasons under *N.J.S.A.* 18A:27-3.2. It also requires that the employee be provided an informal hearing before the Board, sometimes referred to as a Donaldson Hearing. The specific language is:

> Prior to notifying the officer or employee of the nonrenewal, the chief school administrator shall notify the Board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed, shall have the right to a written statement of reasons for nonrenewal pursuant to Section 2 of P.L. 1975, c. 132 (C. 18A:3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment.

In the petitioner's view, it is unpersuasive to argue that this language was not an express intent to preserve certain rights to nontenured employees. The question then is whether the original segment of the Bill relative to the increase of authority given to the chief school administrator alters the ultimate responsibility of the Board after the informal appearance by the employee. Logic seems to dictate against this conclusion.

The final segment of the language cited above indicates that the purpose of the appearance is to convince the members of the Board to offer reemployment. Did the Legislature intend to indicate through the amendment that the purpose of the appearance was to attempt to convince the members of the Board to offer reemployment when they were powerless to reach that decision if the chief school administrator was not similarly convinced and did not recommend reemployment? Because the recent amendment provides that the Board is not to withhold its approval of the recommendations for arbitrary and capricious reasons, does that language not imply that the Board still has the right to make the ultimate decision? Did not the Appellate Division in *Rotondo* say that only where the statutory language relied upon by the chief school administrator is clear will the Board be denied the ultimate right to reach a conclusion?

The petitioner urges that the impression and interpretation of the statute offered by the respondent appears at best to be in conflict with the spirit and intent of *Donaldson v. Board of*

Ed. of North Wildwood, 65 *N.J.* 236 (1974) and *Hicks v. Board of Ed. of Tp. of Pemberton*, 1975 *S.L.D.* 332, as well as *N.J.A.C.* 6:3-4.2(c), the latter also making reference to convincing "the members of the board to offer reemployment." The *Rotondo* court makes clear that a local board's authority should not be abdicated by implication. Therefore, the matter must be remanded to the Board of Education for resolution before Count II is litigated.

The Respondent

This issue has arisen because of the enactment of P.L. 1995, ch. 125 which became effective June 19, 1995. The new law was a response to *Rotondo*, above. The facts in *Rotondo* were similar to those in this matter.

A nontenured teacher employed by the Carlstadt-East Rutherford Regional Board of Education was informed that the superintendent would not recommend her reemployment for the next school year. The Board did not offer her a new contract. After a public protest by families of students and a resulting reconsideration, the Board reversed its decision and offered the teacher a new contract over the superintendent's objection. Joyce Rotondo, a member of the Board who did not attend the meeting at which the new decision was made, filed a petition with the Commissioner of Education to set aside the decision as improper because it was contrary to the superintendent's recommendation. The administrative law judge determined that a local board was not bound to follow the superintendent's recommendation, but rather was obligated only to consider it. The Commissioner reversed the ALJ decision and relied upon the Department of Education regulations. The Commissioner determined that, while Boards of Education are specifically authorized ultimately to select the persons who are employed in the district, the flow of candidates from which they chose is controlled by the superintendent. The State Board affirmed.

The matter was taken to the Appellate Division of Superior Court which reversed the Commissioner's and State Board's decisions. The Appellate Division determined that it is necessary to consider the State Board regulations in the framework that the Legislature established. Both state and local boards have the authority to adopt and rules and regulations, but the rules must not be inconsistent with statute.

N.J.S.A. 18A:27-1 provides that no teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him/her.

The Appellate Court determined that there is nothing in this statute, or in any other statute, that affords the superintendent a veto or other controlling vote in the process of appointing teacher staff members, other than assistant superintendents. The court determined that the fundamental issue is whether regulations that bar a local board from appointing a teaching staff member without the affirmative recommendation of the superintendent are invalid because they contravene *N.J.S.A.* 18A:27-1. The court held that they are. The statute does not even suggest that the local board's authority to appoint is restricted to persons recommended by the chief school administrator. The court indicated that it was not evaluating educational policy but interpreting the meaning of the statute. It determined that if a new answer were to be reached, it was the Legislature that had to reach it.

As a result of the Appellate Division decision in *Rotondo* the Legislature amended the statute. The new law became effective immediately upon being signed by the Governor on June 19, 1995.

The amended statute provides that a board of education shall renew the employment contract of a certificated or noncertificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. As in the prior statute, the Board shall not withhold its approval for arbitrary and capricious reasons. Additional new language provides that a nontenured officer or employee who is not recommended for removal by the chief school administrator shall be deemed nonrenewed.

Thus, the new law requires that the Board may act only upon the recommendation of the superintendent in these personnel decisions. The Board still has authority to accept or reject the superintendent's recommendation. The law requires a majority roll call vote of the full membership of the Board for the appointment or transfer of a staff member. The Board still appoints staff; however, the law requires a recommendation from the chief school administrator.

A person not recommended is deemed nonrenewed. The respondent insists that the superintendent's recommendation is not to be construed as the superintendent having appointing authority. The actual power to appoint still resides in the Board and still requires a majority vote of the full membership of the Board.

There appears to be contradictory language in the statute. The law specifically states that in the absence of a recommendation from the chief school administrator for the renewal of a staff member, that person shall be deemed not renewed. However, in other language, the statute indicates that a person not renewed is entitled upon request to appear before the Board. The purpose of the appearance is to convince the Board members to offer reemployment. The language in the statute that appears to be contradictory is the same as the language in *N.J.A.C.* 6:3-4.2(c): "The purpose of such an appearance shall be to permit the staff member to convince members of the board to offer reemployment."

To require a Board to vote after the informal appearance would not be consistent with the Sponsor's statement. In accordance with *Rotondo*, a board of education did not need the chief school administrator's recommendation to hire and rehire teaching staff members. What was required was an affirmative majority vote of the full membership of the board. In light of *Rotondo*, the Legislature changed the statute so that the chief school administrator's recommendation is required. The Legislature would not have had to amend the statute if the contradictory language is interpreted to mean that the Board can act to renew a contract in the absence of an affirmative recommendation from the chief school administrator.

In the present case, the chief school administrator did not recommend that the petitioner's contract be renewed either before or after the July 5, 1995 appearance before the Board, which took place after the effective date of the new law. The petitioner is deemed nonrenewed. It would not have been necessary to amend the statute otherwise. In *Rotondo*, the Board acted to renew the contract of a teaching staff member in the absence of the superintendent's recommendation. The court ultimately determined that that action was within the Board's authority. The Legislature, in response to *Rotondo*, amended the law and required that a Board could use its power to appoint only when it had a recommendation from the chief school administrator. The Board is still authorized to reject the recommendation. However, now a

person not recommended by the chief school administrator is deemed not renewed. In the absence of the chief school administrator's recommendation, there is nothing for the Board to vote on. Accordingly, in this case, because the petitioner was not recommended by the chief school administrator either before or after his July 5, 1995 appearance before the Board, he is deemed nonrenewed.

DETERMINATION

The basic objective in statutory interpretation is to ascertain the legislative intent. One must look at the full context of the legislation on the subject and must consider the object of the legislation and the problems sought to be remedied. *In Re Suspension of Heller,* 73 *N.J.* 292, 299 (1977). There are dozens of more or less formal rules of statutory interpretation. For example, "Statutes in derogation of the common law are to be strictly construed," and "Statutes *in pari materia* must be construed together." However, it is always necessary to bear in mind that the rules of interpretation cannot be applied mechanically. They are to be used with great caution. As the New Jersey Supreme Court has observed, "When all is said and done, the matter of statutory construction here will not turn on literalisms, technisms or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the common sense of the situation." *Jersey City Chapter, Property Owner's Ass'n v. City Council,* 58 *N.J.* 86, 100 (1969).

Before amendment, *N.J.S.A.* 18A:27-10 provided that on or before May 15, every board of education shall give to each nontenured teaching staff member employed continuously since the preceding September 30 either (1) a written offer of a contract for the next year, or (2) a written notice that such employment will not be offered.

After amendment, the statute provides that on or before May 15, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either (1) a written offer of a contract for employment from the Board of Education for the next succeeding school year, or (2) a written notice from the chief school administrator that employment will not be offered.

The legislation also created a new section, *N.J.S.A.* 27-4.1. The new section provides that, notwithstanding the provisions of any law, rule or regulation to the contrary, a board shall appoint, transfer or remove a certificated or noncertificated employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. *N.J.S.A.* 18A:27-4.1(a).

The new section goes on to provide that a board of education shall renew the employment contract of a certificated or noncertificated employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. Again, the board shall not withhold its approval for arbitrary and capricious reasons. A nontenured employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. Prior to notifying the employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the contract and the reasons for the recommendation. An employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to *N.J.S.A.* 18A:27-3.2 and further shall be entitled to an informal appearance before the Board. The purpose of the appearance shall be to permit the staff member to convince the board members to offer reemployment. The chief school administrator shall notify the employee of the nonrenewal pursuant, where applicable, to the provisions of *N.J.S.A.* 18A:27-10.

This may be graphically represented as follows:

Before Amendment	After Amendment
Superintendent recommendation YES	Superintendent recommendation YES
Board options YES or No	Board options YES or NO
Superintendent recommendation NO	Superintendent recommendation NO
Board options YES or NO	Board options Employee deemed nonrenewed BUT employee can appear before board to convince members to offer reemployment, in which circumstance the options are YES or NO

In criminal law, the constitutional prohibition against *ex post facto* laws flatly prohibits retroactive criminal statutes. There is no such sweeping constitutional prohibition on retroactive civil statutes, but a retroactive civil statute would be constitutionally infirm if it interfered with a vested property right or impaired an obligation of contracts. Aside from potential constitutional questions, a retroactive civil statute has a propensity to be unfair. Hence, legislatures do not usually adopt retroactive statutes and rule makers do not usually promulgate retroactive rules. There is a strong presumption against retroactivity. Note, however, that tax and fiscal statutes and rules are fairly frequently made effective as of the date of original proposal in order to discourage speculation during the adoption process.

Where retroactivity is intended, the Legislature clearly expresses its intent. Similarly, when the courts find retroactive application appropriate, the statement is clear. For example, in

Spiewak v. Rutherford Bd. of Ed., 90 *N.J.* 63 (1982), the Supreme Court addressed the effect of its decision in that case that compensatory education teachers could achieve tenure status, reversing earlier Appellate Division decisions. The Supreme Court decision clearly addressed the concern:

> The various schools boards involved in these suits urge that in the event that we overrule *Point Pleasant*, we grant only prospective relief. We have previously declined to apply a new legal rule retrospectively when it constitutes a "significant change in the law." *Merenoff v. Merenoff*, 76 *N.J.* 535, 560 (1978). This policy rests on a perceived unfairness to parties that have acted in reliance on the rules established in prior case law. See *Ramirez v. Amsted Industries, Inc.*, 86 *N.J.* 332, 357 (1981). It is also intended to avoid any possible confusion in the administration of statutes and the execution of the law. *Tomarchio v. Greenwich Tp.*, 75 *N.J.* 62, 78 (1977).
>
> It is apparent from the Appellate Division decisions below, as well as those in *Biancardi*, *Capella*, and *Point Pleasant*, that for some time the law on the tenurability of part-time, remedial and supplemental instructors has been in doubt. More importantly, we are overruling the decision in *Point Pleasant*. One can hardly imagine a clearer case of a clean break in the law than disapproval of a court decision that has been followed by state agencies. We therefore conclude that this decision should have only prospective application to those parties who are not before the Court.
>
> However, we believe that the teachers here have the right to application of this new rule developed as a result of the litigation they commenced. We have often allowed litigants to benefit from application of a rule that is applied prospectively as to all other persons. *E.g.*, *Ramirez v. Amsted Indus.*, 86 *N.J.* at 357; *Merenoff v. Merenoff*, 76 *N.J.* at 560; *Pascucci v. Vagott*, 71 *N.J.* 40, 50-51 (1976). The teachers in this case should not be denied the reward for their efforts and expense in challenging both the practice of their boards of education and the legal principles established by the various cases criticized here. *See Ramirez v. Amsted Industries*, 86 *N.J.* at 357.

> We therefore hold that the legal rule established by these cases shall be applied prospectively to all persons not before the Court as well as to the teachers before us.[2]

[2]Teachers not before the Court will therefore not be entitled to any back pay award. Similarly, teachers not involved in this case who were terminated prior to the date of this opinion are not entitled to be rehired. However, all currently employed supplemental and remedial teachers should have their tenure eligibility calculated on the basis of this opinion from the beginning of their employment.

As to the teachers involved in this litigation, they are all entitled not only to tenure but also to retroactive payment of any benefits that they would have received if they had been awarded tenure properly. Further, Anderson is to be reinstated to her tenured position and to receive all retroactive benefits.

The enactment of *L.* 1995, c. 125 was in response to the decision in *Rotondo*, above. Briefly, *Rotondo* held that a local board is not bound to follow the superintendent's hiring recommendation, but rather is obligated only to consider it. The Appellate Division decided that it is necessary to consider the state board regulations in that area in the framework that the Legislature established. Both state and local boards have the authority to adopt rules and regulations, but the rules must be consistent with statutory law.

The Appellate Division determined that there is nothing in *N.J.S.A.* 18A:27-1 or any other statute that gives the superintendent a veto or other controlling role in the process of teaching staff member appointments. The court determined in that case that the fundamental issue was whether regulations barring a local board from appointing a teaching staff member without the affirmative recommendation of the superintendent were invalid because they contravened *N.J.S.A.* 18A:27-1. The statute says that no teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him [or her]. The court held the regulations invalid. The statute does not provide or hint that the local board's authority to appoint is restricted to persons recommended by the superintendent. The court indicated that it was not evaluating educational policy, but interpreting the meaning of the statue. It also concluded that, if a new answer were to be reached, it was the Legislature that had to reach it.

The Legislature did change the statute. The new law became effective on June 19, 1995. The present case demonstrates that the new law is less than clear.

If the purpose of the amendment is to remove board of education consideration of reemployment of an employee not recommended by the superintendent, the intent has not been realized. All the nonrenewed employee has to do is to request an appearance before the board. The act clearly states the purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment. Thus, by the simple expedient of the employee's request, the board of education is back in the decision making process. Yet, what violence does this do to the statement barely three sentences earlier that a nontenured employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed? The two provisions are inconsistent.

A great array of legal maxims and case law instructs that the parts of a statute must be harmonized if possible. At the same time, the words used in the statute are to be given their ordinary and well understood meanings in the absence of an explicit indication to the contrary, and only if an ambiguity exists is it necessary to go beyond words of the statute itself. *Ruehl Co. v. Bd. of Trustees for Education*, 85 *N.J. Super.* 4 (Law Div. 1964). In construing Legislative intent, one must avoid a construction of a statute that will render any part of it inoperative. *Shell Oil Co. v. Marinello*, 120 *N.J. Super.* 357 (Law Div. 1972), certif. den. 62 *N.J.* 186 (1972), *cert. den.* 415 *U.S.* 920, 94 *S. Ct.* 1421, 39 *L. Ed. 2d* 475 (1973).

All of these things considered, the least absurd interpretation of the amended statute is that a nontenured officer or employee who is not recommended for renewal by the chief school administrator is to be deemed nonrenewed unless the employee exercises his or her right to an informal appearance before the board. In that circumstance, notwithstanding the earlier language, the board once again has the final say. It can agree, or not, with the superintendent. If the Board agrees, no employment contract will issue. If the Board disagrees, an employment contract will issue notwithstanding the superintendent's recommendation. With the minor difference that the employee now must request an informal hearing before the Board to trigger the Board's consideration, the procedure is unchanged from that in the prior statute.

Applying this to the petitioner's situation, it must first be decided whether the new but not very different procedure is to be invoked because the petitioner's matter had proceeded through

all steps except the informal appearance before the Board, which occurred on July 5, 1995, clearly after the amendment was signed into law. It seems apparent that the legislative and gubernatorial intents were that the amended act take effect immediately. Given the interpretation of the amended act, above, and the intent of the legislative and executive branches, the posture is now this. The petitioner was notified by letter dated May 12, 1995 that he would not be offered a contract for the 1995-96 school year. Stipulation 6. The petitioner requested a statement of reasons why he was not being offered a contract. Stipulation 7. The respondent informed the petitioner of the reasons he was not offered a contract for the 1995-96 school year in a letter dated June 14, 1995. Stipulation 8. The amended act that is the subject of this ruling was signed into law and became effective on June 19, 1995. At that point, the petitioner and the respondent were subject to the mandates of the amended act.

The petitioner requested an informal appearance before the Board pursuant to *N.J.A.C.* 6:3-4.2. He appeared before the Board on July 5, 1995. Stipulation 10. By letter dated July 7, 1995, the petitioner was notified that the Board had determined not to reverse the earlier decision not to offer him employment for 1995-96. Stipulation 11.

The Board did not act by a recorded roll call vote not to offer the petitioner a contract for the 1995-96 school year. Stipulation 13. The respondent Board and its agents apparently believed that the new legislation deemed the petitioner nonrenewed unless the superintendent changed his original recommendation. Therefore, the Board's decision not to renew the petitioner's employment was not reflected in a vote after the petitioner's appearance on July 5, 1995. Stipulation 13.

As of June 19, 1995, both parties were subject to the requirements of the amended statute. The petitioner has done all that he is required or permitted to do under the statute. He has requested and has received a written statement of reasons for nonrenewal pursuant to *N.J.S.A.* 18A:27-3.2. He has requested an informal appearance before the Board pursuant to *N.J.S.A.* 18A:27-4.1(b). That appearance has been granted. There is no statutory requirement that the Board do more than listen. The petitioner has had the opportunity to try to convince the members of the Board to offer reemployment. Apparently that attempt was unsuccessful. The new section created by c. 125, *N.J.S.A.* 18A:27-4.1 simply provides, "The purpose of the appearance shall be

to permit the staff member to convince the members of the Board to offer reemployment. The chief school administrator shall notify the officer or employee of the nonrenewal pursuant, where applicable, to the provisions of section 1 of [*N.J.S.A.* 18A:27-10]." All that this requires is that the superintendent timely convey the results of the Board's consideration to the nonrenewed employee.

Despite the volume of this analysis, it leads to a simple conclusion. The petitioner has received all consideration he is entitled to receive under the statute as amended. Coincidentally, the procedure is the same as it would have been under the statute before amendment. The fact that the legislative intent was different from the legislative product is not unimportant. However, whether because of unartful drafting, error or any other reason, the amended statute does not state the legislative intent. The statute says what it says. If the present language could be read in such a way as to harmonize it with the intent, I would be obligated to do so. No matter how the present language is viewed, there is no way to harmonize the language and the apparent intent without torturing the plain meaning of the words used.

The petitioner's motion for partial summary judgment on Count I of this petition, therefore is **DENIED**. The respondent Board's motion for partial summary judgment on Count I is **DENIED**. As the relevant statutes presently stand, I cannot remand the matter to the Brielle Board of Education with a directive that it render a decision on the issue of the petitioner's nonrenewal subsequent to the petitioner's appearance on July 7, 1955, because the Board has done all it is required to do in that respect. Nor can I grant the Board's request to render a decision that, in the absence of the superintendent's recommendation, the petitioner was deemed not renewed and that the Board may not vote on the petitioner's renewal, or not, in the absence of that recommendation. In point of fact, the posture of the case now is that it is over. The Board, perhaps accidentally, has done all it is required to do. The petitioner, also perhaps accidentally, has received the process he is entitled to receive. I therefore recommend to the Commissioner of Education that the present appeal be **DISMISSED**, because there is no relief that can be afforded to the petitioner and there is no useful direction that can be given to the Board. Ultimately, of course, the matter is one for legislative consideration. Until and unless that consideration is given,

the present state of affairs obtains and, as the parties here will likely agree, that is an unsatisfactory condition.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to *N.J.A.C.* 1:1-14.10, or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

7 MARCH 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

/cat

EXHIBITS

A Letter, Russoniello to Velasquez, May 12, 1995

B Letter, Russoniello to Velasquez, June 14, 1995

C Letter, Russoniello to Velasquez, July 7, 1995

D Statement to Assembly Bill No. 2410, February 21, 1995

OAL DKT. NO. EDU 8276-95

ANGELO VELASQUEZ,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON MOTION
V.	:	
BOARD OF EDUCATION OF BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

This matter has come before the Commissioner by way of request for interlocutory review, filed by petitioner on March 15, 1996, of the ALJ's initial decision on cross motions for partial summary decision.

In his request, which was unopposed by respondent, petitioner argues that a conflict exists between the ALJ's reasoning on the effect of the statutory amendment at issue and his application of that reasoning to the current factual situation. The two components of the initial decision, petitioner contends, cannot be juxtaposed and must be reviewed and corrected by the Commissioner so that this matter may proceed properly hereafter. Petitioner reasons:

> The Administrative Law Judge determined that despite the amendment, an employee may trigger the ultimate decision-making process to revert to the Board of Education by seeking reasons for his termination and requesting an appearance pursuant to N.J.S.A. 6:3-4.2 [sic]. As he concludes in his decision, "...the Board once again has the final say" (citation). Finally, he evaluates the amendment to indicate that the employee must simply request an informal hearing before the Board to trigger the Board's consideration and therefore, that portion of the procedure is unchanged from the procedure in the prior statute (citation).
>
> The Respondent [sic] concurs with the reasoning and submits that as a result of that decision, the Board then has an obligation to make a decision by voting on the issue of whether or not to re-employ the employee.
>
> The Order in this matter which denies the request to remand the case to the Board flies directly in the face of the reasoning set forth above. In fact, the accuracy of

this argument is supported by the Board's cross motion for partial summary judgment which sought a declaration that it need not vote on the issue, absent a change in the Superintendent's recommendation. Clearly, both sides agree that the present procedural process utilized by the Board is inappropriate unless the decision-making power of the Board in a formal fashion is somehow altered by the statutory amendment. By concluding otherwise, the Administrative Law Judge cannot logically determine that the Board has "...done all it is required to do in that respect" (citation).

***If the Commissioner does not review and correct the current order, a markedly incongruous result will take place. The language in the decision will support the position that the Board has the authority, after an informal hearing under N.J.A.C. 6:3-4.2 to resolve the situation, but, also, that it need not vote on the issue if the Superintendent doesn't alter his recommendation. Therefore, although a majority of the Board may wish to re-employ the non-tenured party, they will be impotent to accomplish this intention after the hearing, because the Superintendent did not alter his recommendation. Clearly, that result would be at direct variance with the analysis of the amendment the Administrative Law Judge reached in his decision.

***Therefore, both logic and law dictate that, in accordance with the analysis rendered by the Administrative Law Judge, the relief of remand in order for the Board to officially act on the issue of [petitioner's] re-employment by a vote on the issue, is required. (Letter Memorandum in Support of Request for Interlocutory Review, at pp. 3-5)

Thus, petitioner accepts and advocates the ALJ's basic interpretation of the statute at issue, but contends that such interpretation must lead to a different conclusion with respect to the Board's ability and obligation to vote following an employee's nonrenewal appearance.

Upon review and consideration, however, the Commissioner does not agree with the ALJ's underlying interpretation, holding instead that, contrary to the ALJ's assertion, the plain language of the statute does *not* force a result that is at odds with the overall legislative intent of P.L. 1995, c. 125.

Although the sponsor's statement to Assembly Bill 2410 does not specifically mention the *Rotondo* Appellate Division decision, the timing of its introduction and the stated purpose of the bill clearly indicate that it was proposed in response to that decision, as it seeks to

modify statute to produce precisely the result sought by the Commissioner and the State Board prior to reversal by the Appellate Division:[1]

> This bill clarifies the role of the chief school administrator in school board employment decisions. The bill provides that a board of education would appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. In the case of a contract to be renewed, the bill requires the recommendation of the chief school administrator and a simple majority vote of the board.***A nontenured officer or employee who is not recommended for renewal by the chief school administrator would be deemed nonrenewed***. (Sponsor's Statement to Assembly Bill 2410)

Subsequent amendment by the Assembly Education Committee added language regarding a statement of reasons and the right to an appearance before the board, as well as requiring a recorded roll call (rather than a simple) majority vote for renewals. However, it left the overall intent of the bill intact, as indicated by the Assembly Education Committee Statement to Assembly Bill No. 2410 with Committee Amendments, which reiterated the sponsor's language as cited above.

Thus, it can be inferred that the intent of the Legislature was to follow the directive of the court stating that, notwithstanding considerations of educational policy, in as much as existing statutory provisions could not support the interpretation accorded them by the Commissioner and State Board of Education in their decisions in the *Rotondo* matter:

> "If a new answer is to be reached, it is the Legislature that has to reach it. It seems plain to us that in those specific circumstances in which the Legislature wanted the [chief school administrator] to control the appointment of professional personnel by granting or withholding approval, it clearly said so. The absence of such a provision in N.J.S.A. 18A:27-1 seems dispositive to us."

The ALJ found that, notwithstanding the Legislature's intent, its inclusion of language entitling a nonrenewed employee to an appearance before the board for the purpose of permitting the employee to convince the board to offer reemployment compelled a conclusion that the board had an option to offer, or not offer, reemployment regardless of the

[1] Indeed, the parties to the within matter expressly stipulate that the bill which became c. 125 was known as the "Rotondo" bill (Initial Decision at 3, Article 9).

recommendation of the superintendent. The ALJ then concluded that if the board chose the latter, as in the present situation, it need do nothing more, i.e., it need not specifically so vote and inform the employee, as it would if it opted to renew employment.

The Commissioner, however, finds that the law's statements of legislative intent as noted above, its legislative history and its undisputed origin as a response to the Appellate Division's decision in *Rotondo, supra,* require its language to be read in a way that will *not* permit a board to offer reemployment to a staff member not recommended by the superintendent, and that such a reading *can* be accomplished without doing violence to the plain language of the law.

As noted by the ALJ, the P.L. 1995, c. 125 establishes a framework wherein recommendations for specified personnel actions are to be made by the superintendent to the board; the board can then agree or not. In the case of contract renewal for nontenured staff, the law specifically provides that contracts shall be renewed *only* upon the superintendent's recommendation and a majority vote of the full board. That the Legislature chose to amend the original bill to retain the employee's existing right to a statement of reasons and appearance before the board in the event of a nonrenewal was not intended to, and does not, alter this result.[2] Rather, it simply provides a mechanism by which a staff member whose renewal has not been recommended by the superintendent can appeal to the board, *on which the superintendent specifically sits as a nonvoting member pursuant to N.J.S.A. 18A: 17-20,* in the hope of persuading district decision makers to take favorable action on his or her renewal. In the case of the superintendent, that action would be a recommendation for reemployment, and in the case of the voting members of the board, an offer of reemployment based upon the superintendent's recommendation. To conclude from the statute's ultimate inclusion of this long-standing due process mechanism, as do petitioner and the ALJ (albeit the latter somewhat reluctantly), that the

[2] In fact, the Commissioner's decision in *Rotondo* expressly noted that, in cases of employee contract renewal, recommendation by the superintendent was a necessary prerequisite to any board offer of reemployment *notwithstanding* the employee's right to a hearing before the board, which might (and actually did in the *Rotondo* case) persuade a majority of board members to wish to offer reemployment contrary to the superintendent's recommendation.

Legislature intended, or that the statute permits, boards to offer reemployment to a staff member not recommended by the superintendent, ignores both the context of the specific language being relied upon and the overall scheme of the legislative enactment.

In the matter herein, then, as concluded by the ALJ but for different reasons, the Commissioner finds that petitioner has in fact received all that he is entitled to receive and there is no relief that can be granted with respect to Count One of the petition.

Accordingly, the initial decision of the Office of Administrative Law dismissing Count One of the petition is modified as set forth above. The remainder of the petition, presently pending before the ALJ, shall proceed to disposition as appropriate in light of the Commissioner's ruling on Count One above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

April 4, 1996
Date of Mailing, April 8, 1996

135-96

135-96DHP-B

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
GARY ROBINSON.	:	
_____	:	

APRIL 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11047-95

AGENCY REF. NO. DHP #460

GARY ROBINSON,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Gary Robinson, petitioner, *pro se*

Department of Education, appearing without representation on the papers pursuant to *N.J.A.C.* 1:1-5.6

Record Closed: January 10, 1996 Decided: February 21, 1996

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter comes by way of a remand from a Commissioner of Education in order to allow petitioner to show evidence of rehabilitation pursuant to *N.J.S.A.* 18A:6-7.1 so as to contest his disqualification from school employment, specifically that of a school bus driver.

The decision remanding this case was dated August 4, 1995 and the matter was received at the Office of Administrative Law (OAL) on September 20, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for January 10, 1995 at which time documents were entered into the record as well as testimony taken from the petitioner. On that date the hearing record closed.

FACTS

The facts in this case are not in dispute. The petitioner received a denial and disqualification of school employment pursuant to *N.J.S.A.* 18A:6.7.1 based upon the results of a criminal history check which indicated the following offenses:

1. September 27, 1985, possession of marijuana. Sentence date October 9, 1985, required to pay $100 fine.

2. December 16, 1985, possession of marijuana. Sentence date, January 8, 1986, required to pay $100 fine.

These two offenses were considered by the Department of Education as disqualifying offenses for employment as a school bus driver. Additionally the Department of Education listed four other offenses which they felt fell into the "nondisqualifying" criminal history record. They are:

1. December 16, 1985, illegal possession of alcohol. Fine of $100 fine plus $25 court cost.

2. August 18, 1986, burglary. Sentence date, August 27, 1986, required to pay $525 fine.

3. November 14, 1986, receiving stolen property. Sentence date, December 23, 1986 to 30 days county jail suspended, $520 fine.

4. July 17, 1989, simple assault. Sentence date, July 31, 1989 with a sentence of 45 days in the county jail and a $225 fine.

The remand in this case is to allow petitioner a chance to establish a record in support of his contention that he has satisfied the statutory standard for rehabilitation. This is predicated upon the factors set forth in *N.J.S.A.* 18A:6-7.1 which include "any evidence of rehabilitation."

Petitioner testified that he has been arrested and convicted of marijuana in his possession in a motor vehicle. He also acknowledges a disorderly persons offense of assault which occurred in 1989. The petitioner stated that he has put all of these adverse behaviors behind him and that he does not "hang" with people with drugs. His conditional driver's license (CDL) has been taken away and he is now almost 29 years of age. At the time of the majority of the offenses he was approximately eighteen. Since then he has gotten married, had a child, separated from his wife and is now divorced. He himself has custody of his son who is four years of age and the child stays with his parents and uncle.

Petitioner works for Wilkerson Transportation as an assistant which is a job created because he lost his CDL. He has lost a considerable amount of money due to this and feels that he has been rehabilitated. He attends church regularly and spends time with his son.

Petitioner explained that the assault charge arose out of a police officer hitting him at which time he was under the influence of alcohol. As a result he pled guilty to simple assault and did not appeal. No appeal has ever been filed nor is pending at this time.

Subsequent to this he moved to Virginia and moved in with his grandmother. He has been drug tested several times and each time has come up clean. He stated he

does not use drugs. He also no longer fights. According to him he lost close to $40,000 due to the effects his behavior had on his work status.

Wilkerson Transportation handles only school buses. It is a family owned business and that is why he has had a job specially created for him. He indicated that he makes more money driving rather than acting as an assistant. Wilkerson handles school district contracts. He also works for a security firm and intends to continue doing so.

Petitioner stated adamantly that people can and do change. He stated that he no longer does the things that got him in trouble when he was eighteen years of age.

Petitioner has a job awaiting him but he is unable to get it if he is excluded from school employment and unable to drive a school bus.

Petitioner stated that he did not go to counseling because there was no requirement and he did not believe it was needed. The drug testing that he submitted to was at random through his employment, and on each occasion was negative.

DISCUSSION

N.J.S.A. 18A:6.7.1 provides in pertinent part:

> e. Notwithstanding the provisions of this section an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
>
> (1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic and vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under supervision.

Petitioner provided a number of letters on his behalf to attest to his good character. It is interesting to know that each of these letters indicates that he has been working in the security field for three years and that the individuals have known him for three years and find him to be reliable.

There is also an anomaly in this case. In the remand it indicates that the Deputy Commissioner considered the simple assault conviction as a "nondisqualifying" offense. Pursuant to *N.J.S.A.* 18A:39-19.1 the law considers "assault" as a disqualifying offense for individuals seeking employment as school bus drivers, whether a disorderly persons offense or greater.

While the petitioner in this case has put forth a good case to show that he is working toward, and is in fact turning his life around, the convictions listed and most especially in 1989 assault conviction is troubling. Had the convictions been distant in time it would have been easier to determine whether or not rehabilitation had been established by the petitioner. Even with the letters on the petitioner's behalf the

criminal history check weighs heavily and the 1989 assault conviction has not been overcome by the factors presented by the petitioner at the hearing.

As a result I **CONCLUDE** that petitioner has failed to satisfy the standards enumerated in *N.J.S.A.* 18A:6-7.1 for demonstrating rehabilitation. This determination is made taking into account all pertinent circumstances including any and all evidence of rehabilitation which was presented at the hearing by the petitioner. While petitioner points out that he is now 28 and that the majority of the offenses occurred when he was 18 it should be pointed out that the assault charge occurred in petitioner's 20s and cannot be attributed merely to youthful exuberance or inexperience.

This decision should not be meant to discourage the petitioner from continuing his efforts at rehabilitation at which time a new application may be brought for consideration to the Department of Education.

ORDER

It is hereby **ORDERED** that, based upon a failure to provide sufficient proof of rehabilitation, the petitioner has not met his burden of establishing same by clear and convincing evidence and his petition is hereby **DISMISSED.**

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

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

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

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

2/21/96
DATE

MARY LOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

2/23/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 23 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am(FV)mxl

APPENDIX

Witnesses

For petitioner:
Gary Robinson

For respondent:
None

Exhibits

P-1 Letter dated May 20, 1994 from Rev. Richard G. Rento

P-2 Letter dated May 14, 1994 from Anthony D. Washington

P-3 Letter to the Department of Education dated May 23, 1994 from Gary C. Robinson

P-4 Letter to Gary C. Robinson from Department of Education dated April 12, 1994

P-5 Copies of certified mail receipts

P-6 Copy of letter dated January 24, 1995 from Carl H. Carbelli

P-7 Wayne Municipal Court judgment of conviction

P-8 Letter from Sister Ann Donnelly dated May 20, 1994

P-9 Letter dated May 13, 1994 from Giannina Capria

P-10 Letter from Joan P. Sandeli **(*also notarized by Joan P. Sandeli?)** on letterhead of Wilkerson Transportation dated May 12, 1994

P-11 Letter from Peter Esposito dated May 13, 1994

OAL DKT. NO. EDU 11047-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
GARY ROBINSON.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that Mr. Robinson has not met his burden of establishing rehabilitation by clear and convincing evidence as required by N.J.S.A. 18A:6-7.1 and is, therefore, not qualified for school employment within the intent of the criminal history record check laws.

Accordingly, Mr. Robinson's disqualification from school employment is sustained for the reasons clearly articulated by the ALJ in her initial decision. This matter is hereby transmitted to the State Board of Education which has retained jurisdiction pursuant to its decision of August 2, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 8, 1996

DATE OF MAILING APRIL 9, 1996

136-96

136-96

R.S., on behalf of minor, K.W.S.	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY AND ROBERT A. SUESSMUTH, SUPERINTENDENT OF SCHOOLS,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioning parent alleged her child, K.W.S., was arbitrarily denied admission to first grade. Board's entrance-age policy requires child to be six years of age by September 30; K.W.S.' birthday was October 5.

ALJ concluded that petitioner failed to establish that the Board's entrance-age policy was either arbitrary or selectively enforced. Petition was denied.

Commissioner adopted findings and determination in initial decision as his own. Moreover, Commissioner concurred that the Board was not obligated to admit K.W.S. to first grade as a transfer student in the absence of a separate policy for transfer students.

APRIL 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8171-95
AGENCY DKT. NO. 333-8/95

R.S. ON BEHALF OF MINOR,
K.W.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER AND ROBERT A. SUESSMUTH, SUPERINTENDENT OF SCHOOLS, CAMDEN COUNTY,
Respondents.

R.S., petitioner, *pro se*, on behalf of minor, **K.W.S.**

John D. Wade, Esq., on behalf of respondents (Ferreri and Wade, attorneys)

Record Closed: January 17, 1996 Decided: February 16, 1996

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a petition filed with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9. The matter was transmitted to the Office of Administrative Law as a contested

case pursuant to *N.J.S.A.* 52:14F-1 through -13. A hearing was conducted on January 17, 1996, after which the record closed.

The question presented is whether K.W.S. may now enter first grade in respondents' district.

Most of the facts are undisputed. K.W.S. was born on October 5, 1989; respondents' entrance-age policy requires children entering first grade to be six years old by September 30 (R-1). K.W.S. was denied entry into respondents' kindergarten program last year because of age, and he completed a private kindergarten program. R.S. brought a motion for emergent relief before the commencement of this school year seeking to have K.W.S. admitted into first grade in-district, but the motion was denied (see attached). K.W.S. attends first grade at a private school and in September can enter second grade in-district. This plenary hearing is to determine whether he may attend first grade in-district for the remainder of this school year.

R.S. testified and presented documentation showing that in 1986, 1990 and 1993, three children entered respondents' first grade without meeting the entrance-age requirement (P-1; P-2). If these children were admitted, then K.W.S. should be accepted as well. R.S. testified that she knows of other examples, but most parents do not wish to come forward.

Robert Suessmuth has been superintendent of schools since July 1991, and before that was personnel director in this district from 1974. He testified that the district has the largest K through 8 population in the state, numbering some 7,700 students. The kindergarten has approximately 850 children. Every year he receives numerous requests to except children from the entrance-age policy. He has never done so, nor has the Board of Education ever approved any such petition. Mr. Suessmuth testified that the use of other, more subjective criteria like maturity, teacher evaluation, or test scores is burdensome and likely to encourage more litigation. To change the cutoff date would only shift the debate to whatever date is chosen. Mr. Suessmuth testified that there is no distinction made between in-district and out-of-district students entering first grade; all must meet the same entrance-age requirement.

Mr. Suessmuth testified that he has no knowledge concerning any child that may have entered first grade in violation of the entrance-age policy in 1986. He is aware of the two children (sisters) mentioned by R.S. who entered first grade in 1990 and 1993 without having met the policy. He did not learn of the 1990 violation until the year was over. The mother asked the Board for a waiver of the entrance-age requirement in 1993 with respect to the second child. The request was denied, but during late winter or spring of that school year, Mr. Suessmuth learned that the child had somehow been placed in first grade. He wrote to the mother expressing his displeasure at what she had done, but decided that it might do the child harm to take action so late in the semester. Mr. Suessmuth testified that in the last three years computerization has mostly eliminated parental attempts to sneak children into first grade, but he acknowledged that his precautions probably do not foil every connivance. This is the substance of the record.

Respondents have broad policymaking discretion, and to prevail in this matter R.S. must show that the entrance-age requirement is intrinsically arbitrary or enforced in an arbitrary manner. *N.A.C. v. Cedar Grove Bd. of Educ.*, 94 *N.J.A.R.*2d (EDU) 28; *H.A.B. v. Manalapan-Englishtown Reg. Sch. Dist., Monmouth County*, 92 *N.J.A.R.*2d (EDU) 640. This has not been done. The entrance-age policy provides simply that children cannot start first grade unless they will reach their sixth birthday by September 30. The worst that can be said is that the policy is rigid, yet that is what makes it attractive for respondents. Mr. Suessmuth credibly explained that in so large a district, a more flexible approach would create substantial new work and increase the likelihood of litigation. The fact that some parents have managed to skirt the policy over the years does not mean that it is enforced selectively. Respondents have never approved a waiver.

R.S. continues to maintain, as did her attorney at the emergent relief proceeding, that K.W.S. is a transfer student and thus that the entrance-age policy does not apply. As respondents have no separate policy for transfer students, K.W.S. must be admitted. I do not agree. There is nothing inherently wrong with a blanket policy for all students. If some boards of education differentiate along these lines, that is their prerogative. Mr. Suessmuth testified that as a result of this proceeding, the Board has amended the entrance-age policy to explicitly include transfer students.

Based on the foregoing, it is my conclusion that R.S. has failed to establish that respondents' entrance-age policy is either arbitrary or selectively enforced, and it is **ORDERED** that this petition be **DENIED**.

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

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

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

2/16/96
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

Feb. 20, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 23 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

/cat

LIST OF WITNESSES

For Petitioner:

R.S.

For Respondents:

Robert A. Suessmuth

LIST OF EXHIBITS

For Petitioner:

P-1 Affidavit of Robert and/or Karen Edmonds
P-2 Affidavit of Donna Argenbright

For Respondents:

R-1 Entrance Age rule

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

OPINION AND ORDER

OAL DKT. NO. EDU 8171-95

AGENCY DKT. NO. 333-8/95

R.S. ON BEHALF OF
HER MINOR CHILD, K.W.S.,

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF GLOUCESTER
AND ROBERT A. SUESSMUTH,
SUPERINTENDENT OF SCHOOLS,

Respondent.

Robert P. Becker, Jr., Esq., on behalf of petitioner (Hannold, Marshall & Becker, attorneys)

John D. Wade, Esq., on behalf of respondent (Ferreri and Wade, attorneys)

Record Closed: August 31, 1995 Decided: September 1, 1995

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a motion for emergent relief filed with the Commissioner of Education, seeking to have K.W.S. placed in first grade for the coming school year. The matter

was transmitted to the Office of Administrative Law on August 22, 1995 and oral argument was heard on August 31, 1995.

The facts for purposes of the motion are undisputed. K.W.S. was born on October 5, 1989. He was denied entry into respondent's kindergarten program last year because of age and he attended and successfully completed a private kindergarten program. Petitioner now wants her son admitted to respondent's first grade. Respondent's policy on this issue has been in effect since 1978 and requires that children entering first grade be six years old by September 30. The affidavit of Robert A. Suessmuth, Superintendent of Schools, indicates that to his knowledge respondent has made no exceptions to this policy despite numerous requests to do so. Although counsel for petitioner suggested in argument that some parents have received special treatment, he acknowledged that firm proofs would have to await discovery. This is the substance of the record.

To prevail on a motion for emergent relief petitioner must first show that she is likely to succeed on the merits. *Crow v. DeGioia*, 90 *N.J.* 126 (1992). This has not been done. Respondent might have approached this problem with greater flexibility, but it has chosen to draw a bright line and it is imbued with broad policymaking discretion. *N.A.C. v. Cedar Grove Board of Education*, 94 *N.J.R.* 2d (EDU) 28; *H.A.B. v. Manalapan-Englishtown Regional School District, Monmouth County*, 92 *N.J.A.R.* 2d (EDU) 640. Though K.W.S. would be almost seven if he waited to start first grade in respondent's system, I am at liberty to do no more then state that this seems late to start first grade. Petitioner argues that K.W.S. is actually transferring in from another district and thus that the policy concerning entrance age for first graders does not apply. However, it seems that in the absence of a separate procedure for transferees, the existing policy applies.

Based on the foregoing, it is my conclusion that petitioner has failed to establish a likelihood of success on the merits and it is **ORDERED** that the motion be **DENIED**. The matter is to be scheduled expeditiously for plenary hearing.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

DATE 9/1/95

SOLOMON A. METZGER, ALJ

OAL DKT. NO. EDU 8171-95

R.S., on behalf of minor, K.W.S.	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY AND ROBERT A. SUESSMUTH, SUPERINTENDENT OF SCHOOLS,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	
	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that petitioner has failed to establish that the Board's entrance-age policy is either arbitrary or selectively enforced and, therefore, the Board policy must be upheld. *N.A.C.*, *supra.*; *H.A.B.*, *supra.* Moreover, the Commissioner concurs that the Board is not obligated to admit K.W.S. to first grade as a transfer student in the absence of a separate policy for transfer students. Therefore, the Board acted within its discretion in

denying K.W.S. admission to first grade upon learning that the minor's birthday fell outside of the Board's age cut-off date.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL dismissing the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 8, 1996
DATE OF MAILING APRIL 9, 1996

137-96

137-96SEC

SCHOOL ETHICS COMMISSION, :

PETITIONER, :

V. :

MATTHEW VITECKA, BOARD MEMBER, WINFIELD TOWNSHIP BOARD OF EDUCATION, UNION COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

APRIL 9, 1996

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MATTHEW VITECKA, BOARD MEMBER, WINFIELD TOWNSHIP BOARD OF EDUCATION, UNION COUNTY,	:	
RESPONDENT.	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by N.J.S.A. 18A:12-21 et seq. to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to N.J.A.C. 6:3-9.3(i), on June 19, 1995, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member responded to such Order on June 29, 1995, advising the Commission that his failure to attend training was an oversight but that he would attend training in September 1995; and

Whereas, the above-named Board member was not recorded as having taken the September training course; and

Whereas, the Commission voted on January 23, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, and forwarded this matter to the Commissioner pursuant to N.J.S.A. 18A:12-29; and

Whereas, upon subsequent review it was noted, and confirmed by the Board office upon inquiry, that respondent resigned from his position as a School Board member on September 19, 1995; now therefore

IT IS ORDERED, in that respondent no longer serves as a member of the Board, the within matter is moot and it is not necessary for the Commissioner to rule on the penalty recommended by the Commission pursuant to N.J.S.A. 18A:12-29.

COMMISSIONER OF EDUCATION

APRIL 9, 1996

DATE OF MAILING APRIL 9, 1996

138-96SEC

138-96

IN THE MATTER OF	:	
SALVATORE BUONO, BOARD	:	
MEMBER, PENNSAUKEN TOWNSHIP	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, CAMDEN	:	DECISION
COUNTY.	:	
	:	

APRIL 9, 1996

IN THE MATTER	:	Before the School Ethics Commission
OF	:	
	:	Docket No. C16-94
SALVATORE BUONO	:	
	:	DECISION
	:	

PROCEDURAL HISTORY

This matter arises from a claim that respondent, Salvatore Buono, violated the School Ethics Act by voting for his business partner's renewed employment contract and subsequent retirement proposal. The business partner, Richard Errigo, was the Transportation Director for the Pennsauken Board of Education. Complainant, Bernhard Kofoet, also alleges that respondent violated the Act when he voted in favor of the renewed employment of his emancipated daughter, Kim Buono Trace.

Bernhard Kofoet filed his complaint with the School Ethics Commission on October 19, 1994. The Commission received Mr. Buono's answer on November 18, 1994. After reviewing the answer, the Commission asked the parties to sign a Stipulation as to the Facts, which did not appear to be in dispute. Because both parties suggested that changes be made to the Stipulation, the Stipulation was revised. At its meeting of January 23, 1996, the Commission found probable cause of a violation of the School Ethics Act, specifically N.J.S.A. 18A:12-24(c). The Commission sent the parties a letter on January 24, 1996, advising them of the Commission's determination and enclosing the revised Stipulation of Fact. The Commission invited the parties to comment on the finding of a violation and the penalty the Commission should impose in written statements. The Commission received Mr. Buono's written statement on February 2, 1996.

FACTS

The parties have stipulated and agreed to the following facts:

1. Salvatore Buono is a member of the Pennsauken Township Board of Education.

2. Salvatore Buono is the co-owner of a business, "Catering by Nicholas". The name of the other owner is Richard Errigo.

3. Richard Errigo was the Transportation Director for the Pennsauken School District until his retirement in September 1994.

4. On the agenda for the June 17, 1993, board meeting was a resolution to re-employ Richard Errigo as Transportation Director for the 1993-94 school year at the salary of $65,000. Salvatore Buono was present at that meeting and voted in favor of the resolution. The resolution passed 8-0-1.

5. On the January 19, 1995, meeting agenda was the retirement proposal of Richard Errigo. The proposal included payment for 225 accumulated sick days @ $65.50 per diem and 23 vacation days @ $262.50 per diem. (See Attached) Salvatore Buono abstained on this resolution.

6. The approval of Mr. Errigo's retirement passed with two abstentions as part of a list of agenda items under the Superintendent's report.

7. "Catering by Nicholas" does not do business with the Pennsauken School District.

8. Kim Buono Trace is Salvatore Buono's emancipated daughter. She was married on June 19, 1993.

9. Kim Buono Trace was then and still is a teacher in the Pennsauken School District.

10. On June 17, 1993, a resolution was on the agenda to re-employ teachers for the 1993-94 school year. The list included Mrs. Trace at a salary of $31,450.00. Salvatore Buono voted in favor of this resolution. The resolution passed 8-0-1.

DECISION

The School Ethics Commission found probable cause that respondent potentially violated N.J.S.A. 18A:12-24(c) by his vote. Subsection (c) provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

In his written statement, respondent argues that his vote on July 17, 1993, was to re-employ all non-unit administrative personnel, of which his business partner happened to be a part. He notes that Mr. Errigo had been a board employee for 34 years prior to the resolution and his vote had no real impact on the outcome. Regarding his daughter, respondent argues that his daughter did not reside with him and therefore does not fall within the definition of "member of his immediate family" set forth in the statute. Further, he argues that his daughter's resolution was merely part of a general resolution to re-employ over 400 professional staff members. He urges the Commission to find that since the vote was again 8-0-1, that his vote was not a determining factor in her getting the job.

The Commission will address the business partner's resolution first. The Commission finds respondent's arguments to be unpersuasive regarding whether he violated subsection (c). The relevant inquiry is not whether he was the determining factor in passing the resolution or whether he was the sole name or one of many names on a list. The relevant inquiry is whether the public could reasonably perceive that Mr. Buono had a conflict of interest that would keep him from exercising independent judgment in voting for his business partner. The business, Catering by Nicholas, is a partnership where the partners' personal finances can be attached to pay debts of the partnership. Further, the voting for one's business partner, and ostensibly friend, creates appearance of favoritism that the Legislature intended the School Ethics Act to prevent. The conflict of interest is clear. Thus, the Commission finds that the public could reasonably perceive that Mr. Buono was not being objective ~~when~~ he cast his vote for the resolution. He easily could have asked the board to vote for Mr. Buono separately or abstained on the whole list. He chose neither and voted. In so doing, he violated the Act.

With regard to Mr. Buono's arguments, the Commission will consider them mitigating factors. There is no allegation that Mr. Errigo did not deserve to continue in his position as Transportation Director. For that reason, there is no finding that respondent secured an "unwarranted privilege" for Mr. Errigo in violation of N.J.S.A. 18A:12-24(b). The Commission finds that the mitigating factors that Mr. Errigo was a 34 year employee and part of a list of re-hires does not affect the finding of a violation; rather, the Commission should consider them in determining the penalty.

As stated above, the complainant initially alleged that Mr. Buono also voted for his partner's retirement package. However, the records obtained in the investigation of this matter showed that he abstained on that vote. Therefore, the Commission dismisses that portion of the complaint. The fact that he abstained on that vote, however, indicates an awareness of the conflict of interest in voting for any perceived benefit for his business partner.

Last, the Commission finds that the board member similarly should have abstained from voting on his emancipated daughter's appointment. The Act defines an immediate family member as a child residing in the school official's household. N.J.S.A. 18A:12-22. The Commission acknowledges that the daughter does not and did not at the time of the vote reside in the board member's household. However, the Act requires the Commission to scrutinize the board member's interest to determine whether the public could reasonably perceive that he had a personal or financial involvement that would prevent him from being objective in his vote. The Commission believes that there is certainly personal involvement, if not financial.

In the matter of Scannella v. Scudillo, C14-93, the Commission ruled that respondent's vote for her son-in-law's appointment as superintendent violated N.J.S.A. 18A:12-24(c). There, the Commission found that even though the respondent did not vote for an immediate family member, she had a personal interest and involvement that the public would perceive as hindering her independence of judgment in voting for him. Thus, she should have abstained. The same

her independence of judgment in voting for him. Thus, she should have abstained. The same analysis applies here.

Even though his daughter was emancipated, Mr. Buono has an interest in her continued employment with the Board. His desire for her to succeed does not diminish because she moves out of his house. Certainly, the fact that the daughter does not live with him would not convince the public that his vote was not evidence of nepotism. Thus, he has a personal involvement that the public could reasonably perceive would prevent him from being objective in voting for her. The Commission recognizes that the present case is unlike the Scannella matter in that respondent was not voting solely on his daughter. Rather, he voted in favor of the superintendent's appointments list of which she was a part. (See attached) This fact does not excuse him, but again will be considered in determining the penalty.

CONCLUSION

For the foregoing reasons, the Commission finds that Mr. Buono violated N.J.S.A. 18A:12-24(c). Because the parties agree to the above facts, the Commission does not need to refer the matter for an OAL hearing. Rather, the Commission can recommend a penalty to the Commissioner of Education.

In the matter of Scannella v. Scudillo, the School Ethics Commission recommended a three-month suspension for her voting for her son-in-law. The Commissioner of Education increased the penalty to removal for her two combined offenses. Although the State Board of Education remanded the matter for a hearing, the penalty discussions are no less instructive. The Commissioner found that her vote for her son-in-law was a deliberate and flagrant violation of the Act. For the foregoing reasons, the Commission recommends that the Commissioner of Education suspend respondent from the board of education for one month for his violation of N.J.S.A. 18A:12-24(c).

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 225 East State Street, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Respectfully submitted,

Paul C. Garbarini

Paul C. Garbarini
Chairman, School Ethics Commission

State of New Jersey

DEPARTMENT OF EDUCATION
CN 500
TRENTON NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

LEO KLAGHOLZ
Commissioner

Resolution Adopting Decision - C16-94

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the arguments raised by parties in subsequent submissions; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter with any minor changes to be made prior to release and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on February 20, 1996

Lisa James-Beavers
Executive Director

IN THE MATTER OF	:	
SALVATORE BUONO, BOARD	:	
MEMBER, PENNSAUKEN TOWNSHIP	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, CAMDEN	:	DECISION
COUNTY.	:	
	:	

The initial decision of the School Ethics Commission, together with the recommended sanction adopted by the Commission, has been reviewed. This matter comes before the Commissioner of Education to impose a sanction, pursuant to N.J.S.A. 18A:12-29(c), upon Salvatore Buono (Buono), member of the Board of Education of Pennsauken Township (Board), based upon a finding by the School Ethics Commission that Buono violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq.

BACKGROUND

At its meeting of January 23, 1996, the Commission found probable cause of a violation of the School Ethics Act, specifically N.J.S.A. 18A:12-24(c), by Salvatore Buono. The Commission determined not to transmit this matter to the Office of Administrative Law in that it found that no material facts were in dispute and, therefore, an evidentiary hearing was not warranted. At its meeting on February 20, 1996, the Commission concluded that Buono violated the School Ethics Act, N.J.S.A. 18A:12-24(c), by voting for his business partner's renewed employment contract as Transportation Director with the Board and the renewed employment of

his emancipated daughter as a teacher in the District. The Commission recommends Buono's suspension from the Board for a period of one month as the penalty in this matter. After the issuance of the Commission's decision, the parties were accorded an opportunity to submit comments to the record with respect to the Commission's proposed sanction for the Commissioner's consideration in his determination of an appropriate penalty herein. No comments were filed by either of the parties.

CONCLUSIONS OF LAW

The School Ethics Commission found that Buono violated N.J.S.A. 18A:12-24(c)[1] by casting a vote for a Board resolution to reemploy his business partner as Transportation Director for the 1993-94 school year and casting a vote for a resolution to reemploy teachers in the District for the 1993-94 school year, one of which was his emancipated daughter.

With respect to the resolution dealing with Buono's business partner, the Commission considered Buono's arguments regarding the circumstances of his vote in connection with his business partner's reappointment, i.e., this particular vote "was to reemploy all non-unit administrative personnel, of which his business partner happened to be a part," the fact that this individual "had been a board employee for 34 years prior to the resolution and [because this resolution passed by a vote of 8-0-1] his vote had no real impact on the outcome." (School Ethics Commission Decision at p. 2) and found these to be mitigating factors which would be considered in determining penalty, but unpersuasive as to whether his action of casting a vote was violative of subsection (c). The Commission reasoned

[1] This provision specifies: "No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment."

> ***The relevant inquiry is not whether he was the determining factor in passing the resolution or whether he was the sole name or one of many names on a list. The relevant inquiry is whether the public could reasonably perceive that Mr. Buono had a conflict of interest that would keep him from exercising independent judgment in voting for his business partner. The business, Catering by Nicholas, is a partnership where the partners' personal finances can be attached to pay debts of the partnership. Further, the voting for one's business partner, and ostensibly friend, creates appearance of favoritism that the Legislature intended the School Ethics Act to prevent. The conflict of interest is clear. Thus, the Commission finds that the public could reasonably perceive that Mr. Buono was not being objective when he cast his vote for the resolution. He easily could have asked the Board to vote for [Mr. Errigo] separately or abstained on the whole list. He chose neither and voted. In so doing, he violated the Act.
>
> (School Ethics Commission Decision at p. 3)

With regard to Buono's vote on the resolution to reemploy teachers in the District for the 1993-94 school year, one of which was his emancipated daughter, the Commission similarly found that Buono should have abstained from voting and his failure to do so violated the Act. In so finding, the Commission posited

> *** the Act requires the Commission to scrutinize the board member's interest to determine whether the public could reasonably perceive that he had a personal or financial involvement that would prevent him from being objective in his vote. The Commission believes that there is certainly personal involvement, if not financial. (Id.)

The Commission concluded that, as a parent, Buono had an on-going interest in his daughter's success and continued employment with the Board, which was not lessened by virtue of the fact that she was not living in his home or was emancipated. As such, "he has a personal involvement that the public could reasonably perceive would prevent him from being objective in voting for her." (Id. at p. 4) The Commission likened Buono's "personal interest and involvement" to that

which it found in Scannella v. Scudillo, C14-93, where the respondent voted for her son-in-law's appointment as superintendent. It did, however, recognize that the within matter was also distinguishable from Scannella, in that the vote cast by Buono was not solely for his daughter but he, rather, voted for a list of appointments recommended by the superintendent, one of which was his daughter. The Commission found that, although this circumstance did not justify Buono's vote, it should be a consideration in fashioning a penalty herein.

COMMENTS TO THE COMMISSION'S DECISION

As previously noted, neither party chose to submit comments with respect to the Commission's recommended penalty for the Commissioner's consideration.

COMMISSIONER'S DETERMINATION

Upon review of the Commission's findings of fact and conclusions of law, by which the Commissioner is bound in making his determination in this matter, and the penalty recommended by the Commission, the Commissioner concurs with the Commission that a one-month suspension of the within Board member is the appropriate penalty to be imposed in this matter.

Accordingly, IT IS hereby ORDERED that Board member, Salvatore Buono, be suspended from the Board of Education of Pennsauken Township for a period of one month from the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 9, 1996

DATE OF MAILING APRIL 9, 1996

140-96

MARYLEE FISHER,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE BOARD OF EXAMINERS, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, unsuccessful applicant for principal's certificate, appealed State Board of Examiner's denial of certification.

ALJ found that where the Commissioner has the power of review, the Commissioner will not interfere with agencies or with local boards of education in the management of their missions unless they violate the law, act in bad faith or abuse their discretion in a shocking manner. ALJ found that the arbitrary and capricious standard did apply to the resolution of this matter. ALJ concluded that petitioner did not have the required master's degree in management or leadership nor did she hold the substantial equivalent in coursework in those areas. Thus, the decision of the State Board of Examiners may not be disturbed. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

APRIL 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8035-95

AGENCY DKT. NO. 240-6/95

MARYLEE FISHER,

Petitioner,

v.

STATE BOARD OF EXAMINERS,

Respondent.

John D. McQuarrie, Jr., Esq., for petitioner (Jamieson, Moore, Peskin & Spicer, attorneys)

Arlene G. Lutz, Deputy Attorney General, for respondent (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: January 19, 1996 Decided: February 22, 1996

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

Marylee Fisher, petitioner, appeals from a State Board of Examiners' denial of her application for a principal certificate.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law (OAL) for determination as a contested case. *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held

by telephone on October 31, 1995. It was agreed that the parties would stipulate all necessary facts and that the State would move for summary decision. A schedule was established and all papers were timely submitted.

STIPULATED FACTS AND EXHIBITS

The parties agree to and I adopt the following as **FACTS** in this matter.

1. Ms. Fisher received a Masters in Education from New York University in 1970.

2. After graduation, Ms. Fisher was a teacher at the Roosevelt School, Englewood Public Schools, in Englewood, New Jersey for a period of six years from 1970 to 1976.

3. Ms. Fisher completed 12 credits of postgraduate courses at Teachers College at Columbia University from 1974 to 1976. The courses included a class on problems in education administration and supervision for elementary schools.

4. In 1976, Ms. Fisher took six graduate credits in education at Rutgers University.

5. Ms. Fisher received a New Jersey Supervisor's Certificate in 1977 and worked as a Unit Leader for the McKnight Elementary School, East Windsor Regional School District, Hightstown, New Jersey. Ms Fisher held this position from September 1976 to June 1979.

6. Ms. Fisher led a "unit" of nine classroom teachers, extra ancillary staff, and 300 students. Part of her functions included (a) deploying professional and auxiliary staff, facilities, time and materials for students' instructional activities, (b) training all unit members (teachers, interns and aides), and (c) coordinating instruction including evaluation procedures.

7. In 1980, Ms. Fisher moved to California. She took a graduate course in education at San Jose University. Ms. Fisher received a California Administrator's Credential.

8. Ms. Fisher was a Coordinator in the Alum Rock Union District for five years from 1981 to 1986. The District consisted of 24 schools. The responsibilities of a Coordinator may include assisting with curriculum implementation and assisting in the teacher evaluation process.

9. In 1986, Ms. Fisher became the Principal of the Nimitz Elementary School, in the Cupertino Union School District and remained there for two years until 1988. She served as Principal in the Reed Union School District for a period of six years from 1988 to 1994. Her responsibilities included supervising and evaluating staff, developing and evaluating programs, managing school operations, developing and implementing budgets, and leading teachers and parents through curriculum changes.

10. During the 1993-1994 academic year, in addition to her Principal position, Ms. Fisher assumed the position of an Assistant Superintendent of the Reed Union School District. As Assistant Superintendent, she worked with the Board of Education in making district-wide decisions and policies.

11. On July 15, 1994, the Millburn Township Public Schools in New Jersey offered Ms. Fisher employment as the Glenwood Elementary School Principal for the 1994-1995 academic year. The offer was contingent upon Ms. Fisher obtaining the necessary New Jersey Certification for the position. Ms. Fisher submitted to the State Board of Examiners an application for a principal certificate.

12. On August 16, 1994, the Essex County Superintendent, Peter Carter, notified the Millburn Superintendent, Dr. Kohn, that Ms. Fisher could not serve as principal but could serve in a supervisory capacity until the certification process was completed.

13. On September 15, 1994, Superintendent Carter notified Superintendent Kohn that the Office of Licensing and Academic Credentials of the Department of Education determined that Ms. Fisher cannot receive a Principal's Certificate. Her application for a principal's certificate pursuant to *N.J.A.C.* 6:11-9.5 was denied because the Office of

Licensing and Academic Credentials found that she lacked the required master's degree in a recognized field of leadership or management and the required graduate level study in finance and law.

14. By letter dated September 22, 1994, Ms. Fisher contacted the Office of Licensing and Academic Credentials to request the procedures for the Board of State Examiners to conduct a review based on the substitution of alternative educational background and/or experience.

15. By letter dated September 27, Dr. Kohn requested Superintendent Carter to appoint Ms. Fisher as Acting Principal of Glenwood.

16. On September 30, Superintendent Carter approved Ms. Fisher as Acting Principal of Glenwood School for the period from October 1 to December 31, 1994. Ms. Fisher served as Acting Principal for this period of time.

17. By letter dated October 5, 1994, the Office of Licensing and Academic Credentials forwarded to Ms. Fisher the "Procedures for Credentials Reviews by the State Board of Examiners" for substitution of alternative experience to complete requirements for certification.

18. "Procedures for Credentials Review By the State Board of Examiners," discuss the Board's process for credentials review of substitution of alternative education and/or experience pursuant to *N.J.A.C.* 6:11-3.24. The Procedures provide, in pertinent part, that:

> Any applicant lacking required preparation may provide the State Board of Examiners with evidence of alternative education and/or experience except that such education and/or experience may not be substituted for a passing score on the State Certification test nor may the State Board of Examiners in any circumstances waive the test requirement.

* * *

> If you are presenting job experience as an alternative to required college study or other certification requirements. . . .

19. On December 6, 1994, Dr. Kohn requested Superintendent Carter approve Ms. Fisher as Acting Principal until the Board acts on her application for substitution of credentials.

20. On December 19, 1994, Superintendent Carter notified Dr. Kohn that the request to approve Ms. Fisher as acting principal of the Glenwood School after December 31, 1994 was denied. Ms. Fisher was so approved for a three month period in 1994 (October through December).

21. On January 3, 1995, Ms. Fisher submitted an application to the State Board of Examiners for substitution of alternative education and/or experience pursuant to *N.J.A.C.* 6:11-3.24.

22. On February 23, 1995 the State Board Examiners considered Ms. Fisher's application. Ms. Fisher was present at the meeting. Dr. Gerald W. Kohn, Superintendent of the Millburn Township Public Schools, Ms. Brenda Liss, Millburn Township School Board Attorney, and Dr. Willa Spicer (Ms. Fisher's sister), Assistant Superintendent of the South Brunswick School System were also present. Ms. Fisher and Dr. Kohn made oral presentations in support of Ms. Fisher's application.

23. On March 30, 1995, the Board denied Ms. Fisher's application by a vote of six to two with five members abstaining. The State Board of Examiners set forth its reasons for the denial in a decision dated April 3, 1995, attached hereto as Joint Exhibit 1. In its decision, the Board found that Ms. Fisher's specific experiences and education did present evidence of alternative experience with respect to the requirement of graduate level study in finance and law. Ms. Fisher did not have a master's or higher degree in one of the recognized fields of leadership or management as set forth in *N.J.A.C.* 6:11-9.5.

24. On June 28, 1995, Ms. Fisher submitted the instant Petition to the Commissioner of Education.

The parties also stipulate the following exhibits which are entered as joint exhibits.

J-1 State Board of Examiners Decision dated April 3, 1995.

J-2 Ms. Fisher's application to the Board for substitution of alternative education and/or experience pursuant to *N.J.A.C.* 6:11-3.24. The application consisted of the following: Notarized Statement of Marylee Fisher, Certification Credentials Review Summary, Alternative Education/Experience sheet, Academic Background sheet, Summary of Evidence Submitted (Index), and Exhibits 1 through 28.

THE ARGUMENTS

State Board of Examiners

The petitioner was denied a principal's certificate because she lacked the master's degree or its equivalent from an accredited institution in one of the recognized fields of leadership or management required by *N.J.A.C.* 6:11-9.5. The Board relied on the Commissioner's decision in *David C. Williams v. State of New Jersey, Department of Education, State Board of Examiners*, 95 *N.J.A.R.* 2d (EDU) 58. In Williams, the Commissioner agreed with the ALJ that:

> Work experience coupled with attendance and successful completion of courses at an accredited institution which do not lead to a master's degree or its equivalent from an accredited institution in one of the specified fields is not sufficient to comply with this requirement.

Accordingly, Williams lacked a master's degree in one of the recognized fields of leadership and the ALJ concluded that the Board had not acted arbitrarily or capriciously when it denied a principal certificate. The Commissioner adopted the ALJ's conclusions.

Fisher alleges that the *Williams* decision was wrong. This tribunal does not sit as an appeals court; it conducts a hearing for the agency. Williams was not appealed and this tribunal has no authority to overturn it. It is the law in effect and it was the law in effect at the time the Board made its decision in Fisher's case. It governs this matter.

The petitioner has failed to prove that she possess the required Master's degree or an equivalent degree. Thus, she is not entitled to a principal certificate. Because she cannot show that the decision was arbitrary or an abuse of the agency's discretion, the Board's decision must stand.

Williams held that work experience, even when combined with nondegree courses, may not be substituted for the required Master's degree in leadership or management. In accord with *Kavanaugh v. Quigley*, 63 *N.J. Super.* 153 (App. Div. 1966), the Board took account of the applicable law. Because the petitioner lacks the required degree, the Board did not and could not abuse its discretion nor be arbitrary when it denied the certificate.

N.J.A.C. 6:11-9.5(a)1 states that a candidate for certification must hold a Master's degree or its equivalent in certain fields. The Honorable Joseph F. Martone, ALJ, correctly found in *Williams* that "it's equivalent" meant an equivalent degree. Specifically, the regulation states that the candidate "hold a Master's degree or its equivalent from an accredited institution . . ." *Ibid.* If the phrase "or its equivalent" did not refer to any equivalent degree, the modifying clause "from an accredited institution" would be a nullity.

The Board's refusal to equate the petitioner's work experience to a Master's degree in management or leadership is within the purview and expertise of the Board. It can review to determine if applicants under the rule have the equivalent of a particular course required for a certificate or if they have the equivalent of specific course work in related areas. The Board cannot determine what is the equivalent of a degree. The regulations governing teacher certification in all cases leave the determination of what is a degree to the only entity that has the expertise to establish what is necessary for a degree, that is, the accredited institution that grants the degree. For example, *N.J.A.C.* 6:11-11.5(b)1 requires that all candidates for the substance

awareness coordinator endorsement possess a Bachelor's degree from an accredited institution in Health, Human Services, Psychology, Social Work or in a field leading to teacher certification. Should an applicant appear before the Board pursuant to *N.J.A.C.* 6:11-3.24 and claim that work experience, even if coupled with nondegree courses, is the equivalent of the Bachelor's degree in Health that is acceptable for receipt of the endorsement, it is beyond the Board's ability to decide if the work experience and education presented are the equivalent of a Bachelor's degree in the field from an accredited program. Only an accredited institution, which itself must be approved by accrediting agencies, can verify that the applicant has complied with the requirements for obtaining a degree in that area. To ask the Board to decide what is or is not the equivalent of a degree program is to ask the Board to make a determination outside its area of expertise.

Importantly, the witness for the Board in *Williams* testified that the Board has consistently interpreted the regulation to require a Master's degree or an equivalent degree. An agency's interpretation and application of its own regulations are entitled to due deference. *See, Metro Media, Inc. v. Director of Div. of Taxation*, 97 *N.J.* 313.(1984).

Although the petitioner has demonstrable experience, she does not meet the New Jersey degree requirement for certification. In *Babicz v. State Board of Examiners*, 1978 *S.L.D.* 937, aff'd 1979 *S.L.D.* 816, the applicant for a professional librarian certificate requested the Board to consider experience as the equivalent of the required Bachelor's degree she lacked. The Board rejected her application and the matter was appealed to the Commissioner. The Commissioner determined the petitioner had failed to show that the Board's action refusing to issue the certificate was an invalid exercise of its discretion. The Commissioner addressed the need for a degree:

> The experienced gained by petitioner in excess of twenty years of service is recognized by the prevailing salary scale and longevity payments. However, on-the-job experience cannot be presumed to supplant in such large measure the discipline of formal academic studies which broaden the perspectives and abilities of those who successfully complete approved degree programs. The commissioner so holds.

See, also, *Joan Nolan v. New Jersey State Board of Examiners*, 1987 *S.L.D.* 79. Nolan, who attempted to show equivalency with her experience, was denied certification because she lacked the required Bachelor's degree. The Board's decision in this case does not deviate from its longstanding emphasis on the importance of formal training. Such training would offer a comprehensive, sequential program of courses, as opposed to the petitioner's piecemeal collection of course and work experience.

Williams was correctly decided and sets out the law of this matter. The Board's decision denying the petitioner an endorsement because she lacked the required Master's degree was neither arbitrary nor capricious, nor an abuse of its discretion. The decision was based on settled practice. Work experience is not a substitute for a degree.

The Petitioner

The Board improperly applied *Williams* to prohibit consideration of any amount of education or work experience as a substitute for the formal preparation requirements, irrespective of how qualified the education and experience make the applicant for a principal position. The Board failed to distinguish between its role in reviewing an application in which it is claimed that the formal requirements for a principal's certificate have been met, and the petitioner's application under *N.J.A.C.* 6:11-3.24, which called for the Board to consider whether her education and experience were a sufficient substitute for the specified preparation for a principal's certificate. The effect of the Board's failure was an interpretation of *N.J.A.C.* 6:11-3.2 which violated general rules of construction, frustrated the public policy sought and ignored prior precedent. The Board's decision must be vacated.

The education, experience and passing test score required of an applicant to receive the standard certificate for the principal position in New Jersey are set forth at *N.J.A.C.* 6:11-9.5. However, applicants who lack the required preparation may still gain a certificate by substituting alternative education and/or experience for the formal requirements under the procedure set forth at *N.J.A.C.* 6:11-3.24.

The petitioner was denied a principal certificate under 6:11-9.5 because she did not meet one of the preparation requirements; that is, a Master's degree or its equivalent from an accredited institution in one of the recognized fields of leadership or management. The petitioner did not appeal the denial. Instead, she filed an application under *N.J.A.C.* 6:11-3.24.

As permitted by the regulation and Board procedures, the petitioner submitted evidence of experience and alternative education demonstrating that she was qualified to be a principal despite the fact that she did not have a Masters degree in the required area. Her twenty four years in education included eight successful years as a principal and one as an assistant superintendent. The petitioner further showed that, as for the one educational requirement she did not have, her Master's degree in education together with other graduate-level courses in administration, was comparable to a Master's degree in educational administration. The Board, however, reviewed her application only "to determine whether she holds an equivalent degree from an accredited institution" (J-1). The Board stated it could not consider work experience and courses that did not fulfill the requirements for the requisite Master's degree as equivalent to or substitute for the actual degree and thus denied the application (J-1). In so doing, the Board relied on *Williams*.

What the administrative law judge and the commissioner considered in Williams was the proper interpretation of *N.J.A.C.* 6:11-9.5. Williams contended his course of study constituted an equivalent to a Master's degree in one of the required fields. The ALJ found that under the specific language in *N.J.A.C.* 6:11-9.5, the word "equivalent" meant "equivalent degree." Neither the decision of the ALJ nor that of the commissioner indicated any consideration of the scope of substitution under *N.J.A.C.* 6:11-3.24. The petitioner does not claim to be entitled to a certificate or endorsement under *N.J.A.C.* 6:11-9.5.

The decision in Williams was narrowly stated. The Commissioner agreed with the findings and conclusion of the ALJ that the decision reached by the Board denying issuance of a certificate to Williams because his credentials did not satisfy the criteria of *N.J.A.C.* 6:11-9.5(a)1 was sustainable. 95 *N.J.A.R.* 2d at 61. The Commissioner did not establish a principle of law that the requisite Master's degree in educational administration can never be supplanted by experience and alternative education. The Board's decision in Williams suggests to the contrary. This is

consistent with precedent in which the Board, on a case-by-case basis, accepts work experience as a substitute for formal education if it is found that the applicant is qualified.

Administrative regulations are subject to the same rules of construction as statutes. *State Dept. of Health v. Tegnazian,* 205 *N.J. Super.* 160 (App. Div. 1985). In the construction of statutes, every effort must be made to harmonize provisions relating to the same subject matter. The provisions must be similarly construed when helpful to resolving doubts or uncertainties. *State v. Green*, 62 *N.J.* 547 (1973).

If the Board construes *N.J.A.C.* 6:11-3.24(a) to have exactly the same interpretation as *N.J.A.C.* 6:11-9.5(a), *i.e.*, that work experiences and courses that did not fulfill the requirements for the requisite Master's degree could not be considered as substitutes for the degree in the specified area, *N.J.A.C.* 6:11-3.24(a) is superfluous. The substitution provision has no independent meaning if there can be no substitute for the required preparation.

To avoid this result, the regulations should be read to give meaning to *N.J.A.C.* 6:11-3.24. The Board has interpreted the required preparation regulation, *N.J.A.C.* 6:11-9.5(a), to mean that the requirement of a Master's degree or its equivalent cannot be met through work experience and courses that did not fulfill the requirements for the requisite degree. The regulation allowing for substitution, *N.J.A.C.* 6:11-3.24(a), provides that any applicant lacking the required preparation may provide the Board with evidence of alternative education and/or experience. By the plain language of the regulation, the Board is required to consider whether work experience and courses that did not fulfill the requirements for their requisite Master's degree can make the applicant qualified to be a principal in New Jersey despite lacking required preparation.

This is consonant with the intent of the regulation. The overall policy and purpose of a statute provides additional assistance in its correct interpretation. The construction that best effectuates the statute's ultimate objectives is to be preferred. *Cedar Cove, Inc. v. Stanzione*, 122 *N.J.* 202 (1991). The clear purpose of the substitution regulation is to give the Board discretion to provide certificates to persons who are qualified for positions despite the fact that they do not have all of the required preparation. Under the Board's interpretation, no amount of education or

experience as a principal could make a person eligible to be a principal in the State unless that person has a Master's degree in educational administration.

The petitioner suggests that a person who through years of experience as a principal became an acknowledged expert in the field of school administration and who wrote a textbook from which educational administration Master's degree candidates were taught, could not qualify for a certificate under the Board's interpretation without the requisite degree, clearly an absurd result.

A construction of *N.J.A.C.* 6:11-3.24(a) that permits alternative education and experience to be substituted for required education also is consistent with the general rule of construction that provides that where express mention of one thing is made, the exclusion of others is implied. [*Expressio unius est exclusio alterius.*] *Housing Authority v. Williams,* 263 *N.J. Super.* 561 (Law. Div. 1993).

N.J.A.C. 6:11-3.24(a) states that any applicant lacking required preparation may provide evidence of alternative education and or experience. There is a clear exception that such education and/or experience may not be substituted for a passing score on the state certification test. It is clear that alternative education and/or experience can be substituted for any other requirement in *N.J.A.C.* 6:11-9.5. The Board, therefore, wrongfully failed to consider whether the petitioner's proof of alternative education and experience qualified her for a principal's endorsement.

The petitioner also argues that the Board's written decision makes it clear that it never considered whether or experience and alternative education qualified her to be a principal. The effect of this mistake was to deny her the availability of the procedure spelled out by *N.J.A.C.* 6:11-3.24.

The petitioner should be granted a certificate as a principal based upon the evidence of alternative education and experience submitted to the Board. The issue was simply whether the petitioner is qualified to be a principal in New Jersey despite the fact that she does not have a

Master's degree in educational administration. Once freed by the restrictions the Board imposed because of its misinterpretation, the conclusion is that the petitioner is qualified.

The petitioner had nine years of public school experience in New Jersey. She was certified as a teacher and a supervisor. This alone is probably sufficient to prove that she was prepared to be a principal. However, the petitioner submitted proof that she had a total of twenty four years' experience in education. And this experience included eight years as a principal in California and her experience as an acting principal in New Jersey for which she won high praise from everyone with whom she was associated. The only formal requirement the petitioner did not fulfill was the Master's degree in the field of educational administration. As proof of alternative education, as permitted by *N.J.A.C.* 6:11-3.24(a) the petitioner prepared a comparison of the Montclair State University Master of Arts Degree in Administration and Supervisor to the graduate level credits she achieved in her Master's degree in education from Columbia University and her additional graduate level work at Stanford and Rutgers Universities. Further, the petitioner included actual work experience in the areas of study that were part of the Montclair State curriculum. The petitioner has demonstrated that she is not lacking any formal education required to be a good principal as is corroborated by her successful career as a principal.

Finally, the parties contest what the standard of review should be, whether the requirement of a Master's degree in administration or leadership is correct and supportable, and whether Fisher is qualified notwithstanding that her Master's degree is not in administration or leadership.

DETERMINATION

The parties do not dispute Fisher's experience. They differ on three main points. First, is whether the arbitrary and capricious standard should apply. Second, whether the absolute requirement of a Master's degree in management or leadership is correct and supported by authority. Last, although there is no dispute as to Fisher's experience, is whether she is qualified because of that experience.

Standard of Review

A valid agency rule has the force and effect of law. *State By VanRiper v. Atlantic City Elec. Co.*, 23 *N.J.* 259 (1957). To be valid, a rule must be constitutional, reasonable, authorized by the Legislature and promulgated in accordance with the Administrative Procedures Act (APA). A rule may be declared invalid if it is arbitrary, capricious, unauthorized or procedurally defective, even if there is constitutional compliance. If the promulgating agency follows APA requirements, a challenger may invalidate procedurally perfect and presumably constitutional rules if they are arbitrary, capricious or legislatively unauthorized. *Consolidated Coal Co. v. Kandle,* 105 *N.J. Super.* 104 (App. Div. 1969), aff'd 54 *N.J.* 11 (1969). A reviewing body may not substitute its judgment as to the wisdom of an agency's rule. *New Jersey Guild of Hearing Aide Dispensers v. Long*, 75 *N.J.* 544 (1978). Arbitrary and capricious action is difficult to establish. Tribunals will allow the agency the benefit of any doubt and sustain rules that have a rational basis. *Office of Inmate Advocacy v. Department of Corrections,* 222 *N.J. Super.* 357 (App. Div. 1988). To invalidate a rule, the challenger must show that the agency's action was whimsical, irrational or illogical. In attacking a rule, there are a number of presumptions that must be overcome. An opponent claiming arbitrariness must overcome a presumption of reasonableness that attaches to rules. An agency rule is presumed reasonable when the rule is apparently within the agency's delegated authority. *Bergen Pines County Hospital v. New Jersey Department of Human Services,* 96 *N.J.* 456 (1984). Unless the rule is *ultra vires* on its face, the challenger must overcome what has been characterized as a strong presumption of validity. *Cooper River Convalescent Center, Inc. v. Dougherty,* 133 *N.J. Super.* 226 (App. Div. 1975).

The courts disfavor an *ultra vires* finding. When a rulemaking record is attacked, if any state of facts would sustain the rule, the existence of that state of facts is presumed. *Consolidated Coal, supra.* If the challenger bases an attack on alleged procedural irregularities, the challenger must overcome the presumptions that attach to a rule filed with the OAL. When challenging a rule's language, the challenger must overcome the presumption that the text of the rule published by the OAL is the text of the rule adopted.

Obviously, to prevail in a rule challenge, the proof submitted must rebut these presumptions. The effect is to place the burden of presented evidence on the challenging party. The agency need not present any evidence that its rule is reasonable for that it has substantially

complied with APA requirements. *In re Medicaid Long Term Care Services Bulletin,* 84-2, 212 *N.J. Super.* 48 (App. Div. 1986), certif. den. 107 *N.J.* 31 (1986).

Where the Commissioner has the power of review, the Commissioner will not interfere with agencies or with local Boards of Education in the management of their missions unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. It has been stated often that it is not the Commissioner's function in a judicial decision to substitute his judgment for that of the agency or local Board of Education when they speak on matters which are by statute delegated to them. Se, *e.g.*, *Kenney v. Board of Education of Montclair*, 1938 *S.L.D.* 647 (1935), aff'd State Board of Education 1938 *S.L.D.* 649, 653 (1935); *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7 aff'd State Board of Education 1939-49 *S.L.D.* 15, aff'd 135 *N.J.L.* 329 (Sup. Ct. 1947), 136 *N.J.L.* 521 (E & A 1948).

In consideration of the clear instruction in the above-cited cases and the applicable standard in administrative law generally, I **FIND** that the arbitrary and capricious standard does apply to the resolution of this matter.

Absolute Requirement of MA in Specific Fields

This part of the analysis requires a rational relationship between the rule and the stated goal. Briefly stated, the Board must have a worthy goal, its rule must further accomplishment of the goal and its rule must sweep no more broadly than is necessary to accomplish the goal.

Here, the worthy goal is to provide local school districts with a pool of talent from which to draw candidates for positions that require the principal certification. It is also a goal to reach beyond those who have had a purely traditional preparation, to those who still might possess good management and leadership skills but lack some of the traditional preparation. It is the State Board of Examiners' responsibility to determine just how far from the traditional standards it will go to qualify this pool of talented persons. Of course, this rule must be applied evenhandedly.

The petitioner offers *In the Matter of the Application of Naomi Hill*, State Board of Examiners decision, April 7, 1992 for the proposition that the State Board has addressed her circumstances in at least one other case. In *Hill*, the Board stated that the applicant satisfied the requirements toward certification except for graduate level coursework in finance and law. It then considered her experience to determine whether it demonstrated alternative experience equivalent to the coursework in finance and law. Hill had been a principal for eleven years in New York City, an assistant principal for four years before that and for five years an early childhood supervisor.

The decision states, "After a careful review of the documents submitted by the applicant the State Board of Examiners finds that the applicant has provided evidence of alternative experience with respect to finance and law to satisfy the certification requirement for Principal." The Board then decided that Hill's application for a Certificate of Eligibility to serve as principal should be granted.

These circumstances are not precisely the same as Fisher's. Hill's apparent deficiency was in coursework in finance and law. In Fisher's case, the Board does not point to such a deficiency. In fact, school law and finance are not at issue in this case at all.

The State Board denied Fisher's application because she did not have a Master's degree or the equivalent in one of the recognized fields of leadership or management. The denial was not based entirely on the failure to hold a Master's degree in management or leadership. It was based on that failure *and* the absence of the equivalent coursework in those areas. Thus, *Hill* is distinguishable from the present case.

In consideration of the foregoing, I **FIND**, in addition to the findings above, that this is an as applied challenge, not a facial challenge. I also **FIND** that the Board's action was not *ultra vires* on its face and was within the authority granted by the Legislature to the Board. The challenging party has presented evidence of other experience that she wishes the Board to accept in lieu of the degree in management or leadership or the substantial equivalent. The Board has reviewed her experience and has decided that it is insufficient basis for the Board to grant a Certificate of Eligibility to serve as Principal.

I **CONCLUDE** that Marylee Fisher does not have a Master's degree in management or leadership nor does she hold the substantial equivalent in coursework in those areas. Accordingly, the decision of the State Board of Examiners may not be disturbed. The motion to dismiss the petition of appeal is **GRANTED**. It is so **ORDERED**.

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

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

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

22 FEBRUARY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

2/23/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 23 1996
DATE

Barbara A Kennedy
OFFICE OF ADMINISTRATIVE LAW

/cat

EXHIBITS

Joint Exhibits:

J-1 State Board of Examiners decision, April 3, 1995

J-2 Fisher application

Cover letter
Notarized statement
Certification Credentials Review Summary
Alternative Education/Experience sheet
Academic Background sheet
Evidence list

1. Narrative statement
2. Letter, Hoskins-Graham, November 14, 1994, 2 pp.
3. Resumé
4. Letter, Kohn-Graham, with enclosures
5. Letter, Carter to Kohn, October 10, 1994 and letter Kohn to Carter, October 25, 1994, 2 pp.
6. Letter Puckett to To Whom it May Concern, October 13, 1994, 2 pp and enclosures
7. Letter, Vereen to To Whom it May Concern, October 18, 1994, with enclosures
8. Letter, Erkman to To Whom it May Concern, October 18, 1994, with enclosure
9. Letter, Quick to To Whom it May Concern, October 21, 1994, with enclosure
10. Letter, Brown to To Whom it May Concern, December 5, 1994, with enclosure
11. Letter, Leahy to To Whom it May Concern, August 11, 1981
12. Transcript, Teachers College, Columbia University, with attachments
13. Continuing enrollment certification and course description, San Jose State University
14. California Administrative Service Credentials, August 1981-April 1989
15. Letter, Puckett to To Whom it May Concern, October 24, 1994
16. Letter, Kessler to To Whom it May Concerns, April 2, 1991, 2 pp.
17. Letter, Brennan to To Whom it May Concern, with budget request enclosures
18. 1991-92 evaluation of Fisher, August 10, 1992, 3 pp.
19. Building administrator evaluation, August 1, 1988-June 30, 1989, 10 pp.
20. District office management evaluation, February 2, 1983, 4 pp.
21. District office management evaluation, May 28, 1982, 4 pp.
22. Letter, Kattner to To Whom it May Concern, November 13, 1994, with portions of Reed Union School District 1994-1995 budget, 58 pp.

23. First grade pupil portfolio (copy) narrative statement by Fisher, sample report card, 72 pp.
24. Glenwood Bulletin (copies), 4 issues, 8 pp.
25. Reed School Bulletin (copies), 2 issues, 4 pp.
26. Sample memorandums and education team minutes, 7 pp.

J-3 Credentials Review Procedure, State Board of Examiners, undated, 2 pp.

OAL DKT. NO. EDU 8035-95

MARYLEE FISHER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both petitioner's exceptions and the State Board of Examiners' (hereafter, "Board") reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.[1]

Initially, petitioner finds objectionable the presumption that "[n]o matter how qualified an applicant may be by virtue of work experience as a principal, a master's degree in education, and graduate level studies in administration, the Commissioner of Education *** has dictated a policy whereby an applicant may not receive a principal's certificate in this State if the applicant does not have a master's degree in one of the subject areas specified in N.J.A.C. 6:11-9.5(a)(1)." (Petitioner's Exceptions at p. 1) Rather, petitioner proposes that N.J.A.C. 6:11-3.24 establishes that a candidate

[1] Each of the issues contained in both petitioner's exceptions and the Board's reply was fully developed in briefs submitted to the ALJ. Accordingly, these arguments are treated summarily herein.

for a principal's certificate by virtue of her work experience and alternative education need not be turned away because she does not have the formal preparation specified in the regulations.

Petitioner next contends that it was not the intent of the Commissioner in Williams to establish "an absolute standard" that work experience and alternative education may never suffice as a substitute for the type of master's degree specified in the pertinent regulations. Thus, petitioner reasons that the Board improperly applied Williams to conclude that it had no discretion in this matter. (Petitioner's Exceptions at p. 4) To the extent the Board believed it was so constrained, petitioner continues, it relied upon a faulty premise and improperly failed to consider her qualifications. (Id. at p. 14)

Petitioner further challenges that the Board failed to distinguish between its role in reviewing an appeal of a denial of a principal's certificate based on failure to meet the requirements of N.J.A.C. 6:11-9.5(a)(1) and its role in reviewing an application submitted pursuant to N.J.A.C. 6:11-3.24 to determine whether a candidate's alternative education and work experience may be substituted for the specified preparation for a principal's certificate. (Petitioner's Exceptions at p. 8) Thus, petitioner contends that "the Commissioner should clarify the correct scope of the Board's review under N.J.A.C. 6:11-3.24(a) because the Board's interpretation of its scope of review rendered the rule superfluous, contrary to well-established rules of construction." (Id. at p. 10)

Petitioner maintains that she must be granted a principal's certificate based upon her evidence of alternative education and experience, as submitted before the Board. (Id. at p. 15) She reasons that N.J.A.C. 6:11-3.24 was promulgated for persons in her situation, and concludes, "Public school students in New Jersey are not served by a system of regulations which turn away people as qualified as [she] because they lack some formal requirement for a position." (Petitioner's Exceptions at p. 19)

Finally, petitioner reasserts her argument that where an appeal is based upon grounds that the Board's legal interpretation of a rule and a decision of the Commissioner were incorrect, as in this matter, the standard of review is de novo.

By incorporation of its arguments contained in a Brief filed in OAL, the Board counters that petitioner's claim as to the necessity for de novo review "flies in the face of settled law" which holds that the Commissioner may only review the action taken by the State Board of Examiners to determine if such action was arbitrary or capricious, and an abuse of its discretion. (Board's Reply incorporating Brief at p. 1) The Board asserts that it conducted a full review of petitioner's record of documents before rendering a determination. After evaluating her documents, "***the Board awarded petitioner credit for graduate level study in the areas of law and finance, to satisfy that requirement of N.J.A.C. 6:11-9.5." (Id. at p. 2)

The Board further argues that, like petitioner, David Williams brought an application to the State Board of Examiners for review of his credentials pursuant to N.J.A.C. 6:11-3.24, after having been denied a principal's certificate subsequent to N.J.A.C. 6:11-9.5(a)1. "Plainly, Williams did not argue that he had an equivalent degree, but rather that he had the equivalent *of a* degree." (emphasis added) (Id. at p. 3), The Board notes,

> ***The ALJ found that, when seeking in accord with N.J.A.C. 6:11-3.24 to substitute a combination of work experience and education for the requirements of N.J.A.C. 6:11-9.5(a)1, "attendance at and successful completion of courses together with his work experience, is insufficient to meet the specific requirement of the regulation." (Id. at pp. 3-4, citing Williams, supra, slip. op. at 6)

Similarly, petitioner sought, under N.J.A.C. 6:11-3.24, to prove that her course work and experience would be a sufficient substitute for the requirement of N.J.A.C. 6:11-9.5. In that her case was indistinguishable from the petitioner's case in Williams, the Board affirms that it properly held that the Williams decision controls this matter. (Id.) The Board further explains that, since it was

foreclosed by Williams from allowing petitioner to substitute her education and work experience for the required master's degree,

> ***it did not analyze her application to see if it was equal to the cohesive sequential program that the formal training of a [master's] degree offers. It could, however, consider whether the documentation she submitted to the Board revealed that she possesses a *degree* that is equivalent to the required degree. *** (emphasis added) (Id. at pp. 4,5)

Moreover, the Board argues that, contrary to petitioner's assertion, its decision "***does not render nugatory the substitution process outlined in N.J.A.C. 6:11-3.24.***" (Id. at p. 7) Here, the Board clarifies "***it is beyond the expertise of the Board to determine if work experience and course work are the equivalent of a degree program. *** It can not decide what is a master's degree." (Id. at pp. 7,8)

The Board maintains that Williams was correctly decided, that its decision was neither arbitrary nor an abuse of its discretion, and that its determination should, therefore, be affirmed. To decide otherwise, the Board asserts, would obligate it "*** to evaluate every application in which the individual claimed the equivalency of a degree, notwithstanding that it is beyond the scope of its experience to determine the composition of college degrees." (Board's Reply at p. 3)

Upon careful and independent review, the Commissioner finds petitioner's exception arguments, which essentially recast those made before the ALJ, to be unpersuasive. The Commissioner initially concurs with the ALJ that the arbitrary and capricious standard applies to the resolution of this matter. (Initial Decision at p. 15) Further, there being no finding that the Board abused its discretion or acted outside the scope of its authority, the Commissioner agrees with the ALJ that the decision of the State Board of Examiners may not be disturbed.

Accordingly, as the Commissioner may not substitute his judgment for that of the Board lawfully applied, the recommendation of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 8, 1996

DATE OF MAILING APRIL 8, 1996

141-96

141-96

SUSAN CAVALLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6589-95

AGENCY DKT. NO. 154-4/95

SUSAN CAVALLO,

Petitioner,

v.

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

Respondent.

Harold N. Springstead, Esq., attorney for petitioner (Springstead & Maurice, Esqs., attorneys)

Vito A. Gagliardi, Jr., Esq., attorney for respondent (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: February 22, 1996 Decided: February 22, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

Petitioner appealed respondent's termination of her insurance, health and other benefits of employment.

The Department of Education transferred this matter to the Office of Administrative Law (the OAL) on June 23, 1995. The OAL scheduled a hearing for February 2 and 6, 1996.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On February 22, 1996, they submitted the attached Stipulation of Settlement, dated February 15, 1996, which sets forth the terms of the settlement.

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

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

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

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

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

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

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

Feb 27, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

2/27/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 28 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FEB 22 11 18 AM '96

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07601
(201) 487-1414
Attorney for Petitioner

SUSAN CAVALLO,

Petitioner,

vs.

ELIZABETH BOARD OF EDUCATION, UNION COUNTY,

Respondent.

BEFORE THE
COMMISSIONER OF EDUCATION

OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDUOR 06589-95N
AGENCY REF. NO. 154-4/95

STIPULATION OF SETTLEMENT

The parties hereto, desiring amicable resolution of the above-captioned litigation, do hereby stipulate and agree as follows:

1. The petitioner, Susan Cavallo (hereinafter "Ms. Cavallo") was employed by the Elizabeth Board of Education (hereinafter "Board") as a non-tenured teacher of Home Economics.

2. On February 17, 1994, Ms. Cavallo sustained a work-connected injury at the Holmes Middle School.

3. Ms. Cavallo returned to work as of March 14, 1994 and left in May, 1994.

She was operated on at Englewood Hospital on May 26, 1994 for the repair of a herniated disc and remained continuously out of work in excess of one year.

Based on the foregoing, the parties agree as follows:

1. Pursuant to N.J.S.A. 18A:30-2.1, Ms. Cavallo shall receive full salary for one calendar year from the date of her injury on February 17, 1994.

2. The Board shall pay the salary of $40,245.54 less salary payments and temporary disability payments made to Ms. Cavallo during the calendar year following February 17, 1994. That net amount equals $23,181.56.

3. The Board shall make all appropriate salary deductions and make appropriate payments to the Teachers Pension & Annuity Fund through February 17, 1995.

4. In return for compliance with this Agreement, Ms. Cavallo agrees to withdraw and dismiss the above-captioned litigation against the Board with prejudice.

5. This Agreement shall not constitute a contractual past practice or precedent for contractual purposes as to any person not a party hereto.

6. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party. The February 14, 1996 Resolution of the Board approving this settlement and authorizing counsel to execute same is attached hereto.

7. By entering into this Agreement, each party releases and discharges the other with respect to all claims or rights arising out of the employment by the Board of Ms. Cavallo. This release does not apply to the right to enforce the terms of this Agreement.

8. This Agreement is subject to the approval by the Office of Administrative Law and the Commissioner of Education and will not take effect unless and until such approvals are received.

SPRINGSTEAD & MAURICE, ESQS.
Attorneys for Petitioner

By _____
HAROLD N. SPRINGSTEAD

RAVIN, SARASOHN, COOK,
BAUMGARTEN FISCH & ROSEN
Attorneys for Respondent

By _____
VITO A. GAGLIARDI, JR.

Dated: February 15, 1996

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
FEB 22 11 18 AM '96

BOARD OF EDUCATION

RESOLUTION

SETTLEMENT AGREEMENT

WHEREAS, a former employee alleged she was not afforded the full range of rights available under N.J.S.A. 18A:30-2.1 in an action before the Commissioner of Education encaptioned Cavallo v. Elizabeth Board of Education, OAL Docket No. EDU-06589-95N, Agency Ref. No. 154-4/95; and

WHEREAS, this action was filed on April 26, 1995 and scheduled for a hearing commencing on February 2, 1996; and

WHEREAS, on that date, under the auspices of Administrative Law Judge Marie Simonelli, the parties, through their counsel, arrived at the proposed Stipulation of Settlement attached hereto, subject to the approval of the Board and subsequent ratification by ALJ Simonelli and the Commissioner of Education.

NOW, THEREFORE, BE IT RESOLVED that the Board accepts and approves the Stipulation of Settlement and the terms contained therein; and

BE IT FURTHER RESOLVED, that counsel is authorized to execute same on behalf of the Board.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING OF
FEBRUARY 14, 1996

Linda G. King
Secretary-School Business Administrator

Elizabeth, New Jersey
February 14, 1996

OAL DKT. NO. EDU 6589-95

SUSAN CAVALLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

APRIL 12, 1996

DATE OF MAILING APRIL 12, 1996

143-96

143-96

ANGELO RANCATTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10601-94

Agency DKT. NO. 382-9/94

ANGELO RANCATTI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,

Respondent.

Randi Doner April, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Melvin C. Randall, Esq., for respondent
(Love & Randall, attorneys)

Record Closed: February 14, 1996 Decided: February 28, 1996

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

Petitioner filed a petition with the Department of Education (DOE) on September 24, 1994, contesting the classification of certain days on which he was absent from employment by respondent. Respondent filed an answer on October 18, 1994. The

DOE transmitted the matter to the Office of Administrative Law on October 31, 1994 for determination as a contested case pursuant to *N.J.S.A.* 52: 14F-1 to 13.

Conferences were conducted throughout the proceedings, and the parties ultimately reached a resolution of the matter. An executed Settlement Agreement and General Release was filed on February 14, 1996, on which date the record was closed. Attached herewith is a copy of the Settlement Agreement and Release.

I have reviewed the record and the terms of settlement and I **FIND** that the parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and that the settlement disposes of all issues in controversy and is consistent with the law.

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

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

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

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

February 29 1996
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3/1/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 1 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

SETTLEMENT AGREEMENT AND GENERAL RELEASE

1. WHEREAS, ANGELO RANCATTI (hereinafter referred to as "Petitioner") having made claim for the restoration of sick time arising from his employment with the East Orange Board of Education (hereinafter referred to as "Respondent"); and

2. WHEREAS, Petitioner has filed a Petition of Appeal with the Commissioner of Education entitled Angelo Rancatti vs. East Orange Board of Education, Docket No. EDU 10601-94; and

3. WHEREAS, the parties wish to fully settle and resolve all disputes between them; and

4. WHEREAS, the parties have consulted with attorneys prior to signing this Settlement Agreement and General Release; and

5. THEREFORE, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which is expressly acknowledged by both of the parties hereto, Petitioner and Respondent agree as follows:

(1) The Respondent will restore 5 days of Petitioners accumulated sick days.

(2) Petitioner in exchange for the above consideration does hereby unconditionally release and forever discharge the Respondent, its successors, assigns, officers and agents from any and all claims related to this matter.

6. This Settlement Agreement set forths the entire understanding between the parties pertaining to the subject matter hereof.

THE UNDERSIGNED HAVE READ THE FOREGOING SETTLEMENT AGREEMENT FULLY UNDERSTAND IT AND VOLUNTARILY AGREE TO IT.

Date:

By: _____
Angelo Rancatti
2/7/96

WITNESSED BY:

_____

By: _____
Dr. Kenneth King
East Orange Board of Education

WITNESSED BY:

_____

OAL DKT. NO. EDU 10601-94

ANGELO RANCATTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

APRIL 12, 1996

DATE OF MAILING APRIL 12, 1996

144-96

144-96

IN THE MATTER OF THE TENURE	:	
HEARING OF EVELYN Y. MOORE,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
	:	

SYNOPSIS

District certified charges of unbecoming conduct and other just cause (excessive absenteeism) against respondent physical education teacher.

ALJ concluded that the District proved the charge of excessive absenteeism as a just cause for action against respondent in accordance with N.J.S.A. 18A:6-10 to -29. Respondent had received more than ample warning and counseling, but she did not respond positively, over a period of years, even in the face of increment withholdings. Thus, ALJ determined that the District had just cause for dismissing her.

Commissioner adopted findings and determination in initial decision as his own and ordered respondent dismissed from her tenured teaching position as of the date of this decision. Commissioner directed matter be forwarded to State Board of Examiners for further appropriate action.

APRIL 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10611-94

AGENCY DKT. No. 357-8/94

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, (Formerly Board of Education of the City of Newark),

Petitioner,

v.

EVELYN Y. MOORE,

Respondent.

Gregory G. Johnson, Esq., for petitioner
State Operated School District the City of Newark, (formerly Board of Education of the City of Newark),

John L. Schettino, Esq., for respondent,
(Giblin & Giblin, attorneys)

Record Closed: January 12, 1996 Decided: February 26, 1996

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves tenure charges filed by the petitioner, State Operated School District of the City of Newark, against respondent, a tenured teaching staff

member, pursuant to *N.J.S.A.* 18A:6-10 to -29. Petitioner seeks respondent's dismissal.

PROCEDURAL HISTORY

The petitioner, the then Board of Education of the City of Newark, (Board) certified and filed tenure charges against respondent, Evelyn Y. Moore, with the Commissioner of Education on August 31, 1994. The statement of charges alleges that respondent was guilty of "other just cause" (excessive absenteeism) which, if true, would warrant dismissal. One of the notification documents sent to the respondent referred to unbecoming conduct. However, the tenure charges and initial notification to Ms. Moore of the filing of such charges referred solely to excessive absenteeism, as "other just cause."

The matter was transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education on October 31, 1994, for hearing and determination as a contested case pursuant *N.J.S.A.* 52:14F-1 to 13.

A prehearing conference was held at the OAL on March 7, 1995, identifying the issues, fixing hearing dates, providing for discovery, and regulating other procedural aspects of the forthcoming hearing. The resulting prehearing order is dated March 10, 1995.

The hearing was held in the OAL on November 15, 1995. The witnesses who testified and the documentary exhibits marked into evidence are listed in the appendix attached to this decision. The parties filed post hearing briefs, and the record closed on January 12, 1996.

ISSUES

The issues, as set forth in the prehearing order, are:

A. Did the acts or omissions of the respondent, as alleged in the charges (excessive absenteeism), constitute unbecoming conduct or other just cause for dismissal pursuant to *N.J.S.A.* 18A:6-10 to -29?

B. If the charges are proved, is the penalty of dismissal justified, or should a different penalty be imposed?

The specific charges against the respondent, as set forth by the Board, are as follows:

CHARGES

(as certified and filed with the Commissioner of Education)

1. Other Just Cause (Excessive Absenteeism)

FIRST COUNT

(Excessive Absenteeism)

1. Evelyn Y. Moore is currently employed by the Board of Education of the City of Newark as a physical education teacher currently assigned to Dr. William H. Horton School, 291 North 7th Street, Newark, New Jersey 07103.

2. Ms Moore was employed as a physical education teacher as of September 1972 and in due course became tenured.

3. For the past several years of Ms. Moore's employment, she has been excessively, continuously and consistently absent from her assigned duties resulting in

a wholesale disruption of the orderly process and administration of the schools to which she has been and is assigned.

4. During the ten (10) month period from September 1990 through June 1991, Ms. Moore was absent from her assigned instructional duties forty-seven (47) days.

5. During the ten (10) month period from September 1991 through June 1992, Ms. Moore was absent from her assigned instructional duties sixty-four (64) days.

6. During the ten (10) month period from September 1992 through June 1993, Ms. Moore was absent from her assigned instructional duties seventy-eight (78) days.

7. During the nine (9) month period from September 1993 through May 1994, Ms. Moore was absent from her assigned instructional duties forty-five (45) days.

8. Thus, while assigned as a physical education teacher, during the years 9/90 to 6/30/93, Ms. Moore has been absent thirty-five percent of the total possible days:

1990-91	Total days absent:	47
1991-92	Total days absent:	64
1992-93	Total days absent:	78

Three years total possible days -580

Days absent 189

9. Ms. Moore's attendance during much of her service with the Board has been deplorable at best and each year of her recorded absences (as highlighted above) is sufficient in and of itself to subject her to dismissal.

10. During Ms. Moore's service with the Board she was reminded on numerous occasions in past years that her attendance was a problem and must be improved.

11. Also, Ms. Moore's absence has substantially diminished the Board of Education of the City of Newark's ability to deliver a thorough and efficient education to the pupils assigned to Ms Moore's classes in that:

a. Such conduct has disrupted the continuity of the educational program in her assigned classes.

b. Such conduct has effectively deprived the children committed to her charge of valuable instructional time to which they are entitled.

c. Such conduct creates and leaves a poor example for the students committed to Ms. Moore's charge.

12. Also Ms. Moore's practices have established a poor precedent for other teaching staff employees of the District.

13. Additionally, Ms. Moore has created problems with various parents in that said parents have demanded that their children be removed from Ms. Moore's classes.

14. Moreover, Ms. Moore's absences evidence a complete disregard for Board policy and procedures and applicable law.

15. Although Evelyn Moore's increment has been withheld due to her excessive absenteeism, there has been no improvement.

16. The cumulative effect of Ms. Moore absences is such in that over a two and three-fourth (2 3/4) year period, Ms. Moore has been absent one hundred and eight-nine days or thirty-five (35%) percent of the available instructional time.

17. Ms. Moore's constant and consistent absences bespeak of the need to dismiss her as a teacher in the school district for to do otherwise could be perceived as the Board's condonation of this unprofessional conduct.

TESTIMONY AND EVIDENCE

At the beginning of the hearing counsel stipulated that there was no dispute as to the number of days that the respondent was absent, as set forth in the charges. Therefore, it is undisputed that the respondent was absent for forty-seven (47) days during the 1990-91 school year; sixty-four (64) days during the 1991-92 school year; seventy-eight (78) days during the 1992-93 school years and forty-five (45) days for the nine month period from September through May in the 1993-94 school year.

William Demetroulakos (Mr. D.) has been the principal of the elementary school, Dr. William H. Horton school, since the 1992-93 school year. Ms. Moore taught gym at the Horton school. Mr. D. testified that he formulated the charges against the respondent after she had demonstrated absenteeism of more than thirty to thirty-five percent, without improvement, for the two years during which he was her supervisor.

Mr. D. also produced the attendance records, evaluations and other documents marked in evidence that were used to support the charges. Some of these documents, in conjunction with Mr. D.'s testimony, provided the following information:

The annual teacher evaluation report for the 1993-94 school year completed in June 1994, states "[a]ttendance was so poor that the physical education program suffered greatly and many students expressed their discontent at not having gym classes. This is the second year in the row where the problem existed. . . . Any growth is difficult to assess due to the constant absences of Ms. Moore." Exhibit P - 16. As for the recommendations for the next school year, Mr. D. recommended that the respondent's increment be denied and tenure charges pursued. In her response to the above, Ms. Moore stated that she had taken measures over the past few months to improve attendance and she had taken steps to see that personal conflicts would not affect her job performance in the future.

In his testimony, Mr. D. said that he seriously doubted respondent's assurances of future improvement, because she made the same comments in the prior year but there was no improvement at all. In addition, Mr. D. indicated that he had engaged in numerous conferences with the respondent about her very poor, thirty-five percent, absentee record and told her, for the second consecutive year, that her increment would be denied. In addition, he continually advised her that the physical education program was suffering and causing problems with the students and their parents, who had complained to him. Many of the students, also complained to him, and they expressed disappointment at not having the gym classes they felt entitled to.

Referring to the June 1993 annual evaluation Mr. D. pointed to the section entitled "[a]reas needing attention or improvement," where he noted: "There is a sense of urgency present on the need to improve your attendance so that our children will have an on-going Physical Education Program; constant absences deter our students from the benefits of such a program." In another portion of the document, Mr. D. wrote that "due to excessive absences, action by the Board of Education has been recommended." Exhibit P-15. The respondent did not add any comments to the evaluation, and her increment for the coming year was withheld.

A Professional Improvement Plan accompanied the June 1993 evaluation. The plan also indicated that respondent needed to improve her attendance in order to maintain an ongoing physical education program. She was asked to improve her attendance by examining the reasons for her absences. Mr. D. testified that, despite these comments, Ms. Moore did not improve during the following year. As of the end of March 1994, she recorded forty-five absences.

Another exhibit demonstrating concern regarding respondent's attendance problems in the 1992-93 school year is the memo written by the principal, Mr. D., to the Director of the Physical Education Department on February 8, 1993. Exhibit P-9. In that memo, Mr. D. commented that Ms. Moore had created a serious situation due to her attendance. She had been absent fifty-six days by that time, and at that point she had been out of school sixty-six percent of the time. The entire school year contained

187 days. Mr. D. stated that the portion of the physical education program for which the respondent was responsible had basically become nonexistent, and the complaints were mounting from the staff, students and the president of the Parent-Teacher Organization. Mr. D. also stated in the memo that he had conferred with Ms. Moore and offered to help her. Nevertheless, after these conferences, she proceeded to be absent for the entire month of January 1993. The memo also referred to 1990-91, when respondent was absent a total of forty-seven (47) days, and 1991-92, indicating sixty-four (64) days absent. Concluding the memo, Mr. D. stated that Ms. Moore had been absent for thirty-seven percent of the school days from September 1990 to February 1993.

Mr. D. also said that a review of the school years that are included in the charges, 1990-91 through 1993-94, showed a steady increase in absences, and that they totaled thirty-seven percent of school days. He further noted that a pattern of absences could be discerned, with heavy emphasis on Mondays and Fridays.

Referring again to the 1992-93 school year, Mr. D. produced another memo to the respondent, dated November 25, 1992, relating her accumulated absences for only three months into the school year. This memo also contains hand-written notes of a conference Mr. D. held with the respondent at that time, when she told him that many of her absences were due to the fact that she was helping her sick mother. Mr. D. testified that he knew she had brothers and sisters, and he asked her to work out a schedule that would permit her to be more consistent at work, or in the alternative, to take a leave of absence. In conclusion, Mr. D. informed Ms. Moore that there could be adverse consequences if she did not improve her attendance. Exhibit P -8.

In November 1993, Mr. D. sent another memo to the respondent about her absences. Respondent had been absent for eleven days by November of that year. See Exhibit P-10.

Four months later on March 10, 1994, Mr. D. sent the respondent a detailed memo about the increasing number of her absences, and advised her that the Board of

Education reserved the right to take action against her as a result of her attendance. He said that such an action might include tenure charges, disciplinary action, loss of increment or salary increase, or separation from employment. He asked her to see him immediately upon her return. In his testimony, Mr. D. noted that, at that point, Ms. Moore had been out for thirty-four days and had submitted only five doctor's notes.

In Exhibit P-12, Mr. D. noted that the respondent had been absent for forty-five (45) days up to March 25, 1994. Considering that school had been in session for approximately 120 days at that point, the absenteeism rate was thirty-eight percent. This memo indicated that a personal conference was held on April 6, 1994, when Ms. Moore returned to school. At that time, she said that she was in the process of relocating. Mr. D. reminded respondent of her responsibilities to the school and spoke about past attendance problems. The handwritten note at the bottom of the memo indicates that the respondent said that she would attempt to improve her attendance in the future.

Commenting about Ms. Moore's assurances over the years, Mr. D. said that the numerous conferences and suggestions made to her brought no positive result and that in fact, the absenteeism worsened continuously. He also said that administrators other than himself also met with her over the three or four year period involved in the charges. When asked about the conferences and counseling engaged in, Mr. D. stated that he had six to ten formal conferences with respondent during the years in question, plus many additional informal conferences. He repeated that she always said that she would attempt to improve her attendance, but she never did. According to Mr. D., he never experienced a worse case of absenteeism over the thirty years he had spent in education.

Speaking about the effect of the respondent's absenteeism on the physical education program, Mr. D. characterized it as chaotic, and he said that many children did not receive adequate gym classes for two years or more. In addition, Mr. D. said that he was compelled to retain substitutes for each day that Ms. Moore was absent. Even so, he explained that substitute gym teachers cannot use the facilities without

being certified, and it was difficult and rare to find a substitute with the necessary certification. Therefore, the substitute teacher would often only remain in the classroom, without the usual equipment. Mr. D. also testified that, after complaints received from Parent/Teacher Organization officers, parents and children, he concluded that a lack of respect had developed for the physical education program, and many students just lost interest in it.

When cross-examined, Mr. D. again pointed to the successive increment denials imposed on Ms. Moore due to her absenteeism, without any positive results. However, he acknowledged that Ms. Moore's performance was generally satisfactorily when she was present. He also admitted that during the earlier problem years there had not been any recommendation to terminate her employment, but only to withhold increments.

Mr. D. also explained that there are only two gym teachers in the school, and Ms. Moore was one. When Ms. Moore was absent the remaining teacher would generally incorporate respondent's students into his classes but the quality of the program suffered. In addition, when classes are combined, seventy students are present in a small gymnasium, which results in a reduction in quality of instruction. Another teacher needs to be present when the classes are combined.

Finally, Mr. D. testified that he believed the respondent when she told him about her need to care for her sick mother. However, his necessary concern related to the quality of the physical education program.

Lawrence A. Guarino, Assistant Director of Physical Education testified that he observed the respondent during the 1993-94 school year and discussed her poor attendance with her. Mr. Guarino indicated that he strongly suggested that she try to get to school more often. The respondent also told him about her ill mother and her need to care for her.

Thomas H. Cooke, Jr. was the other gym teacher in the Horton school. , He had taught at Horton between 1972 and 1994. Mr. Cooke knows the respondent well, having taught alongside of her for seven years, ending in 1994. Mr. Cooke testified that the two gym classes were in the gymnasium together most of the time, even when Ms. Moore was there. He said that when respondent was absent there were seventy children in the gym, the same seventy children that were there when she was teaching her separate class.

Mr. Cooke praised Ms. Moore's teaching abilities, saying that she always led the combined classes well, and that the students were not really separated for some of the exercises. Referring to the days when the respondent was absent, Mr. Cooke said that he took over whenever she was not there, and he saw no significant disruption in activities. Mr. Cooke said that all of the children received a full program on such occasions. He also stated that no supervisor ever indicated to him that there were any problems with the curriculum during Ms. Moore's absences.

On cross-examination, Mr. Cooke acknowledged that he and the respondent are good friends. He also indicated that he was not present in school, but was on a sabbatical leave, for the entire 1993-94 school year. He did not know what was happening in gym classes during that year. Referring to earlier years, Mr. Cooke said that he thought the teaching was effective without Ms. Moore, but to a lesser extent.

The respondent, Evelyn Y. Moore testified in her own behalf. She repeated the earlier acknowledgment that the number of absences during the years in question were not disputed. However, she spoke about the reasons for her poor attendance. In 1990, she suffered several personal medical problems of her own. More importantly, her mother began to need more care, because she had congestive heart failure and diabetes.

Asked about any participation of her siblings in her mother's caretaking , Ms. Moore said that her brother was a paraplegic, and therefore unable to care for his mother. In fact, Ms. Moore had to render some care to her brother also. The

respondent also indicated that she always kept the administration aware of the reasons for her absences, and no one told her it was inappropriate to combine the two gym classes into one. Ms. Moore denied that anyone suggested a leave of absence to her as an alternative.

Testifying about the four school years in question, Ms. Moore generally stated that the problems she had, with her own health and the need to care for her mother, were similar in each of those years, except that things kept getting worse. Her mother was more recently beset with kidney failure, which required dialysis. Then, after two strokes, the respondent's mother recently passed away. The respondent changed her residence afterward.

Ms. Moore acknowledged that she was clearly and repeatedly on notice that her attendance needed to be improved, during each of the years in question. She said that she attempted to do better, but knows that she did not.

FINDINGS OF FACT

Having heard the testimony and observed the witnesses, and having reviewed the exhibits and considered the arguments of counsel, I **FIND** the following **FACTS**, by a preponderance of the credible evidence:

The uncontroverted facts stated in the foregoing discussion of the testimony in evidence are incorporated herein by reference. The most critical facts are as follows: The respondent is a tenured physical education teacher in an elementary school in the Newark School System. She began teaching in Newark in 1972.

In the 1990-91 school year, the respondent was absent for forty-seven (47) days.

In the 1991-92 school year, the respondent was absent for sixty-four (64) days.

In the 1992-93 school year, the respondent was absent for seventy-eight (78) days.

In the 1993-94 school year the respondent was absent for forty-five (45) days through May 1994.

The respondent's 234 days of absence during the four school years stated above constitute between thirty and thirty-five percent of the total number of school days in those four years (calculating a school year at approximately 187 days).

The respondent was informally counseled numerous times by her supervisors about her excessive absenteeism during the years in question. Many formal conferences to address the problems were also held between school administrators and Ms. Moore.

The respondent's increments and salary adjustments were withheld consecutively because of the excessive absenteeism, for at least two of the years in question.

In many instances the respondent failed to provide justifiable medical documentation for her absences.

A substantial number of the respondent's absences were due to the fact that she spent time caring for a seriously ill mother.

The respondent was warned, during the four years in question, that her absences could result in actions against her other than increment withholding, such as tenure charges and disciplinary action.

Although the school administration was aware of the fact that Ms. Moore was spending a substantial number of the absentee days caring for her mother, she was nevertheless advised, on numerous occasions, that other arrangements would need to

be made, because the absences from school were adversely affecting the physical-education program. One of the alternatives suggested was a leave of absence. The respondent did not react positively to any of the suggestions given to her.

During the years in question, respondent recognized the problem caused by her excessive absenteeism, and she repeatedly promised to improve. Despite these assurances, her attendance did not improve. In her last two evaluations, 1993 and 1994, the problems caused by respondent's absenteeism dominated the reports. Respondent was clearly informed of the urgent need for improvement and the fact that the students were being adversely affected.

The physical education program at the school became seriously limited and lower in quality because of the respondent's absenteeism.

Aside from her excessive absenteeism during the four years in question, the respondent's evaluations showed that her work performance was satisfactory.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:28-5, dealing with the tenure of teaching staff members, provides:

> The services of all teaching staff members, including all teachers . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . .

See also, *N.J.S.A.* 18A:6-10 to -29.

In any case involving tenure charges, a board of education has the burden of proving the truth of the charge or charges by a preponderance of the competent and credible evidence. *In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, Middlesex County*, 1978 *S.L.D.* 526; *In the Matter of the*

Tenure Hearing of Madeleine Ribacka, Sussex-Wantage Regional School District, Sussex County, 1978 *S.L.D.* 929; *In the Matter of the Tenure Hearing of Fred Brown School District of the City of Bayonne*, 1970 *S.L.D.* 239.

Although there is a passing mention of unbecoming conduct in some of the documentation filed in this matter, the charges and proofs at the hearing dealt only with excessive absenteeism, as "other just cause" for dismissal. It is therefore unnecessary to consider a charge of incompetency, which is not supported by the proofs, or by the specifications set forth within the charges. In fact, but for the excessive absenteeism, the respondent's teaching service prior to the 1990-91 school year indicates generally favorable evaluations. Even during the four years in question, her evaluations, while containing some criticisms, do not reflect incompetency.

However, the allegation of excessive absenteeism is amply supported by the record, and it does constitute "just cause" for action against the respondent. The pattern of absences during the four school years discussed above is exceedingly severe, persistent and chronic. Furthermore, respondent's absenteeism continued to increase in frequency despite the withholding of increments, conferences, counseling and warnings that she could be subject to disciplinary action and tenure charges. It is obvious that the increment withholding and warnings did not prove to be effective sanctions.

It is axiomatic that a tenured teaching staff member must be available to teach on a consistent basis if he or she is to provide the services which the employer and students are entitled to expect. The respondent's consistent and pervasive pattern of absenteeism over the years, as contained in the charges, demonstrate that in her case neither the employer nor the students obtained the full benefit of the services to which they were entitled. The acknowledged record of the respondent's absenteeism was decidedly unacceptable and excessive.

It is unfortunate that some percentage of the absences were caused by medical reasons and personal problems involving her mother's care. Nevertheless, the

respondent evidently did not choose to balance her personal problems against the entitlement of her employer and students to the educational benefits she was expected to render. The respondent received many stern and clear warnings about the problems her absenteeism was creating and the adverse effect it was having on the physical education program, to no avail. While it is noted that Ms. Moore was a long term employee, and there were earlier years when absenteeism was not a problem, she was warned and counseled over a period of three to four years, but the pattern of absenteeism did not improve. How many school years must elapse, how many increments must be withheld, and how many clear warnings must be given before the statutory sanction of dismissal must be applied to a long term employee?

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. . . . .The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with the assigned teacher is vital to this process. In *The Matter of the Tenure Hearing of Catherine Reilly* 1977 *S.L.D.* 403, 414.

The Commissioner concluded, in Reilly, that since pupils are required to be in regular attendance in the public schools, there should be no lesser requirement placed upon the teachers who are there to serve those pupils.

See also, *In the Matter of the Tenure Hearing of Lena White,* 92 *N.J.A.R.2d* 157 (Dept. of Education); *In the Matter of Tenure Hearing of Sheets,* 1979 *S.L.D.* 790; *State Operated School District of the City of Jersey City v. Pellecchio,* 92 *N.J.A.R.2d* 267 (Dept. of Education).

There is no question that the facts and circumstances in this matter comport with the standards enunciated by the Commissioner of Education before a teacher can be dismissed for excessive absenteeism. In this case, it was shown that the absences were clearly excessive and unacceptable quantitatively, without improvement for a period of years. Before submitting the tenure charges the Board considered the particular circumstances of the absences. There was more than sufficient warning given to the respondent, over the long term, that her superiors were dissatisfied with the continuing absences. Perhaps most importantly, there was a clear showing that the respondent's chronic and excessive absenteeism had an extremely negative impact on the quality of the educational program. As set forth in the last two annual evaluations, the physical education program suffered greatly, to the point where the students were being deprived of a necessary aspect of their education.

The testimony of the respondent's coworker, friend and physical education associate, Mr. Cooke, was well intentioned in favor of Ms. Moore. However, his suggestion that there was no appreciable difference between having one instructor doubling up with seventy students, as opposed to two instructors who each taught half that number, cannot be accepted and leads to a dubious conclusion. If that testimony is believed, it is difficult to understand why the students, their parents, and officers of the Parent-Teacher Organization complained to the administration. It is certainly hoped that the second gym teacher, Ms. Moore, was a needed and useful teacher in the first place.

It is therefore **CONCLUDED** that the petitioner has proved the charge of excessive absenteeism as a "just cause" for action against the respondent, in accordance with the statute.

On the question of penalty, the Board should not be compelled to retain a teacher who has demonstrated such chronic, continuing, long-term and serious absenteeism. The respondent had more than ample warning and counseling, but she did not respond positively, over a period of years, even in the face of increment withholdings. While

Ms. Moore gave assurances of improvement, the situation only worsened and the educational deprivation became deeper. As for the personal problems that the respondent evidently placed on a higher plane of importance than the needs of her job, the tenure laws cannot be used to protect such a lack of attendance, beyond a reasonable amount of due process and consideration for the problems of the employee. The welfare of the students must be the first consideration.

It is unfortunate that a dismissal action must be taken after many years of teaching. However, the Board gave more than ample consideration to the length of service by the respondent. After several years of bona fide attempts, without results, to reverse the respondent's absenteeism, the Board's position became reasonable.

Therefore, in considering an appropriate penalty to be levied in this matter, I do not believe that a monetary sanction would be effective, given the fact that several increment withholdings proved to be unsuccessful in improving the respondent's attendance. There has been no showing of any likelihood that yet another monetary sanction would be any more successful than it was previously.

FINAL CONCLUSION

After having carefully considered the factual circumstances surrounding the respondent's absenteeism, it is **CONCLUDED** that the respondent has given the Board "just cause" for dismissing her and for causing a forfeiture of her tenure protection, pursuant to *N.J.S.A.* 18A:6-10 to -29. Under the circumstances, the penalty of dismissal is not excessive or unreasonable.

ORDER

It is therefore **ORDERED** that the respondent be **DISMISSED** from her position as a tenured teaching staff member employed by the State Operated School District of the City of Newark, Essex County.

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

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

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

February 26, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

Feb. 28, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 28 1996
DATE

Barbara A Kennedy
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

William Demetroulakos

Lawrence A. Guarino

Thomas H. Cooke, Jr.

Evelyn Y. Moore

Exhibits:

P-1 Notice of Increment Denial, May 5, 1993.

P-2 Notice of Increment Denial, May 18, 1994.

P-3 Attendance Policy and Regulation.

P-4 Attendance Improvement Program (AIP) form July 1993 to June 1994.

P-5 AIP form July 1992 to June 1993.

P-6 AIP form July 1991 to June 1992.

P-7 AIP form July 1990 to June 1991.

P-8 Memo to respondent, November 25, 1992.

P-9 Memo to William Mallory, February 8, 1993.

P-10 Memo to respondent, November 29, 1993.

P-11 Memo to respondent, March 10, 1994.

P-12 Memo to respondent, April 6, 1994.

P-13 Memo to William Mallory, April 11, 1994.

P-14 Memo from William Mallory, April 15, 1994.

P-15 Annual Evaluation, June 1993.

P-16 Annual Evaluation, June 1994.

P-17 Notice of increment withholding, August 28,1978.

R-1 Teacher Evaluation, June 1982.

R-2 Teacher Evaluation, June 1983.

R-3 Teacher Evaluation, June 1984.

R-4 Teacher Evaluation, June 1986.

R-5 Teacher Evaluation, June 1987.

R-6 Teacher Evaluation, June 1988.

R-7 Teacher Evaluation, June 1989.

R-8 Teacher Evaluation, June 1990.

R-9 Teacher Evaluation, June 1991.

R-10 Teacher Evaluation, June 1992.

OAL DKT. NO. EDU 10611-94

IN THE MATTER OF THE TENURE	:	
HEARING OF EVELYN Y. MOORE,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the District has proved its charges of excessive absenteeism and unbecoming conduct. Further, the Commissioner concurs with the ALJ that the tenure charges, as proven, are sufficient to warrant respondent's termination from employment, pursuant to N.J.S.A. 18A:6-10 and 11.

Accordingly, for the reasons well-expressed therein, the Commissioner affirms the initial decision of the OAL and hereby orders that respondent be dismissed from her tenured teaching position with the District as of the date of this decision. This matter will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to N.J.A.C. 6:11-3.6.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 12, 1996
DATE OF MAILING APRIL 12, 1996

145-96

145-96

ETHEL MAE GRIGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 15, 1996

OAL DKT. NO. EDU 8106-95

ETHEL MAE GRIGGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 15, 1996

DATE OF MAILING APRIL 15, 1996

146-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ADALBERTO MELENDEZ,	:	
SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF LONG BRANCH,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges against respondent custodian under N.J.S.A. 18A:6-11, alleging neglect of duty.

ALJ concluded that the Board had proven by a preponderance of the evidence that respondent neglected to perform the duties assigned to him. Moreover, respondent had been issued reminders and warnings detailing his failures and the principal's expectations, and respondent's increment was withheld in 1993-94, with no lasting improvement. ALJ ordered respondent dismissed from his position.

Commissioner adopted findings and determination in initial decision as his own and ordered respondent dismissed from his position as tenured custodian as of the date of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6662-95

AGENCY DKT. NO. 191-5/95

IN THE MATTER OF THE TENURE HEARING OF ADALBERTO MELENDEZ, BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY

J. Peter Sokol, Esq., for petitioner Board of Education of the City of Long Branch (McOmber & McOmber, attorneys)

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

Record Closed: February 7, 1996 Decided: February 27, 1996

BEFORE **AUGUST E. THOMAS**, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City of Long Branch (Board) suspended Adalberto Melendez (respondent) without pay on April 28, 1995, and filed tenure charges against him with the Commissioner of Education which were received on May 30, 1995. On June 26, 1995, the Commissioner transferred this matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A telephone prehearing

conference was held on August 24, 1995. Hearings were conducted on December 4, 5 and 6, 1995, in the Allenhurst Borough Hall, Allenhurst. The record closed on February 7, 1996, after receipt of the attorneys' written closing arguments.

Respondent was terminated because of neglect of his regular duties as an elementary school custodian. He worked the night shift, from 2 to 10 p.m., and allegedly failed to perform his cleaning duties in a satisfactory manner. Twenty-seven documents were filed by the Board in support of its charge of neglect of duties. Additionally, four teachers, a custodial supervisor, and the Gregory School principal testified on behalf of the Board. Respondent testified on his own behalf.

ISSUE

At issue is whether respondent neglected to perform his duties in a satisfactory manner and, if so, whether this single charge of neglect is sufficient to warrant his dismissal.

MOTION

At hearing, respondent made a motion to dismiss this matter because of the Board's alleged failure to file its charge according to N.J.S.A. 18A:6-10, which provides for charges of "inefficiency, incapacity, unbecoming conduct, or other just cause," and N.J.S.A. 18A:6-11, which sets forth the procedure which must be followed when filing charges of inefficiency. Respondent argued that "neglect" is synonymous with "inefficiency," and that the charge must therefore be discussed pursuant to N.J.S.A. 18A:6-11 and 18A:6-13. He claimed that pursuant to N.J.S.A. 18A:6-11, he was entitled to written notice of his alleged inefficiency, and should have been given ninety days in which to correct and overcome the inefficiency. Since the Board failed to use these statutory procedures, respondent demands that the charge be dismissed.

Charges in this matter were brought under the "Tenure of janitorial employees" statute, N.J.S.A. 18A:17-3, which reads:

> Every public school janitor of a school district shall . . . hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, . . . except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.
>
> [Emphasis added.]

This statute obviously pertains to school custodians, and it sets forth the circumstances under which a custodial employee may be removed from his tenured position by a board of education. N.J.S.A. 18A:17-3 specifically mentions "neglect," and there was no showing by respondent that the Board had a mandate to file charges of "inefficiency" pursuant to N.J.S.A. 18A:6-11. In fact, N.J.S.A. 18A:6-11 states very clearly that "Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing" (emphasis added). The charge of "neglect" certainly qualifies as "[a]ny charge." Nevertheless, the statute also provides that "if the charge is inefficiency" (emphasis added), the employee must be given written notice and an opportunity to correct the inefficiency prior to the certification of the charge to the Commissioner. Respondent argued that when the two statutes are juxtaposed, it becomes clear that "neglect" is synonymous with "inefficiency." Accordingly, the respondent concluded that the Board failed to properly file its charge pursuant to N.J.S.A. 18A:6-11.

Neither Funk and Wagnalls Standard College Dictionary (second printing 1967), nor Webster's New World College Dictionary (3d ed. 1996), nor Roget's International Thesaurus (3d ed. 1962) list "inefficiency" as a synonym for "neglect." The Board did not choose to file tenure charges of inefficiency against respondent, and there is no statutory or decision law requirement that it do so prior to the filing of tenure charges for other reasons. Further, the Commissioner has previously recognized charges of neglect of duties in In re Tenure Hearing of Ingram, 94 N.J.A.R.2d (EDU) 580, and in State Operated School District of the City of Paterson v. Cox, 93 N.J.A.R.2d (EDU) 748. One premise of statutory construction is that statutes must be read so as not to render any statutory provision without effect. In that regard, respondent's argument, if credited, would nullify the wording of N.J.S.A. 18A:17-3, which clearly provides for the consideration of charges of neglect.

Based on this analysis, I **FIND** no impropriety in the manner in which the Board filed its charge of neglect against respondent. Consequently, respondent's motion to dismiss based on the Board's failure to file charges of inefficiency is **DENIED**.

DISCUSSION

It is stipulated that respondent is a tenured custodian. The Board's records show that he was employed on or about August 17, 1989, and that he acquired tenure with the district in September of 1992.

Respondent was recommended for tenure by the same principal who is now the chief witness against him, Dr. Donald T. Donofrio. The record shows that after respondent acquired tenure, he was given repeated notice and warnings by Dr. Donofrio concerning his lack of initiative and industriousness. Twenty-three of the twenty-seven documents in evidence (specifically, evaluations, memoranda and a Board resolution) are critical of respondent's job performance between his acquisition of tenure and the filing of the neglect charge. His job performance deteriorated so much after he acquired tenure that Dr. Donofrio recommended that his salary increment be withheld for the 1993-94 school year. In a memo to respondent dated March 15, 1993 (P-1), the principal informed respondent that his increment was being withheld due to his:

> failure to consistently respond to requests to clean various areas of the school without continued reminders each day and the overall general poor condition of the school on many occasions, and your failure to display the initiative to remain actively busy throughout the evening on the numerous tasks which could be done to bring about a major improvement in the condition of the school without undue supervision.

In an attachment to respondent's March 1993 evaluation (P-2), the principal notified respondent of observations that had been made by the school's director of buildings and grounds, Ted Janks, regarding areas of the school that needed more thorough cleaning; Mr. Janks's criticism of the

general lack of custodial attention to many areas of the school was given "supportive administrative concurrence by the building principal."

Subsequent evaluations of respondent's job performance reveal that his poor work quality continued. He failed to take suggestions, his industriousness lagged and his initiative was weak (P-5, P-8). For the period September through December 1994, respondent's evaluation detailed his weaknesses in the categories of quality of work, cooperativeness, industriousness and initiative (P-13). He was repeatedly reminded about tasks that he neglected. Specifically, in a memo to respondent dated June 21, 1994, the principal reminded respondent that it was his responsibility to put liners in the wastepaper baskets throughout the school, which was not being done (P-7). Dr. Donofrio testified that the matter was brought to his attention by teachers who were unhappy with the cleanliness of the wastebaskets, i.e., they contained spilled milk, food, etc. Earlier in 1994, the principal had sent a memorandum to all custodians, including respondent, notifying them of areas of the school that needed improvement and reminding them of tasks that had to be done on a daily basis, e.g., repetitive cleaning of sinks and bathrooms (P-6). When complaints were received in October 1994 about the cleanliness of the school bathrooms, the principal wrote to respondent, in a memo dated October 26, 1994: "I alerted you to the need of those bathrooms to be in a clean condition each day after Latch Key children are dismissed" (P-9).

Dr. Donofrio testified that despite these repeated warnings, respondent's performance continued to be unsatisfactory. Wastebaskets were not emptied, stairways were left uninspected and the maintenance room and bathrooms were not being kept clean (P-10). Debris was swept into a hallway and left there, and offices were not cleaned regularly, in spite of Dr. Donofrio's previous verbal instructions (P-11). Once, the principal had to physically show respondent how to remove rust spots with steel wool, despite respondent's years of experience as a janitor.

According to Dr. Donofrio, the school's four kindergartens were particularly neglected. Each kindergarten had six tables, which were used for the pupils' snacks and projects. Consequently, at the end of the school day there was usually debris on the tables. Although these tables were to be cleaned during the day by a school matron, and at night by the custodian, the kindergarten teachers complained that they were frequently left dirty; the bathrooms and sinks were also often left unclean (P-14, P-15, P-16, P-18, P-23). In a memo to respondent dated

February 21, 1995, the principal wrote, "I have seen you standing at the Wing Vestibule looking out on the playground for an extended period of time" (P-18). He advised respondent that there were things he should have been doing during that time, like cleaning the kindergarten tables the way he had been instructed. Also, he wrote that on one occasion a teacher found a chair in front of the t.v. in her room, and a milk carton with cigarette butts or ashes in it. Although respondent denied having any knowledge of the incident and blamed it on workmen, the principal pointed to the incident as another example of respondent's "failure to be responsible for the overall security of the building" (P-18).

The four kindergarten teachers also testified on behalf of the Board. The first teacher said that the tables in her room were often dirty when she arrived in the morning. They should have been cleaned each night and ready for the children to eat their breakfast. The second teacher testified that she had her children help her clean the tables in the morning, and that she had spoken to the principal about the cleanliness of her room. The third teacher was a beginning teacher, and although she experienced cleanliness problems in her classroom, she chose not to complain to the principal; she and her paraprofessional washed the tables themselves. The fourth teacher stated that by the end of the day "the cumulative effect" of the children's activities at the tables took a toll, i.e., there were spills and crumbs from snack time, as well as drops of paste and scraps of art project materials. The tables were clean and ready for the children in the morning only "on occasion." She testified that she had communicated these problems to the principal orally.

Because of their dissatisfaction with respondent's work performance, the principal and the superintendent asked a more experienced custodian, Daniel Rodriguez, to go to the elementary school to train respondent to perform his duties. Mr. Rodriguez testified that he was assigned to the maintenance shop; however, he had worked as a janitor in the middle school the previous school year and had prior work experience in the district before moving away and coming back. His job was to train new custodians. Mr. Rodriguez stated that the bathrooms were not clean when he arrived, and that he discussed scrubbing the toilets and using chemicals to control odors. Mr. Rodriguez also discussed mopping, dusting, spray buffing and other tasks respondent was expected to perform. He testified that he worked with respondent one week (five nights), and that respondent understood him and performed adequately while he was there. Respondent gave

Mr. Rodriguez excuses for why his duties hadn't been performed properly, or claimed that the duties belonged to someone else.

During the hearing it was suggested that respondent might not understand fully all directions given to him in English. An interpreter was used during the hearing; however, most of the colloquy at hearing was in English. Mr. Rodriguez testified that he spoke to respondent in English and in Spanish during his training week. Further, respondent does not suggest that his alleged failures to perform his duties were caused by an inability to understand the English language.

Respondent testified on his own behalf and essentially gave a reason for each of the alleged failings set forth by the principal. He claimed that there was too much work for one person. The school was large, with at least seventeen rooms, two portable classrooms, two large bathrooms, and six or more small bathrooms to clean. Additionally, there were hallways, three offices, and the nurse's room to be cleaned, chairs to set up for parent/teacher meetings, and spray buffing which had to be done. Respondent also complained that during one period of about forty-five days, a matron was absent and he had to pick up some of her duties.

The record shows that respondent was not expected to do every job assigned to him on every night. I **CONCLUDE** from Mr. Rodriguez's testimony that the work assigned to respondent was essentially the same as that assigned to other custodians in the district, given the differences between the elementary and middle schools and the types of programs conducted in each building.

CONCLUSION

Based on the testimony and the documents submitted as evidence, I **FIND** and **CONCLUDE** that the Board has proven by a preponderance of the evidence that respondent neglected to perform the duties assigned to him.

Regarding penalty, one option is to reduce respondent's salary and allow him to return to work. Respondent has a second-grade education, he is fifty-eight years old, and on his

evaluations there were many references to excellent cooperation with the principal. The principal even testified that respondent was always pleasant and cooperative. Respondent was also commended for punctuality and courtesy; he once fixed a VCR for one of the teachers, and he would help the teachers carry boxes to and from their cars on occasion. However, in reviewing the entire record, it is particularly troubling to see that among respondent's duties, he did not give priority to the routine cleaning of the kindergarten tables and of the bathrooms and sinks. Respondent had performed these duties without incident prior to earning tenure, and nothing in the record indicates that there was any drastic change in his job assignment in the years after he acquired tenure. The record does show, however, that the principal made frequent attempts to get respondent to perform his tasks. He withheld respondent's 1993/94 increment and repeatedly warned him verbally and in writing that future increment recommendations would be affected by his job performance. Additionally, he had a trainer assigned so that respondent would clearly understand his job, and he issued reminders and warnings to respondent detailing respondent's failures and the principal's expectations. The respondent improved for a time, but the improvement did not last. The principal eventually prevailed on the Board to file tenure charges of neglect. Although the respondent characterizes the Board's action as filing a single charge of neglect, the record shows that there are many charges of neglect of his duties. I might have reduced respondent's salary and reinstated him, had he not already been given so many chances to improve.

Based on all of the above, I **CONCLUDE** that Adalberto Melendez has neglected to perform his duties as a custodian in the City of Long Branch school district. Therefore, it is **ORDERED** that he be, and is hereby, dismissed from his position.

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

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

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

February 27, 1996
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ t/a

Receipt Acknowledged:

Feb. 28, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 29 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Memorandum, March 15, 1993

P-2 Evaluation, December 1992 - March 23, 1993, with attachment

P-3 Letter by Korey, April 6, 1993

P-4 Evaluation, March 23, 1993 - June 30, 1993

P-5 Evaluation, September 1 - December 15, 1993

P-6 Memorandum, February 7, 1994

P-7 Memorandum, June 21, 1994

P-8 Evaluation, January - June 1994

P-9 Memorandum, October 26, 1994

P-10 Memorandum, October 28, 1994

P-11 Memorandum, December 8, 1994

P-12 Memorandum, December 9, 1994

P-13 Evaluation, September 1994 - December 1994

P-14 Memorandum, January 9, 1995

P-15 Memorandum, January 23, 1995

P-16 Memorandum, February 6, 1995

P-17 Memorandum, February 10, 1995

P-18 Memorandum, February 21, 1995

P-19 Memorandum, March 10, 1995

P-20 Memorandum, March 13, 1995

P-21 Memorandum, April 6, 1995

P-22 Sanitary Inspection Report, May 11, 1995

P-23 Memorandum, May 12, 1995

P-24 Evaluation, January - June 1995

P-25 Teacher Record Card (Salary)

P-26 Employee Absence Summary, June 30, 1994

P-27 Employee Absence Summary, June 30, 1995

WITNESSES

For petitioner:

Patricia H. Desfosse, Kindergarten Teacher
Arlene Lomasky, Kindergarten Teacher
Patricia Bruckner, Kindergarten Teacher
Leah Zimerman, Kindergarten Teacher
Daniel Rodriguez, Supervising Custodian
Dr. Donald T. Donofrio, School Principal

For respondent:

Adalberto Melendez, respondent

INTERPRETER

Jose Marquez, for respondent

IN THE MATTER OF THE TENURE	:	
HEARING OF ADALBERTO MELENDEZ,	:	
SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF LONG BRANCH,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

The record of this matter, including transcripts of the hearing conducted by the Administrative Law Judge (ALJ), and the initial decision of the Office of Administrative Law (OAL) have been reviewed.[1] Respondent's exceptions and the Board's reply thereto were timely filed in accordance with N.J.A.C. 1:1-18.4.

Respondent's exceptions generally recast and reiterate arguments advanced before the ALJ, again contending, *inter alia*, that respondent's neglect of duty should be tempered by the procedures required for inefficiency charges as set forth at N.J.S.A. 18A: 6-10 et seq. and that respondent should not be removed from his position as a custodian as removal is an unduly harsh penalty. In that these arguments were fully and fairly considered by the ALJ, they are not discussed in detail herein.

Respondent further excepts to the ALJ's findings of fact, arguing that respondent's job performance had not deteriorated since March 1993, when his increment was withheld, but rather had improved and this, he avers, is supported by the Board's payment to respondent of a subsequent salary increment. (Respondent's Exceptions at p. 4) Respondent further avers that the ALJ did not reference the various positive areas of testimony by the principal concerning respondent's scope of

[1] Additional correspondence from the Board in the form of a letter reply brief, dated February 7, 1996, stamped as received by the Office of Administrative Law on February 27, 1996, was received by the ALJ at home on March 5, 1996, after the case had been decided. The brief was forwarded to the Commissioner on March 14, 1996, and added to the record herein.

performance which is "salient" to an understanding of "the entire 'picture'." (Id. at p. 5) Additionally, respondent argues that the ALJ failed to reference several portions of evidence, including a Monthly Room Condition Report wherein eight of ten school rooms were reported as being in either excellent or good condition, and other exhibits which involve problems or criticisms that were written in respondent's March 1993 evaluation but, "never appear again in the *written* record." [2] Respondent further excepts that the ALJ did not consider the full evidence proffered by four kindergarten teachers, upon whose testimony the ALJ relied to demonstrate neglect, noting they described their classrooms as consistently less than clean. (Initial Decision at p. 6) Respondent contends that, "*** the references contained in the decision should be supplemented by additional testimony offered***." (Respondent's Exceptions at p. 6) Specifically, he notes that two teachers did not know respondent was responsible for cleaning the bathrooms and that the other teachers found him to be cooperative and "good at fixing things." (Id. at p. 7)

Lastly, respondent avers that the ALJ did not carefully examine the testimony regarding the latch key, or other recreational programs and the role of the matron who often cleaned the kindergarten tables.

In reply, the Board argues that the ALJ's initial decision was correct and should be affirmed. (Board's Exceptions at p. 8) As to the contention that the principal noted some improvement with regard to respondent, the Board notes that respondent continued to be rated as exhibiting poor work quality following his increment withholding in subsequent evaluations. (Id. at pp. 2-3) The Board also avers that the Monthly Room Condition Report was inconsistently utilized by the teachers. It further responds that respondent repeatedly did not clean the kindergarten tables in spite of oral and written reminders. (Id. at p. 4) Further, the Board argues that specific instances, as documented, reveal that respondent "would neglect one task one evening and neglect a different task a second evening." (Id. at p. 5) The Board avers that respondent's specific instances of neglect were documented and noted by the ALJ. (Id.)

With regard to the exception that the school's latch key and recreational program had some type of effect on respondent's performance, the Board argues that respondent does not explain how he was able to satisfy these same tasks during his nontenure years in spite of recreational or other programs at the school building. Further, the Board submits that there is no causal connection

[2] The text is emphasized in that there is testimony in the record demonstrating that respondent received oral admonitions after his evaluation from December 1992 through March 1993.

between these programs and respondent's performance. (Id. at p. 6) Also, the Board avers that the evidence is that the kindergarten matron was pressed into daily cleaning duty because respondent had not cleaned the night before. The Board further submits that the balance of the matron's absences were sporadic and not coincident with respondent's specifically identified lapses. (Id. at pp. 6-7)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that respondent's actions, and inactions, constitute neglect pursuant to N.J.S.A. 18A:17-3. Further, the Commissioner concurs with the ALJ that the tenure charges, as proven, are sufficient to warrant respondent's termination from employment, pursuant to N.J.S.A. 18A:6-10 and 11.

In so ruling, the Commissioner finds that the ALJ correctly based his decision on a preponderance of the credible evidence in the record. The Commissioner concurs with the ALJ that respondent is not entitled to a lesser penalty than recommended, since respondent was provided with several opportunities to improve his job performance prior to the Board's certification of tenure charges. To elaborate this point, the ALJ found,

> ***[the principal] withheld respondent's 1993/94 increment and repeatedly warned him verbally and in writing that future increment recommendations would be affected by his job performance. Additionally, he had a trainer assigned so that respondent would clearly understand his job, and he issued reminders and warnings to respondent detailing respondent's failures and the principal's expectations. ***(Initial Decision at p. 8)

Further, and contrary to respondent's exception that the ALJ did not consider testimony that respondent improved after receiving such warnings, the ALJ wrote, "*the respondent improved for a time, but the improvement did not last.*" (emphasis added) (Id.)

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and hereby orders that respondent be dismissed from his position as tenured custodian with the Board as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 15,, 1996
DATE OF MAILING APRIL 15, 1996

147-96

147-96

G.G. and N.G., on behalf of their minor son, G.G., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY, : DECISION

RESPONDENT. :

:

APRIL 15, 1996

OAL DKT. NO. EDU 5220-95

G.G. and N.G., on behalf of their minor son, G.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 15, 1996
DATE OF MAILING APRIL 15,1996

148-96

148-96R

SUSAN LAPIDUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
_____	:	

APRIL 17, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 104-96

AGENCY DKT. NO. 474-12/94

(ON REMAND)

OAL DKT. NO. EDU 388-95

SUSAN LAPIDUS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Seid, attorneys)

John E. Collins, Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: February 7, 1996 Decided: February 22, 1996

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 12, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

March 5, 1996

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 08 1996

DATE

Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

gjb

SETTLEMENT AGREEMENT

This Agreement is hereby made between **SUSAN LAPIDUS** (hereinafter referred to as "Lapidus") and the **Board of Education of the Township of South Brunswick** (hereinafter referred to as "the Board"):

WHEREAS, Lapidus filed a Petition of Appeal with the Commissioner of Education on December 5, 1994 (Agency Docket No. 474-12/94, OAL Docket No. EDUOR 00388-95S), alleging that she had obtained tenure as a teacher in the Board's employ; and

WHEREAS, Lapidus filed a Verified Complaint with the New Jersey Division on Civil Rights on December 1, 1994 (Docket No. EM21AE-38951-A) alleging age discrimination in employment; and

WHEREAS, the Board and Lapidus are desirous of reaching a settlement of the existing litigation between the parties; now therefore be it

RESOLVED, that the parties agree to the following terms of settlement:

1. The Board hereby recognizes Lapidus' status as a tenured teacher in the Board's employ.

2. The Board agrees to assign Lapidus to a one-half time basic skills teaching position, retroactive to September 1, 1995.

3. For the 1995-1996 school year, Lapidus will be compensated pursuant to the second year of Step 10 of the teachers' salary guide; her salary will be $20,450.00, representing one-half of a full-time teacher's salary at the second year of Step 10.

4. Effective September 5, 1995, the Board will also employ Lapidus as a one-half time paraprofessional aide, her duties to be performed during the regular school day.

5. The Board reserves the right to assign Lapidus to different school buildings to perform her teaching and paraprofessional duties.

6. Lapidus agrees that, upon ratification of this Agreement by the Board, she will withdraw with prejudice her Complaint currently pending in the New Jersey Division on Civil Rights (Docket No. EM21AE-38951-A).

7. Lapidus agrees that, upon ratification of this Agreement by the Board, she will sign a Stipulation of Dismissal with Prejudice as to her Petition of Appeal currently pending before the Commissioner of Education and Office of Administrative Law (Agency Docket No. 474-12/94, OAL Docket No. EDUOR 00388-95S).

8. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, regarding this Agreement, that each fully understands the terms of this Agreement and enters into it freely and voluntarily, without any coercion, duress or pressure from the other party.

9. All terms of this Agreement are deemed material. This document contains the entire agreement of the parties and may not be altered, amended, modified or revoked except by instrument in writing executed by the parties.

Intending to be legally bound hereby, Lapidus and the **BOARD** execute the foregoing **AGREEMENT** this **9th** day of **October**, 1995.

WITNESS:

STEPHEN E. KLAUSNER, ESQUIRE

SUSAN LAPIDUS

WITNESS:

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK

By: John B. Wolf, President

John E. Collins, Esq.

OAL DKT. NOS. EDU 388-95 AND EDU 104-96 (ON REMAND)

SUSAN LAPIDUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

APRIL 17, 1996

DATE OF MAILING APRIL 17, 1996

149-96

149-96

NANCY GARRITY, THOMAS GLADDEN, BALBIR PAINTAL, JAMES RING, JOHN SETTEDUCATO AND THE PATERSON EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association and five tenured teaching staff members who were assaulted by students sought to have expulsion hearings conducted for those students. The District denied it was obligated to initiate expulsion proceedings and maintained that the petition was untimely filed.

ALJ concluded that the petition was not time barred. ALJ concluded the District failed to comply with *N.J.S.A.* 18A:37-2.1 in regard to the incidents in question. The District failed to schedule an expulsion proceeding for each student and failed to keep the temporary suspension of each student in effect pending the expulsion proceeding. The ALJ directed the District to schedule expulsion hearings for the students with the exception of W.T., since he graduated. The District was ordered to strictly comply with the provisions of *N.J.S.A.* 18A:37-2.1 in the future and to post notice about the compliance and to develop and implement an education program for all administrators responsible for compliance with *N.J.S.A.* 18A:37-2.1.

Having reviewed the record and transcripts of the hearing, the Commissioner adopted findings and determination in initial decision as his own with modification. Commissioner ordered District to conduct the hearings with due observance to state and federal guidelines pertaining to classified students and to submit revised policy and procedures to the Director, Urban Education and Policy in the Department of Education for review within 120 days of the date of this decision. Moreover, revised policy and procedures are to be adopted and made available to staff and students at or before the start of the 1996-97 school year.

APRIL 17, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9876-94

AGENCY DKT. NO. 340-8/94

NANCY GARRITY, THOMAS GLADDEN, BALBIR PAINTAL, JAMES RING, JOHN SETTEDUCATO AND THE PATERSON EDUCATION ASSOCIATION,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT OF PATERSON,

Respondent.

Mary J. Hammer, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Louis M. Flora, Esq., for respondent

Record Closed: January 18, 1996 Decided: March 1, 1996

BEFORE **RICHARD McGILL,** ALJ:

This matter involves allegations by Nancy Garrity, Thomas Gladden, Balbir Paintal, James Ring and John Setteducato, who are high school teachers employed by the State-Operated School District of Paterson (respondent), that respondent failed to comply with

N.J.S.A. 18A:37-2.1, which relates to the initiation of expulsion proceedings against a pupil who commits an assault as defined in *N.J.S.A.* 2C:12-1 upon a teacher, with respect to several incidents in which they were involved. The Paterson Education Association joins in the petition. Respondent denies that it was obligated to initiate expulsion proceedings under the circumstances of the incidents in question. Further, respondent maintains that the petition is untimely and therefore barred by *N.J.A.C.* 6:24-1.2(c).

PROCEDURAL HISTORY

The petition was filed with the Commissioner of Education on August 15, 1994, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an answer on October 5, 1994, and the matter was transmitted to the Office of Administrative Law on October 11, 1994 for determination as a contested case.

A hearing in this matter was conducted on October 2 and 11, 1995 at the Office of Administrative Law in Newark, New Jersey. At the outset of the hearing, the portion of the petition related to Thomas Gladden was withdrawn. The record closed on January 18, 1996, upon receipt of respondent's written summation.

ISSUES

This issues in this proceeding are as follows:

1. Whether the school district was required to initiate expulsion proceedings pursuant to *N.J.S.A.* 18A:37-2.1 under the circumstances of this case.

2. What standard should be applied to determine whether a school district must initiate expulsion proceedings under *N.J.S.A.* 18A:37-2.1?

3. Whether the request to initiate expulsion proceedings is moot as to Balbir Paintal and John Setteducato, because the students were suspended and never returned to school.

4. Whether the petition was untimely under *N.J.A.C.* 6:24-1.2(c).

5. Whether the relief requested in this petition should be granted.

SUMMARY OF EVIDENCE

a. John Setteducato

John Setteducato testified that he is employed by respondent as a mathematics teacher at Kennedy High School, where he is now in his eleventh year. On March 15, 1994, Setteducato encountered four students on the third floor of the building after the end of the school day. Setteducato directed the students to leave the building. As he was following them down the stairs, one of them turned and pointed an object that looked like a gun at Setteducato. At the time, Setteducato thought that the object was a gun. The students started laughing and ran down the stairs. Upon regaining his composure, Setteducato proceeded to the security office and filed a complaint. Setteducato did not know the students' names.

At the end of the following day, Setteducato saw the same students after his eighth period class and thought they were trying to intimidate him. On the next day, Setteducato went directly to Vice Principal Chase to report the situation. As a result, the students were located, and the police were called to the school. The students identified Fa.A. as the one who pointed the object at Setteducato. The police investigated further and found in one student's locker a cigarette lighter designed in the shape of a gun.

As a result of this incident, Fa.A. was charged with aggravated assault. Setteducato went to municipal court and agreed that Fa.A. should be given the opportunity to plead guilty to simple assault. In fact, Fa.A. pled guilty to simple assault.

Fa.A. was placed in an alternative program run by the City of Paterson. Setteducato was aware that Fa.A. was back at Kennedy High School in December 1994, but he was not sure when Fa.A. returned. Respondent never conducted a hearing to determine whether Fa.A. should be expelled from school.

b. James Ring

James Ring testified that he is employed by respondent as a mathematics teacher at Kennedy High School, where he has taught for twenty-two years. On March 22, 1994, there was an altercation outside his classroom among three students from his class. D.B. and another student was ganging up on the third student.

Ring went into the hallway and attempted to separate the third student and get him back into the classroom. As Ring did so, he and the third student slipped to the floor. At that point, one of the students began to kick Ring and the student who fell to the floor. Ring was kicked twice in the face and once in the right shoulder. On the third kick, Ring grabbed the leg and looked up to see that the student who was kicking him was D.B. D.B. kicked out of Ring's grasp and started down the hall. Ring followed D.B. and stopped him. Security guards arrived and took D.B. downstairs.

Ring was sent to the nurse's office because he had a laceration and a headache. Dr. Sampson, who was the building Principal, and Vice Principal DeChiarra came to the nurse's office to see him. Upon the suggestion of Dr. Sampson, Ring went to the Immedicenter where a doctor examined him but found no serious injuries. Ring stayed home one day and returned to work the following day. However, Ring experienced back spasms and was sent back to the Immedicenter. Upon the advice of the doctor, Ring took the rest of the week off from work.

During the afternoon of March 22, 1994, Ring returned to the high school and spoke with Vice Principal Roman. She informed Ring that D.B. would be placed on bedside, which

generally refers to at-home instruction for students who are unable to attend school as the result of a prolonged illness or injury. Ring voiced his displeasure because D.B. was not an appropriate candidate for bedside. Ring also stated that he intended to press charges against D.B.

In fact, Ring went to the Paterson Police Department later that day and pressed charges. Because Ring was a teacher acting in that capacity at the time of the incident, D.B. was charged with aggravated assault. In June 1994, Ring discussed the case with the prosecutor, who was inclined to offer D.B. the opportunity to plead guilty to simple assault. Ring agreed with the prosecutor, but D.B. refused to plead guilty to simple assault. Ring went to court in October 1994, and D.B. was found guilty of aggravated assault.

In March 1994, D.B. was suspended for ten days rather than placed on bedside. D.B. did not return to school after the suspension, and he was dropped from the rolls after twenty days for chronic absenteeism. D.B. attempted to be readmitted as a student at Kennedy High School in September 1994, but Vice Principal Roman would not allow him to do so because his address indicated that he should attend Eastside High School in Paterson. Ring did not know whether D.B. attempted to enter Eastside High School. Ring was never involved in a hearing as whether D.B. should be allowed to return to school.

c. Balbir Paintal

Balbir Paintal testified that she is employed by respondent as a mathematics teacher at Eastside High School, where she is now in her seventh year. On April 18, 1994, several students remained in class after the bell rang to ask a question. Paintal was helping two students in the first row when she noticed something burning. Paintal looked around, and as she did, a student said that it was her hair. Paintal reached to the back of her head and a large amount of hair came off in her hand or fell to the ground. Paintal still was not certain exactly what happened, but she reported the situation to Vice Principal Veronica Maus, who sent her to the nurse's office.

Paintal experienced a headache after this incident, but she returned to work the following day. Her supervisor informed her that they had identified the student who had burned her and that it was F.H. Paintal pressed charges against F.H., who later admitted that she burned Paintal's hair with a cigarette lighter and pled guilty to the charges.

F.H. was suspended for ten days as a result of this incident. After the suspension, F.H. did not return to school. It became known that F.H. was pregnant, and she was placed in a shelter. Paintal was not certain whether F.H. ever returned to the school. However, Paintal never participated in any hearing before respondent concerning F.H.

d. Nancy Garrity

Nancy Garrity testified that she has been employed by respondent for twenty years as a foreign language teacher. She has been assigned Kennedy High School since September 1994. Prior to that time, she taught at Eastside High School for approximately ten years.

On March 15, 1994, Garrity was teaching a foreign language class, and on that particular day, she gave out warning notices. Among the students who received warning notices was W.T., who had transferred from another school in January. W.T. was not at the same level as Garrity's Spanish class, and in addition, he missed a number of classes due to activities related to social studies. Garrity described W.T. six feet two inches tall and weighing approximately 350 pounds.

Upon receiving the warning notice, W.T. responded by telling Garrity that it was her fault that he was failing because she was not teaching. When Garrity mentioned that W.T. had missed a number of classes and was not coming for extra help, W.T. approached Garrity's desk and told her that he would have his mother come to school and break her ass. Garrity responded by telling W.T. that perhaps his mother would be angry with him for failing. W.T. responded by telling Garrity that he would break her ass.

Garrity was afraid but she did not want to lose her composure in front of the class. In response to this situation, Garrity decided to take W.T. to the office.

Garrity told W.T. to come with her and proceeded to the foreign language office which was not far from the classroom and where she hoped to find Mrs. Lopas, who is the head of the department. As she left the classroom, Garrity motioned to a teacher on hall duty that she was leaving her classroom. Garrity entered the office but no one was there. Garrity told W.T. to sit on a bench in the office and proceeded through another door to a book room which leads to the teacher's room. Garrity told W.T. a second time to sit and thought he did so. As Garrity entered the book room, she noticed that W.T. was behind her and again told him to sit down. As she did so, he pushed her. Garrity was in the air for seven or eight feet and slid head first into the teacher's room. At the time, two teachers were in the teacher's room. Garrity asked them to call the police, and with that, W.T. ran away.

The teachers called Vice Principal Rios, who completed a report along with Ms. Lopas, who arrived shortly thereafter. After returning to her classroom, Garrity was escorted to the nurse's office by one of the teachers. After becoming aware that no one had called the police, Garrity did so from the nurse's office.

Before the police arrived one and a half hours later, Principal Charles Lighty visited Garrity in the nurse's office. Garrity found out later that Lighty had already met with W.T.'s mother who had come to the school. After the police arrived, Garrity proceeded to a conference room, where she met with Lopas, W.T. and his mother. The police officer tried to discuss the situation with W.T.'s mother, who accused Garrity of assaulting her son.

Later, Garrity went to the Immedicenter. Garrity was badly bruised and was given medication for pain. Garrity was unable to return for the rest of the school year, and she requested a transfer from Eastside High School. In September 1994, Garrity was transferred to Kennedy High School.

Garrity pressed charges against W.T., and W.T.'s mother charged Garrity with assault against her son. After two postponements, the charges against Garrity went to trial in October 1994, and she was found not guilty. After several postponements of the charges against W.T., he was allowed to plead guilty to a lesser offense. Specifically, W.T. pled guilty to simple assault. However, there was never a hearing at the school concerning the incident.

e. Peter A. Tirri

Peter A. Tirri testified that he is employed by respondent as a teacher but that he is currently serving as the full-time release President of the Paterson Education Association, which is the bargaining agent for the teachers and certain other employees in the Paterson public schools. In his capacity as President of the Paterson Education Association, Tirri became aware of the incidents concerning Setteducato, Ring, Paintal and Garrity.

By letter dated May 4, 1994, Tirri wrote to the State District Superintendent of Schools concerning the incident involving W.T. and Garrity. Tirri inquired about the length of the suspension of W.T. Tirri also inquired whether an expulsion hearing was held pursuant to *N.J.S.A.* 18A:37-2.1. Tirri requested a response to his letter. By letter dated May 25, 1994, Tirri requested essentially the same information in regard to the incidents involving Setteducato, Ring and Paintal along with two other individuals. Tirri never received a response to these letters, and to his knowledge, expulsion hearings never took place.

f. Lizzie Chase

Lizzie Chase testified that she is employed by respondent as a vice principal and that during the 1993-94 academic year, she served in that capacity at Kennedy High School. Chase testified as a witness for respondent concerning the incidents involving Ring and Setteducato.

Chase became aware of the incident involving Ring on March 23, 1994, which was the following day, when she received a telephone call at home from the principal, Dr. Sampson. Chase's understanding of the incident was that three students attacked another student and that Ring came to the defense of the student who was being attacked. One student pushed Ring, who fell to the floor, and the student, D.B., kicked Ring. Chase expressed a preference to refer to D.B. by his street name, M. Ring chased after M. and attacked M.

When Chase arrived at school the next day, she telephoned M.'s guardian and informed him that M. was suspended for ten days pending an expulsion hearing. Chase gave the guardian the alternative to withdraw M. from the building with the understanding that M. would never return to Kennedy High School again or any other Paterson school. The guardian chose to withdraw M. from the building. Their understanding was that M., who was sixteen at the time, would be sent to Philadelphia, Pennsylvania.

Prior to the withdrawal, Chase discussed the matter with Dr. Sampson, who said that because Ring allegedly assaulted M. when he was injured, M. should be offered bedside. However, because of the withdrawal, M. never received bedside, and he was dropped from the rolls after twenty-one days. M. never attempted to reenter Kennedy High School. He could not have done so in September 1994, because he was in the penal system.

Chase became aware of the incident involving Setteducato on the day that it occurred. Setteducato reported the incident, but he did not recognize the students. As a result, Chase asked the security guard to be on the lookout for the students. Three days later, the security guard brought three students to Chase. During questioning, the students stated that F.A. had a cigarette lighter that looked like a twenty-two caliber gun. The lighter belonged to another student, but Fa.A. pointed it at Setteducato.

Fa.A. was given a ten-day suspension along with the other three students. Chase called the police and she also called Fa.A.'s grandmother. Fa.A:'s mother called the next day and advised that Fa.A. would be kept in a shelter because he violated his probation.

An expulsion hearing was never conducted for Fa.A., but he was placed in the Total Life Program. Chase was not certain how the student got into the Total Life Program, but she knew that it was operated in conjunction with the Paterson School District. As a result, Fa.A. was out of the building from March to November 1994.

Fa.A. was classified as socially maladjusted. Fa.A. returned to school on December 1, 1994 and was placed in a special education program.

g. Florence Lopas

Florence Lopas testified that she is employed by respondent and that during the 1993-94 academic year she was chairperson of the World Languages Department at Eastside High School. On March 15, 1994, Garrity reported the incident with W.T. to Vice Principal Aurea Rios, and Lopas spoke with Garrity at that time. W.T. had transferred from another school. He was having difficulty with Spanish, but he was doing well in all his other subjects.

Garrity gave W.T. a supplementary report indicating that his progress was not satisfactory. Lopas expressed the opinion that it was not necessary to remove W.T. from the classroom. However, Lopas acknowledged that she was not aware that W.T. told Garrity that he would break her ass. Lopas also expressed the opinion that Garrity used poor judgment by entering an unoccupied office and walking through the book room. In regard to the book room, Lopas stated that the flooring is an inch lower than the floor of the room which Garrity was entering, implying that she could have tripped. In sum, Garrity's poor judgment caused the whole situation to arise.

At a meeting attended by Lopas, Garrity, W.T., W.T.'s mother and Principal Lighty, W.T.'s mother alleged that Garrity grabbed W.T. in the book room. Lopas found confirmation of this allegation in a statement by one of the teachers in the teacher's room, Mrs. Beckerman, who said that she heard W.T. say "Don't touch me." Since the situation

involved the word of one person against that of another and since Lopas had confidence in the integrity of both individuals, she could not come to a conclusion as to whether an assault occurred. Other teachers viewed W.T. as a fine, mannerly young man. Lopas stated that it was not within her authority to decide whether an expulsion hearing would be held.

h. Charles Lighty

Charles Lighty testified that he is employed by respondent and that during the 1993-94 academic year he was the principal of Eastside High School. Lighty testified as respondent's witness concerning the Garrity and Paintal incidents.

Lighty spoke with W.T. and Garrity on the date of the incident, and a vice principal conducted an investigation. W.T. told Lighty that he followed Garrity into the book room and that Garrity turned and put her hands on him as she said, "Don't come in here." W.T. said, "Lady, get your hands off of me." W.T. turned to leave, and when he looked back, Garrity was on the floor. W.T. denied that he pushed Garrity.

In Lighty's opinion, W.T. was a very good student, who represented Eastside High School at various conferences, and was generally a fine young man. W.T. subsequently graduated from Eastside High School.

Lighty did not doubt the integrity of W.T. or Garrity. However, he believed that W.T. was not capable of doing what Garrity said that he did. Lighty concluded that he did not have enough proof that an assault actually occurred. Nonetheless, because the teacher said that W.T. assaulted her, W.T. was automatically suspended for a period of ten days. Lighty called W.T.'s mother and informed her of the situation. Lighty weighed all of the evidence, and he made the decision not to conduct an expulsion hearing, because he had no evidence that an assault occurred. Garrity never returned to the school.

Lighty became aware of the incident involving Paintal minutes after it occurred. The police led the student out in handcuffs and took her to a shelter. John Sico, the chairperson of the mathematics department, suspended the student for ten days, and Paintal pressed charges against her.

The child study team evaluated F.H. and classified her as emotionally disturbed. The child study team recommended placement in a self-contained situation. Since F.H. was pregnant at the time, she was transferred to the alternative SAGE program for pregnant women.

F.H. is a ward of the State under the superivision of the Division of Youth and Family Services. F.H. moved to Hackensack, where she is living in a group home as an independent parent. At one point, F.H.'s aunt contacted the school and was told that if F.H. returned, she would be placed in a self-contained class. Lighty would have been comfortable with that arrangement, but F.H. never returned to school.

Asked about the Total Life Program in which Fa.A. from the Setteducato incident was placed, Lighty stated that it is operated by the City of Paterson with some participation by the Paterson School District.

FINDINGS

Setteducato, Ring, Paintal and Garrity (petitioners) had firsthand knowledge of the underlying facts and were fully credible. Their testimony as summarized above is **FOUND AS FACT.** Tirri testified as to two letters which he sent in regard to those incidents. His testimony was credible, and the above summary is **FOUND AS FACT.**

Respondent's witnesses did not have firsthand knowledge of the underlying incidents, but they were knowledgeable and testified truthfully as to the subsequent investigations, the information which they gathered, their assessments of the situations and their responses

thereto. As a reflection of the latter, their testimony as summarized above is **FOUND AS FACT.** The accuracy and reliability of their assessments as well as the consistency of their handling of the situations with *N.J.S.A.* 18A:37-2.1 will be discussed below.

LAW AND ANALYSIS

The threshold issue in this proceeding is whether the petition is time barred by *N.J.A.C.* 6:24-1.2(c), which provides as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The petition in this matter is clearly stamped as having been filed with the Commissioner of Education on August 15, 1994. The parties differ as to the date on which the ninety-day period begins to run.

Respondent argues that the ninety-day period begins to run on the date of the assault. The earliest incidents occurred on March 15, 1994 and involved Garrity and Setteducato. The latest incident occurred on April 18, 1994 and involved Paintal. Petitioners filed their consolidated petition 120 days after the latest incident and 156 days after the earliest incidents. Respondent concludes that the petition should be time barred for failure to comply with the ninety-day time limit set forth in *N.J.A.C.* 6:24-1.2(c).

Petitioners contend that they never received notice of any order, ruling or other action from respondent upon which to act. The Paterson Education Association requested information concerning those incidents by letters dated May 4, 1994 and May 25, 1994. However, respondent never responded to those letters. Petitioners argue that respondent should not be allowed to claim that the petition was untimely filed when respondent would not advise petitioners of its decision despite specific requests therefor.

A remarkably similar issue arose in *Markulin v. Neptune Township Board of Education,* 92 *N.J.A.R.*2d (EDU) 406, in which Elizabeth Markulin, a teaching staff member, alleged that she was assaulted by a pupil and sought as relief, among other things, an order from the Commissioner of Education requiring the Neptune Township Board of Education to convene and conduct an expulsion hearing regarding the assault by the pupil pursuant to *N.J.S.A.* 18A:37-2.1. The facts which are pertinent for present purposes may be stated succinctly as follows. The incident involving the alleged assault took place on June 14, 1991. On August 28, 1991, a union representative wrote to the Superintendent of Schools requesting a date and time for the expulsion hearing. On September 4, 1991, the Superintendent responded that he had no record of any further proceedings in the matter. The petition was filed on January 27, 1992, which was 227 days after the June 14, 1991 incident and 206 days subsequent to the expiration of the twenty-one day limitation for instituting expulsion proceedings under *N.J.S.A.* 18A:37-2.1.

The determination in *Markulin* was that the ninety-day period began to run on September 4, 1991, when the Superintendent advised that he had no record of any further proceedings in the matter. The ninety-day period did not begin on the date of the incident or upon the expiration of the twenty-one day limitation for instituting expulsion proceedings. In *Markulin*, the petition was untimely filed relative to September 4, 1991.

The determination in *Markulin* was consistent with *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993), wherein the Court stated:

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. . . . Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. . . . A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. . . . The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. (Citations omitted.) *Id.* at 587.

Here, respondent never issued any notice of a final order, ruling or other action which would alert petitioners to file a petition. Moreover, respondent did not respond to the specific request of the union representative for information concerning the matter. Under the circumstances, I **CONCLUDE** that the petition in this matter is not time barred by *N.J.A.C.* 6:24-1.2(c).

The main issue in this proceeding is whether respondent complied with the requirements of *N.J.S.A.* 18A:37-2.1, which at the time of the incidents provided as follows:

> Any pupil who commits an assault, as defined pursuant to N.J.S. 2C:12-1, upon a teacher, administrator, board member or other employee of a board of education, acting in the performance of his duties and in a situation where his authority to so act is apparent, or as a result of the victim's relationship to an institution of public education of this State, shall be immediately suspended from school consistent with procedural due process pending expulsion proceedings before the local board of education. Said proceedings shall take place no later than 21 calendar days following the day on which the pupil is suspended.

The statute refers to a "pupil who commits an assault, as defined pursuant to *N.J.S.* 2C:12-1, upon a teacher, . . . acting in the performance of his duties. . . ." Here, there is no doubt that each petitioner was a teacher acting in the performance of his or her duties at the times of the respective incidents. With respect to the question whether an assault occurred, the inference could be made from the fact that the students were suspended that respondent's representatives believed that an assault occurred in each instance. However, the testimony of respondent's witnesses indicates a measure of uncertainty as to whether an assault occurred, as in the Garrity incident, as well as a willingness to accept the parents' assertions, as occurred in the Ring and Garrity incidents, that the teacher assaulted the students. Under the circumstances, it is necessary to discuss the concept of assault as applied to these incidents.

An assault is defined in the pertinent part of *N.J.S.A.* 2C:12-1 as follows:

> a. Simple assault. A person is guilty of assault if he:
>
> (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
>
> (2) Negligently causes bodily injury to another with a deadly weapon; or
>
> (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.
>
> • • •
>
> b. Aggravated assault. A person is guilty of aggravated assault if he:
>
> • • •
>
> (5) Commits a simple assault as defined in subsection a. (1) and (2) of this section upon:
>
> • • •
>
> (d) Any school board member or school administrator, teacher or other employee of a school board while clearly identifiable as being engaged in the performance of his duties or because of his status as a member or employee of a school board; . . . .

The term "bodily harm" means "physical pain, or temporary disfigurement, or impairment of physical condition." *N.J.S.A.* 2C:3-11(e). The term "serious bodily injury" is defined at *N.J.S.A.* 2C:3-11(d) as follows:

> "Serious bodily harm" means bodily harm which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ or which results from aggravated sexual assault or sexual assault.

In the Setteducato incident, Setteducato reported that a student pointed a gun at him and placed him in fear of being shot. The students confirmed that Fa.A. pointed a cigarette lighter which was designed to look like a gun at Setteducato. Thus, respondent's representatives had

ample reason to believe that Fa.A.'s conduct fell squarely within *N.J.S.A.* 2C:12-1(a)(3), which makes it a simple assault to attempt by physical menace to put another in fear of imminent serious bodily injury.

In the Ring incident, Ring reported that D.B. kicked him twice in the face and once in the shoulder and that he was in pain as a result of the incident. This report clearly indicates that D.B. assaulted Ring by kicking three times and causing bodily injury. Evidently, respondent's representatives accepted D.B.'s claim that he was assaulted by Ring. However, there was no indication whatsoever that Ring caused bodily injury to D.B. or otherwise committed an assault against D.B.

In the Paintal incident, Paintal's report and respondent's investigation revealed that F.H. burned Paintal's hair with a cigarette lighter causing a large amount of hair to come off in Paintal's hand or fall to the floor. This circumstance could be viewed as bodily harm, an attempt to cause bodily harm or an attempt to place Paintal in fear of serious bodily injury since the burning could have spread to her scalp or face causing permanent disfigurement. Thus, respondent's representatives had ample reason to believe that an assault occurred.

In the Garrity incident, Garrity reported that W.T. pushed her to the floor and that she sustained an injury, However, this incident differs from the others in that W.T. denied that he pushed Garrity. Additionally, W.T.'s mother claimed that Garrity assaulted W.T. Evidently, Principal Lighty extended credence to W.T.'s denial and the allegation of W.T.'s mother that Garrity assaulted W.T.

With respect to the allegation that Garrity assaulted W.T., Lighty had a statement from W.T. that Garrity placed her hands on him. However, W.T.'s statement does not provide the slightest indication that W.T. suffered any bodily harm whatsoever. Under the circumstances, the notion that Garrity assaulted W.T. should have been dismissed out of hand.

In regard to Garrity's claim that she was assaulted by W.T., Lighty concluded that he had no evidence that an assault occurred. This statement cannot be accepted as accurate, since it is clear that Lighty was faced with conflicting evidence as to whether W.T. assaulted Garrity. This circumstance leads to the question as to the proper course of action when an administrator is faced with conflicting evidence as to whether an assault occurred.

A student has the right as a matter of procedural due process to a preliminary hearing prior to the imposition of a temporary suspension pending a full hearing. *R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 *N.J.Super.* 337 (Chan. Div. 1970); *Goss v. Lopez*, 419 *U.S.* 565 (1975). At the preliminary hearing, the school officials should determine whether they have reasonable cause to believe that the student committed the alleged misconduct. *R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 *N.J.Super.* at 347. The preliminary hearing may be completely informal and the student should be given the opportunity to persuade the school officials that there is a compelling reason, such as a mistake in identity, not to impose a suspension. *Id.* at 348. However, the focus of the hearing should be upon statements and any other evidence presented by the person asserting that an assault occurred. If a credible person, such as a teacher, describes circumstances that amount to an assault, the school administrator should impose a temporary suspension pending full hearing despite denials by the student in the absence of compelling circumstances as described above. Factual disputes should be resolved at the full hearing. Applying these principles to the Garrity incident, it is evident that W.T. should have been suspended pending a full hearing.

In each instance, respondent's representatives conducted a meeting either in person or by telephone with interested individuals that could be described as an informal preliminary hearing. Further, in each instance, respondent's representatives imposed a suspension. To this point, respondent's representatives complied with *N.J.S.A.* 18A:37-2.1 by imposing a suspension from school immediately consistent with procedural due process.

The statute further requires that the pupil "shall be . . . suspended . . . pending expulsion proceedings before the local board of education." In each instance, respondent

imposed a suspension for a period of ten days. The finite length of the suspension implies that the student could return to school at the end of the suspension. However, respondent's representatives determined in three instances that as a practical matter, the students would not be returning to school. In the other instance, W.T. was allowed to return to school and graduated. The question is whether respondent's approach to these incidents complied with *N.J.S.A.* 18A:37-2.1.

The use of the word "shall" in a statute is mandatory or imperative. *Knox v. Krause*, 152 *N.J.Super.* 278, 282 (Law Div. 1977). Here, respondent was mandatorily required to impose a suspension. Further, the expression "pending expulsion proceedings before the local board of education" means that the suspension remains in effect until the hearing on expulsion. However, respondent did not keep the suspension in effect until the expulsion proceeding and in fact never did schedule a full hearing. Respondent's informal approach was not consistent with the mandatory provisions of *N.J.S.A.* 18A:37-2.1. Under the circumstances, respondent did not have the option to choose some other approach that may have seemed advisable at the time.

Respondent raises two additional arguments. First, respondent argues that an amendment to *N.J.S.A.* 18A:37-2.1 allows for a suspension rather than an expulsion. Respondent reasons that in view of the amendment there is no requirement to hold an expulsion hearing.

The amended section of the statute provides that the pupil "shall be immediately suspended from school . . . pending suspension or expulsion proceedings before the local board of education." Respondent's argument is unpersuasive for two reasons. First, the substantive law in effect at the time of the incident is normally applied, and amendments are applied only prosectively. *Gibbons v. Gibbons,* 86 *N.J.* 515 (1981). Second, the amendment does not alter the requirement of *N.J.S.A.* 18A:37-2.1 that the temporary suspension remain in effect pending a proceeding before the local board of education. The amendment simply provides the option of a suspension as opposed to an expulsion. The amendment does not

provide respondent with discretion not to schedule proceedings before the local board of education. Thus, respondent would not have complied with the amended version of *N.J.S.A.* 18A:37-2.1, since it did not schedule any further proceeding and did not keep the temporary suspension in effect pending the full hearing.

Lastly, respondent argues that the matter is now moot with respect to expulsion proceedings since the students involved in the assaults are no longer in the School District. Respondent's argument is unpersuasive. First, as respondent acknowledges, Fa.A. eventually returned to school and was placed in a self-contained special education program. Second, the student who assaulted Paintal was fifteen years old at the time of the incident in April 1994 and therefore could conceivably attempt to return to school. Likewise, it cannot be said that the student who assaulted Ring can never attempt to return to school since it is not established that he would be ineligible due to age.

Finally, the Garrity incident cannot be said to be entirely moot in view of the lasting impression it seems to have made on administrators and very likely students as well. Lighty initially imposed a ten-day suspension, but it is evident that he did not really accept Garrity's version of the events as opposed to that of W.T. Even after court proceedings conclusively established that W.T. assaulted Garrity and that Garrity did not assault W.T., no action was taken against W.T. As late as the hearing in this matter on October 1995, administrators testified that Garrity was to blame for the incident because she exercised poor judgment. Moreover, the administrators' sympathy for W.T. as opposed to the teacher is not likely to be entirely lost on the other students. W.T. threatened Garrity with physical harm in front of the class and a few moments later assaulted her. The teacher never returned to Eastside High School due to her injuries, and yet the student was allowed to return to school and graduate. It seems evident that this course of events would send the wrong signal to the other students. Under the circumstances, the proceeding is not moot.

In view of all of the above, I **CONCLUDE** that respondent failed to comply with *N.J.S.A.* 18A:37-2.1 in two respects in regard to each of the four incidents. First, respondent

failed to schedule an expulsion proceeding for each student. Second, respondent failed to keep the temporary suspension of each student in effect pending the expulsion proceeding.

In addition to a determination that respondent failed to comply with *N.J.S.A.* 18A:37-2.1 in regard to the incidents in question, petitioners request an order requiring respondent to conduct expulsion hearings for the students who assaulted Setteducato, Ring, Paintal and Garrity. Further, petitioners request an order requiring respondent in the future to strictly comply with the provisions of *N.J.S.A.* 18A:37-2.1, requiring respondent to advise all of its employees, through a posting on all school bulletin boards, that it will in the future comply with all of the provisions of *N.J.S.A.* 18A:37-2.1, and requiring respondent to establish guidelines regarding staff and student physical contact, in particular when and to what extent staff must involve itself in student altercations. Lastly, petitioners request any other relief that may be appropriate.

In regard to the request for an order requiring respondent to conduct expulsion hearings, it is questionable whether such hearings will produce any significant results. However, this circumstance is without consequence in view of the mandatory nature of the expulsion hearing under the statute. Respondent must to the fullest extent possible comply with the requirements of *N.J.S.A.* 18A:37-2.1. Under the circumstances, respondent must schedule expulsion hearings for the students in question with the exception of W.T., since he has now graduated. If nothing else, the expulsion proceedings will establish the point that respondent's compliance with the provisions of *N.J.S.A.* 18A:37-2.1 is mandatory.

In view of respondent's failure to comply with *N.J.S.A.* 18A:37-2.1 in the instances *sub judice*, respondent should be ordered to strictly comply with the provisions of *N.J.S.A.* 18A:37-2.1 in the future. Further, in view of the unfortunate message which respondent's failure to comply with *N.J.S.A.* 18A:37-2.1 in the past may have sent to staff and students, respondent will be required to post an appropriate notice on all school bulletin boards stating that in the future it will strictly comply with the provisions of *N.J.S.A.* 18A:37-2.1. Finally, petitioners' request that respondent establish guidelines for physical contact between staff and

students is peripheral to this proceeding and will not be ordered herein. However, it is evident that there is a need for an educational program for administrators responsible for compliance with *N.J.S.A.* 18A:37-2.1. Respondent will be ordered to develop and implement such a program.

Accordingly, it is **ORDERED** that:

1. It is determined herein that respondent failed to comply with *N.J.S.A.* 18A:37-2.1 with respect to the incidents in question.

2. Respondent will conduct expulsion hearings vis-a-vis the students who committed assaults on Setteducato, Ring and Paintal.

3. Respondent will strictly comply with the provisions of *N.J.S.A.* 18A:37-2.1 in the future.

4. Respondent will post an appropriate notice on all school bulletin boards stating that in the future it will strictly comply with the provisions of *N.J.S.A.* 18A:37-2.1.

5. Respondent will develop and implement an education program for all administrators responsible for compliance with *N.J.S.A.* 18A:37-2.1.

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

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

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

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

Mar. 1, 1996
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

March 5, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

WITNESS LIST

For petitioners:

John Setteducato
James Ring
Balbir Paintal
Nancy Garrity
Peter A. Tirri

For respondent:

Lizzie Chase
Florence Lopas
Charles Lighty

EXHIBIT LIST

P-1	Report of John Setteducato dated March 19, 1994	Evidence
P-2	Report concerning James Ring dated March 22, 1994	Evidence
P-3	Report concerning Balbir Paintal dated April 18, 1994	Evidence
P-4	Report concerning Nancy Garrity dated March 15, 1994	Evidence
P-5	Report concerning Nancy Garrity dated March 15, 1994	Evidence
P-6	Letter dated May 4, 1994 from Peter A. Tirri to Dr. Laval S. Wilson	Evidence
P-7	Letter dated May 25, 1994 from Peter A. Tirri to Dr. Laval S. Wilson	Evidence
R-1	Undated letter from John Setteducato to Ms. Sparks and Ms. D. Smith	Identification

R-2	Report of Withdrawal for F.H.	Identification
R-3	Certification of Peter A. Tirri dated August 2, 1994	Evidence

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, New Jersey 07102
(201) 648-6066
Fax (201) 648-6124

Richard McGill
Administrative Law Judge

March 1, 1996

Mary J. Hammer, Esq.
Bucceri & Pincus
1200 Route 46
Clifton, New Jersey 07013-2440

Louis M. Flora, Esq.
Legal Department
Paterson Public Schools
33-35 Church Street
Paterson, New Jersey 07505

Re: Nancy Garrity, Thomas Gladden Balbir Paintal, James Ring, John Setteducato and the Paterson Education v. State-Operated School District of Paterson, Passaic County
OAL Dkt. No. EDU 9876-94
Agency Dkt. No. 340-8/94

Dear Counsel:

Enclosed please find an Order in regard to the above-mentioned matter.

Very truly yours,

Richard McGill
Administrative Law Judge

RMcG:am
cc: William Speziale, Deputy Clerk

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
OAL DKT. NO. EDU 9876-94
AGENCY DKT. NO. 340-8/94

NANCY GARRITY, THOMAS GLADDEN, BALBIR PAINTAL, JAMES RING, JOHN SETTEDUCATO AND THE PATERSON EDUCATION ASSOCIATION,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,

Respondent.

This matter having been opened before the Office of Administrative Law by Bucceri & Pincus, attorneys for petitioners, Mary J. Hammer, Esq., appearing, on motion for sanctions, and responsive papers in opposition to the motion having been filed by Louis M. Flora, Esq., attorney for respondent, and it appearing that:

1. The prehearing order dated January 11, 1995 in this matter required that all dispositive motions be filed by April 4, 1995.

2. Respondent filed a dispositive motion to dismiss on the basis of *N.J.A.C.* 6:24-1.2(c) on October 2, 1995.

3. Respondent unreasonably failed to comply with the prehearing order dated January 11, 1995, and therefore is subject to a sanction pursuant to *N.J.A.C.* 1:1-14.14.

4. Since April 4, 1995, Mary J. Hammer, Esq., has spent 52.25 hours preparing the case and attending hearings at the Office of Administrative law. Her normal hourly rate is $185 per hour.

5. Attorney's fees in the amount of $9,666.25 would be an appropriate sanction, if respondent's motion to dismiss were granted. In that circumstance, petitioners' attorney would unnecessarily have devoted 52.25 hours to the case.

6. In the Initial Decision in this matter, I have concluded that respondent's motion to dismiss based upon *N.J.A.C.* 6:24-1.2(c) is without merit. Under this circumstance, the 52.25 hours which petitioners' attorney devoted to the case was necessary.

IT IS therefore on this 1st day of March 1996 **ORDERED** that:

1. Petitioners' motion for sanctions is denied, provided that in the ultimate outcome of this case, respondent's motion to dismiss on the basis of *N.J.A.C.* 6:24-1.2(c) is denied.

2. In the event that in the ultimate outcome of this case, respondent's motion to dismiss on the basis of *N.J.A.C.* 6:24-1.2(c) is granted, petitioners' motion for attorney's fees in the amount of $9,666.25 is granted.

This Order may be reviewed by the Director of the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.10(k)4.

RICHARD McGILL, ALJ

NANCY GARRITY, THOMAS GLADDEN, BALBIR PAINTAL, JAMES RING, JOHN SETTEDUCATO AND THE PATERSON EDUCATION ASSOCIATION,	:	
PETITIONERS,[1]	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions, and the reply thereto, were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent State-operated School District of Paterson (hereafter, "Paterson") initially contends that the Administrative Law Judge (ALJ) failed to discuss its motion to dismiss for mootness in the initial decision, erred in failing to grant said motion, and in ordering the District to conduct expulsion hearings. (Paterson's Exceptions at p. 1) Paterson maintains, as argued before the ALJ, that, since three of the four juveniles involved in the incidents are no longer in the Paterson school system, "***the convening of expulsion hearings for students no longer in attendance is an exercise in futility.***" (*Id.* at p. 4) Instead, Paterson suggests as a prospective remedy that the District note the records of the students and preclude them from

[1] As per the initial decision, at the outset of the hearing, the portion of the petition related to Thomas Gladden was withdrawn. (Initial Decision at p. 2)

readmission, should they so attempt, unless a hearing is held. (*Id.*) Paterson further asserts, with respect to the four students, that Witness Chase and Petitioner Ring offered conflicting testimony regarding D.B.'s intent to return to school. Moreover, Paterson avers that, "***Judge McGill failed to reconcile the conflicting testimony of Ring and Chase, both of which he found as fact.***" (*Id.* at p. 3)

Petitioners counter that "the ALJ specifically addressed the issue of mootness and found, for the reasons expressed on page 20 of the initial decision, that the matter is not moot." (Petitioners' Reply at p. 1) Petitioners warrant,

> The law mandates that the hearing take place within 21 days of the assault. The evidence presented at the hearing clearly proved that the district did not follow the requirements of N.J.S.A. 18A:37-2.1. ***Now respondent proposes waiting an additional unknown period of time ***. Its reason for this position is the same tired excuse it made repeatedly at the hearing: Other people have dealt with these problems (relatives, the criminal justice system, time), so why should we have to do anything? (*Id.* at pp. 1,2)

Paterson next asserts that the ALJ's order to develop and implement an education program and to post a notice that Paterson will comply with the pertinent law is inappropriate. (Paterson's Exceptions at p. 4) Paterson argues that such relief is inappropriate since it did not fail to comply with the law. Testimony supports the conclusion, Paterson attests, that the District was preparing for expulsion hearings. To order the District to post such a notice, Paterson continues, "***is reminiscent of the parochial practice of having a child who chewed gum wear it on his nose. Surely, we have progressed beyond such forms of discipline." (*Id.* at p. 5)

Petitioners assert, however, that the ALJ's remedy was appropriate and necessary, inasmuch as the poor judgment of the administrators concerned the ALJ, and "***caused him to believe that the administrators involved needed additional education regarding their obligations

under N.J.S.A. 18A:37-2.1." (Petitioners' Reply at p. 2) Petitioners liken this remedy to cases which arise under the New Jersey Employer-Employee Relations Act "***under which employers are frequently directed to post notices stating that they will comply with the law once they have been found guilty of an unfair labor practice." (*Id.*)

Paterson further excepts to the ALJ's ruling that the within petition should not be dismissed for failure to comply with the 90-day rule set forth under *N.J.A.C.* 6:24-1.2(c). (Paterson's Exceptions at p. 5) As argued before the ALJ, Paterson maintains that the Petition of Appeal should have been dismissed since it was not filed "***within 90 days of the occurrence or event which was the subject of their petition for relief." (*Id.*) Paterson asserts that petitioners had numerous occasions to discover the district's intent with respect to the conduct of the expulsion hearings. Paterson argues,

> In that all of the events occurred no later than April of 1994, it is clear that Petitioners, who had the opportunity on four separate occasions to obtain an answer to their alleged inquiries, sat on their hands with respect to the filing of the Petition. (Id. at p. 6)

Petitioners confirm that the Paterson Education Association (PEA) testified that it requested a response from Paterson with respect to its plans to conduct expulsion hearings on the four students. However, Paterson never responded to the PEA. Further, petitioners aver that Paterson presented no evidence at the hearing that it did not receive the PEA's request for information. Nor, petitioners continue, does Paterson "***deny that it made no effort to inform anyone (the teaches [sic] involved, the PEA, the students) whether or not it intended to hold any expulsion hearing in any of the cases." (Petitioners' Reply at p. 3)

Paterson next argues that the ALJ erred in setting forth a separate Order concerning sanctions. (Paterson's Exceptions at p. 6) Here, Paterson asserts that the ALJ should

have included its Order on the motion for sanctions in the initial decision, so as to be reviewable by the Commissioner. Petitioners counter that Paterson cites no case law to support its position that such an Order is not reviewable by the Commissioner; they believe that Paterson's assertion is "simply not true." (Petitioners' Reply at p. 3) Petitioners assert that the Commissioner has the authority to review the Order as well as the initial decision.

Finally, Paterson argues that the ALJ erred in determining that the amount of attorney fees to be awarded, were the Commissioner to grant Paterson's motion to dismiss pursuant to *N.J.A.C.* 6:24-1.2(c), should be based upon the hourly rate of petitioners' counsel, rather than the actual rate charged to the litigant pursuant to contract. (Paterson's Exceptions at p. 7) Paterson contends that petitioners' counsel failed to disclose the contractual rate actually being billed to petitioners, and merely offered the firm's hourly rate. In response, petitioners argue that "[t]he ALJ followed the current case law regarding the award of attorney fees *** to successful attorneys," (Petitioners' Reply at p. 3) and claim that Paterson offers "***no case law in support of its position that petitioners may only be awarded out-of-pocket expenses." (*Id.*)

Upon careful and independent review of the record, which included transcripts of the hearing in this matter, the Commissioner determines to accept the findings and conclusions in the initial decision of the ALJ, with minor modification as to the relief set forth below.

Initially, the Commissioner rejects, for the reasons set forth in the initial decision, Paterson's contention that this matter should be time-barred pursuant to *N.J.A.C.* 6:24-1.2(c). (Initial Decision at pp.13-15) The Commissioner further concurs with the ALJ's conclusion that Paterson failed to comply with *N.J.S.A.* 18A:37-2.1 in two respects; Paterson failed to schedule an expulsion proceeding for each student and also failed to keep the temporary suspension of each student in effect pending the expulsion hearing. (Initial Decision at pp. 20, 21) The

Commissioner agrees that, with respect to Petitioners Setteducato, Ring and Paintal, the Paterson administration had ample reason to believe that an assault within the definition of *N.J.S.A.* 2C:12-1(a)(3) occurred, as the teachers reported. (Initial Decision at pp. 16, 17) Moreover, with respect to the alleged conflicting evidence present in the case of Petitioner Garrity, the ALJ aptly instructs,

> ***If a credible person, such as a teacher, describes circumstances that amount to an assault, the school administrator should impose a temporary suspension pending full hearing despite denials by the student in the absence of compelling circumstances as described above. Factual disputes should be resolved at the full hearing. Applying these principles to the Garrity incident, it is evident that W.T. should have been suspended pending a full hearing. (*Id.* at p. 18)

As to Paterson's contention that the ordered expulsion proceedings are merely an "exercise in futility" since three of the four students are no longer in the District, the Commissioner finds Paterson's position unpersuasive. As set forth by the ALJ, those students may, if still of eligible age and domiciled in the District, attempt to return to the District. Paterson's proposed remedy to conduct a hearing, should the students attempt to return, is simply untenable in view of the circumstances in this case.[2]

The Commissioner does not consider the parties' exception arguments with respect to the ALJ's Order, since sanctions under *N.J.A.C.* 1:1-14.14, including the ordering of attorney's fees, are not reviewable by the Commissioner, but rather by the Director of the OAL, pursuant to *N.J.A.C.* 1:1-3.2(c)4.

Finally, as to the remedy accorded in this matter, the Commissioner orders that Paterson: (1) Failed to comply with *N.J.S.A.* 18A:37-2.1 with respect to the incidents in question

[2] The Commissioner herein notes that, to the extent there may exist factual inconsistencies in testimony with respect to the students' intent or actual attempts to return to Paterson, resolution of such discrepancy is immaterial to the outcome of this matter.

(Initial Decision at p. 22); (2) Will immediately conduct expulsion hearings vis-à-vis the students who committed the assaults on Setteducato, Ring and Paintal, with due observance to state and federal guidelines pertaining to classified students (*Id.*); (3) Will henceforth strictly comply with the provisions of *N.J.S.A.* 18A:37-2.1 *(Id.)*; (4) Will review its policy and procedures adopted pursuant to *N.J.S.A.* 18A:37-2.1, revise said policy and procedures as necessary, incorporating established guidelines for staff and student physical conduct, and will submit the policy and procedures to the Director, Urban Education and Policy in the Department of Education for review within 120 days of the date of this decision; (5) Will ensure that all staff and students are provided a copy of, or ready and reasonable access to, the revised policy and procedures adopted pursuant to *N.J.S.A.* 18A:37-2.1 at or before the start of the 1996-97 school year; and (6) Will promptly develop and implement an education program for all administrators responsible for compliance with *N.J.S.A.* 18A:37-2.1. *(Id.)*

Accordingly, the initial decision of the OAL is affirmed, with modifications to the remedy ordered, as set forth above. The State-operated School District of Paterson is directed to comply with the above-specified orders. A copy of this decision shall be forwarded to the Director, Urban Education and Policy, for review.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 17, 1996

DATE OF MAILING APRIL 17, 1996

150-96

150-96

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In 1991, the Paterson Diocesan Schools closed two nonpublic schools in the City of Paterson and relocated the students to the Pope John Paul Elementary School in Clifton. The relocation was intended to be temporary. Four years later, Petitioning Board Clifton sought Commissioner's determination as to whether it or respondent District Paterson was responsible for providing Chapter 192-193 services to nonpublic students attending Pope John Paul II Elementary School in its District pursuant to the provisions of *N.J.S.A.* 18A:46-1 *et seq.*, 18A:46-19.1 *et seq.* and 18A:46A-1 *et seq.* Paterson Diocesan Schools acted as a participant in the matter.

In the absence of specific indication of legislative intent which supports petitioner's claim, the Commissioner determined that Clifton is the district responsible for identification, examination and classification of handicapped pupils in the Pope John Paul II Elementary School (*N.J.S.A.* 18A:46-6 and 46-8 and *N.J.A.C.* 6:28-6.1 *et seq.*) and for providing remedial and auxiliary services to those students as specifically required by *N.J.S.A.* 18A:46-19.1 *et seq.* and 46A-1 *et seq.* Commissioner emphasized that Clifton's obligation to provide such services is limited to the amount of state aid which it receives for same.

APRIL 18, 1996

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, Clifton Board of Education, Anthony V. D'Elia, Esq.

For Respondent, State-operated School District of the City of Paterson, Louis M. Flora, Esq.

For Participant, Paterson Diocesan Schools, (Dwyer, Connell & Lisbona) Kenneth F. Mullaney, Jr., Esq., of Counsel

This matter comes before the Commissioner of Education by Petition of Appeal for Declaratory Ruling, pursuant to *N.J.A.C.* 6:24-2.1, filed by Petitioner, Board of Education of the City of Clifton ("Clifton"), on July 25, 1995. Clifton requests that the Commissioner construe the provisions of *N.J.S.A.* 18A:46-1 *et seq.*, 18A:46-19.1 *et seq.* and 18A:46A-1 *et seq.*, and determine and declare that it is not required to provide Chapter 192 and Chapter 193 services to students attending the Pope John Paul II Elementary School in its District. (Petition for Declaratory Ruling at p. 4)

Respondent, State-operated School District of the City of Paterson ("Paterson"), filed its Answer on August 8, 1995. By correspondence from the Department dated August 17, 1995, the parties were informed that the Paterson Diocesan Schools, initially made a respondent, would be severed from this matter. However, the parties retained the right to request that the Paterson Diocesan Schools

participate in these proceedings, and pursuant to a decision subsequently made by the ALJ below, the Paterson Diocesan Schools submit arguments herein as a participant.

While this matter was initially transmitted to the Office of Administrative Law (OAL) for determination, in accordance with *N.J.A.C.* 1:1-3.3 and was docketed under OAL DKT. NO. EDU 9498-95, the Commissioner subsequently requested, on December 1, 1995, that the matter be returned to the Department of Education for determination. The Commissioner found that the nature of the dispute herein was such that resolution prior to the final setting of the 1996-97 school budget, would be appropriate, if possible, and inasmuch as there did not appear to be factual disputes necessitating findings by an administrative law judge, it was in the best interest of the parties for the Commissioner to render a determination directly.

By letter dated February 29, 1996, the parties and participant were duly informed that the file had been returned from the OAL and the Commissioner would render a summary decision in this matter. Thus, parties and participant were invited to submit primary and reply briefs in accordance with a designated schedule. Having received primary and reply briefs from both parties, and having received a primary brief from participant, the record in this matter closed on March 19, 1996.

BACKGROUND

In 1991, the Paterson Diocesan Schools closed two nonpublic schools in the City of Paterson (St. John the Cathedral and St. Joseph School), and relocated the students from those two elementary schools to the Pope John Paul II Elementary School in Clifton. The relocation was intended to be temporary. Accordingly, on May 20, 1992, Commissioner John Ellis, granted a request that Paterson remain the designated location of the two nonpublic elementary schools relocated in Clifton, for funding of any entitlement programs. The letter further provided for an extension of the agreement until June 30, 1995 "***if by June 30, 1993, the Paterson Diocesan Schools demonstrated to the Commissioner that it has secured or has an option to buy a building(s) in Paterson to which the relocated

students will return no later than September 1, 1995 ***" (Paterson's Brief, Exhibit A, Letter of August 2, 1993 from Commissioner Fitzgerald, citing Commissioner Ellis' letter)

On August 2, 1993, Commissioner Mary Lee Fitzgerald approved an extension of the agreement to June 30, 1995, contingent upon the Paterson Diocesan Schools' diligent search for a suitable instructional facility in Paterson. *(Id.)* Acting Commissioner of Education Richard DiPatri approved an extension of the agreement for an additional year, until July 1996. To date, no suitable facility in Paterson has been found.

POSITIONS OF THE PARTIES AND PARTICIPANT

Petitioner, Board of Education of the City of Clifton

Clifton initially contends that Title 18A should not be literally construed so as to require Clifton to provide Chapter 192 and 193 services to students at the Pope John Paul II Elementary School when no Clifton residents are able to attend the school. Clifton asserts, that under the unique circumstances presented in this matter, it would be unreasonable to apply Title 18A literally; such application would frustrate the legislative intent to require local boards to provide educational services to students residing in the district. (emphasis in text) (Clifton's Brief at p. 3)

Clifton notes that *P.L.* 1977, *c.* 192, embodied in *N.J.S.A.* 18A:46A-1 *et seq.*, "authorizes the provision of auxiliary services to pupils enrolled full time in nonpublic elementary and secondary schools. Those auxiliary services are compensatory education, English as a second language and home instruction." *(Id.)* Further, *N.J.S.A.* 18A:46A-3 establishes that "...each local Board of Education of a district in which a nonpublic school is located shall provide for the receipt of auxiliary services by children between the ages of 5 and 20 residing in the state and enrolled full time in non-public school located within the district." *(Id.)*

Clifton further observes that *P.L.* 1977, *c.* 193, *N.J.S.A.* 18A:46-19.1 *et seq.*, as amended, authorizes the provision of remedial services, including examination, classification, supplementary

instruction and speech correction, for handicapped pupils enrolled full time in nonpublic elementary schools. *(Id.* at p. 4)

With respect to the services authorized by *N.J.S.A.* 18A:46A-3, Clifton argues that a 1984 amendment specifically deleted the requirement that the provision of auxiliary services would be based upon the *residency* of the student, and instead implemented the current "host district" provision. *(Id.)* However, Clifton argues that, had the Legislature been presented with the circumstances herein, it "***would have provided some type of reasonable relief for the host district so as to prevent an absurd result." *(Id.)*[1]

Clifton cites a series of cases to advance its position that one must construe a statute in a manner which gives effect to Legislative intent, and that statutes are to be read sensibly rather than literally, with the presumption that the legislative intent is consonant with reason. *(Id.* at p. 6) Citing *Schierstead v. Brigantine*, 29 *N.J.* 220, 231 (1959), Clifton attests, "Where a *literal* reading of the statute leads to absurd consequences, the Court must restrain the words and seek the true legislative intent." (emphasis in text) Clifton affirms that although a literal reading of Title 18A

> ***would seem to impose the burden of providing for the receipt of Chapter 192-193 services upon the local district, it cannot be argued that the Legislature would have considered it to be a "reasonable approach" to require the host district to provide for the receipt of auxiliary services by 800 students who reside out-of-district and who attend a non-public school which is closed to residents of the host district.*** (*Id.* at pp. 6,7)

Moreover, Clifton maintains that a literal reading is not consistent with Title 18A's "general reliance upon the concept of residency" to allocate responsibility for the provision of educational services for children in public schools, nor is it consonant with the Federal Law for Individuals with Disabilities Education Act mandating that a nonpublic school pupil's district of residence bears responsibility

[1] Anticipating that Paterson would argue that Clifton is already providing for the receipt of auxiliary services by nonresidents in eight other nonpublic schools located in the City of Clifton, Clifton asserts that the "vast majority" of the students in those eight nonpublic schools reside in Clifton. Thus, providing services pursuant to *N.J.S.A.* 18A:46-3 and *N.J.S.A.* 46-19.1 is not unreasonable. (Clifton's Brief at p. 8)

"***for all special education services beyond those provided by local school districts under Chapter 192-193." *(Id.* at p. 7)

Clifton next argues, that assuming one construes the Act literally, *N.J.S.A.* 18A:46-19.1 *et seq.*, requires that the district within which the child resides provide the services so authorized. Clifton avers,

> ***Boards of Education are required to provide for the services of a certified speech and language specialist for a child attending a non-public school located within the school district and who is classified pursuant to *N.J.S.A.* 18A:46-8. *** In addition, a Board of Education is required to furnish transportation to any children found to be handicapped under the Chapter. ***
>
> Significantly, a school district is only required to provide for the examination and classification of children under Chapter 193 if the child actually resides in district and is enrolled in a non-public school located within that district. *** (emphasis in text) (*Id.* at p. 9, citing to *N.J.S.A.* 18A:46-6 and 46-8)

Clifton reasons, therefore, that it is not required to provide Chapter 193 services for children attending Pope John Paul II Elementary School since none of those children resides in Clifton and such children are, therefore, not required to be examined and classified by Clifton, in accordance with *N.J.S.A.* 18A:46-8. Moreover, Clifton continues, since those children attending Pope John Paul II Elementary School do not reside in Clifton, "**the provisions of *N.J.S.A.* 18A:46-19 and 46-23 do not apply, since the children are not '...found to be handicapped under the Chapter,' as required by *N.J.S.A.* 18A:46-23." *(Id.* at pp. 9, 10)

In response to Paterson's arguments, *infra*, Clifton counters that, on the one hand, Paterson relies on the "strict language" of the statutes when citing to the provision of Chapter 192 services, yet, Clifton asserts, Paterson "***ignores the express language contained in *N.J.S.A.* 18A:46-6, 46-8 and 46-19.4.***" (Clifton's Reply Brief at p. 1) Clifton continues,

> *N.J.S.A.* 18A:46-6 specifically provides that a Board of Education is required to "...provide for the identification of any children *** *residing in the district and* enrolled in the public schools of the state or in a non-public school located in the district..." (emphasis added). *N.J.S.A.*

> 18A:46-8 specifically provides that "...[e]ach Board of Education shall provide for the examination and classification of each child residing in the district and identified pursuant to *N.J.S.A.* 18A:46-6..." (emphasis added). (*Id.* at p. 2)

Clifton maintains that Paterson "conveniently ignores" the residency requirements cited above. Further, Clifton observes that *N.J.S.A.* 18A:46-19.4 authorizes the services of a speech language specialist for children attending nonpublic schools "***located in the school district and *classified pursuant to N.J.S.A. 18A:46-8.*" (emphasis in text) (*Id.* at p. 2, citing *N.J.S.A.* 18A:46-19.4) Thus, Clifton reasons, "***[b]y its very language *** *N.J.S.A* 18A:19.4 could not apply to any of those children attending Pope John Paul II Elementary School***." (*Id.*)

Accordingly, Clifton urges that the Commissioner declare that it is not required to provide for the receipt of services authorized by Chapters 192-193 to those students attending the Pope John Paul II Elementary School.

Respondent, State-Operated School District of the City of Paterson

Paterson contends that Clifton, in its Petition for Declaratory Ruling, has failed to state a claim upon which relief may be granted. As Paterson notes, the petition requests, "...that the Commissioner construe the provisions of *N.J.S.A.* 18A:46-1 *et seq.* (sic), 18A:46-19.1 *et seq.* and *N.J.S.A.* 18A:46A-1 *et seq.* and determine and declare that the Petitioner is not required to provide Chapter 192-193 services to Pope John Paul II." (Paterson's Brief at p. 5, citing from Petition for Declaratory Ruling at p. 4) Paterson reviews the language of the pertinent statutes[2] and argues that they clearly establish that Chapter 192-193 services are to be provided by the district in which the nonpublic school is located. Accordingly, there is nothing for the Commissioner to "construe." (*Id.* at p. 8) Further, Paterson states, "The Commissioner is not empowered to contradict the clearly expressed statutory language of the above cited laws as such a change may only be effected legislatively." (*Id.*)

[2] *N.J.S.A.* 18A:46-6; 18A:46-19.4; and 18A:46A-3

Paterson thus reasons that the relief requested is beyond the authority of the Commissioner under *N.J.S.A.* 18A:6-9.

Additionally, Paterson argues that Clifton is entitled to state aid to pay for the provision of Chapter 192-193 services. Although Clifton claims it has not yet received such aid, Paterson attests that the Commissioner can remedy this situation by ordering that all Chapter 192-193 aid to be received by Paterson be instead directed to Clifton. Paterson further observes that, with respect to Chapter 192 services, as per *N.J.S.A.* 18A:46A-15, "***the provision of services is limited to the aid received from the state ***." (*Id.*) Paterson asserts that it has likewise negotiated for the provision of Chapter 193 services through an outside agency and it is contractually obligated to pay no more for those services than it receives in state aid. Thus, Paterson reasons,

> ***the Commissioner can order that proposed aid for Chapter 192-193 services for PJP students for the 1996-1997 year be remitted to Petitioner Clifton, subject to adjustment. The Paterson district can likewise permit the Clifton district to maintain the same contractual arrangement for all Chapter 192-193 services at PJP. (*Id.* at p. 9)

Finally, Paterson contends that *N.J.S.A.* 18A:46-8 requires that Clifton determine the location for the examination and classification of the students at Pope John Paul II Elementary School. (*Id.*) Paterson interprets this statute to, first, provide for examination and classification services to students who are residents of the district, with the exception that the board of education of a vocational school district must provide for such services for each child attending the county vocational school on a full-time basis, and who are identified pursuant to *N.J.S.A.* 18A:46-6. Next, as for the examination and classification of nonpublic school children, Paterson argues that the statute places clear responsibility upon Clifton, as the local board of education in which the nonpublic school is located, for determining the place for such evaluation and classification services. Thus, Paterson contends "[i]t would be an absurdity to attempt to 'construe' a statute in derogation of its clear language as Petitioner requests be done in this instance." (*Id.* at p. 10)

In reply to arguments advanced by Clifton, Paterson challenges, upon information and belief, that

> ***attendance at PJP is not *** barred to residents of Petitioner Clifton *per se*, but is limited to *parishioners* of the two Paterson churches, St. John's and St. Joseph's. Accordingly, Clifton residents who wish to become parishioners of either of these two churches could also be admitted to PJP. This practice is relatively common within the Archdiocese of Newark, where, due to declining enrollments, parochial schools have been consolidated and parishioners of the churches whose schools were consolidated are permitted to attend the consolidated schools even though the consolidated school may be located outside the city or county in which the church is located. (Paterson's Reply at pp. 1, 2)[3]

Paterson suggests that there are students currently attending Pope John Paul II Elementary School who are receiving Chapter 192-193 services and are not residents of Paterson and, in some instances, are not residents of Clifton. This situation, Paterson continues, "raises the question as to admission policies and the claims of both the *** Diocese and Petitioner, Clifton, that no one but a resident of Paterson does or may attend PJP." *(Id.* at p. 2) Nevertheless, Paterson concludes that the admissions policy of the Diocese is irrelevant to the purposes of this action. (*Id.*)

Paterson further counters that Clifton provides no authority for its position that a legislative directive which is clear on its face "***may be abrogated by the Commissioner of Education" because Clifton believes the application of such law in this instance is "absurd." (*Id.*) Rather, Paterson maintains

> ***there are sound reasons to have all legislatively mandated services provided to students within the physical boundaries of a school district by that same school district, not the least of which are efficiency and economy.*** (*Id.* at p. 3)

[3] Clifton's reply brief specifically refutes this claim. Clifton states, "Contrary to Paterson's assertions (and as established by the June 1995 correspondence of the New Jersey Catholic Conference (attached as Exhibit C to Petitioner's Primary Brief)), admission to Pope John Paul II Elementary School is denied to any Clifton resident." (Clifton's Reply Brief at p. 3)

Paterson also notes that it is appropriate that the Commissioner of Education take judicial notice of the fact that the Department of Education has interpreted the operative statutes to place responsibility for providing Chapter 192-193 services with the district in which the nonpublic school is located. Finally, Paterson reminds Clifton that the prior relief afforded, whereby Paterson was responsible for providing Chapter 192-193 services to Pope John Paul II students, was "extraordinary" and was permitted only because the students were expected to be in the City of Clifton on an interim basis. (*Id.*)

Participant, Paterson Diocesan Schools

It is the position of the Paterson Diocesan Schools that, inasmuch as the "vast majority" of students attending Pope John Paul II Elementary School are residents of Paterson, the responsibility for providing Chapter 192-193 services should remain with Paterson. (Paterson Diocesan School's Primary Brief at p. 1) In support of its position, Paterson Diocesan Schools attaches copies of the following: Paterson Diocesan Superintendent of Schools Frank A. Petruccelli's correspondence of June 6, 1995, addressed to Commissioner Klagholz; Mr. Petruccelli's correspondence of June 13, 1995, addressed to Mayor Pascrell; Mr. Petruccelli's correspondence dated June 22, 1995, addressed to Deputy Commissioner DiPatri; New Jersey Catholic Conference's Associate Director for Education Dr. George V. Corwell's correspondence of June 26, 1995, addressed to Ms. Michelle Doyle of the United States Department of Education; and Mr. Petruccelli's correspondence of June 28, 1995, addressed to Ms. Doyle. Essentially these letters avow that Paterson's retention of responsibility for providing Chapter 192-193 services is in the best interests of the students attending Pope John Paul II, and that such responsibility is consistent with legislative intent.

DETERMINATION

Upon careful review of the arguments presented in this matter, the Commissioner initially affirms that the Federal Individuals with Disabilities Education Act places responsibility for ensuring that all handicapped children *residing* within the jurisdiction of the local educational agency

who are in need of special education and related services are identified, located and evaluated. (emphasis added). (34 *C.F.R.* Part 300, Reg. 300.220) New Jersey statute and State Board of Education regulations are in accord.

Where, however, a parent unilaterally places a child in a nonpublic school, then the pertinent law states,

> Each board of education *** shall provide for the identification of any children between the ages of five and 21 residing in the district and enrolled in the public schools of the state *or in a nonpublic school located in the district* ***. (emphasis added) (*N.J.S.A.* 18A:46-6)

Further, contrary to Clifton's assertion, the examination and classification of said nonpublic school child "***shall be in a location determined by the local board of education *of the district in which the nonpublic school is located* ***."[4] (emphasis added) *(N.J.S.A.* 18A:46-8) As established by *N.J.A.C.* 6:28-6.1 *et seq.*, the district in which the nonpublic school is located must provide for, inter alia, "[i]dentification, evaluation, determination of eligibility, development of individualized education programs and provision of speech and language services, home instruction and supplementary instruction ***" *(N.J.A.C.* 6:28-6.2(a)) Regulation also provides, in pertinent part,

> The district board of education in which the nonpublic school is located shall provide to nonpublic school pupils the programs and services required by this subchapter by itself, or through joint agreements with other district boards of education or through contracts with educational services commissions or with clinics and agencies approved under *N.J.A.C.* 6:28-5. *** *(N.J.A.C.* 6:28-6.1(b))

> When the provision of programs and/or services under this subchapter requires transportation, or the maintenance of vehicular classrooms, the board of education of the district in which the nonpublic school is located shall provide the transportation and maintenance and the cost shall be paid from State aid received under this subchapter by the district board of education. (*N.J.A.C.* 6:28-6.2(i))

[4] It is herein noted that the italicized portion of the statute, above, was specifically introduced by 1984 amendment. Both the Senate Education Committee and the Assembly Education Committee Statements affirm, "Under this bill, the responsibility for providing for the identification of handicapped pupils enrolled in nonpublic schools will rest with the district in which the nonpublic school is located, rather than with the district of residence of the pupil. The intention is to simplify the recordkeeping and the procedures involved." (See S525)

P.L. 1977, *c.* 192 was enacted "***to insure that the State shall furnish on an equal basis auxiliary services to all pupils in the State in both public and nonpublic schools." (*N.J.S.A.* 18A:46A-1) Similarly, *P.L.* 1977, *c.* 193 was enacted "***to require that the State and local communities identify and provide remedial services for handicapped children in both public and nonpublic schools." (*N.J.S.A.* 18A:46-19.1) While the general rule for the provision of services to the handicapped relies upon student residency, *N.J.S.A.* 18A:46A-1 *et seq.* and *N.J.S.A.* 18A:46-19.1 *et seq. specifically* place responsibility for the provision of auxiliary and remedial services for pupils in nonpublic schools with the public district in which the nonpublic school is located.[5] To the extent that the services determined to be necessary to the child's education go *beyond* those which are authorized by these statutes to be offered by the local district to the nonpublic school student, then responsibility lies with the district of residency.[6]

Clifton asserts that Title 18A's "general reliance upon the concept of residency" should be determinative to a decree that it bears no responsibility for providing the students in Pope John Paul II with Chapter 192 and 193 services. (Clifton's Brief at p. 7) However, the Commissioner finds Clifton's arguments to be untenable in view of the clear and unambiguous language in *N.J.S.A.* 18A:46A-1 *et seq.* and *N.J.S.A.* 18A46-19.1 *et seq.*, together with their accompanying regulations (*N.J.A.C.* 6:28-6.1 *et seq.*) and statements of legislative intent. Where there is a conflict between general and specific provisions of a statute, the specific provisions will control. *Wilson v. Unsatisfied Claim and Judgment Fund Bd.*, 109 *N.J.* 271, 278, (1988), citing *Maressa v. New Jersey Monthly*, 89 *N.J.* 176, 195 (1982), *cert. denied*, 459 *U.S.* 907, 103 *S. Ct.* 211, 74 *L.Ed.2d* 169 (1982). The Commissioner further observes,

> ***Ordinarily, we derive a statute's meaning by first looking to its plain language. *** If the language's meaning is clear and unambiguous, it will be given effect "absent any *specific* indication of legislative intent to the contrary."***

[5] As Clifton correctly notes, this provision was effected by statutory amendment in 1984.

[6] "The district of residence, as required by Federal law and regulation, shall maintain responsibility for providing a free, appropriate public education for pupils enrolled in nonpublic schools." (*N.J.A.C.* 6:28-6.1(a))

> Moreover, we presume that the Legislature is familiar with existing judicial statutory interpretations. *** *Chase Manhattan Bank v. Josephson*, 135 *N.J.* 209, 225, 227 (1994)

Thus, in the absence of specific indication of legislative intent which supports Clifton's claim, the Commissioner declines to find that application of the plain meaning of the aforementioned statutes to the matter herein would effectuate an "absurd" result, as Clifton contends.

Accordingly, the Commissioner determines that Clifton is the district responsible for identification, examination and classification of handicapped pupils in the Pope John Paul II Elementary School (see *N.J.S.A.* 18A:46-6, *N.J.S.A.* 18A:46-8; and *N.J.A.C.* 6:28-6.1 *et seq.*) and for providing remedial and auxiliary services to those students as specifically required by *N.J.S.A.* 18A:46-19.1 *et seq.* and *N.J.S.A.* 18A:46A-1 *et seq.*[7] In so doing, the Commissioner emphasizes that Clifton's obligation to provide such services is limited to the amount of state aid which it receives for same. (See *N.J.S.A.* 18A:46-19.8 and *N.J.S.A.* 18A:46A-15.) In view of the fact that budgets have already been fixed for the 1996-97 school year, the Commissioner directs the Division of Finance to pay to Clifton the funding anticipated by Paterson for provision of the above-specified services. Additionally, the parties are directed to review their respective applications for Chapter 192 and 193 funding for the 1996-97 school year, and to amend, as necessary, those applications to be consistent with the Commissioner's determination herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[7] The Commissioner herein notes that, to the extent a factual dispute may exist between the parties as to the admission policies of the Paterson Diocesan Schools, *supra* at footnote 3, said dispute is immaterial to the within matter and does not require resolution in this context.

APRIL 18, 1996

DATE OF MAILING APRIL 18, 1996

150-96

C #150-96
SB # 38-96

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

PETITIONER-APPELLANT,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 18, 1996

For the Petitioner-Appellant, Anthony V. D'Elia, Esq.

For the Respondent-Respondent, Louis M. Flora, Esq.

For the Participant, Dwyer, Connell & Lisbona (Kenneth F. Mullaney, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We, like the Commissioner, stress that the Clifton board's obligation to provide Chapter 192 and 193 services to students attending the Pope John Paul II Elementary School in the district is limited to the amount of State aid which it receives for the provision of such services.

September 4, 1996

Date of mailing SEP 06 1996

151-96

LESTER W. HORTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL TECHNICAL SCHOOLS, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 18, 1996

OAL DKT. NO. EDU 9749-94

LESTER W. HORTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL TECHNICAL SCHOOLS, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1996

DATE OF MAILING APRIL 18, 1996

152-96 SEC

C #152-96SEC
SB # 33-96

SCHOOL ETHICS COMMISSION,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
FRANK A. SPEZIALI, JR., BOARD MEMBER, GLASSBORO BOARD OF EDUCATION, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 18, 1996

Decision on motion by the Commissioner of Education, April 24, 1996

For the Petitioner-Respondent, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Hannold, Marshall & Becker (Walter L. Marshall, Jr., Esq.)

The State Board of Education grants the request of the parties to remand this matter to the Commissioner of Education for resolution and/or reconsideration of the penalty imposed upon respondent in light of facts discovered subsequent to the Commissioner's April 18, 1996 decision. We stress, however, that only the School Ethics Commission may determine whether probable cause exists to credit the allegations in the complaint and, if so, whether the alleged conduct constitutes a violation of the School Ethics Act. N.J.S.A. 18A:12-29(b) and (c). The Commissioner's

8/7/96

jurisdiction is limited to reviewing the sanction, if any, to be imposed following the finding of a violation by the Ethics Commission. N.J.S.A. 18A:12-29(c).

August 7, 1996

Date of mailing AUG 09 1996

153-96

153-96

M.C., on behalf of her minor son, D.C., :

PETITIONER, :

:

V. :

BOARD OF EDUCATION OF THE BLACK HORSE REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY, :

RESPONDENT. :

:

COMMISSIONER OF EDUCATION

DECISION

APRIL 18, 1996

OAL DKT. NO. EDU 577-96

M.C., on behalf of her minor son, D.C., :

PETITIONER, :

: COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE BLACK HORSE REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY, :

RESPONDENT. :

:

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1996

DATE OF MAILING APRIL 18, 1996

154-96

154-96

GINA M. BLAESSER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 18, 1996

OAL DKT. NO. EDU 3068-94

GINA M. BLAESSER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1996

DATE OF MAILING APRIL 18, 1996

155-96

155-96

B.B. and L.B., on behalf of their minor child, T.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 18, 1996

OAL DKT. NO. EDU 6881-95

B.B. and L.B., on behalf of their minor child, T.B.,

PETITIONERS,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1996

DATE OF MAILING APRIL 18, 1996

156-96

156-96

IN THE MATTER OF THE TENURE	:	
HEARING OF JAROSLAW RATYCZ,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF METUCHEN,	:	DECISION
MIDDLESEX COUNTY.	:	
_____	:	

APRIL 19, 1996

IN THE MATTER OF THE TENURE	:	
HEARING OF JAROSLAW RATYCZ,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF METUCHEN,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

For the Board, James E. Stahl, Esq.

This matter having been opened before the Commissioner of Education on December 12, 1995 through certification of tenure charges of unsatisfactory conduct, unbecoming conduct, unprofessional conduct and insubordinate conduct against respondent, a custodial staff member in the employ of the Board of Education of the Borough of Metuchen; and

The Commissioner having directed respondent by two notices[1] and by letter, dated January 29, 1996, sent via regular and certified mail,[2] to file an Answer to the charges against him; and

Having been informed by Counsel to the Board by letter, dated January 24, 1996, that respondent's father was not accepting mail for respondent at respondent's last known

[1] Dated December 14, 1995 and January 18, 1996.
[2] Regular and certified mail letters were addressed and sent to 157 Vineyard Road, Edison, New Jersey and were ultimately returned unclaimed.

address (Edison, New Jersey), and that the Board was advised that respondent was residing at the Marlboro State Psychiatric Hospital; and

Copies of the letter of January 29, 1996 were, therefore, sent, via regular and certified mail, to the Marlboro State Psychiatric Hospital; and

The certified mail receipt having been returned to the Department of Education evidencing receipt at the Marlboro State Psychiatric Hospital on February 1, 1996 of the letter, dated January 29, 1996; and

As of this date, neither respondent nor any attorney on his behalf having filed an Answer to the tenure charges against him and each count of the charges against respondent having been deemed to be admitted; now therefore

IT IS ORDERED this 19th day of April 1996 that summary judgment shall be granted to the Board and that respondent shall be dismissed from his tenured position as a custodian in the District's employ as of the date of this decision.

COMMISSIONER OF EDUCATION

APRIL 19, 1996
DATE OF MAILING APRIL 19, 1996

158-96

158-96

IN THE MATTER OF THE TENURE	:	
HEARING OF JUDITH RUSH,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF COMMERCIAL,	:	DECISION
CUMBERLAND COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of incapacity and other just cause against respondent teacher.

ALJ determined that the parties had reached an amicable settlement of their differences in January 1994, prior to certification of the tenure charges. The settlement terms and conditions were transmitted from respondent's attorney to the Board's attorney and were explicit and unambiguous. The settlement included respondent's resignation from her tenured teaching position.

Commissioner concurred with the findings and conclusion of the ALJ and adopted them as his own. The parties' settlement agreement was held to be in full force and effect and the tenure charges were dismissed.

APRIL 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7181-94

AGENCY REF. NO. 170-5/94

IN THE MATTER OF THE TENURE HEARING OF JUDITH RUSH, SCHOOL DISTRICT OF THE TOWNSHIP OF COMMERCIAL, CUMBERLAND COUNTY,

---

John T. Barbour, Esq., for petitioner, Board of Education

Carol H. Sapakie, Esq., for respondent, Judith Rush, (Selikoff & Cohen, attorneys)

Record Closed: August 29, 1995 Decided: March 4, 1996

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Township of Commercial (Board) certified tenure charges to the Commissioner of Education (Commissioner), pursuant to N.J.S.A. 18A:6-10 to -18.1, charging that respondent Judith Rush, a tenured teaching staff member, with incapacity and other just cause, due to excessive and prolonged absence from her employment position, among other things. The Board seeks to have respondent removed from her tenured position. Respondent

denies the Board's allegations alleging procedural deficiencies in the Board's charges against her together with the affirmative defense that the Board's action is in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-4.1 and its related provisions pursuant to N.J.A.C. 13:13-2.5.

This matter was transmitted to the Office of the Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was held on April 3, 4, and 6, 1995, at the City of Vineland City Hall, Vineland, New Jersey. The parties requested and were granted leave to submit posthearing memoranda. The hearing record closed on August 29, 1995. Extensions were granted in order to execute this initial decision.

ISSUES

Pursuant to agreements reached at a prehearing conference held on November 7, 1994, and the Prehearing Order issued on November 16, 1994, the following issues are to be determined by this administrative tribunal:

1. Whether respondent entered into a settlement with the Board which incorporated her resignation from her tenured teaching position?

2. Whether the tenure charges, as certified, are true in fact?

3. Whether, by the Board instituting the tenure charges against respondent, the Board is in violation of the New Jersey Law Against Discrimination (LAD)?

BACKGROUND FACTS

Based upon the testimony and other evidence adduced at the hearing, I **FIND** the following **BACKGROUND FACTS** in this matter:

Respondent witnessed her only son succumb to a fatal motor vehicle accident on December 27, 1991. Prior thereto, respondent suffered from a long term psychiatric disability where she was treated for emotional illness and was under psychiatric treatment. She was treated for approximately ten years with lithium, among other things.

Respondent was absent from duty from September 11, 1991 through November 21, 1991, under a physician's care due to a broken foot. Subsequent to respondent's son's death, on February 13, 1992, respondent requested personal leave days for February 28, 1992, March 2 and 3, 1992, to accompany her husband to Los Angeles, California, where he was to run in a marathon. Respondent's request for personal leave was denied. Respondent did not appear for duty on February 26, 1992, or thereafter.

On the evening of February 26, 1992, at 9:30 p.m., respondent's husband contacted respondent's building principal at his home to advise that respondent would be absent from duty on February 27 and 28, 1992. Respondent's husband further advised the building principal, among other things, that respondent was to visit a physician and seek a medical leave of absence for the remainder of the 1991-92 school year. Respondent did not appear for duty on March 2 and 3, 1992, nor did she advise anyone at her school she would not report for duty.

Respondent sent the Superintendent of Schools a memorandum, dated February 27, 1992, requesting a medical leave of absence beginning on February 26, 1992 and for the remainder of the 1991-92 school year. The memorandum was received by the Superintendent on March 2, 1992. The memorandum was not accompanied with a physician's report or recommendation for the leave of absence. Respondent advised the Superintendent that a letter from her doctor defining the need for the leave could be provided upon the Superintendent's request.

On March 24, 1992, at the Superintendent's request, Alan Kulick, M.D., performed a psychiatric examination of respondent. Dr. Kulick referred to a letter from Chris Wolf, Ph.D., respondent's psychologist who was then treating respondent for depression. Dr. Wolf asserted to Dr. Kulick that respondent was unable to work. After discussing respondent's work history with the Board, her long history of emotional illness and treatment and his diagnosis of respondent, Dr.

Kulick concluded that her request for medical sick leave should be granted. Dr. Kulick recommended that petitioner be granted permanent disability status.

The Board approved respondent's request for an unpaid medical leave of absence on August 11, 1992, retroactive to March 24, 1992. The Board's adopted Resolution provided, among other things, that respondent's long term leave shall continue until the Board's physician certifies, after an examination, that respondent is fit to return to her teaching duties. Respondent's leave continued through the 1992-93 school year.

On September 23, 1993, subsequent to the start of the 1993-94 school year, the Superintendent received a telephone call from respondent who indicated she was ready to return to duty on October 1, 1993. The Superintendent sent respondent a letter, dated September 23, 1993, in which he reminded respondent that she was required to be examined by the Board's psychiatrist for a psychiatric evaluation before respondent would be considered for reinstatement to her teaching duties.

On October 7, 1993, Dr. Alan Kulick sent a letter to Superintendent Barry Ballard in which Dr. Kulick asserted he performed a psychiatric examination of respondent as requested by the Superintendent. After a discussion of respondent's past history in the Board's schools, her emotional illness since 1985 and treatment thereof, Dr. Kulick concluded that respondent was very susceptible to the stress of teaching and that her return to such work would result in the recurrence of the same problems and symptoms she had manifested and which caused her to take long term medical leave of absence. It was Dr. Kulick's opinion that respondent lacked an understanding of the problem she experienced while a teacher in the Board's schools and lacked insight into the nature of her condition.

On or about November 30, 1993, Superintendent Ballard submitted his written statement in support of two tenure charges against respondent to the Board with a copy forwarded to respondent. The Superintendent alleged and charged respondent with incapacity and removal from her tenure teaching position on the grounds of just cause. Prior to the Board taking action on the Superintendent's tenure charges against respondent, the Board's attorney and respondent's attorney entered into settlement discussions and negotiations on behalf of their respective parties.

The Board had scheduled its regular monthly meeting for January 11, 1994. The Board was to consider the Superintendent's tenure charges against respondent at this meeting. On January 11, 1994, the Board's attorney was in receipt of a facsimile (fax) transmission from respondent's attorney which stated as follows:

> Confirming our conversation, it is my understanding that we have reached a settlement in the Judy Rush matter. The settlement consists of the following:
>
> 1. Payment of $7,500.00 to Judy Rush in the manner previously discussed;
>
> 2. Resignation of Ms. Rush to be tendered;
>
> 3. Ms. Rush to be granted a private appearance before the Board to present her views of her employment relationship with the Board, and for no other purpose. (P-2-SS).

The Board's attorney then transmitted the terms and conditions of the settlement to the Board's Superintendent. Superintendent presented the settlement to the Board at is regular monthly meeting in January 11, 1994, which then took the following action:

> Motion by Mr. Perrelli, seconded by Mr. Taylor, that the board go into executive session to discuss and act upon a personnel matter (8:51 p.m.)
>
> Motion by Mr. Perrelli, seconded by Mr. Taylor, that the board return to regular session at which time the following action was taken by the board while in executive session:
>
> Motion by Mr. Perrelli, seconded by Mr. Taylor, Resolved that the Commercial Township Board of Education agree to the settlement of the Judy Rush matter as set forth in the January 11, 1994 letter from Steven R. Cohen, Esquire. All were in favor by roll call vote - Carmichael, Robbins, Perrelli, Taylor, Beachaump, Van Dyke. (P-2 SS).

As a consequence of the settlement and resolution, the Board took no action concerning the Superintendent's tenure charges against respondent at its regular meeting on January 11, 1994.

ISSUE NO. 1

ARGUMENTS OF THE PARTIES

THE BOARD'S POSITION

RESIGNATION

In a matter essentially on point with this matter with respect to the issue of respondent's resignation, the Commissioner of Education has recently ruled that as a general rule, the resignation of a public employee becomes complete upon acceptance by the employing local board of education. Ralph Cutro v. Board of Education of Twp. of Hazlet, Monmouth County, 94 N.J.A.R. (EDU) 402. This decision is but one in a long line of similar decisions on this point. In Long Branch Board of Education v. Pizarro, Commissioner Decision #156-89 (June 1, 1989), the Commissioner held that a teacher's resignation is effective upon formal acceptance by the board of education. In Hanley v. East Brunswick Board of Education, 1988 S.L.D. 1149, the Commissioner held that a tenured teacher who does not formally rescind a resignation prior to the board of education's acceptance thereof is bound by that resignation. Likewise, in Fischer v. East Orange Board of Education, 1988 S.L.D. 31, it was held that an unambiguous resignation from employment duly accepted by a board of education, can not be unilaterally rescinded or modified by the resigned employee. A tendered resignation can not be withdrawn after being formally accepted by the local board of education. Klinka v. Florence Twp. Board of Education, Commissioner Decision #310-83 (September 1983), aff'd. State Board of Education Dkt. No. 103-83 (March 7, 1984), aff'd. N.J. Super., Appellate Division, A-3878-83T3 (March 21, 1985).

"The burden of proving the right of tenure is upon plaintiff [the teaching staff member] and ordinarily that right must be clearly proved." Canfield v. Board of Ed. of Pine Hill Borough, 51 N.J. 400, 401 (1968) reversing Canfield v. Bd. of Ed. of Pine Hill, 97 N.J. Super. 483 (App. Div. 1967) and adopting the dissenting opinion of Judge Gaulkin at 493. Herein, the respondent would have the burden of proving that her resignation through this settlement was not effective. Respondent has not carried that burden of proof in the instant matter.

Voluntary resignation terminates tenure rights. Kimless v. Board of Education, Woodbridge Twp. 78 S.L.D. 651; and, Misek v. Board of Education, Willingboro, 80 S.L.D. 98, aff'd. State Board of Education, 80 S.L.D. 104. A teaching staff member who resigns from district employment surrenders all rights of tenure and seniority. In Re Tenure Hearing of Trotta, North Bergen Township, Commissioner Decision #128-82 (May 10, 1982). Tenure and re-employment rights may be voluntarily relinquished, by either an employee directly or through her authorized attorney. See O'Toole v. Forestal, 211 N.J. Super. 394, 402-402 (App. Div. 1986), in reliance upon Lange v. Bd. of Ed. of Borough of Audubon, 26 N.J. Super. 83, 88 (App. Div. 1953).

Petitioner respectfully asserts that the settlement is a proven fact and is legally valid and binding.

NOTICE

It is conclusively established that the respondent through her attorney communicated what respondent believed to be a settlement between the parties on January 11, 1994. See Exhibit P2-RR and the attachments to Exhibit P2-SS. In the facsimile cover sheet from respondent's attorney attached to Exhibit P2-SS, the communication is specifically identified as:

"REGARDING: Judy Rush

MESSAGE: Settlement Confirmation"

Furthermore, the text of the body of the letter which accompanied that facsimile cover sheet states that:

"Confirming our conversation, it is my understanding that we have reached a settlement in the Judy Rush matter. The settlement consists of the following:

1. Payment of $7,500.00 to Judy Rush in the manner previously discussed;

2. Resignation of Ms. Rush to be tendered;

3. Ms. Rush to be granted a private appearance before the Board to present her views of her employment relationship with the Board, and for no other purpose."

This letter does not speak of this settlement being conditional in any manner. Rather, the status is "that we have reached a settlement." In its formal action, in a duly convened public meeting, recorded in the formal and official minutes of the petitioner, that settlement was accepted by the petitioner with no modification. That acceptance became final and binding upon the closing of that January 11, 1994, meeting of the petitioner. At that time, the settlement was an enforceable right of both parties. Mutuality requires that such enforceability flows in both directions.

A local board of education only acts by a motion duly introduced and adopted by a vote recorded in its minutes. Companile v. Middletown Board of Education, Commissioner Decision 57-82, 2 March 82. This is precisely what occurred in the instant matter. See Exhibit P2-TT. The minutes of board meetings are the public records of board action. Lange v. Laurel Springs Board of Education. In Matawan Reg. Teachers Assoc. v. Matawan-Aberdeen Reg. Board of Education, 212 N.J. Super. 328 (Law Div. 1986), in an Open Public Meetings Act context, the Court confirms that the actions of a local board of education are recorded in its minutes, and the importance of those minutes to the public as the public record of board action. Likewise minutes of a public body's meetings and actions are public records under the Right to Know Law, N.J.S.A. 47:1A-2. South Jersey Publishing Co. vs. NJ Expressway Authority, 124 N.J. 478 (1991). Hence, the public minutes are the formal and official record, open to the public, of the official actions of a local board of education. Such minutes provide official and constructive notice to any and all parties of such actions. In this instance with nothing more, those minutes provided respondent with official and constructive notice of the petitioner's acceptance of the respondent's settlement on January 11, 1994. That constructive notice is fully sufficient for the settlement and resignation of respondent to have concluded this matter as of January 11, 1994.

Respondent's sole objection or defense is based upon respondent's now asserted claim that there never was any formal personal notice to respondent of the petitioner's acceptance on

January 11, 1994. This objection or defense presents an argument which in essence is an estoppel based argument. See Kaprow v. Board of Educ. of Berkeley Twp., 131 N.J. 572, 589-590 (1933), where the Court held that "equitable estoppel is rarely invoked against public entities. O'Malley v. Department of Energy, 109 N.J. Super. 309, 316, 537 A. 2d. 647 (1987)." In Levin v. Woodbine, 181 N.J. Super. 61, 70 (Law Division 1981), it was held that "There is not only a pronounced reluctance to the judiciary to apply estoppel principles against governmental agencies, Summer Cottager's Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 503, (1955); Boyd v. Institutions and Agencies Dep't, 126 N.J. Super. 273, 275 (App. Div. 1974), but such application is to occur only where 'the interests of justice, morality and common fairness dictate that course.' Anske v. Palisades Park, 139 N.J. Super. 342, 348 (App. Div. 1976)." It should be noted that in Levin, supra., the ultimate decision of the Court was to remove Mayor Levin from the office due to being absent for more than the statutory time period which was set for a vacancy to be declared. The Court refused to allow equitable estoppel arguments to be used to defeat the operation of the statute which set the time period for that vacancy to arise.

With respect to disputes between a local board of education and its employees, the Court has held that even when a statutory basis for notice exists, which is not present in the instant matter between respondent and petitioner, notice to public employees may be constructive rather than individual. See Jamison v. Morris Sch.Dist. Bd. of Educ., 198 N.J. Super. 411, 416 (App. Div. 1985); relying upon Oliveri v. Carlstadt-E. Rutherford Bd. of Education, 160 N.J. Super. 131 (App. Div. 1978).

In any event, the respondent's assertion is that through her attorney's letter dated March 29, 1994, Exhibit P2-XX, respondent attempted to rescind the settlement of January 11, 1994. Note, however, that in the very first paragraph of that same letter, Exhibit P2-XX, respondent attorney confirms that there had been communication, subsequent to January 11, 1994, but prior to March 28, 1994, from the petitioner's attorney with respect to the petitioner's acceptance of the January 11, 1994 settlement. Therefore, it is clear that respondent's claim of an attempt to rescind before receipt of personal notice of acceptance is not supported by the record.

RESPONDENT'S POSITION

PETITIONER HAS FAILED TO ESTABLISH THAT RUSH WAS REQUIRED BY ANY ENFORCEABLE AGREEMENT TO RESIGN HER EMPLOYMENT

Petitioner bears the burden of showing that respondent entered into an enforceable agreement to resign her tenured position. The credible evidence established that the settlement proposal under discussion between the attorneys in January 1994, was abandoned in March of that year, before it was accepted in the manner contemplated by both the attorneys and the Board, namely negotiation of a formal settlement agreement executed by both parties. Alternatively, Rush contends that any acceptance which the Board may have intended was not unambiguously manifested to herself or her attorney before they provided notice to the Board that she would not resign.

Though it is possible to establish an agreement through a less formal exchange of documents where the parties intend to be bound by such a process, there clearly was no such intent to the circumstances of this case. On or about November 30, 1993, Judith Rush was informed by Superintendent Ballard that he had filed the tenure charges against her which would be considered by the Board on December 14, 1993. Ex. J2-OO. Steven Cohen, as attorney for Rush, and John Barbour, as attorney for the Board, agreed to delay any Board action until January 11, 1994, while they discussed a settlement between their clients. Ex. J2-PP and J2-QQ.

It is undisputed that their discussions did not result in a single settlement agreement executed by all parties. The Board contends instead that an enforceable settlement arose when it approved a resolution to "agree to a settlement of the Rush matter as set forth in the January 11, 1994, letter from Steven R. Cohen", even though there is no evidence whatever that its decision was communicated to Rush or her attorney before continued efforts to settle the matter were abandoned.

A comprehensive view of the evidence establishes that Cohen's nine-line letter of January 11, 1994, outlined his understanding of a settlement proposal he was discussing with the Board's

attorney, John Barbour. Subsequent events establish that both attorneys as well as the Board understood and intended that this offer to discuss settlement on the terms outlined would have to be reduced to a formal settlement document executed by both parties before it could become a final agreement.

On January 11, 1994, Cohen sent Barbour a brief, nine line letter "confirming our conversation" that "we have reached a settlement in the Judy Rush matter" which would consist of a $7,500 payment to her "in the manner previously discussed"; a resignation of Mrs. Rush "to be tendered," and Rush's private appearance before the Board. This short letter is no more than an outline. It was not signed personally by Cohen, although it was approved by him, and was telefaxed and mailed to Barbour by Cohen's secretary.[1] J2-44 and TR 4/3/95 at 140:9-24. If for no other reason, the absence of any provision releasing or retaining claims makes it clear that neither lawyer perceived this memo to be a comprehensive settlement offer which could become a final agreement by simple acceptance.[2]

Cohen's correspondence contains no instructions or directions as to how as to proceed. It is apparent, however, from what happened next that both attorneys anticipated that discussions would continue after the Board approved the concept, and that neither attorney anticipated that the Board could convert Cohen's memo into a binding agreement by simply accepting it. Specifically:

> -- In his transmittal of Cohen's letter to the Board, Barbour describes a "possible settlement" and states that "when all of the paper work is completed and the settlement is fully implemented, the terms of the settlement and the underlying dispute will be public information." (emphasis supplied). Ex. P2-SS. Barbour's letter to the Board directly contradicts Superintendent Ballard's testimony that there was nothing left to be done or concluded to bring the settlement about. Even a cursory review of its text also reveals that the petitioner's assertion that Barbour informed his client in Ex. P2-SS that the settlement was conditioned only upon the acceptance by the petitioner is simply false.

[1] The secretary's telefaxed transmittal memo which she labeled "settlement confirmation" was not included with the mailed correspondence, and does not provide persuasive evidence of Cohen's intent.

[2] The completeness is obvious. If the agreement were enforced it would leave Rush free to pursue all legal claims against the district, including her discrimination claim.

-- Having heard nothing, Cohen transmitted the draft of a seven page settlement agreement and release of all claims to John Barbour on January 20, 1994, and invited him to call if there was any problem.[3] Ex. J-UU. Several weeks passed during which Barbour did not respond to this letter or provide Cohen any information concerning his client's reaction to either the January 11, 1994, letter or the January 20, 1994, draft agreement. TR 4/3/95 at 143:24 to 144:3. If Barbour or the Board believed they already had a final agreement, they would have objected to Cohen's letter or returned the draft.

-- On February 22, 1994, Cohen wrote to Barbour asking him where matters stood. Ex. J-VV. Barbour responded to this inquiry with a telephone call to Cohen's office in mid-to-late March requesting another copy of the January 20, 1994, draft. TR 4/3/95 at 144:23 to 145:5. He also asked Superintendent Ballard to search the Board's files for any copy of the draft he may have transmitted to the Board. TR 4/3/95 at 122:17 to 123:12 and Ex. P1-ZZ. Again, if Barbour believed that his client already had a final agreement, he would not have requested another copy of the January 20, 1994, draft or sent his client hunting for it. He would have told Cohen where matters stood by tendering the Board's alleged obligations ($7,500 and an invitation to appear before the Board), and demanding Rush's resignation

-- Even after Cohen withdrew the settlement proposal on March 28, 1995, informed Barbour that Rush would not agree to resign, and asked Barbour to advise him as to the Board's position (see Ex. J2-XX), Barbour did not promptly object or inform Cohen that the parties had an enforceable agreement, tender any of the Board's obligations or demand Rush's resignation. TR 4/3/95 at 142:7-11. On April 7, 1994, Cohen again wrote to Barbour asking for information concerning the Board's position. Ex. J2-YY. Again there was answer until Cohen received a copy of the Board's Certification of Determination, forwarding to the Commissioner of Education on May 31, 1994, the tenure charges presented to the Board in December 1993. In the face of Cohen's repudiation in March, the Board's failure to have asserted earlier that the January 11, 1994, letter was a final settlement supports a conclusion that this was an after-the-fact rationalization inconsistent with its original intent to continue negotiations until there was a formal agreement executed by all the parties.

-- While claiming that he was not aware that anything further needed to be done to implement the alleged settlement, Superintendent Ballard

[3] Because Barbour did not take the stand, there is no credible evidence that he did not receive this letter, even if he subsequently misplaced the enclosure.

> admitted that the Board never issued its settlement check to Judith Rush or invite her to appear at a Board meeting. TR 4/3/95 at 91:11 to 92:1 This failure also supports the conclusion that at the time the events were occurring, it did not believe it had an enforceable settlement agreement by which it was also bound.

Based on the evidence and inferences described above, this court should conclude that there was never a meeting of the minds on a final settlement. Both parties believed, and acted as though they believed, that they would have a deal "when all of the paper work is complete." It never was.

Alternatively, even if it could be established that the Board reasonably believed that it could convert Cohen's nine line letter into a final agreement by simple acceptance, the Board did not unambiguously accept the agreement, and did not inform Rush or her attorney of any alleged acceptance until after they rescinded any alleged offer to settle.

The Board's minutes of January 11, 1994, record a motion to resolve that the Board "agree to a settlement of the Rush matter as set forth in the January 11, 1994, letter from Steven R. Cohen." This is not an unambiguous acceptance. A valid acceptance of an offer must be unambiguous. Looman Realty Corp. v. Broad Street Nat. Bank of Trenton, 74 N.J. Super. 71 (App. Div. 1962), certif. denied 37 N.J. 520 (1962). In the context of unfolding events, the resolution could just as easily be interpreted as authorization for its attorney to continue negotiations on the basis of Cohen's proposal. Its ambiguity alone renders the Board's resolution defective as an acceptance.

Moreover, word of the Board's alleged acceptance was only communicated to Rush after May 31, 1994, long after her attorney had informed the Board's attorney she no longer wished to settle. Where the promisor receives no promise in return, there is no promissory contract. See Friedman v. Tappan Development Corp., 22 N.J. 523 (1956). Because the Board's alleged intention to accept was never manifested to Cohen or Rush by word or act, and was actually concealed in the face of repeated requests for information as to where matters stood, it is clear that there was no mutual exchange of promises. See Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435-436 (1992); Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526, 539 (1953); Looman, supra. 74, N.J. Super. at 82.

If the Board in fact intended its resolution as an agreement not to bring tenure charges against Rush, its failure to inform her or her attorney of its promise is inexplicable. Superintendent Ballard clearly knew how to communicate the Board's actions and resolutions concerning her employment to Rush. He did so with respect to her medical leave of absence (Ex. J-GG and TR 4/3/95 at 83:3-13) her increment withholding (TR 4/3/95 at 85:10-14) and the pendency of tenure charges (see Board's Certification of tenure charges). Superintendent Ballard did not, however, recall providing any confirmation to Rush or her attorney, verbal or written, that the Board had accepted her settlement offer. TR 4/3/95 at 85:15 to 86:1. He could recall no other occasion on which he had not informed Rush of any action taken by the Board concerning her employment. TR 4/3/95 at 91:1-6. He testified that he left this matter in the hands of the Board's attorney, John Barbour. TR 4/3/95 at 86:2-5.

There is no evidence whatever that Mr. Barbour communicated the Board's acceptance to Rush or her attorney. Superintendent Ballard did not recall receiving any written confirmation from Barbour that the Board's alleged acceptance had been sent to Rush or her attorney. TR 4/3/95 at 86:2-18. Cohen appeared at trial of this matter and testified that he did not receive any information concerning the Board's response to the understanding set forth in his letter of January 11, 1994, before he notified John Barbour on March 28, 1994, that his client was no longer willing to settle. TR 4/3/95 at 142:7-11; See Ex. J2-XX. Barbour did not take the stand, and Cohen's evidence stands uncontradicted.[4] See Duratron Corp. v. Republic Stuyvesant Corp., 95 N.J. Super. 527, 531 (App. Div. 1967) (adverse inference may be drawn from failure of party to testify). The unrefuted evidence therefore establishes that any alleged acceptance by the Board was never communicated to Rush or her attorney.

Apparently acknowledging that there was no direct communication of its so-called acceptance, the Board argues that direct communication of its acceptance was not necessary because its minutes provided respondent constructive notice of its action. See petitioner's brief at

[4] Petitioner's reliance upon P2-XX, Cohen's letter of March 28, 1994, to Barbour, to infer knowledge of the Board's resolution authorizing agreement on the terms proposed by Cohen is misplaced. See petitioner's brief at p. 11. That letter is absolutely devoid of any evidence of such knowledge. The "proposed agreement" to which Cohen refers in P2-XX is obviously the seven page draft sent to Barbour on January 20, 1994.

p.10. This argument is unsupported by any authority that a public body may form a contract through "constructive notice."[5] Moreover, even if the constructive notice argument might apply to district residents, it could not apply to Rush who lived in another community and was not then teaching in the district's school. Finally, the motion that the Board resolve to "agree to a settlement of the Rush matter as set forth in the January 11, 1994, letter from Steven R. Cohen" is ambiguous. It could reasonably be interpreted as authorization for its attorney to complete a settlement negotiation on the terms proposed. Where petitioner argues for constructive notice, such ambiguity is fatal.

Although an offer might still be accepted by rendering the requested performance where a mutual exchange of promises is not sought, creating a unilateral contract on the offered term, see Friedman, supra. the Board admits that in this case, it neither performed or tendered performance of any of the duties it claims to have assumed. Any offer, therefore, remained revocable at will. Id.; Gabel v. Manetto, 177 N.J. Super. 460 (App. Div. 1981).

Because the parties did not intend that a final settlement could occur on the basis of the January 11 letter alone, because the Board made no unambiguous acceptance of the understanding set forth there and because any acceptance was not communicated to Rush or her attorney before Cohen informed the Board's attorney on March 28, 1994, that his client was no longer willing to settle, this court should deny petitioner's request for a declaration that the January 11 letter created an enforceable agreement. Alternatively, if the court does enforce the agreement, it should enforce all its provisions, dismiss the Board's tenure charges and leave Judith Rush free to pursue her discrimination claims.

THE BOARD'S REPLY

[5] Petitioner's reliance on Jamison v. Morris School Dist. Bd. of Ed., 198 N.J. Super. 411 (App. Div. 1985) is misplaced. That case did not deal with contract formation. but the adequacy of notice to an untenured teacher that her position was being riffed. Although the court based its decision in part on constructive notice. it also relied upon the Board's power to correct an inadequate notice of this particular adverse action.

The Board's reply memorandum, summarized below, reiterates the fact that it held the tenure charges against respondent in abeyance until January 11, 1994, due to the ongoing settlement discussions between the parties. It counters respondent's assertion that the letter of January 11, 1994, to the Board's attorney from respondent's attorney was a settlement proposal rather than a settlement offer. It argues, among other things, that the letter was nothing less than an offer of settlement, which the Board accepted and executed a formal resolution in acceptance of respondent's offer. There is no evidence to support respondent's claim that the language of the letter was intended to be a step in the negotiating process. The language in the letter used by respondent's attorney was clear and unambiguous and expressed the terms of the offer of settlement.

A board of education acts only by motion duly introduced and adopted by a vote recorded in its minutes. Campanile v. Middletown Board of Education, Commissioner's Decision 57-82, March 2, 1982. An offer without consideration becomes irrevocable by subsequent act of the offeree in reliance thereon if such act was part of the performance bargained for, or was one which the offeror had reason to foresee as a result of the offer. American Handkerchief Corp. v. Frannot Realty Co., 17 N.J. 12 (1955).

In the instant matter the Board acted in two ways. First of all, it acted by the affirmative act of adoption of the motion to accept the offered settlement. Secondly, it acted by the act of refraining from action on the filed tenure charges. Under ordinary contract principles, the acceptance must be clear and unequivocal, through words, through acts, or through conduct, and if the acceptance of the offered contract is by conduct, the court looks to objective circumstances and not subjective intent of a party to determine whether the acceptance is clear and unequivocal. Ponzani v. Kraft General Foods, Inc. 774 F. Supp. 299 (D.C. N.J. 1991) aff'd 968 F. 2d. 14 (3rd. Cir. 1992). A contracting party is bound by the apparent intention he or she outwardly manifests; it is immaterial that he or she has a different, secret intention from that outwardly manifested. Hagrish v. Olsen, 254 N.J. Super. 133 (App. Div. 1992). Cohen's January 11, 1994, letter and the Board's January 11, 1994, resolution are clear, concise, and unequivocal in manifesting a mutual intent that this matter was resolved in accordance with the offer contained in Cohen's January 11, 1994, letter. There is no intent manifested that anything else yet remained

to be accomplished. The respondent's attempts to argue to the contrary in her brief are unsupported and fly in the face of the evidence in the record in this matter.

Existence of a contractual obligation depends not on the so-called real but unexpressed intention of a party, but rather on the intention expressed by the party. The phrase "meeting of the minds" can only mean that agreement as expressed. Comerata v. Chaumont, Inc. 51 N.J. Super. 31 (App. Div. 1958). Intent as expressed, includes expression through words, through acts, or through conduct. Ponzani, supra.

Even where parties intend that there is to be a subsequent writing to memorialize a contract, where the parties intend to be bound by a preliminary agreement, the following written document becomes a mere memorization of their agreement, and they are bound by the preliminary agreement. Morales v. Santiago, 217 N.J. Super. 496 (App. Div. 1987). Therefore, even if there was any proof that as of January 11, 1994, there was any contemplation that a subsequent writing of the parties' contract was to be produced, that writing would only serve as a memorization of the agreement actually reached on January 11, 1994. Unless a specific legal requirement exists, such as the statute of frauds in a real estate context, which is not present here, a contract need not be expressed in writing so long as parties have mutually agreed to do something which they previously did not have an obligation to do. Radiological Soc. of NJ v. Sheeran, 175 N.J. Super. 367 (App. Div. 1980); and, Silverstein v. Dohoney, 32 N.J. Super. 357 (App. Div. 1954), followed in 35 N.J. Super. 303, aff'd 19 N.J. 1. Unless a legal requirement exists to the contrary, parties may bind themselves to an agreement by writing, by an oral understanding, or by acts, or a combination thereof.

The Board observes that respondent relies, in part, upon the New Jersey Supreme Court's decision in a matter concerning the interpretation of whether a "retailer of pharmaceutical supplies in interstate commerce is in the particular circumstances of a 'signer' of a minimum price-fixing agreement .... within the intendment of the Miller-Tydings Amendment of the Sherman Anti-Trust Act adopted August 17, 1937." While certainly not on point with the instant matter, the Supreme Court nonetheless issued general contract holdings which clearly support the petitioner's claim that a binding contract was agreed to by the parties in the instant matter. In that decision, with respect to the creation of a contract, the Court expressly states:

> a contract .... may be made in writing .... or by word of mouth, or partly in writing, and partly by word of mouth, or may be inferred from the conduct of the parties. .... assent may be indicated by acts as well as words.
>
> A contract is an agreement resulting in obligation enforceable at law; and it is basic to an agreement entailing obligatory legal consequences that the parties have a distinct intention common to both. Johnson & Johnson V. Charmley Drug Co. , 11 N.J. 526, 538, 539 (1953).

The Board argues that there was absolutely no ambiguity in its action on January 11, 1994, to accept respondent's offer of settlement, It cites in Looman Realty Corp. v. Broad Street, Nat. Bank of Trenton, 74 N.J. Super. supra. at 77, the Court quotes the alleged acceptance at issue in that matter having provided:

> Upon motion duly made, seconded and carried, approval was given to the recommendation of the committee, consisting of Messrs. Fell, Volpe and Williams, that we accept the offer to purchase the Bank building at 143-147 E. State Street, substantially upon the terms and conditions contained in the letter of Chas. N. Schragger, Inc. dated January 14, 1959, addressed to Mr. Scott M. Fell, President. It is further recommended that acceptance of the terms are [sic] subject to the execution of a formal contract to include miscellaneous details to be agreed upon by the parties. (Emphasis added)

In the instant matter, no such ambiguity is present despite the respondent's attorney's wrongful assertion in respondent's brief to the contrary. Rather, the uncontraverted facts in the instant matter are that the resolution of acceptance fits squarely within the form which the Court in Looman, Id. at 81 states "there appears to be little doubt that had the bank written, simply, 'We accept your offer upon the terms contained therein' there would have been a binding contract." To claim, otherwise, in the respondent's brief is without factual or legal basis.

The above quoted suggestion by the Court as to acceptance language which would not give rise to an ambiguity is precisely the format which the Board used in the instant matter to state its acceptance of Cohen's January 11, 1994, offer of settlement. Hence rather than providing support for the allegations of ambiguity as relied upon respondent, the Looman decision actually

confirms that the parties in the instant matter had reach a binding settlement as of January 11, 1994. On that basis alone, a decision should issue in favor of the petitioner.

CONCLUSIONS

I **FIND and CONCLUDE** that the parties reached an amicable settlement of the matter in controversy on January 11, 1994. The evidence clearly demonstrates that respondent and her attorney were both aware that it was the Board's intent to certify tenure charges against respondent at its regular monthly meeting scheduled for January 11, 1994. Prior thereto, the parties had engaged in settlement discussions and negotiations. The settlement terms and conditions transmitted from respondent's attorney to the Board's attorney were explicit and unambiguous. The settlement was transmitted to the Board from respondent for the purpose of settling the dispute between the parties and to have the Board forebear from certifying tenure charges against respondent to the Commissioner. The Board did not certify the pending charges against respondent. Rather, it accepted respondent's offer of settlement as set forth by her attorney by a duly adopted resolution in public session. The Board accepted all of the terms and conditions set forth by respondent.

I **FIND and CONCLUDE** that the Board's analysis of the law, under the facts set forth hereinbefore, is correct and need not be repeated here.

I **CONCLUDE**, therefore, that a settlement between the parties was reached on January 11, 1994, where respondent resigned from her tenured teaching position for consideration.

Having so concluded, it is not necessary for this tribunal to consider the arguments nor decide Issues Nos. 2 and 3 herein.

Accordingly, I **CONCLUDE** there are no further justiciable issues to be determined.

ORDER

It is therefore, **ORDERED** that the settlement agreed upon between the parties on January 11, 1994, be enforced as to its terms and conditions.

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

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

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

4 March 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

March 6, 1996
DATE

D M Centanni Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 12 1996
DATE

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER

BARRY L. BALLARD

DR. ALAN KULICK

FOR RESPONDENT

STEVEN R. COHEN

DR. JOSEPH MOBILIO

DOCUMENTS IN EVIDENCE

FOR PETITIONER

P-1B LETTER

P-1C LETTER DATED 9/23/93 TO MS. RUSH FROM BARRY L. BALLARD

P-1D TRANSMITTAL LETTER

P-1E LETTER DATED 3/25/93 TO MS. RUSH

P-1F LETTER DATED 12/3/92 TO MS. RUSH FROM BARRY L. BALLARD, SUPERINTENDENT

P-1G LETTER DATED 8/12/92 TO MS. RUSH FROM BARRY L. BALLARD

P-1H LETTER DATED 6/22/92 TO MICHAEL P. KILLEEN FROM JUDITH RUSH

P-1I LETTER DATED 6/11/92 TO RICHARD L. DANIELS, ESQUIRE FROM M. CHRIS WOLF, Ph.D.

P-1J LETTER

P-1K LETTER DATED 3/16/92 TO MS. RUSH FROM BARRY L. BALLARD

P1-M LETTER

P-1N LETTER DATED 3/11/92 TO M. CHRIS WOLF, Ph.D. FROM BARRY L. BALLARD

P-1O ONE PAGE LETTER DATED 3/9/92 TO MS. RUSH FROM AUDREY K. REYNOLDS

P-1P MULTIPLE LETTERS

P-1Q LETTER

P-1S LETTER

P-1U LETTER

P1-V MEMORANDUM TO MR. B. BALLARD FROM MS. RUSH DATED 2/27/92

P1-W HANDWRITTEN MEMO TO MR. KILLEEN FROM MS. RUSH DATED 2/21/92

P1-X REQUEST FOR PERSONAL PROFESSIONAL LEAVE DATED 2/13/92 TO MR. KILLEEN FROM MS. RUSH

P1-Z LETTER DATED 11/19/91 TO MS. RUSH FROM MICHAEL KILLEEN

P1-AA PHYSICIAN'S FORM, THE CUMBERLAND ORTHOPEDIC PROFESSIONAL ASSOCIATES, INC., W. SCOTT WILLIAMS

P1-BB LETTER DATED 10/24/91 TO MS. RUSH FROM MICHAEL P. KILLEEN

P-1CC LETTER

P1-DD MEDICAL FORM FROM CUMBERLAND ORTHOPEDIC PROFESSIONAL ASSOCIATES DATED 10/9/91

P1-EE MEDICAL FORM FROM CUMBERLAND ORTHOPEDIC ASSOCIATES DATED 9/11/91

P1-FF LETTER DATED 9/10/91 TO MS. RUSH FROM MICHAEL KILLEEN

P2-HH ONE PAGE DOCUMENT DATED 2/25/92, TO WHOM IT MAY CONCERN FROM M. CHRIS WOLF, Ph. D., PSYCHOLOGIST

P2-II LETTER DATED 3/18/92 TO BARRY L. BALLARD, FROM M. CHRIS WOLF, Ph.D.

P2-JJ BOARD MEETING MINUTES TUESDAY, 8/11/92 WITH ATTACHED RESOLUTION

P2-KK LETTER DATED 12/18/92 TO BARRY L. BALLARD, FROM M. CHRIS WOLF, Ph. D.

P2-MM EMPLOYEE ATTENDANCE RECORD 1991-92; 1992-93; 1993-94; 1994-95.

P2-OO LETTER DATED 11/30/93 TO MS. RUSH FROM BARRY BALLARD

P2-PP TELEFAX TO JOHN BARBOUR, ESQUIRE FROM STEVEN R. COHEN DATED 12/13/93

P2-QQ LETTER DATED 1/4/94 TO JOHN BARBOUR, ESQUIRE FROM STEVEN R. COHEN, ESQUIRE

P2-RR LETTER DATED 1/11/94 TO JOHN BARBOUR, ESQUIRE FROM STEVEN COHEN, ESQUIRE

P2-TT MINUTES OF COMMERCIAL TOWNSHIP BOARD DATED 1/11/94

P2-VV LETTER DATED 2/22/94 TO JOHN BARBOUR, ESQUIRE FROM STEVEN COHEN, ESQUIRE

P2-WW LETTER DATED 3/17/94 TO WHOM IT MAY CONCERN FROM JOSEPH MOBILIO

P2-XX LETTER DATED 3/28/94 TO JOHN BARBOUR, ESQUIRE FROM STEVEN COHEN, ESQUIRE

P2-YY LETTER DATED 4/7/94 TO JOHN BARBOUR, ESQUIRE FROM STEVEN COHEN, ESQUIRE

P2-AAA MINUTES OF COMMERCIAL TOWNSHIP BOARD, 5/10/94

P-2BBB STAFF POLICY

P2-UU LETTER DATED 1/29/94 TO JOHN BARBOUR, ESQUIRE FROM STEVEN COHEN WITH ATTACHMENT

P2-ZZ LETTER DATE 5/10/94 TO COMMERCIAL TOWNSHIP BOARD FROM JOHN BARBOUR, ESQUIRE WITH ATTACHMENTS THERETO

P-ZZ LETTER TO STEVEN COHEN, ESQUIRE FROM JOHN BARBOUR, ESQUIRE

P-2SS LETTER, 1/11/94

P-2L LETTER, 3/16/92

<u>FOR RESPONDENT</u>

R-1 CV, DR. MOBILIO

OAL DKT. NO. EDU 7181-94

IN THE MATTER OF THE TENURE	:	
HEARING OF JUDITH RUSH,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF COMMERCIAL,	:	DECISION
CUMBERLAND COUNTY.	:	
	:	

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

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the within parties reached an amicable settlement of their differences on January 11, 1994, prior to certification of the tenure charges at issue herein. In that such settlement included respondent's resignation from her tenured teaching position, adjudication with respect to these tenure charges is unnecessary.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein. The parties' settlement agreement is hereby held to be in full force and effect and the within tenure charges are dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 22, 1996

DATE OF MAILING APRIL 23, 1996 -25-

161-96

161-96

T.J. and V.C., on behalf of minor, T.J.	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

April 25, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 178-96

AGENCY DKT. NO. 489-12/95

T.J. AND V.C. ON BEHALF
OF MINOR T.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF SOMERVILLE,
SOMERSET COUNTY,

Respondent.

Diane K. Smith, Esq., for petitioner (Somerset Sussex Legal Services, attorneys)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: March 13, 1996 Decided: March 13, 1996

BEFORE **BARBARA A. HARNED,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 18, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Dismissal indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

3/13/96
DATE

Barbara A Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

3/15/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 21 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

2. The petitioners hereby withdraw their request for a hearing in this matter.

DATED: February 26, 1996

SOMERSET SUSSEX LEGAL SERVICES
Attorneys for Petitioners

By: _____
Diane K. Smith, Esq.

McDONALD, ROGERS & RIZZOLO
Attorneys for Respondents

By: _____
Michael J. Rogers, Esq.

RECEIVED
MAR 13 11 15 AM '96
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SOMERSET SUSSEX LEGAL SERVICES
By: Diane K. Smith, Esq.
Attorney for Petitioners
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET # EDUOS 00178-96S
AGENCY REF. # 489-12/95

TAMMY JACKSON, parent, :
and Vernetter Clarke, :
Guardian, on behalf of :
TEONA JACKSON, :
Petitioner

vs :

SOMERVILLE :
SCHOOL DISTRICT, : STIPULATION OF DISMISSAL
Respondent

:

This matter being opened to the Office of Administrative Law by Somerset Sussex Legal Services, attorneys for petitioners, Tammy Jackson, Parent, and Vernetter Clarke, former Guardian, upon notice to McDonald, Rogers & Rizzolo, Esqs., attorneys for the Board of Education of the District of Somerville, and it appearing that the respondent has acknowledged that Teona Jackson is a resident of Somerville and has registered her in the schools of the District of Somerville and it further appearing that Teona Jackson is attending the schools of the District of Somerville, and for good cause shown;

1. The parties acknowledge that Teona Jackson is a resident of the District of Somerville and entitled to a tuition-free education in the schools of the District of Somerville.

OAL DKT. NO. EDU 178-96

T.J. and V.C., on behalf of minor, T.J.	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

Date of Mailing, April 26, 1996

162-96

162-96

IN THE MATTER OF THE TENURE	:	
HEARING OF JUDITH KULP,	:	
NEW JERSEY DEPARTMENT OF	:	COMMISSIONER OF EDUCATION
HUMAN SERVICES.	:	DECISION
	:	

SYNOPSIS

Board certified tenure charge of unbecoming conduct against respondent, Teacher I at the Atlantic County Day Training Center, for alleged corporal punishment of a physically challenged student.

ALJ concluded there was no competent evidence to demonstrate that respondent committed an act of corporal punishment against a pupil. ALJ found respondent had reacted to a situation where she observed an aggressive pupil approaching a frail, delicate, undefended pupil who would have been bodily harmed without respondent's intervention. It was ordered that the tenure charge be dismissed and respondent be restored to her former position with all back pay and other emoluments due her, less mitigation.

Commissioner adopted findings and determination in initial decision as his own and directed respondent be restored to her position with compensation.

April 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2074-95

AGENCY DKT. NO. 487-12/94

IN THE MATTER OF THE TENURE HEARING OF JUDITH KULP, NEW JERSEY DEPARTMENT OF HUMAN SERVICES.

Deborah Gottlieb, Deputy Attorney General, for petitioner, Department of Human Services, (Deborah T. Poritz, Deputy Attorney General of New Jersey, attorney)

Bruce Gorman, Esq., for respondent

Record Closed: October 18, 1995 Decided: March 11, 1996

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Human Services (Department) certified tenure charges against respondent, Judith Kulp, before the Commissioner of Education (Commissioner) seeking her dismissal from her tenured position of Teacher I, Atlantic County Day Training Center, pursuant to N.J.S.A. 18A:60-2, N.J.S.A. 18A:28-5, in accordance with the procedures set forth at N.J.S.A. 18A:6-10 to -18.1. N.J.A.C. 10:11-1.8 and incorporating N.J.S.A. 18A6-19 to -25.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was held on August 11 and 18, 1995, at the Atlantic City OAL, Atlantic City, New Jersey. The parties requested and were granted leave to submit posthearing memoranda. The hearing record closed on October 18, 1995. Extensions were granted to execute this initial decision.

ISSUES

The issues to be determined by this tribunal are these:

1. Whether respondent committed an act of corporal punishment against a pupil? If so whether respondent's conduct constitutes conduct unbecoming a teaching staff member?

2. Whether the conduct warrants the removal of respondent's tenure rights and her termination?

BACKGROUND FACTS

Based upon the testimony and other evidence adduced at the hearing together with representations proffered by counsel for the parties, I adopt the following Background Facts as **FINDINGS of FACT** in this matter:

The Atlantic County Day Training Center (Center) located in Pleasantville, New Jersey, was, at the time of the alleged incident, a school for the developmentally disabled under the direction and control of the Department. The pupils enrolled at the Center were profoundly and severely retarded, unable to communicate using traditional methods. The pupils were partially or completely non-ambulatory, unable to feed themselves, unable to care for their personal hygiene and unable to clothe themselves. The pupils were all in need of individual attention and completely dependent upon those persons in their charge.

On the morning of November 28, 1994, respondent was working with two pupils; R.M., a male wheelchair bound and A.F., a wheelchair bound female. There were three other pupils in the classroom attended to by one assistant teacher, a speech therapist and a foster grandmother. Of the five pupils, four were in wheelchairs and one was ambulatory. Those adults in the classroom consisted of respondent; Brenda Ellis, assistant teacher; Kathryn Lewis, a volunteer-foster grandparent; and a speech therapist. Sharon Parker, the other assigned assistant teacher was not in the classroom when the alleged incident which gave rise to the herein tenure charges occurred.

Pupil R.M. was known to be aggressive and would exhibit his anger when frustrated. R.M. can walk with help and is considered to be a healthy boy. R.M. was ten years old on November 28, 1994. He was well nourished, weighing 107 pounds. R.M. is mentally retarded with a low frustration tolerance. He is paraplegic with no control of his legs although he has full motor control of his upper body. He is nonverbal but makes his needs and wants known by making a constant sound of "Aw." R.M. has not learned to use the wheels on his wheelchair, however, he is able to use the handrails in the Center to move his wheelchair.

A.F. is non-ambulatory, blind, deaf and suffers from respiratory illness and osteoporosis, a lack of bone density also known as "brittle bones." Pupil A.F. was 15 years old on November 28, 1994, and weighed approximately 69 pounds. She is severely mentally retarded, suffering with cerebral palsy. She is unable to hold her head upright and her biceps and triceps are spastic where she has no control of her upper extremities. A.F. is also blind and legally deaf. Her normal position has her arms positioned against her upper body with fisted hands directed outward.

The Center is no longer operating as a day training center. It currently functions as a facility serving troubled youth.

Carmine J. Limone, a State-wide manager for day training testified among other things, that in September 1993, there was chaos at the Center between parents and the Center's staff. Limone met with the staff, which included respondent, and learned that there was backbiting among the staff members which had separated into different factions. He had learned that certain files had left the Center, against the rules and regulations. Limone ordered that the files be returned to the Center or action would be taken. The files mysteriously reappeared. Limone instructed the staff members that their behaviors could not continue as in the past. In the event there was no improvement, the Center would be closed. He instructed the supervisor of the Center to improve the conditions at the Center.

Mr. Limone testified there were no problems related to respondent at the Center. Rather, the problems were between staff members.

Mr. Limone testified that on November 28, 1994, he received a telephone call from the Center's regular supervisor, Donald Hepner, who reported a serious incident which had occurred at the Center on that day. Mr. Hepner reported that one of the Center's teachers had allegedly struck a pupil three times and forcibly pushed the pupils wheelchair into a table. Mr. Limone instructed Mr. Hepner to complete an incident report; investigate the allegations; have witnesses execute statements of the alleged events; report the incident to the Public Information and the Division of Youth and Family Services (DYFS); and, advise the Employee Relations Office and Confidential Agent in Personnel. Limone recommended that respondent be removed from the Center, with pay.

Mr. Limone testified that the DYFS did not issue a complaint against respondent. He admitted that he did not conduct an investigation of the allegations nor did he know whether the Employees Relations Office conducted an investigation.

Donald Mangus, Assistant Director of Employee Relations, New Jersey Department of Humans Services, testified among other things, that he was familiar with the tenure charges filed against respondent. He testified at length concerning the Department's Disciplinary Action Program and in particular about Administrative Order: 4:08, Supplement 1., Part C. #3. "Physical or mental abuse of a patient, client, resident or employee," which calls for the removal of the employee on the first infraction (P-1).

On cross-examination Mangus asserted that respondent had been changed with physical abuse, not mental abuse. He stated that abuse was any improper act of striking a pupil; any inappropriate physical contact which could cause harm or injury. He conceded that Administrative Order: 4:08, Supplement 1., Part C. #5. "Inappropriate physical contact or mistreatment of a patient, client, resident or employee," called for a minimum penalty of an official reprimand to the maximum penalty of removal (P-1). He asserted that various factors are considered when charging an employee with an infraction; i.e., what was the contact and, touching a pupil inappropriately is not necessarily inappropriate physical contact.

SUMMARY OF TESTIMONY

Brenda Ellis testified on behalf of petitioner asserting, among other things, that on November 28, 1994, she was in the Center's classroom when she heard respondent yelling at pupil R.M. telling him to stop. Ellis's back was toward respondent when Ellis heard respondent shout to R.M. Ellis testified she turned around toward respondent where she observed respondent strike R.M.'s arm three times. She asserted that respondent picked up R.M.'s left arm with respondent's left hand and struck him three times on his forearm with her other hand. Ellis did not see anything thereafter concerning R.M. and respondent. She stated that she was in shock because she had never observed a teacher strike a pupil.

Ms. Ellis testified, on cross-examination, that Supervisor, Ronald Chuchola was standing in the classroom doorway and observed the incident between respondent and R.M. The supervisor then left the classroom without checking the pupil for injuries or making an inquiry of respondent concerning the incident. Nor did Ellis, or anyone else, check R.M. for injuries or call for a nurse or physician to check on R.M.

On redirect, Ellis asserted that respondent approached her to inquire as to whether the supervisor had observed respondent strike pupil R.M. Ellis testified she answered respondent with a "yes." Respondent was purported to have said, "Nice Knowing you."

Ronald T. Chuchola, Assistant Supervisor of Educational Programs for the Center, testified on behalf of petitioner asserting that at approximately 11:00 a.m. on November 28, 1994, he entered the classroom and observed respondent interacting with a pupil which he characterized as "mishandling." He observed the pupil in his wheelchair and respondent shouting "No! No! No!" He observed respondent move the pupils wheelchair which caused a whiplash of the pupils neck. He observed respondent go the back of the pupils wheelchair, pull the wheelchair in a backward motion and then push the wheelchair violently under a table. He observed the foster grandparent in the classroom facing respondent as well as Ellis facing respondent when he entered the classroom.

Mr. Chuchola testified that another pupil, R.A., was seated at a table near the door Chuchola entered. After his observation of respondent's involvement with R.M., Chuchola patted R.A. on his back and left the classroom. While walking in the Center's corridor, he encountered the school nurse, who was a substitute that day, and instructed the nurse to check on R.M. sometime during the day. He stated to the nurse that there was no emergency and that she should not interrupt her feedings of other pupils to check on R.M.

Subsequently, Chuchola telephoned Donald Hepner, the Center's Supervisor, and reported his observations of respondent's conduct at approximately 11:10 a.m. on November 28, 1994. Chuchola asserted it was Hepner's responsibility to take any action against respondent. Subsequently, Chuchola executed two written statements concerning the events on November 28, 1994. Exhibit P-3 states what Chuchola observed in the classroom on November 28, 1994 as set forth above. Exhibit P-4, describes a meeting held at 3:00 p.m. on the afternoon of November 28, 1994, as follows:

Meeting Report

> On the afternoon of 11/28/94, I was assisted Mr. Hepner in gathering information about an incident involving teacher, Judy Kulp. After the students had departed at the end of the school day, Ms. Kulp gave her version of the incident. Ms. Kulp was accompanied by union shop steward, Lyshiron Watford. With Mr. Hepner and myself was also Paul Riley from the Office of Education.
>
> At this time Mrs. Kulp made the statement that she hit student R.M. My recollection of her statement is: "I was working at the can crusher with B.J. I had A.F. and R.M. positioned behind me. I had given R.M. crackers. He dropped them on the floor. I saw him reach out for Amber's arm. I said, "No, R." I reached out for him. I hit him. I am sorry I hit him. (P-4)

Mr. Chuchola testified that on November 29, 1994, respondent was removed from the classroom and instructed to remain in the non-school area. On November 30, 1994, the Center received a facsimile from Carmine Limone with instructions to remove respondent from the Center's premises. Respondent was escorted off the Center's premises.

On cross-examination Chuchola admitted he did not observe respondent strike R.M. He further admitted he did not go to R.M. to examine the pupil's condition for any injuries. Nor did he invite any of the staff members out into the corridor to inquire about what they might have observed. He further admitted he told the nurse he passed her in the corridor that there was no emergency with respect to R.M. Chuchola took no steps to remove either respondent or R.M. from the classroom.

Mr. Chuchola admitted on direct and cross-examination that respondent had accused Chuchola of harassment. Chuchola testified that he did not recall Hepner telling Chuchola of respondent's harassment complaint, although a harassment grievance was filed against him.

Donald Hepner testified, among other things, that on the morning of November 28, 1994, he was in Cumberland County when he received a telephone call from Chuchola concerning an incident of a teacher shouting at a pupil in the classroom. Hepner left his Cumberland County assignment and traveled to the Center where he met with three staff members and the foster grandparent in the afternoon of November 28, 1994.

Mr. Hepner first talked with the foster grandmother in the presence of Chuchola and Paul Riley, Program Compliance Coordinator, Office of Education, Department of Education, who happened to be at the Center conducting a preprogram review of compliance of the pupils Individualized Educational Program (IEP) on November 28, 1994. The foster grandmother reported she looked up and observed respondent yell at a pupil, hit the pupil and wheel the pupil to another table in the classroom. Ellis reported the same circumstances, however, she stated she observed Chuchola in the classroom who observed respondent shout at R.M. and strike R.M.

Mr. Hepner also interviewed respondent who stated, in effect, that she did strike the pupil in question. He testified that respondent volunteered the statement that R.M. was reaching for another pupil when respondent accidentally struck R.M.'s hand out of the way. Hepner testified that respondent stated, "I'm sorry." Hepner's written statement essentially corroborates his sworn testimony (J-1). He admitted, on cross-examination, that respondent's statement revealed that she did not intend to cause R.M. any harm or injury.

Mr. Hepner also testified, among other things, that he met with respondent on October 1994, where respondent had complained to Hepner about Chuchola harassing respondent. Hepner testified he reported his conversation with respondent to Chuchola.

Mr. Hepner testified that it was the Center's policy for the supervisor to become involved when there is an injury to a pupil. The nurse is called immediately, the parents are notified and an incident report is generated by the supervisor. The supervisor is required to remove the offending staff member who is observed to have abused a pupil. He asserted that it was never appropriate to shout at or strike a pupil.

Kathryn Lewis, the volunteer foster grandparent, testified, among other things, that on November 28, 1994, she was in the classroom with respondent, other staff members and the pupils. She was standing beside a table in the classroom facing the table where respondent and pupils R.M. and A.F. were situated. She asserted that respondent was facing her. She noted that R.M. likes food and he was reaching for a soda cracker which was located on another table. When R.M. reached for the soda cracker his wheelchair moved because both wheels were not locked. Lewis asserted that respondent thought R.M. was going to attack A.F. rather than reaching for the food. That is when respondent shouted "No, No, No" at R.M. and struck him. Respondent then pushed R.M.'s wheelchair toward the table where the soda cracker was located. Lewis stated she left the classroom when Chuchola arrived on the scene. She subsequently wrote a statement of her perception of the events on that day (P-5).

Respondent testified on her own behalf asserting among other things, that she had never been disciplined prior to November 28, 1994, nor had she ever abused a client or pupil under her care.

On November 28, 1994, A.F. was in a bedchair which was reclined to a 45 degree angle. It is elongated with a footrest. R.M. was in a "sports" wheelchair with a low, nylon back. Respondent was with both pupils, and others, in the vocational classroom. The technician who works with respondent, Mrs. Parker, was on a rest break and not in the classroom to assist respondent.

Respondent was at the can crusher with pupil B.J. R.M. was upset and angry that he was required to be in the vocational room. Respondent asked R.M. to do three cans at the can crusher for three soda crackers. Respondent moved R.M. to a table after he completed the task and placed three crackers on the table with a napkin. Respondent then locked the left wheel of R.M.'s wheelchair. Respondent moved A.F.'s bedchair towards her while she worked with B.J. at the can crusher.

While respondent worked with B.J., R.M. had increased the volume of noise he was making and by jerking about in his wheelchair, had managed to move it next to A.F.'s left side where he was approximately four inches from A.F. R.M. reached toward A.F.'s left fist with his right hand. Respondent heard R.M.'s loud noise and looked over her shoulder to observe R.M.'s action. She quickly turned toward R.M. and A.F. and shouted "No" at R.M. She then reached for the left fist of A.F., believing that A.F. was in imminent danger of having her arm broken. Respondent immediately intervened and in doing so, accidentally struck R.M.'s hand. As a result of the accident, R.M. withdrew his hand from A.F. Respondent then moved behind R.M.'s wheelchair and moved it away from A.F. while admonishing R.M. Respondent locked both wheels of R.M.'s wheelchair while admonishing R.M. that there was to be no hitting in her class and that hitting others was not good behavior. Respondent made no contact with R.M. while she moved and admonished him.

Sometime during this exchange, respondent observed that Chuchola had entered the classroom, say something to pupil R.A. and then left. Mrs. Lillian Toben entered the classroom from another door. When she observed Chuchola in the classroom, Ms. Toben turned and left. Mrs. Parker, the technician, returned to the classroom after Chuchola had left.

Respondent testified that no one came to the classroom to inquire of or inspect R.M. The incident occurred at 11:05 a.m. Respondent was out of the classroom for 20 minutes, between 12:00 p.m. and 12:20 p.m. R.M. remained in respondent's classroom for the remainder of the school day. She testified that R.M. had been in her classroom for only two weeks prior to the incident.

At 3:00 p.m., Chuchola appeared at respondent's classroom to advise respondent that Hepner wanted to see her and also advised respondent that she would need her union representative to accompany her to the meeting. Those present at the meeting included respondent, her union representative, Hepner, Chuchola and Riley. Respondent explained the circumstances of the events concerning R.M. and A.F. She admitted that she had accidentally struck R.M. when attempting to protect A.F., and apologized for her actions.

Respondent testified about her professional relationship with Chuchola asserting that she had approached Hepner in mid-October 1994, to report that Chuchola was harassing respondent. Hepner advised respondent that he could do nothing until respondent had discussed her complaint with Chuchola. Respondent did not immediately discuss her concerns with Chuchola. She asserted that Chuchola continued to harass her. As a consequence, respondent and her union representative met with Chuchola in mid-October 1994. Respondent alleged that Chuchola was harassing her and that if it did not cease, she would report his actions to the Department's Affirmative Action Officer. Chuchola denied respondent's allegations at that meeting.

FINDINGS OF FACT

Based on the testimony and other evidence adduced at the hearing and having given fair weight thereto, I **FIND** the following **FACTS:**

On November 28, 1994, at approximately 11:00 a.m., respondent was in the Center's vocational classroom in charge of three of its pupils; i.e., B.J., R.M. and A.F. R.M. was in his wheelchair near the can crusher, where respondent was working with pupil B.J. Pupil A.F. was in her bedchair near a table.

After R.M. completed his assignment of crushing three cans, respondent moved him to the table near A.F. where respondent had placed three soda crackers for R.M. to eat as a reward for completing his assignment. R.M. was upset and angry because he was required to attend the vocational class and made loud noises in protest. When respondent moved R.M.'s wheelchair from the can crusher to the table, respondent only locked the left wheel of R.M.'s wheelchair.

While respondent was working with pupil B.J. at the can crusher, she looked over her shoulder to observe that R.M. had moved his wheelchair, through body movements, close to where A.F. was located. Respondent observed R.M. reach toward A.F.'s left fist. Respondent shouted "No" to R.M. and immediately left the can crusher work station and moved toward A.F. where she intervened and accidentally struck R.M.'s hand to prevent R.M. from harming A.F. R.M. immediately withdrew his hand.

Respondent then went behind A.F.'s bedchair and moved R.M.'s wheelchair away from A.F., all the while admonishing R.M. that he was not to hit others. Respondent made no physical contact with R.M. when she moved R.M.'s wheelchair toward a table and locked its wheels.

Respondent's assistant, Technician Parker, was not in the vocational classroom to assist respondent when the incident occurred. She had left the classroom to take her morning break. The incident involving respondent, R.M. and A.F. was witnessed, in whole or part, by Technician Brenda Ellis, volunteer foster grandparent Kathryn Lewis and, Assistant Supervisor Ronald Chuchola.

Assistant Chuchola arrived on the scene while respondent was moving R.M.'s wheelchair away from A.F. and towards the table. He had heard respondent shout at R.M. while he was in the Center's corridor and prior to his entrance into the classroom. After he entered the classroom and observed respondent move R.M.'s chair away from A.F. and towards the table, Chuchola said nothing to respondent nor did he approach R.M. to determine whether or not R.M. had suffered any injury. Rather, Chuchola patted pupil R.A. and left the classroom. Subsequent to leaving the classroom, Chuchola encountered the substitute school nurse in the corridor and asked her to check on pupil R.M. Chuchola advised the nurse that it was not an emergency.

Assistant Supervisor Chuchola testified he was the Supervisor in charge of the Center's school in the absence of Supervisor Hepner. Supervisor Hepner was absent from the Center when Chuchola observed the incident involving respondent, R.M. and A.F. Chuchola did nothing at the time of the incident to intervene, ask questions about R.M.'s physical condition, remove respondent from the classroom or anything that would indicate that respondent had violated any rule or regulation. Rather, he subsequently telephoned Supervisor Hepner who was on assignment at the Cumberland County Day Training Center.

The Center had, while in operation, a policy of zero tolerance with respect to pupil abuse or corporal punishment. It also advised it's staff members that they were not to raise their voice with a pupil.

Supervisor Hepner called a meeting at 3:00 p.m. on November 28, 1994, where respondent was to attend with her union representative. In addition, Assistant Supervisor Chuchola and Program Compliance Coordinator Riley were in attendance. Respondent admitted she had accidentally struck pupil R.M.'s hand on the morning of November 28, 1994 and apologized for her actions.

On November 29, 1994, respondent was suspended from duty and tenure charges were subsequently certified to the Commissioner against her as a consequence of respondent's conduct on November 28, 1994.

Respondent had, in October 1994, advised Supervisor Hepner of alleged harassment of respondent by Chuchola. Hepner did nothing about the alleged harassment, advising respondent she was required to discuss the allegations with Chuchola. Respondent subsequently discussed the allegations with Chuchola in the presence of respondent's union representative. Chuchola denied the allegations. Although Hepner testified that he had, in fact, advised Chuchola of respondent's harassment allegations, Chuchola testified that he did not recall Hepner discussing the allegations with him.

DISCUSSION AND CONCLUSIONS

The record clearly demonstrates that the Center had a policy of zero tolerance with regard to striking a pupil and trained its staff not to raise their voice with a pupil. Under New Jersey Education Law, N.J.S.A. 18A:6-1 corporal punishment of pupils may not be inflicted except the application of force against a pupil may be used under certain circumstances. One such exception is found at N.J.S.A. 18:6-1 (1) where the pupil is found to be "...threatening physical injury to others." That is precisely the circumstance in the instant matter, however, respondent did not intend to punish R.M. Rather, respondent reacted to the situation where she observed an aggressive pupil approaching a frail, delicate, undefended pupil who, she believed, would be bodily harmed without her intervention. In her intervention to save A.F. from harm, respondent accidentally struck R.M.'s hand, which R.M. immediately withdrew.

Although the accident was observed by at least three staff members, none believed R.M. to be injured in any fashion. None of the staff members, including the Assistant Supervisor who observed part of the incident and who was in charge of the Center at the time, intervened or inquired as to R.M.'s condition. Consequently, it was a de minimis event.

Respondent admitted she struck R.M. and acknowledged that the action, although a reaction to what she perceived to be an emergency, was wrong and contra to the Center's policy. Respondent apologized for her actions, which were not intentional.

The Courts and the Commission have held that a single incident of impropriety by a teaching staff member may lead to his/her dismissal from a tenured teaching position. Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1954), aff'd 131 N.J.L. 326 (E & A 1944). However, the Commissioner is assiduous to protect school personnel in their employment when the employee is subject to unfair or improper attacks. In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County, 1966 S.L.D. 77. Such is the case here. There is nothing in the record to demonstrate that respondent administered corporal punishment to R.M. Nor is there any proof that R.M. was injured or harmed in any manner. Rather, the record shows that her inadvertent action was to protect A.F.

I **CONCLUDE**, therefore, that the Department has failed to carry its burden, by a preponderance of the credible evidence, that respondent's conduct on November 28, 1994, was so egregious as to cause her to lose her tenure status.

I **CONCLUDE** that there is no competent evidence to demonstrate that respondent committed an act of corporal punishment against a pupil. Therefore, her conduct on November 28, 1994, did not constitute conduct unbecoming a teaching staff member and the tenure charges against her should be dismissed.

ORDER

Accordingly, it is **ORDERED** that the tenure charge against Judith Kulp be **DISMISSED** and that she be restored to her former position with all back pay and other emoluments due her, less mitigation.

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

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

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

11 March 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/14/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 20 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

FOR PETITIONER:

DONALD MANGUS
CARMINE J. LIMONE
BRENDA ELLIS
PAUL RILEY
DONALD HEPNER
RONALD CHUCHOLA
KATHRYN LEWIS

FOR RESPONDENT:

JUDITH A. KULP

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS:

J-1 MEETING REPORT - DON HEPNER

FOR PETITIONER:

P-1 N.J. DEPT. OF HUMAN SERVICES, DISCIPLINARY ACTION PROGRAM
P-2 STATEMENT OF BRENDA ELLIS
P-3 STATEMENT OF RONALD T. CHUCHOLA
P-4 MEETING REPORT-RON CHUCHOLA
P-5 STATEMENT OF KATHRYN LEWIS

FOR RESPONDENT:

NONE

IN THE MATTER OF THE TENURE	:	
HEARING OF JUDITH KULP,	:	
NEW JERSEY DEPARTMENT OF	:	COMMISSIONER OF EDUCATION
HUMAN SERVICES.	:	DECISION
	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the Department failed to demonstrate that Ms. Kulp's actions constituted unbecoming conduct in that it was unable to prove that she committed an act of corporal punishment against a pupil. (*N.J.S.A.* 18A:6-1) Pursuant to *N.J.S.A.* 18A:6-1(1), one has not inflicted corporal punishment where the pupil is found to be "threatening physical injury to others," which the ALJ found to be the situation in the instant matter, where a teacher reactively struck an aggressive pupil's hand who was approaching a frail, delicate, undefended pupil, who could have been bodily harmed without Ms. Kulp's intervention. (Initial Decision at p. 15)

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL and finds that the tenure charge must be dismissed and respondent restored to her former position with all back pay and other emoluments due her, less mitigation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 25, 1996
Date of Mailing, April 26, 1996

166-96E

166-96

SANDRA HYNES,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTHERN REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

April 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING APPLICATION
FOR TEMPORARY EMERGENT RELIEF
OAL DKT. NO. EDU 2897-96
AGENCY DKT. NO. 145-4/96

SANDRA HYNES,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,

Respondent.

Leonard J. Wood, Esq., for petitioner (Morelli and Rinaldi, attorneys)

Charles R. Iannuzzi, Esq., for respondent

This matter was commenced on April 23, 1996 when Sandra Hynes, an eighteen year old senior student at Delsea Regional High School, filed a verified petition with the Commissioner of Education seeking a ruling that respondent's determination that she was guilty of misconduct was arbitrary, capricious and unreasonable. Also filed on April 23, 1996, was an application for temporary emergent relief seeking a stay of imposition of all penalties pending resolution of the appeal process. On April 24, 1996 the Commissioner of Education transmitted the matter to the

Office of Administrative Law for determination pursuant to N.J.A.C. 1:1-12.6. A return date for oral argument on the motion for temporary emergent relief was scheduled for April 25, 1996, at the Trenton office of the Office of Administrative Law and took place as scheduled. In addition to the motion papers which were filed with the Commissioner of Education on April 23, 1996. counsel for petitioner filed his own certification in support of the application to stay the decision of respondent. Counsel for respondent filed a letter brief and other supporting papers including a certification of Joseph S. Marrare. The following facts and procedural history appear from the papers filed and from the arguments of counsel on the record on April 25, 1996.

On April 10, 1996 while petitioner was at Universal Studios Theme Park in Orlando, Florida, participating in the senior class trip, adult chaperones Paula Chamberlain and Joseph Pepitone observed petitioner with a container of beer in her hand. During the investigation which followed that evening, petitioner advised the school officials who were in charge of the trip that she had been walking through the park with a group of students, including Linda Stephens and Ilene Holiday, and that as they passed another group of students including J. F. and Jen Matteis, J. F. thrust a cup of beer into her hand. She insisted that she had not asked for the beer, she was not expecting the beer, she did not want the beer and she did not intend to drink it. It is petitioner's position that as soon as she realized what it was, she immediately brought it to the closest trash container. A series of certifications from petitioner and from each of the other students involved were filed in support of the application for temporary emergent relief. Each certification supports petitioner's contention that petitioner was surprised when the container of beer was thrust into her hand and that she immediately disposed of it. The certification of J. F. acknowledges that she purchased the beer without the knowledge or consent of petitioner and gave it to petitioner without any foreknowledge on petitioner's part that it was coming. The certification does not explain why J. F. would do such a thing. A hand-written document, dated 4/10/96, signed by Paula Chamberlain and Joseph Pepitone, indicates that Ms. Chamberlain personally observed Jen Matteis and Kate Tinney standing at a beer vendor's cart. "Jen Matteis had a beer in one hand and money in the other. The vendor also had his hand on the money," the report recites. The report, apparently written by Ms. Chamberlain, indicates that she advised Joe Pepitone who was walking down the street at Universal Studios with her and instead of responding to her he had

walked off toward their right, directly following which she heard him say, "Dump it." When she looked over she discovered that Mr. Pepitone was talking to petitioner. The report also recites that as Ms. Chamberlain was dealing with Ms. Matteis, Mr. Pepitone had "crossed over the street and dumped the beer." A certification filed by Joseph S. Marrare, a teacher who questioned the students on the evening of April 10, 1996, signed, but undated, provides in pertinent part:

> 3. During this interview, Mr. Sottosanti and Ms. Chamberlain asked me to remain with the students while they went to get J. F. for her interview.
>
> 4. At this time, I asked Sandy "if she would not have gotten caught, would she have consumed the beer?"
>
> 5. She then responded "yes"

On April 11, 1996, the parents of all the students involved in the incident were called and were advised that the students were not being permitted to participate in any of the remaining trip activities and that discipline pursuant to the policy in the student handbook would be imposed upon their return to school. The policy set forth in the student handbook, page 56, lists the following discipline for a first infraction of "possession or use of alcohol or other drugs":

> Police notification - parent conference with principal, vice-principal, and SAC* - mandatory 10 days internal suspension - mandatory counseling - loss of eligibility to participate in or attend extra curricular activities for one calendar year.

On Monday, April 15, 1996, petitioner (and presumably the other students involved) commenced a ten-day internal suspension. On Tuesday, April 16, 1996, high school vice-principal, Joe Sottosanti, interviewed petitioner about the April 10, 1996 incident. Petitioner was given a copy of the Student Assistance Program Student Contract Form, which begins, "As a result of being in violation of the Delsea Regional School District's Board of Education Policy on

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* Substance Abuse Counselor.

Substance Abuse, it is mandatory for you to be involved in a program to assist in the remediation of possible alcohol and/or other drug use and its related problems." Petitioner refused to sign the contract because she felt she had not done anything wrong. Mr. Sottosanti did not give petitioner a copy of the disciplinary report he prepared, although the form bears Mr. Sottosanti's signature and the signature of the principal. On the line for student signature under which appears the explanation "(My signature merely acknowledges my awareness of content)" only the date "4/15/96" appears. Since petitioner was not interviewed until April 16, 1996, what exactly that date means is not clear; it appears to be the date that Mr. Sottosanti signed the report. Under "Discipline Problems Described" on the report appears the following handwritten information, "Student seen in possession of a beer in the park. Two other students involved. Two adult chaperones witnessed behavior. Students interviewed to come up with complete story of all parties involved." The disciplinary report also indicates that the administrative action taken was a ten-day internal suspension and "mandatory conference with SAC and loss of eligibility to participate in extra curr. activities."

On April 18, 1996, Leonard J. Wood, Esquire, petitioner's attorney, called the high school and spoke with Mr. Sottosanti to ascertain the appropriate appeal process for the disciplinary action. Mr. Sottosanti indicated that Mr. Wood should look in the disciplinary handbook, that he did not have time to advise Mr. Wood concerning the procedures or forms to use. Immediately thereafter, Mr. Wood spoke with a secretary in the Superintendent's office and requested whatever form was necessary to appeal the decision of the vice-principal. He requested that the proper form be faxed to him. When he did not receive it later that day, he called the office of counsel to respondent, Mr. Iannuzzi. No form of appeal was forthcoming on Friday, April 19, 1996, however. On Monday, April 22, 1996, the superintendent's office (or perhaps respondent's counsel's office, this is not entirely clear) faxed the form to Mr. Wood's office at approximately 11 o'clock a.m. He filled it in and filed it the same day. On the following morning, April 23, 1996, the Superintendent's office advised Mr. Wood that he had used the wrong form and that the appeal had to be filed with the building principal. Promptly thereafter at approximately 8:30 a.m. counsel for petitioner forwarded the information which he had filed with the superintendent directly to the principal together with a letter indicating the nature of the appeal. Not until the

morning of April 24, 1996, was Mr. Wood advised by a letter from the principal that he had "used the wrong form." The correct form was then provided.

At approximately 4:30 p.m. on April 24, 1996, the Office of Administrative Law Clerk's office scheduled oral argument on petitioner's application for temporary emergent relief seeking a temporary stay of the penalties for the following morning, April 25, 1996. As of 4:30 p.m. on April 24, 1996, no hearing date or time for the appeal before the school principal had been scheduled. During the oral argument the undersigned directed that immediately upon return to the school district the hearing before the principal which is provided for in respondent's disciplinary procedures should take place.

At 4:45 p.m., counsel for both parties advised the undersigned by telephone conference call that although the hearing had commenced and all of the adult witnesses and one student witness had been heard, it would be necessary for the hearing to continue on the morning of April 26, 1996, because some of the student witnesses had been under the age of 18 and parental consent for their testimony was required. Counsel anticipated that the hearing would conclude mid-morning on April 26, 1996 and that the principal's determination on the appeal would be available within a couple of hours thereafter.

Petitioner now seeks emergent relief in this forum because the disciplinary action which has been imposed prohibits her from attending the senior prom on April 26, 1996. Petitioner insists that she is innocent of any misconduct and that she is entitled to a temporary injunction prohibiting respondent from imposing further penalties, including precluding her from attending the prom. The criteria which must be established before the imposition of temporary injunctive relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). One principle is that a preliminary injunction should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Id. at 132-133. Petitioner notes that there is only one senior prom in any senior's life and not only will she be missing the prom, but so will her date. Wrongful

deprivation of the prom experience is exactly the kind of irreparable injury which money damages cannot adequately compensate, she argues. I agree; a senior's senior prom is a once in a life-time experience which cannot be duplicated.

A second principle is that temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled. In the present matter, it is clear that absent the imposition of discipline, petitioner would be entitled to attend the prom. It further appears to the undersigned clear that respondent's own board policies concerning the appeal process in disciplinary actions for misconduct require the imposition of an automatic stay whenever the discipline imposed exceeds a suspension of three days. Board of Education Policy Number 5201 Subsection B entitled "Hearing of Appeals - Procedure" specifies the procedures to be followed when appealing from disciplinary actions imposed by the vice-principal. The first appeal is heard by the principal and the appeal process terminates with the superintendent; his determination at the district level is final. The second paragraph under Subsection B provides: "Short term suspensions of three days or less will be served immediately following the due process conference while the appeal process is in progress." Subsection C of the same board policy is entitled "Disposition of an Appeal" and provides:

> C. Disposition of an Appeal
>
> - The hearing officer will close the hearing when he/she has determined that all information appropriate to the appeal has been gathered. He/she will render a decision, in writing, within three school days on the form approved by the Board of Education.
>
> - Any action pending from the issue being appeal will be continued on the first school day following the written disposition of the hearing officer.
>
> - If an appeal is found in favor of the complainant, all suspension days will be expunged from the record.

hand for a period of time before it was deposited in the trash container, makes her guilty of the offense of possession. I **CONCLUDE** that disposition is simply wrong as a matter of law. N.J.S.A. 18A:37-2, the statute which sets forth the conduct which shall constitute good cause for suspension or expulsion, requires "knowing possession" . . . of alcoholic beverages. Accordingly, if respondent's disciplinary action herein was imposed merely because it concluded that petitioner had a beer in her hand, even if she had not expected it or asked for it or intended to drink it, such a determination would be unreasonable as a matter of law. Of course the ultimate determination of the facts in this matter depends upon credibility determinations and I did not hear the witnesses or have an opportunity to observe them. Ultimately, petitioner may not prevail. She is, nevertheless, entitled to due process as provided in respondent's own Board Policy and case law. As of April 26, 1996, respondent's appeal process has not terminated with a final determination at the district level. Petitioner is still entitled to be heard by the superintendent and pursuant to respondent's own rules and regulations, the clear meaning of which can be ascertained merely from reading the policy, the discipline imposed as a result of the principal having denied the appeal is not scheduled to recommence until Monday, April 29, 1996. Furthermore, respondent's conduct in failing to facilitate the appeal process by providing counsel with information and forms concerning the proper procedures is directly responsible for the inability of the process to come to a final decision prior to commencement of the senior prom.

Therefore, for all of the foregoing reasons, the discipline imposed upon petitioner, including loss of eligibility to participate in or attend extra curricular activities, is hereby **STAYED** until Monday, April 29, 1996. It is my understanding that the next extra curricular activity is not scheduled until May 25, 1996 which will permit time for a proper determination on the merits. I will contact counsel on Monday, April 29, 1996 to schedule a plenary hearing.

Pursuant to the clear language of these policies, only short term suspensions of three days or less are to be served immediately following the due process conference while the appeal process is in progress. In other cases, after an appeal has commenced, it is clear that discipline is to be suspended until "the first school day following the written disposition of the hearing officer." The hearing officer at the first step is the principal and the undersigned received the principal's written disposition, which is attached hereto, at 11:01 a.m. on April 26, 1996. (Note that although the time indicator on the OAL fax machine says 10:01 a.m., the clock was never changed to reflect accurate Day-Light Savings Time.) Although principal Borelli's report does not specifically so indicate, I am advised that it was his determination that the appeal is denied. Therefore, pursuant to respondent's own rules, imposition of discipline upon petitioner should have ceased with the filing of her appeal to the principal and will recommence only on Monday, April 29, 1996.

Respondent has stated that petitioner's appeal was not filed in a timely fashion pursuant to this same Board Policy Number 5201 which requires an appeal to be filed in the principal's office by the third school day after the due process conference. It is clear that the appeal was not in fact filed on the proper form with the principal until April 24, 1996. The reason for the late filing, however, was vice-principal Sottosanti's failure to respond to the reasonable request of counsel on Thursday, April 18, 1996, when Mr. Wood called to ask the appeal process and to obtain the forms. Accordingly, respondent was fully aware as of April 18, 1996, that petitioner was appealing the determination of the vice-principal imposing this penalty. If Mr. Sottosanti had simply faxed the proper form to petitioner's attorney on the day when it was requested or even the next day, none of us would be in the current position of having to address this issue only hours before commencement of the event in question.

With respect to the third criterion in Crowe v. DiGioia, supra, at 133, that a preliminary injunction should not issue where all materials facts are controverted, thus requiring a petitioner to make a preliminary showing of a reasonable probability of ultimate success on the merits, it is true that the facts in this matter are highly contested. Doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo, however. Respondent has taken the position that even if petitioner is being truthful, the fact that she had the container of beer in her

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 26, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

106-96

OAL DKT. NO. EDU 2897-96

SANDRA HYNES, :

V :

BOARD OF EDUCATION OF : THE SOUTHERN REGIONAL SCHOOL DISTRICT, : GLOUCESTER COUNTY,

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were filed by respondent Board of Education immediately upon issuance of the initial decision, which essentially recast and reiterate arguments presented at hearing, while contending that petitioner has failed to meet the criteria for grant of emergent relief.

Pursuant to N.J.S.A. 18A:4-34, authority to hear this matter has been delegated to the Assistant Commissioner.

Upon review of the record, the Assistant Commissioner affirms the determination of the Administrative Law Judge (ALJ) that emergent relief is warranted in this matter. The Assistant Commissioner finds that, while deprivation of extracurricular activities does not normally rise to the level of irreparable harm, in the present instance petitioner will suffer such deprivation without having had the due process at the local level to which she is entitled; the Assistant Commissioner finds this particularly troublesome in that the ALJ found that petitioner's attorney made prompt and diligent efforts to obtain such due process, but was thwarted by the actions of district administrators. Additionally, petitioner has demonstrated a reasonable likelihood of success on the merits of this case based on the testimony presented at the hearing, and weighing of equities inures in petitioner's favor under the circumstances of this matter.

Accordingly, the Motion for Emergent Relief, wherein the discipline imposed upon petitioner is hereby stayed until Monday, April 29, 1996, is GRANTED and the matter shall proceed to hearing at the Office of Administrative Law as recommended by the ALJ.

IT IS SO ORDERED.

Peter B Contini

ASSISTANT COMMISSIONER

April 26, 1996
Date of Mailing, April 29, 1996

166-96

513-96 (166-96 E)

SANDRA HYNES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 22, 1996

OAL DKT. NO. EDU 2897-96
AGENCY DKT. NO. 145-4/96

SANDRA HYNES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

168-96

IN THE MATTER OF THE TENURE	:	
HEARING OF BEVERLY PINHEIRO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF COLTS NECK,	:	DECISION
MONMOUTH COUNTY.	:	
_____	:	

MAY 1, 1996

IN THE MATTER OF THE TENURE	:	
HEARING OF BEVERLY PINHEIRO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF COLTS NECK,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

This matter having been opened before the Commissioner of Education on February 26, 1996, through certification of charges of conduct unbecoming a teaching staff member, insubordination, incapacity and other just cause against respondent[1], then a tenured teaching staff member in the employ of the Board of Education of the Township of Colts Neck; and

The Commissioner having directed respondent to file an Answer to the charges against her by notice dated February 27, 1996; and

Respondent having filed a response which did not comport with *N.J.A.C.* 6:24-1.4; and

The Commissioner having directed respondent to file an Answer to the charges against her by a second notice dated March 1, 1996; and

[1] The Board's initial submission included the Statement of Evidence and Certificate of Determination, which specified the charges filed against respondent and certified by the Board of Education on February 21, 1996. On March 18, 1996, the Board submitted a copy of the charges, which had inadvertently been omitted from the package mailed to the Commissioner.

The Commissioner having been informed by letter, dated March 18, 1996, from the Board Secretary that respondent unilaterally resigned from her tenured position with the Board by letter dated February 29, 1996; and

The Commissioner having received confirmation that the Board accepted said resignation at its meeting held on March 6, 1996; and

The Board being unable, as a result of respondent's resignation, to move forward with the above-referenced tenure charges before the Commissioner of Education; now therefore

IT IS ORDERED this 30th day of April 1996 that this matter is dismissed as moot. This matter will, however, be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to *N.J.A.C.* 6:11-3.5 and 3.6.

COMMISSIONER OF EDUCATION

MAY 1, 1996

DATE OF MAILING MAY 1, 1996

169-96

169-96

OAL DKT. NO. EDU 11616-94

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBBIE MAC DOWELL,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
PATERSON, PASSAIC COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of corporal punishment, unbecoming conduct, use of profane and inappropriate language, and insubordination against respondent music teacher.

ALJ determined that the District had not proven corporal punishment or unbecoming conduct with respect to two incidents with pupils, but had proven those charges with respect to an incident with one pupil (J.M.), in that J.M. was moved into a seat by physical means when not presenting a threat to himself or others. Thus, the physical movement of him became a matter of physical force, be it light, moderate or strong, and violated the ban on corporal punishment. The District did prove charge of use of profane and inappropriate language but did not prove insubordination. Thus, ALJ found that although respondent's conduct was serious and unprofessional, dismissal was not appropriate. ALJ ordered respondent's annual salary increment for school year 1996-97 withheld and respondent to attend an appropriate course or training program to heighten and enhance respondent's sensitivity.

In light of the record, the transcripts of the hearings, and *In re Fulcomer,* among other cites, the Commissioner concurred with the ALJ that respondent's conduct, although serious and unprofessional, did not warrant his dismissal from his tenured position. However, to impress upon respondent and others the seriousness of the conduct at issue, the Commissioner directed that in addition to the employment and adjustment increment withholding recommended by the ALJ, respondent forfeit the 120 days' salary withheld following certification of the within tenure charges. Given that the State Board recently ruled that imposing a general continuing education program as a punishment for unbecoming conduct was inappropriate, the Commissioner declined to impose such a requirement.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11616-94
AGENCY DKT. NO. 453-11/94

IN THE MATTER OF THE TENURE HEARING ROBBIE MacDOWELL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

Gregory G. Johnson, Esq., for petitioner

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

Record Closed: September 15, 1995 Decided: January 29, 1996*

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter concerns tenure charges brought against the respondent, Robbie MacDowell, which were certified by Laval F. Wilson, the State District Superintendent and served upon respondent on November 9, 1994. An answer was filed by respondent on November 29, 1994. On December 1, 1994 the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

An in-person prehearing was held in the matter on February 7, 1995 at which time the issues as well as the hearing dates were set forth. The hearing took place on

eight separate days including April 12, 19, 20, 26, 1995 as well as May 17, 1995, June 2, 1995, July 13, 1995 and July 14, 1995.

At the conclusion of testimony the hearing record was left open until August 30, 1995 for both briefs and responsive filing. Due to difficulty in obtaining transcripts of all the hearing dates in a timely fashion a request was made to extend the time to file posthearing submissions. That request was granted and the hearing record closed upon receipt of the last submission on September 15, 1995. Ordinarily, the initial decision would have been due within 45 days however an order of extension was requested and granted extending the time for the initial decision until December 14, 1995 for good cause on the part of the undersigned due to an excessive case load as well as numerous transcripts to review and the length of the proceeding. A second extension was granted extending the time to January 28,1996 which, due to the fact it falls on a Sunday, would make the actual date for the Initial decision to be due Monday January 29,1996.*

STIPULATION OF FACTS

On the first day of hearing the parties entered into a stipulation of facts (J-1a) which was signed but also included handwritten corrections and notations. The stipulation of facts was then submitted in signed form incorporating those notations and corrections made by the parties (J-1b) and reads as follows:

The parties, petitioner Paterson Public Schools ("District") and Robbie McDowell, respondent, hereby stipulate to the following facts and exhibits:

1. The petitioner District hired the respondent as a music teacher on September 1, 1986. The respondent acquired tenure as of September 2, 1989.

2. During the 1989-90 school year, the respondent was assigned to Public School No. 4. At Public School No. 4 Vincent Caramico was the building principal, and Pasquale Migliaccio the vice-principal.

3. On October 2, 1989, the respondent was assigned to cafeteria duty in addition to his teaching responsibilities. Guidance counselor Daniel DiGiacomo and vice-principal Migliaccio was (sic) also assigned to cafeteria duty on that date.

4. On October 2, 1989, between the time period 11:20 a.m. to 11:40 a.m. Thabiti Wheeler and Clemente Marty, students, were involved in an altercation.

5. On October 2, 1989, at approximately 11:45 a.m. Thabiti was seen by the school nurse, Lucy Sheridan, for an examination. See student incident report attached as Exhibit J-1.

6. During the 1989-90 school year, Martha Bolds (now Martha Affessi) parent of Thabiti Wheeler was the president of the Home School Council. On October 2, 1989, Ms. Bolds visited school for after being called regarding the incident in the cafeteria. Later that day, Ms. Bolds called the Paterson Police Department and the copy of the police report emanating from that call is attached hereto as Exhibit J-2.

7. Ms. Bolds filed assault charges against the respondent. After a trial in the Paterson Municipal Court on May 9, 1990, Judge Fenster, P.M.C. found the respondent guilty of simple assault upon Thabiti Wheeler. See transcript as Exhibit J-3. On appeal, Superior Court Judge William J. Marchese rendered a decision on December 17, 1990 reversing the respondent's conviction. See transcript of judge's decision dated December 17, 1990 as Exhibit J-4.

8. No disciplinary action was taken by Principal Caramico or the former board of education against the respondent regarding the incident, nor at any other time during his eight year teaching career was disciplinary action undertaken against him, other than in connection with these charges.

9. On August 7, 1991, the State Board of Education issued an order taking control of the Paterson public schools. See order attached as Exhibit J-5.

10. During 1993-94 school year, the respondent was assigned to teach music at two schools: Public School No. 1, Monday through Wednesday and Public School No. 2, Thursday and Friday.

11. On or about May 6, 1994, the respondent was teaching music class at Public School No. 2. On this date the respondent taught Mr. Jackson's fifth grade class wherein Jose Marques was a student.

12. On or about May 6, 1994, Jose reported an incident involving the respondent and vice-principal Vitone discussed the incident with the respondent. A memo regarding the incident was drafted by vice-principal Vitone and dated May 11, 1994. See Exhibit J-6.

13. During May, resource room teacher Susan Gubar contacted vice-principal Vitone concerning a song written by the respondent. After a discussion between vice-principal Vitone and the respondent, a memo was drafted and dated May 11, 1994 regarding the meeting. See Exhibit J-7.

14. The auditorium in which the J.M. incident and the L.T. took place contains sixteen rows of seats, twelve on each side with a center isle. The right side seats are number 1 to 23 and the left side seats are numbered 2 to 24. See Exhibit J-8.

As both sides have agreed that these facts are underlying facts in this case as well as the referenced documents I hereby **FIND** them as **FACTS** with respect to this matter.

CHARGES AND FACTS

Having heard the testimony, and assesed the credibility of the witnesses as well as having reviewed the documentary evidence the discussion of the **Facts** which I **Find** in the case must proceed by each allegation stated in the tenure charges for clarity.

Charge One: Corporal Punishment

3. The respondent committed numerous acts of corporal punishment with the intent to discipline, harm punish intimidate or otherwise harass the pupils under his charge.

a) On or about October 2, 1989, while assigned to Public School No. 4, the respondent did injure pupil T. W. by grabbing his neck and pushing him into a table causing bruises on his neck, chest and back areas.

The testimony regarding the October 2, 1989 incident came from a number of sources including T.B.'s mother who also supplied photographs of bruising as well as her account of her visit after the incident. Additionally testimony from Mr. DiGiacomo, R. B.; L. C. and portions of the municipal court testimony were offered along with that of MacDowell. Noticeably absent was any testimony from T.W. who is now an adult or from C. M. who was engaged in the altercation preceeding this in 1989.

All agree and it is found as fact that T.W. and C.M. were engaged in an altercation that T.B.'s mother described as her son relating to her that they got into a "little battle" in the cafeteria. Both R. M. and L. M. who were students at that time saw MacDowell break up the fight.

While photographs of bruising on T. W. are in evidence there has been no direct link between MacDowell and those marks. While excessive force is alleged, those marks may have come from the fight between the two students. The lack of testimony of T. W. elicited to confirm or deny that there is any specific causation that distinguishes the two events coupled with the proofs causes the Districts case to fail to meet it's burden of proof of proof as to this portion of the tenure charges.

b. During the 1993-94 school year while assigned to Public school No. 2 the respondent engaged in the following conduct:

1. On or about May 11, 1994 the respondent grabbed pupil J. M. by the shirt and pushed him in his seat with force.

All of the testimony confirmed that J.M. had been misbehaving in class and he had been told to be quiet three or four times. E.B. stated that J.M. had been "acting up" in class. J. N., L. N. and E. B. all testified to the incident and to the moving of J. M as did the student himself. The testimony of each as well as MacDowell showed that, because of J.M.'s behavior he was asked to move. I find as fact, based on the credibility of the witnesses that MacDowell did take hold of J.M.'s shirt to move him to the back of the auditorium when he did not comply with MacDowell's direction. The only question is whether he was put into a seat with "force". The very fact that J.M. was moved by physical means when not presenting a threat to himself or others makes the physical movement of him a matter of physical force, be it light, moderate or strong.

I further find as **fact** that this was, at the very least embarrassing to the student and was done for the purposes of noncompliance. This conduct is in violation of the ban against corporal punishment.

2. On or about June 16, 1994, the respondent grabbed pupil L.T. and slammed him into the chair.

With respect to this charge we once again have an instance of two students, L.T., and R. O., engaging in an altercation. I **Find** that this arose out of R.O. "plucking" the ear of L.T. and the situation escalating into a fight or wrestling encounter. L.T., D. M., E. R. and A. L., all substiantiated this. Only one witness, Y. H. does not recall R. O. even being in the auditorium. All witnesses, although they differ on the positioning of the two boys agree that MacDowell told them to stop and then tried to stop the altercation and separate the boys. While MacDowell tried to hold them apart, they continued to try to get to each other. Ultimately MacDowell physically placed L.T. in a seat.

Due to the fact that the physical touching in this case arose out of MacDowell's attempt to stop an ongoing fight and injury to the two boys' the respondent's action's were reasonable and the District has failed to meet it's burden of proof as to this incident.

Charge Two: Conduct Unbecoming a Teacher

4.The charge of Conduct Unbecoming a teacher is based upon the same specifications as those set forth above in Charge One. Those specifications are hereby incorporated by reference.

As a result of the finding that only one charge had been supported by the facts in Charge One, that is also incorporated in these findings and the above charge is found only consistent with the above findings.

Charge Three: Use of Profane and Inappropriate Language

5. During the 1993-94 school year, the respondent referred to pupils in a demeaning and disrespectful manner by using profanity and other derogatory language.

a. On June 16, 1994 the respondent referred to pupil L.T. as "gay" and " a hell of a child"

Having heard the testimony and having assessed the credibility of the witnesses I **Find** that the respondent did use the words "one hell of a child" on that date but I further find insufficient proof that the word "gay" was used by respondent due to conflicting witness statements.

b. In May 1994, the respondent taught sixth graders a song containing derogatory language such as "faggots"

In composing and producing a musical for the school, respondent included a song which he had written which states verbatim:

Good to Me is Bad

Dressed like a mommy's (sic) boy what
a joke they are to see
Helping people in distress makes
no sense to me
Everyone should be like us
we're so cool and mean
We are called the desparate (sic) eyes
because we're ruthless and sheen

Dancing is for faggots, those boys
should wear a dress
Being a nuisance makes us
cool, illiteracy is just a word
Smoking, choking is the thing to do;
intelligence is for the birds
Cursing, hurting, a street wise punk
There's nothing else that you need

After this song was distributed to the sixth grade class Ms. Gubar, who had been shown the song by a student who was upset by it, took it to Vice- Principal Liptak. MacDowell was later requested to remove the song from the show and did so without argument. A memo was sent to respondent stating the song was not appropriate for students to learn or sing. In that memo Vice Principal Vitone stated that she "appreciated" the song being removed from the play. (J-7)

This song, while not ultimately used in the play, was disseminated to sixth grade students and contained derogatory language. Although respondent claims it was to be used to illustrate a point the language was derogatory and should not be used with sixth grade students under any circumstances. It is the teaching of the song and it's language, not whether or not it was actually in the show that is the charge and as a matter of **Fact** it is sustained.

Charge Four: Insubordination

6. On or about May 11,1994, the respondent was directed to cease and desist from physically grabbing pupils. Despite this directive from Vice Principal Catherine Vitone, the respondent again grabbed and harmed L. T. pupil on June 16,1994.

The substance of the underlying facts have already been delineated above. Due to the fact that the District failed to meet it's burden of proof regarding the June 16, 1994 incident in which MacDowell broke up the fight in which L. T. was involved they have failed to meet their burden of proof regarding this charge.

As a result **I FIND** the **FACTS** consistent with the above narrative.

DISCUSSION AND CONCLUSION

Both sides agree that the respondent has no prior disciplinary history. Petitioner District requests dismissal of respondent from his tenured position based upon the charges. Respondent argues that dismissal is too severe a penalty and that the charges have not been proved.

As already indicated the District has failed to meet it's burden of proof in a number of those charges. For those already indicated that the District has proved the question becomes what the appropriate penalty is.

A careful and thoughtful weighing of those charges which have been sustained, the students welfare, the interests of the district and the absence of any prior disciplinary history on the part of respondent lead to the conclusion that an increment withholding rather than dismissal is appropriate in this case. This **must** be coupled with an appropriate course or training program to heighten and enhance respondent' sensitivity so that songs such as the one taught to the sixth grade will not take place. It is not sufficient that the song be removed from the program, once it has been circulated to the students the damage has been done.

Respondent must be made completely and fully aware that touching students when no dangerous situation presents itself will not be tolerated nor will inappropriate language or references which are in and of themselves offensive.

ORDER

It is hereby **ORDERED** that respondent have his annual salary increment withheld; and

It is further **ORDERED** that respondent attend an appropriate course or training program, consistent with the above, as determined by the Commissioner of Education.

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

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

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

1/29/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

Jan. 31, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 31 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

am(FV)mxl

APPENDIX

Witnesses

For petitioner:

Susan Gubar
Lynn Liptak
Catherine Vitone
Martha Asetse
Anthony Lugo
Jose Martuez
Diane Moran
Roberto Mercado
Lamore Clark
Yisselle Hernandez
Elaine Rodriguez
Jessica Nevarez
Leandro Tejada
Luis Colon
Richard Corbani
Daniel DiGiacomo
Lucy Sheridan

For respondent:

Vincent Caramico
Erica Bustos
Javier Santiago
Pasquale Migliaccio
Carol Kirby
Robbie MacDowell
Pamela DiPrima

Rebuttal Witnesses

For petitioner:

Lynn Liptak
Stephen Kane
Bonnie P. Miele

Evidence

J-1a Stiplation of facts with handwritten notations by parties

J-1b Stipulation of facts in finalized form

J-1 Student incident report regarding October 2, 1989 incident (2 pages)

J-2 Offense report, Paterson Police Department regarding October 2, 1989 incident

J-3 Transcript of proceeding of *State v. MacDowell* dated May 9, 1990

J-4 Transcript of reverse decision; *State v. MacDowell* dated December 17, 1990

J-5 Administrative order regarding creation of the State-Operated School District of Paterson, Passaic County

J-6 Memo dated May 11, 1994 from Ms. Vitone re: incident with Jose Marquez

J-7 May 11, 1994 memo from Ms. Vitone re: song taught to six grade class

J-8 A through F, photograph of school auditorium

J-9 Statement of charges

J-10 Testimony of Roberto Mercado in municipal proceeding

J-11 Page 31 of testimony of Lamore Clark in municipal proceeding

J-12 Page 30 of testimony of Lamore Clark in municipal proceeding

J-13 Page 33 of testimony of Lamore Clark in municipal proceeding

J-14 Page 35 of testimony of Lamore Clark in municipal proceeding

Petitioner's Exhibits

P-1 Notes of Principal Lynn Liptak, June 17, 1994

P-2 Student incident investigation report, T.W., June 17, 1994

P-3, ev. Photo of T.W. (face - ribs)

P-4, ev. Photo of T.W (chest - ribs)

P-5, ev. Photo of T.W. (side neck)

P-6, ev. Photo T.W. (rear neck)

P-7, ev. Photo T.W. (front chest)

P-8, id. only

P-9, id. only

P-10 Portion of municipal transcript, testimony of Robbie MacDowell, pgs. 147-149

R-1, id. only

R-2, id. only

R-3 Letter from Gregory C. Johnson to Thomas Cavanaugh dated March 2, 1995

OAL DKT. NO. EDU 11616-94

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBBIE MAC DOWELL,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
PATERSON, PASSAIC COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the State-operated School District of Paterson (District) and those of Robbie MacDowell (respondent) were timely filed,[1] as were respondent's reply exceptions.

Exceptions of the parties and reply exceptions of respondent recast and reiterate the arguments presented to the Administrative Law Judge (ALJ) in post-hearing submissions. Essentially, the District objects to, and respondent agrees with, the ALJ's determination that the District had not proven Charge One - Corporal Punishment and Charge Two - Unbecoming Conduct with respect to the T.W. incident and the L.T. incident. Exceptions and replies represent, in great detail, a recitation of the parties' respective versions of the facts surrounding

[1] On February 14, 1996, counsel for the District requested an extension of time within which to file exceptions to the initial decision, asserting that his copy of such decision had been mailed to the wrong address and had just been received. By letter dated February 15, 1996, the Director of the Bureau of Controversies and Disputes granted the extension request, according the District until February 21, 1996, for the filing of its exceptions and directing that any reply thereto be filed within five days of receipt of such exceptions.

these incidents, with each of them presenting a recapitulation of selected portions of elicited testimony which they contended support their particular version and each further suggesting the weight and credibility assessments which should be ascribed to all of the evidence.

With respect to the J.M. incident, respondent asserts that the "gravity" of this incident is best exemplified by testimony of the Vice Principal who stated "***she conducted no investigation after hearing about the incident nor did she find it sufficient to bother to contact the central office or DYFS (11T 26 to 27, 62)," and testimony of the Principal who indicated "***that when the matter came to her attention, she never made further inquiry about it nor did she even conduct an investigation, notify the central office, or consider the response of the Vice Principal any more than a 'warning' (1T 115 to 117)." (Respondent's Exceptions on p. 14)

Next, respondent contends that there is a procedural motion, fully addressed in his post-hearing brief, left unresolved here, which calls into question the fundamental fairness of this matter. He proffers that due to the unique status of this District as a state take-over district, there is an inherent potential conflict here. Rather than the tenure charges in the instant case having been certified by a board of education, they were certified by "***the State Department of Education appointed District Superintendent ***, after receiving permission to do so from Dr. Peter B. Contini, an Assistant Commissioner of the Department of Education.***" (Respondent's Post-hearing Brief at p. 8) As such, respondent argues "***the Department of Education would appear to be indirectly involved in certifying and processing the charges, as well as being the ultimate receptacle for the determination of those charges.***" (*Id.* at p. 9)

In conclusion, the District urges that respondent's conduct during the 1993-94 school year was totally inappropriate and inexcusable and fully warrants his dismissal from his

tenured position, while respondent maintains that the ALJ correctly determined that his dismissal in this matter is unjustified given his unblemished eight-year teaching career in the District prior to the institution of these charges and the fact that he had no intent to harm or injure a student.

The Commissioner has conducted his own detailed examination of the entire record in this matter, which included transcripts of the eight days of hearings at the OAL. Initially, the Commissioner finds respondent's procedural argument with respect to the presence of an inherent conflict of interest in this matter to be without merit. The legislative scheme with respect to the governance and operation of state-operated school districts clearly contemplates the authority and ability of such a district to file tenure charges pursuant to *N.J.S.A.* 18A:6-10 *et seq*. Further, such legislative scheme is explicitly implemented in such a way as to avoid the potential of conflict alluded to by respondent. Specifically, the takeover legislation provides that a state-operated district remain a corporate entity despite the absence of a board of education. *N.J.S.A.* 18A:7A-37. The legislation further delegates to superintendents in state-operated school districts the powers and authority previously granted to the local school board. "***[T]he State district superintendent shall have the power to perform all acts and do all things consistent with law necessary for the proper conduct, maintenance and supervision of the schools in the district." *N.J.S.A.* 18A:7A-35e. This includes the express power to make all personnel determinations relative to all officers and employees of the district. *N.J.S.A.* 18A:7A-42a(3). Thus, it is clear that the State District Superintendent appointed for the district has the statutory authority to certify tenure charges against a teaching staff member. Moreover, recognizing that the Legislature saw fit in *N.J.S.A.* 18A:7A-42a(3*)* to condition the superintendent's authority with regard to personnel matters as "subject to the approval of the commissioner or his designee," the

departmental administrative process which was set into place to effectuate this statutory provision expressly precludes any possibility of a conflict, or even the appearance thereof, in those matters which call for a Department "approval," which must ultimately be followed by a department adjudication, i.e., tenure charges. Essentially, in this instance an Assistant Commissioner, with no role whatsoever in the adjudicative process of tenure matters, was appointed to act in the Commissioner's stead, in the required approval process with the Commissioner retaining the adjudicative function. In that the internal structure of the Department clearly segregates these two functions, *N.J.A.C.* 6:5-1.1 *et seq.*, the Commissioner determines that respondent's concerns with regard to "fundamental fairness" being compromised by the existence of potential conflict of interest are unfounded.

With regard to the charges in this matter, the Commissioner concurs with the ALJ that Charge 1 - Corporal Punishment and Charge 2 - Conduct Unbecoming a Teacher have been established with respect to the J.M. incident on May 11, 1994. As aptly stated by the ALJ

> All of the testimony confirmed that J.M. had been misbehaving in class and he had been told to be quiet three or four times. E.B. stated that J.M. had been "acting up" in class. J.N., L.N. and E.B. all testified to the incident and to the moving of J.M. as did the student himself. The testimony of each as well as Mac Dowell showed that, because of J.M.'s behavior he was asked to move. I find as fact, based on the credibility of the witnesses that Mac Dowell did take hold of J.M.'s shirt to move him to the back of the auditorium when he did not comply with Mac Dowell's direction. The only question is whether he was put into a seat with "force". The very fact that J.M. was moved by physical means when not presenting a threat to himself or others makes the physical movement of him a matter of physical force, be it light, moderate or strong.
>
> I further find as **fact** that this was, at the very least embarrassing to the student and was done for the purposes of noncompliance. This conduct is in violation of the ban against corporal punishment. (emphasis in text) (Initial Decision at p. 6)

Notwithstanding respondent's attempts to minimize the "gravity" of this situation, the Commissioner does not find this to be the case as such minimization would serve to undermine the legislative philosophy of the corporal punishment statute *(N.J.S.A.* 18A:6-1*)*. As noted in *In the Matter of the Tenure Hearing of Thomas Appleby*, 1969 *S.L.D.* 159, 172-173, aff'd State Board, 1970 *S.L.D.* 448, citing *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185, 186

> ***While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1*) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm.*** (emphasis added)

Further,

> "***that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that 'it was one of those things that just happen'***. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control."
> *In the Matter of the Tenure Hearing of David Fulcomer,* 1962 *S.L.D.* 160, 162, remanded State Board of Education 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 225, reversed and remanded

93 *N.J. Super.* 404 (App. Div. 1967), decided by the Commissioner 1967 *S.L.D.* 215.

With regard to the remaining charges, the Commissioner agrees with the ALJ's conclusion that Charge Three - Use of Profane and Inappropriate Language was proven by the District. He specifically finds that respondent's conduct in teaching a song containing derogatory and inflammatory language to his sixth grade students, standing alone, fully supports the sustaining of this charge.

Finally, the Commissioner finds and determines, as did the ALJ, that the District has not met its burden of proof with regard to the charges as they relate to the T.W. incident, the L.T. incident or the charge of Insubordination. Although this matter turns to a certain extent on the credibility of witnesses and the weighing of evidence, the Commissioner is satisfied, based upon his review of the record, that the ALJ considered all testimony and weighed it according to the credibility of the witnesses and the plausibility of its content. The Commissioner finds no basis in the record for overturning the credibility assessments of the ALJ who had the benefit of observing the witnesses first hand.

With regard to evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner is mindful that he is required to consider respondent's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967). Having considered the proven charges and all of the remaining factors, the Commissioner concludes, as did the ALJ, that respondent's conduct, although serious and unprofessional, does

not warrant his dismissal from his tenured position. Notwithstanding, he disagrees with the ALJ's recommendation that an increment withholding is a sufficient consequence for respondent's behavior. Therefore, to impress upon respondent and others the seriousness of the conduct at issue herein, the Commissioner directs that in addition to the employment and adjustment increment withholding recommended by the ALJ, respondent should suffer the loss of the 120 days' salary withheld pursuant to *N.J.S.A.* 18A:6-14 following certification of tenure charges.[2]

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein in all respects except as to penalty. The Commissioner hereby directs that respondent forfeit the 120 days' salary withheld following certification of the within tenure charges and that he be denied his salary and adjustment increments for the 1996-1997 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] The ALJ also directed that respondent be required to complete a course or training program as part of her penalty recommendation in this matter. Given that the State Board recently ruled "imposing a general continuing education program as a punishment for the specific determination of unbecoming conduct made in these proceedings would be inappropriate and counter to the educational mission of such a program" (see *In the Matter of the Tenure Hearing of Mary Ellen DiPillo, School District of the Township of Randolph, Morris County*, 95 *N.J.A.R* 2d (EDU) 206, 208, (emphasis supplied)), the Commissioner declines to impose such a requirement.

MAY 2, 1996

DATE OF MAILING MAY 2, 1996

170-96

BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought to change the method used by respondent Regional District to apportion financial contributions of its constituent municipalities from proportions based on the equalized valuation of each municipality to proportions based on per pupil enrollment.

ALJ concluded that genuine issues of material fact did not exist. ALJ further concluded that under *N.J.S.A.* 18a:13-23, the proposal to change the method of apportionment in the present matter must be deemed not approved where the voters of two of the three constituent municipalities defeated the motion. (*Northern Burlington County Regional School District*) Thus, ALJ granted respondent's motion for summary decision as a matter of law. Petition was dismissed. Petitioner's cross motion for summary decision was denied.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
MOTIONS TO DISMISS
OAL DKT NO EDU-7260-95
Agency Docket No. 160-5/95

BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON

Petitioner,

v.

MANCHESTER REGIONAL HIGH SCHOOL DISTRICT,

Respondent,

Record Closed: February 20, 1996 Record Decided: March 8, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

Petitioner, Borough of North Haledon (North Haledon), seeks to change the method used by respondent, Manchester Regional High School District, to apportion the financial contributions of its constitute municipalities from proportions based on the equalized valuation of each municipality to proportions based on per pupil enrollment.

On July 13, 1995, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On December 27, 1995, the respondent moved for summary decision. Petitioner opposed the motion and filed a cross motion for summary decision on February 7, 1996. Thereafter, respondent and Intervenor opposed petitioner's cross-motion.

The following facts are not disputed:

1. Respondent, Manchester Regional High School District, is comprised of three constituent municipalities: petitioner, North Haledon and intervenors, Boroughs of Haledon and Prospect Park. Pursuant to *N.J.S.A.* 18A:13-23, a proposal was presented to the voters of the district at a special election held on April 18, 1995, to change the method used by respondent to apportion the financial contributions of its constituent municipalities from proportions based on the equalized valuation of each municipality to proportions based on per pupil enrollment.

2. The question put to the voters stated as follows:

> The Board of Education of the Manchester Regional High School District is hereby authorized, subject to the approval of the legal voters of the District, to modify the manner in which amounts to be raised for annual or special appropriations for the District, including the amounts to be raised for interest upon, and the redemption of, bonds payable by the district, are apportined among the district's constituent municipalities so that, at the end of a five year phase-in period, the district will apportion its appropriations among its constituent municipalities based upon the number of pupils enrolled in the district from each municipality. The progression of change from the equalized valuation to the per pupil enrollment basis during each fiscal year of the five year phase-in period shall be as follows:
>
> a. 1995-1996: Eighty percent (80%) equalized valuation and twenty percent (20%) pupil enrollment;
> b. 1996-1997: Sixty percent (60%) equalized valuation and forty percent (40%) pupil enrollment;
> c. 1997-1998: Forty percent (40%) equalized valuation and sixty percent (60%) pupil enrollment;
> d. 1998-1999: Twenty percent (20%) equalized valuation and eighty percent (80%) pupil enrollment;
> e. 1999-2000: One Hundred percent (100%) pupil enrollment.

EXPLANATION

Approval of this proposal would allow the Manchester Regional High School District Board of Education to change the method it uses to apportion the financial contributions of its constituent municipalities from proportions based solely on the equalized valuation of each municipality to proportions based solely on pupil enrollment. The change would take place on a graduated basis over a five year period so that beginning in the fifth year (1999-2000 school year) and for all subsequent years, each municipality's share of financial contribution to the regional school district will be on the basis of its pupil enrollment in the district.

3. The result of the votes cast on April 18, 1995, were:

	YES	NO
North Haledon	1,601	101
Haledon	114	337
Prospect Park	41	467
	1,756	914

Position of the Parties and Intervenors:

North Haledon asserts that the proposal carried because it received a plurality of the votes cast in the overall district.. Respondent and Intervenors argue that the proposal was defeated because passage requires that the proposal receive a plurality vote in each constituent municipality of the district. The proposal did not receive a plurality vote in Haledon and Prospect Park.

In this matter there is no genuine issue of material fact. The issue is whether voter approval of any change in the method of cost apportionment for existing regional district governed by *N.J.S.A.* 18A:13-23 or *N.J.S.A.* 18A:13-5.

North Haledon asserts that the applicable section is *N.J.S.A.* 18A:13-5 which requires the majority vote of the regional district. Respondent and Intervenors assert that the applicable section is *N.J.S.A.* 18A:13-23 which requires the majority vote in each constituent municipality.

The Commissioner has already addressed this issue. The form of voter approval necessary to change from one method of apportionment to another is determined under *N.J.S.A.* 18A:13-23. The governing statute provides that:

> The annual or special appropriations for regional districts, including the amounts to be raised for interest upon, and the redemption of, bonds payable by the district, shall be apportioned among the municipalities included within the regional district, as may be approved by the voters of each municipality at the annual school election or a special school election, upon the basis of [equalized valuation, pupil enrollment or a combination of both].

In the Matter of the Special Election Held in the Northern Burlington Co. Reg. Schl. Dist., 94 *N.J.A.R.*2d (EDU) 385, *dismissed*, St. Bd. of Educ. (Oct. 5, 1995)[1], the facts were virtually identical to the facts in the present matter. In *Northern Burlington, supra.*, the voters in one of the four constituent municipalities cast their votes against the proposal. Upon a review of the relevant statutory sections and legislative history, the Commissioner rejected the interpretation that a majority vote of the regional district overall is sufficient for passage of a referendum question on cost apportionment. Instead, the Commissioner determined that:

> *N.J.S.A.* 18A:13-23 requires approval by the majority of voters in each constituent municipality in order to change the manner in which costs are apportioned in a regional school district. [*Id.* at 387.]

[1] The appeal from the Commissioner's decision was dismissed by the State Board of Education for failure to file the appeal within the specific statutory time period set forth at *N.J.S.A.* 18A:6-28. *In the Matter of the Special Election Held in the Northern Burlington Co. Reg. Schl. Dist.*, St. Bd. of Educ. (Oct. 5, 1995).

Therefore, the proposal to change the method used to apportion the financial contributions of the constituent municipalities was not approved. *Ibid.*

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate:

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts. The traditional concept of summary judgment is:

> designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact regarding disposition at a trial. [*Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 74 (1954)].

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Ibid.* Thus, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion, the papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

Recently, the New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520 (1995), applied the summary judgment standard employed by the federal courts and held that:

> when deciding summary judgment motions trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential material as required by Rule 4:37-2(b) in

> light of the burden of persuasion that applies if the matter goes to trial.
>
> Under this new standard, a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' *Liberty Lobby, supra*, 477 *U.S.* at 249, 106 *S.Ct.* at 2511, 91 *L.Ed.*2d at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. *Liberty Lobby, supra*, 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed.*2d at 213. The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' *Liberty Lobby, supra*, 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed.*2d at 214, the trial court should not hesitate to grant summary judgment. [*Id.* at 540].

Under *Brill* once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing was held. If the evidence, along with reasonable inferences, could sustain a judgment in favor of the nonmovant, the motion must be denied.

I **CONCLUDE** that genuine issues of material fact do not exist. I further **CONCLUDE** that under *N.J.S.A.* 18A:13-23, the proposal to change the method of apportionment in the present matter must be deemed not approved where the voters in two of the three constituent municipalities defeated the motion. Thus, respondent's motion for summary decision must be granted as a matter of law.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED** and petitioner's appeal is **DISMISSED** with prejudice. It is further **ORDERED** that petitioner's cross motion for summary decision is **DENIED**.

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

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

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

March 8, 1996
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

March 18, 1996
DATE

DN Cantanucci jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, *inter alia*, that the language contained in *N.J.S.A.* 18A:13-23 must be read in context with existing statutes of Title 18A, (Petitioner's Exceptions incorporating Brief at p. 2) and that the correct statute for analysis of this matter is *N.J.S.A.* 18A:13-5. (*Id.* at p. 6) Petitioner also argues that the Legislature's failure to reference *N.J.S.A.* 18A:13-5 in a bill adopted on February 1, 1993, amending *N.J.S.A.* 18A:13-23 [*P.L.* 1993, *c.* 67], requires *N.J.S.A.* 13-5 to control this matter. (*Id.* at pp. 13-15) Lastly, petitioner argues that the Commissioner's decision entitled, *In the Matter of the Special Election Held in Northern Burlington County Regional School District, supra,* was "illconsidered and erroneous," (Petitioner's Exceptions incorporating Brief at p. 16) In that

these exception arguments represent a verbatim recitation of arguments presented in post-hearing briefs, already fully and fairly considered by the ALJ, they are not discussed in further detail herein.

In reply, respondent argues that petitioner's exceptions were not written in accordance with *N.J.A.C.* 1:1-18.4(b). (Respondent's Exceptions at p. 2) Further, respondent asserts that the ALJ's initial decision was correct and should be affirmed. (*Id.* at p. 3)

Upon a careful and independent review, the Commissioner finds petitioner's exceptions to be without merit and concurs with the findings and conclusion of the ALJ that in accordance with *Northern Burlington, supra,* approval is required by the majority of voters in *each* constituent municipality in order to change the manner in which costs are apportioned in a regional school district. The Commissioner reiterates that,

> ***in light of both the overall statutory scheme governing regional districts and the legislative history of the specific controlling statute, it is simply not sustainable to conclude*** that the results of elections held to change a regional district's method of apportioning costs among its members should be reckoned according to the "overall majority" standard established by *N.J.S.A.* 18A:13-5 for the general operation of a regional district. 94 *N.J.A.R.* 2d (EDU) at 388

Accordingly, the Commissioner affirms the initial decision of the OAL for the reasons expressed therein and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 2, 1996
DATE OF MAILING MAY 2, 1996

170-96

EDU #7260-95
C # 170-96
SB # 41-96

BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 2, 1996

For the Petitioner-Appellant, Segreto & Segreto (James Segreto, Esq., of Counsel)

For the Respondent-Respondent, Fogarty & Hara (Gary Hall, Esq., of Counsel)

For the Intervenor Borough of Haledon, George Foster, Esq.

For the Intervenor Borough of Prospect Park, Hook, Smith & Myer (Gordon O. Meyer, Esq., of Counsel)

This is an appeal from a declaratory judgment issued by the Commissioner of Education that the terms of N.J.S.A. 18A:13-23 require a vote by a majority of the voters in each constituent municipality of a regional school district in order to change the method of apportionment of contributions among those municipalities. The Borough of North Haledon had petitioned the Commissioner for a declaratory judgment

9/4/96

authorizing a change in the method used by the Manchester Regional High School District following the election in which a majority of the total vote cast in the regional district had approved the change, but a majority of the voters in each of the constituent municipalities had not approved the change.[1]

Basically, North Haledon asserts that it is absurd to bar a change in the method of apportionment under these circumstances and that the Commissioner's interpretation of the statute must be rejected. We do not agree. The words of N.J.S.A. 18A:13-23 are clear that in order to change from one method of apportionment to another, such change must be approved "by the voters of each municipality." (Emphasis added.) While N.J.S.A. 18A:13-5 provides that generally, "the total vote of the entire regional district...shall be counted in determining the result of the election" in a regional school district, that statute also provides that this rule only governs "unless otherwise provided by this Title." As stated, N.J.S.A. 18A:13-23, which applies specifically to the question presented to the voters in this matter, clearly provides otherwise. Thus, given the character of the question involved, we reject North Haledon's contention that this result is absurd.

September 4, 1996

Date of mailing SEP 06 1996

[1] Of the three constituent municipalities, Haledon and Prospect Park had defeated the question. However, the change was approved by a sufficient number of voters in North Haledon to constitute a majority of the total votes cast in the regional district.

171-96

171-96

VERA P. ALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 2, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4234-95
AGENCY DKT. NO. 68-3/95

VERA P. ALLEN,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent.

Anthony P. Sciarrillo, Esq., for petitioner

Gregory G. Johnson, Esq., for respondent,

Record Closed: March 15, 1996 Decided: March 15, 1996

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law on April 26, 1995 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15. and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

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

March 15, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 18, 1996
DATE

D. N. Contaratis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

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GREGORY G. JOHNSON, ESQ.
198 West State Street, 3rd Floor
Trenton, New Jersey 08608
(609) 392-0044
Attorney for Respondent

VERA P. ALLEN *Petitioner* *vs.* STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK *Respondent.*	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 4234-95 Agency Dkt. No. 68-3/95 STIPULATION OF SETTLEMENT

The parties, the petitioner Vera P. Allen ("Petitioner") and respondent State Operated School District of the City of ~~Paterson~~ Newark ("Respondent" or "District"), have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy.

1. In March 1995, the petitioner, tenured teacher, filed a Petition of Appeal with the Commissioner of Education claiming the respondent former Newark Board of Education violated her tenure and seniority rights by hiring non-tenured supervisors.

2. The respondent filed an Answer to the Petition denying the petitioner's claims on or about April 12, 1995.

3. The Petitioner was promoted from a classroom teacher to the position of Curriculum Specialist on January 3, 1990. The Petitioner subsequently acquired promotional tenure on January 3, 1992, pursuant to *N.J.S.A.* 18A:28-6.

4. In August, 1993, the respondent Board eliminated Petitioner's Curriculum Specialist position as a part of a reduction in force. Effective September 27, 1993, the Petitioner was reassigned to a teaching position.

5. On or about January 3, 1995, the Respondent hired Ruby Green as a Central Office Supervisor (Basic Skills). Ms. Green was a non-tenured supervisor.

6. On or about February 14, 1995, the Respondent hired Angela Chiaravalloti as a Central Office Supervisor (Cluster I). Ms. Chiaravalloti was a non-tenured supervisor.

7. On or about July 15, 1995, the State Board of Education issued an Order placing the Newark Public Schools under State operation, removed the top-level administrators, and abolished the former Board of Education.

8. A review of this matter indicates that in September 1993 the Petitioner was not placed on a preferred eligibility list for vacancies in supervisory positions in accordance with applicable regulations.

9. By March 11, 1996, the Petitioner will be reinstated to a supervisory position within the Office of Curriculum Services, Central Administration. She will be entitled to back pay, based upon a salary differential between her current salary on the Teacher's Guide and Salary Guide for Supervisors contained in the CASA Contract. According to the calculations, the Petitioner is entitled to back pay of $ 11,238.

10. The Petitioner understands that her position has been identified as administrative and supervisory pursuant to *N.J.S.A.* 18A:7A-44 and will be included in the State mandated central office reorganization.

11. This Agreement is subject to the approval of the State District Superintendent, Dr. Beverly L. Hall, Administrative Law Judge and Commissioner of Education.

12. In accordance with the Supervisor's salary Guide contained in the CASA contract, the petitioner's annual salary for the 1995-96 school year is $71,864 ($69,847, plus longevity $2,017 (step. 6)).

13. The respondent will endeavor to issue a retroactive salary payment within thirty days after approval of the settlement agreement by the Commissioner of Education.

March 4, 1996 — Vera P. Allen

Date — Vera P. Allen, Petitioner

March 4, 1996 — Anthony P. Sciarrillo

Date — Anthony P. Sciarrillo, Esq.

March 7th, 1996 — Beverly L. Hall

Date — Dr. Beverly L. Hall
State District Superintendent
State Operated School District
For the City of Newark

3/4/96 — Gregory G. Johnson

Date — Gregory G. Johnson, Esq.

OAL DKT. NO. EDU 4234-95

VERA P. ALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the terms of the settlement appear to have already been partially effectuated through petitioner's reinstatement to a supervisory position on March 11, 1996, and admonishes the parties that settlements of controverted matters are of no force or effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 2, 1996

DATE OF MAILING MAY 2, 1996

172-96

H.S., on behalf of a minor, H.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MELINDO A. PERSI AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent alleged Board wrongfully denied student, H.S., admission to school due to a residency dispute. Board submitted motion to dismiss based on untimely filing of the petition of appeal.

ALJ found that parent appealed Board's decision beyond the 21-day period mandated by *N.J.S.A.* 18A:38-1. ALJ granted summary decision to the Board and dismissed matter as untimely.

Commissioner found that the record and any reasonable notion of fundamental fairness compelled a determination that the petition must be deemed as timely filed. He noted that, notwithstanding the clear directive contained in its own resolution, the Board failed to notify petitioner's attorney of the Board's determination in this matter until a full month after such decision was rendered and well past the 21-day appeal period. Commissioner further noted that counsel for petitioner promptly filed the petition upon receipt of notice. Thus, Commissioner reversed initial decision and ordered matter remanded to the OAL for hearing on the merits.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6661-95
AGENCY DKT. NO. 168-5/95

H.S., ON BEHALF OF A MINOR, H.S.,
Petitioner,
v.
MELINDO A. PERSI AND BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON,
Respondents.

Ben W. Payton, Esq., for petitioner

Viola S. Lordi, Esq., for respondents (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: March 11, 1996 Decided: March 14, 1996

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

H.S., petitioner, appeals from a residency determination and alleges that the respondent Edison Township Board of Education wrongfully denied access to school to H.S., a minor.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1

through -13. After notice, a prehearing conference was conducted by telephone on November 8, 1995. Among other things, it was determined that the Board would move for summary judgment. The matter was set down for hearing on February 29, 1996.

The Board submitted its moving papers on January 16, 1996. Pursuant to *N.J.A.C.* 1:1-12.2(c), opposing parties have ten days after receiving the moving papers to file responsive papers. That period elapsed and no responsive papers were received.

The Board's motion to dismiss is grounded on untimely filing of the petition of appeal. The petition of appeal seeks relief from the Board's decision of April 10, 1995 and was filed on May 18, 1995.

H.S. was enrolled in the John Adams Middle School in Edison beginning on September 8, 1994. In February 1995 he was an eighth grade pupil. At that time, the building principal learned of facts indicating that H.S., although attending the school, was not domiciled in the Edison Township School District, that H.S. was not kept in the home of a resident of Edison Township and that the petitioners did not reside 892 Ellis Parkway as they had informed the Board.

The Board conducted a residency hearing in this matter. The Board fulfilled its obligation in respect of H.S. under *N.J.S.A.* 18A:38-1 by conducting the residency hearing on March 2, 1995. The petitioners were represented by counsel at the hearing and the hearing was memorialized by a certified shorthand reporter.

Pursuant to *N.J.S.A.* 18A:38-1, the Board gave the petitioners the opportunity to present at hearing evidence of petitioners' alleged domicile in Edison. Following its review of the evidence presented at hearing and its consideration of the arguments of counsel, the Board determined that H.S. was not entitled to a free public education in the Edison Township Public Schools.

The petitioners were notified of this determination. The Board also informed petitioners of their right to contest the Board's determination before the Commissioner of Education within 21 days of the Board's determination, rendered on April 10, 1995. The petitioners failed to file

their appeal within the 21-day period mandated by *N.J.S.A.* 18A:38-1. The record shows that the petition was served on the Board on May 18, which is thirty-eight days after the Board's decision.

In *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995), the New Jersey Supreme Court stated that the essence of the inquiry in a summary judgment action is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. That set of circumstances clearly obtains in this case. *N.J.S.A.* 18A:38-1 provides, in pertinent part, that the public schools shall be free to certain persons over five and under 20 years of age. Any person who is kept in the home of another person domiciled within the school district and who is supported by that other person gratis, as if he were the other person's own child, shall be admitted to attendance without charge upon filing by the other person with the secretary of the board a sworn statement that the pupil is domiciled within the district and that the other person is supported the child and will assume all personal obligations for the child relative to school requirements, and further, that the person intends to keep and support the child for a longer time than simply through the school term.

The statute also provides that if the superintendent of a district finds that the parent or guardian of a child who is attending the district's school is not domiciled within the district and the child is not kept in the home of another person domiciled within the district and supported by him gratis, the administrator may apply to the Board of Education for removal of the child. The parent or guardian is entitled to a hearing before the Board and, if in the judgment of the Board the parent or guardian is not domiciled within the district and the child is not kept in the home of another person domiciled within the district and supported by that other person, then the Board may order the transfer or removal of the child from school. The parent or guardian may contest the Board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute.

All of the prescribed procedures have been followed except the last. The parent or guardian did not contest the Board's decision within the 21 days provided by statute. The Edison Board's decision is dated April 10, 1995. The petition of appeal was served on the Edison Board,

through a deputy superintendent, on May 18, 1995. According to the pleadings received from the Commissioner of Education, the petition was not filed with the Bureau of Controversies and Disputes until June 7, 1995.

Under *N.J.S.A.* 18A:6-9, the Commissioner of Education has jurisdiction over controversies and disputes arising under the school laws, except those governing higher education. With this power, the legislature gave the authority to create rules and regulations to help carry out the legislative mandate. Generally, the petitioner must file a petition of appeal no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested hearing. *N.J.A.C.* 6:24-1.2(c). This rule has been strictly construed over the years. See, *e.g.*, *Riley v. Hunterdon Central High School Board of Education*, 173 *N.J. Super.* 109 (App. Div. 1980). However, the legislature can, and in this area did, create an exception to the 90-day rule. In *N.J.S.A.* 18A:38-1(b)2, the legislative intent is clear: the parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision. That clearly did not happen in this case. Even if the date of service upon the Edison Board could be accepted, the 21 days required by statute cannot be demonstrated.

After the procedural history recited above and after this decision was written but not signed, the petitioner again made contact though counsel. I held this decision to allow an attempt at settlement. The attempt was made, but was unsuccessful and the record closed on March 11, 1996. Therefore, nothing above is modified.

Finally, upon issuance of a final decision by the Commissioner of Education or upon this decision becoming final by operation of law, the Edison Township Board of Education may move the Commissioner to assess the parent tuition for the pupil prorated to the time of the pupil's ineligible attendance. *N.J.S.A.* 18A:38-1(b)2.

In consideration of the clear and uncontroverted record, I **FIND** and **CONCLUDE** that the motion of the Edison Township Board of Education for summary decision must be **GRANTED**. Summary decision having been granted on the only issue in the case, I **ORDER** the matter **DISMISSED**.

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

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

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

14 MARCH 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/18/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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H.S., on behalf of a minor, H.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MELINDO A. PERSI AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

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

Upon a careful and independent review of the record in this matter,[1] the Commissioner determines to reverse the recommended decision of the Administrative Law Judge (ALJ) granting Summary Decision to the Board based on an untimely filing of the Petition of Appeal in this case. Rather, even accepting, for purposes of this decision, that the 21-day period stipulated in *N.J.S.A.* 18A:38-1 operates as a bar to petitions filed outside this timeframe, the Commissioner finds, for the reasons detailed below, that the record before him and any reasonable notion of fundamental fairness compel a determination that the instant Petition of Appeal must be deemed as timely filed.

Initially, the Commissioner takes specific notice that it is uncontroverted that the within petitioner was, at all times relevant to this matter, represented by legal counsel.[2] It is

[1] A transcript of the hearing afforded petitioner by the Board of Education of Edison Township on March 2, 1995 is a component of this record.

[2] Petitioner's appeal contends that "On or about February 27, 1995, Ben W. Payton, an Attorney at Law, of the State of New Jersey, informed respondents by letter, delivered by courier, that he would be representing petitioners, with

further observed that the Petition of Appeal filed by such counsel, on behalf of his client, on May 18, 1995 [3] raises explicit allegations with respect to the timeliness of the petition which were left totally unaddressed by the ALJ in his initial decision. Specifically, the petition contends

> 5. Respondents' resolution, dated April 10, 1995, in relevant part, stated, "BE IT FURTHER RESOLVED that the custodial parent of pupil Case No. 9495-3 and legal counsel be advised forthwith, in writing, of the Board's determination herein, and further advised that the Board's decision may be contested before the Commissioner of Education within 21 days of the adoption of this resolution..."***
> [6.] Counsel for petitioners, was advised by respondents, of their April 10, 1995 determination, on or about May 15, 1995, well after the 21 day period for appealing respondents' determination had expired.*** (Petition of Appeal at p. 2)

In his prayer for relief, petitioner specifically requests that the Commissioner accept the Petition of Appeal as timely filed due to the failure of the Board to timely inform petitioner's counsel of its April 10, 1995 determination.

The Commissioner notes that the Board's apparent response to counsel's assertion is that because the relevant statutory provision does not directly speak to notification of counsel for the parent or guardian, such a requirement is unnecessary, in that the Board's Brief in Support of Motion for Summary Decision states

> ***Pursuant to *N.J.S.A.* 18A:38-1, the Edison Board was required, at the time of its April 10, 1995 decision, to notify only the parent or guardian of pupil [H.S.] in writing of his right to contest the

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respect to their domicile and any related issues before them." (Petition of Appeal at pp. 1-2) It is noted that such pronouncement was at no time denied in any submission advanced by the Board.

[3] In his initial decision the ALJ states that "***according to the pleadings received from the Commissioner of Education, the petition was not filed with the Bureau of Controversies and Disputes until June 7, 1995." (Initial Decision at p. 4) In that the record contains a letter to the parties in this matter, dated May 19, 1995, from the Director of the Bureau of Controversies and Disputes acknowledging receipt of the petition on May 18, 1995, and petitioner's Proof of Service included with his petition indicates that the petition was filed with the Commissioner by fax and regular mail on May 18, 1995, and hand delivered to the Board on this same date, the Commissioner concludes that the date to which the ALJ is referring is the date the hard copy of the petition was received by the Bureau of Controversies and Disputes.

> decision within 21 days. As noted above, the Board did so by letter dated April 11, 1995, the day after it rendered its decision in this matter. (Board's Brief at pp. 8-9)

The Commissioner finds such a contention to be both a perversion of the spirit and intent of the statute and disingenuous in light of this Board's own declarations and actions in this matter. The Commissioner opines that it is fundamental that, as petitioner's recognized attorney,[4] his counsel herein was entitled to any and all information which would impact his client's interests in this matter. Moreover, the record substantiates, notwithstanding the Board's protestations to the contrary, that this Board recognized and accepted that it had an obligation to notify petitioner's counsel of the determination it had made in that its April 10, 1995 resolution, by its own terms, directed that notice of its decision be communicated to "***the custodial parent ***and *legal counsel*." (emphasis added) (Board's April 10, 1995 Resolution at p. 2, Attachment A, Petition of Appeal) Further, even accepting, *arguendo*, that this Board reasonably believed that notification to petitioner's counsel was unnecessary, the Commissioner finds its ultimate transmittal of such notification to this individual by letter dated May 10, 1995 from Superintendent, Melindo A. Persi, (see Attachment B, Petition of Appeal), to be inexplicable.

It is clear that *N.J.S.A.* 18A:38-1b(2) compels a board to provide expeditious notice of its determination with respect to a child's eligibility for a free public education in its schools in that it states "***The board of education *shall, at the time of its decision*, notify the parent or guardian in writing of his right to contest the decision within 21 days.***" (emphasis added) It is likewise clear that here, despite the Board's recognition that petitioner was represented by counsel and the clear directive of its own resolution, petitioner's attorney was not

[4] *Black's Law Dictionary* defines an attorney as "***an agent or substitute, or one who is appointed and authorized to act in the place or stead of another.***"

notified of the Board's determination in this matter until a full month after such decision had been rendered, and well past the 21-day appeal period specified in *N.J.S.A.* 18A:38-1. It is also noted that upon receipt of such notice, on or about May 15, 1995, counsel for petitioner promptly filed the within Petition of Appeal.

The Commissioner finds and determines that, under the circumstances existing in this matter, it would be unconscionable to allow this Board, which failed to effectuate its own lawful directive, to essentially utilize the specified statutory appeal period as both a sword and a shield, thereby depriving petitioner of his "day in court" as a result of its own negligence. Further, condoning such a consequence would send a message that compromising or eliminating a petitioner's due process rights under this statute will be tolerated. Therefore, the Commissioner determines that both the spirit and intent of *N.J.S.A.* 18A:38-1 and any reasonable notion of fundamental fairness compel a determination that the within Petition of Appeal be accepted as timely filed.

Accordingly, the Commissioner reverses the initial decision of the ALJ granting Summary Decision to the Board and Orders that this matter be remanded to the OAL for hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 2, 1996
DATE OF MAILING MAY 2, 1996

173-96

JENNIFER C. FIGURELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner claimed tenure and seniority entitlement to position of Executive Director of Pupil Personnel Services, which she contended encompassed the duties of her abolished position. (Count One) Alternatively, petitioner sought placement in the position of principal. (Count Two) District contended petition was untimely filed.

ALJ concluded that the petition violated the 90-day rule and dismissed it as untimely.

Commissioner reversed the initial decision and remanded matter for further proceedings. Commissioner found that Count One was not time-barred pursuant to *N.J.A.C.* 6:24-1.2(c); he found that matter arose upon the RIF which petitioner experienced in May 1994 not at time of Dr. Elias' hiring in August 1990. Commissioner remanded matter to OAL for factual findings and testimony as necessary to 1) Determine whether petitioner's service in the position of Director/Children's Partial Hospital Unit-Teenage Expectant Mother's Program (CPHU-TEMP) and/or the position of Director, Special Services, Department of Pupil Personnel Services, based upon required certifications and qualifications, as well as duties of position, accrues to the same category as that for the position of Executive Director, Pupil Personnel Services, held by Dr. Elias; (2) Where such an identity is established between either one or both of the above-mentioned positions held by petitioner and the position of Executive Director, Pupil Personnel Services, conduct a seniority analysis against petitioner's claim to the latter position; and 3) Determine petitioner's rights as asserted under Count Two of the Petition of Appeal.

MAY 2, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DENYING PETITIONER'S MOTION FOR SUMMARY DECISION;

GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 8377-94

AGENCY DKT. NO. 321-8/94

JENNIFER C. FIGURELLI,

Petitioner,

v.

BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Maria M. Lepore, Esq., for petitioner

Patricia A. Taylor, Assistant General Counsel, for respondent
(Charlotte Kitler, General Counsel, Legal Department, attorney)

Record Closed: March 12, 1996 Decided: March 12, 1996

BEFORE **MARYLOUISE LUCCHI-MCCLOUD**, ALJ:

PROCEDURAL HISTORY

This matter was commenced by way of petition from Jennifer C. Figurelli received August 3, 1994 by the Department of Education. An answer was filed on

August 22, 1994 and, on August 30, 1994, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing was held on February 28, 1995 and an order was generated. That order was amended to reflect an extension of time for the filing of cross-motions for summary decision as well as responses to May 25, 1995. On September 18, 1995, the parties had oral argument on the motion and the undersigned reserved and dates were set for the hearing. On September 25, 1995, a supplemental letter brief was also received on behalf of petitioner in this case. The hearing dates were set for March 1996. Those dates were adjourned due to a conflict in the calendar of the undersigned. However, March 12, 1996 was reserved for an oral decision for the cross-motions on summary decision. On that date, an oral bench decision was given with respect to the cross-motions which granted respondent's motion for summary decision, denied petitioner's motion for summary decision, and thereby dismissed the petition in this matter. For the purposes of this motion and this motion alone, both sides entered into a joint stipulation of facts.

FACTS

For the purposes of this motion alone, the following are agreed to be **Facts** by both sides. Should this matter proceed beyond the cross-motions in this case, neither side is or shall be bound by these **Findings of Fact** as they are only for the purpose of making a determination as to the legal issues presented by the parties in the context of motions for summary decision. The Stipulation and agreed upon exhibits have been marked into evidence as C-1.

1. On April 4, 1990, Dr. Jennifer Figurelli's position as Director/Bureau Pupil Personnel Services was abolished, pursuant to *N.J.S.A.* 18A:7A-44. The letter from Dr. Elena Scambio to Dr. Figurelli evidencing the abolishment of her position is attached hereto as Exhibit A.

2. On April 4, 1990, immediately upon abolishment of her position, Dr. Jennifer Figurelli was appointed Director/CPHU TEMP, pursuant to *N.J.S.A.* 18A:7A-44 (Ex. A).

3. Dr. Sylvia Elias began employment with the State-Operated School District of Jersey City on August 27, 1990. At that time, she became the Executive Director, Pupil Personnel Services.

4. On May 11, 1994, Dr. Jennifer Figurelli received notice that due to a reduction in force (RIF), her position as Director/Special Services-Department of Pupil Personnel Services was abolished.

5. The petition in this case before the court was filed on August 1, 1994.

6. The petition which gave rise to the instant matter was filed within ninety days of May 11, 1994.

7. The employment history of Dr. Figurelli with the Jersey City Public School District is set forth as follows: Throughout twenty-five years, Dr. Figurelli has held the following positions:

A) School Psychologist, September 1, 1970 through August 31, 1979

B) Chief School Psychologist, September 1, 1979 through August 31, 1980

C) School Psychologist, September 1, 1980 through January 31, 1981

D) Acting Director, Pupil Personnel Services, February 1, 1981 through August 31, 1982

E) School Psychologist, September 1, 1983 through September 17, 1985

F) Director, Bureau of Pupil Personnel Services, September 1, 1982 through August 31, 1983 (pursuant to *Figurelli v. Jersey City Bd. of Ed.*, 87 *S.L.D.* 1318, aff'd, *State Bd. of Ed.*, 84 *S.L.D.* 1319)

G) Director, Bureau of Pupil Personnel Services, September 18, 1985 through March 1, 1987 (pursuant to *Figurelli v. Jersey City Bd. of Ed.*, 87 *S.L.D.* 2607). Dr. Figurelli obtained tenure in this position.

H) School Psychologist, January 6, 1986 through March 1, 1987

I) Director, Bureau of Pupil Personnel Services, March 1, 1987 through April 4, 1990

J) Director - CPHU/TEMP, April 4, 1990 through June 30, 1991

K) Director, Special Services, Department of Pupil Personnel Services, July 1, 1991 through August 31, 1994

L) Supervisor, Special Education/Student Services, September 1, 1994 to present

Dr. Figurelli holds the following certificates from the State Department of Education: School Psychologist (received June 1970); Supervisor (received January 1979); Principal/Supervisor (received January 1979); Director of Student Personnel Services (received January 1980); School Administrator (received August 1986).

8. Attached as Exhibit B to this motion is the job description for the position of Executive Director, Pupil Personnel Services, which was in effect at the time of the RIF (May 11, 1994) and is in effect up until the time of the motion.

9. Attached as Exhibit C is the job description for Director, Special Services, which was the job description of the position held by Dr. Figurelli at the time of the RIF (May 11, 1994).

10. Attached as Exhibit D to this Initial Decision is the job description for the position of Director, CPHU-TEMP, which was Dr. Figurelli's job description upon the reorganization of the District until the time that the position was changed to Director, Special Services.

11. Exhibits E and F attached as evidence are memoranda from Louis Accocella, Hudson County Superintendent of Schools, which relate how the titles of Executive Director in the State-Operated School District of Jersey City are to be recognized.

As these facts have been stipulated to the parties for the purpose of this motion only, they are accepted as **FACT**.

LEGAL DISCUSSION

This case presently stands in the posture of cross-motions for summary decision. Summary decision may be granted when the facts are not in dispute if, as a matter of law, a party is entitled to judgment. *Brill v. Guardian Life Ins. Co. Of America,* 142 *N.J.* 520. In this case it should be noted that both parties are willing to agree to facts which they concede only for the purposes of this motion.

The threshold issue is whether or not petitioner's claim passes what is sometimes referred to as the 90-day rule found in N.J.A.C. 6:24-1.2. In order to initiate a contested case pursuant to school law, a petitioner shall have no more than 90 days from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case hearing. N.J.A.C. 6:24-1.2. This 90-day requirement is strictly construed and is not subject to expansion. *No. Plainfield Ed. Ass'n v. Bd. Of Ed. Of No. Plainfield,* 90 *N.J.* 587 (1984).

In this case, petitioner claims entitlement to the position of Executive Director of Pupil Personnel Services within the Jersey City schools. The Jersey City schools have been the subject of a State takeover and both sides agreed during oral argument that the takeover occurred in October 1989. Petitioner's original position was abolished as part of the reorganization by way of letter dated April 4, 1990. No petition was filed to place this as a matter in controversy before the Commissioner of Education. It was not until May 1994 when petitioner's most recent position was abolished.

Clearly, based upon the Stipulation of Facts, petitioner has tenure and seniority in a number of different positions. It is the subject of this matter that she asserts seniority and tenure in a position referred to as Director, Pupil Personnel Services, which is now held by Dr. Sylvia Elias. Petitioner claims that she had tenure and seniority rights to that position before Dr. Elias ever joined the Jersey City School District.

The State takeover legislation, N.J.S.A. 18A:7A-44(c), provides that a state district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. The statute specifically states that these individuals shall be hired with tenure if they had tenure in their prior positions.

The question presenting itself with respect to the 90-day rule is whether or not the 90 days runs from the date after the state takeover, specifically the April 4, 1990 letter to Dr. Figurelli by which her position was abolished or whether it runs in 1994 when Dr. Figurelli received a notice that due to a reduction in force her more recent position was abolished. In 1990, the position abolished which was held by petitioner was Director/Bureau Pupil Personnel Services and she was appointed as Director/CPHU-TEMP.

In 1994, Dr. Figurelli was sent a notice that due to a RIF, her position as Director/Special Services-Department of Pupil Personnel Services was abolished. At this juncture, petitioner asserts a right to the position held by Dr. Sylvia Elias who began employment in August 1990 as Executive Director, Pupil Personnel Services.

Petitioner is correct in reading *N.J.S.A.* 18A:7A-44 to mean that individuals such as petitioner retain tenure which has accrued. The State district superintendent has the ability to hire an individual whose position has been abolished based upon the evaluation of the individual and the staffing needs of the reorganized district staff. That is exactly what occurred in this case. At the time that Dr. Figurelli's position was abolished as of April 4, 1990, the district supervisor did just that, hire petitioner based

upon an evaluation of Dr. Figurelli and the staffing needs of the district. Additionally, Dr. Figurelli has and retains tenure rights in those positions to which she had previously had tenure.

The difference which occurs is the difference regarding seniority. The words seniority and tenure are not interchangeable. The two words are used almost interchangeably by petitioner in this case. There is no question as to the tenure which is held by petitioner. The question that does arise is whether or not petitioner's seniority exceeds that of Dr. Elias. According to petitioner's brief, Dr. Elias did not have any tenure or seniority rights with the Jersey City Public School District at the time she was employed. She did acquire tenure and seniority within the district.

The very question of when the action arises is answered by answering the question of tenure and seniority. On April 4, 1990, Dr. Figurelli was appointed Director/CPHU-TEMP after her position as Director/Bureau, Pupil Personnel Services was abolished. While petitioner's tenure was carried with her in those positions in which she held tenure, seniority accrued only in positions which were held. In August 1990, Dr. Elias was appointed to the position of Executive Director, Pupil Personnel Services. Whether 90 days is counted from the time that the action was taken in April 1990 when petitioner's position was abolished and she was appointed pursuant to N.J.S.A. 18A:7A-44(c) or, even if counting from the time that Dr. Elias began service, the 90 days has been well exceeded by the 1994 petition.

It is important to note that on May 11, 1994, petitioner received a notice of RIF and that her position was abolished. As a result, she asserted rights in the position held by Dr. Elias. Those rights that she asserted were both tenure and seniority. The position of Director of Pupil Personnel Services to which petitioner is now asserting a right did not exist prior to the State's takeover of the Jersey City Public Schools. As a practical result, no seniority can accrue with respect to petitioner. One cannot claim seniority, which is a timeline only, in a position which did not exist prior to 1994. Dr. Elias, on the other hand, has obtained seniority based upon the time spent in that position.

One of petitioner's claims is that this is an ongoing violation. That very argument shows that the matter is time barred by operation of the 90 day rule and should be dismissed. There cannot be seniority in a position which did not exist in 1990. If, however, one could argue that an ongoing violation existed, then the time to bring the matter would have been in 1990. In April 1990, petitioner had notice of final agency action. At no time until the 1994 RIF did petitioner assert her tenure and seniority rights. During the 1990 reorganization, the position of Executive Director, Pupil Personnel Services, was filled by Dr. Elias. If petitioner had wished to she could have petitioned the Commissioner of Education for the position at that time. The 90 days began upon the first notice of final action in April 1990. To assert in 1994 that seniority exists in a position which did not exist in 1990 is disingenuous. Additionally, to find otherwise would mean that any person who is the subject of a reduction in force could assert a claim at any time rather than within the 90 days permitted. This would be an incorrect reading of the 90 day rule and an incorrect result.

For the foregoing reasons and having taken into account the briefs, affidavits and stipulation of facts (C-1) with appended exhibits, I **CONCLUDE** that the petition in this matter is out of time and violates the 90-day rule. Petitioner has not complied with N.J.A.C. 6:24-1.2 and as such the petition in this instant matter must be **DISMISSED**.

ORDER

It is hereby **ORDERED** petitioner's motion for summary decision be and hereby is **DENIED**. It is further **ORDERED** that respondent's cross-motion for summary decision be and hereby is granted and that the petition in the instant matter be and hereby is **DISMISSED**.

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

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

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

DATE

MARYLOUISE LUCCHI-MCCLOUD, ALJ

Receipt Acknowledged:

3/18/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

Md(FV)mxl

APPENDIX

EVIDENCE

C-1 Joint Stipulation of Facts for purposes of summary judgment only with appended Exhibits A through F

JENNIFER C. FIGURELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner contends that the initial decision misapplies the 90-day rule in three ways. First, petitioner avows that the initial decision erroneously dismissed Count Two of the petition for failure to comply with *N.J.A.C.* 6:24-1.2, in the absence of facts on the record and without argument from respondent, which would serve as a basis for said dismissal. (Petitioner's Exceptions at p. 3) Petitioner argues that the facts, as stipulated, were relating only to Count One. "When there are no facts before a tribunal to support a dismissal, summary judgment cannot be granted." (*Id.* at p. 4, citing *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995)) Moreover, petitioner continues,

> The 90-day rule could not possibly apply to bar [her] from asserting a claim to the position of principal, since [she] could not challenge a violation of her seniority rights until after a RIF occurred. No RIF occurred affecting her entitlement to this position until May 14, 1994.*** (*Id.* at pp. 4, 5)

Second, with respect to Count One, petitioner avers that, since she filed the petition within 90 days of the elimination of her position as Director, she complied with *N.J.A.C.* 6:24-1.2.

(*Id.* at p. 5) Petitioner maintains that she retained her position as Director without a substantial change in her duties when respondent hired Dr. Elias to her current position in 1990. In hiring Dr. Elias, petitioner reasons, it took no action which affected her position. (*Id.* at p. 6)

> ***Rather, the district only acted illegally in **reducing** [her] to a supervisor position and preventing her from asserting her seniority entitlement to the remaining director position entitled Executive Director of Pupil Personnel Services. To hold otherwise is to misapply the established law governing the vesting of seniority rights which permit an aggrieved employee to challenge the elimination of a position and retention of a less senior individual pursuant to a RIF. (emphasis in text) (Petitioner's Exceptions at p. 8)

Petitioner's third exception with respect to the 90-day rule as applied in the initial decision concerns the ALJ's discussion of the continuing violation, as pleaded by petitioner. Here, petitioner asserts,

> The Initial Decision incorrectly states that, by pleading a continuing violation, [she] acknowledges that she did not meet the requirement to file within the 90-day time period. However, the Petition provides "these violations have occurred for the 1994-95 school year and will continue to recur in each and every **subsequent** year in which Respondent wrongfully prevents Petitioner from assuming the position of Executive Director, Pupil Personnel Services [as well as the position of principal]." (emphasis in text) (*Id.* at p. 11)

Petitioner maintains that this language applies to the violation of her rights as a result of the reduction in force (RIF) which occurred in May 1994 and to the violation of her rights which may be anticipated for every school year in which she is not appointed to the position to which she has superior tenure and seniority rights. (*Id.* at pp. 11, 12)

Petitioner next argues that the initial decision misapplies, in three respects, the regulations governing the application of seniority in the instant matter. (*Id.* at p. 13) Petitioner first attests that respondent was required to credit her with seniority she earned in her prior tenured positions. (*Id.*) Although she maintains that her seniority for the position of Director, Pupil Personnel Services, arguably dates back to the early 1980's when she first held the position, she does assume,

for the purpose of these exceptions, that, inasmuch as she was considered a "new hire" by the District as of April 4, 1990, her seniority in that position began to accrue as of that date. (*Id.* at p. 15)

Next, with respect to the application of seniority principles to the instant matter, petitioner reasserts her argument, as presented to the ALJ, that she is entitled to the position of Director, Pupil Personnel Services, since the position of Executive Director, Pupil Personnel Services, is recognized by the title of Director, Pupil Personnel Services. (*Id.* at pp. 15-17)

Finally, petitioner maintains that, even if the title Executive Director, Pupil Personnel Services, is not recognized as the title of Director, Pupil Personnel Services, her seniority nevertheless entitles her to the position. Noting the regulations which govern seniority found at *N.J.A.C.* 6:3-5.1, petitioner observes,

> ***A director acquires seniority in an individual position **based on the qualifications and endorsements required.** *** As is also clear from the record, [she] holds an Educational Services Certificate with the School Psychologist and Director, Student Personnel Services endorsements. She also held the positions of School Psychologist and Director, Pupil Personnel Services. Accordingly, she has tenure and accrued seniority in each of these positions. She would also have tenure and seniority to any position requiring either or both of these endorsements; this includes the position of Executive Director, Pupil Personnel Services. (emphasis in text) (*Id.* at p. 19)

Petitioner concludes that she began accruing seniority in these positions on April 4, 1990; whereas Dr. Elias' seniority dates to August 27, 1990. Thus, since petitioner has four months' greater seniority to the position of Executive Director, Pupil Personnel Services, she contends that her seniority rights have been violated by the District's refusal to place her in that position. (*Id.* at pp. 19, 20)

Upon careful and independent review of the record in this matter, the Commissioner determines to reverse the initial decision and remand this matter for further proceedings, as set forth below.

Initially, the Commissioner finds that Count One of the Petition of Appeal is not time-barred pursuant to *N.J.A.C.* 6:24-1.2(c). Rather, the Commissioner concurs with petitioner that her tenure and seniority rights under the particular circumstances herein were not implicated upon the hiring of Dr. Elias on August 27, 1990 but, rather, arose upon the RIF which petitioner experienced on May 11, 1994, together with the District's resultant refusal to place petitioner in a position to which she claimed entitlement by seniority. Thus, it was petitioner's demotion to the position of Supervisor, Special Education, and the District's concomitant refusal to honor her claim to a Director's position which establish the cause of action set forth in Count One, which was, therefore, timely taken to the Commissioner.

The Commissioner further finds that petitioner was properly considered a "new hire" on April 4, 1990, in the position of Director/Children's Partial Hospital Unit-Teenage Expectant Mother's Program (CPHU-TEMP) pursuant to pertinent statute, *N.J.S.A.* 18A:7A-44, which governs the abolishment of central office positions upon operation of a local district by the State. (District's Brief, Exhibit R-1) The Commissioner agrees with the District that, "Once Dr. Figurelli began employment in the new position, her seniority began to accrue in that position as of her first day in that position." (District's Brief at p. 7) Notwithstanding that petitioner maintained upon appointment to her new position the tenure and seniority credit accrued in other respects prior to State operation and abolishment of her former position, the pertinent statute clearly provides, "No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein." *N.J.S.A.* 18A:7A-44(c). See also *Van Dyke v. State-Operated School District of the City of Jersey City*, 91 *N.J.A.R.* 2d (EDU) 43, 45.

Finally, the Commissioner finds that the record supports petitioner's assertion that Count Two of the petition was improperly dismissed for failure to comply with the 90-day rule.

Consequently, the Commissioner remands this matter to the OAL for factual findings and testimony as necessary to: (1) Determine whether petitioner's service in the position of Director/CPHU-TEMP and/or the position of Director, Special Services, Department of Pupil Personnel Services, based upon required certifications and qualifications, as well as duties of position, accrues to the same category as that for the position of Executive Director, Pupil Personnel Services, held by Dr. Elias; (2) Where such an identity is established between either one or both of the above-mentioned positions held by petitioner and the position of Executive Director, Pupil Personnel Services, conduct a seniority analysis against petitioner's claim to the latter position; and 3) Determine petitioner's rights as asserted under Count Two of the Petition of Appeal.

Accordingly, this matter is reversed and remanded to the OAL for further proceedings as set forth under the above-specified parameters.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 2, 1996

DATE OF MAILING MAY 2, 1996

173-96

EDU #8377-94
C # 173-96
SB # 37-96

JENNIFER C. FIGURELLI,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 2, 1996

For the Petitioner-Respondent, Maria M. Lepore, Esq.

For the Respondent-Appellant, Ken Iwama, Esq.

On April 4, 1990, the State district superintendent of the State-operated School District of Jersey City (hereinafter "State-operated District") abolished the position of Dr. Jennifer Figurelli (hereinafter "petitioner") as Director, Bureau of Pupil Personnel Services and appointed her as Director, CPHU-TEMP.[1] Such action was taken pursuant to the reorganization of administrative and supervisory staff following the creation of a State-operated school district in Jersey City. N.J.S.A. 18A:7A-44. In August 1990, the State district superintendent appointed a non-tenured individual as Executive Director, Pupil Personnel Services. In July 1991, petitioner's position was changed to Director, Special Services, Department of Pupil Personnel Services. On

[1] "CPHU" is the Children's Partial Hospitalization Unit.

8/6/97

May 11, 1994, petitioner received notice that her position was being abolished as the result of a reduction in force ("RIF").

On August 3, 1994, petitioner filed a two-count petition of appeal with the Commissioner of Education, claiming that she was entitled to reinstatement as the Executive Director of Pupil Personnel Services (Count One) or as a principal (Count Two) by virtue of her tenure and seniority rights. Petitioner alleged that the State-operated District had "failed to demonstrate good cause for the alleged abolition of [her] position as Director of Pupil Personnel Services and its failure to permit her to assume the position of Executive Director of Pupil Personnel Services to which she has tenure and seniority rights." Petition of Appeal, at 3. Petitioner maintained that the Executive Director position was "ostensibly the same as the position of Director of Pupil Personnel Services." Id. at 2. Petitioner also claimed that she had achieved tenure as a principal by virtue of her service as the Director, CPHU-TEMP. The parties filed cross-motions for summary decision, along with a joint stipulation of facts for purposes of summary decision only.

On March 12, 1996, the Administrative Law Judge ("ALJ") recommended granting the State-operated District's motion and dismissing the petition, concluding that the petition had not been filed in a timely manner. N.J.A.C. 6:24-1.2(c).[2] The ALJ determined that the 90-day rule had begun to run when petitioner's position as Director, Bureau of Pupil Personnel Services was abolished in April 1990.

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[2] N.J.A.C. 6:24-1.2(c) provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

On May 2, 1996, the Commissioner rejected the Initial Decision, finding that the petition was not time-barred. The Commissioner concluded that petitioner's rights arose in May 1994 when her position as Director, Special Services, Department of Pupil Personnel Services was abolished and the State district superintendent refused to place her in a position to which she claimed entitlement by virtue of seniority. The Commissioner stressed that it was the State district superintendent's refusal to honor petitioner's claim to a director's position which established the cause of action set forth in the petition. Noting, however, that petitioner retained no tenure or seniority rights in her abolished position, N.J.S.A. 18A:7A-44, the Commissioner remanded this matter to the Office of Administrative Law for such proceedings as were necessary to determine whether petitioner's service as the Director/CPHU-TEMP and/or as the Director, Special Services, Pupil Personnel Services accrued to the same seniority category as Executive Director, Pupil Personnel Services and, if so, whether she was entitled to the Executive Director position by virtue of seniority. The Commissioner also remanded for further proceedings on Count Two of the petition, in which petitioner claimed entitlement to a principal's position.

The State-operated District has filed the instant appeal to the State Board, arguing that the Commissioner erred in determining that petitioner's claim to the Executive Director position was filed in a timely manner.[3]

[3] We note that the State-operated District did not appeal the Commissioner's determination to remand this matter to the Office of Administrative Law for further proceedings on petitioner's claim to a principal's position.

After a thorough review of the record, we affirm, as clarified herein, the Commissioner's ultimate determination to remand this matter to the Office of Administrative Law.

Since this case arises from the reorganization of administrative staff following the creation of a State-operated school district in Jersey City, it is necessary to consider the statutory provisions governing the creation and operation of State-operated districts. N.J.S.A. 18A:7A-44(c) provides in pertinent part:

> Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff...shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff....Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract....Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein. (Emphasis added.)

It is clear from the express language of the statute that petitioner retains no tenure or seniority rights in her former position as Director of Pupil Personnel Services, which was abolished in April 1990 following the creation of the State-operated District. See Van Dyke v. State-Operated School District of the City of Jersey City, decided by the Commissioner, 91 N.J.A.R.2d (EDU) 43, aff'd by the State Board, 91 N.J.A.R.2d

(EDU) 46, appeal dismissed, Docket #A-3633-91T2 (App. Div. 1992). Petitioner, however, claimed in her petition that the State-operated District had failed to demonstrate good cause for the "alleged abolition" of that position and for the State district superintendent's failure to assign her to the Executive Director position, which had been created during the statutorily-mandated reorganization of administrative and supervisory personnel. Petitioner further contended that the Executive Director position was "ostensibly the same" as her abolished position as Director of Pupil Personnel Services.[4]

We stress, however, that the abolishment of petitioner's position was effectuated by operation of law. Moreover, pursuant to the clear language of N.J.S.A. 18A:7A-44(c), petitioner did not retain any right to her abolished position even if it were re-created, as she now contends. Cirasa v. State-Operated School District of the City of Paterson, Docket #A-2408-93T2 (App. Div. 1995). N.J.S.A. 18A:7A-44 "does not mandate the rehiring of any of those [displaced administrative and supervisory staff] in the reorganized district. The statute clearly places that decision within the power of the State district superintendent....N.J.S.A. 18A:7A-44(c) evinces a legislative intent to permit the State district superintendent to assemble the best possible central administrative and supervisory staff to move the school district toward the required goal of providing a thorough and efficient education to its students." Id., slip op. at 10-11. Since the statute is permissive rather than mandatory with respect to the rehiring of individuals displaced in a reorganization, petitioner had no entitlement to reappointment

[4] Although petitioner contends in her petition that the State-operated District "allegedly" abolished her position of Director of Pupil Personnel Services in May 1994, the parties stipulated for purposes of summary decision that such position was abolished on April 4, 1990. Exhibit C-1, in evidence.

in the newly-established Executive Director position by virtue of her service in the abolished Director of Pupil Personnel Services position, even if the duties were "ostensibly the same," as she now contends.

In any event, we note that petitioner did not challenge the abolishment of her Director of Pupil Personnel Services position until August 1994, after her position as Director of Special Services was abolished. As a result, any claim she might have to the Executive Director position is time-barred to the extent that it is predicated on the validity of the statutorily-mandated reorganization of administrative and supervisory staff in 1990. N.J.A.C. 6:24-1.2(c). See Kaprow v. Berkeley Twp. Bd. of Ed., 131 N.J. 572 (1993). Moreover, under the circumstances, we find that petitioner has provided no basis for relaxation of the 90-day rule. N.J.A.C. 6:24-1.15.

Consequently, while we agree with the Commissioner that petitioner's instant claim arose in May 1994 when her position as Director of Special Services was abolished and the State district superintendent refused to appoint her to the Executive Director position, we grant in part the State-operated District's motion for summary decision and dismiss Count One of the petition to the extent that it is predicated on a challenge to the reorganization of administrative and supervisory personnel following the creation of a State-operated school district in Jersey City in 1990.

In view of such determination, we affirm, as clarified herein, the ultimate determination of the Commissioner to remand this matter to the Office of Administrative Law for further proceedings in order to determine whether petitioner's employment in the district subsequent to the abolishment of her Director of Pupil Personnel Services position in 1990 accrued to the same regulatory category as that of Executive Director,

Pupil Personnel Services, N.J.A.C. 6:3-5.1(g), and, if so, whether she had any entitlement by virtue of seniority to the Executive Director position at the time of the RIF in May 1994.[5]

We do not retain jurisdiction.

Attorney exceptions are noted.

August 6, 1997

Date of mailing AUG 08 1997

[5] Since the instant appeal is limited to the Commissioner's determination to remand this matter to the Office of Administrative Law for further proceedings on petitioner's claim to the Executive Director position, we have not addressed that portion of the Commissioner's decision remanding this matter for further proceedings on Count Two of the petition, in which petitioner claimed entitlement to a principal's position.

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(173-96)

JENNIFER C. FIGURELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

JULY 20, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5230-96
AGENCY DKT. NO. 321-8/94

JENNIFER C. FIGURELLI,
Petitioner,
v.
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Wayne J. Oppito, Esq., and **Maria M. Lepore,** Esq., for petitioner

Ken Iwama, Assistant General Counsel, for respondent

Record Closed: June 4, 1998 Decided: June 4, 1998

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

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

At the hearing the parties agreed to settle the matter and submitted the attached Stipulation of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is further **ORDERED** and that the proceedings in this matter be concluded.

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

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

6/4/98
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

6/9/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1998
DATE

Barbara A Noonan
OFFICE OF ADMINISTRATIVE LAW

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EDUOA 5230-96
6/4/98

KEN IWAMA
Assistant General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

DR. JENNIFER C. FIGURELLI, Petitioner, v. BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Respondent.	OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY AGENCY REF. NO. 321-8/94 OAL DOCKET NOs. [redacted], EDUOA 05230-96N STIPULATION OF SETTLEMENT

In consideration of the mutual promises and undertakings contained in this settlement (hereinafter "Agreement") Petitioner, Dr. Jennifer C. Figurelli and Respondent, State-Operated School District of Jersey City, improperly pleaded as the Board of Education of the State-Operated School District of Jersey City, Hudson County, hereby agree that the above-captioned matter and any and all other claims, rights and obligations between the undersigned parties shall be resolved as follows:

1. The parties agree that this Agreement represents the compromise of disputed claims and is not an admission of liability, negligence or wrongdoing by either party. The Agreement was reached by the parties as a business judgment bearing in mind the cost, disruption and uncertainty of litigation.

2. Dr. Jennifer C. Figurelli withdraws with prejudice the petition, including any amendments thereof, against the State-Operated School District of Jersey City, entitled Dr. Jennifer C. Figurelli, v. Board of Education of the State-Operated School District of Jersey City, Hudson County, bearing OAL Docket Nos. EDUOA 08377-94N and EDUOA 05230-96N and Agency Ref. No. 321-8/94.

3. Dr. Figurelli withdraws, with prejudice, all outstanding grievances regarding the withholding of her salary increments for school years 1995-1996 and 1997-1998.

4. Dr. Figurelli hereby releases and forever discharges the State-Operated School District, its successors and assigns, and its past, present or future officers, directors, agents or employees, from all claims, causes of action, suits, grievances, etc., which she has now or has ever had against the State-Operated School District of Jersey City, arising from the withholding of her 1995-1996 and 1997-1998 salary increments and from the abolishment of her position as Director, Special Services in 1994 and her subsequent placement in the position of Supervisor, Special Education/Student Services.

5. The State-Operated School District of Jersey City shall reverse Dr. Figurelli's 1995-1996 salary increment withholding. The parties agree that, due to administrative error, Dr. Figurelli received the monies from her 1995-1996 increment. The District agrees not to make any claim to recoup the erroneously paid monies.

6. The parties to this Agreement acknowledge that they have been represented by independent legal counsel of their own choice throughout all of the negotiations that preceded the execution of the Agreement and that they are satisfied with their representation. The parties acknowledge that they have carefully read and understand all of the provisions herein and that they

have voluntarily executed same without coercion and duress. The parties further acknowledge that they are not taking any medication nor are they suffering from any physical or mental disabilities which would affect their understanding or the terms of this Agreement or their decision to enter into this Agreement.

7. This Agreement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties.

for the State-Operated
School District of Jersey City

Jennifer Figurelli

5/18/98
Ken Iwama
Assistant General Counsel for the
State-Operated School District of
Jersey City

5/21/98
Wayne J. Oppito
Attorney for Petitioner

Maria M. Lepore
Attorney for Petitioner

OAL DKT. NOS. EDU 5230-96 and EDU 8377-94 (ON REMAND)
AGENCY DKT. NO. 321-8/94

JENNIFER C. FIGURELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

JULY 20, 1998
DATE OF MAILING JULY 20, 1998

174-96

174-96

IN THE MATTER OF THE TENURE	:	
HEARING OF CARMEN QUINONES,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct, including corporal punishment, against respondent physical education teacher.

ALJ concluded that Board failed to prove that respondent used corporal punishment against two students. ALJ did find that respondent left a student in a park and left a class unattended, thus, warranting disciplinary action. ALJ concluded respondent's improper conduct did not warrant dismissal but that forfeiture of 120 days' salary already withheld was appropriate penalty.

Having reviewed the record, including transcripts of the hearing at OAL, the Commissioner concurred with the ALJ's conclusions and directed the forfeiture of the 120 days' salary already withheld.

MAY 2, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7009-94
AGENCY DKT. NO. 263-6/94

IN THE MATTER OF THE TENURE HEARING OF CARMEN QUINONES, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

Gregory G. Johnson, Esq., attorney for petitioner

John L. Schettino, Esq., attorney for respondent (Giblin & Giblin, attorneys)

Record Closed: February 22, 1996 Decided: March 11, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioner, School District of the City of Newark, Essex County (the District) filed tenure charges against respondent, Carmen Quinones (Ms. Quinones). The District seeks to dismiss Ms. Quinones from her position as a tenured physical education teacher on charges of unbecoming conduct.

PROCEDURAL HISTORY

On June 10, 1994, the District filed tenure charges against Ms. Quinones. On June 27, 1994, the District certified the charges and suspended Ms. Quinones without pay. On June 28, 1994, the District issued a Certificate of Determination to certify the charges to the Commissioner of Education and it filed a Statement of Evidence and Tenure Charges.

On July 21, 1994, the Department of Education transferred this matter to the Office of Administrative Law for a hearing. The hearing was held on January 22, 23, 24 and 25, 1996. Prior to the start of the hearing, counsel for Ms. Quinones moved for sequestration of witnesses. The undersigned granted that motion and sequestered the witnesses.

The record closed on February 22, 1996, after the submission of all post-hearing Briefs.

FACTS

The parties stipulated the following which I **FIND** as **FACTS** in this case:

1. Ms. Quinones is a tenured physical education teacher.

2. Ms. Quinones was assigned to the Roberto Clemente School and the South Seventeenth Street School from 1991 to the date of her suspension.

3. On April 16, 1992, Ms. Quinones met with Joyce A. Kornegay, the Vice-Principal at the South Seventeenth Street School (Vice-Principal Kornegay), about allegations of abuse concerning a student, L. H.

4. On June 10, 1992, Ms. Quinones met with Vice-Principal Kornegay about allegations of abuse concerning a student, S.H.

5. On January 27, 1993, Ms. Quinones met with Vice-Principal Kornegay and the Division of Youth and Family Services (DYFS) about allegations of abuse concerning a student, Y.W.

6. On June 17, 1993, Ms. Quinones met with Vice-Principal Kornegay about allegations of abuse concerning a student, A.P.

7. On September 28, 1993, Ms. Quinones met with Vice-Principal Kornegay about allegations of leaving a class unsupervised.

8. On June 10, 1994, the District filed charges of unbecoming conduct against Ms. Quinones with the Office of the Executive Superintendent.

9. On June 27, 1994, the District certified the charges and suspended Ms. Quinones without pay.

In addition to the above, having heard the witnesses and reviewed the Exhibits, I **FIND** the following **FACTS**:

Ms. Quinones is accused of inflicting corporal punishment on L.H., Y.W. and S.H., of leaving A.P. unsupervised in West Side Park and of leaving a class unattended on one occasion. With respect to the corporal punishment allegations, Ms. Quinones is accused of hitting L.H. in the head with a ball, of hitting Y.W. in the mouth and of pulling S.H's hair. With respect to the remaining allegations, at the hearing, Ms. Quinones admitted that she left A.P. at West Side Park and that she left a class unattended on September 24, 1993. She denied inflicting corporal punishment on any student.

THE INCIDENT INVOLVING L.H.

There is no dispute that Ms. Quinones hit L.H. in the head with a ball. The question is whether she did it to punish L.H.or whether it happened inadvertently when she was playing a game with her class. On April 1, 1992, Ms. Quinones was participating in a game with her students. Ms. Quinones testified that the game involved positioning the students and throwing a ball at them. If she hit a student, that student had to sit down. Whoever was left was the winner and a new game started. Ms. Quinones called this game "monkey-in-the-middle" or "tag." Other witnesses called it either "monkey-in-the-middle" or "duck-duck-goose." Whatever the name, Ms. Quinones and her students were playing a game at the time of the incident involving L.H.

The problem with respect to this incident is that three students, including L.H. and his sister, R.H., gave three different accounts of what happened. One of the students, P.B., was 8 years old at the time of the incident. He testified that the class was not playing a game at the time of the incident. According to P.B., the class was sitting down and Ms. Quinones had asked them to be quiet. L.H. was standing at the window and the window was down. P.B. testified that Ms. Quinones told L.H. to sit down and he did not do so. P.B. also testified that he saw Ms. Quinones throw a basketball at L.H. and hit him in the forehead over his left eye. He saw blood coming from L.H.'s head, but he did not see the cut. P.B. stated that L.H. was facing Ms. Quinones at the time she threw the basketball at him.

L.H.'s sister, R.H., was 6 years old at the time of the incident. She took gym with L.H. Contrary to P.B.'s testimony, R.H. testified that prior to the incident L.H. was playing basketball and Ms. Quinones was participating. R.H. was playing jump rope. L.H. stopped playing basketball and went to the window to talk to another sister who was outside the window. R.H. testified that Ms. Quinones told L.H. to get back and finish the game and that L.H. said that he was tired and did not want to play anymore. According to R.H., Ms. Quinones then threw the basketball at L.H. and hit him in the back of the head. L.H. then hit his head on a piece of metal that was sticking out of a gate on the window. R.H. testified that L.H. cut his head, that the blood came out heavy and that Ms. Quinones did not help L.H. Instead, L.H. went back to class

with blood running down his face and his classroom teacher, Lynn Irby-Jackson (Ms. Irby-Jackson), took him to the nurse. R.H. went with them to the nurse.

Although on direct examination R.H. was crystal clear on what happened to her brother, on cross-examination she curiously was not able to remember certain things. She admitted that she "forgets things fast." She also admitted that the District's attorney had to help her remember what happened and that he put a few words in her mouth.

L.H. testified that Ms. Quinones told him to sit down. Contrary to P.B.'s testimony, L.H. testified that he was playing basketball with P.B. and other students. He went to the window to talk to a sister because he was bored and tired of playing. Ms. Quinones told him to get away from the window. Contrary to P.B.'s testimony, the window was up, he did not see the ball coming because he was facing the window and talking to his other sister and the ball hit him in the back of the head. Ms. Quinones called his name and then threw a basketball at him. Contrary to the testimony of R.H., L.H. testified that he hit his left eyebrow area on the window sill, that he cut his head but it did not bleed much and that Ms. Quinones took him to her office and put a tissue on the cut.

Ms. Irby-Jackson testified about the incident on April 1, 1992. She corroborated that the students were playing a game in gym and that L.H. was hit with a ball. She also testified that she saw blood on L.H.'s forehead when he returned from gym on the day of the incident. Although there was blood, it was not gushing and the cut was not large. It was noticeable to her and she got a towel to put on it and the bleeding stopped. Contrary to R.H.'s testimony, Ms. Irby-Jackson did not take L.H. to the nurse because the nurse was not in that day. Ms. Irby-Jackson also testified that she did not report the incident to anyone. She further testified that prior to this incident, no student complained of any problems with Ms. Quinones and Ms. Quinones controlled her class. The students enjoyed taking gym and were not reluctant to do so. In fact, L.H. continued to take gym with Ms. Quinones after this incident.

The most startling testimony came from L.H.'s mother, F.H. F.H. testified that Ms. Quinones allegedly had previously struck one of her other children with a ruler. With respect to that previous incident, F.H. testified that she went to the school with a pine stick to go after Ms.

Quinones. The Principal of the school stopped her and, from that time on, would not let F.H. get anywhere near Ms. Quinones. F.H. also testified that she has a great deal of animosity and ill-feeling toward Ms. Quinones and that she intends to sue the District over the incident involving L.H. after the conclusion of this matter. She already has consulted several lawyers. She also complained about Ms. Quinones to the Division of Youth and Family Services.

Ms. Quinones testified that, on the day of the incident, she started the class with exercises. She then played the game she described as tag with the class. L.H. was one of the last students remaining. He was standing by the window. She threw the ball at him. He saw her throw the ball and he tried to get out of the way so as not to get hit and have to sit down. The ball hit him in the head. Ms. Quinones administered First Aid to L.H. and she cleaned the cut. She did not throw the ball at him as punishment. She was playing tag and she merely tried to hit him as part of the game.

THE INCIDENT INVOLVING Y.W.

Ms. Quinones is accused of hitting Y.W. in the mouth on January 20, 1993. Y.W. testified that her class was on the way to the gym. The class was on the stairs leading to the outside of the gym. The class was lined up and she was the first one in line. Ms. Quinones was in front of her getting ready to take the class outside. Y.W. was talking to a friend. Y.W. testified that Ms. Quinones told her to be quiet and then turned around, swung her hand back and "smacked" Y.W. in the mouth. Ms. Quinones did not smack her real hard, but Y.W. claimed that it did hurt. Y.W. took gym that day. She admitted that she got mad and told Vice-Principal Kornegay and her parents about it. The parents then came to school and met with Ms. Quinones and Vice-Principal Kornegay.

Ms. Quinones testified that on the day of the incident, Y.W. started fighting with another student and she was cursing and screaming. Ms. Quinones moved Y.W. to the front of the line and she moved the other student to the back. Y.W. continued arguing and screaming. Ms. Quinones then put two fingers on Y.W.'s lips and told her to be quiet. Ms. Quinones did not smack Y.W. Y.W. took gym that day and she went to Vice-Principal Kornegay. Vice-Principal

Kornegay testified that Y.W. had no physical sign of being hit in the mouth. She checked Y.W.'s mouth and did not see anything.

THE INCIDENT INVOLVING S.H.

The District offered no testimony from S.H. as to the allegation that Ms. Quinones pulled her hair. It only offered hearsay testimony from Vice-Principal Kornegay. Vice-Principal Kornegay admitted that Ms. Quinones denied pulling S.H.'s hair. Pursuant to the provisions of *N.J.A.C.* 1:1-15.5, there must be some legally competent evidence to support a finding that Ms. Quinones pulled S.H.'s hair. No such evidence exists with respect to this allegation.

MS. QUINONES' EMPLOYMENT WITH THE DISTRICT

Ms. Quinones began her employment with the District in September 1988. The District initially assigned her to the Harriet Tubman Elementary School. The Principal of that school observed Ms. Quinones during the 1988-89 school year and gave her an overall rating of satisfactory in all categories. The Principal also stated that Ms. Quinones was a talented person and that she had the skills "to make our school's Phys Ed program the best in the City." (R-1)

During the 1989-90 school year, the District assigned Ms. Quinones to the Wilson Avenue School and to the South Seventeenth Street School (the South Seventeenth Street School). The Vice-Principal of the South Seventeenth Street School at that time and the Assistant Director Office of Physical Education and Extra-Curricular Activities, Lawrence A. Guarino (Assistant Director Guarino), observed Ms. Quinones during that school year. They gave her an overall rating of satisfactory in all categories. The Vice-Principal of the South Seventeenth Street School also commented that "Ms. Quinones displays enthusiasm and vitality. She is doing an excellent job." Assistant Director Guarino commented that "Ms. Quinones had good control of the class." (R-2 and R-3)

During the 1991-92, 1992-93 and 1993-94 and 1994-95 school years, the District assigned Ms. Quinones to the Roberto Clemente School (the Roberto Clemente School) and to the South Seventeenth Street School. At the Roberto Clemente School, Ms. Quinones taught

physical education to grades K through 4 on Mondays and Tuesdays. At the South Seventeenth Street School, she taught physical education to grades K to 8 on Wednesdays, Thursdays and Fridays.

In her annual evaluation at the South Seventeenth Street School in June 1991, Ms. Quinones received satisfactory ratings in all categories. The evaluator noted that she was a "Receptive and cooperative staff member," she "Portrays completence (sic) in subject area," and her "Pupils portrays (sic) evidence of having been taught well." (R-4)

The Principal of the Roberto Clemente School, Fidiberto Soto (Principal Soto) testified at the hearing. He observed Ms. Quinones during the 1991-92, 1992-93, 1993-94 and 1994-95 school years. He rated Ms. Quinones satisfactory in all categories during those school years. (R-5, R-11, R-14, and R-21). He also noted that Ms. Quinones "served as a motivator by being part of the activity" in her class (R-11), she "monitored her students continuously," she "maintained good discipline" (R-14) and her class "was well behaved and very much involved in the lesson presented." (R-21)

. Principal Soto also testified that, as a teacher, Ms. Quinones performed satisfactorily and was a good teacher. He had recommended her for a full-time position. (R-17) He received no complaints from any teachers or students about Ms. Quinones, he received no complaints that Ms. Quinones abused or struck students and he observed that she maintained control and discipline of her classes. He also testified that Ms. Quinones went above and beyond her duties while at the Roberto Clemente School and that she was always there to help. She even received a Teacher Recognition Certificate in May 1994 for her "commitment, dedication and responsibility for our children during the school year." (R-22). Principal Soto rated Ms. Quinones between 8 to 10 as a teacher on a scale of 1 to 10 because of the way she worked with the students, the staff and the administration. Mr. Soto still wants Ms. Quinones to teach at the Roberto Clemente School.

Assistant Director Guarino also testified at the hearing. He is the supervisor of all Physical Education teachers in the District, including Ms. Quinones. He observed her on several occasions and he gave her satisfactory ratings in all categories. (R-3, R-9, R-10, R-22). In his Observation Reports, he noted that Ms. Quinones "had good control of the class" (R-3), "her

students were attentive and enthusiastic" (R-9) and "she has excellent rapport with her students" (R-22). In another report in February 1994, Assistant Director Guarino stated that "Ms. Quinones plans very well for her classes and displays boundless energy and enthusiasm." (R-18)

Assistant Director Guarino also testified that, in his opinion, Ms. Quinones is a very good teacher. She has a reputation as a very good teacher and he received no complaints about her. He never saw Ms. Quinones being abusive toward her students, he never heard her be negative and he thought that she did an outstanding job. He rated Ms. Quinones an 8 or 9 as a teacher on a scale of 1 to 10.

The other Assistant Director of Physical Education and Extra-Curricular Activities, Leonard Moore (Assistant Director Moore) also testified at the hearing. He supervised Ms. Quinones when she taught at the South 17th Street School. He observed her and rated her satisfactory in all categories. (R-15 and R-23). He testified that Ms. Quinones always maintained control of her students, she always participated in the class activities and her students enjoyed her classes. He rated Ms. Quinones an 8 and he stated that he would rehire her. He also testified that, other than a complaint about leaving a student in the park, he received no other complaints about Ms. Quinones.

Three teachers at the South Seventeenth Street School testified, Marie Love (Ms. Love), Violet Campos (Ms. Campos) and Dorothea Ryles-Williams (Ms. Ryles-Williams). Each of these teachers were 3rd grade teachers at the South Seventeenth Street School at the time Ms. Quinones taught there. Ms. Quinones was the Physical Education teacher for their classes. Ms. Love testified that her students liked Ms. Quinones and responded to Ms. Quinones in a favorable manner. Ms. Love also testified that Ms. Quinones had good control of her classes and never had problems with Ms. Love's students. Ms. Campos testified that, although her class was a difficult class, Ms. Quinones was able to control and discipline the students in it. Ms. Campos also testified that none of her students complained about Ms. Quinines striking them. Ms. Ryles-Williams testified that her students liked Ms. Quinones and responded to her in a favorable manner. Ms. Quinones had good control of the class and had no problems with any students.

Two other teachers at the South Seventeenth Street School also testified, Timothy Solomon (Mr. Solomon) another Physical Education teacher, and Felicia Smith (Ms. Smith), an ESL teacher. Mr. Solomon and Ms. Quinones taught together. He testified that he observed Ms. Quinones frequently and she always was well prepared, she got along with the students and she had good control and discipline of her classes. He never saw Ms. Quinones hit or abuse a student. He also testified that he was walking through the gym at the time of the incident involving L.H. He corroborated that the students were playing monkey-in-the-middle and that Ms. Quinones was participating in that game.

Ms. Smith's room connected with the gym and Ms. Quinones's office. Ms. Smith observed Ms. Quinones a number of times and Ms. Quinones always had control of her classes, she always was orderly with her activities and she never saw a student get out of hand. She also testified that she never saw Ms. Quinones hit or abuse a student. She saw Ms. Quinones embrace a child and she stated that students were overjoyed at seeing Ms. Quinones.

Vice-Principal Kornegay also testified at the hearing. With respect to the incident involving L.H., she testified that the incident occurred on April 1, 1992 and that she met with Ms. Quinones on April 16, 1992 to discuss the matter. She took no disciplinary action against Ms. Quinones at that time. The incident with Y.W. occurred on January 20, 1993. Vice-Principal Kornegay spoke to Ms. Quinones on January 27, 1993 about this incident, but she took no disciplinary action against Ms. Quinones at that time. The incident involving leaving A.P. in West Side Park occurred on June 17, 1993. Vice-Principal Kornegay met with Ms. Quinones on June 17, 1993 to discuss the matter. Again, she took no disciplinary action against Ms. Quinones at that time.

The incident involving leaving a class unattended occurred on September 24, 1993. Vice-Principal Kornegay met with Ms. Quinones on September 28, 1993 to discuss that matter. The District did not bring tenure charges against Ms. Quinones until June 10, 1994, after she already had taught the entire 1993-94 school year without any further incidents.

Vice-Principal Kornegay gave Ms. Quinones an overall unsatisfactory rating in only one Observation Report in December 1993. (P-10). This occurred seven months after the incidents

involving L.H. and Y.W. Prior to and after that December 1993 report, Vice-Principal Kornegay gave Ms. Quinones overall satisfactory ratings. (R-7, P-8, R-12 and R-20). Nearly all of these reports were made after the incidents involving L.H. and Y.W. and one was made after the incidents involving leaving A.P. in West Side park and leaving a class unattended. In fact, in an Observation Report, dated March 23, 1994 (R-20), three months before the District suspended Ms. Quinones, Vice-Principal Kornegay gave her an overall satisfactory rating and satisfactory ratings in the following categories:

1. Consistently administers control and understanding, firmness, and consideration for the rights of others.

2. Organizes and utilizes classroom time effectively.

3. Demonstrates wholesome rapport with students/has sympathetic understanding.

4. Displays enthusiasm and vitality.

5. Uses effective instructional techniques.

6. Uses motivational techniques appropriate to the learner and objectives.

7. Selects objectives and gives directions which are clearly stated and appropriate to the learner.

8. Encourages student leadership and responsibility. Develops student skills in individual and group decision making.

9. Provides activities which develop critical thinking, resourcefulness, responsibility and creativity. (R-20)

DISCUSSION AND CONCLUSION

The District charges Ms. Quinones with unbecoming conduct because she left a student in West Side Park, she left a class unattended and she allegedly utilized corporal punishment against L.H. and Y.W. Ms. Quinones has admitted that she left a student in West Side Park and that she left a class unattended. Thus, the question remaining is whether Ms. Quinones utilized corporal punishment against L.H. and Y.W.

The District initially attempted to substantiate the corporal punishment charges against Ms. Quinones by introducing evidence of DYFS investigations. Such evidence is inadmissible under *N.J.S.A.* 9:6-8.10(a)(b)(5) and cannot be used to prove those charges against Ms. Quinones. *Matter of Tenure Hearing of Tyler,* 236 *N.J. Super.* 478, 487 (App. Div. 1989); *certif. den.*, 121 *N.J.* 615 (1990). Thus, a determination must be made as to whether or not the evidence presented at the hearing proves that Ms. Quinones used corporal punishment against L.H. and Y.W.

The use of corporal punishment is prohibited by *N.J.S.A.* 18A:6-1. Corporal punishment is defined in *Black's Law Dictionary* as "Physical punishment as distinguished from pecuniary punishment or fine; any kind of punishment of or inflicted on the body." In *Craze v. Allendale Board of Ed.*, 1938 *S.L.D.* 585, 586, the Commissioner of Education defined corporal punishment as "any punishment causing or intended to cause bodily pain or suffering." Corporal punishment is a teacher's use of force and fear in dealing with students and unnecessary and inappropriate physical contact. In *Tenure Hearing of Lomakin,* 1971 *S.L.D.* 331, 334.

The District bears the burden of proving the charges of unbecoming conduct by a preponderance of the credible evidence. *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 12 (App. Div. 1974). In determining whether this standard of proof has been met, the credibility of the witnesses must be weighed. Credibility contemplates an overall assessment of a witness' story in light of its rationality, internal consistency and manner in which it hangs together with other evidence. *In the Matter of Schulman,* 92 *N.J.A.R.* 2d (BDS) 16, 27, citing *Carbo v. United States,* 314 *F. 2d* 718 (9th Cir. 1963). The term has been defined as testimony which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge and common observation can accept as probable under the circumstances.

Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. *In the Matter of the Tenure Hearing of Boyd, 93 N.J.A.R. 2d* (EDU) 445, 451 (1992), citing *In Re Perrone*, 5 *N.J.* 514 (1950). Testimony may be disbelieved but it may not be disregarded. *Id.* at 451-451, citing *Middletown Tp. v. Murdoch,* 73 *N.J. Super.* 552 (App. Div. 1962). The finder of fact may accept or reject, in whole or in part, the

testimony of any witness. *Id.* at 452, citing *Application of Howard Sav. Bank,* 143 *N.J. Super.* 1 (App. Div. 1976). The Commissioner also recognizes the need to examine the testimony of children with great caution. *Id.* at 451.

In this case, the District presented the testimony of three children, L.H., R.H. and P.B., to prove that Ms. Quinones used corporal punishment against L.H. The credibility of the testimony of L.H. and R.H. is questionable. Their mother, F.H., made it crystal clear during her testimony that she had a great deal of animosity toward Ms. Quinones and that she intended to sue the District after the conclusion of this matter. F.H. even testified that on one occasion, she went to the school with a pine stick with the intention of going after Ms. Quinones.

In addition, L.H., R.H. and P.B. gave conflicting testimony. P.B. testified that the class was sitting down. L.H. and R.H. testified that some of the class and Ms. Quinones were playing basketball and R.H. was jumping rope. P.B. testified that the window was down. L.H. and R.H. testified that the window was up and L.H. was talking to another sister who was outside the window. P.B. testified that Ms. Quinones told L.H. to sit down. R.H. testified that Ms. Quinones told L.H. to get back and finish the basketball game. P.B. testified that Ms. Quinones hit L.H. in the forehead and that L.H. was facing her at the time. L.H. and R.H. testified that Ms. Quinones hit L.H. in the back of the head and L.H. testified that he was facing the window when he got hit. R.H. testified that L.H. hit his head on a piece of metal that was sticking out of a gate on the window. L.H. testified that he hit his head on the window sill. R.H. testified that L.H. cut his head and the blood came out heavy. L.H. testified that the cut did not bleed much. R.H. testified that Ms. Quinones did not help L.H. L.H. testified that Ms. Quinones took him to her office and put a tissue on the cut. Finally, R.H. testified that L.H.'s classroom teacher, Ms. Irby-Jackson, took her and L.H. to the nurse. Ms. Irby-Jackson testified that the nurse was not in that day.

In addition to the obvious bias of L.H. and R.H., there are too many inconsistencies in the testimony of all three children to make their testimony believable. Furthermore, there is no credible evidence that Ms. Quinones threw the ball at L.H. as punishment intended to cause him bodily pain or suffering. Based upon the foregoing, I **CONCLUDE** that Ms. Quinones did not use corporal punishment against L.H.

With respect to Y.W., the District did not present the testimony of any eyewitness other than Y.W. Y.W. testified that Ms. Quinones turned around, swung her hand back and "smacked" Y.W. in the mouth. Y.W. testified that it hurt when Ms. Quinones smacked her in the mouth. Y.W. complained to Vice-Principal Kornegay who admitted that she checked Y.W.'s mouth and saw no physical sign that Y.W. had been hit. Based upon the foregoing, I **CONCLUDE** that Ms. Quinones did not use corporal punishment against Y.W.

Ms. Quinones admitted that she left A.P. in West Side Park and that she left a class unattended on one occasion. Although she explained the reasons for so doing, her conduct cannot go unpunished. A teacher cannot leave a student in a park or a class unattended under any circumstances. The question is whether dismissal is the appropriate penalty. I **CONCLUDE** that it is not.

Except for one evaluation, Ms. Quinones received satisfactory evaluations, even after the incidents in question. She is regarded as a good teacher by her supervisors and colleagues and her students liked her. Except for the allegations of L.H. and Y.W., no one ever had complained that Ms. Quinones struck or abused any of her students. Although her conduct in leaving a student in a park and of leaving a class unattended warrants disciplinary action, her otherwise unblemished service in the District must be recognized. Dismissal is an unduly harsh penalty under the circumstances.

I, therefore, **CONCLUDE** that Ms. Quinones's conduct does not warrant her dismissal. A forfeiture of 120 days' pay already withheld is a sufficient penalty.

ORDER

I **ORDER** that Ms. Quinones shall be continued in her tenure status as an employee of the District and she shall forfeit 120 days' pay already withheld.

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

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

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

March 11, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

3/18/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

P.B.

L.H.

R.H.

F.H.

Y.W.

Joyce A. Kornegay

Lynn Irby-Jackson

For Respondent:

Carmen Quinones, respondent

Marie Love

Violet Campos

Dorothea Ryles-Williams

Timothy Solomon

Felicia Smith

Lawrence A. Guarino

Fidiberto Soto

Leonard Moore

Exhibits

P-1	Memo, dated April 13, 1992, from J. Kornegay to Carmen Quinones
P-2	Memo, dated April 17, 1992, from J. Kornegay to Hattie Black
P-3	Memo, dated June 12, 1992, from J. Kornegay to Carmen Quinones
P-4	Memo, dated January 29, 1993, from J. Kornegay to Carmen Quinones
P-5	Incident Report

P-6	Memo, dated September 30, 1993, from Joyce Kornegay to Carmen Quinones
P-7	Letter, dated January 6, 1993, from Joseph G. Morano to Carmen Quinones
P-8	Teacher Annual Evaluation Report, dated June 1993
P-10	Teacher Observation Report, dated December 1, 1993
P-11	Memo, dated October 7, 1991, from Mrs. Kornegay to C. Quinones
P-12	Memo, dated November 20, 1991, from Mrs. Kornegay to Ms. Quinones
P-13	Diagram of the Gym
P-14	Accident Report Form, dated April 2, 1992
R-1	Teacher Observation Report
R-2	Teacher Observation Report, dated April 4, 1990
R-3	Teacher Observation Report
R-4	Teacher Observation Report, dated June 1991
R-5	Teacher Observation Report, dated December 2, 1991
R-6	Teacher Observation Report, dated February 6, 1992
R-7	Teacher Observation Report, dated May 14, 1992
R-9	Teacher Observation Report, dated December 7, 1992
R-10	Teacher Observation Report, dated March 25, 1993
R-11	Teacher Observation Report, dated May 12, 1993
R-12	Teacher Observation Report, dated June 2, 1993
R-13	Memo, dated October 20, 1993, from Carmen Quinones to Leonard Moore
R-14	Teacher Observation Report, dated November 29, 1993
R-15	Teacher Observation Report, dated December 9, 1993
R-17	Letter, dated February 10, 1994, from Fidiberto Soto
R-18	Memo, dated February 22, 1994, from Lawrence A. Guarino
R-20	Teacher Observation Report, dated March 23, 1994
R-21	Teacher Observation Report, dated March 28, 1994
R-22	Teacher Observation Report, dated April 15, 1994
R-22	Teacher Recognition Certificate
R-23	Teacher Observation Report, dated January 27, 1994

OAL DKT. NO. EDU 7009-94

IN THE MATTER OF THE TENURE	:	
HEARING OF CARMEN QUINONES,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The District's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4. No reply exceptions were filed by respondent.

The District raises four objections to the initial decision: (1) That the ALJ incorrectly characterizes the District's charges as corporal punishment, while the Statement of Charges alleges respondent committed several acts of conduct unbecoming a teacher; (2) That the ALJ failed to credit the testimony of Vice Principal Kornegay with respect to the L.H. incident of April 2, 1992; (3) That the ALJ incorrectly found that respondent did not smack pupil Y.W. on January 20, 1993, and that respondent was not guilty of unbecoming conduct; and (4) That the ALJ improperly blames Vice Principal Kornegay for failing to take disciplinary action against respondent immediately after each reported incident. (District's Exceptions at p. 1)

In support of its contentions, the District essentially recasts its arguments as presented to the ALJ. The District adds to its position that, inasmuch as respondent admitted she

threw the ball at L.H. because he did not want to come to class, such admission should be given due weight. (*Id.* at pp. 3, 4) Additionally, the District argues that respondent's version of the Y.W. incident is "not trustworthy," and that, given respondent's admission that she placed her fingers over Y.W.'s mouth, "***her conduct constitutes improper touching or conduct unbecoming." (*Id.* at p. 5) Finally, the District avers that the ALJ places undue emphasis on respondent's evaluations while criticizing the vice principal for failing to take timely disciplinary action against respondent. (*Id.* at p. 6, citing Initial Decision at p. 10) Thus, the District maintains that respondent should be terminated from her tenured position.

Upon careful and independent review of the record in this matter, which included the transcripts from the hearing at the OAL, the Commissioner finds no basis either in the transcripts or in the record as a whole to challenge the ALJ's credibility determinations and resultant conclusions and, therefore, concurs that the District has failed to prove by a preponderance of credible evidence that respondent used corporal punishment against L.H. and Y.W. (Initial Decision at pp. 13, 14)[1] That the District contends the ALJ improperly characterizes the charges as corporal punishment, rather than unbecoming conduct, is without consequence where the District's own testimonial and documentary evidence support such characterization, and where such evidence, in view of respondent's attestations, fails to establish that respondent is guilty of improper conduct with respect to the L.H. and Y.W. incidents.

[1] In so doing, the Commissioner notes that the District's exception arguments recount respondent's "admission" as to her conduct concerning L.H., yet the testimony is not respondent's own testimony, but rather the (admissible) hearsay testimony of Vice Principal Kornegay. (Transcript of January 22, 1996 at p. 66, lines 19-23) However, respondent specifically refutes that she threw the ball at L.H. as punishment, maintaining in her testimony that she threw the ball at L.H. in the course of a game of tag. (Transcript of January 24, 1996 at p. 49 line 25, p. 50, lines 1-4, pp. 66-67)

As to the finding that respondent left her class unattended and left a student unattended in the park (*Id.* at p. 14), the Commissioner concurs with the ALJ that such conduct is improper, but further agrees that these incidents do not, in view of respondent's overall employment record with the District, provide sufficient basis for termination.

Accordingly, the initial decision of the OAL, directing that respondent forfeit the 120 days' pay already withheld, is adopted for the reasons expressed therein as the appropriate penalty in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 2, 1996

DATE OF MAILING MAY 2, 1996

176-96

THEODORE BOURELOS, WENDY KORENSTEIN, BIRDIE LEE POWELL, YVETTE MORRIS, MARY ROBINSON, DOROTHY HOWARD, BETTE JOHNSON, ANITRA MARTIN, MARY CATLIN, DORIS MORANEY, JOHN PORTEE, AND SATYA DAS,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners, 12 tenured teaching staff members, appealed the withholding of their increments for alleged unsatisfactory performance in the 1993-94 school year. One petition was dismissed for petitioner's failure to appear; one petitioner withdrew her petition; and one petitioner's case was transferred to consolidated OAL cases.

ALJ concluded the State District Superintendent appointed for the District has the statutory authority to withhold increments consistent with *N.J.S.A.* 18A:29-14. Moreover, ALJ concluded that the evaluation procedures were consistent with *N.J.A.C.* 6:3-4.3. Citing *Kopera,* the ALJ stated the scope of review on appeal is limited to whether there existed a reasonable basis for the District's decision to withhold. ALJ concluded in all cases but that of Petitioner Das that petitioners failed to meet their burden of proof by a preponderance of credible evidence that the District's action to withhold was unreasonable, arbitrary, or capricious. ALJ ordered District's determination to withhold Petitioner Das' increment for school year 1994-95 reversed and relief be granted to Petitioner Das.

Commissioner concurred with ALJ concerning State District Superintendent's authority and concerning the District's evaluation procedures. Commissioner also affirmed ALJ's determination that the District properly withheld petitioners' salary increments. Commissioner, however, reversed ALJ's finding as to Petitioner Das. Commissioner could not, on the basis of the record before him, find the District's decision to withhold Das' salary increment was unreasonable since as of the date of the District's decision to deny his increment, Das had received two unsatisfactory evaluations. Thus, ALJ's decision was adopted in part, reversed in part.

MAY 6, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8488-94

Agency Docket No. 324-8/94

THEODORE BOURELOS, WENDY KORENSTEIN, BIRDIE LEE POWELL, YVETTE MORRIS, MARY ROBINSON, DOROTHY HOWARD, BETTE JOHNSON, ANITRA MARTIN, MARY CATLIN DORIS MORANEY, JOHN PORTEE, SATYA DAS.

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioners
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel and **Patricia A. Taylor**, Assistant General Counsel, for respondent

Record Closed: January 18, 1996 Decided: February 1, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioners, Theodore Bourelos, Anitra Martin, Mary Catlin[1], Dorothy Howard, Bette Johnson, Doris Moraney[2], Yvette Morris, John Portee[3], Birdie Lee Powell, Mary Robinson, Satya Das and Wendy F. Korenstein appeal the decision by the State Operated School District of Jersey City, Hudson County (District) to withhold their salary increment for unsatisfactory performance during the 1993-94 school year.

The matter was transmitted to the Office of Administrative Law (OAL) on September 1, 1994, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to - 15 and *N.J.S.A.* 52:14F-1 to -13. Hearings were held on March 6, 7, 8, 9 and 10, 1995. At the conclusion of the hearing, the parties filed post hearing briefs. The record closed on August 8, 1995. The forty-five (45) day statutory period within which to file the initial decision with the Department of Education expired on September 22, 1995. Based on the administrative law judge's voluminous case load and the extensive record in this matter, three extensions of time to complete the initial decision were granted. *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8. The date for filing the initial decision is February 2, 1996.

ISSUE

Petitioners' employment and salary increments were withheld for unsatisfactory performance ratings during the 1993-94 school year. Thus, the issue is whether petitioners are entitled to the salary increment for 1994-1995 school year. The scope of review on appeal is limited to whether there exists a reasonable basis for the District's decision.

---

[1] On March 9, 1995, the ALJ granted respondent's motion to dismiss the petition of Mary Catlin for failure to appear at the scheduled hearing.

[2] On March 9, 1994, counsel for petitioners informed the ALJ that Doris Moraney withdrew her petition.

[3] The petition of John Portee has been transferred to the consolidated cases OAL DKT Nos. EDU-8491-94 and EDU. 8490-94.

FINDINGS OF FACTS

The District uses the "Jersey City Public Schools Instructional Observation Report" to rate the performance of staff. The evaluation covers five performance areas:

1. Demonstrates proficiency in subject matter.
2. Assesses needs and evaluates progress of pupils.
3. Employs effective organization and planning.
4. Utilizes effective instructional techniques.
5. Addresses affective domain.

There are four ratings for each performance area:

S - Satisfactory
N.I. - Needs Improvement
U - Unsatisfactory
N/A - Not Applicable

Based on a review of the evidence in each petition I **FIND** the following as **FACT**.

THEODORE BOURELOS

Bourelos was hired by the District in 1983. He is certified in English and social studies and for the 1993-94 school year he was assigned to Dickinson High School. Bourelos had been on a disability leave since November 29, 1990.

On October 14, 1993, Rosalie Anglin, the building supervisor for social studies conducted an informal observation of Bourelos. After the class, Anglin discussed her comments and suggestions with Bourelos.

On January 6, 1994, Anglin formally observed Bourelos. She reviewed his roll book, attendance book, and lesson plan book. The average class has

thirty students. There were eighteen students in class and only few were prepared to participate in the lesson. Bourelos mostly lectured and responded only to the six students who sat in the front and participated in class. The other students were inattentive and some sat with their heads on the desk.

Based on her observations she rated Bourelos performance in January (J-1) and February (J-3) as follows:

S 1. Demonstrates proficiency in subject matter.
N.I. 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
N.I. 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain

On March 7, 1994, John Greco evaluated Bourelos's ninth grade World History and Culture class. Greco has been employed by the District for twenty-five years. The evaluation was consistent with the procedure which requires that the District supervisor observe the teacher after he or she has received an unsatisfactory rating. There were twenty-two students in the class. Greco has previously evaluated Bourelos several times and rated his performance excellent and good.

Greco rated Bourelos performance (J-4), as follows:

S 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
N.I. 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

On March 30, 1994, Francis Dooley, principal, notified Bourelos that he recommended withholding of Bourelos's increment for school year 1994-95 based on unsatisfactory evaluations.

WENDY KORENSTEIN

Wendy Korenstein has been assigned to Dickerson High School for twenty-two years. She is certified to teach math and trained in "New Jersey Algebra Project Program." On March 23, 1994, she was evaluated by Francis Dooley, principal. Dooley rated Korenstein's performance (J-9), as follows:

S	1. Demonstrates proficiency in subject matter.
U	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
U	4. Utilizes effective instructional techniques.
N.I.	5. Addresses affective domain.

On April 13, 1994, Dooley notified Korenstein that he requested that her increment be withheld for the 1994-95 school year.

Richard Woodall, a mathematics teacher for twenty-six years and the building supervisor of mathematics at Dickinson High School, evaluated Korenstein on April 21, 1994. Woodall found Korenstein deficient in several areas. Her roll book showed no recorded grades since March. There was no evidence that homework assignments were consistently checked. Additionally, Korenstein taught a remedial class and each student had an individual improvement program (ISIP). However, the students' ISIP had not been updated since December 1993. Moreover, he found Korenstein's desk area cluttered and messy and the overhead projector poorly positioned. Woodall rated Korenstein's performance (J-11), as follows:

S	1. Demonstrates proficiency in subject matter.
N.I.	2. Assesses needs and evaluates progress of pupils.

S 3. Employs effective organization and planning.
S 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

Dooley reviewed Woodall's evaluation of Korenstein and determined that her performance had not improved. Dooley considered Korenstein's overall performance for the school year and then he concluded that there was no reason to change his prior decision to recommend that Korenstein's increment be withheld.

Frances Brill completed Korenstein's instructional annual written performance report dated June 17, 1994. Brill rated Korenstein's performance (J-13), as follows:

S 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
N.I. 4. Utilizes effective instructional techniques.
U 5. Exhibits professional attitudes and manner.
S 6. Establishes rapport with pupils, staff and/or parents and community.
U 7. Implements and enforces school rules, administrative regulations and Board policy.

Korenstein was recommended for reemployment but she was not recommended for salary increment based on the unsatisfactory ratings.

BIRDIE LEE POWELL

Birdie Powell, employed by the District since 1979, is certified to teach elementary education and special education. She taught basic skills to elementary school students at P.S. No. 24. A basic skills program is designed for pupils whose proficiency in basic communications and computational skills is

below the Statewide standard. Its interim goal is "to assure reasonable progress toward the goal of achievement by each pupil of at least the Statewide standard of proficiency." *N.J.S.A.* 18A:7A-7. Powell retired on disability in 1994.

David Meluso, principal of P.S. No. 24 evaluated Powell on February 3, 1994. He rated her performance (J-15), as follows:

N.I.	1. Demonstrates proficiency in subject matter.
N.I.	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
U	4. Utilizes effective instructional techniques.
S	5. Addresses affective domain.

Arlene Onnembo, the supervisor of basic skills, evaluated Powell on March 22, 1994. The first grade reading class contained five students. Onnembo rated Powell's performance (J-17), as follows:

U	1. Demonstrates proficiency in subject matter.
U	2. Assesses needs and evaluates progress of pupils.
N.I.	3. Employs effective organization and planning.
N.I.	4. Utilizes effective instructional techniques.
S	5. Addresses affective domain.

Meluso completed Powell's annual performance report (J-19), and rated her performance as follows:

N.I.	1. Demonstrates proficiency in subject matter.
N.I.	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
U	4. Utilizes effective instructional techniques.
S	5. Exhibits professional attitudes and manner.

S 6. Establishes rapport with pupils, staff and/or parents and community.
S 7. Implements and enforces school rules, administrative regulations and Board policy.

YVETTE MORRIS

Yvette Morris, a health and physical education teacher, has been employed in the District since 1988. Delores Curtis, district supervisor of health and physical education, has been employed by the District for thirty-five years. She evaluated Morris's second grade class on September 29, 1993, and rated her performances (J-20) as follows:

S 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
N.I. 3. Employs effective organization and planning.
N.I. 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

Classes began on September 7, 1993, although Morris' attendance book indicated that the first class was on September 27, 1993. The roll book was blank. There was no record of the students' names, attendance or grades. The first marking period extended from September 7 through October 15.

Morris was evaluated on October 6, 1993, by Diana R. Harmon, the building principal. Harmon rated Morris's performance (J-22), as follows:

S 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
N.I. 4. Utilizes effective instructional techniques.
U 5. Addresses affective domain.

The class that Harmon observed was scheduled to begin at 1:15 p.m. but did not start until 1:42. Harman saw Morris sitting in the courtyard waiting for the children to arrive but made no effort to determine why they had been delayed. No teaching occurred for twenty-two minutes. After the students arrived in the courtyard, Morris took the attendance while the students performed warm-up exercises. The lesson involved trapping a ball with their feet. The class ended at 1:58.

David Meluso, principal of P.S. No. 24, evaluated Morris on February 7, 1994. He rated her performance (J-24), as follows:

S	1. Demonstrates proficiency in subject matter.
S	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
N.I.	4. Utilizes effective instructional techniques.
S	5. Addresses affective domain.

Meluso completed Morris's annual performance report (J-27). He rated her performance as follows:

S	1. Demonstrates proficiency in subject matter.
S	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
U	4. Utilizes effective instructional techniques.
N.I.	5. Exhibits professional attitudes and manner.
S	6. Establishes rapport with pupils, staff and/or parents and community.
S	7. Implements and enforces school rules, administrative regulations and Board policy.

Meluso recommended her for reemployment but recommended that she not receive a salary increments based on the prior evaluations.

MARY ROBINSON

Mary Robinson, employed by the District for sixteen years, was assigned to P.S. No. 39 and taught second grade for school year 1993-94. Michael DiGenova, District mathematics supervisor, evaluated Robinson on December 2, 1993. He reviewed Robinson's plan book and roll book. He acknowledged that Robinson maintained good records of students' work and tests. In class she explained the objective of the lesson to the students and demonstrated a professional attitude and good rapport with the students. DiGenova rated Robinson's performance (J-28) as follows:

N.I.	1. Demonstrates proficiency in subject matter.
N.I.	2. Assesses needs and evaluates progress of pupils.
N.I.	3. Employs effective organization and planning.
N.I.	4. Utilizes effective instructional techniques.
S	5. Addresses affective domain.

The students used the first eight minutes of class time to sharpen pencils and had to be told three times to get their books. During the lesson the class responded to questions in chorus. At times, the students called out incorrect answers and did not listen to the teacher. Notwithstanding their misbehavior, Robinson continued to teach the lesson and merely wrote the correct answer on the chalk board.

Dorian Skeete, principal of P.S. No. 39, evaluated Robinson on March 25, 1994. Robinson was teaching her second grade class a reading lesson from the Open Court Reading/Writing reader, the District's program for students in grades one through five. Skeete rated Robinson's performance (J-29), as follows:

N.I. 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
U 4. Utilizes effective instructional techniques.
N.I. 5. Addresses affective domain.

On March 29, 1994, Skeete notified Robinson that she was recommending that her increment be withheld based on her evaluations; she had not made a satisfactory improvement of her performance. (J-31).

Skeete completed Robinson's annual performance report in June (J-33), and rated her as follows:

N.I. 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
U 4. Utilizes effective instructional techniques.
S 5. Exhibits professional attitudes and manner.
NI 6. Establishes rapport with pupils, staff and/or parents and community.
S 7. Implements and enforces school rules, administrative regulations and Board policy.

Skeete recommended that Robinson's salary increment be withheld. (J-33)

DOROTHY HOWARD

Howard, employed with the District for twenty-two years, was assigned to teach grade six at school No. 17 annex, for the 1993-94 school year.

Assistant Principal Cassandra Hansen was assigned to supervise the staffs' activities and their teaching performance. Hansen, employed with the

District for nineteen years, evaluated Howard's performance. Howard felt nervous about the pending observation and asked Hansen to postpone the evaluation for several weeks. Hansen agreed and conducted the evaluation on March 11, 1994. She rated Howard's performance (J-45), as follows:

U	1. Demonstrates proficiency in subject matter.
U	2. Assesses needs and evaluates progress of pupils.
N.I.	3. Employs effective organization and planning.
N.I.	4. Utilizes effective instructional techniques.
S	5. Addresses affective domain.

Twenty-five students were enrolled in Howard's sixth grade math class. Hansen questioned several students and discovered that they were confused about the lesson. Additionally, Howard's plan book was not updated and unorganized. Hansen had prior discussions with Howard about her teaching strategies and had suggested improvements. She also wrote several memos to Howard about her need for improvement. Hansen noted that Howard failed to timely submit report cards during the first and second marking period.

Hansen also observed a lack of discipline in Howard's class. A disruptive class made teaching and learning very difficult. She described the students behavior as a "free for all." She described several incidents of students' misbehavior: four students were involved in throwing a compass in the classroom, and one student gathered the snow from the window sill, made a snowball and threw it inside the class. During a fight, a student was injured and required medical assistance from the school nurse. On another occasion, a teacher assigned to a classroom next to Howard's class sent Hansen a note complaining that Howard's classroom was noisy and disrupting other classes.

BETTE JOHNSON

Bette Johnson, an elementary school teacher, has been employed by the district for twenty years. She taught kindergarten at P.S. No. 28 in school year 1993-94. Mark Hayes, principal of P.S. No. 28, conducted an informal observation of Johnson's performance on January 24, 1994. When the class had not settled down after fifteen minutes, he agreed to return on another day. On February 7, 1994, Hayes returned and observed Johnson teaching a math lesson. Johnson's class included twenty-eight students and two teacher's aides. One aide was required by law because the class exceeded the minimum twenty-five students, and the other aide was assigned to assist approximately five to eight basic skill students in the class.

Johnson taught a lesson on measurement. Hayes believed that Johnson was unfamiliar with the textbook series because she referred to a worksheet, rather than the textbook. He watched Johnson instruct the children to measure the length of the blackboard with "bunny hops." After they returned to their seats, she began another exercise to measure furniture and then stopped the lesson because the children were not on task. Hayes believed that the lesson lacked continuity. The children appeared to be unfocused and off task and misbehaved. During the lesson some students were playing in the closet area. Moreover, there was minimal use of the teacher's aides. The aides sat at tables during the lesson. Hayes acknowledged that poor student behavior impacted the class. Johnson's roll book was not available for Hayes to review until February 10, because she left it home.

Hayes rated Johnson's performance (J-50), as follows:

N.I. 1. Demonstrates proficiency in subject matter.

U 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
U 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

Between January and February, Haynes requested Patricia Noonan, supervisor of early childhood education, to assist Johnson in improving her teaching technique. Noonan conducted an informal observation of Johnson's class and made recommendations including that she rearrange the classroom seating. On March 24, 1994, Noonan conducted a formal observation.

Johnson implemented the recommended changes. However, Noonan found her teaching unsatisfactory. For example, during "Circle Time" the children were seated on the floor but cramped too close together. Consequently, they were not as attentive as they could have been and poked each other during the lesson. Noonan also observed instruction on the letter "L." Johnson did not instruct or inform the children what they would be doing. Nor did she have the material ready for the lesson. Consequently, the children did not become immediately involved in the lesson. Noonan rated Johnson's performance (J-51), as follows:

N.I. 1. Demonstrates proficiency in subject matter.
S 2. Assesses needs and evaluates progress of pupils.
N.I. 3. Employs effective organization and planning.
U 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

During school year 1993-94, Jorges Fernandez, assistant principal, made several informal observations of Johnson's class. The students were noisy and they misbehaved. Pupils left their seats and roamed the bathroom, hallways and

school yard. On several occasions, Fernandez suggested that Johnson try to keep the children on task with planned activities and that she use the teacher's aides more often to control the class. Fernandez conducted a formal observation on May 31, 1994, and he noted disorganization, lack of discipline and no use of teacher's aides basically no improvement. Based on the unsatisfactory ratings (J-54), Principal Mark Hayes recommended that Johnson's increment be withheld for 1994-95.

ANITRA MARTIN

Anitra Martin had been employed by the District for five years and was assigned to teach kindergarten for the 1993-94 school year at P.S. No. 9.

Wendy Perez, principal of P.S. No. 9, received several complaints between September and October from parents about the lack of instruction and students' misbehavior in Martin's class. Consequently, Perez spoke to Martin about her lack of control in the classroom and while monitoring the children in the hallway. She informed Martin of her concerns regarding Martin's ability to manage her students and her professional demeanor.

On January 18, 1994, Perez visited Martin's class with the intent to conduct a formal evaluation. When Perez arrived she observed a disruptive class. When it appeared as if Martin could not control the class Perez interceded and told the children to stop fighting. Martin became upset and began to cry and scream. She asked Perez to leave her classroom or else she would call a union representative. A union representative entered the room to calm Martin. Perez documented the incident and her concerns regarding Martin's teaching effectiveness and suggested improvements. (R-1) Perez also reprimanded Martin for her emotional outburst and for asking her to leave the room and stated, "Let this be the first and last time that you question my

authority with the threat of Union Intervention." (R-1) Additionally, Perez admonished Martin about leaving the class unattended during her lunch hour. Perez also suggested that Martin seek professional help to deal with "your inability to control your emotions and implusivity.***Unable to control [B], you grabbed him, and started to shake him in a rough and unacceptable manner." *Ibid.*

Messano was the assistant principal and he has been employed by the District for 24 years. He has observed Martin informally and formally in the classroom and in the hallways. Messano admonished Martin for leaving the children unattended on December 20, 1994. He warned her not to ever leave the children unattended and to notify the office "as soon as possible" if her aide did not appear. He also reminded her that "the welfare and safety of the children must supersede your lunch time commitment. Your lunch can always be adjusted to accommodate the students in your class." (R-2) In a memorandum dated January 13, 1994, Messano reiterated his discussion with Martin about leaving the children unattended while she went to lunch. (R-6).

Messano evaluated Martin on January 28, 1994, and rated her performance (J-60) as follows:

N.I.	1. Demonstrates proficiency in subject matter.
U	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
U	4. Utilizes effective instructional techniques.
N.I.	5. Addresses affective domain.

Messano observed the class of twenty-five to thirty students and a teacher's aide. One activity involved cutting letters. Messano saw the children running throughout the room with the scissors in their hands. Another activity included a reading lesson. Martin read a poem to the children who were seated

in a circle. The class was inattentive. Martin reprimanded one student by asking him to leave the group but did not explain why he was being disciplined.

Patrician Noonan, supervisor of early childhood education, met with Martin several times during the school year at the request of Perez. Martin disclosed feelings of being overwhelmed. Noonan evaluated Martin on April 29, 1994, and rated her performance (J-62), as follows:

U	1. Demonstrates proficiency in subject matter.
N.I.	2. Assesses needs and evaluates progress of pupils.
U	3. Employs effective organization and planning.
U	4. Utilizes effective instructional techniques.
N.I.	5. Addresses affective domain

Noonan observed Martin reading a story about Jesse Owens to the children. During the lesson, the children looked at other story books and played games.

SATYA DAS

Satya Das has been a mathematics teacher at Lincoln High School since 1979. He is also qualified to teach advanced math, advanced physics, advanced chemistry, and advanced computer science. For the 1993-94 school year, Das was assigned to teach math orientation, a remedial math class.

Belinda Stokes, math supervisor in the building, conducted informal observations of Das on September 30, 1993, and January 12, 1994. On her second informal visit, Stokes noticed some students spitting seeds on the floor and other students engaged in private conversations. Stokes conducted a formal evaluation of Das's performance (J-67), on February 17, 1994, and rated his performance as follows:

S 1. Demonstrates proficiency in subject matter.
U 2. Assesses needs and evaluates progress of pupils.
U 3. Employs effective organization and planning.
U 4. Utilizes effective instructional techniques.
U 5. Addresses affective domain.

Arlene Farrell, vice principal, evaluated Das on March 29, 1994. Her ratings of Das's performance was similar to Stokes. (R-7).

Charles Cooper, principal of Lincoln High, informed his staff to expect informal and formal observations throughout the school year. He also instructed the teachers to present their lessons employing "cooperative learning, discovery learning, limit lecturing," and to apply the lesson to life. At the hearing, he revealed that 15% of the students were "socially disaffected." Thus, he also informed his staff that if the students felt uncomfortable in the classroom and misbehaved, the teacher should refer the student for crisis intervention. On March 30, 1994, Cooper informed Das that based upon his evaluation for the 1993-94 school year, he was recommending that Das's increment be withheld. (J-69).

On May 10, 1994, Anita DeRosa, district supervisor of mathematics, observed Das's math orientation class and evaluated his teaching performance. She rated his performance (J-68), as follows:

S 1. Demonstrates proficiency in subject matter.
S 2. Assesses needs and evaluates progress of pupils.
N.I. 3. Employs effective organization and planning.
N.I. 4. Utilizes effective instructional techniques.
S 5. Addresses affective domain.

DeRosa reviewed Das's roll book and plan book; they were both up to date. Sixteen students were registered in the class. The grades recorded for a test given the week of April 25, 1994, showed that thirteen students or eighty-one percent of the class had passed the test. DeRosa had no input in the determination to withhold Das's increment. DeRosa concluded that those students had mastered the lessons taught on adding polynomials.

DISCUSSION AND CONCLUSIONS

I

Petitioners first claim that "the school District, as presently constituted, lacks the authority necessary to withhold increments." Petitioners' Brief at 33. Petitioners acknowledged that the Order entered by the State Board of Education allowed the takeover of the Jersey City Board of Education, created of the State-Operated School District, and authorized the Commissioner of Education to appoint a State District Superintendent to direct all operations of the new district. However, petitioners submit that *N.J.S.A.* 18A:29-14 was not superseded or abolished by the State takeover legislation. Petitioners further submit that to permit the superintendent "to deny increment without first allowing the affected teacher to plead his/her case, amounts to a denial of appellant's due process as one of the statutorily prescribed procedure[s] has been effectively removed." *Id.* at 34. Petitioners argue that the statutory authority granted to the state district superintendent does not include the power to act in lieu of a board of education. Petitioners also submit that "the State District Superintendent did not have the authority to rule by fiat and deny [petitioners their] due process rights by making the unilateral decision to file the within tenure charges. *Id.* at 36.[4]

[4]Also, petitioners asserted that the action taken by the District against them in denying the increments is void because the District failed to comply with the Open Public Meetings Act. *N.J.S.A.* 10:4-6 to -21. Petitioners aver that the State Superintendent of Schools, denied petitioners' increments without any

I have considered and reject petitioners' challenge to the superintendent's power to withhold their increments. *N.J.S.A.* 18A:29-14 provides that the board may withhold the employment increment or salary adjustment of any member based on insufficiency or other good cause by a recorded roll call majority vote of the full membership of the board. The District asserts that "all of the powers and authority of a board of education are exercised by the State District Superintendent appointed for the District. *N.J.S.A.* 18A: 7A-15.1. This includes the express power to make all personnel determinations relative to all officers and employees of the District." *N.J.S.A.* 18A:7A-42a(3). Respondent's Brief at 1. I agree. The takeover legislation delegates to superintendents in state operated school districts the authority previously granted to the local school board. Pursuant to *N.J.S.A.*. 18A:7A-35e, "the State district superintendent shall have the power to perform all acts and do all things consistent with law necessary for the proper conduct, maintenance and supervision of the schools in the district." Consequently, a district superintendent is empowered to engage in all necessary activities to allow the district to be fully functional. This necessarily includes the power to act on a recommendation to withhold an increment. See *Brown v. State-Operated School Dist. of Jersey City,* 93 *N.J.A.R. 2d.* 875 (Dept. of Ed.). Thus, I **FIND** and **CONCLUDE** the State District Superintendent appointed for the District has the statutory authority to withhold increments consistent with *N.J.S.A.* 18A:29-14.

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action taken at a public meeting of the Board of Education. Petitioners did not assert this issue in their pleadings, but raised it in post hearing briefs. Therefore, it will not be addressed.

II

Petitioners also contend that the withholding of their increment was procedurally defective because the District did not establish or adopt policies to evaluate tenured teaching personnel as required by *N.J.A.C.* 6:3-4.3. Thus, petitioners submit that "no one, not the teachers or the evaluators knew what policy and/or procedure to follow in making these evaluations." Petitioners' Brief at 37.

Respondent counters that "[t]he actual teaching performance of each petitioner was observed by supervisory staff during 1993-94 school year and evaluated according to five performance factors indicated on the District's standard form for instructional observation." Respondent's Brief at 3.

I have reviewed carefully the evaluation procedures used for each petitioner. The District uses the "Jersey City Public Schools Instructional Observation Report" to rate the performance of staff. The evaluation covers five performance areas: (1) Demonstrates proficiency in subject matter; (2) Assesses needs and evaluates progress of pupils; (3) Employs effective organization and planning; (4) Utilizes effective instructional techniques; and (5) Addresses affective domain. Additionally, the District applies four ratings to measure each performance area: S -Satisfactory; N.I. -Needs Improvement; U - Unsatisfactory; N/A -Not Applicable. Moreover, in many cases the evaluators made formal and informal observations and then rated the teacher on his or her cumulative performances. This method of evaluating teachers was reasonable because it allowed the evaluator to consider the cumulative assessment of teacher, and not rely merely one day's performance. The District recognized that although a teachers may perform well on one day, that performance is not

reflective of their overall ability. Conversely, a teacher's poor performance on one day does not necessarily reflect his teaching ability. I **FIND** and **CONCLUDE** that the evaluation procedure was consistent with *N.J.A.C.* 6:3-4.3.

III

Petitioners contend that the denial of their increments predicated upon unsatisfactory evaluations were without basis. Petitioners also assert that the evaluations were punitive.

Respondent counters that the increments of all the petitioners were withheld for unsatisfactory performance during the 1993-94 school year. Therefore, if it was not unreasonable for the evaluators to conclude from the underlying facts that a staff member's performance during that school year was unsatisfactory, the increment withholdings must be sustained.

I have considered the claim of each petitioner, the underlying facts, and the arguments of the parties. The individual claims presented in this consolidated matter each challenged the District's procedure in conducting the evaluation of the teacher's performance. I agree with petitioners' assertion that evaluators apply subjective criterion in their assessment. Indeed, respondent's administrators did not refute that subjectivity played a role in the evaluator's judgment. Therefore, in each appeal I have carefully considered the teacher's overall performance for the 1993-94 school year and the remarks of each supervisor who observed the teacher and reviewed the instructional reports. For example in Powell's appeal, I considered any action which followed Meluso's evaluation of Powell's performance including the observation by Onnembo. Notably, Korenstein in her appeal relies on action taken subsequent to Principal Dooley's evaluation of her performance on March 23, 1994. Specifically Korenstein noted the observation conducted by Woodall on April 21, 1994, and

asserted that "portions of Woodall's observation/evaluation were glowing. This evaluation was subsequent to that of Mr. Dooley's, the school principal." Petitioners' Brief at 7.[5] Thus, it is appropriate that petitioners seek to admit a showing of improved performance through favorable evaluations which were conducted after there had been a decision to recommend denial of their increment. Conversely, it is equally appropriate to consider unfavorable evaluations conducted after the recommendation hads been made to deny the increment.

N.J.S.A. 18A:29-14 provides that a teacher's salary increment may be withheld for inefficiency or other good cause. Conversely, the approval of a "salary increment is 'a reward for meritorious service.'" *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). Indeed, the purpose of *N.J.S.A.* 18A:29-14 is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Ass'n*, 79 *N.J.* 311, 321 (1979). Consequently, an annual increment is not a statutory right; it is a reward for good performance and the acknowledgment that the teacher's overall performance has met the high standards of performance required by the District. *North Plainfield Ed. Ass'n v. North Plainfied Bd. of Ed.*, 96 *N.J.* 587, 594 (1984)

The Legislature has vested local boards and state district superintendents with the power to withhold increments from teachers who have not performed satisfactorily during the previous year. *Probst v. Haddonfield Bd. of Educ., supra*, 127 *N.J.* at 526. Indeed, a decision to withhold an increment is a matter of management prerogative. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ., supra*, 96 *N.J.* 587; *Bernard Twp. Bd. of Educ., v. Bernard Twp. Educ.*

[5] Principal Dooley did review Woodall's evaluation report and determined that Korenstein's performance had not improved. After Woodall considered Korenstein's overall performance for the school year, he then concluded that there was no reason to change his prior decision to recommend that her increment be withheld.

Ass'n, supra, 79 *N.J.* 311. Accordingly, the Commission is prohibited from substituting his judgment for that of the board or state district superintendent.

The scope of review on appeal is limited to whether there exists a reasonable basis for the District's decision. The exercise of discretionary powers may not be upset unless it is patently arbitrary, capricious, unreasonable or induced by improper motives. *Kopera v. West Orange Bd. of Educ.,* 60 *N.J. Super.* 288 (App. Div. 1960). Thus, the Commissioner must determine: "(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they were experts." *Id.* at 296-97. The burden proof proving that the increment withholding was arbitrary, capricious, or unreasonable rests with the person challenging the decision. *Kopera* at 297.

THEODORE BOURELOS

Anglin described deficiencies in several areas of Bourelos teaching performance. In assessing the needs and progress of pupils, she noted that the grades recorded in the roll book did not match the students' performance. There was no indication how Bourelos would help those students who appeared to be struggling to learn. Although High School Proficiency Test (HSPT) skills were noted in the lesson plan book, she observed no skills, *e.g.*, skills that develop critical thinking, being taught during the lesson. Additionally, she found that Bourelos had scheduled tests weeks in advance. Anglin found it unacceptable to schedule tests weeks in advance if students had not mastered the subject.

Anglin found Bourelos deficient in effective organization and planning. The objective of the lesson was too broad and unclear. Bourelous' lecture/question and answer teaching method was repetitive and lacked motivation.

Anglin testified that Bourelos needed to employ teaching methods that met the needs of all his students. Instead, he focused on only a few students seated in the front of the class and he was not attentive to those students who did not participate in the lessons. She also noted that the lesson ended fourteen minutes prior to the end of the period. Although the students were given time to work on their assignments, she did not observe Bourelos assisting the students.

Anglin believes that teaching is an art, not a science, and therefore the lesson must focus on the needs of the student. The question and answer technique does not serve the best method of teaching students who have different levels of learning ability. A more appropriate method of instruction is a cooperative learning approach that will induce all students to participate in the lessons. Students who function on a higher level will be the leaders of the group and those who have difficulties will work closely within the group, express their concerns and ask questions. Anglin observed Bourelos again on February 23, 1994, and found deficiencies similar to those which she observed in January. Bourelos had scheduled tests weeks in advance without any indication that the students had mastered the lesson. His teaching method was repetitive and lacked motivation. His plan book and the lesson plan objectives were unclear. Bourelos's roll book lacked clarity, organization, and accuracy.

Bourelos denied favoring the few students who sat in the front of the room. He contended, however, that some students were lazy and that some did not speak English or could not read. These handicaps "contributed to their lack of participation in the classroom." Bourelos claimed to have used the same but several teaching methods and strategies for many years. He found that the most effective method was the question and answer instruction. He maintained that he also motivated his students with pep talks, giving them extra work before and after school and conferring with parents. He has never received a poor

evaluation for his teaching performance. Also, he has used the same method in preparing his plan book. Bourelos believed that Anglin's evaluations of his performance were a form of harassment because he had been on disability leave. Following the post observations conferences with Anglin, Bourelos wrote a memo to John Greco, supervisor of social studies, stating his disagreement with Anglin's evaluations.

John Greco observed and evaluated Bourelos on March 7, 1994. Greco found that Bourelos objectives listed in the plan book were unclear and Bourelos's teaching was inconsistent with the objectives. Additionally, the plan book was unclear and had been amended. Greco believed that the plan book should cover one week at a time to avoid numerous corrections. Further, the roll book lacked clarity, organization, and accuracy. It was difficult for Greco to "decipher" the information contained in it. (J-4)

Greco also criticized Bourelos for using the form tests which were supplied by the textbook publishers rather than teacher-made tests or a combination of the two. Because the students' level of ability differ in each class, generic tests compiled by the publisher may not fit into the needs of the students in a particular class. Therefore, teachers should tailor the test to meet the needs of each class.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Bourelos's employment and adjustment increment.

I further **CONCLUDE** that petitioner has failed to meet his burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

WENDY KORENSTEIN

Dooley acknowledged that Korenstein was knowledgeable about the subject matter (math), however, she did not demonstrate an ability to teach the students. Dooley also concluded that Korenstein was not able to assess the pupils' progress because she administered only two tests and did not record all the test scores in the marking book. Thus, he rated her unsatisfactory in assessing and evaluating the needs of the pupils.

Dooley also rated Korenstein unsatisfactory in effective organization and planning because she did not have a lesson plan in her book for the day she was observed. Instead, Korenstein was using a plan book from the 1991-92 school year. Because students change, proficiencies change and strategies change from year to year, Dooley further concluded that lessons plans for 1991-92 may not be applicable for the current year. Moreover, Korenstein's failure to have a current lesson plan was a violation of her teaching contract and thus, unacceptable.

Dooley rated Korenstein unsatisfactory in effective instructional techniques. During the class period, Korenstein reviewed twelve homework problems on the chalkboard but did not introduce a new topic to the students. Thus, Dooley concluded that because Korenstein had no plan, she had no objective to achieve. Additionally, she used an overhead projector with a dirty overlay as a teaching tool and the presentation was difficult to read.

In the area of "addresses affective domain" Dooley found that the overall appearance of the classroom and clutter were not conducive to positive learning experience. For example, the bulletin board had Halloween borders in March and there was an accumulation of papers and cardboard in the corner. Because homework was left on the chalkboard from the previous class, the students had to write their homework answers around assignments which had not been erased. Dooley recommended that Korenstein remove all unessential items and improve the appearance of the classroom. Dooley also noted that Korenstein used positive reinforcement and the class behaved respectfully towards her. (J-9)

Korenstein candidly testified about her teaching performance on March 23, 1994. Korenstein maintained that she had serious medical problems during that period and she fell behind schedule on some of her administrative tasks. She conceded that her usual work product was not up to par. Korenstein claimed, however, that when Dooley observed her class she gave him two plan books; one was the current school year and the other was a 1991-92 plan book. However, the lesson plans for the current school year were one week behind. Therefore, she referred to a 1991-92 plan book. Additionally, the students' ISIP were not updated because of her medical problems.

Korenstein also maintained that she changed the planned lesson and decided to review the homework assignment because five students were absent. With one-fifth of the class absent, she believed that it was better to review homework problems rather than to begin a new lesson. She denies that the overhead projector was dirty. Moreover, because the teacher's desk was "waxed to the floor," the cart which holds the projector was "situated as far over in front of the overhead screen as it can possibly go." (P-2) Korenstein also disputed that the room was decorated with Halloween decorations. She maintained that the teacher who shares the room decorated it with a purple and

black spider figure border. Additionally, there were "math oriented charts around the room, math related cartoons, and school related flyers" decorations. (P-2)

After she was observed by Dooley, Korenstein told him about her medical problems. Further, in her post observation rebuttal statement, Korenstein imputed some of her performance ratings to her medical problems. She stated that:

> Sometime in late February, 1994 I started having a great deal of difficulty seeing and made an appointment with my physician to have the problem checked out. It turned out that I have a medical condition, diabetes, which would cause my eyesight to become worse before it could improve. The cause was discovered on March 3, 1994 and it would take 6 weeks before it could be reevaluated. Being the dedicated teacher I am, I chose to do the best I could under the circumstances and work around my disability be coming to work and teaching every day.
>
> [P-2]

Korenstein candidly testified that her medical problems made it difficult for her to complete the administrative tasks and that her teaching was not up to par.

I am persuaded by the evidence that Dooley and Woodall provided a candid assessment of Korenstein's teaching performance. She was a knowledgeable math teacher, however, she was deficient in organization and planning. Korenstein administered only two tests and did not record all the test scores in the marking book. She failed to have a current lesson plan on the day she was observed and used a plan book from 1991-92 school year. She did not maintain her classroom in a neat and orderly manner. She used an overhead projector with a dirty overlay making the presentation difficult to read. The classroom environment was not conducive to learning.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Korenstein's employment and adjustment increments.

I further **CONCLUDE** that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

BIRDIE LEE POWELL

Meluso observed Powell teaching a basic skills reading class, consisting of three students in grade levels three and four. The lesson involved the use of the telephone book but Powell did not state the objective of the lesson. Meluso believed that using a telephone book is a good motivational technique. However, the skills that Powell sought to address were questionable and the students appeared to be confused by the examples they were given. The basic skills instruction is designed to help pupils pass the standardized tests. Meluso concluded that the lesson was disorganized and that the students knew how to use the telephone book. Therefore, Meluso rated Powell "NI" in demonstrates proficiency in subject matter and "NI" in assessing the needs of the students. He believed the lesson was not thought out. He also found that Powell's lesson plan book was not up to date. Additionally, Powell should have encourage the students to participate more in class.

Meluso rated Powell unsatisfactory in employing effective organization and planning. Powell visited the class on a Thursday, but the lesson scheduled for Tuesday was taught. Meluso also rated Powell unsatisfactory in using effective teaching techniques. The lesson lacked direction and progressed with some difficulties. The activity seemed to drag and the students appeared to be restless and bored. When the students appeared reluctant to answer questions,

Powell should have rephrased the questions or asked individual the student to respond. Meluso concluded that they were capable of doing more work and at a faster pace. He also concluded that more activities which required creative thinking should have been incorporated into the lesson. Meluso attached a questionnaire with objectives for improving teaching performance to the evaluation report. (J-15) On March 14, 1994, Meluso notified Powell that based on unsatisfactory evaluations for 1993-94, he was recommending that her increment for the 1994-95 school year be withheld. (J-16).

Onnembo rated Powell unsatisfactory in "demonstrates proficiency in subject matter." Powell read a story from the "Open Court Reader" program but made no use of the phonics components of the program. She demonstrated little knowledge of current instructional techniques. For example, neither reading nor writing were taught as a process. Additionally, Powell consistently mispronounced the words and used incorrect grammar and pronunciation when reading to the students. For example, the sentence in the book was, "they'll eat the cake," Powell misread the sentence as follows, "they ate the cake." (J-17) Also, Powell told the children that the story was about Pete's birthday, but it was about Sue's and Bert's birthday. She misread the title of the story as "Birsday," the actual title is "The Birthday." Onnembo did not believe that Powell had a speech impediment or that English was her second language. Onnembo concluded that Powell did not understand the story she was reading.

Onnembo rated Powell unsatisfactory in "assesses needs and evaluates progress of pupils." Although there were only five pupils assigned to the class, Powell did not know their names and referred to one pupil as "Room 109," his homeroom. Onnembo saw no evidence throughout the lesson that Powell assessed or addressed the various needs of each of the students.

Onnembo rejected Powell's reason for not having a lesson plan. Although Powell received materials from each pupil's classroom teacher daily, Powell should plan added activities to address first graders' short attention span. Thus, Onnembo rated Powell "NI" in employs effective organization and planning. Onnembo did acknowledge that Powell did an effective job in applying the lesson to the pupils life experience. However, Onnembo admonished Powell because she read the entire story to the pupils and did not instruct the students to read from the book.

Powell claimed that she taught the correct lesson on the day she was observed by Meluso and that she taught the lesson as he instructed. She also asserted that she maintained each student's work in a separate folder. She also disputed Onnembo's conclusions about her performance. Powell maintained that Onnembo directed her how to teach the lesson. In response to Onnembo's criticism that Powell did not instruct the students to read from the book, Powell claimed that she was addressing the pupils listening skills.

I have considered the disputed facts concerning Powell's performance on February 3 and March 22, 1994. During her testimony, Powell's verbalization was consistent with the demeanor described by Meluso and Onnembo. For example, Meluso noted that Powell misspelled "physician" and Onnembo observed her misread sentences from a book. At the hearing, Powell's poor grammar was evident.

Petitioner has the burden of proof. The term "burden of proof" refers to the "burden of persuasion." The burden of persuasion entails more than merely producing evidence to establish a state of equilibrium with respect to whether a certain fact exists. This tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." *Jackson v D.L. & W.R.R. Co.,* 111 *N.J.L.* 487, 490 (E. &

A. 1933). Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis,* 67 *N.J.* 47 (1975). The evidence must be such as to lead a reasonable cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div 1959).

I have observed the demeanor of the witnesses, and I **FIND** and **CONCLUDE** that the lesson taught by Powell on February 3, 1994, was scheduled in her plan book for another day; her plan book was not current; she had no lesson plan for March 22, 1994, and was not prepared for class on that day. Further, I **FIND** and **CONCLUDE** that Powell did not have her roll book on February 3, 1994, and she did not know the names of the five students in her class.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Powell's employment and adjustment increments.

I further **CONCLUDE** that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

YVETTE MORRIS

Curtis believed that students' performance should be graded and recorded because this progress is based on achievement in activities and skills taught daily. Morris had no record for evaluating each student's achievements in activities and skills. Consequently, Curtis rated Morris "unsatisfactory" in assesses needs and evaluates progress of pupils because her roll book lacked evaluation documentation. Although classes started on September 7, 1993; there were neither names nor grades in Morris' roll book as of September 27, 1994.

Curtis rated Morris "NI" in employs effective organization and planning, and in utilizes effective instructional techniques. Curtis found no formal instruction in place nor could she ascertain the identity of the instructional focus. Curtis believed that Morris's lesson plan "to develop locomotive skills," should "describe what the students will learn and how it will be learned." (J-20; J-21) Curtis also believed that performing windmills, sit-ups, jogging and relays were "good for warm-ups and lead-up activities for advanced activities for sports." (J-20) Curtis also found instructional techniques deficient. Students only responded to the instructions after they were repeated by Morris. Curtis believes that all tasks should be modeled and the movement demonstrated for the students by the teacher when possible. (J-20) Curtis also noted that the class should end about four minutes before dismissal; Morris ended the class eight minutes early.

Harmon believed that Morris needed to improve her time on tasks techniques. Too much time was wasted on roll call and making comments about who was not present. Further, the lesson taught did not provide sufficient time

for the students to practice the skill. The activity was not well prepared and showed signs of inadequate planning to meet the individual needs of the students. Harmon recommended that Morris (1) work with the District supervisor to improve her lesson planning and preparation techniques; (2) visit another school and observe a master teacher's class; and (3) attend a summer academy for teachers to improve her planning techniques.

In February 1994, Meluso rated Morris "unsatisfactory" in organization and planning because her lesson plans were not up to date. Melusso stated that planning is essential for good teaching and that the teacher can use her preparation period to complete this task. Additionally, the plan should include long and short term goals. An unplanned lesson results in an inefficient lesson.

Morris believed that the negative ratings of her performance by Curtis were a form of criticism, and they offered her no constructive advice. Morris requested help from Curtis who responded by making informal "drop-ins" and gave her "tips." Morris conceded that the attendance book had not been updated on the day she was observed by Curtis. However, Morris explained that during the first three weeks of school, she was assigned to three different classes. Therefore, she had no time to evaluate or test the students. Furthermore, she did not keep a roll book because her class schedule had changed each week. She did, however, keep a list of the children's names on a separate piece of paper. Curtis found this method of record keeping unacceptable.

On the day she was observed by Curtis, Morris planned to teach a lesson on locomotives skills. The skill allowed the children to jump from heights. At the hearing, Morris demonstrated a leaping motion similar to frogs leaping.

Morris filed exceptions to Harmon's evaluation, (J-23) Morris noted that the classroom teachers are required to escort the pupils to and from physical education. Therefore, Morris waited for her class to arrive in the courtyard where lesson was scheduled. Harmon observed a class that included "Special education students." Morris disputed Harmon's observation that she was just sitting in yard waiting for her class. Morris claimed that while she was sitting on her chair, she was "taking attendance of the special education students who were in the courtyard when I arrived, however, they were not visible to Mrs. Harmon, because there were no spots to assign them on outside, so they stood up against the gate." (J-23) Morris conceded that she "did not immediately make an effort to find out where the students were," but she eventually sent another student to the school basement to see if the class was there. *Ibid.* Morris attributed the delay in the start of her lesson to the classroom teacher's failure to escort the students to the courtyard. Morris also claimed that she conducted the class for thirty minutes.

Morris conceded she did not have a lesson plan on February 7, 1994, the day she was observed by Meluso, because they had just come back from a snow day. She candidly admitted that she did not know everything and asked for technical assistance in areas where she was deficient.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Morris's employment and adjustment increments.

I further **CONCLUDE** that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

MARY ROBINSON

District Mathematics Supervisor Michael DiGenova's major concern was the students' misbehavior in Robinson's class and how this hampered learning. He described the class he observed . During the this class, Robinson appeared to be very frustrated, raised her voice, became louder and talked over students' voices. The sequence of the lesson was procedurally deficient and Robinson had problems keeping the students on task. DiGenova believed that Robinson should have found effective techniques for dealing with the discipline problems. For example, she should have contacted the parent, talked to the student and if these attempts failed, notify the principal. DiGenova acknowledged that performance ratings included the subjective viewpoints of the evaluators. However, he uses a team approach to evaluate teachers. The procedure includes follow-up evaluations by the building principal.

Dorian Skeete, principal of P.S. No. 39, agreed that the evaluator inherently imputes subjective views to the teacher's performance. Moreover, the evaluator's expectations of the teacher's ability to be effective is based on the evaluator's experience and the experience of the teacher. Skeete could not determine the object of the lesson that she observed because the students continuously disrupted the lesson. When Robinson tried to discipline them they ignored her, showed no interest in the lesson, and continued to talk above Robinson's voice. Some students had private conversations during the lesson and others left their seats and walked around the classroom. Robinson appeared to have no structure or procedure to bring the students on task.

Skeete noted that a disruptive class prohibits the teacher from monitoring and assisting the other children.

Skeete believed that Robinson demonstrated poor organization and planning. The pace of the lesson was too slow for the students and not educationally constructive. Moreover, Robinson did not have her grade book because she left it at home. Skeete also rated Robinson "unsatisfactory" in using effective instructional techniques. Robinson failed to use question and answer techniques to engage students in the learning process. Robinson did not call on the students by name, therefore they responded to questions in chorus. Skeete maintained that students should be called by their name because this discourages calling out and confusion. Indeed, good questions encourages students to think critically and draw conclusions, read between the lines, draw inferences and evaluate what they have read. High levels of comprehension are achieved by silent reading and good questioning. The lesson must then be summarized so that the students understand how conclusions are reached.

Skeete rated Robinson "NI" in affective domain noting that the atmosphere in the classroom did not reflect mutual support between the teacher and students. Expectations to learn and acceptable standards of behavior must be set by the teacher and clearly understood by the students. (J-29)

Mary Robinson, employed by the District for sixteen years, has taught from the first grade through fifth grade. Her class of approximately twenty-two students included several students who were referred to the child study team for evaluation for special education. Robinson acknowledged that student misbehavior was a problem in the classroom. She described the behavior of three students as "outrageous." The children ranged in ages between seven to

ten years old; some were on class level and some had been retained. The older children were often frustrated by being with younger children.

Robinson explained the sequence of events on December 2, 1993, the day she was observed by DiGenova. DiGenova came to observe her class after an assembly program. Robinson had decided to review a lesson she previously taught for clarity. She acknowledged that the children may have been bored, but the review was necessary. She also conceded that the math program that she taught was new, and that she was not as familiar with the program as she should have been. She was also unprepared for an evaluation. Although her plan book was up-to-date, her roll book did not have the updated grades because she recorded the children's grades on separate pieces of paper each day and then would insert them in the roll book.

Although Robinson disputed Skeete's conclusions, she acknowledged the discipline problem and claimed to have spent most of her time dealing with it. The children often left their seats without permission. In fact, they would deliberately break their pencil points for an excuse to leave their seats and sharpen them. She had a consultant from the "open court program" visit her classroom approximately three times. On the day that she was evaluated, Robinson asserted that she left her grade book at home because she was recording grades for the marking period. Robinson also conceded that that she was unprepared to be observed by Skeete and she asked her to return at "another time." Robinson believed that Skeete's refusal to reschedule the evaluation was unfair. (J-30). Robinson preferred teaching grades four and five and requested a transfer to P.S. No. 39.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Robinson's employment and adjustment increments.

I further **CONCLUDE** that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

DOROTHY HOWARD

Cassandra Hansen, assistant principal of P.S. No. 17, found that Howard failed to employ effective strategies for teaching. There was no stated objective, no motivation for learning, no logical development of the lesson, no ongoing assessment of pupil progress and meaningful closure. (J-45) Howard's teaching method was "vague" and she appeared to have limited knowledge of the subject matter.

Hansen observed that the students were disruptive, and she suggested several methods to improve student discipline. For example, Howard should contact the parents, ask the parents to sit in the class with their children, and as a last resort, recommend suspension. Hansen believed that students must learn to follow a code of conduct which has to be set by the teacher and that Howard should have been more assertive in taking charge of the students. She should verbally outline the rules for the students and post the rules. Further, the students should be told the consequences of breaking rules. Hansen acknowledged that Howard did inform the administration of the discipline problem in her classroom, contacted parents and placed other students on detention. Hansen realized that Howard had several disruptive students in her class and she removed five students for behavioral problems. Hansen provided

credible and believable testimony about her observation of Howard's performance.

Dorothy Howard took over the class on November 3, 1993, after returning from one and one-half years of administrative leave. Howard testified that the transition from the prior teacher to her assignment to the class was smooth. The class was well behaved for the first ten days; the students were quiet and there were no distractions. Within two weeks after she began teaching, the students became disruptive and began to misbehave. In December 1993, another teacher, Mrs. Lawrence was assigned to mentor Howard and assist her in lesson planning, recordkeeping, and in other areas that would improve Howard's performance.

Howard explained her approach to teaching. She believed that the students' behavior had previously been the result of some "artificial control" by the former teacher. Howard does not believe in "artificial control." Contrary to Hansen's assertion, Howard claimed that she took steps to discipline her students. For example, she implemented after school detention and used a community aide. Howard's request to implement early morning detention was denied. Howard also maintained that Hansen denied her request for aid. Howard acknowledged that five students were transferred from her class, but not all for disciplinary reasons. Two students were doing well, one student was transferred at the parent's request and two students were removed for misbehaving. Howard also claimed that each student had a copy of the class rules. She maintained that the rules were posted on the wall, but they fell down. Howard maintained that she implemented various discipline strategies like requiring students to write paragraphs on conduct

Howard further explained why she was late issuing report cards. She had to evaluate the students' progress and include their attendance. Howard

described her class as difficult. Some students were "resource class students" and needed special attention, others had "deep" social problems and some had academic problems. She was satisfied, however, that they were learning and showed achievement.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Howard's employment and adjustment increments.

I further **CONCLUDE** that Howard has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

BETTE JOHNSON

Noonan candidly testified that evaluators use different perspectives including the subjective criteria to observe a teacher's performance. Nevertheless, different styles of teaching must meet the criteria for successful learning. Noonan explained that a national standard for teaching involves hands on experience. Noonan observed Johnson's instruction on the letter "L." Johnson should have used pictures of the letter "L" and "L" words. Moreover, Johnson did not have the materials ready for the lesson and she did not instruct the students about the objectives of the lesson. Johnson ignored these standards and was unprepared to begin the lesson. This resulted in too much waiting time. Omiting the "visual" and "touch" learning was another departure from acceptable teaching methods. Noonan noted that Johnson was responsive

to the needs of the children and displayed a "very warm and gentle tone throughout the lesson." (J-51)

Fernandez had many discussions and made informal observations of Johnson. Therefore, he expected to see planned activities, students on tasks and an orderly class. Instead, he saw disorganization, no discipline, no clear rules of behavior and no use of teacher aides. Fernandez observed no improvements from his prior informal observations. Principal Mark Haynes considered the informal and formal evaluations conducted by Noonan and Fernandez before recommending that Johnson's increment be withheld for the 1994-95 school year based on unsatisfactory ratings. (J-54).

Johnson did not recall much about Hayes's visit to her classroom in January. However, she remembered the observation conducted on February 7, 1994. She recalled that the students were distracted and the aides sat on the side "as normal." Johnson agreed that the two aides should have assisted her, but they did not. She described the relationship between herself and the two aides as a "conflict of interest." She described their demeanor as having an "attitude." Johnson believed that the aides had agreed between themselves that they would not to help her. Thus, they did as they pleased. She also believed that their failure to help hindered her job performance. Johnson tried but was not able to work out their differences.

Johnson stated that she tries to keep the children on task by maintaining eye contact with them, but she was not successful. She directed children who were playing around the cabinet area without permission to return to their seats. Johnson attributed the class behavior, in large part, to the diverse background of her students . She described the class as the most usual class she has taught in twenty years. She believed that some students should have been classified for special education and others referred to outside counseling. Johnson also mainted that the five to eight basic skills students had a negative impact on her

class. She used various techniques to discipline the children. For example; she contacted the parents, spoke to the students outside the classroom and sent them to the corner for "time out" when they misbehaved. Johnson appreciated Noonan's assistance. She believed the children's behavior improved after Noonan intercession. Johnson disputed, however, Noonan's assertion that she failed to use pictures to demonstrate the letter "L."

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Johnson's employment and adjustment increments.

I further **CONCLUDE** that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

ANITRA MARTIN

Based on his observation of the lesson on January 28, 1994, Messano concluded that Martin failed to use a variety of teaching techniques. She did not involve the students in cooperative learning which requires more discussion among the children and relating the subject matter to everyday experience. Instead, the lesson was teacher oriented and did not encourage critical thinking or develop comprehension skills. Additionally, Messano described the classroom as "sterile and unorganized." (J-60) The students' work was not displayed; there were no visual aids "depicting the lessons or skills" being taught. *Ibid.* Messano concluded that the unorganized and uninviting learning center was indicative of "lack of structure, organization and learning." *Ibid.*

Noonan observed a class where Martin was reading the story about Jesse Owens which Noonan believed was more appropriate for grade six and seven, not kindergarten. The story was above the maturity level of the students, it was too long, and it was not aligned to the curriculum.

Noonan saw that Martin maintained anecdotal records on each child's progress but did not have them available for Noonan's review. Noonan also found Martin's plan book incomplete and inconsistent with the classroom activities. The children were not engaged in any meaningful educational activities during the time she observed the class. Noonan observed Martin informally three or four times prior to this evaluation; she saw no improvement in Martin's ability to manage the class.

Martin conceded that there were some behavioral problems in the class, but she attributed this to the lack of classroom materials. The assigned classroom lacked many materials and supplies used for kindergarten. Many of the parents complained about the lack of materials. Thus, Martin purchased some equipment and used her bulletin board for the class. Martin disputed Noonan's account of students' misbehavior. With regard to the incident that occurred on December 20, 1993, Martin explained that her teacher's aide was scheduled report to her class at 11:00 a.m., but did not show up. At 11:45, Martin escorted her class to the cafeteria. She saw several teachers and aides in the lunch room. Martin seated the students and then left to keep an appointment outside of the building. Martin asserts that, "she had no idea that her children would be unsupervised." Petitioner's Brief at 31. Martin did not display the students' work around the room because one student would destroy the display. She also explained that she could not display the their work above the students' reach because it would block the sensor to the burglar alarm.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Martin's employment and adjustment increments.

I further **CONCLUDE** that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

SATYA DAS

Stokes acknowledged that Das demonstrated proficiency in the subject matter and presented the math problems "in a logical and sequential manner." (J-67) She believed, however, that Das could improve his communication with the students and suggested that he "rephrase" his lecture. She also believed that Das did not allow enough time to assess the needs of the students, presented the material in a hurried fashion, spent too much time disciplining the students rather than teaching, and attempted to actively involve the students "from bell to bell." *Ibid.* She suggested that "rather than give the students a 'Do Now' with six examples, reduce the number." (J-67) Stokes described the classroom as an undisciplined learning environment and attributed several weaknesses to Das poor teaching performance, *e.g.,* poor management of time, lack of student discipline, lack of effective communication with students, and poor rapport with students. Stokes conceded that although Das addressed the discipline problem, it appeared as if he "begged" and "cajoled" the students to "be good." However, the students did not respond. Thus, Stokes concluded that Das was not able to successfully discipline the pupils. Stokes also criticized Das

because he did no teach the students an alternate method to solve math problems.

DeRosa has held the position of math supervisor in the District for ten years. Her duties include supervising the teachers and she is the District Supervisor for Basic Skills. Contrary to Stokes opinion that Das reduce "Do Now" practice math problems to less than six problems, DeRosa believed that Das gave the students too few "Do Now" examples and that he spent too much time reviewing easy problems. Consequently, Das's students completed the practice math problems in a short period of time and then had free time to do nothing. Thus, DeRosa believed that Das should have increased the "Do Now" math problems to ten practice math problems. DeRosa also believed that Das's instruction technique was too teacher oriented.

Cooper reviewed the Instructional Observation Report (J-67), completed by Stokes. Cooper was concerned with Das' quality of instruction and discipline. He consulted with Stokes and Ferro and then he recommended that Das's increment be withheld. At the hearing, Cooper candidly disclosed that he was alarmed that Das received four unsatisfactory ratings from Stokes. Moreover, he believed that it was "highly unusual" to receive four out of five "U's" unless the teacher could not teach. Cooper conceded the wide disparity between the evaluations conducted by DeRosa and those conducted by Stokes and Ferro. Although he claimed that he saw no marked improvement in the three evaluations, he conceded, however, that there was a marked improvement in the evaluation conducted by DeRosa. However, he did not consider DeRosa's report in recommending to withhold Das' salary increment on March 30, 1994.

Das acknowledged the poor student behavior in his class but disputed that his class was out of control. When students misbehaved Das called parents, sent letters home and issued detention. Das also conceded that he

used one method to solve a math problem rather than teach alternative solutions. In order to avoid confusing the students he used one consistent method, rather than different terms, to resolve math problems. Das believed in the success of his teaching method because 43% of his students passed the HSPT test compared to the 26% to 30 % of the student body.

Consequently, petitioner Das urges that this tribunal note the evaluation conducted after the decision had been made to withhold his increment. Petitioner believes that action following the principal's notice about withholding an increment was relevant "since the evaluation by [Anita] DeRosa was a marked improvement." Petitioner's Brief, June 15, 1995, at 4-5. I agree. DeRosa rated Das' performance "S" in three ares and "NI" in two areas. (J-68). Petitioner correctly notes that Cooper was "stunned by the evaluation." Petitioner's Brief, June 15, 1995, at 5. However, Cooper did not consider DeRosa's evaluation. Although student misbehavior was apparent, the evidence supports petitioner's claim that the students mastered the subject on adding polynomials. Indeed, over eighty percent of the class passed the test. Furthermore, the District did not refute that 43% of his class passed the HSPT test compared to the 26% to 30% of the student body.

Considering the disparate evaluations of Das, Cooper's candid response to the disparity, and the students' test scores which demonstrated that the majority of students in the class were learning from Das, I **CONCLUDE** that the underlying facts do not support the District's action to withhold Das's increment.

I further **CONCLUDE** that petitioner has met his of proof, by a preponderance of the credible evidence, that the District's action was unreasonable.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1994-95 for unsatisfactory performance is **REVERSED** and the requested relief of petitioner be **GRANTED**.

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

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

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

February 1, 1996
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

2/5/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Theodore Bourelos

Witnesses:

For Petitioner: Theodore Bourelos

For Respondent: Rosalie Anglin
John Greco

Wendy Korenstein

Witnesses:

For Petitioner: Wendy Korenstein

For Respondent: Francis Dooley
Richard Woodall

Birdie Lou Powell

Witnesses:

For Petitioner: Birdie Lou Powell

For Respondent: David Meluso
Arlene Onnembo

Yvette Morris

Witnesses:

For Petitioner: Yvette Morris

For Respondent: Delores Curtis
Diana R. Harmon
David Meluso

Mary Robinson

Witnesses:

For Petitioner: Mary Robinson

For Respondent: Michael DiGenova
Dorian Skeete

Dorothy Howard

Witnesses:

For Petitioner: Dorothy Howard

For Respondent: Carol Ann Kaeser
Cassandra Hansen

Bette Johnson

Witnesses:

For Petitioner: Bette Johnson

For Respondent: Mark Hayes
Patricia Noonan
Jorges Fernandez

Anitra Martin

Witnesses:

For Petitioner: Anitra Martin

For Respondent: Wendy Perez
Richard Messano
Patricia Noonan

Satya Das

Witnesses:

For Petitioner:	Satya Das
For Respondent:	Belinda Stokes Charles Cooper Anita DeRosa

Exhibits:

J-1 Jersey City Public Schools Instructional Observation Report of Theodore Bourelos by Rosalie A. Anglin, dated January 6, 1994.

J-2 Memo to Mr. John Greco from Theodore A. Bourelos, dated January 13, 1994.

J-3 Jersey City Public Schools Instructional Observation Report of Theodore Bourelos by Rosalie A. Anglin, dated February 24, 1994.

J-4 Jersey City Public Schools Instructional Observation Report of Theodore Bourelos by John Greco, dated March 7, 1994.

J-5 Letter from Francis X. Dooley to Theodore A. Bourelos, dated March 30, 1994.

J-6 Letter from Judi Granickto Theodore A. Bourelos, dated May 12, 1994.

J-7 Status Report: Mr. Theodore Bourelos dated, May 26, 1994.

J-8 Instructional Annual Written Performance Report of Theodore Bourelous, dated June 24, 1994.

J-9 Jersey City Public Schools Instructional Observation Report of Wendy Korenstein, dated March 23, 1994.

J-10 Memo from Francis X. Dooley to Wendy Korenstein, dated April 13, 1994

J-11 Jersey City Public Schools Instructional Observation Report of Wendy Korenstein, dated April 21, 1994.

J-12 Letter from Judi Granick to Wendy F. Korenstein, dated June 2, 1994.

J-13 Jersey City Public Schools Instructional Annual Written Performance Report of Wendy Korenstein, dated June 17, 1994.

J-14 Instructional Annual Written Performance Reply Report by Wendy Korenstein, dated June 30, 1994.

J-15 Jersey City Public Schools Instructional Observation Report of Birdie Powell, dated February 3, 1994.

J-16 Letter from David Meluso to Ms. Powell, dated March 14, 1994.

J-17 Jersey City Public Schools Instructional Observation Report of Birdie Powell, dated March 22, 1994.

J-18 Letter from Judi Granick to Birdie Lee Powell, dated May 12, 1994.

J-19 Jersey City Public Schools Instructional Annual Written Performance Report of Birdie Powell, dated May 2, 1994.

J-20 Jersey City Public Schools Instructional Observation Report of Yvette Morris by Delores H. Curtis, dated September 29, 1993.

J-21 Instructional Observation Reply Report of Yvette Morris, undated.

J-22 Jersey City Public Schools Instructional Observation Report of Yvette Morris, dated October 6, 1993.

J-23 Three page report of Yvette Morris, unsigned and undated.

J-24 Jersey City Public Schools Instructional Observation Report of Yvette Morris, dated February 10, 1994.

J-25 Letter to Ms. Morris from D. Meluso, dated March 14, 1994.

J-26 Letter to Ms. Morris from Judi Granick, dated May 12, 1994.

J-27 Jersey City Schools Instructional Annual Written Performance Report of Yvette Morris, dated May 2, 1994.

J-28 Jersey City Public Schools Instructional Observation Report of Mary Robinson, dated December 2, 1993.

J-29 Jersey City Public Schools Instructional Observation Report of Mary

Robinson, dated March 25, 1994.

J-30 Mary Robinson's Rebuttal to Evaluation of March 25, 1994 (April 6, 1994).

J-31 Letter to Mary Robinson from Dorian L. Skeete, dated March 29, 1994.

J-32 Letter to Ms. Robinson from Judi Granick, dated May 12, 1994.

J-33 Jersey City Schools Instructional Annual Written Performance Report of Mary Robinson, dated June 16, 1994.

J-34 Jersey City Public Schools Instructional Observation Report of Doris Moraney, dated October 13, 1993.

J-35 Jersey City Public Schools Instructional Observation Report of Doris Moraney. dated December 3, 1993.

J-36 Letter by Moraney regarding evaluation of December 3, 1993 (undated).

J-37 Memorandum to Mrs. Doris Moraney from Anne E. Butler, dated March 29, 1994.

J-38 Letter to Ms. Moraney from Judi Granick, dated May 12, 1994.

J-39 Jersey City Public Schools Instructional Observation Report of Doris Moraney, dated June 2, 1994.

J-40 Jersey City Schools Instructional Annual Written Performance Report of Doris Moraney, dated June 23, 1994.

J-41 Memorandum to Dorothy Howard from Cassandra C. Hansen regarding student discipline, dated November 29, 1993.

J-42 Memorandum to Dorothy Howard from Cassandra C. Hansen, regarding report cards, dated November 30, 1993.

J-43 Memorandum to Dorothy Howard from Cassandra C. Hansen regarding need for improvement, dated February 22, 1994.

J-44 Memorandum to Dorothy Howard from Cassandra C. Hansen regarding report cards, dated February 24, 1994.

J-45 Jersey City Public Schools Instructional Observation Report of Dorothy Howard, dated January 11, 1994.

J-46 Instructional Staff Evaluation of Dorothy Howard by Carol Kaiser, dated March 30, 1994.

J-47 Letter to Ms. Howard from Judi Granick, dated May 12, 1994.

J-48 Memorandum to Dorothy Howard from Cassandra C. Hansen, regarding need for improvement, dated May 19, 1994.

J-49 Jersey City Public Schools Instructional Annual Written Performance Report of Dorothy Howard, dated June 1, 1994.

J-50 Jersey City Public Schools Instructional Observation Report of Bette Johnson, dated February 7, 1994.

J-51 Jersey City Public Schools Instructional Observation Report of Bette Johnson, dated March 24, 1994.

J-52 Jersey City Public Schools Instructional Observation Report of Bette Johnson, dated May 31, 1994.

J-53 Letter to Ms. Johnson from Judi Granick, executive assistant, dated May 12, 1994.

J-54 Jersey City Public Schools Instructional Annual Written Performance Report of Bette Johnson, dated June 20, 1994.

J-55 Reserved Number - Not Used.

J-56 Reserved Number - Not Used.

J-57 Reserved Number - Not Used.

J-58 Reserved Number - Not Used.

J-59 Reserved Number - Not Used.

J-60 Jersey City Public Schools Instructional Observation Report of Anitra Martin, dated January 28, 1994.

J-61 Reserved Number - Not Used.

J-62 Jersey City Public Schools Instructional Observation Report of Anitra Martin, dated April 29, 1994.

J-63 Jersey City Public Schools Instructional Observation Report of Anitra

Martin, dated May 4, 1994.

J-64 Memorandum to Judi Granick from Wendy Perez, principal, regarding Anitra Martin, dated May 5, 1994.

J-65 Letter to Ms. Martin from Judi Granick, dated May 12, 1994.

J-66 Jersey City Schools Instructional Annual Written Performance Report of Anitra D. Martin, dated June 1, 1994.

J-67 Jersey City Public Schools Instructional Observation Report of Satya Das, dated February 17, 1994.

J-68 Jersey City Public Schools Instructional Observation Report of Satya Das, dated May 10, 1994.

J-69 Memo to Satya Das from Charles Cooper, Jr., dated March 30, 1994.

J-70 Memo to Satya Das from Charles Cooper Jr., dated March 30 1994.

P-71 Letter to Satya Das from Judi Granick , dated May 12, 1994.

P-1 Class Book Calendar regarding Wendy Korenstein, dated March 22, 1994.

P-2 Letter Addressed to Whom it May Concern (W. Korenstein), undated.

P-3 Memorandum from S. Das, dated March 9, 1994.

R-1 Memorandum to Anitra Martin from Wendy Perez, dated January 18, 1994.

R-2 Notice from R. Messano to A., dated December 20, 1993.

R-3 Memorandum to Dr. Pablo Clausell Wendy Perez, dated May 5, 1994

R-4 Memorandum to Judi Granick from Wendy Perez, dated May 5, 1994.

R-5 Memorandum to Anitra Martin from Wendy Perez, dated January 25, 1994.

R-6 Memorandum to Anitra Martin from Richard Messano, dated January 13, 1994.

THEODORE BOURELOS, WENDY KORENSTEIN, BIRDIE LEE POWELL, YVETTE MORRIS, MARY ROBINSON, DOROTHY HOWARD, BETTE JOHNSON, ANITRA MARTIN, MARY CATLIN, DORIS MORANEY, JOHN PORTEE, AND SATYA DAS,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by petitioners[1] and the District, in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners initially set forth objections pertaining to the evaluation procedures established by the District, and to the Administrative Law Judge's (ALJ) discussion of these procedures in the initial decision. Here, petitioners first assert the ALJ did not address the issue of the District's failure to abide by *N.J.A.C.* 6:3-4.3. (Petitioners' Exceptions at p. 2) Rather, petitioners contend, the ALJ "cavalierly determined" that the District's evaluation procedure met

[1] Exceptions were filed on behalf of Petitioners Bourelos, Martin, Howard, Johnson, Morris, Powell, Robinson and Korenstein. (Petitioners' Exceptions at p. 1) On March 9, 1995, the ALJ granted respondent's motion to dismiss the petition of Petitioner Catlin for failure to appear at the scheduled hearing. (Initial Decision at p. 2., n.1) On March 9, 1994, counsel for petitioners informed the ALJ that Petitioner Moraney withdrew her petition. (*Id.* at n. 2) The petition of John Portee has been transferred to the consolidated cases of OAL Docket Numbers EDU 8491-94 and EDU 8490-94. (*Id.* at n. 3)

administrative code requirements. (*Id.*) Yet, petitioners maintain that the District's policy is deficient in this regard.

Petitioners next aver that the ALJ failed to realize that the District has not established standards by which either the evaluator or the teaching staff member can be evaluated. (*Id.* at p. 4) Thus, petitioners reason, "***the basis upon which the teachers in question were denied their increments greatly varies.***" (*Id.*) The lack of standards, petitioners continue, is particularly evident in the cases of Petitioners Das and Korenstein. Petitioners illustrate,

> ***Mr. Das was the only petitioner who succeeded in having the District's determination reversed by the ALJ. Mr. Das received one "S" and for [sic] "U's" on his initial evaluation (J-67). Thereafter, he was evaluated on March 29, 1994 and he was scored with three "U's", one "N.I." and one "S" (R-7). His final evaluation, (J-68), scored three "S's" and two "N.I.'s." Here, the improvement, as reflected in Das' final evaluation was not so great as the improvement received by Korenstein ***. However the ALJ using no discernible standard at all determined that the district acted wrongfully in denying his increment. (*Id.* at pp. 4, 5)

Lastly as to procedural violations, petitioners maintain that the ALJ failed to recognize that the District did not abide by their due process protections. Here, petitioners essentially recast their argument as presented to the ALJ in their post-hearing brief. Accordingly, the argument is not herein summarized.

Petitioners next take exception to the treatment of their individual cases by the ALJ. In so doing, significant portions of their arguments are as presented before the ALJ. To the extent the arguments are supplemented or amplified, they are reviewed below.

Petitioner Bourelos asserts that the ALJ failed to properly weigh the evidence before her, and argues that it is "patently unfair" for the District to "change the rules" without advising him of the changes, then to determine his instruction was deficient when he merely

"continued to do things as he always did them." (Petitioner's Exceptions at p. 7) Petitioner Johnson similarly claims that the ALJ improperly weighed the evidence before her. (*Id.* at pp. 12, 13)

Petitioner Korenstein contends that the ALJ failed to appreciate the marked improvement between the two evaluations conducted and, thus, concludes that the evaluations were used for punitive purposes, rather than as an instructional tool. (*Id.* at p. 8)

Petitioner Powell argues that "the ALJ erred in allowing the district to make a farce of the evaluation procedure," in that the administration's decision to deny Powell her salary increment was based on a single evaluation conducted on February 3, 1994. Powell continues,

> As the ALJ pointed out [on] page 4 of her opinion, in her Findings of Fact, the procedure in the district requires that the District Supervisor observe the teacher after he or she has received an unsatisfactory rating. Thereafter, on March 22, 1994 she was evaluated again ***. There is no question but that Onnembo's evaluation was worse than Meluso's; but that is of no consequence in light of the fact that Meluso determined, prior to Onnembo's evaluation, that he would recommend denial of her increment. (*Id.* at p. 9)

Petitioner Morris similarly warrants that "the ALJ failed to recognize that the evaluation process was perverted by the district." (*Id.* at pp. 9,10)

Petitioner Robinson also alleges that the ALJ failed to recognize that the District was using its evaluation process to discipline its personnel rather than to promote effective instruction. (*Id.* at p. 9) Robinson further illustrates the subjective nature of the evaluation procedure by indicating that when Mr. DeGenova evaluated her, he observed, "Mrs. Robinson has a very professional attitude and maintains a good rapport with her students." (*Id.* at p. 11) However, when Ms. Skeete evaluated Robinson, she noted, *inter alia*, "The atmosphere in the

classroom does not reflect a climate of mutual respect between Ms. Robinson and her students." (*Id.*)

Petitioner Howard affirms that the District violated its own policy in that it made the decision to withhold her increment based on a single evaluation. (*Id.* at pp. 11, 12) Howard contends, "***[t]he fact that she received an unfavorable evaluation and there was no follow up flies in the face of the policy of the district as espoused in the Bourelos case and set forth by the ALJ at page 4 of her opinion.***" (*Id.* at p. 12)

Petitioner Martin attests that the ALJ failed to take into consideration that her room was not properly equipped when she received unsatisfactory evaluations. (*Id.* at p. 13) Her argument in this respect is a reiteration of that which is embodied in the post-hearing brief.

The District's exceptions contend that the ALJ erred in reversing its decision to withhold the salary increment of Petitioner Das. Here, the District asserts that the ALJ applied the incorrect legal standard in evaluating the decision to withhold Das' increment. (District's Exceptions at p. 1) Citing *Kopera, supra*, the ALJ stated that the Commissioner must determine,

> (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was *reasonable* for them to conclude as they did upon those facts, bearing in mind they were experts.*** (emphasis in text) (*Id.* at p. 1, citing Initial Decision at p. 24)

Rather, the District argues, the *Kopera* standard requires the Commissioner to determine "***whether it was *unreasonable* for the evaluators to reach the stated conclusion." (emphasis in text) (*Id.*)

With respect to Petitioner Das, the District further argues that the ALJ failed to credit testimony and evidence showing that Das failed to achieve a satisfactory performance

evaluation during the 1993-94 school year. (*Id.* at p. 2) The District recounts that Das received three evaluations during the 1993-94 school year:

> ***In the first, on February 17, 1994, petitioner received four Unsatisfactory ratings. In the second, on March 29, 1994, petitioner received three Unsatisfactory ratings and one Needs Improvement. In the third, on May 10, 1994, petitioner received two Needs Improvement ratings. All three evaluations demonstrated that petitioner failed to achieve and sustain a satisfactory level of teaching performance throughout the 1993-1994 school year. Therefore, it could not have been "unreasonable" for the district to determine that petitioner's increment should be withheld.*** (*Id.*)

The District contends that the ALJ improperly substituted her judgment for that of the District's evaluators. Moreover, the District underscores that the decision to withhold Das' increment was made on March 30, 1994, at the time his performance was severely deficient.

Finally, the District asserts that the ALJ erroneously credited unsubstantiated statistical testimony offered by Das. (*Id.*) Specifically, the District attests that Das failed to substantiate with appropriate documentation his claim as to the percentage of students in his class who pass the HSPT, as contrasted with the student body as a whole. Here, the District underscores Petitioner Das' burden of proof, stating the District "***was not required to 'refute' petitioner's data, as further erroneously stated by the Administrative Law Judge.***" (*Id.*)

Upon careful and independent review, the Commissioner initially concurs with the ALJ's determination that the State District Superintendent has the statutory authority to withhold increments consistent with *N.J.S.A.* 18A:29-14. (Initial Decision at p. 20) The Commissioner further concurs with the ALJ that the District's evaluation procedures used for

petitioners were reasonable. (*Id.* at p. 21) That petitioners contend such procedures are not in compliance with *N.J.A.C.* 6:3-4.5 is not necessary to reach herein.[2]

As to the specific objections raised by petitioners[3], the Commissioner finds such objections unpersuasive, and determines that the ALJ properly upheld the District's decisions to withhold their salary increments. With respect to Petitioner Das, the Commissioner notes that, as of the date of the District's decision to deny his salary increment, Das had received two evaluations. In the first evaluation performed on February 17, 1994, Das received four Unsatisfactory ratings and a single rating of Satisfactory in the first category, "Demonstrates proficiency in subject matter." (*Id.* at pp. 17, 18) In the second evaluation performed on March 29, 1994, Das received three Unsatisfactory ratings, one Needs Improvement rating, and a Satisfactory rating in the same category as the first evaluation. (R-7) Hence, the Commissioner cannot, on the basis of the record before him, find that the District's decision to withhold Das' salary increment was unreasonable.

Accordingly, the initial decision of the OAL is adopted in part, and reversed in part as set forth herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] Here, the Commissioner notes that petitioners' allegation as to the District's noncompliance with *N.J.A.C.* 6:3-4.3 *et seq.* is nowhere contained in their Petition of Appeal and, accordingly, the record contains no counterarguments from the District as to this claim.

[3] As noted above (footnote 1), exceptions were not advanced on behalf of Petitioner Das.

MAY 6, 1996
DATE OF MAILING MAY 6, 1996

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BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EDWARD RENAUD,	:	DECISION ON MOTION
RESPONDENT.	:	

MAY 6, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 2697-96
AGENCY DKT. NO. #126-4/96

BOARD OF EDUCATION OF
THE TOWNSHIP OF EDISON,
MIDDLESEX COUNTY,
Petitioner,

v.

E.R.,
Respondent.

Francis X. Journick, Jr., Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

No appearance by or on behalf of respondent

Record Closed: April 19, 1996 Decided: April 22, 1996

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

This is the matter of Board of Education, Township of Edison v. Edward Renaud, OAL Docket Number EDU 2697-96. This matter was brought before the Office of Administrative Law (OAL) by way of application for emergent relief, under N.J.A.C. 1:61A-12.1, and was transmitted to the OAL on April 10, 1996. Oral argument was heard on April 19, 1996, at the Office of Administrative Law, 9 Quakerbridge Plaza, Hamilton, New Jersey. There was no appearance by

respondent, and no contact was made by respondent or anyone purporting to represent him to this Office. After waiting approximately 50 minutes, this application for emergent relief was heard in his absence.

Petitioner (Township of Edison Board of Education, hereinafter "Board") seeks an order directing respondent to submit to psychiatric and physical evaluations, or, in the alternative, to suspend respondent without pay, pursuant to N.J.S.A. 18A:1-2. At the commencement of the proceedings, petitioner withdrew its request in the alternative, i.e., its request to suspend respondent without pay. The matter proceeded solely on the issue of whether respondent should be ordered to submit to a psychiatric evaluation and a physical evaluation, pursuant to N.J.S.A. 18A:16-2.

Counsel for petitioner stated that respondent is a tenured teacher, who teaches shop classes in high school. Counsel for petitioner further stated that the Board adopted a resolution on January 25, 1996, finding that respondent has shown evidence of deviation from normal, physical and mental health, and directed the Board's superintendent of schools to require respondent to undergo physical and psychiatric evaluations. Further, counsel for petitioner stated that the superintendent of schools sent a letter dated January 31, 1996 to respondent directing respondent to undergo physical and psychiatric evaluations by doctors retained by the Board. The names, addresses and telephone numbers of the doctors appeared in the letter of January 31, 1996. To date, respondent has not complied with the January 25, 1996 order of the Board, or the January 31, 1996 letter of the superintendent. Neither respondent's January 23, 1996 letter to the Board, nor his April 3, 1996 letter to Joseph Jankowski, Esq., indicate any intention on respondent's part of complying with Board' direction to undergo physical and psychiatric evaluations.

Respondent has not been at work since November 30, 1995, and has been suspended with pay since February 5, 1996.

The granting of emergent relief is an extraordinary remedy which can only be awarded based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. See, N.J.A.C. 1:1-12.6.

The expanded criteria for determination of an application for emergent relief have been set forth in Crowe v. Degioia, 90 N.J. 126, 132-34 (1982). Four standards are articulated:

1. The relief should not be granted unless it is necessary to prevent irreparable harm.

2. Such relief should not be granted when the legal rights underlying the claim are unsettled.

3. In order to prevail on an application for temporary relief, a party must make a preliminary showing of a reasonable probability of ultimate success on the merits.

4. The relative hardship of the parties in granting or denying the relief sought should be considered.

Irreparable injury has been defined as "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac, Inc. v. General Motors, Inc., 418 F. Supp. 1212 (D. N.J. 1976); John Tully v. Mott Supermarkets, Inc., 337 418 F. Supp. 834 (D. N.J. 1972). I **FIND** that money damages will not now address petitioner's concerns in this matter. I further **FIND** that the Board is continuing to pay respondent with funds that cannot be recovered should respondent be later deemed unfit or unable to continue his employment. Additionally, I further **FIND** that there has been a showing of "substantial injury to a material degree" by respondent's failure to comply with the January 25, 1996 resolution of the Board, or the January 31, 1996 letter of the superintendent, both of which directed respondent to submit to a physical evaluation and to a psychiatric evaluation.

The legal rights underlying the claim are not unsettled. Rather, they are very clear. I **FIND** that the Board has the right to require a physical evaluation and a psychiatric evaluation, if it finds that an employee has shown evidence of deviation from normal, physical or mental health. N.J.S.A. 18A:16-2. The supertinendent had the obligation to comply with the direction of the Board, and to direct respondent to submit to a physical evaluation and to a psychiatric evaluation.

Thirdly, the petitioner must make a preliminary showing of a reasonable probability of ultimate success on the merits. As the petitioner is merely asking for an order directing respondent to comply with a direction the Board had the right to issue under law, i.e., under N.J.S.A. 18A:16-2, I **FIND** that there is more than a reasonable probability of ultimate success on the merits.

Lastly, balancing the harms to be suffered by the parties, I **FIND** that the harm to the respondent is negligible - he will be required to undergo a physical evaluation and a psychiatric evaluation. The harm to be suffered by the Board should their request be denied could be extreme, beyond even the monetary consequences of continuing to pay an employee who may not be fit or able to work.

In sum, I **FIND** the request of the Board to be appropriate, justifiable and reasonable. Consequently, I **ORDER** that petitioners' request for relief should be **GRANTED,** and that respondent be **ORDERED** to submit to a physical evaluation and to a psychological evaluation. Further, I **ORDER** that the Board schedule appointments for a physical evaluation and a psychiatric evaluation for respondent with a medical doctor and a psychiatrist of the Board's choosing, during the medical doctor's and the psychiatrist's regular office hours. I further **ORDER** that the Board advise respondent in advance, by telephone (if possible), and by certified and regular mail, of these scheduled appointments. Should these scheduled appointments be inconvenient for respondent, respondent may contact the Board prior to the date scheduled for the appointment, and the Board is to reschedule the complained-of appointment at a time convenient to respondent (and to the doctor), and to advise respondent accordingly. Should respondent not be satisfied with the either the medical doctor or the psychiatrist chosen for the evaluations, the respondent may contact the Board and provide the name of a medical doctor, or of a psychiatrist, suitable to respondent. If suitable and appropriate, the Board will make the necessary arrangements and advise respondent. Counsel for the Board has advised this tribunal that, should respondent choose another medical doctor or a psychiatrist, the Board will pay for the examination to be conducted.

This is an order on emegent relief only. Any findings by the undersigned are made only to the extent necessary in order to decide the temporary relief. The underdersigned will retain juridiction of the underlying case unless otherwise directed by the Commisssioner of the Department of Education.

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF THE DEPARTMENT 0F EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **THE COMMISSIONER OF THE DEPARTMENT 0F EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

April 22, 1996
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

ej

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EDWARD RENAUD,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this matter and the Order Granting Motion for Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. By letter dated April 25, 1996, the Director of the Bureau of Controversies and Disputes accorded the parties until close of business on Tuesday, April 30, 1996, to file exceptions to the recommended Order of the Administrative Law Judge (ALJ), and until close of business on Friday, May 3, 1996, for filing reply exceptions. No exceptions were filed by the parties.[1]

Upon a careful and independent review of the record, including the audio tape of the hearing conducted at OAL on April 19, 1996,[2] the Commissioner agrees with the findings

[1] On May 1, 1996 the within Board filed "exceptions" in *support* of the ALJ's Order. In that this submission was filed outside the stipulated exception filing period and did not conform to the requirements of *N.J.A.C.* 1:1-18.4, it is not herein considered.

[2] It is noted that the within respondent neither attended the hearing in this matter nor did he, or anyone on his behalf, offer any justification for his nonattendance.

and conclusion of the ALJ that the Board's emergent application should be granted for the reasons clearly articulated in the Order.

Accordingly, the recommended Order of the ALJ granting emergent relief is adopted as the final decision on motion. Respondent Edward Renaud is hereby directed to submit to physical and psychiatric evaluations, to be scheduled forthwith by the Board, with the cost of such evaluations being borne by the Board. This matter is hereby returned to the OAL for such further proceedings as may be necessary, consistent with the recommendation of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 6, 1996
DATE OF MAILING MAY 6, 1996

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SB # 40-96

MEREDITH FREEDMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 6, 1996

For the Petitioner-Appellant, Meredith Freedman, pro se

For the Respondent-Respondent, Green & Dzwilewski (Allan P. Dzwilewski, Esq., of Counsel)

The decision of the Commissioner of Education dismissing the petition in this matter is affirmed substantially for the reasons expressed therein. We find, in addition, that petitioner has failed to demonstrate a sufficient stake in the outcome of the proceedings so as to have the necessary standing to maintain this action. N.J. Chamb. Commerce v. N.J. Elec. Law Enforce. Comm., 82 N.J. 57 (1980); Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98 (1971); Ridgewood Educ. v. Ridgewood Bd., 284 N.J. Super. 427 (App. Div. 1995).

August 7, 1996

Date of mailing AUG 09 1996

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FRANCESCO CORDASCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, Board member appointed by outgoing mayor, sought to compel Board to seat him and sought declaration that subsequent appointment of another person to the same position by a new mayor was invalid.

ALJ determined that petitioner was validly appointed by the outgoing mayor in compliance with the statute, *N.J.S.A.* 18A:12-7, wherein the mayor had 30 days to select a qualified person to serve out the unexpired term Thus, the subsequent refusal of the Board to seat petitioner was improper and contrary to law, as was the new mayor's subsequent appointment of another person to fill the seat to which petitioner was entitled. Petitioner's claim to indemnification was denied as the action did not arise out of the performance of his duties as a board member. ALJ ordered the Board to seat petitioner as a member for the remainder of the term that began on May 16, 1995.

Commissioner adopted findings and determination in initial decision as his own and ordered petitioner seated as of May 16, 1995, and the subsequent appointment of any other individual null and void as of the same date.

May 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5892-95

AGENCY DKT. NO. 145-5/95

FRANCESCO CORDASCO,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,

Respondent.

Joseph J. Ferrara, Esq., for Petitioner
(Ferrara & Hantman, attorneys)

Allan C. Roth, Esq., for Respondent,
(Scarinci & Hollenbeck, attorney)

Record Closed: February 6, 1996 Decided: March 22, 1996

BEFORE **ARNOLD SAMUELS,** ALJ:

The petitioner, appointed by an outgoing mayor as a member of the Board of Education of the Town of West New York (Board), seeks to compel the Board to seat

him. He also seeks a declaration that a subsequent appointment of another person to the same position by a new mayor was invalid.

PROCEDURAL HISTORY

Mr. Cordasco filed his verified petition with the Commissioner of Education on May 24, 1995, and the respondent filed an answer on June 2, 1995. On June 6, 1995 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held on October 23, 1995, and a prehearing order was filed, defining the issues to be decided, fixing hearing dates, providing for discovery, and regulating other procedural aspects of the forthcoming hearing.

The hearing, which consisted of oral argument by counsel and testimony taken from two witnesses, was held on December 22, 1995. An itemized list of the documentary exhibits marked in evidence and identification of the two witnesses who testified are attached to this decision as an appendix. The parties filed post-hearing briefs and memoranda, and the record closed on March 8, 1996.

A Joint Stipulation of Facts, with exhibits attached, was filed by counsel at the beginning of the hearing. The stipulated facts, which are not contested, are as follows:

1. Petitioner Francesco Cordasco resides at 6606 Jackson Street, West New York, New Jersey.

2. The Respondent, West New York Board of Education, is a Type I school district whose members are appointed pursuant to the provisions of *N.J.S.A.* 18A:12-5 et seq.9.

3. The West New York Board of Education consists of five board members, each of whom is appointed by the Mayor of the Town of West New York, the chief executive officer of the town constituting the school district.

4. By correspondence dated April 5, 1995, James P. Verbist, Secretary to the West New York Board of School Estimate advised Mayor Anthony M. DeFino of a trustee vacancy on the West New York Board of Education to occur on May 16, 1995. (Exhibit 1).

5. On April 13, 1995, in accordance with the provisions of *N.J.S.A.* 18A:12-8, Mayor DeFino appointed George Rodriguez as trustee to the West New York Board of Education for the term to commence on May 16, 1995 and expire on May 15, 2000. (Exhibit 2).

6. On April 21, 1995 George Rodriguez declined his appointment as trustee to the West New York Board of Education. (Exhibit 3).

7. On April 21[sic], 1995, Mayor DeFino appointed the Petitioner Francesco Cordasco to serve as a trustee of the West New York Board of Education for the term to commence on May 16, 1995 and expire on May 15, 2000. (Exhibit 3).

8. On May 1, 1995 a resolution was adopted by the Commissioners of the Town of West New York noting the appointment of Francesco Cordasco as a trustee of the West New York Board of Education to replace the previous appointee, George Rodriguez. (Exhibit 4).

9. On May 16, 1995 the term of office of Mayor DeFino expired.

10. On May 16, 1995 the Honorable Albio Sires succeeded Anthony DeFino as Mayor and Chief Executive Officer of the Town of West New York.

11. On May 16, 1995 Mayor Sires appointed Ricky Solares to succeed Mr. Rodriguez as a trustee to the Board of Education.

12. On May 16, 1995, the West New York Board of Education refused to permit petitioner to assume his appointed office as trustee of the West New York Board of Education and permitted Mr. Sires [sic] appointee to assume that appointed position.

ARGUMENT OF COUNSEL AND TESTIMONY

The petitioner claims that he was validly appointed on April 28, 1995, by Mayor DeFino (whose term expired on May 16, 1995) to fill the vacancy created when the prior appointee, George Rodriguez, declined his appointment. The petitioner was appointed pursuant to *N.J.S.A.* 18A:12-7.

The respondent alleges that the appointment of George Rodriguez on April 13, 1995, was void from its inception because he was not qualified to be a Board member. The qualifications are set forth in *N.J.S.A.* 18A:12-1, which requires that each member of a board of education shall be able to read and write. Although not mentioned in the statute, respondent argues that the ability to read and write must be interpreted to mean read and write in the English language.

Secondly, respondent alleges that Mayor DeFino, whose term was due to expire on May 16, 1995, was prohibited from making an appointment to the Board because the new Board member's term would commence on May 16, 1995, the same day on which Mayor DeFino's term would expire.

George Rodriguez testified about the circumstances of his appointment by Mayor DeFino on April 13, 1995. Mr. Rodriguez accepted the appointment, and he told that to Mayor DeFino. About a week later he reconsidered. Mr. Rodriguez testified that he hesitated because he does not speak, read or understand English too well. After

informing Mayor DeFino about his concerns, on April 21, 1995 Mr. Rodriguez decided to decline the appointment.

The respondent first questioned the validity of the Mr. Rodriguez's residence in West New York at the time of his appointment. However, Mr. Rodriguez testified that he was a resident of West New York at the time and remained a resident until June 1995, when he moved to Guttenberg. Although he had sold his West New York house in June 1994, Mr. Rodriguez continued to reside in that home, paying rent, until he moved in June 1995. Additionally, he was a registered voter in West New York at the time of his appointment. This testimony, relating to his residence, was uncontested.

James P. Verbist, Business Administrator and Secretary of the West New York Board of Education, testified that he never saw an oath of office or written resignation from Mr. Rodriguez resigning his position as a Board member. He thought that any such documentation should have been sent to him for transmittal to the Mayor. Mr. Verbist said that, although he knew of the initial appointment, he first found out, on April 28, that Mr. Rodriguez had resigned. See Exhibit J-2, the written appointment by Mayor DeFino of George Rodriguez. This document, dated April 13, 1995, is addressed to James Verbist, Secretary/Business Administrator.

See also Exhibit J-3, a written appointment of Francesco Cordasco, in place of George Rodriguez, the previous appointee. This document, dated April 28, 1995, was also addressed to James Verbist, Secretary/Business Administrator. Mr. Verbist further testified that he was aware of the fact that Mayor DeFino's term ended on May 16, 1995, that the newly elected mayor's term (Albio Sires) began on May 16, 1995, and that the term of the newly appointed board of education member also began on May 16, 1995.

The petitioner applied for indemnification of his counsel fees and costs, in accordance with the provisions of *N.J.S.A.* 18A:12-20.

LEGAL DISCUSSION AND CONCLUSIONS

The pertinent statutes relating to appointments to boards of education are as follows:

> *N.J.S.A.* 18A:12-8. When appointed; Commencement of Terms
>
> In districts, other than those in cities of the first class, *the members of the board shall be appointed between April 1, and April 15, and their terms of office shall begin on May 16, next succeeding*, and in districts in cities of the first class they shall be appointed during the month of June and their terms of office shall be begin on July 1, next succeeding. [Italics added].
>
> *N.J.S.A.* 18A:12-7. Boards; Appointments; Vacancies
>
> The boards of education shall be appointed by the mayor or other chief executive officer of the municipality constituting the district. Any vacancy occurring in the membership of the board shall be reported forthwith by the secretary of the board to the mayor or other chief executive officer of the municipality, who shall within 30 days thereafter appoint a qualified person to fill the vacancy for the unexpired term.

In the instant matter, Mayor DeFino appointed George Rodriguez on April 13, 1995, within the permitted time and otherwise in accordance with *N.J.S.A.* 18A:12-8. See Exhibit J-1, in which Mr. Verbist, Secretary to the Board, notified the mayor of the need to make this appointment, replacing a member whose term was due to expire on May 16, 1995. The newly appointed Board member or trustee would take office on May 16, 1995, in accordance with the statute.

When Mr. Rodriguez unexpectedly resigned on April 21, 1995, that date was beyond the April 15th deadline for appointments in accordance with *N.J.S.A.* 18A:12-8. Instead, the circumstances fit the provisions of *N.J.S.A.* 18A:12-7. A vacancy had occurred, and the mayor had 30 days thereafter to appoint a qualified person. This was done on April 28, 1995. See Exhibit J-3. In addition, the mayor and board of

commissioners certified the appointment of Mr. Cordasco in a resolution passed at a meeting on May 1, 1995. See Exhibit J-4. This was followed by a certification by the Secretary of the Board of Education, Mr. Verbist, confirming that Mr. Rodriguez declined to accept his appointment. See Exhibit J-5.

All of the material facts are substantially set forth in the foregoing stipulation of facts of both parties. Several additional **FACTS**, needed in order to reach the conclusions to follow, are:

George Rodriguez speaks, reads, writes and understands English, albeit not fluently and accented. He answered questions and otherwise testified in English, without assistance, and he was easily understood.

George Rodriguez was a resident of West New York at the time of his appointment by Mayor DeFino and remained a resident until June 1995, when he moved out of the district to Guttenberg.

The Business Administrator and Secretary of the West New York Board of Education, James P. Verbist, performed his assigned duties and was the recipient of the appointments of both George Rodriguez and the petitioner. He was at all times notified of each action taken by Mayor DeFino in making the appointments in accordance with the applicable statutes.

The respondent claims that the initial appointment of George Rodriguez was void for lack of qualification because he was not able to read and write can be disposed of quickly. It was uncontested that Mr. Rodriguez was fully literate in Spanish. However, even if the respondent's argument, that the unexpressed intent of the applicable statute, *N.J.S.A.* 18A:12-1, is to require literacy in English is accepted, it nevertheless is **CONCLUDED** that Mr. Rodriguez is also literate in the English language. This was proved at the hearing, and has been found to be a fact. The respondent cannot, in good conscience, claim that such linguistic ability must comply

with a minimum standard or be measured with such clarity and precision that would preclude a person whose ability to communicate in English may be accented or halting.

Despite argument engaged in by the parties dealing with their respective interpretations of related or collateral case law, the clear fact remains that the petitioner's appointment by Mayor DeFino was validly accomplished in strict compliance with the requirements of *N.J.S.A.* 18A:12-7. The statute contains no condition or prohibition against being exercised by a lame-duck mayor.

Georgia v. Suruda, 154 *N.J. Super.* 439, (Law Div. 1977), *Bownes v. Meehan,* 45 *N.J.L.* 189 (Sup. Ct. 1883) and *Downey v. Board of Education of Jersey City*, 74 *N.J. Super.* 549 (App. Div. 1962) do not deal primarily with the subject at hand. The most extensive of these cases, *Georgia v. Suruda, supra*, concerns a municipality organized under the Faulkner Act, *N.J.S.A.* 40:69A-1 to -210, whereas the Town of West New York is a Walsh Act (*N.J.S.A.* 40:70-1 to 78-5) municipality. The controversy in *Suruda* revolved around two seemingly contradictory statutes, one of which clearly dealt only with Faulkner Act municipalities. No such contradiction is presented here. A similar problem was considered by the Appellate Division in *Downey*, which involved an appointment made by a mayor who was a holdover from a previous form of government. Again, that complication is not a part of this case.

In Suruda, an appointment was made by an outgoing mayor on the same day that his successor was to take office. The case at hand is clearly different. Here, Mr. Cordasco was validly appointed by Mayor DeFino in clear compliance with the statute, *N.J.S.A.* 18A;12-7, on April 28, 1995. The making of the appointment by the mayor is not the same as the date on which the appointee's term is to begin. If respondent's interpretation is to be accepted, a mayor's appointment powers would virtually be removed for a substantial period of time before he or she leaves office, under circumstances where a different person has been elected for the next term. It is **CONCLUDED** that the statute, *N.J.S.A.* 18A:12-7, is not intended to be interpreted in

that manner. See *Thomas v. McGrath*, 145 *N.J. Super.* 288 (App. Div. 1976) (rev'd on other grounds).

It is therefore **CONCLUDED** that the petitioner's appointment by Mayor DeFino was valid. It necessarily follows that the subsequent refusal of the Board to seat Mr. Cordasco was improper and contrary to law, as was Mayor Sires' subsequent appointment of another person to fill the seat to which Mr. Cordasco was entitled.

As for the petitioner's claim for indemnification pursuant to *N.J.S.A.* 18A:12-20, that statute does not seem to be applicable to Mr. Cordasco's claim.

> Whenever a civil or criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.
> *N.J.S.A.* 18A:12-20.

In the case at hand, no civil or criminal action has been brought against the petitioner arising out of and in the course of the performance of his duties as a member of a Board of Education. Instead, Mr. Cordasco himself has brought a civil action against the Board of Education, which refused to install him as a member. He is not defending any action. The petitioner seeks to become a member of the Board of Education, believing that he was unlawfully deprived of such membership. In *Suruda, supra*, the plaintiff was indemnified because he had been appointed by a lame-duck mayor to fill a vacancy on the Board, and he successfully defended against and

withstood a challenge raised by a new mayor who sought to make a different appointment. That action rose out of the performance of the plaintiff's duties as a member of the Board of Education.

The circumstances here do not comport with the statute, which does not provide indemnification for a challenge against a Board of Education by one who seeks to become a member.

ORDER

It is therefore **ORDERED** and **DECLARED**:

That petitioner Francesco Cordasco is the duly appointed member of the West New York Board of Education by virtue of his appointment by Mayor DeFino on April 28, 1995.

That petitioner Francesco Cordasco be immediately inaugurated and seated as a member of the West New York Board of Education for the remainder of the term that began on May 16, 1995.

That the Board of Education of the Town of West New York should cease and desist from interfering with the petitioner's right to be a member of said Board.

That any subsequent appointment of another individual to the seat on the Board of Education to which petitioner is entitled is null and void from and after May 16, 1995.

That the petitioner's claim to indemnification in accordance with *N.J.S.A.* 18A:12-20 is denied.

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

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

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

March 22, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

March 26, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

George Rodriguez

James P. Verbist

Exhibits:

J-1 Letter from James P. Verbist to Anthony M. DeFino April 5, 1995.

J-2 Appointment of George Rodriguez from Anthony M. DeFino to James P. Verbist April 13, 1995.

J-3. Appointment of Francesco Cordasco from Anthony M. DeFino to James P. Verbist April 28, 1995.

J-4 Resolution appointing Francesco Cordasco as a Member of the Board of Education May 1, 1995.

J-5 Certification of appointment of JGeorge Rodriguez by James P. Verbist May 16, 1995.

R-6 Letter of resignation by Richard Tedesco to Bruce Klein, dated May 15, 1995.

R-7 Letter of appointment of Charles J. Hughes from Mayor DeFino to James Verbist, dated May 16, 1995.

FRANCESCO CORDASCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions and reply exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4. Although petitioner submitted on April 30, 1996, a response to the Board's reply exceptions, there is no provision for such a reply in either statute or regulation. Accordingly, this April 30, 1996 submission is not herein considered.

Petitioner excepts to the portion of the initial decision that denies his claim for indemnification of legal costs and expenses relying on *N.J.S.A.* 18A:12-20, which states,

> Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education***the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.***

Petitioner avers that

> [t]he undisputed factual record in this case establishes that the Respondent Board of Education refused to permit Petitioner to assume his legal statutory duties as a duly appointed member of the West New York Board of Education ***. The record also

> demonstrates that the Board of Education acted in bad faith in refusing to seat the Petitioner. (Petitioner's Exceptions at p. 2)

Consequently, petitioner argues that the Administrative Law Judge's (ALJ) determination is "illogical and inconsistent with the construction of the statute as applied by our courts in *Suruda* and in *Kolbeck, supra****(*id.* at p. 3) and that "Respondent should be held accountable for its refusal to recognize [petitioner's] lawful appointment.***" (*Id.* at pp. 5-6) In summation, petitioner requests modification of the ALJ's determination with regard to the issue of legal costs on the ground of equitable estoppel. (*Id.* at p. 8)

In its reply exceptions, the Board first recasts an argument included in its Summation Brief that government officials are not allowed to make prospective appointments. (Board's Reply Exceptions at pp. 3-7) In that this argument was already considered and dismissed by the ALJ as inapplicable to the instant matter, it is not more fully set forth herein.

The Board next challenges the ALJ's finding that petitioner's predecessor accepted the outgoing mayor's appointment to the Board when, it avers, he *declined* the appointment on April 21, 1995. (emphasis in text) (Exceptions at p. 7) It argues that,

> ***[allowing the outgoing mayor] to select a person at random during the selection period, allow the deadline to pass, and then have the potential appointee to decline the appointment***abrogates the entire process by permitting the mayor to extend the time he legislatively is entitled to find someone who would accept the position. (Id.)

The Board concludes that the ALJ erroneously found a vacancy existed and was subsequently filled pursuant to *N.J.S.A.* 18A:12-7, in that there was no vacancy because petitioner's predecessor never accepted nor held a position on the Board. (Board's Reply Exceptions at p. 8)

The Board further argues that common law was not abrogated in favor of *N.J.S.A.* 18A:12-8 and

> [t]herefore, the appointing requirements of *N.J.S.A.* 18A:12-8 are superseded by the Common Law when the Common Law states that an outgoing official is prohibited from making prospective appointments when said appointments are to commence on or after the outgoing mayor is to leave office. (Board's Reply Exceptions at p. 9)

Thus, the Board contends, the Court erred in not considering the legislative history for amending the appointment dates of Board of Education appointees. *(Id.)*

Lastly, the Board contends that the Court properly found that petitioner is not entitled to indemnification and costs "arising out of and in the course of his duties as a member" of the Board, in that petitioner "never commenced a term of office as trustee of the Board." *(Id.)*

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ. The ALJ correctly construed the circumstances herein to conclude that a vacancy existed and that petitioner's appointment by the outgoing mayor was validly accomplished in strict compliance with the requirements of *N.J.S.A.* 18A:12-7.[1] This statute provides that a vacancy, "shall be reported forthwith by the secretary of the board to the mayor***" who then has 30 days to select a qualified person to serve out the unexpired term. In so ruling, the Commissioner agrees that *N.J.S.A.* 18A:12-7 contains no condition or prohibition against this authority being exercised by a "lame-duck mayor." (Initial Decision at p. 8) See *Georgia v. Suruda, supra.*[2] To hold otherwise, the Commissioner concurs, would create a situation that could not have been contemplated by statute or case law. As illustrated by the ALJ,

> ***If respondent's interpretation is to be accepted, a mayor's appointment powers would virtually be removed for a substantial period of time before he or she leaves office, under circumstances where a different person has been elected for the next term.*** (Initial Decision at p. 8 and *Thomas v. McGrath, supra*)

Therefore, contrary to the Board's arguments, the Commissioner concurs that petitioner's appointment was not prospective and should not be construed as such.

With regard to legal fees, the Commissioner affirms the ALJ's finding that *N.J.S.A.* 18A:12-20 indemnifies a board member only in defense of an action brought against him or her. In the case at hand, no civil or criminal action has been brought against petitioner

---

[1] Although the Board challenges the factual findings that a vacancy existed, the existing record provides no cause to challenge any of the determinations or credibility assessments made by the ALJ nor may the Commissioner properly reject such findings of fact without reviewing those portions of the transcript(s) where such findings were reached. *Rowley v. Board of Education of Manalapan-Englishtown*, 205 *N.J. Super.* 65, 75 (App. Div. 1985); *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). Additionally, it is the responsibility of those challenging such determinations to provide the Commissioner with such portions of the transcript, *Morrison* at 158, and no obligation arises for the Commissioner to review them before rendering a final decision regarding the findings and recommendations of the ALJ.

[2] The Commissioner notes that the *Suruda* case involved the City of Jersey City, a city governed by provisions of the Faulkner Act, unlike the Town of West New York. This distinction, however, does not alter the proposition for which this case is cited.

and, thus, he is not entitled to indemnification for the within challenge. In view of this finding, it is not necessary to address the claim that petitioner never served as a board member.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision and orders:

That Petitioner Francesco Cordasco be immediately inaugurated and seated as a member of the West New York Board of Education for the remainder of the term that began on May 16, 1995;

That the Board of Education of the Town of West New York cease and desist from interfering with petitioner's right to be a member of said Board;

That any subsequent appointment of another individual to the seat on the Board of Education to which petitioner is entitled is null and void as of May 16, 1995; and

That petitioner's claim to indemnification in accordance with *N.J.S.A.* 18A:12-20 is denied.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 8, 1996
Date of Mailing, May 10, 1996

186-96

186-96

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS BARBAROW,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF LITTLE FERRY,	:	DECISION
BERGEN COUNTY.	:	

May 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11618-95
AGENCY DOCKET NO. 365-9/95

IN THE MATTER OF THE TENURE HEARING OF THOMAS BARBAROW, BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY

Dennis G. Harraka, Esq., attorney for petitioner (Ferrara, Turitz, Harraka & Goldberg, attorneys)

Paul E. Griggs, Esq., attorney for respondent

Record Closed: January 18, 1996 Decided: March 14, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

This matter was transmitted to the Office of Administrative Law on October 18, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties agreed to settle this matter and set forth the following settlement terms on the record:

1. Petitioner shall pay respondent a sum equal to three (3) months salary in one lump sum gross payment as severance pay. Said payment will be reported on a 1099 form with a copy to be provided to respondent.

2. The payment shall be made on or after April 1, 1996.

3. Respondent's employment contract with petitioner, dated June 22, 1995, for the period July 1, 1995, through June 30, 1996, is terminated effective September 10, 1995.

4. James Campbell, Superintendent of Schools of the Borough of Little Ferry shall provide respondent with a letter of recommendation from him concerning his positive interpersonal relationship with respondent.

5. The parties further agree that this settlement shall serve as a mutual release for any and all claims relating to or arising out of respondent's employment contracts with petitioner.

After being placed under oath, respondent stated that he fully understood and consented to all of the terms and conditions of the settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

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

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

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

March 14, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

March 26, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 11618-95

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS BARBAROW,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF LITTLE FERRY,	:	DECISION
BERGEN COUNTY.	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

May 8, 1996
Date of Mailing, May 10, 1996

187-96

187-96

IN THE MATTER OF THE ANNUAL :

SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF TEANECK, : DECISION

BERGEN COUNTY. :

SYNOPSIS

Petitioners, defeated candidates for school membership, alleged there were improprieties and violations of law in the conduct of the school election. Petitioners claimed the Board's public relations director improperly asked for preferential treatment for a certain candidate by asking for and receiving a 20% discount for advertising in a publication which has since ceased to publish.

ALJ concluded that petitioners had not met their burden of establishing a violation of school election laws. Further, petitioners acknowledged that they were unable to show that any item which they brought out was sufficient to show that the will of the people was thwarted and would have changed the outcome of the election. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

May 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9816-95
AGENCY DKT. NO. 247-7/95

INQUIRY IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF TEANECK, BERGEN COUNTY

Marvin Markman, pro se, petitioner

Beverly Lefkowitz, pro se, petitioner

Sidney Sayovitz, Esq., for respondent
(Young, Dimiero & Sayovitz, attorney of record)

Record Closed: December 26,1995 Decided: March 25, 1996*

BEFORE: **MARYLOUISE LUCCHI-McCLOUD**, ALJ:

This case comes by way of a petition originally incorrectly filed in April 1995. Subsequently a second petition was properly filed on June 6, 1995 with the Commissioner of the Department of Education and stamped and dated June 6, 1995.

The matter was scheduled for a hearing on November 29, 1995 at the Bergen County Courthouse, Hackensack, NJ. At the conclusion of the testimony the hearing record remained open until December 26, 1995 at the request of both sides to submit memoranda of law as well as a transcript of March 29, 1995 of remarks of Dr. Morris in lieu of his live testimony (C-1). As a result the Initial Decision would have been due on February 9, 1996. An Order of extension was granted for good cause due to the

undersigned's heavy caseload as well as the undersigned's Jury Duty obligation. The Order extended the time to file the Initial Decision until Monday, March 25, 1996.*

The original matter had been filed by petitioner Marvin Markman by way of an undated letter expressing complaints regarding the conduct of Judith Distler, a public relations Director for the Teaneck Board of Education. After ultimately being forwarded to the Commissioner of Education and the Bureau of Controversies and Disputes, the matter was then transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 on September 8, 1995.

FACTS

This matter arises out of a complaint filed with the Commissioner of Education by Marvin Markman (Markman) and joined by Beverly Lefkowitz (Lefkowitz) by way of an undated letter. The letter is entitled "Complaint against Judith Distler". This letter alleges that the actions of Judith Distler (Distler) as public relations director for the Teaneck Board of Education were improper in that Distler asked for preferential treatment for a certain candidate in the school board election. The alleged preferential treatment was in the form of allegedly asking for and receiving a 20% discount for advertising in a publication called the "Consumer Advocate" which has since ceased to publish.

It must be noted at the outset that the petitioners conceed that, while they feel that certain improprieties occurred, they have no indication nor are they able to show that the actions complained of thwarted the will of the people or changed the outcome of the election.

Paul Cohen testified that he was the editor of the "Consumer Advocate" and was also the owner. This was a publication which was mailed to the population of Teaneck. Prior to the School Board election Mr. Cohen contacted Judy Distler with whose

assistant he had previously dealt regarding advertisements for the Community School. He was attempting to generate advertising for his publication which was experiencing financial difficulty. A 20% discount was arranged for candidates for the school board election. Mr. Cohen did not know how the candidates were to be informed of the discount.

Cohen stated that he spoke with candidate Markman prior to arranging the discount but recalls that Markman said he would not place an ad because he had no money available for advertising. Cohen stated that candidates got preferable placement based upon when they had placed their order. Ms. Ostroth got half a page located on the second page because she had reserved around the second week of March. He also confirmed that he called Mr. Amdur who placed Ostroth's ad again after he spoke with Judy Distler. The other candidates had been called to generate advertising before his conversation with Ms. Distler.

On March 22, 1995 he received a phone call from Dr. Morris, the District Superintendent, and was asked if Ms. Distler had asked for a discount for only her candidate. He testified that the discount was for all candidates and not specifically for a candidate supported by Ms. Distler.

Mr. Cohen explained that his publication has ceased to exist due to financial reasons as a result he was hopeful for all advertising to keep the paper going. For that election he did receive an ad placed by Mr. Amdur on behalf of Ms. Ostroth and also as ad for Tasha Morton. He was unable to recall where the ad from Tasha Morton was generated. The magazine was published monthly and came out in the beginning of March and April. While there would ordinarily have been a deadline for the taking of ads, the financial situation was so precarious that it made it such that he would take ads up to "the last minute." The last date to place an ad for the April edition was April 1, 1995. Other than Ostroth and Morton none of the other candidates placed ads. This included Markman and Lefkowitz whom he had originally contacted about purchasing ad space before the discount, as well as his conversation with Markman after the discount had been secured.

During Cohen's first conversation with Markman the candidate stated that he did not have money for advertising. The second conversation on March 21, 1995 with Markman once again did not indicate any intention to place an ad. When Cohen contacted Lefkowitz she left a message on his machine that she was not going to place an ad. Cohen did not recall specifically advising Morton, Wilburn or Houston, other candidates, of the discount.

Judy Distler testified that she is the coordinator of school community relations and is responsible for ads such as those dealing with the budget. She has worked for the Board of Education for 22 years and has occupied this position for 15 or 16 years.

Ms. Distler testified credibly that she contacted two publications to see about a discount for candidates. These were the Consumer Advocate and The Connection. She did not contact The Suburbanite but does think she may have contacted someone at The Standard regarding rates. Ms. Distler acknowledges having made the calls to The Connection and the Consumer Advocate from her office in the Township but does not recall the time. She also did not discuss these call and ads with Dr. Doyle. She was unaware of any responsibility to inform him of these matters. Her only official responsibility was to publicize the election date.

Ms. Distler did not originally discuss a discount with the Connection but she got a call back and a discount was offered.

Ms. Distler stated candidly that she did not intend to inform the candidates of the discount that she had secured for them. She felt she "had done a good deed." It was her impression that the individual candidates would find out when they called to place ads. She did speak with Mr. Amdur because she was aware he was securing advertising through the Consumer Advocate. The witness acknowledges calling The Connection on school time but does not recall if she called Mr. Cohen on school time. None of this was discussed with the board of Education. She did make an announcement in her office prior to the complaint being made. Ms. Distler felt she was

doing this as a concerned Teaneck citizen. She states that she does not punch a clock there and sometimes works from 8am until 7pm. As a result her personal calls appear on her phone bill along with those official calls from her office.

Ms. Distler testified that when she made the calls she did not do so on behalf of only one candidate. She did not know how the candidates would become aware of the discount other than by calling the publication. Nothing was set up by which they would all be apprised in the same manner.

Petitioner Markman also testified that he spoke with Mr. Cohen of the Consumer Advocate. During this conversation Cohen stated that Ms. Distler had obtained a 20% discount but that Markman would not be able to receive prime placement since others had reserved first. This was the second conversation Markman had with Cohen and occurred around March 20 or 21, 1995. The first conversation took place several weeks earlier and Markman had indicated that he did not have funds for advertising.

Although Markman attempted to speculate that the discount was for only one candidate, that of Ms. Distler, he produced no supporting evidence of this at the hearing. He also stated at the hearing that he would not have placed an ad, with or without the discount since his funds did not permit it.

The parties also stipulated a transcript which was supplied to the undersigned of the remarks of Dr. Morris at an executive session of the Teaneck Board of Education taking place on March 29,1995. (C-1) His remarks confirmed that he had contacted Mr. Cohen in response to a complaint from Ms. Lefkowitz. He stated that Mr. Cohen confirmed a conversation with Ms. Distler who had called about placing ads for candidates. Cohen confirmed to him that had no time had Distler used her position to obtain such a discount.

Dr. Morris also confirmed that what employees do on their own time regarding the election process was up to them. He also made clear that campaigning on school time should not occur.

Having listened to the evidence, observed the demeanor of the witnesses and having reviewed the exhibits, I **FIND** the preceding to be the operational facts of this case.

LEGAL DISCUSSION

This matter arises out of a complaint by Lefkowitz and Markman against Distler, not the Board of Education. At no time has any evidence been adduced that the Board of Education has participated in or acted in an improper manner or had anyone do so on their behalf. There is only a speculative view that Ms. Distler acted for a candidate she supported. The proofs in this case do not support that mere speculation.

It is clear from the allegations in the petition that nothing, as a matter of law is alleged to be linked to the school district itself nor someone acting as agent for the Board. The Commissioner of Education specifically is limited to jurisdiction in matters arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. In this case we are talking about a school election but the actions alleged in the petition are beyond the scope with which either the school district and the board, nor its authorized representatives, have the authority to deal.

Distler obtained an advertising discount for all candidates. She concedes that she never informed them and assumed they would find out when calling the individual publications. This hardly seems the best approach, however, that is not the issue here. Hindsight is always 20/20. If a benefit is obtained for all candidates it would be best if all candidates were simultaneously advised. Nonetheless, no cognizable violation has been proven in this matter.

Additionally, it is clear that the school Board does not condone the use of paid school time for campaigning. No concrete proof that this has occurred was brought forth in this case. While these may be issues for the Board and issues of policy to make school Board elections run more smoothly and evenly they are insufficient as proof to invalidate the election.

Additionally, there is no reference to the statutorily prescribed procedure about which is being complained. Pursuant to *N.J.S.A.* 18A:14-63.12 the Commissioner of Education shall inquire into alleged violation of statutorily prescribed procedures for school elections. As a result the petition must hereby be dismissed as failing to state a cause of action cognizable in this forum and by the Commissioner of Education. It should be pointed out that even in cases where irregularities are shown it is well established that elections are to be given effect whenever possible and are not to be set aside unless it can be shown that the will of the people was thwarted, was not properly expressed, or could not fully be determined. *In the Matter of the Annual School Election held in the Township of Pitsgrove, Salem County*, 1976 *S.L.D.* 585 at 589. Here, even the petitioners acknowledge that they are unable to show that any item which they brought out was sufficient to show that the will of the people was thwarted and would have changed the outcome of the election.

Conclusion

Based upon the foregoing, I **CONCLUDE** that the proofs in this case do not give rise to a cause of action within the jurisdiction of the Commissioner of Education and that the petition in this case must be dismissed.

Order

It is hereby **ORDERED** that the petition be and hereby is dismissed.

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

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

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

3/25/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ
Receipt Acknowledged:

3/28/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 29 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al(FV)mxl

APPENDIX

Witnesses

For Petitioner

Paul Cohen
Judy Distler
Marvin Markman

For respondent

none

Exhibits

C-1 Transcript of remarks of Dr. Harold Morris - meeting March 29, 1995

P-1 Letter from Cohen to Morris
P-2 Letter from Cohen to Morris
P-3 (ID only) Letter to Ms. Butler

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF TEANECK, : DECISION
BERGEN COUNTY. :

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

Petitioners' exceptions take issue with the Administrative Law Judge's (ALJ) conclusion that there was no cognizable violation of election procedures in the within matter. They argue that the record and testimony elicited at the hearing clearly belie such a conclusion. Petitioners assert "***Ms. Distler admitted to working with and informing only one candidate. The claim that she was attempting to get discounts for all the candidates is a subterfuge." (Petitioners' Exceptions at p. 2) Further, they assert that this individual

> ***us[ed] Board facilities, working for a personal candidate on Board time, and when calling from the Board, on Board time the callers could only assume that she was acting in her capacity as public relations director of the Board. (*Id.*)

In response, the Board contends that petitioners' exceptions have failed to set forth any basis, other than their mere disagreement with the outcome, which would warrant the reversal of the ALJ's decision in this matter. The Board argues that during the hearing the ALJ

"***had the opportunity to review all documentary evidence, as well as listen to the oral testimony of witnesses and to observe the demeanor of those witnesses***" and, based on this totality, properly concluded that "no evidence had been adduced 'that the Board of Education has participated in or acted in an improper manner or had anyone do so on their behalf'***." (Board's Exceptions at pp. 2, 3, citing Initial Decision at p. 6)

Upon a careful and independent review of the record of this matter, the Commissioner concurs with the ALJ that petitioners have not met their burden of establishing any violation of the school election laws which thwarted the will of the people or changed the outcome of the election and, therefore, the petition is properly dismissed.*

Accordingly, the Commissioner adopts the recommended decision of the OAL for the reasons expressed therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is noted that *P.L.* 1995, *c.* 278 repealed *N.J.S.A.* 18A:14-1 through 104 inclusive, and further states that "For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws." The Commissioner, therefore, does not find it necessary to reach to the ALJ's conclusion with respect to the appropriate scope of inquiries brought under *N.J.S.A.* 18A:14-1 *et seq.*

188-96

188-96E

CAROL J. CALLOWHILL, THERESA KELLEY AND BARBARA PERSKIE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, MARVIN HILL, PRESIDENT, AND DR. CHARLES B. HAWN, JR., SECRETARY, ATLANTIC COUNTY,	:	
RESPONDENTS.	:	

May 13, 1996

CAROL J. CALLOWHILL, THERESA KELLEY AND BARBARA PERSKIE,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, MARVIN HILL, PRESIDENT, AND DR. CHARLES B. HAWN, JR., SECRETARY, ATLANTIC COUNTY,	:	
RESPONDENTS.	:	

For Petitioners, Hankin, Sandson and Sandman (Robert S. Sandman, Esq.)

For Respondents, George G. Frino, Esq.

This matter comes before the Commissioner of Education by way of Petition of Appeal with Motion for Emergent Relief, filed on April 29, 1996, by three members of the respondent Atlantic City Board of Education, all of whom are representatives of sending districts appointed to membership on the receiving Board pursuant to N.J.S.A. 18A:38-8.1 et seq. Petitioners were seeking a directive compelling the Board to consider, at a meeting to be held that night, their evaluative comments regarding the Superintendent, Board Business Administrator and Board Solicitor in the same manner as are all other Board members' comments. Petitioners' expectation that this would not occur was based on a legal opinion rendered by Board counsel, submitted as part of petitioners' application. However, Petitioners' application was received too late in the day to permit response by the Board or adequate hearing prior to the meeting in question, and the parties were so notified. Thereafter, petitioners sought renewal of their application on grounds that the expected evaluative discussions had not occurred on April 29, 1996 as planned, but were now expected to occur at a meeting to be held on May 14, 1996. Accordingly, the Board was directed to file responsive papers and the matter was set down for summary determination on the application for emergent relief.

In their papers, Petitioners argue that any attempt to prevent their participation in the evaluation of the Superintendent would violate a prior emergent order of the Deputy Commissioner restraining the Board from taking any action on the contract of the Superintendent without the inclusion of Petitioners. In particular, they note the Deputy's directive that

> ***respondent Board must either postpone or include petitioners in, *and provide them with pertinent background materials for, any discussions or votes on the superintendent's employment contract* held pending issuance of the Commissioner's decision on the merits of this matter. *Emphasis added.* (Affidavit of Carol J. Callowhill at p. 2)

With respect to all three positions at issue, Petitioners argue that they will be irreparably harmed by the Board's failure to consider their evaluative input, as they will then be unable to make any meaningful contribution to the processes and documents upon which subsequent employment decisions, including contracts, for these positions will be based, and on which, in the cases of Superintendent and Business Administrator, Petitioners contend they are entitled to vote. As to the merits of their appeal, Petitioners essentially reiterate the argument of their prior motion as to the applicability of N.J.S.A. 18A:38-8.1 to the position of Superintendent, and contend that this statute is equally applicable to the Business Administrator, who is by law a certificated member of the professional teaching staff. Finally, Petitioners argue that, notwithstanding the related but separate question of their ability to *vote* on positions covered by N.J.S.A. 18A:38-8.1, as full members of the Board they may not be precluded from discussions and deliberations even on positions on which that statute does *not* give them the authority to vote.

In reply, the Board initially reiterates the argument of its filings on the prior motion that the Commissioner of Education is without jurisdiction to decide this matter, as it fundamentally arises from a facial attack on the controlling statute's improper apportionment of voting power and dilution of protected class membership voting in violation of the U.S. and State Constitutions. The Board also reiterates that its narrower interpretation of the statute as it now exists is fully supported by the legislative history of the enactment, particularly the Governor's veto message, and that administrative Department of Education memoranda interpreting the statute in a broader fashion are both erroneous and of no legal import. Instead, the Board avers

that notwithstanding that the Commissioner may not decide the statute's constitutionality, "[his] obligation is to uphold the law in a manner that supports its validity and avoids an unconstitutional application" (Board's Reply Brief at p. 12). Moreover, "Allowing sending districts to vote on matters not strictly based upon the use of facilities or direct receipt of personnel services, would lend great force to the likelihood of a successful constitutional attack." (Board's Reply Brief at p. 13) Finally, the Board argues that it has in all respects complied with the Deputy Commissioner's prior order in that it has indefinitely postponed all discussion of the Superintendent's contract. Thus, Petitioner's cannot meet the standard for grant of injunctive relief and their application must fail.

Pursuant to his authority under N.J.S.A. 18A:4-33, the Commissioner has designated the Deputy Commissioner to hear and decide this emergent matter. Upon consideration of the parties' arguments and the standards for appropriate granting of emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), the Deputy finds that, in light of his prior determination as to the scope, pending full adjudication on the merits, of sending board members' authority under N.J.S.A. 18A:38-8.1, it would be inconsistent to hold that Petitioners may vote on the Superintendent's contract, but then have no concomitant entitlement to participate in the evaluations underlying that action. If Petitioners were to be precluded from such participation, even if it were later granted them prior to any impending contract vote, they would be severely disadvantaged in having been foreclosed from deliberations to that point; alternatively, if it is found on the merits that participation was not envisioned by controlling statute, the Board may discount any prior documents or discussions in making its ultimate contractual determination. A similar situation exists with respect to the School Business Administrator, whose placement under the purview of N.J.S.A. 18A:38-8.1 is consistent with the Deputy's understanding of the intended scope of that statute. With respect to the Board Solicitor, however, where no entitlement to vote on the underlying contract has been shown, even for the purposes of an emergent relief application, no directive compelling participation in evaluative discussions will issue.[1]

[1] The Deputy Commissioner notes that the matter underlying this application was brought by Petitioners as a Request for Declaratory Judgment, expressly requesting the Commissioner to construe the provisions of a specific school law, consistent with N.J.A.C. 6:24-2.1 et seq. While the Board may raise Constitutional defenses and seek to characterize the underlying matter

Accordingly, petitioners' Motion for Emergent Relief is GRANTED with respect to the positions of Superintendent and School Business Administrator, but DENIED with respect to the position of Board Solicitor. The Atlantic City Board of Education is, therefore, directed to accept and consider Petitioners' evaluative input for the specified positions in the same manner in which it accepts and considers the evaluative input of all other Board members; or alternatively, to refrain, pending resolution of the appeal on the merits, from the conduct of any evaluation of the Superintendent or Business Administrator that does not include Petitioners.

IT IS SO ORDERED.

DEPUTY COMMISSIONER

May 13, 1996

Date of Mailing, May 14, 1996

as a challenge to the facial validity of the statute at issue, this stance does not preclude consideration of the within emergent application arising from Petitioner's duly filed Request.

189-96

189-96

B.J., on behalf of minor children, M.K. and F.K.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12338-95
AGENCY DKT. NO. 432-11-95

B.J., ON BEHALF OF THE MINOR
CHILDREN M.K. AND F.K.,
Petitioner,
v.
TENAFLY BOARD OF EDUCATION,
Respondent.

Mark P. Fierro, Esq., for petitioner (Fierro, Fierro & Izzard, attorneys)

James L. Plosia, Jr., Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: March 22, 1996 Decided: March 25, 1996

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter was transmitted to the Office of Administrative Law as a contested case by the Department of Education on December 13, 1995 with a request for an expedited hearing in light of the fact that the matter involved the question of entitlement to attend the respondent's public schools. See *N.J.S.A.* 18:38-1 *et seq.*

An amendment to the original petition subsequently was filed in January 1996 by counsel and an answer to the amended petition was submitted in response.

Hearings were scheduled to commence on March 4, 1996 and to continue until March 6, 1996. However, on the first hearing date counsel conferred with the undersigned administrative law judge and with their respective clients and an agreement tentatively was reached to settle the case.

Thereafter, a stipulation of settlement was submitted to the undersigned, which document is attached hereto and made a part hereof.

I have reviewed the terms and conditions of the proposed settlement as set forth in the stipulation attached hereto and **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures of counsel which appear on the amended settlement agreement;

2. The settlement as set forth in the amended settlement agreement fully disposes of all issues in controversy and is consistent with law.

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

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

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

March 25, 1996
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

March 27, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mh

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
MAR 22 11 14 AM '96

APRUZZESE, McDERMOTT,
MASTRO & MURPHY, P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
Attorneys for Tenafly Board
of Education

B.J., ON BEHALF OF THE MINOR CHILDREN M.K. AND F.K., Petitioner, v. TENAFLY BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION AGENCY DOCKET NO. 432-11-95 **STIPULATION OF SETTLEMENT**

The parties in the above-captioned matter having reached an amicable settlement of this case, the following terms are hereby agreed to between the parties:

1. Petitioners will dismiss their Petition of Appeal with prejudice.

2. The parties agree that, as of September of 1995, the three Kamal children were domiciled in Tenafly, and are therefore entitled to a tuition-free education in the Tenafly school system at the present time.

3. In consideration of the legal fees expended by the Tenafly Board of Education in this matter, and due to the administrative time expended in this case, Petitioners hereby agree to pay to the Tenafly Board of Education the sum of $4,000.00. Said sum shall be paid to Tenafly over an 8 month

LAW OFFICES
APRUZZESE, McDERMOTT,
MASTRO & MURPHY
A PROFESSIONAL CORPORATION
25 INDEPENDENCE BOULEVARD
P.O. BOX 112
LIBERTY CORNER, N.J. 07938
(908) 580-1776

period, beginning in March of 1996, with $500.00 being forwarded by check payable to the "Tenafly Board of Education" on or before the 15th of each month. Said payments will be forwarded to Wayne Demikoff, Tenafly Business Administrator, for each month beginning in March, 1996 and ending in October 1996.

4. Petitioners will have a 10 day grace period (between the 15th and 25th of each month) within which to forward the $500.00 check to Mr. Demikoff. If said payments are not made by the end of this 10 day grace period (or the 25th of each month), the Tenafly school district will be entitled to enter this Stipulation of Settlement as a default judgment in Superior Court, Bergen County.

By: _____
Mark P. Fierro
Attorney for Petitioners

By: _____
James L. Plosia Jr.
Attorney for Respondent

DATED:

DATED:

As the Administrative Law Judge assigned to this matter, I hereby ~~accept~~ recommend for approval each and every term of this Stipulation of Settlement.

_____
STEPHEN G. WEISS, A.L.J.

DATED: 3/25/96

JLP:rlm:46967

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
P.O. Box 112
Liberty Corner, N.J. 07938
(908) 580-1778

OAL DKT. NO. EDU 12338-95

B.J., on behalf of minor children, M.K. and F.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them and other litigants whose controverted matters have been duly transmitted to OAL against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

COMMISSIONER OF EDUCATION

MAY 13, 1996
DATE OF MAILING MAY 14, 1996

190-96

(43-96E)
190-96

N.O., on behalf of her minor child, O.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent contested decision that her son be denied attendance in Regional District's schools under the provisions of *N.J.S.A.* 18A:7B-12 and 7B-12.1 (Homeless provisions).

ALJ concluded petition was abandoned as petitioner failed to appear for a hearing of which she was properly noticed. Matter was dismissed.

Commissioner adopted findings and determination in initial decision, concurring that the ALJ made a reasonable determination to dismiss this matter pursuant to *N.J.A.C.* 1:1-14.4 after petitioner failed to appear for a hearing and offered no explanation for such nonappearance.

MAY 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL FOR FAILURE

TO PROSECUTE

OAL DKT. NO. EDU 203-96

AGENCY DKT. NO. 7-1/96

N.O., ON BEHALF OF HER MINOR CHILD, O.O.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT,

Respondent.

No appearance by or for petitioner, N.O.

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

Record Closed: March 26, 1996 Decided: March 27, 1996

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

N.O., petitioner, sought review of the Bridgewater-Raritan Board of Education, respondent's, decision that her son be denied attendance under the provisions of N.J.S.A. 18A:7B-12 and -12.1.

The matter was opened on January 16, 1996. The petitioner filed a petition of appeal with the Commissioner of Education challenging the Board's determination. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14F-1 through -13. The transmission included a request, treated as a motion, for emergent relief. The motion for emergent relief was argued on January 29, 1996, at the Office of Administrative Law in Trenton.

An order denying emergent relief issued on January 31, 1996. The Commissioner reviewed the order and remanded the matter for a hearing on the merits, particularly evaluation of the petitioner's circumstances under the regulations governing homeless students. The Commissioner also requested further fact finding as to domicile. O.O. was readmitted to the Board's schools pending outcome of this matter.

The matter was rescheduled for March 18, 1996 at the Bound Brook Municipal Court. Notices of hearing were mailed on March 4, 1996. No notice was returned as undelivered or undeliverable. At the appointed time, the Board's counsel and witness appeared. There was no appearance by or for the petitioner.

After waiting for more than thirty minutes, I took limited testimony from the Board's Director of Student Personnel Service. His responsibilities include dealing with and placing homeless pupils.

The witness stated that N.O. met with the Crim Road School principal on March 13, 1996. N.O. informed the principal that she would take residence at 119 [B] Court. The principal advised N.O. that the address N.O. provided was in the attendance area of the Hamilton Elementary School. The principal reviewed N.O.'s options. O.O. could remain at Crim School for the balance of the year with the superintendent's permission. O.O. could begin attendance at Hamilton School.

Later, the parent advised the principal that O.O. would attend the Hamilton School. The principal advised N.O. that she would need documentation. The principal advised N.O. of the need for documentation several times. No documents were forth coming.

On the morning of hearing, March 18, 1996, N.O. attempted to enroll O.O. at the Hamilton School. She presented a lease for premises at 119 [B] Court, Bridgewater. However, the lease is in the name of another person and identifies a total of three persons who will occupy the premises, none of whom is the petitioner, the petitioner's husband or O.O.

The witness also testified that Hamilton School will continue to pursue the matter and will get documentation if possible. It is the Board's intent to keep O.O. in attendance, provided it has sufficient proof that the pupil has, in fact, returned to the district, after decision in this matter.

The present circumstances are these. The case came on for hearing on request for emergent relief on January 29, 1996. On January 31, 1996, an order issued denying the emergent relief based on N.O.'s testimony that the family was moving from place to place every few weeks and that none of the places the family stayed was within the district or within Somerset County.

N.J.A.C. 6:3-8.3(b) provides, "Additionally, a child or youth shall be considered homeless if he or she is: . . . 6. The child of a homeless family which is out of necessity living with relatives or friends; . . . ." It is arguable that this language means living with relatives or friends in a fixed place. Thus, once the "stay put" provisions of the statute were exhausted, a district of responsibility could be determined. That analysis, which might provide useful guidance, will await another day.

The petitioner has failed to appear for a hearing of which she was properly noticed. N.J.S.A. 1:1-14.4 provides that, if, after appropriate notice, neither a party nor a representative appears at any scheduled proceeding, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the non-appearance within one day, the judge may, pursuant to N.J.A.C. 1:1-3.3(b)(c), direct the Clerk to return the matter to the transmitting agency for appropriate disposition. In consideration of the petitioner's pro se status, and pursuant to N.J.A.C. 1:1-14.6(h), I allowed one week for N.O. to contact the judge. She did not.

Accordingly, I **FIND** and **CONCLUDE** that the petition of appeal has been abandoned. I direct the Clerk of the Office of Administrative Law to return the matter to the Department of Education for appropriate disposition.

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

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

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

27 MARCH 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

March 29, 1996
DATE

Deborah Contaxakis
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 4 1996
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

Board's Exhibit:

A Photocopy of lease of premises at 119 [B] Court, undated, 2 pp. and affidavit of domicile, March 18, 1996.

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

N.O., on behalf of her minor child, O.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner affirms the initial decision of the Administrative Law Judge (ALJ) for the reasons expressed therein. The Commissioner concurs that the ALJ made a reasonable determination to dismiss this matter pursuant to *N.J.A.C.* 1:1-14.4 after petitioner failed to appear for a hearing for which she was properly noticed and offered no explanation for such non-appearance. In so ruling, the Commissioner is also mindful that petitioner has not filed exceptions nor offered reasons for her failure to appear following the ALJ's issuance of the initial decision.

Accordingly, the Commissioner adopts the initial decision and the within appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 13, 1996

DATE OF MAILING MAY 14, 1996

191-96

191-96E

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
D.F. AND R.F., individually and as guardians of D.F.,	:	DECISION ON MOTION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought emergent relief compelling the testing of respondents' son, D.F., for tuberculosis or compelling other suggested schooling alternatives if the parents refuse to do so.

ALJ granted emergent relief finding: 1) considerable harm has occurred as D.F. has been without public or private education for three months; 2) State law plainly calls for application of the Mantoux test in the instance of a child transferring into a school from outside the State without a record that such test occurred within the previous six months; 3) none of the material facts outlined by the Board and supplemented by affidavit have been controverted by respondents; 4) there is reasonable probability that the Board will prevail if the case advances to plenary hearing. ALJ ordered respondents to permit the Board physician to administer the Mantoux test or have their personal physician administer the test. If respondents refuse, the ALJ ordered them to resume D.F.'s education immediately by either placing him in a private or parochial school or the initiation of Board-approved home schooling according to school law. ALJ ordered scheduling of plenary hearing.

Commissioner reversed ALJ's order and denied Board's Motion for Emergent Relief. Commissioner did not agree with the ALJ that irreparable harm had been established in that the Board had not established that D.F. cannot be provided with a thorough and efficient education during the pendency of this matter through normal mechanisms for the provision of education to children precluded from school attendance for medical reasons, i.e., home instruction pursuant to *N.J.A.C.* 6:28-4.5. Further, the Commissioner did not agree that Board would likely succeed on the merits, as this case represents a novel issue of law, application of the Religious Freedom Restoration Act of 1993, which remains to be addressed at plenary hearing. Board was ordered to provide home instruction pending the final determination.

May 14, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING EMERGENT RELIEF

OAL DKT. NO. EDU 2696-96
AGENCY DKT. NO. #125-4/96

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,
Petitioner,

v.

D.F. AND R.F., INDIVIDUALLY AND AS PARENTS OF D.F.,
Respondent.

R.F., *pro se*

Robert J. Pruchnik, Esq., for respondent (Kenny and Gross, attorneys)

BEFORE **JOSEPH LAVERY**, ALJ:

THE EMERGENT MOTION

Petitioner, the Middletown Township Board of Education (Board) asks for emergent relief. It moves for an order to compel the testing of D.F. for tuberculosis, or for an order compelling other suggested schooling alternatives if the parents refuse to do so.

Respondents, D.F. and R.F., the parents of D.F., contest the motion, arguing that federal law prohibits the order for which the Board applies.

Today's order grants the Board's motion.

ANALYSIS

Background:

Respondent parents and their three children moved to the Middletown Township school district from Staten Island, N.Y. at some time prior to the onset of the 1995-96 school year. For that year, they enrolled their two daughters in the seventh and eighth grade of Thompson Middle School. Their son, D.F., was placed in the first grade of Nut Swamp School. The immunization records from the family's private physician requested by the district showed that the two girls had undergone Tuberculin testing on May 3, 1995. D.F., in contrast, had been tested well before this, on May 3, 1994. The timing of the girls' testing satisfied the school requirements for pupils transferring from out of state. The son's did not. His test was more than six months preceding transfer.

After inquiries by the school nurse and later the principal of Nut Swamp School, it became clear that respondents were not going to provide the records of necessary Tuberculin evaluation for D.F., nor would they permit their son to undergo the test imposed on the girls. The test in issue is the Mantoux Tuberculin Test (Mantoux Test), and it is mandated by the State Department of Health in a document entitled "Mantoux Tuberculin Testing in Public Schools Required in 1995-1996." The parents justified their refusal by relying on their religious beliefs. Eventually, after much discussion and some delays to accommodate the parents, the principal excluded the child from the Nut Swamp School on February 8, 1996, for failure to document or to have administered the Mantoux Test.

Since that time the child has not formally been placed in private school, nor have arrangements been made to put home instruction in place. Consequently, D.F. has been without thorough and efficient education, apart from informal efforts by D.F.'s mother. For that reason, the Board now moves in its petition for Mantoux testing, or, in the alternative, those other courses of action discussed below.

Arguments of the Parties:

The Board's argument:

In support of its petition, the Board contends that nothing short of emergent relief can remedy the educational deprivation of D.F. With the parents insisting the Mantoux Test is a

prohibited exercise of religion by the government, *i.e.*, imposing the "religion" of medicine, which the parents refuse to allow, D.F. has already been denied almost three months of the schooling required by law for thorough and efficient education. The Board believes these circumstances will not change. Consequently, the Commissioner must impose his authority on the parents, as a matter of law. Part of his authority is found in statutes and rules cited in the Board's brief which support the imposition of the Mantoux test for children transferring into a school from outside the state.

The parents' reply:

Through the mother, R.F., the parents argue that their membership in the religious group known as the "Congregation of Eternal Wisdom" exempts them from the test. They believe federal law, as cited in documents prepared by Minister David J. Dalton, Doctor of Chiropractic, (and now part of this record), interdicts the operation of State law and rules on their son's circumstance, notwithstanding that their two daughters had undergone the Mantoux test. Recalling that she herself had served as a volunteer in the school without being tested, R.F. testified that this arrangement was inconsistent with the Board's avowed fear of contagious disease.

CONCLUSIONS OF LAW

The Board seeks emergent relief under *N.J.A.C.* 6:24-1.5(b). The standard for application of emergent relief calls for the following considerations:

1. Is the emergency relief necessary to prevent irreparable harm?
2. Is the legal right underlying the petition unsettled in the law?
3. Are all material facts controverted?
4. Is there a reasonable probability of ultimate success on the merits?

[*N.J.A.C.* 1:1-12.6(f); *Crowe v. Di Gioia,* 90 *N.J.* 126, 132-33 (1982)]

Applying that standard, the Board's motion must be granted, for the following reasons:

First, D.F. is well into his third month without public or private education. The informal efforts referred to by his mother are insufficient to persuade that the home instruction anticipated by law is taking place. This suggests that considerable harm has already occurred, which should be cured at the earliest possible time.

Second, the law is not unsettled on this subject. It plainly calls for application of the Mantoux test in the instance of a child transferring into a school from outside the state without a record that such test occurred within the previous six months. *N.J.A.C.* 6:29-2.3, implementing *N.J.S.A.* 18A:16-2 and *N.J.S.A.* 18A:40-16, as well as the State Department of Health document entitled "Mantoux Tuberculin Testing in Public Schools Required in 1995-1996." Similarly, the law permits exclusion of a child whose parents do not comply with this or similar legal requirements. *N.J.S.A.* 18A:40-18, *N.J.S.A.* 26:4-6, *N.J.S.A.* 18A:35-4.8, *Mountain Lakes Bd. of Educ. v. Maas*, 56 *N.J. Super.* 245 (App. Div. 1959). The citations to federal law of Minister Dalton, D.C., do not offset the foregoing.

Third, none of the material facts outlined in the Board's petition and supplemented by the affidavit of Marilyn Cohen, Assistant Superintendent for Pupil/Personnel Services of the Middletown Township Board of Education have been controverted by respondents.

Fourth, in the face of the foregoing, there is a reasonable probability that the Board will succeed on the merits if the case advances to plenary hearing.

ORDER

I ORDER therefore that pending plenary hearing on the full merits of the Board's petition:

1. The parents of D.F. must now (a) permit the Board physician to administer the Mantoux test, or (b) have the Mantoux test administered by their personal physician, as a condition to re-entry to the Nut Swamp School.

2. If the parents choose not to do this, they must resume D.F.'s education immediately, either through placement in a private or parochial school, or through initiation of home-based education as regulated by school law and its implementing rules.

3. Plenary hearing now must be scheduled on the full merits.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

April 23, 1996

DATE

JOSEPH LAVERY, ALJ

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
D.F. AND R.F., individually and as guardians of D.F.,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this matter and the initial Order Granting Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. Respondents' exceptions and the Board's reply thereto were timely filed in accordance with the time schedule established for the filing of such exceptions.

Respondents' exceptions initially recast and reiterate what they contend is the fundamental issue advanced before the Administrative Law Judge (ALJ) in this matter, erroneously left unaddressed by his Order. Essentially, they maintain that because medicine is a "religion" involving false gods and goddesses, the State and the Board are precluded by federal law from requiring the Mantoux test for tuberculosis as a condition for their son's school admission. Respondents argue that under the "Religious Freedom Restoration Act of 1993," such a requirement is a prohibited exercise of religion by the government, i.e., imposing the "religion of medicine." Respondents maintain that D.F. was "ejected" from school "because ***we would not except (sic) the State of New Jersey's illegal religion, 'the religion of

medicine'." (Respondents' Exceptions at p. 2) Consequently, D.F. has been denied three months of education to which he is constitutionally entitled due to this illegal requirement.

Respondents further assert that the Board has in the past accommodated students who are unable to attend school because of injury or illness and contend that "***the Equal Protection Clause of the Fourteenth Amendment requires the same accomodation (sic) for [their] child.***" (*Id.*) They suggest that the Board should provide a TV line from school and testing by a teacher as an alternative educational method for D.F.

Finally, notwithstanding their assertion that the Board has an affirmative obligation to assure D.M.'s constitutional entitlement to an education through accommodation, respondents dispute the ALJ's finding that the education he is currently receiving from them at home is "***insufficient to persuade that the home instruction anticipated by law is taking place." (Respondents' Exceptions at p. 4, quoting the Initial Decision at p. 3) Rather, they aver that D.F.'s teacher and another mother have been giving them his homework and classwork and they have been utilizing these materials to teach D.F. Respondents urge

> The Fact is [we were] following the home policy formally allowed by the school to accomodate (sic) the educational need of homebound students, a common practice. Therefore as already stated and established, the teacher provided the work and the plan/schedule and [we] merely implemented it. Therefore, [the] Judge's representation that D.F.['s] education was inadequate is Clearly a Plain Error and an out an[d] out misrepresentation of the facts. (Respondents' Exceptions at p. 4)

In reply, the Board argues that its exclusion of respondents' minor son, D.F., was "***an appropriate exercise of its statutory authority***," citing *N.J.S.A.* 18A:40-18, *N.J.S.A.* 26:4-6, *N.J.S.A.* 18A:35-4.8 and *Mountain Lakes Board of Education v. Maas*, 56 *N.J. Super.* 245 (App. Div. 1959) as its support for this proposition. (Board's Reply Exceptions at pp. 2-9)

The Board next asserts that, contrary to respondents' apparent position that they are complying with the Compulsory Education Laws by providing D.F. with "home schooling," they are not, in fact, in compliance with such laws in that respondents have "***failed to produce any documentary or testimonial evidence which would support [their] contention that [they are] providing [their] minor son D.F. with an equivalent instruction at home and/or that a certain teaching staff member in the District is assisting [them] in the implementation of a home schooling program.***" (*Id.* at p. 10)

Moreover, the Board avers that respondents have, through their actions, precluded the Board from "carrying out its obligation to provide D.F. with the public education to which he is constitutionally and statutorily entitled." (*Id.* at p. 12) While recognizing that the relationship between a child and the school district is mandatory in nature and firmly established, (*Jackson v. Hankinson and the Board of Education of New Shrewsbury*, 51 *N.J.* 230, 235 (1968)), the Board maintains that "such a relationship cannot exist where a parent refuses or fails to send a child to school." (Board's Reply Exceptions at p. 12) Further elaborating, it asserts

> In other words, attendance by the child is a condition precedent for the existence of this relationship. It therefore follows that, if this condition is not met, the local school district is under no obligation to continue with its efforts to provide a student with a public education and, more importantly, that it should not be held liable for failure to provide the child with a public education. (*Id.*)

As such, the Board charges that, due to the unreasonable, protracted actions of respondents, D.F. has, for the past three months, remained at home without the benefit of a thorough and efficient education.

The Board next proffers that, notwithstanding respondents' arguments to the contrary, the ALJ properly categorized this matter as a dispute arising under school law. Although respondents allege that in deciding this matter, the ALJ erred in failing to consider

relevant federal law, they fail "to set forth any legal analysis which would explain how Federal law impacts upon the instant matter and, furthermore, [fail] to demonstrate how Federal law would pre-empt the State law relied upon by [the] ALJ ***in reaching his decision.***" (Board's Reply Exceptions at p. 13)

Finally, the Board's reply exceptions review its arguments advanced before the ALJ with respect to its satisfaction of the *Crowe* standard for the granting of emergent relief in this matter which, it contends, the ALJ rightfully recognized and accepted in granting his Order.*

Upon consideration of the record in this matter, including the audio tape of the proceedings before the ALJ on April 23, 1996, the Commissioner determines to reverse the Order of the ALJ granting the Board's request for emergent relief as he finds that the Board has not met the standards necessary for the granting of such extraordinary relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for the reasons detailed below.

Initially, the Commissioner does not agree with the ALJ's determination that irreparable harm has been established herein, in that he finds that the Board has not demonstrated that D.F. cannot be provided with a thorough and efficient education during the pendency of this matter through normal mechanisms for the provision of education to children precluded from school attendance for medical reasons, i.e., home instruction pursuant to *N.J.A.C.* 6:28-4.5. Contrary to the Board's exception assertions, while a child may be forestalled from day-to-day

*It is noted that the Board's reply exceptions also raised procedural objections with respect to respondents' exceptions. The Board initially alleges that although respondents were directed to submit their exceptions in this matter no later than noon on Friday, May 3, 1996, the Board was not served with its copy of such exceptions until Monday, May 6. The Commissioner observes that the Board raised such argument with the Bureau of Controversies and Disputes upon its receipt of the exceptions, whereupon it was granted two extensions of time within which to file reply exceptions. As such, it is determined that the Board experienced no undue prejudice from any "delay" in respondents' service of exceptions. The Board also contends that respondents' exceptions "***incorporate and ***refer to a number of factual representations which [they] failed to make during oral argument***," in violation of *N.J.A.C.* 1:1-18.4(c). (Board's Reply Exceptions at pp. 1-2) In this regard, it is not clear what "factual representations" are being referenced. Notwithstanding, the Commissioner's determination in this matter did not rely on any factual representations which were not a part of the record before the ALJ.

school attendance for medical reasons, this does not in itself constitute a termination of the Board's obligation to provide such child a free public education. With respect to likelihood of success on the merits, the Commissioner concludes that the fundamental question as to application of the federal law relied upon by respondents to the within situation represents a novel issue of law which remains to be addressed through plenary proceedings, particularly in view of the fact that the primary law cited, the Religious Freedom Restoration Act of 1993 at Sec. 3(c) Judicial Relief, specifies

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. ***

Finally, the Commissioner determines that a weighing of the equities in this matter favors respondents in that requiring the Board to provide homebound instruction for D.F. does not impose an extraordinary effort or hardship on the Board. Moreover, in that D.F. is not physically present in the school, the Board's concerns with regard to the safety and well-being of its students and employees due to possible exposure to a communicable disease are not compromised.

Accordingly, the recommended Order of the ALJ is reversed and the Board's Motion for Emergent Relief is denied. This matter is hereby returned to the OAL for an expeditious plenary hearing on the merits as contemplated by the ALJ in his Order. Further, the Board is ordered to provide home instruction to minor child, D.F, until such time as the Commissioner's final determination on the merits of this matter has been rendered.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 14, 1996
Date of Mailing, May 15, 1996

191-96E

EDU #2696-96
C # 191-96E
SB # 44-96

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
D.F. AND R.F., individually and as guardians of D.F.,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, May 14, 1996

For the Petitioner-Appellant, Kenny & Gross (Robert J. Pruchnik, Esq., of Counsel)

For the Respondents-Respondents, D.F. and R.F., pro se

This is an appeal by the Board of Education of the Township of Middletown (hereinafter "Board") from the determination of the Commissioner of Education to deny its application for emergent relief.

The underlying controversy between the Board and respondents developed after respondents moved to New Jersey from Staten Island and enrolled their three children in the Middletown School District in September 1995. Review of the immunization records provided by respondent at that time indicated that although the Mantoux Intradermal Tuberculin Test ("Mantoux Test") had been administered to respondents' two oldest children in May 1995, D.F., who was entering the first grade, had not been

10/2/96

tested since May 1994. Since the State Department of Health's guidelines required that out-of-state transfer students be tested if the Mantoux Test had not been administered to them within the previous six months, the District attempted to obtain respondents' consent to administer the test. When respondents notified the District that the family's religious beliefs prohibited vaccination or medical testing by the State, they were advised that D.F. would be excluded from school if they did not have him tested by January 22, 1996. That deadline was extended to February 5, 1996, and when respondents had not complied by February 8, D.F. was excluded from school. Since that point, the only education D.F. has received has been provided informally by his mother.

In April 1996, the Board filed a petition with the Commissioner seeking a declaratory judgment that it had acted properly in excluding D.F. from school and that respondents could not claim an exemption from the testing requirement on the basis of their religious principles. The Board also sought a directive from the Commissioner that respondents either permit administration of the Mantoux Test to D.F. or resume his education at a private school or through home schooling. At the same time, the Board filed an application for emergent relief with the Commissioner seeking the same relief as requested in its petition.

The Administrative Law Judge ("ALJ") recommended that emergent relief be granted to the Board pending the outcome of a hearing on the merits of its petition to the Commissioner. The Commissioner rejected the ALJ's determination, directing instead that the Board provide home instruction to D.F. pending the outcome of hearings on the merits of the underlying matter.

The Board filed the instant appeal to the State Board.

On July 5, 1996, the Board filed its brief in support of the appeal, arguing that it had met the standards entitling it to the emergent relief it had sought from the Commissioner. Although respondents' answer brief was due on July 25, 1996, respondents did not file their response until August 19, and the Board objected to such late filing.

After reviewing the record developed thus far and the arguments made by the Board, we deny its application for emergent relief substantially for the reasons expressed by the Commissioner. In so doing, we agree that the question of whether the Religious Freedom Restoration Act would apply in this case so as to permit D.F. to be exempted from the Mantoux Test is a novel one. We also concur with the Commissioner that the Board has not demonstrated the necessity of relieving it from its obligation to provide D.F. with a thorough and efficient education during the pendency of this matter, and we affirm the Commissioner's directive that the Board provide D.F. with home instruction until he renders his final determination on the merits. We also join the Commissioner in requesting that the Office of Administrative Law conduct the hearings in this matter on an expeditious basis.

In view of our determination, we do not find it necessary to relax the regulatory time limits so as to consider respondents' answer brief.

Wendel E. Daniels opposed.

October 2, 1996

Date of mailing OCT 04 1996

191-96

293-97
(191-96E)

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
D.F. AND R.F., individually and as guardians of D.F.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board sought summary decision compelling the testing of respondents' son, D.F., for tuberculosis or compelling other suggested schooling alternatives if the parents refuse to do so.

ALJ granted summary decision to the Board. ALJ ordered respondents to permit the Board physician to administer the Mantoux test to D.F. or have their personal physician administer the test. If respondents refuse, the ALJ ordered them to enroll D.F. in either a private or parochial school or to initiate Board-approved home schooling according to school law, thus, ending the Board's current home instruction obligation.

Commissioner adopted findings and determination in initial decision as his own, finding that the Mantoux test meets a compelling state interest and, therefore, regardless of respondents' religious beliefs, D.F. would be required to undergo tuberculin testing in order to attend public schools. *(Grigas; Spano)* Commissioner found that the Board met constitutional standard and that the present decision and order were not inconsistent with the Religious Freedom Restoration Act of 1993.

JUNE 3, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2696-96

AGENCY DKT. NO. 125-4/96

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

D.F. AND R.F., INDIVIDUALLY AND AS PARENTS OF D.F.,

Respondents.

Robert J. Pruchnik, Esq., for petitioner (Kenney and Gross, attorneys)

D.F. and R.F., parents of D.F., respondents, *pro se*

Record Closed: January 27, 1997 Decided: March 13, 1997

BEFORE **JOSEPH LAVERY,** ALJ:

STATEMENT OF THE CASE

Petitioner, the Middletown Board of Education moves for summary decision, pursuant *to N.J.A.C.* 1:1-12.5. It asks (a) that the testing of D.F. for tuberculosis be ordered, or (b) that other suggested schooling alternatives be compelled, if the parents refuse to do so.

PROCEDURAL HISTORY

This appeal by the Board was filed in the Office of Administrative Law (OAL) on April 10, 1996. After hearing, an order dated April 23, 1996 issued, granting the emergent relief sought. The Commissioner of Education reversed and remanded on May 14, 1996. The Board moved for reconsideration on May 28, 1996, and to the State Board of Education on June 14, 1996. The results of those appeals are not of record here.

When the matter again came before the administrative law judge (ALJ), petitioner moved (a) to deny the Board's request for prehearing, (b) to adjourn the next scheduled date, and (c) for recusal of the ALJ. By order of August 6, 1996, the ALJ acted only on the recusal request, and denied the motion. That order was affirmed by the Director and Chief Administrative Law Judge, OAL on September 23, 1996.

By letter of September 14, 1996, appellant moved before the Commissioner for "forced compliance" with his order of May 14, 1996. Since home instruction was instituted by Board on September 30, 1996, the Commissioner dismissed the motion as being moot, by order of October 18, 1996.

After conference, a draft prehearing order was presented to the parties by the ALJ in a letter of November 22, 1996. After replies by the parties, that order issued in final form on December 5, 1996, with hearing dates calendared for December 12 and December 17, 1996, as well as for February 18, 1997.

On December 5, 1996, a telephone conference concluded with the cancellation of the December 12 date, and conversion of December 17, 1996, to an in-person prehearing conference, which would address respondent parents' wish to move for summary decision, and perhaps include oral argument. On December 8, respondents appealed interlocutorily from the final prehearing order.

During the subsequent December 17 conference, it was agreed that further briefs would be submitted on the motion brought December 16, 1996, by respondents for summary decision, with hearing to convene on February 18, 1997, if the matter could not conclude summarily.[1] On December 20, 1996, the Commissioner declined to review respondents' interlocutory appeal from the prehearing order.

Additional letter briefs on the motion for summary decision followed, the last of which was filed by respondents on January 27, 1997. On February 4, 1997, the undersigned advised the parties that the hearing date of February 18, 1997 was adjourned, because the case would conclude summarily.

ANALYSIS OF THE RECORD

The material facts are not in dispute:

Respondent parents and their three children moved to the Middletown Township school district from Staten Island, N.Y., at some time prior to the onset of the 1995-96 school year. For that year, they enrolled their two daughters in the seventh and eighth grade of Thompson Middle School. Their son, D.F., was placed in the first grade of Nut Swamp School. The immunization records from the family's private physician requested by the district showed that the two girls had undergone Tuberculin testing on May 3, 1995. D.F., in contrast, had been tested as well, but that had occurred earlier, on May 3, 1994. The timing of the girls' testing satisfied the school requirements for pupils transferring from outside the state. The son's did not. His test was more than six months preceding transfer.

After inquiries by the school nurse and later the principal of Nut Swamp School, it became clear that respondents were not going to provide the records of necessary Tuberculin evaluation for D.F., nor would they permit their son to undergo the test imposed on the girls. The test in

[1] *See*, letter from the administrative law judge to the parties, dated December 6 and December 17, 1996.

issue is the Mantoux Tuberculin Test (Mantoux Test), and it is mandated by the State Department of Health in a document entitled "Mantoux Tuberculin Testing in Public Schools Required in 1995-1996." The parents justified their refusal by relying on their religious beliefs. Eventually, after much discussion and some delays to accommodate the parents, the principal excluded the child from the Nut Swamp School on February 8, 1996, for failure to document or to have administered the Mantoux Test.

This appeal followed, and was dealt with procedurally as outlined above. The child, D.F., continues under the home instruction begun September 30, 1996, pending its outcome.

Arguments of the Parties:

The Board's argument:

The Board advances its argument through a post-motion brief and documents, and from that brief and accompanying documents submitted with the Board's earlier motion for emergent relief, as well as included affidavits.

The Board contends that by any judicial measure, reflected in the cases it cites, the standard for summary decision has been satisfied. In its view, respondents' case turns on what they have proffered as an irrefutable "fact." Specifically, the Board states that respondents have maintained that administering the Mantoux test to their child amounts to the practice of medicine. In turn, the practice of medicine is also the practice of religion, in their view, and consequently, the "Religious Freedom Restoration Act of 1993" (the Act) has been violated. The Board disagrees.

Addressing the Act, the Board insists that its legislative intent was only to reinstate a strict standard of constitutional review, namely, the "compelling interest" standard. Since New Jersey courts have never departed from use of this standard, the existing New Jersey laws and rules continue unaffected. This would include settled case law upholding the compelling

interest of the State to regulate public health, safety, and welfare of children. Prior decisions of the Commissioner of Education, relying on this compelling interest, have upheld the statutes and regulations mandating Mantoux testing in the public schools, the Board emphasizes.

Since the record is uncontroverted, and respondents have not come forward with any material fact in issue, the Board maintains, the legal controversy must be resolved through reference to unvarying State law. On that basis, it asks that summary judgment should be awarded.

Respondents' reply:

Respondents agree that decision should be issued summarily, but insist that the decision should uphold their refusal to have the Mantoux test administered to their child. Respondents answer that the State has come forward with no documentation, *e.g.*, medical text or dictionary definitions, that the practice of medicine is *not* the practice of religion, even though the Hippocratic oath demonstrates that it is. Consequently, under authority of the First and Fourteenth Amendments to the U.S. Constitution, the Religious Freedom Restoration Act of 1993, and assorted case law, their right to decline the medical test in controversy should be upheld.

CONCLUSIONS OF LAW

Ripeness for Summary Decision:

This dispute is ripe for summary decision pursuant to *N.J.A.C.* 1:1-12.5:

Respondents, though not joining in an executed stipulation of facts, do not contest those which are material to a decision here.[2] Instead, respondents

[2] See, respondent's proposed Stipulation of Facts, dated December 16, 1995.

> [R]equest a Summary Decision as to whether there are "gods and goddesses" etc. et. al. in the "religion of medicine" and as to whether the prescription Rx prayer exist, and that whether Pharmacy "is a practice of witchcraft and the practice of sorcery and whether or not, the religious icon of the Physiciain [sic], the god Hermes's, caduceous, god Hermes "inventer [sic] of Medicine"/ "founder of the occult "/satanism, the religion of medicine, exist and the god Asclepius, the god of Medicine's staff of Aesculapius, "on the religion of Medicine's" temples/hospital etc. et. al., therefore medicine is as historically described and documented a religion. Therefore, prima facie an Issue Of Law, irrefutable under the law. Prima facie historic facts, see attached Pro Se Respondent's documentations/proofs.
> [Respondent's letter brief of December 16, 1996, at p. 1]

Respondent R.F. has represented that the foregoing inquiry would be all that she would attempt in questioning witnesses, were a hearing to be held.[3]

The rule governing summary decision, cited *supra*, states:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [*See also, Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 73-75 (1954)]

[3] Respondent listed her intended witnesses in a letter to her adversary dated July 8, 1996. These witnesses included the Governor, respondent's representatives in the United States Senate and House of Representatives, the Commissioner of Education, and members of her Board of Education, among others.

Additionally, the facts must be considered in the light most favorable to the opposing party, *Boyer v. Anchor Disposal*, 135 *N.J.* 86 (1994).

Moreover, under the most recent guidelines delivered by our New Jersey Supreme Court, summary judgment is encouraged when the proper circumstances present themselves. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 541 (1995). The court there elaborated on its intent:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, supra*, 477 *U.S.* at 249, 106 *S.Ct.* at 2511, 91 *L.Ed.2d* at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. *Liberty Lobby, supra*, 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed.2d* at 213. The import of our holding is that when the evidence " is so one-sided that one party must prevail as a matter of law," *Liberty Lobby, supra,* 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed. 2d* at 214, the trial court should not hesitate to grant summary judgment.
> [*Id.* at 540]

The Commissioner's Order Denying Emergent Relief, Dated May 14, 1996:

In his order denying emergent relief, the Commissioner established the paramount issue to be addressed at plenary hearing:

> [T]he Commissioner concludes that the fundamental question as to application of the federal law relied upon by respondents to the

> within situation represents a novel issue of law which remains to be addressed through plenary proceeding, particularly in view of the fact that the primary law cited, the Religious Freedom Restoration Act of 1993, Sec. 3(c) judicial Relief, specifies
>
> > A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. ***

Considering this issue, it must be remembered that respondents are the parties who have raised the Act as a defense. Consequently, to support its preeminence, they must demonstrate factually and legally that the federal Act has been violated by the operation of existing New Jersey law. The facts are not in dispute. The matter must therefore be resolved through reliance on legal argument. For the reasons which follow, summary decision should be awarded the Board:

The Continuing Validity of New Jersey Law:

New Jersey authorizes the Mantoux test, as this tribunal noted in disposing of the Board's initial motion in this case, which sought emergent relief:

> Second, the law is not unsettled on this subject. It plainly calls for application of the Mantoux test in the instance of a child transferring into a school from outside the state without a record that such test occurred within the previous six months. *N.J.A.C.* 6:29-2.3, implementing *N.J.S.A.* 18A:16-2 and *N.J.S.A.* 18A:40-16, as well as the State Department of Health document entitled "Mantoux Tuberculin Testing in Public Schools Required in 1995-1996." Similarly, the law permits exclusion of a child whose parents do not comply with this or similar legal requirements. *N.J.S.A.* 18A:40-18, N.J.S.A. 26:4-6, *N.J.S.A.* 18A:35-4.8, *Mountain Lakes Bd. Of Educ. v. Maas*, *56 N.J. Super.* 245 (App. Div. 1959). The citations to *federal* law of Minister Dalton, D.C., do not offset the foregoing.
> [Emphasis added; Order Granting Emergent Relief, April 23, 1996; *See also*, *Kolbeck v. Kramer*, 84 *N.J. Super.* 569, 571-72 (App. Div. 1964) upholding the Commissioner's power to impose tuberculosis tests]

In the same vein, the Commissioner of Education himself most recently has held that:

> [R]eligious exemption for inoculation does not apply to the Mantoux test for tuberculosis because the Mantoux test is merely a screening device, for which there is a *compelling need*, overriding claims for exemption on the basis of religious belief.
> [*Spano v. Jackson Tp. Bd. of Ed., Ocean Cty.*, and *N.J. Dept. of Education*, 1988 SLD 1007, 1017. Emphasis added]

Respondents do not argue that New Jersey law is otherwise, but instead appear to contend that State law has been barred by the U.S. Constitution, specifically in its implementation by the Religious Freedom Restoration Act, 42 *U.S.C.A.* 2000bb -1 through -4 (the Act).

The Commissioner, in his order of May 14, 1996, asks for a ruling on whether respondents correctly interpret the legal effect of the Act. The answer is no, they do not. The reasons for this conclusion are as follows.

Congressional intent in the Act is unambiguous:

> The Congress finds that --
> (1) The framers of the Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the Constitution;
> (2) Laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
> (3) Governments should not substantially burden religious exercise without compelling justification; . . .
> [42 *U.S.C.A.* 2000bb(a)]

Further, the Act states:

> The purposes of this chapter are --
> (1) To restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S.

> 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.
> [42 *U.S.C.A.* 2000bb(b)]

The Act then goes on to describe both the rule which it intends, and the exception which is permitted:

> **(a) In General**
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> **(b) Exception**
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.
> [42 *U.S.C.A.* 2000bb(1)]

Finally, the reach of the Act extends to the States:

> This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.
> [42 *U.S.C.A.* 2000bb-3]

Against this legal background, the question becomes whether New Jersey School Law, in particular *Spano, supra,* and the Board policy which implements it, are prohibited by the Act. There can be no such prohibition, because, as the Board correctly argues, the "compelling interest" test, which the Congress sought to restore through the Act, was never abandoned in this State. Judge Pressler's decision in *Essex Cty. Welfare Div. v. Harris,* 189 *N.J. Super.* 479 (App. Div. 1983) is illustrative. There, she ruled:

> [I]n the context of governmental impingement upon religious beliefs which interdict particular medical procedures, it is well settled in this State that the practice of such beliefs is not immune from a modicum of governmental restraint *where the governmental interest is compelling*. See, e.g., *John F. Kennedy Memorial Hosp. v. Heston*, 58 *N.J.* 576 (1971), and *State v. Perricone*, 37 *N.J.* 463 (1962), *cert. den.* 371 *U.S.* 890 (1962), 83 *S.Ct.* 189, 9 *L.Ed.*2d 124 (1962), requiring blood transfusions contrary to religious beliefs. And see, requiring vaccination, *Mountain Lakes Bd. of Ed. v. Maas, supra*: *Sadlock v. Carlstadt Bd. of Ed.*, 137 *N.J.L.* 85 (Sup. Ct. 1948).
> [*Id.* at 482. Emphasis added]

The next considerations then are (a) whether tuberculin testing is a compelling governmental interest overriding the private interest of protecting religious belief, and (b) whether that testing is undertaken through the least restrictive means. 42 *U.S.C.A.* 2000bb(1)(b). Here too, in both instances, the answer is yes.

Testing to avoid the introduction and spread of tuberculosis in our public schools on its face qualifies as a compelling interest anticipated by the Act as an exception. Yet, beyond that, there are in this undisputed factual record recitations of how serious a need there is for such medical prevention, and how "least restrictive" and unintrusive the Mantoux test actually is. (Affidavit of Marilyn Cohen, Assistant Superintendent for Pupil/Personnel Services, Middletown Township Board of Education, dated March 29, 1996 and affidavit of Kenneth L. Shilkret, Chief, Tuberculosis Control Program, New Jersey Department of Health and Senior Services.)

The test itself is not a medical procedure akin to vaccination or immunization. Instead, it is a screening device, subject to guidelines imposed on grade schools such as Nut Swamp by the State (Cohen affidavit, at p. 2, par. 5 and p. 5, par. 12; Shilkret affidavit, at p. 13, par. 46). The seriousness and transmissibility of tuberculosis has been established (Shilkret affidavit, at pp. 3-6 and pp. 10-12, pars. 35-39). The test itself, an intradermal injection of 0.1 ml. of purified protein derivative (PPD) tuberculin identifies even those who are not ill, thus alerting the child's parents as well as the school that preventive therapy is needed.

More importantly, the Mantoux test is the only means of identifying infection before it progresses to disease, and it is the only identifying screen for groups and individuals (*Id.* at pp. 6-8). It does not contain live virus vaccine, and cannot transmit or cause tuberculosis (*Id.* at p. 13, par. 46). The procedures for and scope of testing are constantly under review by the State, and effected in the least invasive manner. At present, the Mantoux test, endorsed by the American Thoracic Society, American Lung Association and Centers for Disease Control, is the most restricted method of screening (*Id.* at pp. 8-10 and pp. 12-13).

The import of the foregoing record is that both the first and second prongs of the standard for exception, at 42 *U.S.C.A.* 2000bb(1)(b), have been satisfied: the Board and the State have turned to the least restrictive means in furthering a compelling governmental interest, which is to prevent the introduction and spread of tuberculosis in the public schools.

ORDER

I ORDER, therefore, that the petitioner Board's appeal be **GRANTED**, and

1. That D.F. be screened through administration of the Mantoux tuberculin test, to be undertaken by the Board, or by respondents' personal physician, or in the alternative,

2. That respondents forthwith (a) enroll their child in private or parochial school, or (b) begin education of D.F. through "home schooling" under the applicable State laws and implementing rules, and,

3. That if respondents elect to undertake home schooling, that they immediately submit an appropriate educational plan, with a proposed timetable for prompt initiation of home

schooling, thus ending the Board's current home instruction obligation.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 13, 1997
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

3-14-97
DATE

DNA
DEPARTMENT OF EDUCATION

MAR 19 1997
DATE

Mailed to Parties:
Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 2696-96
AGENCY DKT. NO. 125-4/96

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
D.F. AND R.F., individually and as guardians of D.F.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondents' exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4. In that no provision is made for additional submissions beyond the above-mentioned exceptions, respondent's submission filed in response to the Board's reply exceptions was not considered herein.

Respondents' voluminous exceptions generally recast and reiterate arguments raised previously throughout this litigation and, therefore, are not summarized in detail herein. Respondents' general contention is that because medicine is a religion involving "medical gods and goddesses," the order of the Administrative Law Judge (ALJ) and the Board requiring D.F. to undergo the Mantoux test for tuberculosis, violates the Establishment Clause of the First Amendment, prohibiting laws respecting the establishment of religion, and the Religious Freedom Restoration Act of 1993 ("Act"). (Exceptions at pp. 1-3) Respondents also contend that the ALJ's determination improperly places the burden of proof upon them, as defendants, rather than upon the Board, which they also aver to be contrary to the Act. Additionally, respondents assert that the material facts in this matter were in dispute in that the ALJ did not

address the issue as to whether medical gods and goddesses exist in the practice of medicine and that summary judgment was improperly granted. (Exceptions at pp. 4-5 and 7-8)

In reply, the Board contends that Respondent R.F., who steadfastly maintains that performance of the Mantoux Test upon her son, D.F., "constitutes a medical procedure which is a religion with 'satanic cult pagan false Gods and Goddesses,'" has failed to distinguish between opinion and fact. (Reply Exceptions at p. 1) The Board then cites *Kopp, Inc. v. United Technologies*, 223 *N.J. Super.* 548, 554-555 (App. Div. 1988), for the proposition that summary judgment is appropriate where the pleadings, depositions, answers to interrogatories and affidavits, if any, show that there are no genuine issues as to any material fact challenged and that the moving party is entitled to judgment as a matter of law. Further, the Board notes, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment. *Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994). The Board summarizes its argument that Respondent R.F.'s subjective belief with regard to the Mantoux test cannot create the existence of a material fact.

The Board next reiterates that the Commissioner has ruled in previous cases that there can be no religious exemption to the Mantoux test and that the religious beliefs of parents must yield to the compelling interest test of the State to insure the health, safety and welfare of children, including students in public schools, citing *In the Matter of the Joint Application of Kathleen Grigas and Appellant Board of Education of the East Windsor Regional School District*, 1983 *S.L.D.* 775 and *Margaret Spano v. Board of Education of the Township of Jackson, Ocean County and the New Jersey Department of Education*, 1988 *S.L.D.* 1017. (Reply Exceptions at p. 3) The Board avers that "the legitimacy of both decisions has not been undermined by Respondent's reliance upon the [Act], for the Act merely reaffirms the 'compelling interest' standard of constitutional review [and] this is the same standard of review relied upon by the Commissioner in both *Grigas* and *Spano.*" (Reply Exceptions at p. 5) Thus, it urges the Commissioner to affirm the initial decision and Order of the ALJ.

Upon a careful and independent review, the Commissioner affirms the initial decision and Order of the ALJ. As noted by the ALJ, the Commissioner has determined previously, in *Grigas, supra,* and *Spano, supra*, that the Mantoux test serves a compelling governmental interest, *i.e.*, screening students for tuberculosis in order to insure the health, safety

and welfare of students in the public schools, in the least invasive manner available. The Act requires that such compelling governmental interest exist in order for a challenged action to withstand constitutional scrutiny. Therefore, the Commissioner finds that the Board has met the constitutional standard and that the present decision and Order are not inconsistent with the Act.

In so ruling, the Commissioner finds that it is not necessary to reach to the question as to "whether there are gods and goddesses etc. et. al [*sic*] in the religion of medicine," in that the Mantoux test meets a compelling state interest and, therefore, regardless of respondents' religious beliefs, D.F. would be required to undergo tuberculin testing in order to attend the public schools. Consequently, the Commissioner affirms the determination that summary judgment was proper in this instance.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL and enters summary decision in favor of the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1997
DATE OF MAILING JUNE 3, 1997

191-96

EDU #2696-96
C # 191-96E
SB # 44-96
C # 573-96M
C # 293-97
SB # 59-97

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
D.F. AND R.F., individually and as guardians of D.F.,	:	DECISION
RESPONDENTS-APPELLANTS.	:	

Decided by the Commissioner of Education, May 14, 1996

Decided by the State Board of Education, October 2, 1996

Decision on motion by the Commissioner of Education, December 20, 1996

Decided by the Commissioner of Education, June 3, 1997

For the Petitioner-Respondent, Kenny & Gross (Robert J. Pruchnik, Esq., of Counsel)

For the Respondents-Appellants, D.F. and R.F., pro se

The underlying controversy in this matter between respondents and the Board of Education of the Township of Middletown (hereinafter "Board") developed after respondents moved to New Jersey from Staten Island and enrolled their three children in the Middletown school district in September 1995. Review of the immunization records provided by respondents at that time indicated that although the Mantoux

12/3/97

Intradermal Tuberculin Test ("Mantoux test") had been administered to respondents' two oldest children in May 1995, D.F., who was entering first grade, had not been tested since May 1994. Since the State Department of Health's guidelines required that out-of-state transfer students be tested if the Mantoux Test had not been administered to them within the previous six months, the District attempted to obtain respondents' consent to administer the test. When respondents notified the District that the family's religious beliefs prohibited vaccination or medical testing by the State, the Board excluded D.F. from school and filed a petition with the Commissioner of Education seeking a declaratory judgment that it had acted properly and that respondents could not claim an exemption from the testing requirement on the basis of their religious principles. The Board also sought a directive from the Commissioner that respondents either permit administration of the Mantoux test to D.F. or resume his education at a private school or through home schooling. At the same time, the Board filed an application for emergent relief with the Commissioner seeking the same relief as requested in its petition.

The Commissioner denied the motion for emergent relief and directed the Board to provide home instruction to D.F. pending the outcome of hearings on the merits of the underlying matter.

On appeal, the State Board affirmed the Commissioner's determination, agreeing that the Board had not demonstrated the necessity of relieving it from its obligation to provide D.F. with a thorough and efficient education during the pendency of this matter. Consequently, we affirmed the Commissioner's directive that the Board

provide D.F. with home instruction until the Commissioner rendered his final determination on the merits.

When the matter came before an Administrative Law Judge ("ALJ") for consideration of the merits, the Board moved for summary decision compelling D.F. to submit to testing for tuberculosis or directing other schooling alternatives if D.F.'s parents refused to comply. The ALJ granted the Board's motion and directed that D.F. obtain a Mantoux test in order to enter public school or, in the event his parents refused, that they either enroll him in a nonpublic school or initiate home schooling.

By decision of June 3, 1997, the Commissioner adopted the ALJ's determination, concluding that the Mantoux test served the compelling State interest in screening students for tuberculosis in order to insure the health, safety and welfare of students in public schools in the least invasive manner available. The Commissioner found that such testing therefore met the constitutional standard and that the ALJ had properly concluded that D.F.'s re-entry into public school was contingent on obtaining an appropriately administered Mantoux test. In so ruling, the Commissioner found that the Board had not violated the Religious Freedom Restoration Act of 1993 and concluded that it was not necessary for him to decide other questions raised by D.F.'s mother, including her allegation that there were gods and goddesses in the "religion" of medicine.

D.F.'s parents appealed to the State Board, renewing their previous arguments.

After the parties had filed their briefs, the counsel for the Middletown Board advised us by letter that D.F.'s father had provided the Board with appropriate documentation that a Mantoux test had been administered to D.F. by a private

physician on September 2 and that the result was negative. On October 16, the Board formally moved for dismissal of the matter on grounds of mootness.

D.F.'s mother opposes the Board's motion, arguing that she had no control over the actions taken by D.F.'s father to comply with the Commissioner's determination and that the public interest demands resolution of her claims, including her contention that medicine is a religion.

After reviewing the arguments made by the parties, the State Board dismisses this matter as moot. E.g., Oxfeld v. New Jersey State Board of Education, 68 N.J. 301 (1975). Notwithstanding the fact that D.F.'s mother does not agree with the decision made by D.F.'s father to comply with the Commissioner's directive, the Mantoux test has been administered to D.F. and, as a result, he is able to re-enter public school. Furthermore, the specific allegations made by D.F.'s mother with respect to either the course taken by D.F.'s father or the entanglement of religion with the medical profession are not wrongs which are capable of repetition yet evading review in the proper forum. Nor do we find that any of the issues remaining in this case are of such transcendent public importance as to compel resolution by this agency. State v. Allen, 73 N.J. 132, 138-39 (1977). We therefore agree with the Board that this matter has been rendered moot, and dismiss the appeal.

December 3, 1997

Date of mailing DEC 05 1997

192-96

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

May 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 4693-95
AGENCY DKT. NO. 158-5/95

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,

Respondent.

Richard H. Insley, Esq., represented petitioner
(Ferrara Turitz Harraka & Goldberg, attorneys)

Cherie L. Maxwell, Esq., represented respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A.)

Record Closed: March 20, 1996 Decided: March 22, 1996

BEFORE **JEFFREY A. GERSON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 10, 1995, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached documents.

Having reviewed the contents of the attached documents, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **DISMISSED**.

I hereby **FILE** my initial decision settlement with the **COMMISSIONER of the DEPARTMENT OF EDUCATION** for consideration.

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

March 21 96
DATE

JEFFREY A. GERSON,
Administrative Law Judge

3/21/96
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 27 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

FERRARA, TURITZ, HARRAKA & GOLDBERG

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MARLA WOLFE TAUS (N.J. AND N.Y. BAR)
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OF COUNSEL:
MICHAEL J. FERRARA
RICHARD H. INSLEY
RAYMOND S. CARROLL
(N.J. AND N.Y BAR)
CHARLES BARTEL (N.Y. BAR ONLY)

March 20, 1996

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
MAR 21 11 12 AM '96

VIA FAX & REGULAR MAIL

The Honorable Jeffrey A. Gerson
Administrative Law Judge
185 Washington Street
Newark, New Jersey 07102

Re: **Little Ferry Board of Education vs. Ridgefield Park Board of Education**
Docket No.: EDU4693-95
Our File No.: SB-3883

Dear Judge Gerson:

Please be advised that the application made by the respondant in this matter appears to indicate that they are at this time willing to give full membership rights pursuant to the statutory limitations to the sending district's representative.

Based upon this perception, it would appear that the outstanding matter has therefore been resolved. Therefore, petitioner hereby withdraws the Petition in this matter and consents to having the pending matter dismissed.

Naturally, this action is without prejudice should the respondant fail to accord the appropriate rights and powers to the representative from the sending district. In that event, petitioner will be free to re-open this matter and seek appropriate relief.

On behalf of the petitioner, please accept our appreciation for the time and consideration which you have given to this matter.

Very truly yours,

FERRARA, TURITZ, HARRAKA
& GOLDBERG, P.C.

By: _____
RICHARD H. INSLEY

RHI/as
cc: Little Ferry Board of Education (via fax & regular mail)
Cherie L. Maxwell, Esquire (via fax & regular mail)

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Respondent

LITTLE FERRY BOARD OF EDUCATION,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
-vs-	:	OAL DOCKET NO. EDUOT 04693-95N AGENCY REF. NO.: 158-5/95
RIDGEFIELD PARK BOARD OF EDUCATION,	:	**MOTION TO DISMISS PETITION**
Respondent.	:	

Richard H. Insley, Esq.
Ferrara Turitz Harrake & Goldberg
505 Main Street
Hackensack, NJ 07601

PLEASE TAKE NOTICE that pursuant to N.J.A.C. 1:1-12.5, Respondent, Ridgefield Park Board of Education, hereby moves before the Honorable Jeffrey A. Gerson at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102, for an Order:

1. Dismissing the instant Petition in its entirety.

PLEASE TAKE FURTHER NOTICE that in support of said Motion Respondent shall rely upon the accompanying Brief of law submitted herewith.

Sills Cummis Zuckerman Radin
Tischman Epstein & Gross, P.A.
Attorneys for Respondent

By: Cherie L Maxwell
CHERIE L. MAXWELL

Dated: February 21, 1996

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed.

Upon review, the Commissioner notes that the papers appended to the initial decision indicate that the appeal was withdrawn, rather than settled by joint stipulation of the parties. Accordingly, the Commissioner deems this matter withdrawn as a controversy before him and the matter is accordingly dismissed.

COMMISSIONER OF EDUCATION

MAY 13, 1996
DATE OF MAILING MAY 14, 1996

193-96

JEAN KLINE FEIGENBAUM,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8105-95
AGENCY DKT. NO. 284-7/95

JEAN KLINE FEIGENBAUM,
Petitioner,
v.
CRANBURY TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Philip H. Shore, Esq., for respondent (Shore & Zahn, attorneys)

Record Closed: March 22, 1996 Decided: March 26, 1996

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

This matter was transmitted to the Office of Administrative Law on August 15, 1995, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

March 29, 1996
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

March 29, 1996
DATE

D N Cantanautis / fe
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 4 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

ej

SHORE & ZAHN, ESQS.
P. O. BOX 755
EAST BRUNSWICK, NJ 08816
(908) 254-5500
Attorney for Respondent

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

JEAN KLINE FEIGENBAUM, Petitioner,	:	AGENCY DOCKET NO. 284-7/95
-vs-	:	OAL DOCKET NO. EDU 8105-95
CRANBURY TOWNSHIP BOARD OF EDUCATION, Respondent.	:	SETTLEMENT AGREEMENT

BEFORE KATHRYN A. CLARK, A.L.J.:

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the Petitioner and Respondent:

1. Petitioner withdraws, with prejudice, her appeal and request for a hearing.

2. Respondent and Petitioner agree to have monthly informal meetings as long as deemed necessary. Such meetings shall be for the purpose of reviewing and discussing Petitioner's teaching performance.

3. The parties agree that there shall be no restriction on the use of this Settlement Agreement, including its terms and purposes in any future proceedings in which the parties may become involved.

4. The Petitioner waives all claims against the Respondent with regard to this matter, including any award of back pay or counsel fees.

5. Both parties agree to waive the right to file exceptions and cross exceptions.

6. This Agreement will only become effective when it is approved by the Cranbury Board of Education. Any disapproval by the Cranbury Board of Education shall not interfere with the rights of either party to pursue the matter further.

DATED: 3-5-96

MICHAEL T. BARRETT
Attorney for Petitioner,
Jean Kline Feigenbaum

DATED: 3-13-96

PHILIP H. SHORE
Attorney for Respondent,
Cranbury Board of Education

C:\WP51\feigenbaum.agr

OAL DKT. NO. EDU 8105-95

JEAN KLINE FEIGENBAUM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record and initial decision incorporating a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

The Commissioner is unable to accept the written settlement in its present form to the extent that the language of the Settlement Agreement on its face (Term 6) reveals that the settlement may not have been approved by the Board. Such language, making settlement contingent upon approval by the Board while expressly reserving the rights of both parties to pursue the matter further in the event of Board disapproval, reveals that the settlement is not "fully dispositive of all issues in controversy" as required under *N.J.A.C.* 1:1-19.1(b). In that agency approval would render this agreement a final decision pursuant to *N.J.A.C.* 1:1-19.1(c) 2, the Commissioner finds that agreement to terms by *both* parties is necessary prior to the Commissioner's approval of settlement.

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 13, 1996

DATE OF MAILING MAY 14, 1996

197-96

197-96E

P.O.G., on behalf of minor daughter, D.O.G.,:

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

May 17, 1996

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Respondent Board of Education
of Ridgefield Park

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

PATRICIA O'GRADY, as Guardian ad Litem for DANIELLE O'GRADY, an infant,	:	Agency Docket No. 144-4/96 O.A.L. Docket No. EDUOS 03931-96N
Petitioner,	:	**ORDER DENYING APPLICATION FOR EMERGENT RELIEF**
-vs-	:	
BOARD OF EDUCATION OF RIDGEFIELD PARK,	:	
Respondent.	:	

This matter having come before me by way of Petition and Application for Emergent Relief, filed before the Commissioner of Education on April 19, 1996, by Lesnevich & Marzano-Lesnevich, P.A., attorneys for Petitioner, with due notice given to Louis Franzese, Esquire, of Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A., attorneys for Respondent Board of Education of Ridgefield Park; and the matter having been received by the Office of Administrative Law on April 24, 1996; and having

read and considered the submissions of the parties, and having heard oral argument and for good cause shown: and for the reasons expressed on the record on 5/13/96

IT IS HEREBY ORDERED, on this 14th day of May, 1996, as follows:

1. Petitioner's application for emergent relief is denied in its entirety, in that Petitioner has failed to demonstrate: (a) a reasonable probability of success on the merits; (b) hardship as a result of denying the relief sought; and (c) irreparable harm.

2. The matter will therefore proceed as a contested case and set down for hearing.

IT IS FURTHER ORDERED that a copy of this Order shall be served upon counsel for Petitioner within 5 days of the date hereof, and pursuant to N.J.A.C. 1:1-14.9(c), Petitioner shall have five days from receipt of same within which to object to its form.

Elinor R. Reiner

Elinor R. Reiner, A.L.J.

P.O.G., on behalf of minor daughter, D.O.G.,:

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

The tape-recorded proceedings in this matter, which concerned D.O.G's attendance at the senior prom and participation in graduation ceremonies, and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

The Deputy Commissioner was designated to hear and decide this matter pursuant to the Commissioner's authority under N.J.S.A. 18A:4-33.

Upon review, the Deputy Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) denying emergent relief as petitioner failed to meet the standards for such relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the Motion for Emergent Relief is denied for the reasons expressed by the ALJ and this matter shall duly proceed on its merits in accordance with the ALJ's recommendation.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

May 17, 1996
Date of Mailing, May 20, 1996

198-96

198-96E

W.L. B. AND K.B., on behalf of their minor son, W.M.B. AND W.B. AND J.B., on behalf of their minor daughter, M.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WOODBURY SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

May 17, 1996

W.L. B. AND K.B., on behalf of their minor son, W.M.B. AND W.B. AND J.B., on behalf of their minor daughter, M.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WOODBURY SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioners, Suzanne Pallante Buckley, Esq.
For Respondent, John L. White, Esq. (George, Korin, Quattrone, Blumberg & Chant)

This matter was opened before the Commissioner of Education on May 14, 1996, by way of a Petition of Appeal and Motion for Emergent Relief filed by petitioners seeking an order permitting W.M.B. to attend a junior-senior prom. On May 15, 1996, the Board denied petitioners' appeal of its determination that W.M.B. was ineligible to attend his prom because of his asserted failure to achieve 27.5 credits and, therefore, had insufficient credit to participate in senior events, including the senior trip and the senior prom. M.B. is the girlfriend of W.M.B. and has filed because W.M.B. is her intended prom date.

On May 16, 1996, after petitioners attempted to resolve this matter on the local level at a Board hearing, petitioners sought and received permission to supplement their initial filing, and the Board was given the opportunity to respond. Parties were notified telephonically and by facsimile letter dated May 16, 1996 that this motion would be decided on the papers submitted. Petitioners and respondent filed additional submissions on May 17, 1996. As no provision was made for any additional filings beyond May 16, 1996, the May 17, 1996 submissions are not considered herein.

The Deputy Commissioner was designated to hear and decide this matter, pursuant to the Commissioner's authority under *N.J.S.A.* 18A:4-33.

This matter arose after the Board denied petitioners' appeal to it under the provisions set forth in the *Student Co-Curricular Eligibility Policy* (hereinafter referred to as "School Policy") and as set forth in the *Student Handbook 1995-96* (hereinafter referred to as "Student Handbook"). The school policy states in pertinent part that,

> Eligibility for participation in Woodbury Junior-Senior High School's co-curricular activities is determined on the basis of a student's academic performance, attendance and conduct.*** Activities in this co-curricular category include ***[s]everal social/educational activities *** **specifically the junior-senior prom*****. (emphasis in text) (Student Policy 6145.1, Student Handbook at p.48)

The Board requires its pupils to achieve a 27.5 credits in order to attend the senior prom.

The *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) standards required petitioners to show that W.M.B. and M.B. would be irreparably harmed if not permitted to attend the senior prom, that W.M.B. and M.B. have a substantial likelihood of prevailing on the merits of the claim, and that in balancing the interests of the parties, the harm to W.M.B. and M.B. would be greater than the harm to the Board of Education should the requested relief not be granted. Petitioners assert that W.M.B. would be irreparably harmed if not permitted to attend his senior prom as would M.B., his "high school sweetheart," who would not attend without W.M.B.

Petitioners aver that the Board's refusal to allow W.M.B. to attend the prom was arbitrary, capricious and unreasonable. (Petition of Appeal at pp. 6-7) They cite a recent recommended order on motion issued by Administrative Law Judge Kathleen Duncan entitled, *Sandra Hynes v. Board of Education of the Southern Regional School District, Gloucester County*, OAL Dkt. No. EDU 2897-96, which recommended order stated that "[missing one's] senior prom is a once in a lifetime experience which cannot be duplicated" thus constituting irreparable harm to the student. (Petitioners' Motion for Emergent Relief at p. 2) Petitioners also argue that they have a likelihood of success on the merits in that W.M.B.'s requests to drop Chemistry class in the first marking period were ignored (Petition of Appeal at p. 3) while he could still replace the course with another for credit (*id.* at p. 4)and when he finally dropped the course, he was never advised that he would fall below the number of credits needed for participation in the senior event. (*Id.*)

Petitioners further assert they were denied due process on the local level in that discovery was not permitted prior to the Board hearing and petitioners' counsel was unable to prepare for the hearing in advance. (Petitioners' Supplemental Submission at pp. 1-2)

They also aver that the school policy is selectively enforced and that W.M.B. was misled into believing he could not appeal his case. (Petition of Appeal at pp. 4-5 and Motion for Emergent Relief at p. 3)

In response, the Board argues that petitioners are guilty of laches and that W.L.B.'s ineligibility status has been an issue since October 1995. (Answer at p. 1 and Board's Supplemental Response at p. 4) Moreover, W.M.B. had received notice of his inability to attend the junior-senior prom because of academic deficiencies in that the consequences of violating the policy are contained in the District's student handbook which was provided to petitioners prior to the commencement of the school year. The Board points out that M.B. was assured that she was eligible and welcome to attend the prom. It further argues that the policy applies to *all* seniors.

The Board also avers that the Superintendent never denied any forum of communication with any parents but, rather, returned all phone calls. (Board's Supplemental Response at p. 2) The Board also granted petitioners a hearing wherein it avers that petitioners' attorney had all documentation for more than one hour and did not request to keep additional documentation. (*Id.*)

Lastly, it avers that a Board must focus first on the academic preparation and success of its pupils and that the current policy aligned with NJSIAA requirements and the State Board of Education directive has been enforced since 1989. (Board's Supplemental Response at p. 3)

A weighing of the arguments of the parties leads the Deputy Commissioner to conclude that petitioners have not demonstrated entitlement to injunctive relief as set forth in *Crowe, supra*. The Commissioner has long held that prohibition from attending one's senior prom does not constitute irreparable harm and the State Board of Education has affirmed this finding, writing,

> "the memories [petitioners] will have foregone as a result of not participating in ...extracurricular activities," do not provide [them] with the requisite harm warranting the extraordinary relief requested.*** *(Domacasse at p. 2)*

Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County, decided by the State Board April 17, 1996.

In this regard, the Commissioner specifically disavowed ALJ Duncan's finding in the *Hynes* decision that missing one's senior prom constituted irreparable harm, stating

> ***while deprivation of extracurricular activities does not normally rise to the level of irreparable harm**, in the present instance petitioner will suffer such deprivation without having had due process at the local level to which she is entitled; the Assistant Commissioner finds this particularly troublesome in that the ALJ found that petitioner's attorney made prompt and diligent efforts to obtain such due process, but was thwarted by the actions of district administrators.*** (emphasis supplied) (Hynes Slip Opinion at p. 10)

Hynes v. Board of Education of the Southern Regional School District, Gloucester County, decided by the Commissioner on April 26, 1996. Moreover, M.B. is not prevented from attending the prom simply because W.M.B. is ineligible and, therefore, not only is her standing to bring this action in question, the notion that she would be entitled to the extraordinary relief sought is disingenuous at best.

Further, petitioners have made no showing of a likelihood of success on the merits. It is well-settled that the Board's policy concerning participation in its senior events may not be upset unless it can be demonstrated to be patently arbitrary, capricious or unreasonable. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). It has also been held that the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera* at 297.

This case is distinguishable from *Hynes*, in that petitioner in that matter had demonstrated that the board refused to give her the hearing to which she was entitled by board policy despite her attorney's numerous attempts to invoke established due process procedures. She had also demonstrated a likelihood of success on the merits based on a unique and compelling factual record, which included the fact that her board denied her the hearing required under its own policies and procedures. In the instant matter, a hearing was held by the Board providing petitioners with an opportunity to be heard. As previously established,

> ***Due process is flexible and calls for such procedural protections as the particular situation demands.***Consideration of what procedures due process may require under any given set of

> circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.*** (*Ivory* at 73)

Ivory v. Ocean Twp. Board of Education, 94 *N.J.A.R.* 2d (EDU) 70, 73, quoting *New Jersey Parole Bd. v. Byrne*, 93 *N.J.* 192 (1983). It is further noted that as a general proposition, the Commissioner may not interfere in a board's implementation of its own policies as the standard set forth in *Kopera, supra*, would not permit him to substitute his judgment for that of the board. Moreover, petitioners herein have not met their burden of proving that this policy was arbitrary. Rather, the Deputy Commissioner finds, as has been the rule in many similar prom and graduation cases,

> ***such activities as attending a school-sponsored prom or graduation ceremonies are special privileges. As such these privileges can be revoked for infractions of school rules, of school policy and of state law.*** (*R.F.* at 82)

R.F., et al., and L.H., et al v. Board of Education of Park Ridge, Bergen County, 93 *N.J.A.R.* 2d (EDU) 79 (1992), aff'd State Board 416 (1993). Finally, the Deputy Commissioner notes that due process procedures of the type to which petitioners claim entitlement are normally reserved for serious penalties such as long-term suspension from school. See *R.R. v. Bd. of Ed., Shore Regional High School*, 109 *N.J. Super.* 337 (App. Div. 1970).

Lastly, the Deputy Commissioner finds that harm to the Board would be greater than that to petitioners if the present motion were granted in that the Board has an important interest in enforcing its policies in order to effectively operate its schools and ensure academic achievement.

Accordingly, the Motion for Emergent Relief is denied.

DEPUTY COMMISSIONER OF EDUCATION

May 17, 1996
Date of Mailing, May 20, 1996

199-96

333-97
199-96

G.S., on behalf of minor children, A.M. and S.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 24, 1997

OAL DKT. NO. EDU 5534-96
AGENCY DKT. NO. 487-12/95

G. S., on behalf of minor children, A.M. and S.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on May 30, 1997, providing petitioner ten days to submit an explanation for her nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 24, 1997
DATE OF MAILING JUN E 24, 1997

201-96

201-96

KATHERINE A. TRIMARCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 17, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7003-94
AGENCY DKT. NO. 250-6/94

KATHERINE A. TRIMARCO,
Petitioner,
v.
CALDWELL-WEST CALDWELL BOARD OF EDUCATION,
Respondent.

Andrew S. Kessler, Esq., for petitioner
(Chapman, Henkoff, Kessler, Peduto & Saffer, attorneys)

Brenda C. Liss, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: April 1, 1996 Decided: April 1, 1996

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

Statement of the Case

This matter was transmitted to the Office of Administrative Law on July 21, 1994, for determination as a contested case, pursuant to *N.J.S.A.* 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

April 1, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

April 4, 1996
DATE

DN Antamaitis/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 08 1996
DATE

Barbara R. Hamed
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
APR 1 11 24 AM '96

SETTLEMENT AGREEMENT

THIS AGREEMENT dated March 29, 1996, between Dr. Katherine A. Trimarco ("Trimarco"), Dr. Daniel Gerardi ("Gerardi"), and the Caldwell-West Caldwell Board of Education ("Board").

W I T N E S S E T H

WHEREAS, Trimarco filed a Petition with the Commissioner of Education on June 16, 1994 against the Board, and the Board filed an Answer denying the allegations in the Petition and raising affirmative defenses (and this matter is hereinafter referred to as the "Administrative Action"); and

WHEREAS, the Administrative Action was transmitted to the Office of Administrative Law ("OAL") on July 21, 1994 and assigned OAL docket number EDU-07003-94 and Agency reference number #250-6/94; and

WHEREAS, Trimarco filed a civil complaint in the Superior Court of New Jersey, Essex County, against Gerardi and the Board, docket number ESX-L-3612-95, and Gerardi and the Board filed an Answer denying the allegations in the Complaint and raising affirmative defenses (and this matter is hereinafter referred to as the "Superior Court Action"); and

WHEREAS, the hearing of the Administrative Action began on April 10, 1995 before the Honorable Ken R. Springer, ALJ and continued for six additional non-consecutive days thereafter; and

WHEREAS, without any admission as to the truth, falsity or legal effect of any allegation in the Administrative Action or the Superior Court action, Trimarco, the Board, and Gerardi wish

to enter into an amicable agreement to settle all disputes between and among them; and

WHEREAS, on September 27, 1995, at the continuation of the Administrative Action, the parties set forth before Judge Springer and on the record a settlement agreement; and

WHEREAS, the terms of the settlement placed on the record on September 27, 1995, with modifications subsequently agreed to by the parties, have been set forth herein below;

NOW, THEREFORE, for good, complete and adequate consideration it is agreed as follows:

(1) Trimarco shall take any and all action necessary to dismiss with prejudice and without costs the Administrative Action and the Superior Court Action, and shall execute a general release which shall release the Board and Gerardi from all claims she may have against them, whether known or unknown, up to the date of such general release.

(2) The Board and Gerardi shall remove from Trimarco's personnel file, or any other file relating to Trimarco, any and all documents regarding Trimarco and/or Trimarco's employment with the Board except as follows:

(i) Dr. Trimarco's letter of interest in obtaining position of Principal, dated July 29, 1993;

(ii) Dr. Trimarco's resume;

(iii) Dr. Trimarco's Employment Eligibility verification;

(iv) Physical examination form;

(v) Mantoux tuberculin test verification form;

(vi) Dr. Trimarco's Principal Certificate;

(vii) Letter of recommendation from Clark Public Schools, dated February 11, 1992;

(viii) Letter of recommendation from Seton Hall University, dated June 2, 1992;

(ix) Letter of recommendation from Montclair State College;

(x) Letter of Recommendation from State of New Jersey HSPT Committee;

(xi) Employment Contract with the Caldwell-West Caldwell Board of Education;

(xii) September 21, 1993 letter to Dr. Trimarco from Dr. Gerardi;

(xiii) Administrator's Evaluation, dated October 21, 1993;

(xiv) Administrator's Evaluation, dated January 28, 1994;

(xv) Memo dated March 7, 1994 to Dr. Gerardi from Dr. Trimarco reference the Organization of Wilson School for the 1994-1995 School year;

(xvi) Accident Report of April 14, 1994, reference Basketball game;

(xvii) Letter dated June 29, 1994 confirming Approval of Request for additional sick leave;

(xviii) Trimarco's Worker's Compensation file. This file is subject to a review of its contents by the law offices of Chapman, Henkoff, Kessler, Peduto & Saffer (attorneys for Trimarco). Any documents contained therein which are to be removed pursuant to the terms of this Agreement shall be removed from said Worker's Compensation file and turned over to the law offices of Chapman, Henkoff, Kessler, Peduto & Saffer to be kept in their litigation file.

Any and all documents either typed or handwritten which are to be removed shall be turned over to the law offices of Chapman, Henkoff, Kessler, Peduto & Saffer, 425 Eagle Rock Avenue, Roseland, New Jersey. These documents shall be sealed and kept in their litigation file. Notwithstanding the foregoing, the memorandum by Nancy Graham dated March 7, 1994, entitled "Conversation with Board Member 2/17/94" ("Nancy Graham Memorandum") shall not be turned over to Chapman, Henkoff, Kessler, Peduto & Saffer.

(3) Any and all documents not listed in Paragraph 2(i)-(xviii) above, which were identified and/or marked in evidence during the trial of the Administrative Action shall be turned over to the law offices of Chapman, Henkoff, Kessler, Peduto & Saffer and kept in their litigation file.

(4) Any documents not listed in Paragraph 2(1)-(xviii) above which are in the possession of McCarter & English,

attorneys for the Board, which were obtained from Trimarco's personnel file or any other file maintained by the Board relating to Trimarco shall be turned over to Chapman, Henkoff, Kessler, Peduto & Saffer, except that the Nancy Graham Memorandum and any copies thereof shall not be turned over. The documents to be turned over shall be kept in the storage facility maintained by Chapman, Henkoff, Kessler, Peduto & Saffer and marked as a McCarter & English file. A letter shall be attached to said file indicating that it is a McCarter & English file and will only be turned over to McCarter & English with an appropriate Court Order or with the approval of Trimarco. This file shall be kept for a minimum of seven years and shall not be destroyed without the authorization of McCarter & English.

(5) Any and all copies of the Nancy Graham Memorandum which are in the possession of Trimarco or Chapman, Henkoff, Kessler, Peduto & Saffer shall be turned over to McCarter & English.

(6) In the event that the Board receives a request from any source for a recommendation of Trimarco, the Board's response shall be limited to a letter in the form attached hereto as Exhibit 1. Said letter shall be typed on Board letterhead and signed by Gerardi.

(7) In consideration of Trimarco's release of claims against the Board and Gerardi, including the release of those claims raised in the Superior Court Action, the Board shall deliver to the offices of Chapman, Henkoff, Kessler, Peduto &

Saffer a settlement draft or drafts in the amount of $27,500.00 (twenty-seven thousand five hundred dollars) made payable to Trimarco and Chapman, Henkoff, Kessler, Peduto & Saffer.

(8) This Agreement is subject to dismissal of the Administrative Action by the Commissioner of Education. The terms of this Agreement and all actions to be taken by all parties as set forth in paragraphs 1 through 8, including the filing of a stipulation of dismissal of the Superior Court Action, shall be completed within 10 days of receipt of the final decision of the Commissioner of Education dismissing the Administrative Action, except that payment pursuant to paragraph 8 above shall be made within 21 days of receipt by the Board of the executed general release and stipulation of dismissal of the Superior Court Action. This Agreement shall not be considered fully implemented until all such terms and actions as set forth herein are fully complied with by the parties to this Agreement.

(9) Trimarco, Gerardi and the Board each agree to keep this Agreement confidential to the extent permitted by law. Each party agrees and promises that he/she/it will not undertake to issue or publish any writing in any way concerning or referring to this Agreement. Either party may make application to seek an Order sealing and protecting from the public the documents which are a part of the Superior Court Action and Administrative Action. It is hereby agreed that upon such application, the non-applying parties shall not oppose said motion.

(10) This Agreement contains the entire agreement among the parties hereto with regard to the matters set forth herein and shall be binding upon and inure to the benefit of the executors, administrators, personal representative, heirs, successors and assigns of each party.

(11) This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

KATHERINE A. TRIMARCO

DANIEL A. GERARDI

ATTEST:

Ronald M. Skopak
Secretary

CALDWELL-WEST CALDWELL BOARD OF EDUCATION

By: Ned M. Rosenberg
President

EXHIBIT 1

Letter of Recommendation

To whom it may concern:

Dr. Katherine Trimarco was employed as an Elementary School Principal for the 1993-1994 school year at Wilson School. She satisfactorily performed her instructional leadership duties as Principal of Wilson School. Her determination of the organization of the Wilson School from multi-ago to straight-grades was implemented for the 1994-95 school year.

OAL DKT. NO. EDU 7003-94

KATHERINE A. TRIMARCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

May 17, 1996
Date of Mailing, May 20, 1996

202-96

202-96

IN THE MATTER OF THE TENURE :
HEARING OF LONNIE MC INTYRE, :
SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
CITY OF TRENTON, MERCER : DECISION
COUNTY. :

May 20, 1996

IN THE MATTER OF THE TENURE	:	
HEARING OF LONNIE MC INTYRE,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF TRENTON, MERCER	:	DECISION
COUNTY.	:	

For the Board, Thomas W. Sumners, Jr., Esq., (Sumners, Council, George & Dortch)

This matter having been opened before the Commissioner of Education on January 5, 1996, through certification of tenure charges of abandonment of position, excessive absenteeism and unbecoming conduct against a tenured custodian of the Board of Education of the City of Trenton, Mercer County; and

The Commissioner having directed respondent via both certified and regular mail on January 10, 1996 and February 2, 1996, to file an Answer to the tenure charges against him; and

On February 15, 1996, respondent having filed a letter in response to such tenure charges, which did not conform to the requirements for an Answer, in that such submission did not specifically admit or deny each of the Board's charges as required by *N.J.A.C.* 6:24-1.4; and

Respondent having been advised on February 16, 1996, March 11, 1996, and via both certified and regular mail on March 25, 1996, that his submission must be amended to

conform to the requirements of *N.J.A.C.* 6:24-1.4, and having been invited on each of these occasions to contact the Bureau of Controversies and Disputes if he had any questions in this regard; and

Respondent having failed as of this date to comply with the directive of the Commissioner or even to seek filing guidance, each count of the charges against him is deemed to be admitted, now therefore

IT IS ORDERED THIS 20th day of May 1996 that summary judgment shall be granted to the Board, and Lonnie McIntyre shall be dismissed from his tenured position as a custodian in the Board's employ as of the date of this order.

COMMISSIONER OF EDUCATION

May 20, 1996
Date of Mailing, May 21, 1996

203-96

203-96

E.R., on behalf of minor child, A.K., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

May 20, 1996

OAL DKT. NO. EDU 11985-95

E.R., on behalf of minor child, A.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 20, 1996
Date of Mailing, May 21, 1996

204-96

204-96

BARBARA GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

May 20, 1996

OAL DKT. NO. EDU 9795-95

BARBARA GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on April 16, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 20, 1996
Date of Mailing, May 21, 1996

205-96

205-96

RUBY WILLIAMS, :

:

PETITIONER,

:

V. : COMMISSIONER OF EDUCATION

:

BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY, : DECISION

RESPONDENT. :

May 20, 1996

OAL DKT. NO. EDU 9796-95

RUBY WILLIAMS,	:	
	:	
PETITIONER,		
	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on April 16, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 20, 1996
Date of Mailing, May 21, 1996

206-96

206-96

KENNETH MAC LEAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 20, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7842-95
AGENCY DKT. NO. 246-7/95

KENNETH MACLEAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Seid, attorneys)

James P. Granello, Esq., for respondent

Record Closed: March 28, 1996 Decided: April 1, 1996

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 27, 1995, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

April 1, 1996
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

June 4, 1996
DATE

J.N. Centanaites Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 9 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

JAMES P. GRANELLO, ESQ.
530 Prospect Avenue
Little Silver, New Jersey 07739
(908) 842-4114
Attorney for Respondent

KENNETH MACLEAN,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	DOCKET NO. EDU-7842-95
vs.	:	Civil Action
RED BANK REGIONAL HIGH SCHOOL BOARD OF EDUCATION,	:	STIPULATION OF SETTLEMENT AND DISMISSAL
Respondent.	:	

WHEREAS, the parties hereto have amicably resolved to forego litigating the above-captioned matter based upon the following terms and conditions:

That the Petitioner, Kenneth MacLean, will accept the loss of his increments for the 1995-1996 school year and voluntarily accept a dismissal with prejudice of the above-captioned matter in consideration of the Respondent, Red Bank Regional High School Board of Education, placing the Petitioner on the increment step for the 1996-1997 school year that he would have attained if his increment had not been withheld for the 1995-1996 school year, effective July 1, 1996. The employment and adjustment increment of $2,740 remains denied for the 1995-1996 school year.

This Stipulation of Settlement has been approved by both sides who have authorized the attorneys of record to execute same on their behalf and submit the terms of this settlement to the Commissioner of Education for his approval.

Stephen B. Hunter
Attorney for Petitioner

Dated: 3/18/96

James P. Granello
Attorney for Respondent

Dated: March 15, 1996

OAL DKT. NO. EDU 7842-95

KENNETH MAC LEAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

May 20, 1996
Date of Mailing, May 21, 1996

207-96

207-96

MARY KOPKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reinstatement to a full-time tenured position following Board's actions eliminating her tenured position of Teacher-Coordinator of Cooperative Vocational-Technical Education (COE): Business Education and abolishing the position of Coordinator of Cooperative Marketing Education in order to establish a new, consolidated position of COE/Marketing Education Coordinator.

ALJ found summary judgment was appropriate. ALJ concluded administrators' recommendations to the Board that a reduction in force and a consolidation of academic courses take place were appropriate and that petitioner was not dismissed from her position by reason of her gender (male teacher was appointed to new position). ALJ concluded that petitioner was not entitled to the new position because she did not hold the two endorsements required and she never taught a Cooperative Marketing Education class. Board's motion to dismiss was granted.

Commissioner concurred with ALJ that the Board's "RIF" of petitioner and abolishment of two positions in order to establish new consolidated position were within its authority and discretion. However, Citing *Dennery,* the Commissioner remanded matter solely to determine, by stipulation or testimony, the job duties of the position of COE/Marketing Education Coordinator so as to assess the certification(s) required for the position, as well as petitioner's claim to the position.

May 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10298-94

AGENCY DKT. NO. 384-9/94

MARY KOPKO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET,

Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Seid, attorneys)

Viola S. Lordi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Robert M. Schwartz, Esq., for intervenor, John L. Scally (Lake and Schwartz, attorneys)

Record Closed: March 7, 1996 Decided: April 3, 1996

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

Mary Kopko, petitioner, seeks reinstatement to a full-time, tenured position and claims the Carteret Board of Education, respondent, has failed and refused to recognize her tenure and seniority rights. She also demands sixty days' termination pay and reimbursement of any salary wrongfully withheld and she further alleges gender discrimination in the reduction in force that led to her loss of position.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. A prehearing conference was held by telephone and the matter was calendered for hearing on June 29, 1995, in Highland Park Municipal Court. The Board had moved to exclude a proposed expert report and the petitioner filed responsive papers. In addition, John L. Scally, the person holding the controverted position, announced he wished to be represented by counsel. He was given time to have an appearance filed on his behalf.

The judge heard oral argument on the motion to exclude the proposed expert testimony. Further, the Board moved for summary judgment on the second count of the petition dealing with sixty days' notification and pay. The judge reserved decision on that motion.

On July 25, 1995, an order issued granting the petitioner's motion to admit her expert's report and testimony.

Similarly, the Board's motion to dismiss Count II of the petition was granted.

After two procedural delays that were overcome by the cooperation of counsel, the matter proceeds to summary judgment on the papers. The intervenor joined the Board's motion to dismiss.

THE ARGUMENTS

The Board and Intervenor

The respondents urge that the Board's action abolishing the position of the Teacher-Coordinator of Cooperative Vocational-Technical Education: Business Education, also known as Office Education, and referred to as COE Coordinator was reasonable and violated no statute or code. The petitioner asserts that the Board has created a single class where instruction allegedly will be given by one teacher at the same time in business education and cooperative distributive education, sometimes called cooperative marketing education. The petitioner also asserts that, as

a result of the Board's actions, she has been denied the opportunity to exercise her seniority in accordance with *N.J.S.A.* 18A:28-11, -13 and *N.J.A.C.* 6:3-1.10. The First Count asserts the Board has assigned the duties of the petitioner's full-time position to a person who does not have tenure and seniority in the COE Coordinator position.

The Third Count alleges that the petitioner's nontenured replacement is a male and that the petitioner was terminated in violation of *N.J.S.A.* 18A:28-10, which prohibits dismissals resulting from any such reduction to be based upon gender.

All of the petitioner's allegations are without merit.

The Board conducted a reduction in force (RIF) for reasons of economy and the determination to consolidate COE and the marketing education classes was based on economy. Until June 1994, the Board offered both COE and the marketing course. By spring 1994, however, enrollment in both classes had declined to the point that continuing to offer either course alone could not be justified financially. Based on long experience, and with the advice of the County Superintendent of Schools, the Board's administrators determined that COE and marketing education are compatible for the purpose of classroom instruction in a single class by a single teacher-coordinator.

On that basis, the superintendent recommended consolidation of the course and creation of the position of Cooperative Office Education/Marketing Education Coordinator to the Board. The individual serving in the new position would be required to hold endorsements in both Cooperative Office (business) Education and Cooperative Marketing Education.

In June 1994, the Board abolished the COE Coordinator and Coordinator of Cooperative Marketing Education positions and it offered a consolidated COE/Cooperative Marketing Education Course to be taught by the new COE/Marketing Education Coordinator. The Board required that the new COE/Marketing Education Coordinator hold both endorsements discussed above.

The petitioner began her tenured teaching in the Carteret District in September 1971. In September 1973, she assumed duties as the COE/Coordinator. From September 1973 until June 1994, she continued as a tenured business teacher with responsibility for teaching business classes and as the COE Coordinator. She taught one Cooperative Education: Business Education class and supervised the Cooperative Education: Business Education Program. The Petitioner holds an instructional certificate with Teacher-Coordinator of Cooperative Vocational-Technical Education Program: Business Education endorsement. By memorandum dated June 30, 1994, the Board notified the petitioner of its decision on June 29, 1994 to take the above-recited actions for economy reasons. It abolished the full-time position of Marketing Education Coordinator, then held by the intervenor. It established a newly created COE/Marketing Education Coordinator requiring both subject matter certifications or endorsements. The petitioner acknowledge receipt of the memorandum of June 30, 1994.

Following abolition of the COE Coordinator position, the petitioner continued as a tenured business teacher at Carteret High School with a full-time assignment of teaching business classes, effective September 1994.

The intervenor began his tenure service in April 1974, having been hired in 1971. He began as a business teacher at Carteret High School and later taught Marketing (also known as Distributive Education) and Cooperative Education: Marketing. The latter course was also known as Distributive Education II and Marketing II. In 1977, he became head of the business department. He holds an instructional certificate with teacher-coordinator of Cooperative Vocational-Technical Education Program, Business Education, and Teacher Coordinator of Cooperative Vocational-Technical Education Program, Distributive Education endorsements. He also has endorsements covering General Business Studies, Distributive Occupations and Bookkeeping and Accounting.

On June 29, 1994, the Board appointed the intervenor to the newly-created position of COE/Marketing Coordinator. The intervenor had the instructional certificate endorsements required for the position. The petitioner was not offered the position because she had not earned instructional certificate endorsements in both Cooperative Business Education and Cooperative Marketing Education.

The Board argues it should be granted summary decision dismissing the balance of the petition because the undisputed facts and documentary evidence bar the claims set forth. Application of the legal principles surrounding summary judgment indicate the Board is entitled to summary decision. The petitioner is not qualified for the new position of COE/Marketing Education Coordinator because that position requires endorsements in both Cooperative Office (Business) Education and Cooperative Marketing Distributive Education. An individual accrues seniority rights only in positions in which she or he has actually served. Therefore, the petitioner cannot demonstrate that she was entitled to the COE/Marketing Education Coordinator position on the basis of seniority. The Third Count of the petition alleges that the petitioner was dismissed from her position of COE/Coordinator by reason of gender and in violation of *N.J.S.A.* 18A:28-10. That statute provides:

> Dismissals resulting from any such reduction [in force] shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to the standards to be established by the commissioner with the approval of the state board.

The petitioner has failed to show that abolition of her position and the appointment of Scalley, instead of her, to the new position was made by reason of gender. The petitioner merely alleges that because a male teacher was appointed to the new position, she was discriminated against by reason of gender.

The Board's RIF of the Teacher/Coordinator positions in Business and Distributive Education and its creation of the new COE/Marketing Education Coordinator position for economy reasons was entirely within the Board's authority. It is a procedure provided for by statute. In *N.J.S.A.* 18A:28-9, the Legislature has clearly stated, "Nothing in this title . . . shall be held to limit the right of any board of education to reduce the number of teacher staff members employed in the district whenever, . . . it is advisable to abolish any such positions for reasons of economy . . . ."

In June 1994, the Board determined it could not justify offering both cooperative education classes because of low enrollments. The Board was completely within its statutory authority under *N.J.S.A.* 18A:28-9 to consolidate the two cooperative education classes for reasons of economy.

The petitioner's seniority rights that accrued in her position as COE/Coordinator are not transferable to the newly-created position in which capacity she has never served. *N.J.A.C.* 6:3-5.1(l)17i provides, "any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served." While the petitioner would have superior seniority rights in her position as COE/Coordinator if she and the intervenor were both seeking that position, she is not entitled to superior seniority rights in respect of the newly-created position because her seniority accrued only in the COE/Coordinator position in which she actually served.

Therefore, even though the intervenor, who holds an endorsement in COE does not have seniority in COE because he has never actually served in that position, neither the petitioner nor the intervenor may claim seniority rights in respect of the newly created position precisely because it is new. Seniority at the secondary school level depends upon actual service in a position. The abolition of the petitioner's position and subsequent creation of the new position means that the newly-created position was not a position in which the petitioner could claim superior seniority rights because she has accrued seniority only in her previous position as COE/Coordinator. The petitioner's seniority rights were not violated by the Board's appointment of the intervenor to the COE/Marketing Education Coordinator position.

The petitioner is not qualified for the new position by reason of the fact that she does not have the two endorsements required. While the statutes and code protect carefully the seniority rights of teachers, *N.J.A.C.* 6:3-1.4(a) expressly gives authority to boards of education to determine the types of background experiences and personal qualities, if any, that the district requires or prefers successful candidates for specific positions to possess in addition to appropriate certification. Furthermore, the requirements may emphasize the nature of experience and the quality of individual achievement desired as opposed to the amount of experience held.

If the present case, the Board determined that the new position should require a teacher to hold dual endorsements, that is, in both Cooperative Office Education and in Cooperative Marketing Education.

The certificates and endorsements of the petitioner and the intervenor are set forth above. It is undisputed that the petitioner does not hold an endorsement in Marketing Education. The intervenor does and has also taught other business classes and has been the Business Department Head for seventeen years. The petitioner was not appointed to the new position, not by reason of her gender, but rather because she is not qualified for the new position on the basis of endorsements held.

Any argument that the intervenor is not tenured in the position of COE Coordinator is irrelevant. It is seniority, not tenure, that is at issue. Both the petitioner and the intervenor are tenured with respect to the COE Coordinator position because both are tenured under their respective instructional certificates. The issue regarding the new position is seniority, not tenure. The petitioner does not have seniority with respect to the newly-created position because seniority depends upon actual service in a particular position, and she has never served in that position. Although tenure rights transfer to all endorsements under a particular certificate, the petitioner does not have seniority in Cooperative Marketing education under her instructional certificate because she does not hold a Cooperative Marketing endorsement. Nor has she ever taught a Cooperative Marketing education class.

The Petitioner:

The petitioner argues that the Board's assertion of declining enrollment in both Cooperative Office Education and Cooperative Marketing Education is not supported by any evidence. The petitioner intends to show that ten students were enrolled in the COE course. This number was in the range that had previously existed and ten students was not an unacceptably low number. In fact, the Marketing/Distributive Education course was no longer viable or justified because that course had only six pupils enrolled.

When a teacher contests the validity of the reason given by a board for an RIF, a hearing on the issue was necessary. The Board asserts that it relied on the long experience of its administrators and the advise of the County Superintendent of Schools. But the Board has submitted no evidence that those administrators had any training or experience in teaching business education courses. There is no evidence that any study, whether done internally or by reviewing the curriculums, goals and objectives of both courses, or by interviewing the teachers who taught the courses was done. Thus, a non-arbitrary, reasonable decision could not have been made. No outside expert was contacted or retained to evaluate the feasibility of consolidating the two courses. The Board did not change the curriculums of the two courses nor did it develop a curriculum for the new course. Rather, two curriculums are being used simultaneously. This has the effect of giving short shrift to pupils in both areas by fifty percent of their time each day. The petitioner's expert has written a report critical of the merger.

The Board's administrators do not have the expertise to rebut the petitioner's expert and have not retained an expert to challenge her statements and conclusions. Nor has the intervenor attempted to explain why, if at all, the petitioner's expert is incorrect.

The petitioner urges that the issue is whether the Board acted arbitrarily, capriciously or unreasonably by consolidating the two courses. The tribunal can, after a trial, easily find arbitrariness, capriciousness or unreasonableness in the Board's actions.

The petitioner also urges that similar cases have held that were dual certification is required, a determination must be made as to whether the duties of the new position are substantially the same as abolished position or positions. *See, e.g., Dennery v. Passaic County Regional High School District,* 131 *N.J.* 626 (1993). In the present case, the tribunal cannot find without a factual record that the Board did not act arbitrarily, capriciously or unreasonably.

As to her discrimination count, the petitioner asserts that even though there are no cases relating to the issue of gender being the basis for an RIF, cases interpreting the New Jersey Law Against Discrimination (LAD) are analogous. The uniqueness of the context of this case requires the tribunal to modify the traditional McDonald-Douglas test. The issue of qualifications that

normally must be proved by a petitioner in an LAD case does not operate here, because the employer was able to sidestep this requirement by its conduct. It is undisputed that the petitioner is a tenured female and clearly qualified to teach Cooperative Office Education. It is also clear that the Board, without evidence supplied to this tribunal, created a consolidated position and retained a male teacher, whose program had become educationally non-viable. The petitioner need not provide direct evidence that the employer had discriminatory reasons in order to survive summary judgment. She need only point to sufficient evidence to support an inference that the employer did not act for its proffered reasons. See, *Josey v. John R. Hollingsworth, Corp.*, 996 F. 2d. 632 (3rd Cir. 1993).

The petitioner contests the Board's articulated reason for combining the two courses. The petitioner also contests the validity of the RIF of her position, the method used to reach the conclusion to RIF and the educational viability of the decision. If, after trial, the court agrees, than the petitioner has met her burden.

DETERMINATION

Initially, I **FIND** that the Board's decision to eliminate separate Office Education and Marketing Education classes based on low enrollments was within the compass of authority given to the Board by the Legislature. The fact that low enrollments may have been countenanced in the past does not mean that those standards necessarily apply now. As budgets have become more straitened, boards of education have had to rethink virtually every aspect of school operation including course offerings and the related question of minimum enrollments. "The School Law vests the management of the public schools . . . in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." *Kenney v. Board of Education of Montclair,* 1938 SLD 647 (1935), aff'd St. Bd. of Ed. 649, 653 (1935), and

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

> decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner, but to their constituent for the wisdom of their actions. *Boult and Harris v. Board of Education of Passaic*, 1939-49 SLD 7, 13, aff'd St. Bd. of Ed. 15, aff'd 135 NJL 329 (Sup. Ct. 1947), 136 NJL 521 (E&A 1948).

Common experience and common sense dictate that as resources become increasingly scarce, boards of education will search constantly and diligently for ways to effect savings. The type of action complained of here is commonplace throughout the State. More importantly, however, it is an action precisely provided for by statute. The petitioner's argument that a non-arbitrary, reasonable decision could not have been made must be rejected.

Similarly, there is no requirement that administrators have business education experience. Administrators could not possibly have experience in all areas for which they have responsibility. The responsibility exists, nonetheless.

The Board's motion for summary decision dismissing the First count of the petition must be granted because the petitioner has raised no genuine issue of material fact. This judge is aware that the standards for grant of summary decision should be applied with discriminating care so as not be defeat a summary judgment where the movant is entitled to that relief. The New Jersey Supreme Court in *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995), has held that for summary judgments the proper test is whether there exists a genuine issue with respect to a material fact which requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the nonmoving party. This assessment of the evidence is to be conducted in the same manner as that required under *Rule* 4:37-2(b).

In other words, the same standard of proof, here, a simple preponderance, as is used for the merits is to be applied to the summary judgment decision. *N.J.A.C.* 1:1-12.5 states that when a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only

be determined in an evidentiary proceeding. For the reasons cogently set forth by the Board, above, I **FIND** and **CONCLUDE** that summary judgment should issue.

The only material facts in this matter are that the Board eliminated the part-time teacher/coordinator positions in Business Education (COE) and Distributive Education (Marketing Education) and the Board created the new COE/Marketing Education Coordinator position and that these actions were entirely within the Board's authority to affect a reduction in force pursuant to *N.J.S.A.* 18A:28-9.

The petitioner did not accrue seniority rights in the COE/Marketing Education Coordinator position because she never served in that position. The Board's decision to appoint the intervenor to the newly-created position was not arbitrary, capricious or unreasonable because he holds endorsements in both areas and the petitioner does not.

A mere assertion to the contrary does not constitute a germane issue of fact.

The Third Count of the petition alleges that the petitioner was dismissed from her COE Coordinator position by reason of gender in violation of *N.J.S.A.* 18A:28-10. However, the petitioner has failed to demonstrate any nexus between the abolition of her position and the appointment of the intervenor, instead of her, by reason of her gender. The mere allegation that a male teacher was appointed to the position does not constitute discrimination by reason of gender and does not constitute a material fact. Nevertheless, the petitioner has put forward no evidence whatsoever to support an inference that the Board acted based on gender when it appointed the intervenor.

I **FIND** and **CONCLUDE** that the petitioner was not entitled to the position because she did not have the endorsement required and has never taught a Cooperative Marketing Education class. Thus, she could not have accrued seniority in that position and her gender has absolutely nothing to do with the intervenor's appointment.

I further **FIND** and **CONCLUDE** that the administrators' recommendations to the Board were a proper exercise of their powers and duties. *N.J.S.A.* 18A:17-20 provides that the chief school administrator shall have general supervision over the schools of the district and *N.J.A.C.* 6:11-9.3 require that superintendents and assistant superintendents have a school administrator endorsement. This endorsement authorizes a superintendent and an assistant superintendent to direct the formulation of district goals, plans, policies and budgets; to recommend their approval by the district board of education; to direct their implementation; to recommend all staff appointments and other personnel actions for Board approval; to direct district operations and programs; to supervise and evaluate building administrators and central office staff; and to oversee the administration and supervision of school-level operations, staff and programs. It is clearly beyond argument that the superintendent and the assistant superintendent have both the statutory and regulatory authority to determine the appropriateness of recommendations to a board of education that a reduction in force and a consolidation of academic courses take place.

To the extent that the petitioner relies on *Klinger v. Cranbury Township Board of Education*, 190 *N.J. Super.* 354 (App. Div. 1982), that reliance is misplaced. The issue in *Klinger* was whether the reduction in Klinger's duties as a teacher from full-time to .7 time, with a corresponding reduction in salary, violated his tenure and seniority rights. *Id.* at 355. The Appellate Division held that whether of tenured or nontenured teachers, a reduction in force is entirely within the authority of the Board if done for reasons of economy. *Id.* at 357.

Klinger simply does not stand for the proposition that when a teacher contests the validity of the reason proffered by the Board for an RIF, a hearing on the issue is necessary. As the Appellate Division noted in respect of the Cranbury Board's physical education program which constituted the subject matter, "the fact that . . . [the Board] preferred two teachers instead of one is no concern to the courts, and so long as petitioner was not treated inferiorly upon reduction in force, he has no legitimate complaint." *Id.* at 358. I have read *Klinger* and I find no requirement of a hearing therein.

Nor does *Dennery v. Board of Education,* 131 *N.J.* 626 (1993) require a hearing. To the extent the petitioner relies on *Dennery*, it offers her no support.

In summary, making all inferences that fairly may be made in favor of the petitioner, there still is not enough to block the Board's appropriate motion for summary decision. In consideration of the foregoing, I **FIND** for the Respondent Board and **GRANT** the motion to **DISMISS**. It is so **ORDERED**.

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

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

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

3 APRIL 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4/8/96
DATE

LNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 11 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

MARY KOPKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4 in that the initial decision was mailed to the parties on April 11, 1996, and the exceptions were filed with the Commissioner of Education on April 25, 1996. Accordingly, neither petitioner's exceptions nor the Board's and intervenor's replies thereto are considered herein.

Upon careful and independent review of the record in this matter, the Commissioner determines to adopt in part the initial decision of the Administrative Law Judge (ALJ), and to remand this matter solely on the issue defined below.

Initially, the Commissioner concurs with the ALJ that Counts II and III of the petition are properly dismissed. As to the first count of the petition, the Commissioner agrees that the Board's decision to eliminate petitioner's tenured position of Teacher-Coordinator of Cooperative Vocational-Technical Education ("COE"): Business Education and to also abolish the position of Coordinator of Cooperative Marketing Education in order to establish a new, consolidated position, COE/Marketing Education Coordinator, was within its authority and discretion, notwithstanding that petitioner's expert witness is critical of the Board's action.

However, the Board now requires that the new COE/Marketing Education Coordinator hold endorsements in both Cooperative Office Business Education and Cooperative Marketing Education. Petitioner does not hold the latter endorsement; Intervenor Scally holds both endorsements.

Petitioner correctly argues that the outcome herein rests, in part, on an analysis of the job duties of the new position. (Initial Decision at p. 8) As *Dennery, supra* , instructs,

> When the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements.*** (*Dennery* at 639)

The Commissioner finds nothing in the record of this matter to indicate that an analysis of the COE/Marketing Education Coordinator job duties has been effectuated so as to satisfy him that the Board has properly set a requirement for dual certification.[1] Thus, this matter is remanded solely to determine, by stipulation or testimony, the job duties of the position of COE/Marketing Education Coordinator so as to assess the certification(s) required for the position, as well as petitioner's claim to the position.

Accordingly, the initial decision is adopted in part, as set forth above, and remanded to the OAL for further proceedings in accordance with the parameters established herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 22, 1996
Date of Mailing, May 22, 1996

[1] While the record demonstrates that the parties stipulated, that "***Respondent had abolished [petitioner's] tenured position and had 'established a newly created COE/Marketing Education Coordinator [position] requiring subject matter certification in both Marketing Education and Cooperative Office Education for the purposes of economy***'" (Parties' Stipulation of Facts, dated June 28, 1995), this stipulation appears to merely affirm that the event took place, rather than to evidence the parties' agreement that the new position rightfully requires dual certification.

207-96

570-97
(207-96)

MARY KOPKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner sought reinstatement to a full-time tenured position following Board's actions eliminating her tenured position of Teacher-Coordinator of Cooperative Vocational-Technical Education (COE): Business Education and abolishing the position of Coordinator of Cooperative Marketing Education in order to establish a new, consolidated position of COE/Marketing Education Coordinator.

In prior decision, ALJ found summary judgment was appropriate. ALJ concluded administrators' recommendations to the Board that a reduction in force and a consolidation of academic courses take place were appropriate and that petitioner was not dismissed from her position by reason of her gender (male teacher was appointed to new position). ALJ concluded that petitioner was not entitled to the new position because she did not hold the two endorsements required and she never taught a Cooperative Marketing Education class. Board's motion to dismiss was granted. Commissioner concurred with ALJ that the Board's "RIF" of petitioner and abolishment of two positions in order to establish new consolidated position were within its authority and discretion. However, citing *Dennery,* the Commissioner remanded matter solely to determine, by stipulation or testimony, the job duties of the position of COE/Marketing Education Coordinator so as to assess the certification(s) required for the position, as well as petitioner's claim to the position.

On remand, the ALJ concluded that the job duties of the COE/Marketing Education Coordinator properly demanded that the instructor hold the two endorsements the Board required. As petitioner did not possess the two endorsements, there was no justiciable issue here and the petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6804-96
AGENCY DKT. NO. 384-9/94
(ON REMAND EDU 10298-94)

MARY KOPKO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET,

Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner and Hunter, attorneys)

Viola S. Lordi, Esq., for respondent (Wilentz, Goldman and Spitzer, attorneys)

Robert M. Schwartz, Esq., for intervenor John L. Scally

Record Closed: July 18, 1997 Decided: September 11, 1997[1]

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

Mary Kopko, petitioner, seeks reinstatement to a full-time, tenured position and claims the Carteret Board of Education, respondent, has failed and refused to recognize her tenure and seniority rights. She also demands sixty days' termination pay and reimbursement of any salary

[1] An extension of time was requested to file this Initial Decision pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8.

wrongfully withheld and she further alleges gender discrimination in a reduction of force that led to her loss of the position.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. Following a prehearing conference and the addition of an intervenor, the matter proceeded on the papers. An initial decision was issued on April 3, 1996. On May 22, 1996, the Commissioner concurred with the ALJ that Counts II and III of the petition were properly dismissed. As to the first Count, the Commissioner agreed that the Board's decision to eliminate the petitioner's tenured position of Teacher-Coordinator of Cooperative Vocational-Technical Education (COE): Business Education, and also to abolish the position of Coordinator of Cooperative Marketing Education in order to establish a new, consolidated position, COE/Marketing Education Coordinator, was within its authority and discretion.

However, the Board requires that the new COE/Marketing Education Coordinator hold endorsements in both Cooperative Office Business Education and Cooperative Marketing Education. The petitioner does not hold the latter endorsement. Intervenor Scally holds both endorsements.

The matter was remanded for reconsideration of that part of Count I that goes to the duties of the new position as they relate to the endorsements required. The judge ordered limited hearing and that was accomplished on June 25, 1997. Between the remand and the second hearing, Intervenor Scally left the Board's employ.

At hearing, the sole issues were (1) What are the job duties of the COE/Marketing Education Coordinator and (2) Do these duties properly demand the certifications now required for the position.

The board supplied the certifications of Joseph A. Torre and S. Louis Panigrosso concerning deliberations and decisions made by the Carteret Board relevant to this matter.

S. Louis Panigrosso, superintendent of schools since July 1994, testified concerning the courses of study for Cooperative Business Education and Marketing II (Exhibits A and B). All courses are readopted by the Board in August of each year. The witness could not say when these courses were first adopted. When the two courses were consolidated, a new job was created. The course objective proficiencies are not the same. The Board voted to combine the two courses. As far as the witness was concerned, that incorporated all goals and proficiencies from the two courses.

The witness did not observe Scally after the merger of the two courses. That is the job of others. The witness met with the high school principal and discussed the courses. Among the job duties are provision of Cooperative Business Education, Marketing Education and outside experience. After the Board moved to combine the two courses, the witness looked at the certifications and endorsements required and believed both were necessary to teach the combined course. He consulted the New Jersey Administrative Code and spoke to the County Superintendent of Schools by telephone. He reviewed the certifications and endorsements of all business teachers.

After the merger was accomplished, the course was entitled Cooperative Business Education and Marketing II. Credit was given under either course title. Instruction was given in the same class however, to approximately fourteen pupils.

The Assistant Superintendent/Business Administrator testified. He was the high school principal in June 1994 when the Board adopted the change. He reviewed his certification of August 27, 1996 (R-2) and adopted it as his direct testimony.

The witness stated that in the early 1990's, the office education coordinator did classroom teaching, monitored outside jobs, helped secure jobs and also serve as a troubleshooter. The Marketing II teacher had similar duties as to marketing and distributive education. The witness described the job descriptions for the two courses as different and overlapping. Course proficiencies differ in the main, but there is some overlap. The responsibility of pupils to be employed is the same in both courses. However, secretarial skills are not the same as cashier skills.

The Board decided in June 1994, while he was high school principal, to make changes. No one wanted any pupil denied an opportunity. On August 1, 1994, the witness became assistant superintendent.

The objectives of each course focused on skills that did not necessarily relate to skills in the other course. Reference is to courses of study. The goals are different. In effect, two separate curriculums are offered in one class. Some goals continue to be separate, some continue to be similar or the same. There are differences in course objectives. There are similar or parallel district goals. No new course description was drafted for the merged course. He refers in paragraph seven of his certification to significant differences in objectives.

At the superintendent's direction, he contacted the County Superintendent of Schools. Inasmuch as the title for the consolidated position was not an unrecognized title, the County Superintendent's approval was not required prior to the appointment of Scally to the position. The witness nevertheless obtained the oral approval of the County Superintendent. Because *N.J.A.C.* 6:11-6.1(a) requires each teaching staff endorsement be held for the corresponding teaching assignment, the Board determined that both endorsements should be required of a teaching staff member assigned to teach and coordinate a consolidated course covering Cooperative Business (office) Education and Cooperative Marketing Education.

DETERMINATION

The scope of the remand is to determine what the job duties of the COE/Marketing Education Coordinator are and whether these duties properly demand the certifications now required for the position. The short answer is that the job duties are virtually unchanged from what they were before the positions were consolidated. These duties properly demand the dual certification the Board required.

Exhibit A, Cooperative Business Education, focuses on a well-rounded training program to prepare the student for an office position upon graduation. Exhibit B, Marketing II, is designed to provide students with an out-of-school afternoon session. The inductive method of

instruction, such as conferences and discussions based on actual working experience of the trainees, is a unique feature of the course. Thus, one basic difference is that the instruction in Marketing II is ongoing and derives to a great extent from the pupil's experience, while the pupils in Cooperative Business Education are taught various skills and theories in the classroom and they attempt to transfer these to job situations. At the same time, district-wide goals for the two courses are the same.

The combination of differences and similar characteristics may be shown graphically.

COURSE OBJECTIVES
(PROFICIENCIES)

	Cooperative Business Education		Marketing II
1.	To allow students to apply the various skills and theories learned in the classroom to actual on the job situations.	1.	To offer instruction in distribution, marketing and management.
2.	To provide a method for students to explore various office positions thereby aiding them in their selection of a proper occupation.	2.	To provide an opportunity for the student to select and prepare for a career in the areas of distribution.
3.	To provide realistic business experiences that are not readily available in the classroom.	3.	To afford students the opportunity to develop marketable skills.
4.	To further enhance the ability of the student to secure permanent employment in the area of choice upon graduation.	4.	To upgrade the competence of students to the maximum.
5.	To develop desirable personality traits, such as cooperation, tact, initiative, mental alertness, dependability and punctuality in order to get along with others and to handle office work competitively.	5.	To aid in the improvement of the techniques of distribution.
		6.	To assist persons already employed to do a more effective job.
		7.	To develop a broader understanding of the social and economical responsibilities of those engaged in distribution in a free, competitive society.

(CAREER EDUCATION)

1.	The students will learn to establish goals that are important to them.	1.	The students will become proficient in using resource information to make career decisions.
2.	The students will recognize that their		

	educational experiences are a part of their career development.	2.	The students will develop the skills required to identify the task, specify resources required, outline procedures, perform operations and evaluate the product.
3.	The students will understand the relationship between career and lifestyle.	3.	The students will recognize the implication of working, with or without supervision independently, and with others.
4.	The students will understand the range of social and economic benefits associated with various occupations.	4.	The students will understand the roles of leisure and the air of achieving self-satisfaction.
5.	The students will identify personal goals as part of making career decisions.		
6.	The students will become familiar with the use of basic tools, equipment, and materials associated with business, commercial, and industrial activities.		
7.	The students will relate information about themselves in selecting, learning or performing duties.		
8.	The students will understand and appreciate the relationship of work, continual learning, the arts, and leisure in achieving social responsibility and self-satisfaction.		

The Comprehensive Business Education endorsement on an instructional certificate authorizes the holder to teach business education subjects in all schools. These subjects include bookkeeping and accounting, secretarial studies, general business, consumer education, business mathematics and business English. *N.J.A.C.* 6:11-6.2(a)4i. There is an endorsement for bookkeeping and accounting that authorizes the holder to teach bookkeeping, accounting and business mathematics. *N.J.A.C.* 6:11-6.2(a)4ii. The general business endorsement authorizes the holder to teach general business studies including, but not necessarily limited to business law, economic geography, economics, social business studies, consumer education[,] sales, retailing and advertising. *N.J.A.C.* 6:11-6.2(a)4iv. The secretarial studies endorsement authorizes teaching of shorthand, typewriting, office procedures, business machines and business English. *N.J.A.C.* 6:11-6.2(a)4v. The marketing and distributive occupations endorsement authorize the holder to teach marketing and distributive occupations which include sales, advertising and retailing. *N.J.A.C.* 6:11-6.2(a)4vii. Clearly, the comprehensive business education endorsement subsumes the endorsements for bookkeeping and accounting and for secretarial studies. It does

not subsume the marketing and distributive occupations endorsement. Thus, the person assigned to teach the combined course at Carteret High School would have to hold two endorsements to be authorized to cover all areas the course presents.

The foregoing are found as **FACTS**.

It must be noted that the Board's administrators contacted the County Superintendent of Schools while the consolidation was under consideration. The Board and its administrators took reasonable steps under the circumstances. While it would have been better if they had asked for the County Superintendent's opinion in writing, the steps they took were appropriate to the circumstances.

It must also be noted that the petitioner's objection to the administrators' lack of business education experience is not relevant. It would be impossible for high school and district administrators to have experience in all areas of instruction. It is sufficient that they hold supervisory and administrative certifications and endorsements.

In consideration of all the circumstances, I **CONCLUDE** that the job duties of the COE/Marketing Education Coordinator properly demand that the instructor hold the two endorsements the Carteret Board of Education requires.

The petitioner herein does not possess the two endorsements.

Therefore, there is no justiciable issue before me. The petition of appeal is **DISMISSED**. It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11 SEPTEMBER 1997
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

9/15/97
DATE

DNP
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 13 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

slf

WITNESSES

On behalf of the Petitioner:

None

On behalf of the Respondent:

S. Louis Panigrosso
Joseph A. Torre

EXHIBITS

On behalf of the Petitioner:

None

On behalf of the Respondent:

R-1 Certification of S. Louis Panigrosso, August 27, 1996, 10 pp. with four attachments: (A) Course of Study Cooperative Business Education, 3 pp., (B) Course of Study, Marketing II 3pp. (C) Instructional Certificate, Mary Kopko, November 1976, Teacher-Coordinator of Cooperative Vocational-Technical Education Program (Business Education), (D) Instructional Certificate, John L. Scally, May 1977, Teacher-Coordinator of Cooperative Vocational-Technical Education Program: Distributive Education; Teacher-Coordinator of Cooperative Vocational-Technical Education Program: Business Education

R-2 Certification of Joseph A. Torre, August 27, 1996, 10 pp. with same attachments as R-1

MARY KOPKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's conclusion that the Board has demonstrated that the job duties of the COE/Marketing Education Coordinator are such that it has appropriately required dual certification in order to hold that position, notwithstanding that the Board, apparently, has not yet developed a single job or course description to accommodate the consolidated Cooperative Business Education and Marketing II courses.[1] The certifications and testimony of

[1] Although, as the ALJ notes, Intervenor Scally resigned from employment with the Board prior to the issuance of the initial decision on remand, the Commissioner's conclusion as to the propriety of the Board's action is unaffected by her resignation.

both Joseph A. Torre and S. Louis Panigrosso fairly establish that the COE/Marketing Education Coordinator is responsible for teaching two distinct occupational areas, *i.e.*, the broader study of business education, and the more narrow field of marketing education.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein.[2] The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] In response to the ALJ's observation on page 7 of the initial decision, the Commissioner herein notes there is nothing in the pertinent regulations which would compel a local board to obtain an opinion, written or otherwise, from the county superintendent upon assigning a recognized title to a new position. *N.J.A.C.* 6:11-3.3.

OCTOBER 30, 1997
DATE OF MAILING OCTOBER 30, 1997

208-96

208-96

ROBERT L. JEFFERSON, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner, Assistant Superintendent for Curriculum and Instruction, challenged abolishment of his position pursuant to a reduction in force in August 1994. Petitioner sought reappointment to another position in the District in keeping with his tenure and seniority rights.

Citing recent Superior Court decision in *Gittleman*, ALJ concluded that petitioner was entitled to fill any vacant administrative position or any administrative position held by a nontenured individual in accordance with his tenure and seniority rights because the Court held that "[an] educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate" regardless of whether that educator had actually served in the area (*Dennery*; *Ellicott*). Moreover, the ALJ concluded that petitioner should receive back pay from October 18, 1994 to August 14, 1995 at the highest level administrative position to which he was entitled in accordance with his tenure and seniority rights, minus the $7,000 he earned as a consultant.

Commissioner concurred with the findings and conclusions of the ALJ that petitioner's tenure and seniority rights were violated when he was terminated from employment with the Board due to a reduction in force. Commissioner found, in light of the April 29, 1996 Appellate Division decision in *Nelson*, it is no longer tenable to interpret *Gittleman*, and *Dennery* to permit concepts of separate tenurability based on *N.J.S.A.* 18A:28-5. Based on *Nelson*, Commissioner affirmed the ALJ's position that based on *Gittleman*, petitioner was entitled to hold any vacant administrative position or any administrative position held by a nontenured individual in accordance with his tenure rights. Commissioner ordered that petitioner receive mitigated compensation.

May 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11782-94

AGENCY DKT. NO. 458-11/94

ROBERT L. JEFFERSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Stephen B. Wiley, Esq., attorney for petitioner (Wiley, Malehorn and Sirota, attorneys)

Melvin C. Randall, Esq., attorney for respondent (Love & Randall, attorneys)

Record Closed: February 16, 1996 Decided: February 23, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioner, Robert L. Jefferson (Dr. Jefferson) appealed the abolition of his position as Assistant Superintendent for Curriculum and Instruction with respondent, Board of Education of the City of East Orange, Essex County (the Board), based upon an alleged reduction in force. Dr.

Jefferson sought re-establishment of and appointment to that position or appointment to another position within the District in keeping with his tenure and seniority rights.

PROCEDURAL HISTORY

On November 15, 1994, Dr. Jefferson filed a Petition of Appeal with the Commissioner of Education. The Board filed an Answer on November 23, 1994. On November 21, 1994, Dr. Jefferson filed a Motion for Emergent Relief. On December 23, 1994, the Honorable Richard McGill entered an Order denying the motion. On June 30, 1995, Dr. Jefferson filed a Motion for Partial Summary Decision. The Board filed its opposition thereto on March 3, 1995. On March 8, 1995, the undersigned entered an Order denying the motion.

The undersigned held a Prehearing Conference and entered a Prehearing Order on April 4, 1995. The parties appeared for the hearing on December 4, 1995. Prior to the start of the hearing, Dr. Jefferson filed another Motion for Summary Decision. The undersigned reserved decision on that motion and permitted the Board to file a Brief in opposition thereto. Dr. Jefferson also withdrew this claim for re-establishment of and reinstatement to the position of Assistant Superintendent for Curriculum and Instruction or appointment to a position within the District in keeping with his tenure and seniority rights. Dr. Jefferson seeks back pay.

The hearing was held on December 4, 5, 6 and 7, 1995. The record closed on February 16, 1996, after the submission of all post-hearing Briefs.

FACTS

The parties stipulated the following which **I FIND** as **FACTS** in this case:

1. Dr. Jefferson was a tenured teaching staff member.

2. Dr. Jefferson holds an Administrative Certificate with a School Administrator endorsement.

3. The Board hired Dr. Jefferson in August 1987 as an Assistant Superintendent for Curriculum and Instruction.

4. Dr. Jefferson served as Assistant Superintendent for Curriculum and Instruction until August 1994

5. During the 1991-92 school year, Dr. Jefferson served on an interim basis as Superintendent.

6. Following the abolition of Dr. Jefferson's position as Assistant Superintendent for Curriculum and Instruction, the Board did not conduct an analysis of whether there were other administrative positions in the District into which Dr. Jefferson could be placed.

7. Prior to the abolition of Dr. Jefferson's position, Dr. Jefferson consistently received positive evaluations.

8. John J. Howard, Jr., Ph.D. (Dr. Howard) became Superintendent in about July 1992.

9. At about the time the Board abolished Dr. Jefferson's position, it appointed Dariel Haythe to the position of Supervisor of Evaluation and Dr. Loretta Osakwe to the position of Supervisor of Social Studies.

10. On about December 4, 1994, the Board advertised in the Star Ledger vacancies for the positions of Supervisor of Evaluation and Unique School Supervisor.

11. The Board voted four to three in favor of Dr. Howard's appointment as Superintendent.

12. The following positions were vacant at the time the Board abolished Dr. Jefferson's position or became vacant after that time:

a. School Business Administrator/School Board Secretary;
b. Supervisor of Construction;
c. Unique School Supervisor;
d. Supervisor of Secondary Language Arts;
e. Supervisor of Child Study;
f. Supervisor of Speech;
g. Supervisor of Grants;
h. Assistant Principal of East Orange High School;
i. Supervisor of Child Study;
j. Supervisor of Physical Education;
k. Supervisor of Physical Education, Health and Drivers Education;
l. Supervisor of Language Arts;
m. Supervisor of Mathematics;
n. Department Head of Performing Arts at East Orange High School;
o. Assistant Principal of Cicely Tyson School;
p. Assistant Principal of Lincoln Elementary School;
q. Supervisor of Evaluation; and
r. Supervisor of Health Services.

13. At the time the Board abolished Dr. Jefferson's position, non-tenured individuals held the following administrative positions:

a. Director of Secondary Education;
b. Principal position held by Seymour Lerner;
c. Superintendent position held by Dr. Howard;
d. Assistant Principal position held by Joyce Eldridge-Howard;
e. School Business Administrator/Board Secretary;
f. Director of Community Education Center;

g. Supervisor of reading, grades 7 to 12;

h. Principal position held by Yvette Peacock;

i. Assistant Principal position held by Michael Banks;

j. Assistant Principal position held by Gloria Watson;

k. Supervisor of Good Start;

l. Assistant Principal position held by Azel Colston, Jr.

m. Assistant Principal position held by Sadie Vincent;

n. Supervisor of Social Studies position held by Loretta Osakwe;

o. Supervisor of Evaluation position held by Dariel Haythe;

p. Supervisor of Evaluation position held by Maurice Rybowski;

q. Director of Staff Development;

r. Principal of East Orange High School;

s. Principal of Truth Middle School;

t. Principal of Stockton Elementary School;

u. Assistant Principal of East Orange High School;

v. Assistant Principal of Washington Elementary School;

w. Assistant Director of Special Education;

x. Assistant Director of Student Personnel Services;

y. Supervisor of Bilingual/Bicultural & Foreign Languages

z. Supervisor of Language Arts, grades 7 to 12;

aa. Supervisor of Mathematics, grade 3 to 5; and

bb. Supervisor of Mathematics, grades 6 to 8.

14. Each of the Supervisor positions listed in paragraphs 12 and 13 above require an Administrative Certificate with a School Administrator endorsement or a Supervisor endorsement.

15. The School Business Administrator position listed above required an Administrative Certificate with a School Administrator endorsement or a School Business Administrator endorsement.

16. Each of the Principal or Assistant Principal positions set forth in paragraphs 12 and 13 above required an Administrative Certificate with a School Administrator endorsement or a Principal endorsement.

17. The Superintendent position required an Administrative Certificate with a School Administrator endorsement.

18. The Director of Secondary Education, Director of Community Education and Director of Staff Development positions required an Administrative Certificate with a Director endorsement;

19. Dr. Jefferson had the necessary Certificate and endorsement to fill each of the positions listed in paragraphs 12 and 13 above.

20. Since the time the Board abolished Dr. Jefferson's position, it failed to offer him another administrative position in the District.

(See: C-1 and C-2.) The parties also stipulated during the hearing that Dr. Jefferson's performance during his employment in the District was outstanding or above average.

In addition to the above, having heard the witnesses and reviewed the Exhibits, I **FIND** the following **FACTS**:

Dr. Jefferson received his Ph.D. in 1982. He holds a School Administrator Certificate under *N.J.A.C.* 6:11-9.3. Prior to Dr. Jefferson's employment in the District, the State had taken over the District's fiscal operations. The State also had refused to certify the District and had placed it into a Level II status due to deficiencies in the areas of curriculum and instruction in reading, writing and mathematics. The Board advertised for an Assistant Superintendent for Curriculum and Instruction. Dr. Jefferson applied for the position and the Board appointed him to it on August 28, 1987. His job was to remove the deficiencies and to get the District out of Level II status. Dr. Jefferson obtained tenure in the 1991-92 school year.

During the 1991-92 school year, Dr. Jefferson served as Interim Superintendent while the Board conducted a nationwide search for a new Superintendent. Dr. Jefferson applied for the position. He and Dr. Howard were the only finalists. In April 1992, the Board selected Dr. Howard and appointed him to the position of Superintendent effective July 1, 1992.

Dr. Jefferson returned to his tenured position of Assistant Superintendent for Curriculum and Instruction. He oversaw the Director of Staff Development, the Teachers on Special Assignment, the Director of Secondary Education, Chapter 1, the Supervisor of Secondary Reading, the Supervisor of Secondary Language Arts, the Supervisor of Secondary Math, the Supervisor of Middle School Math, all Principals, the Director of Instruction Services, Science and Technology, the Supervisor of Gifted & Talented, the Supervisor of Bilingual, the Supervisor of Social Studies and Music Art, the Supervisor of Technology and Science, the Director of Elementary Education, Chapter 1, the Supervisor of Elementary Reading, the Supervisor of Elementary Language Arts, the Supervisor of Elementary Math and the Supervisor of Targeted Skills (P-13).

Prior to the time Dr. Howard became Superintendent, the District still was in a Level II status and was in jeopardy of a State takeover. When Dr. Howard began his employment, his main objective was to correct the deficiencies and to get the District into Level I certification status. To accomplish his objective, Dr. Howard began to restructure the District. As a result of the restructuring, Dr. Jefferson's duties changed during the 1992-93 school year. He no longer oversaw the Director of Staff Development, the Teachers on Special Assignment, the Director of Secondary Education, Chapter 1, the Supervisor of Secondary Reading, the Supervisor of Secondary Language Arts, the Supervisor of Secondary Math, the Supervisor of Middle School Math, the Director of Elementary Education, Chapter 1, the Supervisor of Elementary Reading, the Supervisor of Elementary Language Arts and the Supervisor of Targeted Skills (P-28 and R-6).

Dr. Jefferson's duties further changed during the 1993-94 school year. He no longer oversaw the Supervisor of Vocational Education/Science, the Supervisor of Social Studies and Music Art, and the Supervisor of Technology and Science (P-28 and P-16). By the 1994-95

school year, Dr. Jefferson's position no longer existed (P-21). The Board abolished Dr. Jefferson's position on August 16, 1994. By letter, dated August 17, 1994, the Board formally notified Dr. Jefferson of its decision (P-24). Dr. Jefferson filed an appeal on November 15, 1994.

At the time of the abolition of Dr. Jefferson's position, there were vacant positions or positions held by non-tenured individuals as set forth in the paragraphs 12 and 13 in the stipulated facts above. Although Dr. Jefferson held the necessary Certificate and endorsement for all of those positions, the Board did not advise him of any re-employment rights, nor did it offer him any of those positions.

After the abolition of Dr. Jefferson's position on August 16, 1994, the Board continued to pay his full salary until October 17, 1994 at the rate of $89,378 per year. He also earned $7,000 as a consultant and he sought other employment. On August 14, 1995, Dr. Jefferson was appointed to the position of Superintendent by the Board of Education of Englewood. His salary in that position is $110,000 per year.

DISCUSSION AND CONCLUSION

The Board argues for the first time in its post-hearing Brief that Dr. Jefferson's appeal should be dismissed because it was untimely filed. The Board claims that Dr. Jefferson filed his appeal one day late. A cause of action for a claim based upon termination of employment because of a RIF accrues when an employee receives written notice that his or her position was abolished. The employee has ninety days from receipt of the written notice to file an appeal. *Mullen v. Boonton Town Bd. of Ed.*, 94 *N.J.A.R. 2d* (EDU) 583, 589; *aff'd*, 94 *N.J.A.R. 2d* (EDU) 591; *Sasse v. Bd. of Ed. of the Borough of Point Pleasant*, 92 *N.J.A.R. 2d* (EDU) 339; *aff'd*, 92 *N.J.A.R. 2d* (EDU) 345.

In this case, the Board produced no evidence at the hearing as to when Dr. Jefferson actually received the Board's letter, dated August 17, 1994, which formally notified him of its decision to abolish his position Absent such evidence, the undersigned relies upon New Jersey Court Rule 1:3-3 which adds three days to the period of time after service by mail. Assuming that the Board mailed the letter to Dr. Jefferson on August 17, 1994, he is deemed by this Court Rule

to have received it by August 20, 1994. He filed his appeal on November 15, 1994. This was within the ninety day period required by *N.J.A.C.* 6:24-1.2(c).

With respect to the remaining claim, Dr. Jefferson holds a School Administrator Certificate under *N.J.A.C.* 6:11-9.3. He is tenured under that regulation. In addition to qualifying to serve as an Assistant Superintendent, *N.J.A.C.* 6:11-9.3 also qualifies Dr. Jefferson to serve as an Executive Superintendent, a Director, a Principal, a Supervisor and a School Business Administrator. The parties stipulated that Dr. Jefferson had the necessary Certificate and endorsements for the positions set forth in paragraphs 12 and 13 of the stipulated facts that either were vacant or were filled by non-tenured employees at the time the Board abolished his position.

In *Dennery v. Board of Education,* 131 *N.J.* 626 (1993), the New Jersey Supreme Court stated, in pertinent part:

> An educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under that particular certificate. Tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his or her certificate... Thus, an educator with tenure in any endorsement that he or she posses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same Certificate. (Citations omitted).

Id. at 634.

The Commissioner of Education disagrees with the holding in *Dennery.* In *Nelson v. Board of Ed. of the Tp. of Old Bridge,* 95 *N.J.A.R. 2d* (EDU) 257, the Administrative Law Judge held that the language in *Dennery* mandated that the petitioner, who had obtained tenure under one Certificate, was entitled to another position requiring the same Certificate. Even though the petitioner never held that other position, his tenure attached to that position. The Commissioner disagreed and held that statutory and case law support the proposition that positions under an Administrative Certificate are separately tenurable.

The Commissioner also relied upon *N.J.S.A.* 18A:28-5 which provides, in pertinent part:

> The services of all teaching staff members including all teachers, principals other than administrative principals, assistant principals, vice principals, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require then to hold appropriate certificates issued by the board of education, excepting those who are not the holder of proper certificates in full force and effect, shall be under tenure...

The Commissioner held that this statute delineates those positions which are separately tenurable.

The Commissioner also held that the *Dennery* court did not address the separately tenurable positions specifically enumerated in *N.J.S.A.* 18A:28-5, nor did it consider whether tenure could be transferred across endorsements to the administrative certificate at issue herein, as an examination of these was unnecessary in the case before it. *Nelson,* 95 *N.J.A.R. 2d* at 261. The Commissioner reasoned that the *Dennery* court based its decision on a long line of cases that support the notion of separately tenurable positions. The Commissioner contended that the New Jersey Supreme Court had no intention of eliminating the requirement of separate tenure.

The Appellate Division's recent decision in *Gittleman v. Board of Education of the Township of Hamilton, Mercer County,* (Docket No. A-3659-93T5, decided January 2, 1996), is contrary to the Commissioner's position. *Gittleman* involved the reassignment of the petitioner from the position of Director of Elementary Education to the position of High School Principal due to a reduction in force. The petitioner claimed that the reassignment violated her tenure rights because it resulted in a decrease in her salary and because a nontenured person continued to be employed in the position of Director of Elementary Education. The petitioner also claimed that she had more seniority in the position of Director of Elementary Education and that she had tenure and seniority in the position of Assistant Superintendent for Instructional Services.

An Administrative Law Judge ruled that each Director position was a separate seniority category and, because petitioner had more seniority as Director of Elementary Education than the person who had been moved into that position, the petitioner should be reinstated to that position.

The Acting Commissioner adopted the Administrative Law Judge's ruling and, by way of modification, held that petitioner had tenure as a Principal because that was "both the designated legal title of the Director position for tenure purposes and the certificate required to hold it pursuant to *N.J.A.C.* 6:11-3.3(b)." Since the position of Director of Elementary Education had been eliminated, the Acting Commissioner ordered that the petitioner must "be assigned to either a principalship within her entitlement or the appropriate preferred eligibility list."

The petitioner appealed further to the State Board of Education. She argued that the governing regulations qualified a teaching staff member who possessed a Principal's Certificate to serve in an Assistant Superintendent position. She, therefore, argued that she had tenure as an Assistant Superintendent rather than as a Principal. The State Board affirmed the Acting Commissioner and, for reasons different from those relied upon by the Acting Commissioner, it agreed that the petitioner had accrued seniority as a Director of Elementary Education rather than as a Director.

On appeal to the Appellate Division, the petitioner argued that she had tenure entitlement to the position of Assistant Superintendent for Instructional Services when her former position was abolished in a reduction in force. The Appellate Division held that under *N.J.A.C.* 6:11-9.3(b), the petitioner was qualified and entitled to hold the position of Assistant Superintendent for Curriculum and Instruction. The Appellate Court also held that the petitioner had tenure in that position because "an educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate" regardless of whether that educator had actually served in the area. *Slip. Op.* at p. 9, citing *Dennery,* 131 *N.J.* at, 634 and *Ellicott v. Board of Education, Tp. of Frankford,* 251 *N.J. Super.* 342, 349 (App. Div. 1991).

CONCLUSION AND ORDER

Based upon the foregoing, I **CONCLUDE** that Dr. Jefferson was entitled to fill any vacant administrative position or any administrative position held by a non-tenured individual as set forth in paragraphs 12 and 13 of the stipulated facts in accordance with his tenure and seniority rights. I further **CONCLUDE** that Dr. Jefferson shall receive back pay from October 18, 1994 to August 14, 1995 at the rate of the highest level administrative position to which he was entitled in accordance with his tenure and seniority rights, minus the $7,000 he earned as a consultant. It is so **ORDERED**.

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

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

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

FEB. 23, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 28 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

Robert L. Jefferson, petitioner

Ed Taylor

For Respondent:

John Howard, Jr., Ph.D.

Peter E. Carter

Jimmy Small

Mark S. Kramer

Exhibits

C-1	Stipulations
C-1A	Stipulations
P-1	Dr. Jefferson's Resume
P-2	Advertisement
P-3	Job Description for Assistant Superintendent for Curriculum and Instruction
P-4	Charts for Grades 3 and 6 Reading, Math and Writing
P-5	Administrator Evaluation, dated March 15, 1989
P-6	Administrator Evaluation, dated March 1990
P-7	Administrator Evaluation, dated June 30, 1993
P-8	Administrator Evaluation, dated November 30, 1993
P-9	Administrator Evaluation, dated March 30, 1994
P-10	Memorandum, dated August 20, 1992, from Dr. Howard to Dr. Jefferson
P-11	Purchase Requisition, dated April 14, 1992
P-12	Memorandum, dated July 15, 1992, from Dr. Howard to Dr. Jefferson

P-13	Interim Organizational Chart for 1991-92
P-14	Organization Chart for 1992-93
P-15	Letter of Reappointment, dated May 18, 1993
P-16	Organizational Chart for 1993-94
P-17	Memorandum, dated June 1, 1993, from Kenneth D. King to Administrator
P-18	Memorandum, dated June 2, 1993, from Dr. Jefferson
P-19	Resolution Form
P-20	Minutes of August 16, 1994 Board Meeting
P-21	Organization Chart for 1994-95
P-22	Letter, dated August 4, 1994, from Kenneth D. King to Dr. Jefferson
P-23	Letter, dated August 9, 1994, from Dr. Jefferson to Kenneth D. King
P-24	Letter, dated August 17, 1994, from Dr. Howard to Dr. Jefferson.
P-25	Letter, dated August 24, 1994, from Kenneth D. King to Dr. Jefferson
P-26	Letter, dated October 15, 1994, from Dr. Jefferson to Dr. Howard
P-27	Letter, dated November 15, 1994, from Dr. Howard to Dr. Jefferson
P-28	Interim Organizational Chart for 1991-92 with handwritten notations
P-29	Advertisement
P-30	Minutes of October 4, 1994 Board Meeting
P-31	Minutes of November 15, 1994 Board Meeting
P-32	Letter, dated April 27, 1994, from Kenneth D. King to Dr. Jefferson
P-33	Transcript of Testimony of Hearing for Emergent Relief, dated December 22, 1994
P-34	Audit for Year Ending June 30, 1994
P-35	Memorandum, dated September 8, 1992
R-5	District Objectives for 1992-1993
R-6	Organizational Chart for 1992-1993
R-7	Mission Statement
R-8	Memorandum, dated June 7, 1994, from Nilkanth Patel to Dr. Howard
R-10	Letter, dated September 21, 1995, from Peter E. Carter to Dr. Howard
R-11	Letter, dated November 21, 1995, from Leo Klagholz to Dr. Howard
R-12	Memorandum, dated September 24, 1993, from Dr. Howard to Central Office Administrators

OAL DKT. NO. EDU 11782-94

ROBERT L. JEFFERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4. Although petitioner submitted on March 27, 1996, a reply to the Board's submission, there is no provision for such a reply in statute or regulation. Accordingly, petitioner's submission of March 27, 1996 is not herein considered.

Petitioner's exceptions stress that the Administrative Law Judge (ALJ) erred in calculating damages for petitioner in that "[he] lost approximately 10 months of service credit and employer contributions to the Teachers' Pension and Annuity Fund and social security fund and 15 days of vacation time.***" (Petitioner's Exceptions at p. 2) Petitioner argues that such damages should be granted as a result of the ALJ's finding that his tenure and seniority rights were violated. (*Id.*)

Petitioner cites case law including *Board of Education, City of Newark, Essex County v. Levitt*, 197 *N.J. Super.* 239 (App Div 1984), to stand for the proposition that the Commissioner has broad power to fashion an appropriate remedy, including the award of specific items of compensatory damages not expressly enumerated by statute. Petitioner further cites *Takakjian v. Fairview Borough Bd. of Ed.*, 93 *N.J.A.R.* 2d (EDU) 184 (Feb. 18, 1993) to illustrate that the Commissioner has, in past cases, awarded damages including lost salary, medical benefits, contributions to the pension fund and social security benefits, where a petitioner's tenure or seniority rights have been violated by a local school district. Therefore, petitioner argues, he is entitled to the full breadth of compensatory relief. (*Id.*)

In reply exceptions, the Board argues that the decision of the ALJ is in error and cites numerous Commissioner and State Board decisions which have consistently interpreted *N.J.S.A.* 18A:28-5 as a provision which requires separate tenure under each endorsement listed in statute in order for an individual to claim entitlement to a school position outside of his or her endorsement. (Board's Reply Exceptions at pp. 1-4) The Board distinguished the present case from the decision in *Dennery, supra,* wherein a guidance counselor with an educational services certificate and an administrative certificate attempted to transfer tenure rights obtained under the educational services certificate to the administrative certificate. In *Dennery,* the Supreme Court held that tenure could not be transferred between certificates. In contrast, the Board notes that

> ****Dennery did not address the separately tenurable positions specifically listed in N.J.S.A. 18A:28-5 and Dennery also did not consider the issue presented in the instant case whether tenure may be properly transferred among endorsements to the administrative certificate.* (emphasis in text) (Board's Reply Exceptions at p. 5)

Further, the Board argued that the *Gittleman, supra,* decision was decided on a limited portion of *Dennery, supra,* which stated that "[a]n educator who has attained tenure by virtue of the

requisite service in a specific position will have tenure with respect to all positions under the particular certificate.***" *Dennery* at 634. (Board's Reply Exceptions at p. 5) The Board avers that the ALJ should not have relied on *Gittleman* in the instant matter in that a teacher position is not at issue in the present case and that the term *educator* does not apply to administrators. (Board's Reply Exceptions at pp. 5-6) The Board then cited the Commissioner's decision in *Nelson, supra*, to advocate that *Dennery* was not intended to overturn the long-established precedent of tenure law in that it did not address the separately tenurable positions specifically enumerated in *N.J.S.A.* 18A:28-5, nor did it consider whether tenure could be transferred across endorsements to the administrative certificate at issue herein. Thus, the Board avers that there was no indication in any reasonable reading of *Dennery* that the Supreme Court intended to reverse prior holdings in this area. (Board's Reply Exceptions at p. 6)

The Board next avers that the ALJ erred in providing the Board with a mitigation credit of $7,000 in that it was owed $10,000 from petitioner for unemployment received between October 18, 1994 and August 14, 1995. (*Id.*)

Lastly, the Board argued that the ALJ erred in hearing this case in that it was time-barred. (*Id.* at p. 7) In that this issue was fairly considered and addressed by the ALJ, this argument is not more fully set forth herein.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner's tenure and seniority rights were violated when he was terminated from employment with the Board due to a reduction in force. Although the Board construes the law in a manner consistent with prior Commissioner and State Board decisions, in light of the Court's ruling in *G. Michael Nelson v. Board of Education of the Township of Old Bridge*, decided by the New Jersey Superior Court, Appellate Division, on

April 29, 1996, (A-6441-94T5), it is no longer tenable to interpret *Gittleman*, *supra*, and *Dennery, supra,* to permit concepts of separate tenurability based on *N.J.S.A.* 18A:28-5. Therefore, in light of *Nelson*, the ALJ's position, based on *Gittleman* that petitioner was entitled to hold any vacant administrative position or any administrative position held by a nontenured individual in accordance with his tenure rights, must be affirmed.

With respect to damages, the Commissioner affirms the ALJ's determination that the Board reimburse petitioner back pay at the rate of compensation of the highest level administrative position to which he was entitled and further clarifies the phrase *back pay* to include emoluments such as medical benefits, seniority rights and contributions to the pension fund and Social Security, as these are normally contemplated when ordering a petitioner to be made whole following a violation of employment rights. Additionally, the Commissioner affirms the ALJ's calculation of mitigation credit as $7,000, based on credible testimony that petitioner had not received $3,000 owed to him by the Board.

Accordingly, the Commissioner affirms the initial decision of the OAL and orders that petitioner immediately be reimbursed for salary and emoluments at the highest level administrative position to which he was entitled from October 18, 1994 to August 14, 1995, in accordance with his tenure rights, minus the $7,000 earned as a consultant.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 22, 1996
Date of Mailing, May 22, 1996

214-96

214-96

CHRIS SHUSTER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning resident and taxpayer contended that the Board's proposed building project for a new middle school was sufficiently different from that approved by referendum so as to render such approval void.

ALJ denied without prejudice the Board's motion for summary decision, finding that there was genuine issue of material fact as to whether construction according to the one-story plan would contravene the voters' approval of a two-story plan. Moreover, ALJ directed parties to attempt to develop a plan for construction of the new middle school that addresses petitioner's concerns in order to avoid costs of full litigation. Upon interlocutory review of the decision, the Commissioner affirmed ALJ's order denying the Board's motion for summary judgment without prejudice, with modification. Commissioner concurred with ALJ that given petitioner's specific allegations and supporting certifications, this matter clearly raised genuine issues of material fact that precluded its being decided on a summary basis. Commissioner did not concur with the ALJ's directive concerning settlement of the matter; the Commissioner will encourage settlement efforts but not order them to a specific end.

Following hearing complete with testimony and numerous exhibits, the ALJ dismissed the petition, finding that petitioner did not prove that the Board's exercise of its discretion in its choice of the one-story plans was unlawful or arbitrary, capricious or unreasonable. ALJ determined that petitioner did not present evidence that the majority of voters intended their approval of the referendum to limit construction to the two-story schematics.

Commissioner adopted findings and determination in initial decision as his own, finding that the ALJ's consideration of extrinsic evidence to the extent that it may or may not have formed the basis of voter approval of the referendum was appropriate. Petition was dismissed.

May 28, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8772-95

AGENCY DKT. NO. 334-8/95

CHRIS SHUSTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,

Respondent.

Chris Shuster, petitioner, pro se

David W. Carroll, Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: March 28, 1996 Decided: April 10, 1996

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

STATEMENT OF THE CASE

The petitioner, a resident and taxpayer of Montgomery Township, claims that the Montgomery Township Board of Education (BOE) should be enjoined from construction of a new middle school according to one-story plans and ordered to construct the school according to

two-story schematics previously considered but abandoned by the BOE. The BOE submits that it may proceed according to the one-story plans.

The facts are summarized as follows: Consistent with educational specifications approved by the New Jersey Department of Education's Bureau of Facility Planning (Bureau), the BOE's architect prepared schematics and cost estimates for school buildings, including schematics and a cost estimate for a two-story new middle school. N.J.S.A. 18A:18A-16; N.J.A.C. 6:22-1.1 to -5.5. The BOE then adopted a resolution providing for a special election on a referendum authorizing issuance of bonds to fund construction of the school buildings. N.J.S.A. 18A:20 -4.2(d), 18A:22-33. Copies of the schematics, including schematics for a two-story new middle school, were displayed in public buildings in the township. During BOE meetings, the schematics and possible sites were described as subject to change. The schematics were subjected to public comment, input from school professionals, and study by the BOE. The BOE mailed to Township voters brochures explaining the referendum with copies of the schematics, including the schematics for a two-story new middle school. Copies of the schematics, including the schematics for a two-story new middle school, were displayed near an entrance to the referendum election polling place. Township voters approved the referendum. Thereafter, the schematics and possible sites were subjected to further public comment, input from school professionals and study by the BOE and, as directed by the BOE, consistent with the approved educational specifications, the architects prepared schematics for the one-story new middle school. The architect then developed one-story preliminary plans, which were approved by the Bureau and from which the BOE intends to develop final plans for construction of the new middle school. N.J.A.C. 6:22-1.5, -1.6.

The petitioner's position is summarized as follows: He contends that the referendum voters intended to limit construction to the building described in the two-story schematics and that the one-story plans constitute an entirely new and different concept, unlike that explained to the public before the referendum. He contends that, compared to a school constructed pursuant to the two-story schematics, the school constructed pursuant to the one-story plans will have significantly increased construction, operation, maintenance and renovation costs. He contends that construction pursuant to the one-story plans would contravene the will of the referendum voters. The petitioner claims that the BOE should be enjoined from proceeding with construction

of the new middle school pursuant to the one-story plans, and ordered to proceed with construction pursuant to the two-story schematics.

The BOE's position is summarized as follows: The BOE denies that the referendum proposal incorporated or was limited by any specific schematics. The BOE contends that the pre-referendum schematics were subject to change, so long as they were consistent with the approved educational specifications. The BOE points out that the one-story plans are consistent with the approved educational specifications and that they provide as many classrooms, educational features, etc., as the two-story schematics. The BOE points out that construction pursuant to the one-story plans will be within the cost estimate approved by the Bureau, which cost estimate was a component of the total authorized by way of the referendum vote. Further, the BOE alleges, the one-story plans provide additional features that are superior to the two-story schematics. The BOE denies that, compared to a school constructed pursuant to the two-story schematics, the school constructed pursuant to the one-story plans would constitute an entirely new and different concept and denies that it will have significantly increased construction, operation, maintenance and renovation costs. Consequently, the BOE denies that construction pursuant to the one-story plans would contravene the law and/or the will of the voters; it contends that construction pursuant to the one-story plans is consistent with the referendum vote; and it submits that the petition should be dismissed with prejudice.

PROCEDURAL HISTORY

On August 22, 1995, the petitioner's verified petition was filed with the Department of Education. N.J.S.A. 18A:6-9. In a letter filed with the Department on September 18, 1995, the petitioner set forth enumerated allegations and argument by which he attempted to demonstrate that he met the standards for the granting of a motion for emergent relief, i.e., an injunction. On September 27, 1995, the BOE's answer to the petition was filed with the Department. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on September 28, 1995, it was filed as a contested case. N.J.S.A. 52:14B-2(b). The OAL's clerk treated the petitioner's letter as a motion for emergent injunction of the BOE and notified the parties that, on October 5, 1995, the "motion" would be argued. On October 5, 1995, the parties appeared and the motion was argued. On October 6, 1995, I issued an order denying the

petitioner's motion; and, on October 23, 1995, the Commissioner issued a Decision on Motion concurring with my order. On October 18, 1995, the BOE filed and served papers in support of its motion for summary decision; and, on November 1, 1995, the petitioner's responding papers were filed. On November 2, 1995, I issued an Order Denying (the BOE's) Motion for Summary Decision; and, on December 6, 1995, the Commissioner issued a Decision on Motion affirming the denial of the BOE's motion. On February 7, 8, 9 and 21, 1996, the case was heard in the OAL Trenton (Hamilton Township). The parties submitted written summations, and the record was closed with the receipt of the parties' memoranda on the issue of the effect of N.J.S.A. 19:60-1. The petition involves educational issues, e.g., whether the one-story plans satisfy educational specifications approved by the Bureau and whether the one-story school constitutes an entirely new and different concept. The petition does not claim, e.g., irregularities in the conduct of the election. Therefore, the statutory changes do not remove jurisdiction of this case from the Commissioner of Education. N.J.S.A. 18A:6-9.

FINDINGS OF FACT

The petitioner is a resident and taxpayer of Montgomery Township.

Montgomery Township is being developed. Consequently, the township's population is growing and it is expected to continue to grow. This has caused increasing demands for governmental services, including school services, and the question of whether to construct additional school buildings to accommodate the growing student population, as well as questions about the costs, locations and features of such buildings, have been among the most important facing the BOE.

The BOE's type II school district is K-12, and the BOE operates two elementary schools and a junior-senior high school, serving grades 7 through 12. The schools are on contiguous sites located on the corner of Burnt Hill Road and Orchard Road: The Burnt Hill Elementary School fronts on Burnt Hill Road, and the Orchard Road Elementary School fronts on Orchard Road, and both are located at the southern end of the BOE property. The junior-senior high school is located at the northern end of the BOE property and fronts on Burnt Hill Road. To the rear and east of the high school is BOE land known as the "Rosepopa" property. P-1A at 103.

In 1991, Township voters rejected a referendum that proposed construction of school buildings to accommodate the growing student population. However, thereafter, the question of the need for such construction continued.

The BOE considered another referendum authorizing funding for school construction. Jamie Savedoff, Ph.D., superintendent of the BOE's school system, reviewed the planning, referendum and construction process with the BOE: Educational specifications would have to be approved by the Bureau; schematics would be prepared according to the approved specifications; cost estimates, based on the schematics, would be prepared and approved by the Bureau; voters would vote on another referendum proposing funding for construction; and plans, which may involve changes from the schematics, would be prepared for bidding and construction. N.J.A.C. 6:22-1.1 to -5.5. Preparation of final plans is time-consuming and extremely expensive. Normally, before a referendum vote approving funding for construction, much information, such as site conditions, upon which the final plans depend, is not known. Consequently, normally, unless and until voters authorize funding for construction, final plans would not be prepared.

In July 1993, the BOE created a "Building Project Ad-Hoc Committee," including members of the community, the BOE and the school administration. P-30. The committee's mission was to study the need for increased school services; to collect information; and, based upon criteria including "completion time, flexibility to meet changing population and program needs, site availability and cost," to prepare a report including a recommended plan of action to "resolve current facilities problems and meet the long-term needs of the students of the community." P-1A at 3, 1; P-32; N.J.S.A. 18A:33-1.

During the twelve months after its creation, the committee collected information, met twenty-two times, and held public meetings on March 23, 1993, May 24, 1994, and June 28, 1994. P-1A. The committee considered demographics, education philosophy, the middle school concept and grade organization. The committee consulted with demographers; Faridy Thorne Fraytak, P.C., the BOE architect; Dr. Savedoff; and James Strimple, the BOE's business administrator. Relative to a new middle school, the committee considered linking a new middle school building to the existing high school building, and considered an independent new middle

school building. Because of concerns related to the location of flood plains, wetlands and wetlands buffer zones regulation, at first it was unknown whether the Rosepopa property was practical for an independent new middle school building. Preliminary educational specifications, i.e., verbal descriptions of, e.g., the number of and types of rooms, were prepared, approved by the superintendent and BOE, and, on June 8, 1994, submitted to the Bureau. N.J.A.C. 6:22-1.2, -1.4. Based upon the preliminary educational specifications, the architect prepared "conceptual drawings," a/k/a schematics, including schematics for a two-story new middle school. The "New Middle School Addition" schematics showed a basically H-shaped two-story school that adjoined and coordinated visually with the existing high school. In the H-shaped schematics, the center (cross-bar) of the first floor contained a media center. On one side of the media center (on the first floor) was an "8th grade cluster" of classrooms and a "7th grade cluster" of classrooms. On the other side of the media center (on the first floor) were a gymnasium, a cafetorium, an industrial technology area, and art and music areas. On the second floor was a "6th grade cluster." P-67. The "New Middle School" schematics showed a two-story building that was basically square with an open center, known as the "square doughnut," and independent of other buildings. P-1A.

On June 21, 1994, the committee received the architect's cost estimates for the possible projects.

On September 7, 1994, the committee presented its report to the BOE. The report included the committee's meeting minutes, recommendations, and the schematics of possible school buildings. J-1. In the report, the committee recommended a substantial construction project, including construction of a new middle school. The committee did not recommend a specific schematic and/or design for the middle school (serving 800 students in grades 6-8), but recommended:

> a) a configuration that permits clustering of academic classrooms by grade level, e.g., a sixth grade cluster, seventh grade cluster and eighth grade cluster to allow for academic teacher teams or houses to meet student needs. Particular attention should be paid to school layout in terms of traffic flow and access to the media center, computer labs and related arts classes.

b) science laboratories and preparation areas appropriate to the curriculum at each grade level.

c) support for technology including, computers in classrooms, computer labs, wiring in each classroom for video, cable and satellite learning.

d) small group instructional spaces for speech, BSIP and resource room instruction.

[P-1A at 7.]

The schematics (drawings) were preceded by the following statement:

ARCHITECT'S CONCEPTUAL DRAWINGS

The following drawings are intended to conceptually illustrate how the needs of the district might be met.

These drawings provide a concrete model and are subject to change.

[P-1A at 91; emphasis added.]

The statement about the nature of the architect's conceptual drawings was followed by a number of schematics, including the two-story New Middle School Addition (H-shaped) and the two-story New Middle School (square doughnut) schematics. Possible site plans showed the New Middle School Addition and the New Middle School on different locations, including the Rosepopa property. P-1A at 96-103.

On September 12, 19 and 26, 1994, the BOE held public meetings relative to the committee's report and the elementary school, middle school and high school options. The possible location of the new middle school (by the high school or on the Rosepopa property) was discussed. Dr. Savedoff recommended the Rosepopa property and public comment was allowed. P-47; P-48.

On September 26, 1994, the BOE decided on construction options relative to the elementary and high schools and decided to build the new middle school on the Rosepopa

property. (That is, the BOE decided not to construct the H-shaped two-story New Middle School Addition.) Dr. Savedoff described the resolution as calling for a $31,367,339 referendum for all projects, $17,925,000 of which was for the new middle school. P-63. The BOE passed a resolution (1) to hold a special election on November 29, 1994, for the authorization of school bonds to fund the construction and improvement of the schools; (2) to authorize the architect to apply to the Department of Education, pursuant to N.J.A.C. 6:22-1.2, for approval of educational specifications and schematic plans; (3) to authorize the BOE secretary to contact the planning board for its recommendations; (4) to authorize the BOE secretary to arrange for publication of absentee ballot notices for the special election; and (5) to authorize Dr. Savedoff, the BOE secretary, et al. to take actions necessary for the special election and authorization of bonds to finance the project. R-8.

During the October 10, 1994 meeting, the BOE passed a resolution providing for a special school district referendum election to be held on November 29, 1994, during which election the following proposal would be submitted:

> The [BOE] is authorized (a) to provide for the construction of an addition to connect the Burnt Hill Road School and the Orchard Road School to provide core facilities and the renovation of and the construction of additions to each school to provide additional space, other interior improvements and additional parking, the construction of renovations and additions to the High School to provide for science laboratories, locker room and auditorium improvements, expansion of the library and other interior improvements and the construction of a new middle school on land owned by the [BOE], including play fields and, for all of the above, including site work, acquisition and installation of equipment and furnishings and related work, and (b) to issue bonds of the School District for such purpose in the principal amount of $31,368,000.
>
> [R-1, emphasis added.]

The architect presented to the BOE an outline entitled "Techniques for Referendum Promotion," and, between October 10, 1994, and November 29, 1995, the project was the subject of additional public debate. P-16.

By letter dated October 20, 1994, Jamil Faridy, the architect's lead partner, notified Dr. Savedoff that, having received a report relative to flood plains, wetlands and wetlands buffer zones regulation, a (one-story) new middle school (with a larger footprint than a two-story school) and parking could be located on the Rosepopa property. P-59; N.J.S.A. 13:9B-8.

In a letter published in the October 21, 1994 edition of The Princeton Packet, a local newspaper, the BOE vice president and chairman of the BOE Building Committee characterized the proposed buildings' plans as "preliminary schematics." P-3, emphasis added.

During the BOE's October 24, 1994 meeting, Dr. Savedoff stated that the "schematics [were] based on the Educational Specifications previously approved by the [BOE] . . . and approved by the Department." R-3a. However, he also stated:

> "these plans may be and probably will be altered at a later date when the staff becomes involved in the process. The intent of these plans is to show that there is sufficient space to accommodate the plans and spatial relationships.
>
> [R-3a, emphasis added.]

Also during the BOE's October 24, 1994 meeting, Mr. Faridy presented to the public plans for the project, including the schematics showing the "proposed [two-story] middle school layout." Many circumstances, such as site conditions, upon which the final plans depend, were not known, and both Dr. Savedoff and Mr. Faridy described the schematics as preliminary and not final. P-4; P-14; R-3.

At Dr. Savedoff's direction, enlargements of the schematics, including the schematics for the H-shaped two-story New Middle School Addition, were displayed in the three BOE schools, the municipal building and a local public library. These displays enabled members of the public and school professionals to contribute comments and information relative to the possible project and to suggest changes to the schematics. P-67A; P-67B; P-67C.

In November 1994, the high school's newspaper, The Paw Print, included copies of schematics for the project, including schematics for the H-shaped two-story "New Montgomery Middle School." P-62.

Dr. Savedoff gave presentations to Township residents at coffee-klatches, etc., during which he explained the project, including the fact that the schematics were "preliminary and will change." R-14, emphasis added.

Mr. Faridy has been licensed by the State of New Jersey and has practiced as an architect for over twenty years. He has participated in the design of over four hundred schools and numerous other public buildings. Mr. Faridy's firm has about fifty employees; about 80 percent of its work involves public schools and about 95 percent of those schools are in New Jersey. Using the square footage of the new middle school schematics and information from the numerous school construction bids with which his firm has been constantly involved, Mr. Faridy prepared a total cost per square foot analysis. By reviewing component bids by separate prime contractors in the major trades (steel, electrical, plumbing and HVAC), the analysis was refined and he developed a cost estimate for the new middle school. On November 2, 1994, Mr. Faridy's firm submitted to the Bureau a completed "Project Cost Estimate Form" for the new middle school, wherein it estimated $14,107,000 as its "Construction Cost," i.e., exclusive of contingency, architect's fees, legal and bonding costs, site development, and movable furniture and equipment. P-63; N.J.A.C. 6:22-1.4. (With contingency cost, the architect's estimate was $14.1 to $15.1 million.) The Bureau reviewed the Project Cost Estimate Form and schematics and approved them (before the referendum election).

During a November 9, 1994 Montgomery Township governing body meeting, Dr. Savedoff "stress[ed]" that the schematics were "only . . . preliminary plans." He said that the BOE's architect would be discussing the plans with the school professionals and the BOE; that "things may move"; that "[s]ome rooms may move to make it a more efficient building"; and that "the actual shape or where some of the classes are may be moved to make it more efficient and more effective." R-13, emphasis added.

In mid-November 1994, the BOE mailed to voters a referendum brochure which referred to, e.g., the current enrollment and "need" for additional facilities for current and/or expected enrollment, (if the referendum was not approved and the project did not go forward) the possibility of a "disruptive" "split session plan," the "cost" of available options, etc. The brochure also included copies of schematics for the project, including schematics for the H-shaped two-story "New Montgomery Middle School." P-7; P-14.

In a letter published in the November 18, 1994 edition of The Princeton Packet, a BOE member wrote that the "plan recommended by the ad hoc facilities committee and approved by the [BOE] is the most effective option available to meet our district's needs," and she urged voter approval of the proposal. P-5.

In a letter published in the November 22, 1994 edition of The Princeton Packet, Dr. Savedoff wrote, inter alia, "The plan is not vague, . . . rather it is quite detailed. The educational specifications upon which the architect's drawings are based are several hundred pages of detailed descriptions of every space to be built renovated or modified." P-6.

On November 29, 1994, from 9:00 a.m. to 7:00 p.m., the election was held in the Burnt Hill Road School multipurpose room, also known as its gymnasium. A parking lot on Burnt Hill Road serves the building, and about 90 percent of the voters walked from the parking lot through outside school doors that led directly into the multipurpose room. About 10 percent of the voters walked through the school lobby and then through an inside door to the multipurpose room; in the corridor, about fifteen feet away from the door to the multipurpose room, copies of the schematics, including the New Middle School Addition schematics, remained on display. P-8. The voters approved the referendum: 1,857 voted for it and 1,270 against it. J-5.

Following approval of the referendum, the schematics remained on display and the BOE continued to collect information relative to the project. The architect held a series of meetings ("charettes") with school professionals to collect their reactions and suggestions relative to the plans. Teachers wanted areas where there could be "teacher-teamwork" and group activities. A two-story school's traffic flow would require use of stairs or an elevator and would complicate communication and sharing of resources among grades. The one-story school's grade level "pod"

design and traffic flow would be simpler and more conducive to communication and shared resources. The one-story plan's "interior court[s]" would allow for "teacher-teamwork."

The architect also obtained more information relative to the sites, including, in February 1995, a survey and wetlands delineation of the Rosepopa property. The survey and delineation showed it to provide more area than was previously thought available, i.e., enough for the larger footprint of the one-story middle school. P-70. With this information, consistent with the educational specifications the architect prepared schematics for a one-story new middle school. P-72. (John Garcia, deputy director of the Bureau, testified that site and design details are costly and frequently unavailable before referenda votes. Consequently, he has frequently seen changes from pre-referendum schematics to post-referendum plans, including changes from two-story to one-story plans. His view is that changes which are consistent with educational specifications and not inconsistent with a referendum proposal are lawful.)

During the BOE's March 27, 1995 meeting, the BOE continued the discussion of "middle school philosophy" and its relation to the design of the new middle school. The architect presented the plans for the one-story new middle school. J-6. In the center of the one-story plans are a media center and areas for science, language, industrial arts, etc. Three basically similar pods (one each for the sixth, seventh and eighth grades), each of which has an "interior court," extend off of the center. On the other side of the center is a wing including a gymnasium, a cafetorium, and industrial technology, etc., areas. The one-story plans have the same number and size of classrooms, educational spaces, office spaces and storage spaces as the two-story schematics and they satisfy the approved educational specifications. Because of the one-story plan's interior courts, the one-story plan's area (121,700 square feet) is somewhat greater than the two-story schematics' area (118,870 square feet). P-72; P-91A; P-91B(1); P-91B(2). The BOE and the public considered the one-story plan relative to future growth capacity, total square footage, student capacity of building, seating capacity of the cafetorium and gymnasium, location, flexible classroom space, location and use of the science rooms, and location of student lockers. There was "extensive discussion" of whether the new, one-story plans were "significantly different" than the two-story schematics. J-6.

During the BOE's April 24, 1995 and May 22, 1995 meetings, the question of whether the new one-story plans were "significantly different" than the two-story schematics was again discussed. Also, the referendum process and the question of commitment to specific plans were discussed. And, by a vote of seven to one, the BOE approved the new one-story plans for the middle school; thereafter, the plans were submitted to, reviewed by, and approved by the Bureau. J-7; J-8; N.J.A.C. 6:22-1.5.

By letter dated August 8, 1995, the Bureau notified the BOE that the revised educational specifications and preliminary plans (for the one-story) building had been "educationally reviewed and approved" and that the BOE could submit "final plans" for review. R-9.

Mr. Faridy explained that, given the scale of the construction (pursuant to either the two-story schematics or the one-story plans) and other factors, costs for the one-story and two-story schools would be the same. Construction of a two-story new middle school would include costs not included in construction of the one-story school, and construction of the one-story school would include costs not included in construction of a two-story school. Construction access to a second floor is more difficult and expensive. Construction of a two-story school would require strengthened (more expensive) bearing walls to support the second floor. A two-story school would require features (costs) such as an elevator and stairs that would not be necessary with the one-story school. Once the contractors have built one of the one-story school's classroom clusters (pods) and are familiar with its layout, etc., they will more efficiently build the other pods, thereby saving time and costs compared to a two-story school. On the other hand, the one-story middle school would include, e.g., greater costs for its larger slab and foundation and roof. Mr. Faridy's cost estimate for the one-story middle school was $14,107,000, i.e., the amount submitted to the Bureau before the referendum election (when the two-story schematics were under consideration). P-63. Considering the scale of construction, operation and future additions, etc., the costs of the two-story and one-story schools would be substantially the same.

Anthony T. Baionno testified for the petitioner relative to construction costs. Since 1961, he has been licensed as an architect by the State of New Jersey; he has prepared designs for educational and commercial buildings and he has performed construction cost estimates relative to schools and other public buildings. Only two bids have come in over his cost estimates.

(Interestingly, until 1989, the BOE's architect retained him for preparation of construction cost estimates.) However, Mr. Baionno has not performed design work for schools for over ten years. P-91.

Mr. Baionno used the two-story schematics and the one-story preliminary plans to prepare cost estimates for construction of a new middle school. P-91A; P-91B; P-91B(1). In preparing cost estimates, he considered the size and shape of the proposed buildings and he used a dollar cost per square foot or cost per perimeter (measured by foot) for, e.g., slab and foundation. To the slab and foundation cost he added line item costs: floor construction; roof construction; exterior walls & glazing; partitions; doors, frames, & hardware; finishes & millwork; miscellaneous specialties & equipment; stairs & elevator; plumbing; HVAC; and electric. P-91. Because specific line item materials were not available, he assumed that similar materials and workmanship would be used in each school, e.g., brick and block cavity walls and a "good" HVAC system. For the two-story middle school, he calculated 98,630 square feet and multiplied that area by a $9 cost factor, equaling $887,670 for grade slab and foundations. To that he added line items, resulting in a total estimated cost of $11,828,484 for the two-story school. In such cost estimation there is a margin of error, and he allowed a range of $11.8 to $13 million. P-91 at 10; R-12. For the one-story middle school, he calculated 123,110 square feet and multiplied that area by a $10 cost factor, equaling $1,231,100 for grade slab and foundations. To that he added line items, resulting in a total estimated a cost of $13,003,720 for the one-story school. (Mr. Baionno did not estimate cost for a one-story middle school according to 121,700 square feet, the lesser area that Mr. Faridy had calculated. Use of the 121,700 area would, of course, have resulted in a lower cost estimate by Mr. Baionno.) He allowed a range of $13.0 to $14.3 million for the one-story school.

The one-story school would require a larger slab and foundation area and a larger roof, resulting in greater costs. Mr. Baionno's line item cost estimates were almost all lower for the two-story school than for the one-story school. For example, costs of doors, frames, and hardware for a two-story school were estimated at $228,000, and for the one-story school were estimated at $297,000; costs of finishes and millwork for a two-story school were estimated at $1,188,700, and for the one-story school were estimated at $1,231,100; costs of miscellaneous specialties and equipment for a two-story school were estimated at $1,129,500, and for the one-

story school were estimated at $1,231,100; cost of plumbing for a two-story school was estimated at $564,750, and for the one-story school was estimated at $615,500; and cost of electric for a two-story school was estimated at $1,188,700, and for the one-story school was estimated at $1,231,100. There was no apparent cost for the greater bearing strength needed for support of a two-story school's second floor. These differences in line item cost estimates were explained as resulting from the generalization that the one-story construction has higher costs; but this explanation was not well detailed.

Relative to construction costs, the one-story plans and the two-story schematics may be compared and contrasted as follows: Using the estimate of Mr. Faridy, whose breadth and depth of experience and data is greater and more current than Mr. Baionno's, the costs would be about the same for construction of the one-story school or the two-story school. Mr. Baionno did not use Mr. Faridy's area calculation, which would have resulted in a lower cost estimate for construction of the one-story school than he presented. Accepting Mr. Baionno's cost estimates, the one-story school would be more expensive, but still within the amount ($14,107,000) submitted to the Bureau in the Project Cost Estimate Form and within the estimate described by Dr. Savedoff at the time of the BOE's vote to hold the election on the referendum. P-63; R-12.

Relative to educational features and functions, the one-story plans and the two-story schematics may be compared and contrasted as follows: The one-story plans and the two-story schematics have the same number of classrooms and other educational features. However, in a two-story school, traffic flow would require use of stairs and/or an elevator. In a two-story school, communication among school professionals would require more use of telephones, and use of stairs and/or an elevator. In a two-story school, access to resources among grades would require use of stairs and/or an elevator. That is, a two-story school would make traffic flow, communication and access to resources more complicated and difficult. The one-story school's traffic flow would be simpler and more conducive to communication and access to resources, e.g., the media center and cafetorium. P-91B(1). In the event of fire or similar emergency, evacuation from a two-story school would be more difficult. The one-story plans provide interior courts within which group activities can be conducted, and there would be easier travel to and from classrooms. A two-story school's elevator would require construction, maintenance and inspection, with annual costs estimated at $2,000-$3,000. The one-story school's greater

footprint would result in a greater slab and foundation area and resultant costs, its greater roof area would result in greater costs, and it would have a $5,000 greater annual HVAC operational cost. If necessary, the one-story school can be expanded by way of a second story; however, the elevator and stairs (which would already be present in the two-story school) would then be needed. Considering the scale of construction, operation and future additions, etc., the two-story schematics' costs and one-story plans' costs are substantially the same.

CONCLUSIONS OF LAW

Generally, the board of education of a type II school district (such as the BOE here) has the power to "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." N.J.S.A. 18A:11-1d. Such a board of education must "provide . . . suitable educational facilities including proper school buildings." N.J.S.A. 18A:33-1.

When a board of education contemplates school construction, consistent with its general powers, it may adopt "educational specifications" and "schematic plans" for a proposed school building which, with a cost estimate, are submitted to the Bureau for approval. N.J.S.A. 18A:18A-16; N.J.A.C. 6:22-1.2, -1.4(a) to -1.4(d). But the district's voters' authorization, by way of approval of a referendum proposal, is required for the board of education to issue a bond to fund school construction (or land acquisition). N.J.S.A. 18A:24-12, 18A:20-4.2(d).

As found above, after the drawing of the (pre-referendum) schematic plans, frequently, a board needs substantial time to collect information and to decide on appropriate plans, and a board would incur substantial expense in preparation of (post-approved-referendum) "preliminary plans" and "final plans" (which are more detailed than the schematics). N.J.A.C. 6:22-1.5, -1.6.

District voters must be "acquaint[ed] . . . with the [referendum] proposal," and that is accomplished by way of the educational specifications, schematic plans and public statements; but, before the referendum election, there is not a "commitment to a firm final plan." Borough of Farmingdale v. Board of Educ. of Farmingdale, 1981 S.L.D. 130, 135 (quoting Kearby v. Bd. of Educ. of Watchung, 1963 S.L.D. 73, 75). Voters may not approve a referendum proposal and,

therefore, the board is not required to have expensive "preliminary plans" and "final plans" prepared before the referendum election. "[F]ollowing local funding authorization," there may be changes from the schematics to the "preliminary plans" and "final plans" (which are submitted to the Bureau for approval and which must include details suitable for bidding and construction). N.J.A.C. 6:22-1.5, -1.6. However, the board may not contravene the will of the voters by substituting school plans which are entirely different in concept from those presented to the voters before the election. Durgin v. Brown, 37 N.J. 189, 197-98 (1962); Farmingdale, supra, 1981 S.L.D. 136 (quoting Kearby, supra, 1963 S.L.D. at 75.

The BOE argues as follows: Voter approval of a referendum proposal is "basically a voter-enacted form of [local] law." Like a municipal ordinance, the approved referendum proposal should be construed using the same rules as are used in construing a statute. White Castle v. Planning Bd., 244 N.J. Super. 688, 691 (App. Div. 1990); certif. denied, 126 N.J. 320 (1991). If a statute is "clear and unambiguous on its face and admits of only one interpretation," its literal meaning manifests the Legislature's intent. GE Solid State v. Director, Taxation Div., 132 N.J. 298, 307 (1993), quoting State v. Butler, 89 N.J. 220, 226 (1982). Further, "[w]here the words of the statute are clear and explicit, courts should not resort to extrinsic material to determine that the Legislature intended something other than what it actually expressed." Gauntt v. City of Bridgeton, 194 N.J. Super. 468, 483 (App. Div.); certif. denied, 99 N.J. 148 (1984). "Extrinsic aids are never used to create an ambiguity, only to resolve one." Myers v. Cedar Grove Tp., 36 N.J. 51, 61 (1961). And, "although statements of legislative committees may serve as aids in construing ambiguous or conflicting terms of a statute," they should not be used to ascribe to it "a meaning not fairly within its word and purposes." N.J. Civil Service Ass'n v. State, 88 N.J. 605, 615 (1982). Because the two-story schematics were not appended to the referendum proposal, use of the authorized funding is not limited by the two-story schematics and the funding may be used for construction of the one-story new middle school.

The material facts are summarized as follows: The educational specifications were publicly described as "detailed descriptions of every space to be built renovated or modified." P-6. The two-story new middle school schematics were publicly displayed and included in the brochure which was mailed to the voters explaining the referendum. However, the schematics were repeatedly characterized, on the BOE record and elsewhere, as (merely) "preliminary," etc.;

it was repeatedly publicly stated that "classes may be moved," etc.; and it was repeatedly publicly stated that the schematics would "change." P-1A; P-3; R-3a; R-13; R-14. The new middle school cost estimate was a component of the total funding proposed to be authorized in the referendum election. The two-story schematics (among others) were displayed about fifteen feet from an entrance to the referendum polling place. However, that entrance was used by only about 10 percent of the voters, i.e., far less than a majority of voters. The referendum proposal, as stated, did not incorporate or refer to particular schematics. The petitioner did not present evidence that a majority of voters intended their approval of the referendum to limit construction to the two-story schematics. After approval of the referendum proposal and after receipt of information relative to the site and input from school professionals, the BOE decided to proceed according to the one-story plans. The one-story plans and the two-story schematics have the same number of classrooms and other educational features, both satisfy the approved educational specifications, and both are within the cost estimate for the new middle school which was a component of the funding authorized by the referendum vote. The one-story plans are superior in traffic flow, opportunities for professional communication, and opportunities for group activities. Considering their scale, costs of construction, operation, maintenance, renovation and future additions, etc., would be substantially the same for schools constructed pursuant to the two-story schematics and the one-story plans.

The educational specifications, the two-story schematics and the repeated public statements served to "acquaint the voters with the proposal" of construction of a new middle school. Farmingdale, supra, 1981 S.L.D. at 135 (quoting Kearby, supra, 1963 S.L.D. at 135). These (extrinsic) materials are necessary for an understanding of the referendum proposal, i.e., the will of the voters. Farmingdale, supra, 1981 S.L.D. at 135 (quoting Kearby, supra, 1963 S.L.D. at 135). Further, given the repeated public statements that the schematics would "change," etc., the petitioner has not proven that voters intended to limit funding to construction according to the two-story schematics. R-14. To the contrary, because the one-story plans satisfy the educational specifications and because construction pursuant to the one-story plans will be within the new middle school cost estimate component of the authorized funding, construction according to the one-story plans is consistent with the will of the voters.

A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith. Schinck v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960); Quinlan v. North Bergen Bd. of Educ., 73 N.J. Super. 40, 46 (App. Div. 1962). Consistent with these notions, the petitioner bears the burden of proof that the BOE acted unlawfully and that its choice of the one-story plans was unlawful and/or arbitrary, capricious or unreasonable.

The BOE determined that a school constructed pursuant to the one-story plans will be educationally superior to one constructed pursuant to the two-story schematics and the cost, etc., of construction of the one-story school will be substantially the same as that of the two-story school. And the petitioner has not proven that the BOE's exercise of its discretion in its choice of the one-story plans was unlawful or arbitrary, capricious or unreasonable.

ORDER

I **ORDER** the petition **DISMISSED WITH PREJUDICE**.

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

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

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

April 10, 1996
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

4/11/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 1996
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Joint Exhibits:

J-1Ev	Minutes of BOE Meeting of September 7, 1994
J-2Ev	Minutes of BOE Meeting of November 14, 1994
J-3Ev	Minutes of BOE Meeting of November 21, 1994
J-4Ev	Portion of minutes of BOE meeting of November 28, 1994
J-5Ev	Portion of minutes of BOE meeting of December 12, 1994
J-6Ev	Portion of minutes of BOE meeting of March 27, 1995
J-7Ev	Portion of minutes of BOE meeting of April 24, 1995
J-8Ev	Portion of minutes of BOE meeting of May 22, 1995

Petitioner's Exhibits:

P-1	Portion of Montgomery Township Schools Building Project Ad-Hoc Committee report
P-1AEv	Montgomery Township Schools Building Project Ad-Hoc Committee report (complete)
P-2	Two-story plans for "Montgomery Middle School," etc., by Faridy Thorne Fraytak, P.C., 1994
P-3	Letter of vice president of the BOE, appearing in The Princeton Packet, October 21, 1994
P-4	Newspaper article entitled "$31 million plan pays a courtesy call," The Princeton Packet, November 11, 1994
P-5	Letter of member of the BOE, appearing in The Princeton Packet, November 18, 1994
P-6Ev	Letter of superintendent of schools, appearing in The Princeton Packet, November 22, 1994

P-7Ev	BOE's "School Bond Issue Referendum," forwarded to voters before the November 29, 1994 vote
P-8Ev	Photograph of Burnt Hill Road School hallway, showing display of proposed school plans on November 29, 1994
P-9	One-story "Floor Plan" for "The New Montgomery Middle School," "Drawing SK-2," by Faridy Thorne Fraytak, P.C., 1995
P-10	Borough of Farmingdale v. Board of Education of the Borough of Farmingdale, 81 S.L.D. 173 (1980)
P-11	Board of Education of Belvidere v. Bosco, 138 N.J. Super. 368 (Law Div. 1975)
P-12	One-story "Floor Plan" for "The New Montgomery Middle School," "Drawing SK-2," and two-story plan for "Montgomery Middle School," by Faridy Thorne Fraytak, P.C.
P-13	"Supplement to Petition, dated October 4, 1995
P-14	Certification of Orsini
P-15	Affidavit of Mekjian
P-16	"Techniques for Referendum Promotion," by Faridy Thorne Fraytak
P-17	Certification of Baionno
P-26	Résumé of Goldberger
P-30Ev	Portion (pages 16 & 17) of minutes of BOE meeting of July 26, 1993
P-32Ev	Outline, "Ad Hoc Building Committee, Overview of Process, November 8, 1993"
P-35Ev	Report, "Middle Level Education, A Unique Organization for Young Adolescents," New Jersey School Boards Association, November 1, 1990
P-39Ev	Outline "Ad-Hoc Building Committee, Overview of Process Time Lines, February 15, 1994"
P-44Ev	Montgomery Township Schools, Board Policies - Second Reading (8/19/91)
P-47Ev	Portion (pages 2 & 3) of minutes of BOE meeting of September 2, 1994
P-48Ev	Portion (pages 1, 2, 3, 4, 5, 6 & 7) of minutes of BOE meeting of September 19, 1994
P-50Ev	Montgomery Township Schools, Office of the Superintendent, memorandum to Board members, dated 9/22/94
P-51Ev	"Educational Specifications for Montgomery Middle School," revised September 23, 1994

P-51AEv	"Educational Specifications for Montgomery Middle School," revised September 23, 1994, and received November 18, 1994, by the Department of Education
P-56Ev	Portion (pages 1, 2 & 3) of minutes of BOE meeting of October 10, 1994
P-57	Newspaper article entitled "Montgomery panel to spread the word," appearing in The Princeton Packet, October 14, 1994
P-59Ev	Letter from Faridy Thorne Fraytak, P.C., dated October 20, 1994
P-62Ev	The Paw Print, November 1994, pages 4 & 5
P-63Ev	"Project Cost Estimate Form," dated November 1, 1994, received by the Department of Education
P-63A	Handbill reading "Let's Shed Some Light on the School Bond Referendum, Come for Coffee," sponsored by The Citizens' Referendum Committee
P-67AEv	Two-story "Floor Plan" for "New Middle School Addition," "Montgomery Middle School" (mounted on foam-board)
P-67BEv	"Additions & Alterations to the Montgomery High School" (mounted on foam-board) (including two-story plan)
P-67CEv	"Additions & Alterations to the Orchard Rd. Elem. School, Floor Plan," marked with locations of Burnt Hill Road and Orchard Road, outside entrance to "Polling Place," outside entrance to lobby, location of schematics on November 29, 1994, etc.
P-70Ev	Letter from Faridy Thorne Fraytak, P.C., dated February 9, 1995, with attached wetlands delineation sketches
P-72Ev	One-story "Floor Plan" for the "New Middle School," marked by witness Faridy to show how wings were moved to avoid wetlands buffer area
P-81	Letter from BOE president, dated May 26, 1995; "Turning Points" brochure by Carnegie Council on Adolescent Development; "Middle School Presentation," Montgomery Township Schools, Office of the Superintendent, dated May 22, 1995; "Building a Community of Excellence," dated January 28, 1991, Faridy Thorne Fraytak, P.C.
P-85Ev	"Educational Specifications for Montgomery Middle School," revised September 23, 1992, "Addendum Revision: August 1, 1995"
P-91Ev	"Cost Analysis of Two Designs for Montgomery Middle School," by Anthony T. Baionno

P-91AEv	Two-story "Floor Plan" for the Montgomery Middle School, "Drawing No. SK.1" and "Drawing No. SK.2" (showing rooms numbered)
P-91BEv	One-story "Floor Plan" for "The New Montgomery Middle School," "Drawing No. SK-2"
P-91B(1)Ev	One-story "Floor Plan" for "The New Montgomery Middle School," "Drawing No. SK-2"
P-91B(2)	One-story plan for "The New Montgomery Middle School," "Drawing No. A-1" (showing rooms numbered)

Respondent's Exhibits:

R-1Ev	Portion of minutes of BOE's October 10, 1994 meeting, with referendum proposal
R-1A	Certification of Savedoff
R-2Ev	Portion of minutes of BOE's October 10, 1994 meeting
R-3Ev	Portion (page 5) of minutes of BOE's October 24, 1994 meeting
R-3aEv	Portion (pages 1, 3, 5, 6, & 11) of minutes of BOE's October 24, 1994 meeting
R-4	Portion of minutes of BOE's March 27, 1995 and April 24, 1995 meetings
R-5	Portion of minutes of BOE's May 22, 1995 meeting
R-6	Certification of Faridy
R-7	Certification of Kahn
R-8Ev	Portion of minutes of BOE's September 26, 1994 meeting
R-9Ev	Letter from Department of Education, dated August 8, 1995
R-10Ev	Letter from Faridy Thorne Fraytak, P.C., dated June 8, 1994
R-11Ev	Letter of Interpretation from Department of Environmental Protection, dated August 10, 1995
R-12Ev	Chart showing one-story and two-story areas, perimeters, costs, etc.
R-13Ev	Excerpt from Township Committee meeting of November 9, 1994
R-14Ev	Outline entitled "Referendum 1994, Coffees/Presentations" by Savedoff
R-15Ev	Letter from Faridy Thorne Fraytak, P.C., dated May 19, 1995, with "FTF Responses to Requested Clarifications Re: Middle School Pod Design"

WITNESSES

Petitioner's witnesses:

Anthony Baionno

Virginia Goldberger

Leslie Orsini

Respondent's witnesses:

Jamil Faridy

John Garcia

Basil Smith

OAL DKT. NO. EDU 8772-95

CHRIS SHUSTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both petitioner and respondent Board filed timely exceptions pursuant to *N.J.A.C.* 1:1-18.4. The Board also filed a reply to petitioner's exceptions.

Petitioner's exceptions, in pertinent part, challenge three aspects of the initial decision: 1) The failure of the ALJ to rely on particular case law; 2) The ALJ's use of exhibits to buttress the Board's position when, in fact, certain documents support petitioner's case; and 3) The ALJ's disregard of testimony which reinforces petitioner's case. (Petitioner's Exceptions at p. 1)

Petitioner's exceptions assert that the ALJ "apparently ignored the key aspect" of *Borough of Farmingdale v. Board of Education of the Borough of Farmingdale*, 1981 *S.L.D.* 130 in that the ALJ in *Farmingdale* found that "once *preliminary* [building] plans are presented to the voters the Board no longer has the discretionary authority to substantially change those

preliminary plans ***." (emphasis in text) (Petitioner's Exceptions at p. 2) Although petitioner's exceptions include a detailed review of *Farmingdale*, the Commissioner finds it unnecessary to review the case herein, inasmuch as that case, along with *Durgin v. Brown,* 37 *N.J.* 189 (1962) and *Kenneth Kearby v. Board of Education of the Borough of Watchung, Somerset County*, 1963 *S.L.D.* 73, was part of the record before the ALJ in this matter.

In reply, the Board contends that "Petitioner's discussions of case law reflect a complete misunderstanding of the use [of] legal precedent and an inability to determine the *holding* of a case.***" (emphasis in text) (Board's Reply at p. 2) For example, the Board indicates that petitioner's reading of *Farmingdale* fails to consider the Commissioner's affirmance language therein which places importance on the wording of the referendum in that matter. The Board argues that, unlike *Farmingdale*, the wording of the referendum in the instant matter was general and was, therefore, "***not violated by the ultimate board action adopting a one-story plan for the middle school." (*Id.*) Similarly, the Board asserts that petitioner misreads *Kearby, supra*, and extracts language from *Durgin, supra,* without consideration for the factual backdrop of that case. The Board concludes that "Nothing in [*Durgin*] provides any meaningful basis for a holding that the Board in this case is not implementing the actual referendum proposal approved by the voters ***." (*Id.* at p. 3)

As to the exhibits and testimony adduced at the hearing, petitioner asserts, *inter alia*, that the ALJ apparently relied upon the Board's testimony "seemingly at the exclusion of all the other evidence." (Petitioner's Exceptions at p. 4) Specifically, petitioner contends that the ALJ failed to rely on the "totality of the information" contained within Superintendent Savedoff's letter of November 22, 1994, as published in the *Princeton Packet.*

(*Id.* at pp. 3, 4) This letter, petitioner claims, induced voters to believe that they were voting for a two-story plan. Next, petitioner contends that the ALJ "apparently ignored" an inter-Board memorandum from Dr. Savedoff (Exhibit P-50) and misconstrued the message offered by Vice President of the Board, Mr. Kling, in his letter which appeared in the *Princeton Packet* on October 21, 1994. (Petitioner's Exceptions at p. 5, referring to Exhibit P-3) Acknowledging that both letters use the phrase "preliminary" with regard to the Board's schematics presented to the voters, petitioner nevertheless insists that these letters, as well as other exhibits relied on by the ALJ, when taken in their entirety, do not support the ALJ's conclusion that the electorate could reasonably anticipate a change from a two-story to a one-story building plan. (*Id.* at p. 8)

Moreover, petitioner asserts that the ALJ's conclusion that only ten percent of the voters saw the schematic blow-ups situated outside the polling places is unsupported by the evidence adduced at the hearing (*id.* at pp. 10, 11), as is the ALJ's conclusion that, "*** costs of construction, operation, maintenance, renovation and future additions, etc., would be substantially the same for schools constructed pursuant to the two-story schematics and the one-story plans." (*Id.* at p. 14, citing Initial Decision at p. 18)

The Board counters that petitioner has improperly furnished the Commissioner with purported recitations from the transcripts, without furnishing the actual hearing transcripts. Moreover, as to the analysis of evidence the Board maintains, *inter alia*, that "***the ALJ's analysis of the evidence was balanced, and he made appropriate and rational findings of fact and credibility.***" (Board's Reply at p. 3) The Board argues that, while petitioner attempts to discredit the testimony of Principal Smith concerning the likelihood of the schematics being seen by the voters, he ignores Smith's point "***that the reason the voters were unlikely to have seen

the schematics on election day was that the 'most direct and convenient access' to the polling place was to park alongside the gym ***." (*Id.* at p. 4) The Board observes, "There is no reasons [sic] to think that pattern of convenience, observed by Mr. Smith over a 36 year period as principal, would have changed at any time during the day on November 29, 1994.***" (*Id.*)

Finally, petitioner maintains that the extrinsic materials in this matter were necessary for an understanding of the referendum proposal and, therefore, were properly considered by the ALJ. Petitioner argues,

> ***Referendum proposals are typically general in wording due to the space constraints on the ballot and therefor[e] both the Board and the public rely on "extrinsic aids" to further define the proposal. To decide otherwise would allow Boards to propose a general question, define it with factual information (intrinsic aids) and then proceed to do something contradictory with that information. (Petitioner's Exceptions at p. 15)

In reply, the Board contends that petitioner fails to articulate a "single, practical standard" which should be employed by the Commissioner in this matter. (Board's Reply at p. 1) Rather, the Board asserts,

> ***[P]etitioner variously refers to several very amorphous standards (e.g. what was the voters' "basis;" what was "internally incorporated" into the referendum; what was their "understanding;" and *** whether there was a "continuum of spirit" between the two plans[)]. ***(Board's Reply at p. 1, citing to Petitioner's Exceptions at pp. 1, 2, 6, 13)

The Board, however, urges the Commissioner, in adopting the ultimate conclusion of the ALJ, to apply a different test from that which was employed by the ALJ in reaching his conclusion. (Board's Exceptions at p. 1) Incorporating by reference its post-hearing brief presented before the ALJ, the Board argues, *inter alia*, that the determination of voter intent in this matter should be based on the wording of the referendum, and "***[o]nly if the

referendum proposal is ambiguous should the Commissioner look to 'extrinsic evidence' as to voter intent.***" (*Id.* at pp. 1, 2) The Board's conclusion that such a test is appropriate "***is grounded in the education statutes and regulations and in judicial precedent for interpreting legislative as well as electoral actions." (Board's Post-hearing Brief at p. 24)

Arguing that the ALJ failed to address its argument with respect to its proposal for a narrower standard of review in this matter, the Board affirms that the ALJ instead "***focused on a factual analysis of what plans were presented prior to the election, and whether those plans differed substantially from what the Board ultimately implemented after the election.***" (Board's Exceptions at p. 2) The Board contends that the ALJ, rather than relying on the wording of the referendum, looked instead to the extrinsic evidence which petitioner argued formed a basis upon which the electorate cast its votes. (*Id.*) However, the Board maintains,

> ***The only question submitted to the voters in this case was what type of school to build (a new middle school), where to site in (on land already owned by the Board) and how much to borrow for all three projects. No aspect of such approved referendum question has been violated by the Board's actions in this case. Hence, the will of the voters was not contravened. (*Id.*)

Thus, the Board urges the Commissioner to adopt "***the traditional statutory interpretation test utilized by the courts" whereby the meaning of a referendum's proposal is first determined by the language of the proposal, and where that language is clear and unambiguous on its face, no further inquiry into the literal terms of the proposal in order to devise the voters' intent is made. (*Id.* at p. 5) This test, the Board reasons, "***is consistent with the statutes which vest authority in the Board to adopt (and therefore modify) schematics and educational specifications," and obviates the need for a costly, time-consuming factual inquiry. (*Id.* at pp. 2, 3)

Upon careful and independent review, the Commissioner finds no basis in the record to challenge the ALJ's credibility determinations and resultant conclusions, and, therefore, concurs that petitioner has failed to establish that the Board's exercise of discretion in the choice of a one-story building plan was arbitrary, capricious, unreasonable, or otherwise unlawful. In so holding, the Commissioner declines to accept that the test proposed by the Board is the appropriate standard to be applied in this matter but, rather, finds that the ALJ's consideration of extrinsic evidence to the extent that it may or may not have formed the basis of voter approval of the referendum was appropriate.

As to petitioner's exceptions, the Commissioner finds them to be unpersuasive, and herein notes that, to the extent petitioner's challenge to the findings of the ALJ relies on proffered testimony, he cannot in the absence of hearing transcripts, ascertain the merits of petitioner's claims. *In re Morrison*, 216 *N.J. Super.* 143, 157, 158 (App. Div. 1987).

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and the Petition of Appeal in this matter is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 28, 1996
Date of Mailing, May 29, 1996

215-96

215-96

N.D., on behalf of minor child, M.M.,

PETITIONER,

V.

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

RESPONDENT.

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

COUNTERCLAIMANT,

V.

N.D. AND Z.Z.M.,

COUNTERCLAIM-RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

May 28, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11528-95
AGENCY DKT. NO. 362-9/95

N. D., on behalf of a minor child, **M.M.,**
Petitioner,
v.
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE and MAPLEWOOD,
Respondent.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE and MAPLEWOOD,
Counterclaimant,
v.
N.D. and **Z. Z. M.,**
Counterclaim-Respondents.

Frank Askin, Esq., for petitioner

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

Record Closed: April 10, 1996 Decided: April 10, 1996

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

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

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

April 10, 1996
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4-16-96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

YOUNG, DIMIERO & SAYOVITZ, P.C.
A Professional Corporation
Skyline Plaza
414 Eagle Rock Avenue
West Orange, NJ 07052
(201) 736-5200
Attorneys for Respondent/Counterclaimant

APR 9 3 13 PM '96

NATHANIEL DURANT Petitioner v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD Respondent	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO. EDUOS-11528-95N** **Agency Ref. No. 362-9/95** **STIPULATION OF SETTLEMENT**
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD Counterclaimant v. NATHANIEL DURANT and ZAHEERAH Z. MUHAMMAD Counterclaim Respondents	

Petitioner/Counterclaim Respondent Nathaniel Durant and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood herein stipulate as follows:

3a

1. This settlement is being made without any admission of liability or wrongdoing on the part of either party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to the other party's claim.

2. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorney fees and damages pursuant to any federal or State constitutional or civil rights claims, and specifically release the other parties from any claims arising out of or related to these claims.

3. The pupil M.M. will be permitted to continue to attend District schools so long as he satisfies the statutory criteria set forth in N.J.S.A. 18A:38-1, *et seq.* If the District determines in the future that M.M. is in violation of N.J.S.A. 18A:38, the District will notify counsel for M.M. of the basis for its belief and will not take any action against M.M. until the expiration of ten (10) days from the date of notice to counsel so that the parties may discuss the matter.

4. As a result of the foregoing, Petitioner hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

FRANK ASKIN
Attorney for Petitioner

By: FRANK ASKIN

Dated:

YOUNG, DIMIERO & SAYOVITZ
Attorney for Respondent

By: JOANNE L. BUTLER

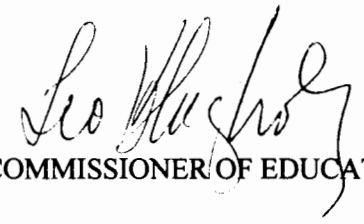
Dated:

OAL DKT. NO. EDU 11528-95

N.D., on behalf of minor child, M.M.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
COUNTERCLAIMANT,	:	
V.	:	
N.D. AND Z.Z.M.,	:	
COUNTERCLAIM-RESPONDENTS.	:	

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

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



COMMISSIONER OF EDUCATION

May 28, 1996
Date of Mailing, May 28, 1996

216-96

216-96

I.T., on behalf of minor children, I.T., E.T., and E.T.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

May 28, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 1289-96

I.T. ON BEHALF OF MINOR CHILDREN

I.T., E.T., AND E.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION,

UNION COUNTY,

Respondent.

I.T., *pro se*

James J. Damato, for respondent

Record Closed: March 28, 1996 Decided: April 3, 1996

BEFORE **LINDA BAER**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 24, 1996, for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was scheduled for March 28, 1996. At the prehearing conference the parties discussed the possibility of settling this matter.

The parties agreed to settle this matter and have prepared a settlement agreement indicating the terms thereof, which is attached hereto and fully incorporated herein. Additionally, the terms and conditions of the settlement were memorialized on the record.

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

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by their signatures and their on the record representations.

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

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

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

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

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

April 3, 1996
DATE

Linda Baer
LINDA BAER, ALJ

Receipt Acknowledged:

April 15, 1996
DATE

Mi Interrato/p
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mh

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT
OAL DKT. EDU 1289-96

I.T. ON BEHALF OF MINOR CHILDREN
I.T., E.T., AND E.T. ,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION,
UNION COUNTY
Respondent.

SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and have prepared this settlement agreement which fully disposes of all issues in controversy between the Petitioner and the Respondent.

1. Petitioner withdraws his appeal and request for a hearing, and the Respondent agrees to place on the Board's agenda of April 23.,1996 the acceptance of the children I.T., E.T. and E.T. as tuition students.

2. The Petitioner will pay to the Board the following amounts:

On or before April 16, 1996	$3,000
On or before May 16, 1996	3,000
On or before June 16, 1996	$4,840

This amount will satisfy in full tuition for the 1995- 1996 school year for I.T, E.T. AND E.T. If payment is not made on or before the aforementioned dates or if the check is dishonored, the total tuition due and owing from the date of enrollment to the date of exit is acknowledged and agreed pursuant to the per pupil daily cost of $36.76 for I.T. and E.T. and $38.94 for E.T.

3. As of June 21, 1996 the children will either continue as tuition students or be issued transfer cards. This agreement does not prevent I.T. from independently establishing residency for the 1996- 1997 school year.

4. Any agreements as to future tuition will be governed by standard Board contract.

5. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other pupils.

6. Both parties waive the right to file exceptions and cross exceptions.

7. This agreement will only become effective when it is approved by the **BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY AND THE COMMISSIONER OF EDUCATION**. Any disapproval by the Board or the Commissioner shall not interfere with the rights of either party to pursue the matter further.

3.28.96

3/28/96

OAL DKT. NO. EDU 1289-96

I.T., on behalf of minor children, I.T., E.T., and E.T.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

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

The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them and other litigants whose controverted matters have been duly transmitted to OAL against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

COMMISSIONER OF EDUCATION

May 28, 1996
Date of Mailing, May 29, 1996

217-96

217-96

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

May 28, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7623-95
Agency Dkt. No. 206-6/95

IN THE MATTER OF THE TENURE HEARING OF DORIS MORANEY, BOARD OF EDUCATION OF THE STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY

Charlotte Kitler, Esq., for petitioner, State-Operated School District of Jersey City
Doris Moraney, *pro se*

Record Closed: March 20, 1996 Decided: April 9, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State-Operated School District of the City of Jersey City certified charges of inefficiency against respondent, Doris Moraney. Moraney is a tenured teacher employed by the District. On January 20, 1995, the District found probable cause to certify the tenure charge of inefficiency which, if true, would warrant Moraney's termination. On June 8, 1995, the District filed the written charges with the Commissioner of Education.

The matter was transmitted to the Office of Administrative Law (OAL) on July 21, 1995 for a determination as a contested case pursuant to

This matter was transmitted to the Office of Administrative Law on January 31, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to -13. This matter was scheduled for hearings on February 20, 21 and 22, 1996. *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties have agreed to a settlement of the matter, subject to the approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brookline Board of Education*, 1990 S.L.D. 842, the record of any proposed settlement must include:

> [T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights and that the agreement is consistent with the public interest. *Cardonick* at 850-51.

On March 20, 1996, the OAL held a public hearing on whether the proposed settlement was in the public interest and therefore should be accepted. Also, the parties submitted a written stipulation dated March 20, 1996 setting forth the terms of the agreement.

Based on my review of the record, I **FIND** that the proposed settlement is consistent with the public interest because it will save significant legal expenses and costs as well as time expended by administrators and witnesses. I further **FIND** that Moraney had full opportunity to consult with legal counsel to explain the meaning of the settlement to her prior to entering into the agreement. Moraney is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, Moraney was informed by counsel that, notwithstanding, the parties agreement to settle this matter,

Commissioner must approve the agreement. Thus, any execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies. I further **CONCLUDE** that the terms of this settlement are in the public interest.

ORDER

It is therefore **ORDERED** that upon approval by the Commissioner that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

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

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

April 9, 1996
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

April 15, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

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General Counsel
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of Jersey City
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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU TH-07623-95N
AGENCY REF. NO. 206-6/95

In the Matter of the Tenure Hearing of

DORIS MORANEY

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY.

SETTLEMENT AGREEMENT

This Agreement is made and entered on the record this 20th day of March, 1996, by and between

The State-Operated School District of Jersey City, having its Administrative Offices at 346 Claremont Avenue, Jersey City, New Jersey 07305, hereinafter referred to as the "District"

- and -

Doris Moraney, whose home address is 110 Washington Street, East Orange, New Jersey 07017

WHEREAS, Ms. Doris Moraney has been employed as a full-time teacher with the District since March 1, 1983, and

WHEREAS, tenure charges of inefficiency were certified against Ms. Moraney and filed with the Commissioner of Education on or about June 8, 1995; and

WHEREAS, the parties wish to resolve the matter without full litigation and believe that settlement is appropriate in the public interest for the reasons expressed in the proceeding before the Administrative Law Judge on March 20, 1996; and

NOW, THEREFORE, it is hereby agreed as follows:

1. Ms. Doris Moraney agrees to resign, and confirms that she has submitted a written resignation, from employment with the District effective June 30, 1996.

2. The District agrees to accept the resignation of Ms. Moraney, to continue her on full pay through June 30, 1996 and to continue her health

benefits through August 30, 1996.

3. The District further agrees to withdraw with prejudice the tenure charges of inefficiency bearing Agency Reference No. 206-6/95 and OAL Docket No. EDU TH-07623-95N.

FOR PETITIONER
State-operated School District
of Jersey City

FOR RESPONDENT
Doris Moraney

Doris Moraney

OAL DKT. NO. EDU 7623-95

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

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

May 28, 1996
Date of Mailing, May 29, 1996

218-96

~~218-96~~

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH TRAWICK,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges of unbecoming conduct, unlawful use of physical force, use of profanity and making improper sexual remarks to students against respondent health and physical education teacher.

Having considered the record including the testimony of witnesses, the ALJ concluded that respondent's actions did constitute unbecoming conduct in that he struck a student with a pointer and he used inappropriate language. The District did not prove that he made inappropriate sexual remarks. ALJ determined that the proven charges were insufficient to warrant respondent's termination from employment. ALJ recommended the penalty of withholding respondent's increment for the 1993-94 school year.

Commissioner concurred with ALJ's findings and conclusions that respondent's actions, as proven, constituted unbecoming conduct. However, the Commissioner disagreed with the ALJ's recommendation that an increment withholding was sufficient penalty in light of the serious and unprofessional nature of his actions. Citing *In re Fulcomer, In re Appleby, In re Tyler and In re Campbell,* the Commissioner directed that in addition to the denial of respondent's salary and adjustment increments for the 1996-97 school year, respondent forfeit the 120 days' salary withheld following certification of the tenure charges.

May 28, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7008-94
AGENCY DKT. No. 261-6/94

IN THE MATTER OF THE TENURE HEARING OF JOSEPH TRAWICK, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

Gregory G. Johnson, Esq., for petitioner, State Operated School District of the City of Newark

John L. Schettino, Esq., for respondent (Giblin & Giblin, attorneys)

Record Closed: October 10, 1995 Decided: April 4, 1996

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE

Respondent, Joseph Trawick is a tenured teacher employed by the Newark Board of Education now the State Operated School District of the City of Newark (District). On June 28, 1994, the District filed with the Commissioner of Education certified tenure charges against Trawick alleging conduct unbecoming a teacher, unlawful use of physical force, use of profanity and making improper sexual remarks to

his students. The District suspended Trawick without pay and seeks his removal. Respondent denies the allegations.

PROCEDURAL HISTORY

On July 21, 1994, the Commissioner of Education transmitted the certified tenure charges to the Office of Administrative Law (OAL) for hearing as a contested case. Plenary hearings were held on March 21, 24, April 27, 28 and May 5, 1995. On July 5, 1995, the State Board of Education seized control of the Newark Public Schools and all Board personnel were removed from their positions by operation of law. The record remained open to allow the respondent to substitute counsel and for the submission post hearing briefs. The initial decision was due in this matter on November 27, 1995. On March 20, 1996 the undersigned requested an extension of time to file this decision.

OVERVIEW OF THE CHARGES

First count, unbecoming conduct, paragraph three states that Trawick conducted himself in a manner unbecoming a teaching staff member as follows:

a. On April 21, 1993 Trawick struck pupil G.D. on the back with a wooden pointer as a means of discipline.

b. An investigation revealed that other pupils claimed that Trawick used physical force as a means of ongoing discipline.

c. On December 3, 1993, two eight grade females, N.H. and S.G., complained to a vice principal that during class Trawick used profanity and made sexual remarks about them and other females.

d. On December 10, 1993, Trawick touched the breast of an eight grade female, L.C., after commenting about her chest.

e. During the investigation of the L.C. incident other students confirmed that Trawick commented about sexual matters and the female anatomy in an offensive manner.

f. Other pupils have accused Trawick of cursing at them.

g. On several occasions beginning in September, 1993 Trawick failed to supervise his students.

4. Trawick's inappropriate interaction with pupils endangers their well-being and makes him unfit to be a teacher.

Second Count charges:

Trawick's conduct constitutes just cause for his immediate dismissal.

At the conclusion of the District's direct testimony, I **granted** respondent's motion to dismiss the charges contained in paragraph 3b, use of physical force on an ongoing basis and 3g failure to properly supervise students.

UNDISPUTED FACTS

I **FIND** the following facts undisputed facts:

Joseph Trawick was hired as a health and physical education teacher on September 10, 1990. Prior to this employment with the District, he was employed in private industry by Supermarkets General and The Great Atlantic & Pacific Tea Company. Trawick's first teaching assignment for the District was at Westside High School where he was the tenth grade physical education instructor for two years. Additionally, Trawick coached the freshman football team and he was the assistant coach for the varsity football team. He also coached the girls softball team. At Westside Trawick received satisfactory evaluations.

Trawick expressed a desire to teach elementary school students and for the 1992-93 school year he was transferred to the Sussex Avenue Elementary School (Sussex Avenue). There, he was assigned to teach health to the third, sixth, and eight grade students and physical education to students in grades four to eight. Sussex Avenue did not have a defined physical education curriculum. Trawick instituted a curriculum and an after school program called "Class Against Class " The program consisted of intramural sports where classes competed against each other. Forty to fifty students participated in the program.

The school cafeteria doubled as the gym. Some of the female students complained about the general conditions of the gym; the area was considered generally unclean and inadequate. Further, other students would frequently refuse to change into their gym uniforms and to participate in class. Trawick obtained permission for the girls to dress in sweat pants in lieu of the formal gym attire. This measure led with limited success.

The students were not used to gym classes and some were uncooperative. Consequently, disciplinary problems were frequent and severe. Thus, on December 7, 1992, Trawick wrote a memorandum to the school's principal, Mr. Johnson, and requested that a plan be developed to deal with ongoing disciplinary problems in his gym and health classes (R-2). The memorandum was copied to Eugene Campbell, superintendent of the District, Marilyn Bowles and Anthony Orsini, vice principals at Sussex and Leonard Moore, Trawick's immediate supervisor. Additionally, Trawick requested that a female gym instructor be assigned to the school. Lawrence Guriano, Assistant Director of Physical Education and Extracurricular Activities, confirmed that Trawick had expressed that there were "big problems" at Sussex. The girls refused to get dressed for class and were generally unruly. Trawick did not receive any response to his requests for assistance.

On April 21, 1993, Vice Principal Marilyn Bowles, heard a commotion in Trawick's third-grade class. Bowles went to the class and observed that a student,

G.D., was out his seat and Trawick standing nearby with a pointer in his hand. The students were yelling that Trawick hit G.D. with a pointer. Bowles got G.D. to take his seat. Subsequently, G.D.'s mother reported that Trawick had hit G.D.. The school nurse examined G.D. and found a bruise on his back. But, it is not alleged that G.D. was seriously hurt.

Trawick conceded that he "popped" G.D, but alleged that he did not intend to harm the student. Trawick explained that G.D. was hitting other students disrupting the entire class, and presented a danger to himself and to others. Moreover, G.D. refused to take his seat even though he had been instructed to do so at least six times. G.D. was a problem student who would start fights and run around the classroom. Further, Trawick had previously discussed G.D.'s behavior with Bowles.

After the incident, Trawick enrolled and successfully completed a class on classroom behavior control at Jersey City State College.

On December 13, 1993, Mr. T., the stepfather of two Sussex Ave students, L.C. and S.C., lodged a complaint with Vice Principal Anthony Orsini. Mr. T. reported that Trawick had spoken to his daughters in an inappropriate manner and had touched L.C.'s breast. Orsini questioned Trawick and the students and then notified the Division of Youth and Family Services (DYFS). DYFS also conducted an investigation. Orsini also conducted an investigation for the District wherein he interviewed L.C., S.G., N.H., A.S. and Z.W. These students were not asked and they did not give him any dates as to when the alleged events took place. Orsini concluded his investigation with a memorandum to the assistant superintendent. (P-2).

SUMMARY Of THE TESTIMONY ON DISPUTED FACTS

Count One, paragraph 3 sections c, d, e and f of the petition charges that Trawick engaged in unbecoming conduct. Specifically, it is alleged that Trawick made inappropriate sexual remarks to female students, used profanity and touched the breast of an eighth grade female student. The charges of inappropriate touching and making sexual remarks will be discussed separately from the charge of using profanity.

Inappropriate touching and making sexual remarks:

A.S. is presently sixteen years old and a ninth grade student at Clifford Scott High School. She attended Sussex Avenue school from the fourth to eight grades. Trawick was her seventh grade physical education instructor.

A.S. claimed that Trawick said that she had "a fat pussy" and that she was "pleasantly plump." A.S. could not recall when Trawick made the alleged remarks to her but she recalled that S.G. and N.C. were present. At that time S.G. was her best friend and N.H. was "like a friend." She did not consider L.C. a friend.

A.S. also claimed that Trawick told her "if she was older or he younger, he would take her to lunch." Because of these remarks, she stopped participating in gym class and would sit on the sidelines of the gym in her street clothes. She did not tell anyone about Trawick's remarks until an incident occurred with L.C. A.S. then told her mother about Trawick's remarks.

Under cross-examination, A.S. conceded that in January 1993, she was assigned to Trawick's gym class. At that time, she had a C-B average in gym. A.S. did not recall that she was in danger of failing gym in the seventh and the eighth grades. Rather, A.S. believed that she continued to maintain her grade average in the seventh grade and that she was medically excused from gym in eighth grade. A.S.

acknowledged that she spoke with S.G. about this case but denied that she discussed the matter with N.H.

N.H. is presently a fifteen year old ninth grade student at Barringer Prep. She attended Sussex Avenue and Trawick was her eighth grade gym teacher. In the beginning of the school year, she though that Trawick was "cool." Her positive feelings changed because Trawick made sexual remarks during gym class. Specifically, N.H. stated that during an exercise that required the students to bend down and touch their toes, she heard Trawick tell A.S. "if your boyfriend tells you to go down further, you would go down." N.H. believed that this was a sexual comment.

N.H. also alleged that Trawick told her that "he liked her shirt and what was inside the shirt." On that day she was wearing large oversized big cotton T-shirt. She also heard Trawick say that "someone had a fine body." L.C. was with her when Trawick made the remark. N.H. did not recall any comments that Trawick made with respect to another student's lips.

N.H. testified that she was a B-C student while at Sussex. She was good friends and "hung around" with L.C. and S.G. She received a C in gym but admitted that along with L.C. and S.G. she did not always participate in class activities. A.S. took gym class everyday and would lead the class in exercises. However, A.S. did not have Trawick's permission to lead the class exercises.

L.C. is a fifteen year old ninth grader at Barringer Prep. She attended Sussex Avenue for the eight grade and was assigned to Ms. Webster's homeroom. L.C. thought Trawick was "cool" and liked him until he started saying "nasty stuff." She did not recall when or why Trawick told her that she had "big thighs," but she remembered that he made the comment. L.C. claimed that she had reported to Ms. Webster that Trawick had a "nasty mouth."

L.C. recalled that she and Z.W. were in Trawick's class observing a third grade basketball game. Trawick approached her and told her to leave the class "before I

touch your chest." She and Z.W. were leaving the gym when Trawick put his right arm over her shoulder and touched her left breast. She told Trawick to "stop playing." L.C. then told Z.W. what Trawick said to her.

Under cross-examination, L.C. stated that she attended Avon Avenue school in the seventh grade and was suspended for fighting. She was also suspended in eight grade from Sussex for using profanity towards a substitute teacher. Further, L.C. admitted that on the day of the alleged touching she did not have permission to be in Trawick's class. Indeed, she had been sent to the principals office and left the office without permission.

Further, she conceded that she did not like Trawick before the touching incident but she was not afraid of him. Rather, she "didn't care." L.C. also admitted that S.G. is her best friend and N.H. was a good friend. The two have always been there for her and she would tell them her problems.

S.G. is presently enrolled at Barringer Prep with L.C. and N.H. She was a student at Sussex Avenue from kindergarten through eight grade. Ms. Webster was her eight grade homeroom teacher and Mr. Trawick was her gym teacher. Initially, she considered Trawick a friend and called him "Coach T." At the beginning of the I term in the eighth grade, she came prepared for gym because she wanted to graduate. However, by November she was unprepared for class since she would forget her gym clothes at home. Subsequently, she stopped dressing for class because of Trawick's language.

S.G. claimed that in A.S.'s presence Trawick told her that her "lips were big and juicy." He also told her that her mother was "fine" and that he would like to "take her (mother) to his house and do a couple of things."

S.G. asserted that in December 1993 Trawick had said to A.S. that she had a "fat pussy," and that Trawick said this in front of S.N,. L.S., C.F. and M.M. They reported Trawick's comment to Ms. Webster.

It was after Christmas of the 1993-1994 school term that she heard Trawick tell A.S. that she had a "fat ass." The remark was made when she and A.S. were standing by Trawick's office. A.S. had been hit with a basketball and she went after the boy with the ball. When A.S. returned, Trawick's made the remark and A.S. laughed at the comment. Trawick would make similar remarks when the girls were dressed in tight shorts or tight jogging pants.

Under cross-examination, S.G. admitted that she had failed gym before Trawick's assignment as her gym instructor. Further, Trawick had failed her in the seventh grade gym because she was unprepared for class. She was also failing in the eight grade and was apprehensive about not graduating. After Trawick left Sussex, she was promoted. She further admitted that at this time she considered A.S. and L.C. as her best friends and N.H. as a friend.

Trawick then recounted his unsuccessful efforts to obtain assistance in handling the disciplinary problems at the school. The students were told that if they were unprepared for gym five times in any given marking period that they would receive a "F." He was aware and concerned that many of the students came from single parent homes. Trawick believed that he developed a "brotherly" relationship with the girls because they came to him for counseling. For example, Trawick noted that he counseled A.S. when her friend died.

A.S., N.H., L.C. and S.G. were all students in his gym classes and they formed their own "clique". N.H., L.C. and S.G. were in the same class. A.S. was older than the other students and was a "bully" who ran the playground. She was given an incomplete and was in danger of failing for absenteeism and being unprepared. (R-3 and R-4). A.S. was not medically excused from gym and on occasion did participate in

the class. Trawick does not recall meeting with A.S.'s mother and noted that she did not attend parent teacher meetings.

In December 1993, when L.C. came to his third grade gym class Trawick instructed her to leave. She returned twice and was directed to leave each time. Trawick denied touching L.C. in any inappropriate manner. He believed that L.C. is easily influenced by A.S. who was the leader of the clique.

Trawick denied making an inappropriate comment to N.H. Rather, on the day of the alleged incident N.H. was being teased by the students about an oversized flannel shirt that she was wearing. N.H. asked him "Coach T. do you like my shirt?" He responded "of course I like your shirt and I like who's wearing the shirt." N.H. did not leave the class or express any distress in response to his remark.

Trawick recalled that S.G. was continuously unprepared for gym and was given a "F" the seventh and eight grade. Her mother came to school to bring her son's sneakers to class; not to complain about any alleged incident. Trawick denied expressing any desire about S.G. or her mother.

DYFS investigated the charge that Trawick inappropriately touched L.C. The agency concluded that there was insufficient evidence to substantiate the allegations.

J.S., a fifteenyear old former student of Trawick, testified that he was in Trawick's seventh and eight grade physical education classes. Gym classses were scheduled twice a week and Trawick would begin the class with an exercise. J.S.'s assigned place was in front of the gym class facing Trawick. J.S. stated that he never heard Trawick say "if your boyfriend tells you to go down further, you would go down." Further, he did not hear Trawick make any sexual remarks to any student. Moreover, J.S. did not hear any "gossip" about the alleged incidents.

J.S. recalled that N.H., L.C. and A.S. were all good friends. A.S. and S.G. always ate lunch together. He was friends with N.H. but was not friends with L.C., S.G.

and A.S. J.S. admitted that he liked Trawick and found him easy to talk too. J.S. participated in the "Class against Class" program and had a B average while at Sussex.

T.M. a sixteen year old testified that she was in Trawick's seveth and eight grade gym classes. In the seventh grade she was assigned to second or third row in the front of the class. She was an A student . T.M. maintained that she never heard Trawick utter any sexual remarks. She was friends with N.H., A.S. and S.G. A.S. and S.G did not tell her that Trawick had made sexual remarks to them. Rather, A.S. and S.G. told her that they did not take gym because the gym was dirty or that they had menstrual "pains."

T.M. described the gym class as a "bad class" where the students would fight, run around and curse. Further, she described A.S. as "more than a bully," she was a "nasty girl" who would touch boys in their "private parts." T.M. recalled that L.C. came to Sussex in the eight grade. In the beginning, A. S. would "beef"(*e.g.*, to establish that L.C. could fight) L.C. to see if she had any worth. Subsequently, L.C. and A.S became friends and they both would lie to teachers.

T.M. became aware of the allegations against Trawick after L.C. reported that he had touched her chest. Thereafter, N.H. "got in it" followed by A.S. and S.G. T.M. overheard L.C. tell N.H., S.G. and A.S. about Trawick. Thereafter, the these students spread the allegations throughout the school. At this time, she and N.H. were no longer friends.

S. B., a rebuttal witness for the District, testified that she also heard Trawick comment that a particular girl had a "nice ass, nice breast" and "nice legs". She too complained to Ms. Palmeri but did not tell Mr. Orsini. S.B. admitted that she was not always prepared for gym.

Mrs. C.S., mother of A.S. testified that she is employed by the District and she was previously assigned to the Sussex Avenue School as a food service substitute worker. Her daughter told her that Trawick called her "thick," made remarks about her

chest, and said that he wanted to take A.S out. Mrs. C.S. claimed that when she spoke with Trawick about these remarks, he responded that A.S. was a liar and belittled her daughter. Consequently, she told Trawick that any future incidents would result in her "bring[ing] her husband to see him but not to talk." After speaking with Trawick she saw Orsini about the incident who directed her to report the incident to the District.

Mrs. C.S stated that her daughter was an average student. She recalled that A.S. had failed math, English and science. Further A.S. had to repeat the seventh grade, primarily because of inappropriate behavior, such as, fighting and talking. She also believed that her daughter was medically excused from gym in the eight grade. Ms. C.S. further acknowledged that she considers S.G. as a second daughter.

Use of Profanity:

A.S. alleged that Trawick would use words like "shit," damn," and "f--k" on a daily basis. When Trawick used these words some students would laugh and others appeared shocked because teachers did not curse or "tried not to." A.S. has only heard other teachers curse when they were very angry. She reported Trawick's cursing to Ms. Palmer, her homeroom teacher.

N.H. recalled that Trawick would frequently curse when aggravated by a student. He would use words like that "f-----g child" when referring to O.G. However, she acknowledged that O.G. was very disruptive in class and would not listen to Trawick.

L.C. stated that Trawick would curse using words like "goddamn" and "sit your ass down." Trawick would also curse at Z.W. She did not know O.G. and therefore, she does not know if Trawick cursed at him. But, she did ask Trawick why he cursed around the students. S.G. recalled that Trawick would regularly use the word "shit" and sometimes "ass".

J. S. testified that he did not hear Trawick use any profanity. J.M stated that Trawick would occasionally use the word "damn" when he was unable to get the students to "respect" him. HE never heard Trawick use the words "god damnit" and "f--k." Rather, the students would curse at him.

The District presented the rebuttal testimonies of S.B., H.P. and S.D., who were students in Trawick's seventh or eight grade gym classes. They generally confirmed hearing Trawick use the word 'damn" and "ass." S.B. also heard him use the word "mother f----r" and "bitch."

Trawick conceded that he used the word "damn" when he saw some students climbing on top of the fence in the playground. He believed that they were in danger of falling. However he denied using any other profanity.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:6-10 provides that no tenured teacher shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Petitioner bears the burden of proving the charges by a preponderance of the credible evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982). The resolution of this matter depends on the credibility of the witnesses. Thus, careful scrutiny was given to each witness and their respective testimony. Testimony was evaluated for its believability and the probability of its occurrence under the circumstances. *In re Perrone's Estate,* 5 *N.J.* 514 (1950).

It is important to note that the girls testified that Trawick openly made the remarks sexual remark to them in the presence of others. Thus, one factor to be considered is element of consistency in the testimony. I am mindful that the hearing in this matter took place almost two years after the time that the alleged incidents occurred and thus some absence in recall is to be expected.

It is also equally important to consider that A.S., S.G., N.H. and L.C. were very good friends who basically associated with each other on a daily basis. Further, with the exception of N.H., they were in danger of failing gym and therefore they would not graduate from elementary school to high school. Thus, there existed a motive to fabricate the charges. Consequently, motive is one factor that must be considered in the determination as to which party's version of an incident has the reasonable probability of the truth. "The interest, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness in disbelieving his testimony." *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952) ; *State v. Bicanich*, 132 *N.J. Super.* 393 (App. Div. 1973).

I **FIND** that the District failed to prove by a preponderance of the credible evidence that Trawick uttered inappropriate sexual remarks to A.S. A.S.'s statements at this hearing and those given during the school's investigation were blatantly inconsistent.

Although the testimonies of A.S. and S.G. are minimally consistent, the two students were best friends. Moreover other factors were presented which exposed the witnesses' bias against their teacher. A.S. received a D in gym after Trawick became her teacher. In the eighth grade, Trawick gave her an incomplete and she was in danger of receiving an F. (J-1 and J-2). Contrary to her testimony, she was not medically excused from gym in the eight grade. Rather, she was only excused on an as needed basis in 1991 and 1992. (R- 6). S.G. failed gym in the seventh grade and was in danger of failing gym in the eighth grade. It is undisputed that neither would graduate if they were to fail gym. Thus, A.S. and S.G. had strong motives to fabricate the charges against Trawick. Both knew that a teacher could be removed from the class because another teacher had been replaced based on student complaints.

The testimony from A.S. is also unbelievable. A.S. was an older student who was far wiser than her chronological years. Her statements and demeanor appear to

be tailored to her audience. When speaking with the vice principal, she presented Trawick's remarks as openly vile and sexual. In contrast her statements to her mother and at the hearing were substantially different in substance from the statements that she gave to Orsini. The only consistent statement made by A.S. is that Trawick called her "pleasantly plump." I **FIND** credible the testimony of T.M. that it was only after the incident with L.C. that A.S., N.H., and S.G. chimed in with their complaints that Trawick had made sexually offensive remarks to them.

I **FIND** that the District failed to prove the allegations by a preponderance of the credible evidence that Trawick uttered inappropriate sexual remarks to N.H. With respect to Trawick's comments about N.H.'s shirt, no other student testified to this comment, although it was made during gym class. Trawick did not deny making a similar comment but argued that no sexual connotation was intended. I **FIND** the testimony of Trawick to be credible on this issue. His statements were directed at N.H. as a person and did not refer to any part of her anatomy. N.H.'s demeanor suggests that she is a likable child. Indeed based on testimony of witnesses, N.H. was a very different student from A.S., L..C., and S.G. both academically and temperamentally. Moreover, I conclude that N.H. was simply trying to keep up with the "wrong crowd."

N.H.'s testimony about the alleged remarks that Trawick made to A.S. when she was leading the class in exercise is consistent with the statement that she gave to Orsini. (P-2). It is also consistent with S.G.'s statement to Orsini. However, the remark was made in open class but neither J.S., T.M. or the rebuttal witnesses corroborated hearing this remark. Thus I do not **FIND** N.H.'s testimony to be credible. The credibility of N.H. and S.G. is also tempered by their relationship; they are very good friends and had an opportunity to conspire with each other. Further, N.H. was good friends with S.G. and A.S. who were on the verge of failing gym and thus had a motive to have Trawick removed from his position. T.M. acknowledged that the class had already been successful in removing one teacher whom they perceived as unfair. Based on the lack of any independent corroboration that Trawick made the alleged statement, the evidence does not support the charge against Trawick.

I also reject L.C.'s claims that Trawick told her in the presence of S.G. that she had big thighs. S.G. did not corroborate this remark in her testimony. Having had an opportunity to view L.C. I do not find her testimony to be credible. Nor am I persuaded that Trawick touched L.C.'s breast. L.C.'s testimony at the hearing about the incident was inconsistent with the statement that she gave to Orsini. In P-2, Orsini reports that L.C. stated that Trawick told her to "get out of this gym before I put my hands on your boobs."

Further, L.C. did not explain why she was observing Trawick's third grade class, when she claimed that she did not like him. The alleged touching is highly dubious and certainly was not supported by a preponderance of the credible evidence. The alleged remark testified to at the hearing is nothing other than childish gibberish and is simply incredulous. Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Lowe v. Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div. 1959).

S.G.'s testimony at the hearing was also inconsistent with the statement that she gave to Orsini. (P-2). Further, A.S. and S.G. were such close friends that Mrs. S. considered S.G. as a second daughter. Absent some independent corroboration S.G.'s testimony is highly suspect.

I am persuaded that Trawick did not made any sexual comments about S.G.'s mother. S.G.'s version of the circumstances surrounding the remark is not credible. It has been held that:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. . .
>
> *[In re Perrone's Estate*, 5 *N.J.* 514, 522 (1950)]

Based on the record, I am not persuaded that Trawick made any sexual remarks to any of his students. I have further considered the testimony of the J.S. and T.M. who were also students of Trawick. I **FIND** their testimony credible and trustworthy. These two witnesses were able to provide simple details about the gym class that none of the charging students could recall. Further, I am convinced that the charging witnesses had selective memories and had previously discussed this matter among themselves.

On Count one, paragraph three c I **FIND** that Trawick used the words damn and ass. The testimony of the witnesses establishes a probability of the fact. The *Matter of the Tenure Hearing of James Schafer*, OAL DKT. NO. EDU 5288-82 (Jan. 20, 1983) aff'd Comm'r(March 4, 1983), at 12. Trawick acknowledged that he used the word damn when he perceived a student to be in danger. The testimony supports that he uttered the word "damn" and "ass" when he was angry. However, I **FIND** that Trawick did not use any other inappropriate language.

I further **FIND** that the charge of striking G.D. is not disputed and thus Trawick is guilty as charged. The issue that remains is what is the appropriate penalty. Should Trawick be removed from his position for striking a student and using inappropriate language.

In determining the appropriateness of a teacher's conduct, the Commission of Education has often stressed "that those persons who enter the teaching profession exercise a significant influence upon those they teach and . . . must exhibit a high degree of exemplary behavior." *In Re Tyler*, 13 *N.J.A.R.* 297, 308 (1991). *In The Matter of the Tenure of Eddie Lee Harrell*, 1979 *S.L.D.* 497, the Commissioner concluded that while *Harrell's* single act of slapping a student could not be condoned, it did not warrant dismissal. Subsequently in *The Tenure Hearing of Harrell,* 93 *N.J.A.R.2d* (387 (Dept. of Ed.), a series of subsequent corporal punishment charges were sustained. It has been held that unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but is best evidenced by a series of incidents. In *Re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967); *Redcay v. State Bd. of Ed.* 130

N.J.L. 369, 371 (Sup. Ct. 1943) aff'd, 131 *N.J.L.* 326 (E. & A. 1944). Thus, the issue is whether Trawick's striking of G.D. with a pointer is sufficiently flagrant to justify his dismissal.

The facts show that G.D. was disruptive student not only on the day of the incident but prior thereto. Trawick had sought Bowles assistance in dealing with G.D. His request went unanswered. G.D. was not injured. There is no contention that Trawick intended to inflict bodily harm. Rather, he "popped" G.D. with the pointer. I **FIND** that the conduct was inappropriate and manifested poor judgment. The evidence shows that this was an isolated incident. Indeed, there is no suggestion of prior or subsequent conduct or that Trawick intended to harm G.D. Moreover, Trawick did seek help in dealing with unruly students when he enrolled in and completed a course at Jersey City State College. I conclude that the striking of G.D. by Trawick with a pointer does not justify his removal under the circumstances of this case.

The next issue is whether Trawick's use of profanity justifies removal. It is undisputed that at the Sussex Avenue School there were generally many problems ranging from poor facilities to unruly and dysfunctional students. In the words of the students the school was unclean and the students behaved badly. The record reflects the students threw books in the cafeteria and caused a homeroom teacher to leave because of what they perceived to be unfair punishment. There were many substitutes after Ms. Webb left and as one student stated that is when the "class got bad."

Based on totality of the record herein, it appears that chaos reigned and at times Trawick was at his wits end. Considering the totality of the circumstances, I **FIND** that the utterances of "damn" and "ass" although inappropriate were spontaneous. Thus, I **CONCLUDE** that the conduct does not constitute sufficient reason for removal.

I **CONCLUDE** that the appropriate penalty is to withhold Trawick's increment for the 1993-1994 school year.

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

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

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

4/11/96
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

4/11/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witness List

For Petitioner

Carletta Mitchell

Anthony Orsini

Lawrence Guriano

Marilyn Bowles

A.S.

N.H.

L.C.

S.G.

S.B.

C.S.

H.P.

S.D. (Sha. D.)

For Respondent

Joseph Trawick

J.S.

T.M.

Exhibits

J-1 A.S. report card, 1992-1993.

J-2 A.S. report card, 1993-1994.

J-3 L.C. report card, 1993.

J-4 S. G.'s report card, 1993-1994.

J-5 N.H.'s report card, 1993-1994.

J-6 Class roster, 1993-1994.

J-7 Class roster, 1993-1994.

P-1 Student health record of G.D.

P-2 Memorandum from Mr. Orsini to Dr. Gonzalez, dated December 15, 1995.

P-3 Student Record, L.C.

P-4 Student Record, S.G.

P-5 Student Record, N.H.

P-6 Document

R-1 Letter dated December 7, 1992.

R-2 Letter dated April 25, 1993.

R-3 Class Record Book for 1993.

R-4 Class Record Book for 1993-1994.

R-5 Letter dated March 28, 1993, from DYFS.

R-6 Letter dated June 2, 1995 with attachments.

R-7 Letter dated June 21, 1995 with attachments.

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH TRAWICK,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter, transcripts of the hearing, and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that respondent's actions, as proven, constitute unbecoming conduct for the reasons expressed therein. In so ruling, the Commissioner is satisfied that the ALJ considered all testimony and weighed its content according to the credibility of the witnesses and, therefore, finds no basis to challenge the ALJ's credibility determinations and resultant conclusions with respect to the charges against respondent.

With regard to evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner concurs with the ALJ that the tenure charges, as proven, are insufficient to warrant respondent's termination from employment, pursuant to *N.J.S.A.* 18A:6-10 and 11. Notwithstanding, the Commissioner disagrees with the ALJ's recommendation that an increment withholding is sufficient penalty in light of the findings that he struck a student with a pointer and used inappropriate language--actions which are both serious and unprofessional. In reaching such determination, the Commissioner is aware that he is required to consider the totality of respondent's record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation, or aggravation

and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer,* 93 *N.J. Super.* 404, 421-22 (App Div. 1967).

Although the ALJ afforded great weight to the evidence of provocation, extenuation and aggravation, in considering that

> ***there were generally many problems ranging from poor facilities to unruly and dysfunctional students. In the words of the students the school was unclean and the students behaved badly.***
>
> Based on totality of the record herein, it appears that chaos reigned and at times [respondent] was at his wits end.***
>
> (Initial Decision at p. 18)

The Commissioner has stated that corporal punishment is not appropriate for a teacher under any circumstance, even with provocation. As stated in prior case law,

> [w]hile the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance.*** (*Appleby* at 172-173)

In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County, 1969 *S.L.D.* 159, 172-173, aff'd State Board 1970 *S.L.D.* 448, aff'd N.J. Superior Court 1972 *S.L.D.* 662 (App. Div. 1972), citing *In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County*, 1966 *S.L.D.* 185, 186.

> ***[P]rohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience.*** If all other means fail, there is always a resort to removal from the classroom or school through suspension or expulsion.*** While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control. *(Fulcomer at 162)*

In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County, 1962 *S.L.D* 160, 162, remanded State Board of Education 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, aff'd State Board of Education 1966 *S.L.D.* 225, rev'd and remanded 93 *N.J. Super.* 404 (App. Div. 1967), decided by the Commissioner 1967 *S.L.D.* 215.

Moreover, although the ALJ classifies respondent's use of profanity as "inappropriate but spontaneous," the Commissioner has stated that "[b]eing a teacher requires, *inter alia*, a consistently intense dedication to civility and respect***." *In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, Middlesex County*, 1973 *S.L.D.* 157, 163, and that teachers "***must exhibit a high degree of exemplary behavior." *In re Tyler*, *supra.*

See also *In the Matter of the Tenure Hearing of Ward Campbell and Ward Campbell v. Board of Education of the Princeton Regional School District, Mercer County,* decided by the Commissioner 93 *N.J.A.R.* 2d (EDU) 196, aff'd State Board 604, aff'd N.J. Superior Court, Appellate Division 95 *N.J.A.R.* 2d (EDU) 211.

Therefore, based on the totality of respondent's behavior as proven, the Commissioner directs that in addition to an employment and adjustment increment withholding as recommended by the ALJ, respondent must forfeit the 120 days' salary withheld pursuant to *N.J.S.A.* 18A:6-14. Such penalty the Commissioner has found to be appropriate in similar cases. See *In the Matter of the Tenure Hearing of Robbie Mac Dowell, State-Operated School District of the City of Paterson, Passaic County*, decided by the Commissioner on May 2, 1996.

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein except as modified with respect to penalty. The Commissioner hereby directs that respondent forfeit the 120 days' salary withheld following certification of the within tenure charges and that he be denied his salary and adjustment increments for the 1996-97 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 28, 1996
Date of Mailing, May 29, 1996

219-96

219-96

K. F., on behalf of minor child, S.F., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioning parent contested Board's refusal to provide round-trip transportation for District student, S.F., to attend Marine Academy of Science and Technology (MAST) in violation of *N.J.S.A.* 18A:54C-7.

ALJ concluded petitioner established by a preponderance of credible evidence that the Trenton Board was obliged to provide S.F. the transportation to MAST and back as N.J.S.A. 18A:54C-7 provides that pupils who attend the MAST must be provided transportation "by the district in which the pupil resides." ALJ further ordered the Trenton Board to reimburse K.F. for the cost borne by her in transporting S.F. from January 22, 1996 to the point when she was no longer capable of financing such cost.

Commissioner adopted findings and determination in initial decision as his own and directed the reimbursement.

May 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 799-96

AGENCY DKT. NO. 71-2/96

K.F. ON BEHALF OF
MINOR CHILD S.F.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER COUNTY,

Respondent,

George M. Holland, Esq., for petitioner, (Herbert D. Hinkle, attorney)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners Council George & Dortch, Attorneys)

Record Closed: April 15, 1996 Decided: April 17, 1996

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about February 27, 1996, the petitioner, K.F., on behalf of her minor child, S.F., through counsel, requested that the Commissioner of Education (the Commissioner) afford K.F. emergent relief in the form of compelling respondent, the Board of Education of the City of

Trenton (Trenton), to undertake the responsibility of providing round-trip transportation for S.F. to attend the Marine Academy of Science and Technology (MAST) located in Sandy Hook, County of Monmouth, New Jersey. On the following day, February 28, 1996, the Commissioner of Education transmitted the matter to the Office of Administrative Law for disposition. Oral argument and testimony, as well as Trenton's brief were submitted on March 4, 1996 at which time the record closed. On March 6, 1996, my office issued a 9-page ruling and order granting K.F.'s request for the emergent relief described. Thereafter, Trenton submitted its exceptions to the Commissioner of Education and on or about March 15, 1996, the Commissioner issued a 4-page decision on motion in which he affirmed my ruling and order for the reasons which were expressed in my decision.

Thereafter, at the request of Mr. Thomas W. Sumners, Jr., Esquire, counsel for Trenton, I convened a telephone conference with him and Mr. Holland, counsel for K.F., to discuss the procedures to be subsequently employed. Following conference calls which were conducted both on March 19, 1996 as well as in early April 1996, it was finally agreed by the parties that the best fashion to proceed was for me to issue an initial decision that would essentially be reiterative of the analysis that I articulated in my emergent ruling, based upon a stipulation that the facts serving as the basis for the initial decision were the same as those which I set forth in the emergent ruling and that the Trenton Board of Education would then have available to it a plenary decision from which it could take any appeal it felt appropriate. I asked Mr. Sumners to memorialize that agreement by letter, and that it include a representation that both he and Mr. Holland stipulated to the facts and agreed to the procedure discussed. That letter was received by my office by fax on April 15, 1996, at which time the record closed. The original letter was received the following day.

THE FACTS AND LEGAL ANALYSIS

The following is a substantial and at times verbatim reiteration of the substance of the ruling and order which was issued by my office on the petitioner's request for emergency relief.

The Marine Academy of Science and Technology (MAST), located at the tip of Sandy Hook in Monmouth County, New Jersey, is a 4-year secondary school with a high-school

curriculum designed to accommodate the needs of students interested in marine science technology. For the 1995-96 school year it has an enrollment of 233 students from 39 school districts from throughout Monmouth County and other counties in New Jersey (of the 233 full-time students, 20 are out-of-county). MAST has stringent admission requirements and a rigorous curriculum. In its 1995-96 school profile MAST indicates that "the Marine Academy of Science and Technology is opened to male and female students throughout the State of New Jersey. Daily transportation is provided by the resident districts." (at page 8).

S.F. has demonstrated high grades at MAST, scoring into the mid-high 90s in several of his courses, and receiving comments indicating, "outstanding performance" in these as well as "doing well" in a variety of his other courses. The guidance counselor of MAST in a letter directed to respondent, dated February 13, 1996, describes S.F. as:

> a bright young man who went through an extremely competitive application process. . . He has flourished here as evidenced by his academic record. In spite of having to deal with difficult and trying family issues, [S.F.] is well adjusted, focused and diligent. S.F. is a dedicated student who wants very much to continue his education here. To the best of my knowledge, [MAST] is the only public school in New Jersey that can offer him the specialized curriculum and it would be sad to deny him this opportunity. [Letter, Ann Marie Klecak, Guidance Counselor, MAST, February 13, 1996.]

Last year, when S.F. was a freshman at MAST, he and presumably his mother and father, resided in the Freehold School District, located in Monmouth County, and presumably Freehold undertook all the obligations imposed upon it to pay for S.F.'s attendance at MAST. S.F.'s parents are divorced and have joint custody of S.F. S.F. continued to live with his father in Freehold until January 14, 1996, when he was compelled to leave that residence because of parental abuse. He currently resides with his mother in Trenton, New Jersey, where on January 18, 1996 he was enrolled in the school district.[1]

In spite of informal efforts to have Trenton undertake the responsibility of transporting S.F. to MAST and back to his home, the district maintains it has no obligation to do so. That

[1] No issue was raised in this proceeding in respect to S.F.'s residency in the district.

decision was apparently arrived as of January 22, 1996. As a consequence, and since that date,[2] K.F. had undertaken the obligation to transport her son to MAST. She had done so by personally taking time off from her employment and drove him part-way and then paid someone to drive him the rest of the distance and return him to a location near Trenton where K.F. returns him home. Her certification and testimony were that the cost of transporting her son in this fashion had been $200 per week. As of March 1, 1996, K.F. indicated that she was no longer able to afford to pay for transportation and that as a consequence, her son would no longer be able to attend MAST after that date. She also indicated that the Freehold Board of Education terminated S.F.'s transportation to MAST effective January 18, 1996.

The emergent relief order and ruling which was upheld by the Commissioner, directed Trenton to provide S.F. with an appropriate form of transportation from his home to MAST and back from January 22, 1996, the date that I determined that S.F.'s mother was no longer capable of undertaken that obligation. The basis under which I made that ruling under the emergent relief test was to first determine that were such relief denied, S.F. would suffer immediate and irreparable harm. It was then determined that the relief requested would be as narrowly defined as possible so as to not cause unreasonable expense to Trenton and/or substantial inconvenience to it. Neither of those issues is relevant to the plenary disposition of this matter and I will refer the reader to those portions of the emergent relief motion at which those issues were addressed with more particularity.

It was also determined as part of the emergent relief ruling that S.F., through K.F., was able to demonstrate a reasonable probability of prevailing on the merits of this appeal. Since no further legal arguments were submitted or requested to be submitted by the parties on the legal issue, the analysis which was utilized in my emergent order still adheres; however, it has also, in my view, met the higher standard necessary for a plenary disposition of these proceedings in that, in my judgment, it has been established by a preponderance of the relevant, credible evidence that S.F. should prevail.

---

[2] Until the order on emergent releif was implemented.

A review of the relevant statutes and the Commissioner's decision in *R.H. and E.H. v. Bd. of Educ. of the Freehold Reg. High Schl. Dist.*, 1985 *S.L.D.* 282, makes this apparent.

The legislation which established a Marine Academy of Science and Technology was enacted in 1982 and is codified at *N.J.S.A.* 18A:54C-l to -7. The Act provides that

> [u]pon the request by a board of education of a regional school district ..., the State Board of Education is authorized to establish a Marine Academy of Science and Technology under the local area vocational-technical school for the purpose of providing education to students throughout the State of New Jersey in the fields of marine sciences, marine trades, marine technologies and related courses, as well as academic courses.
>
> [*N.J.S.A.* 18A:54C-1.]

The State of New Jersey currently has only one MAST which is located in Sandy Hook, Monmouth county. It operates "under the auspices" of the Monmouth County Vocational-Technical School (MCVTS). *N.J.S.A.* 18A:54C-4. The board of education of the MCVTS determines the admission policies of the MAST. *N.J.S.A.* 18A:54C-6. Pupils who attend the MAST must be provided transportation "by the district in which the pupil resides." *N.J.S.A.* 18A:54C-7.

Contrary to the Trenton's position in the present matter, it appears that the legislation requires all school districts to provide transportation for its students who attend a MAST. The plain language of *N.J.S.A.* 18A:54C-7, *supra,* makes no distinction between pupils who reside in the same county where a MAST has been established and those who live out-of-county.

The statewide nature of the MAST program was recognized by the Commissioner in *R.H. and E.H., supra,* in which he adopted the ALJ's conclusion that "the resident school board's authority over the attendance of a pupil accepted at MAST on a full-time basis has been preempted by statute and, thus, the residential board of education is without jurisdiction over the MAST program." *R.H. and E.H., supra,* 1985 *S.L.D.* at 295 (resident school board could not require its resident pupil to enroll in its local school program for the academic courses of study while also enrolled in and attending the MAST program for the marine sciences and technologies

on a shared-time basis). The Commissioner emphasized the availability of the program to all New Jersey pupils in the reasons set forth for his adoption of the ALJ's decision.

> The enabling legislation enacted relative to the Marine Academy of Science and Technology (MAST) is clear and unambiguous in its intent to establish a full-time instructional program available to New Jersey pupils. Admission procedures and operation of the MAST program fall under the jurisdiction of the Monmouth County Vocational-Technical School. Hence, there is no statutory authorization in N.J.S.A. 18A:54C-1 et seq. granting local boards the power to establish their own admission/attendance policies for those pupils in their districts who desire to attend this unique educational program.
>
> A board policy which would serve to unilaterally restrict pupils' attendance merely to a shared-time program would contravene clear legislative intent to have a full-time program available to New Jersey's pupils. If such a policy were allowed to be enacted by the Freehold Regional High School Board of Education or other boards of education, it would unquestionably undermine the legislative intent and purpose for a full-time instructional program to be operated... A board policy which prevents access to the MAST program on a full-time basis would serve to deprive those pupils of a statutory entitlement created by N.J.S.A. 18A:54C-1 et seq. Therefore, it is determined that any policy of the Freehold Regional Board restricting a pupil's attendance in the MAST program to shared-time is hereby declared null and void.
>
> Petitioner's son was accepted for full-time attendance in the MAST program. Therefore, there can be no impediment raised by the Board which precludes his right to attend a full-time educational program established by legislation, irrespective of how cost effective the rationale may be from the Board's perspective.
>
> [*Id.* at 297-98.]

The Commissioner ordered that the Board be permanently restrained from restricting the pupil's attendance at MAST and that it provide transportation pursuant to *N.J.S.A.* 18A:54C-7. *Id.* at 298. This decision was affirmed by the State Board of Education. *Ibid.*

Even though *R.H. and E.H.* involved a school district located within the same county as the MAST, like the language of the MAST legislation nothing in the Commissioner's decision can be read to limit its application to within county school districts. The language of the decision clearly speaks to *all New Jersey pupils and school districts*. Respondent's determination that it is not obligated to provide transportation for S.F. to attend the MAST has no other effect but to

"preclude his right to attend" this educational program established by legislation. Accordingly, that determination must be declared null and void.

In support of its position, Trenton relies to a great extent upon the 1990 amendment to *N.J.S.A.* 18A:54C-4, *L.*1990, *c.* 52, which transferred the assets of a MAST to the county vocational school board it operates under and directed that the costs for operating the program "be paid in the same manner as the costs are paid for other county vocational school programs pursuant to the provisions of chapter 54 to Title 18A." *N.J.S.A.* 18A:54C-4. Citing a section in the referenced title, *N.J.S.A.* 18A:54-20.1, the Respondent concludes that the "intertwining" of the MAST and county vocational school statutes exempts out-of-county local school districts from the obligation to provide transportation for its students who attend the MAST.

Trenton's interpretation is not supported. The impetus for changing the manner in which costs are paid for operating a MAST was the Quality Education Act of 1990 (QEA), *N.J.S.A.* 18A:7D-1 to -37. *See, N.J.S.A.* 18A:54C-4; *N.J.S.A.* 18A:54-20.1; *Committee statement to Senate, No.* 272l, L.1990, c. 52, *N.J.S.A.* 18A:7D-1. The purpose of the QEA was to establish a new system for distributing state aid to the school districts. The 1990 amendment to the MAST legislation is more accurately characterized as housekeeping in that it was part of the Legislature's effort to fit the many funding statutes in Title 18A within the new system established by the QEA. The amendment does not reduce a school district's obligations to a student who is accepted and attends a MAST.

As the Commissioner stated in *R.H. and E.H.*, the MAST is a unique educational program available to all New Jersey pupils. There is no language in that decision or the relevant statutes that would exempt a local school district from the requirements of the MAST legislation.

It is my view that the Legislature never anticipated the circumstances that are presented in this case, i.e., wherein a student seeks application to MAST who is located in a school district which is significantly off-shore and geographically far from MAST's location. Nevertheless, that the Legislature may have failed to anticipate such circumstance cannot and does not change the clear and express mandate of the statute. It is not the ALJ's job to rewrite the legislation; should the Legislature determine that the circumstances in this matter, which may very well occur in

other instances, were never intended to be embraced by the statute at issue, then it is left to it to amend the legislation to reflect its intentions.

It is also my judgment, as an aside, that it ostensibly seems to be an unfair burden to place upon a local school district, such as Trenton, to bear the costs of transporting a student to MAST - a school opened to those qualified and interested on a statewide basis - when the costs could reasonably be considered greater than tuition to a university for a full year. The consequence in my view, is an additional result of the Legislature failing to assume that a scenario such as the current one would occur. Perhaps those in authority should apprise the Legislature of these circumstance and perhaps the appropriate resolution would be to provide some additional or other sources of funding for transportation rather than placing the burden exclusively on a local school district which typically is already short of funds.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the petitioner has established by a preponderance of the relevant, credible evidence that the Trenton Board of Education is obliged to provide S.F. with transportation to MAST and back to his home. It is therefore **ORDERED** that Trenton comply with this directive[3]. It is further **ORDERED** that Trenton reimburse K.F. for the cost borne by her in transporting S.F. to and from her home to MAST from January 22, 1996 through to when she was no longer capable of undertaking this obligation.

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

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

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[3] I have been advised that Trenton has and continues to provide for the transportation requested since the emergent relief motion was decided.

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

4/17/96
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

4-22-96
DATE

DNA
DEPARTMENT OF EDUCATION

APR 24 1996
DATE

Mailed to Parties:

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On behalf of petitioner:

K.F.

On behalf of respondent:

None

EXHIBITS

On behalf of petitioner:

None

On behalf of respondent:

None

K. F., on behalf of minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4. As noted by the Administrative Law Judge (ALJ) in his initial decision, for purposes of this plenary hearing, the within parties agreed to rely on testimony and prior submissions advanced in connection with the emergent relief motion in this matter, decided by the Commissioner March 15, 1996. In that the parties exceptions merely reiterate their respective positions addressed in the Commissioner's previous decision, it is unnecessary to revisit such arguments herein.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the ALJ that petitioner has established by a preponderance of the relevant, credible evidence that the within Board is responsible for providing S.F. with round-trip transportation to attend the Marine Academy of Science and Technology (MAST) located in Sandy Hook, County of Monmouth, New Jersey.

Accordingly, the Commissioner adopts the initial decision of the OAL as the final decision in this matter for the reasons clearly articulated therein. The Trenton Board of Education is hereby directed to provide S.F. with round trip transportation between his home and MAST. The Board is further directed to reimburse Petitioner K.F. for the cost she incurred in providing S.F.'s transportation to this program for the period January 22, 1996 through to the point when she was no longer capable of financing such cost.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 29, 1996
Date of Mailing, May 29, 1996

220-96

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,

PETITIONER,

V.

C. M., individually and as parent of minor child, E. M.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought approval of its policy banning backpacks in the classrooms, in the hallways and in the school cafeteria in the face of respondent E.M.'s refusal to comply.

Following review of the record and in light of testimony presented, the ALJ concluded that the ban on backpacks was a valid exercise of the Board's discretion and E.M.'s First and Fourteenth Amendment rights were not violated. Board's ban was rationally based. ALJ ordered the continuation of the policy.

Commissioner concurred with the ALJ that the backpack ban was not arbitrary, capricious or unreasonable and that the Board's ban was rationally based and may continue in place.

May 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 261-96

AGENCY DKT. NO. 24-1/96

BOARD OF EDUCATION OF BERNARDS TOWNSHIP,

Petitioner,

v.

C.M., INDIVIDUALLY AND AS PARENT OF MINOR CHILD, E.M.,

Respondent.

Lester Aron and Louis R. Franzese, Esqs., on behalf of petitioner (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

C.M., respondent, *pro se*, and on behalf of minor child, **E.M.**

Record Closed: March 29, 1996 Decided: April 12, 1996

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a petition filed by the Bernards Township Board of Education (Board), pursuant to *N.J.S.A.* 18A:6-9, seeking the Commissioner's approval of its policy banning backpacks in the face of E.M.'s refusal to comply. The matter was transmitted to the Office of

Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. The Board sought emergency relief which I denied and the Commissioner granted. A plenary hearing followed.

The questions presented are whether the backpack policy is arbitrary and capricious under the school law and whether it violates the First and Fourteenth Amendments of the United States Constitution.

Certain basic facts are undisputed. On January 2, 1996, Joan Tonnarelli, the principal of William Annin Middle School, implemented a policy barring the use of backpacks during the school day. Students may now bring their backpacks into the building, but then must store them in school lockers until the end of the day. School begins at 7:55 a.m. and concludes at 2:20 p.m. There are three minutes between periods for students to retrieve books from their lockers. From October 24 to November 8, 1995, a trial period was held, during which the faculty and principal monitored student behavior with their backpacks. On or about November 13, a ban went into effect and E.M., an eighth-grade student, was disciplined for her refusal to comply. After discussing the ban with Dr. Dalen Showalter, the superintendent of schools, Ms. Tonnarelli reopened the matter and a second trial period commenced on or about December 4, 1995. She brought parents up to date with a letter reading, in part, as follows:

> [T]hree weeks ago students were reminded of rules concerning backpacks and given a chance to use them more responsibly. When there was little improvement, I suspended their use during the school day only. . . .
>
> My decision to ban backpacks from the classroom was not made lightly. . . . Staff members compiled a list of concerns regarding the use of backpacks in class and presented them to me. This list included safety issues, such as fire and emergency egress problems. Since there have been many journal articles expressing concern about the effect of the backpack's weight on growing bodies, it also included health issues. Time management issues were also represented. . . . Lastly, backpacks are dangerous in hallways, classrooms, the cafeteria because of the space they require, and the imbalance they can cause when students turn quickly and hit others with this dangling weight.

> The students now have a second opportunity to respond responsibly during the month of December. We ask you to encourage your child to carry only the books needed for one/two classes so that their backpack will fit appropriately and safely under their seats. The staff and I will then confer and make a definitive decision for the New Year.
>
> [P-10]

Ms. Tonnarelli received minimal response to this letter. During the second test period, Ms. Tonnarelli, Dr. Showalter and members of the student council spoke to the student body over the intercom and exhorted them to be careful with their backpacks. At the end of the test period the faculty voted by a substantial majority for an immediate ban (P-11). Parents were notified by letter of December 22, 1995, that a permanent ban would take effect when school reconvened after the new year (P-12). E.M., with the support of her parents, continued to resist and the question came before the Board on January 15, 1996. After a hearing, the Board voted 7-2 to uphold Ms. Tonnarelli's decision.

Petitioner presented a series of witnesses. Regina W. Townsend teaches seventh grade at William Annin and is vice-president of its teachers' association. In early 1994 she began to notice a growing use of backpacks at school and the teachers began talking about this at their team meetings. Students were storing their backpacks under their seats, and backpack straps as well as the backpacks themselves often spilled out into the aisles. Ms. Townsend testified that she walks up and down the aisles regularly to check homework and the like, and the backpacks were becoming an obstacle. By the beginning of the 1995/96 school year there were more and larger backpacks in use and the problem was becoming acute. Since the ban, students carry their books loosely and keep them in a basket under their seats or under their desks. Instead of cramming all of their belongings into their backpacks, they must plan ahead and thereby learn a lesson in organization. Less class time is now consumed packing and unpacking. Ms. Townsend has observed no problems since the ban and the safety concern has been eliminated.

James S. Buist is a guidance counselor at William Annin. He testified that initially students were encouraged to use backpacks because it was thought they might promote efficiency. As their use multiplied, teachers began to complain that students were swinging them

in the hallways and dropping them carelessly in the cafeteria at lunchtime. He had the backpacks stored on shelving along a wall in the cafeteria and at two lunch tables set aside for this purpose. This created a lot of pushing and shoving as students sought to exit the cafeteria after lunch. Mr. Buist testified that some teachers experimented with storing backpacks in the rear of their classes, but this too resulted in a lot of bumping at the bell. Additionally, some of the older students have used their backpacks to intimidate younger students.

Mr. Buist acknowledged that during a bomb scare at the building prior to the ban, evacuation proceeded without incident. He also testified that individual students were not disciplined for misbehavior in connection with misuse of their backpacks, because it is difficult to assess blame in such incidents.

Four William Annin teachers testified concerning mishaps they had during the last year involving backpacks. Leslie P. Henry tripped over the straps of a backpack in class; she was not hurt. Sandra A. Hyde was struck in the face twice by backpacks while walking through the hallway. In both instances a student immediately in front of her turned abruptly and hit her. She testified that she was not really hurt, but experienced some discomfort after these accidents. She began to feel defensive as she walked through the building. Dorothy J. Norris tripped and fell over a large backpack while teaching a class. She hurt her right ankle and the injury remained painful for many weeks. A workers' compensation claim was filed on her behalf (P-1). Elaine S. Lent tripped on a backpack strap in class, fell forward and hit her thigh against her desk. A black-and-blue mark developed and the injury hurt for a few days. This occurred during a photography lesson while the students were mixing chemicals. A second incident occurred while she was on crutches as a result of a bicycle accident. After the school day was over she tripped over a backpack and fell against a row of lockers; she did not hit the ground.

Julie M. Eger is president of the Parent/Teacher Organization (PTO). A Parent Advisory Council, made up of twelve parent representatives and Ms. Eger, meets monthly with Ms. Tonnarelli to discuss school business. Ms. Tonnarelli raised the backpack issue at one of their meetings in the spring of 1995 and then again in a November 1995 meeting (P-9). Ms. Eger testified that at the spring meeting, Ms. Tonnarelli simply said that backpacks were being used increasingly and that the faculty was concerned. By November she reported that the faculty had

become more insistent that a solution be found. Ms. Tonnarelli noted that the assistant fire marshall walked through the building with her and had concerns that backpacks might be an obstacle during an emergency. She also noted that there were health issues relating to the weight of backpacks on growing bodies, and she mentioned the disorganization and loss of instructional time associated with students fumbling through their packs to get at their materials. The council decided to support the principal and faculty.

Deborah A. Karuppan is the school nurse at William Annin. She reviewed her records going back to the beginning of the 1994/95 school year to see how many student injuries were attributable to backpacks. An accident report was filed on November 28, 1995, involving D.S., a sixth grader (P-2). He had been "fooling around" with a friend at approximately 7:20 a.m., before the school day began, and was hit in the face with a backpack. He complained of dizziness and a headache and had a bruise on the bridge of his nose. On October 27, 1995, C.W., a seventh grader, was walking down the hall at approximately 12:50 p.m. and felt an impact on the left side of her head and fell backwards on her backpack (P-3). She did not know what hit her. K.S., mother of C.S., wrote a note to Ms. Karuppan on January 19, 1996, seeking to have her daughter excused from gym class because she had injured her back the day before, lifting her backpack (P-4). This incident occurred after the ban went into effect. Ms. Karuppan's log book also shows that L.K. reported being hit on the wrist by a backpack on October 13, 1994 (P-5). We do not know the time of day. On September 21, 1995, at approximately 12:50 p.m., M.T. hit her right elbow against her own backpack (P-6). On November 3, 1995, D.M. was hit in the left eye with a backpack. She saw Ms. Karuppan at 7:55 a.m.; presumably the injury occurred before then (P-7).

Ms. Karuppan testified that students were carrying too much weight on their backs and they labored under the burden; they also did not center the backpacks, which exacerbated the strain. Ms. Karuppan was not offered as a medical expert on this subject.

Joan C. Tonnarelli has been the principal at William Annin for seventeen years. Faculty complaints about the proliferation of backpacks had been building since 1994, and by the fall of 1995 it became necessary to address these concerns. In November she met with faculty representatives (P-8) and the Parent Advisory Council (P-9); the former group pressed for a permanent ban, the latter supported it. Ms. Tonnarelli testified that during this period Joseph

Moscello, the assistant fire marshall, accompanied her from class to class and commented that the backpacks in the aisles might pose a problem in an emergency.

Respondent also presented a number of witnesses. Ralph Dorio is the chief fire official in Bernards Township. Work at the school over the summer made it necessary for him to conduct a series of inspections to determine compliance with the uniform fire code. He was in the building for this purpose on August 14, September 5, September 20, November 13 and November 22, 1995, and he made a final inspection on February 1, 1996 (R-3). He cited various violations, including some for blocked means of egress. Mr. Dorio testified that none of these infractions were attributable to backpacks. Joan Tonnarelli contacted him sometime in the fall of 1995 to express concern about the safety of backpacks. He told her they presented no fire code violation. He made a copy of the egress sections of the code for Ms. Tonnarelli. Later, C.M. contacted him and was curious about his interaction with Ms. Tonnarelli.

Michael J. Byrne is a member of the Board of Education who voted against the ban. He did not believe the administration established that backpacks were a significant problem. The documentation appeared to him to be a *post hac* creation.

B.W.M. is C.M.'s son. He is a college freshman, but attended William Annin as a junior high school student. He testified that backpacks were the norm then; use of backpacks at the school is not a new phenomenon.

E.M. testified in her own behalf. She wore her backpack to class during the initial ban in November 1995, but Ms. Tonnarelli told her that the school had been cited by the fire marshall for egress violations relating to backpacks and that the issue was out of her hands. Ms. Tonnarelli gave her a copy of the regulation (R-7). She returned to class without her backpack, but when she subsequently reviewed this material with her father she learned that it was not a citation, but merely a copy of the egress provisions of the fire code. The next day E.M. confronted Ms. Tonnarelli and told her that she felt deceived.

E.M. testified that during the trial periods students were more careful with their backpacks, but the teachers were predisposed to finding problems. E.M. also felt that if some

students abuse the right to carry a backpack they should be punished, and if some carry oversized backpacks, then these should be regulated. She thought that three minutes between classes was insufficient time for many students to retrieve materials from their lockers. Presently, students leave books all over their desks and on the floor, and to E.M., this system is no improvement.

Ms. Tonnarelli returned to the stand in rebuttal to say that she never told E.M. that there had been a citation from the fire marshall. She told E.M. about her conversation with the assistant fire marshall. E.M. asked for a copy of the fire code sections that were of concern to Mr. Moscello and she provided it. This is the substance of the record.

Boards of education enjoy wide policymaking discretion and their decisions may not be disturbed unless arbitrary and capricious. *Thomas v. Morris Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). The evidence on behalf of the backpack ban is not overwhelming, indeed some of it is contrived. Nevertheless, at bottom there is a nexus between the ban and the interests of safety. Ms. Henry, Ms. Hyde, Ms. Norris and Ms. Lent testified that they were hit by backpacks or tripped over them. More generally, these witnesses were troubled by the need to be on guard against such perils and they appear to be representative of a majority of the faculty. Nurse Karuppan searched her files back to the fall of 1994 and reported that a few students had been injured by backpacks. Guidance counselor James Buist testified that bunched backpacks in the cafeteria caused pushing and shoving after lunch, and that teachers who tried storing backpacks in the rear of their classrooms reported similar problems. Moreover, students inclined to bullying or horseplay found backpacks a useful aid. This testimony from the faculty was credible and I accept as fact that teachers and students have been injured by backpacks, that at least some teachers became apprehensive as a result, that backpacks have posed storage problems and that some students have used them irresponsibly.

Respondent points out that one of Ms. Lent's accidents occurred after the school day and that approximately half of the six reported student mishaps also took place at times when the present ban would not have averted the injuries. This is true, but that still leaves a small number of incidents attributable to backpack use during the school day. Respondent suggests that teachers exercise greater caution in order to avoid backpack accidents, that students who abuse

the backpack privilege or any other privilege be disciplined as individuals, that oversized backpacks be regulated, and that retrieval of backpacks after lunch or class be better planned in order to prevent turmoil. Any measured solution, respondent argues, would be preferable to the sweeping proscription now in effect. These are reasonable views and with study might deliver a good result. We are not here, however, to chaperon local action. Boards of education are statutorily authorized to manage the public schools and their decisions may not be disturbed unless patently unreasonable.

Some aspects of the record are troubling. In her December 4, 1995 letter to parents, Ms. Tonnarelli marshalled the arguments against backpacks, two of which are that backpacks present an emergency egress problem and that "many journal articles" raised concerns about the weight of backpacks on growing bodies. She also made these points in a November 1995 meeting with the Parent Advisory Council. When E.M. inquired in November about the reason for the ban, Ms. Tonnarelli responded that the backpacks were a fire hazard. At the January 15, 1996 hearing before the Board, Ms. Tonnarelli alluded to her conversation with the assistant fire marshall about the hazards of backpacks in an emergency (J-1). The problem here is that Ms. Tonnarelli specifically sought out Mr. Dorio's view on the subject, and when he did not provide the desired response, she opted not to reiterate his opinion. Though Mr. Dorio is the chief fire prevention official in Bernards Township and he undertook a series of inspections at William Annin over a course of months, Ms. Tonnarelli preferred to relate Mr. Moscello's comments. Although I take no adverse inference from petitioner's failure to call Mr. Moscello, the observations attributed to him are hearsay and we do not know whether he holds this opinion seriously, or was merely making an aside. In any case, this record provides scant support for representations to anyone, let alone the Board, that backpacks pose an emergency egress problem.

Further, the "many journal articles" expressing concern about backpacks turn out to be two newspaper pieces and a letter to the editor and reply from the author of an article on the topic, published in the *New England Journal of Medicine* (R-4). These materials are mainly distant hearsay and were not received in evidence to focus the medical question. Rather, they reveal that the quantum and quality of materials relied upon by the administration gave it little basis for implying that the ban was undergirded by a serious body of medical literature.

Under some circumstances, a remand might be in order to give the Board an opportunity to reconsider in light of the evidence as it is. My review of the record, however, leads me to conclude that respondent cannot prevail on the merits, and little would be served by extending this debate. The Board is, of course, free to reconsider at any time.

Respondent also argues that E.M. has First and Fourteenth Amendment rights to carry a backpack throughout the school day. These arguments have not been sharply joined and I will not attempt to construct a position for respondent. As support for the constitutional rights argument, respondent relies first on *Tinker v. Des Moines Independent Community School District*, 393 *U.S.* 503, 21 *L. Ed.* 2d 731, 89 *S. Ct.* 733 (1969), a seminal case on the subject of symbolic speech. The high court found that students who wore black armbands to school in protest against the Vietnam War were exercising First Amendment rights. This record does not disclose what protected speech is represented by backpacks and I do not see the parallel. Respondent has also referred to *New Jersey v. T.L.O.*, 469 *U.S.* 325, 83 *L. Ed.* 2d 720, 105 *S. Ct.* 733 (1985), apparently for the proposition that E.M. has been deprived of property. That case set search and seizure standards for students and is inapposite. E.M. is free to carry her backpack into and out of school each day; she may not carry it in crowded school hallways, into classrooms, or into the cafeteria. As previously indicated, the rule is rationally based and respondent was heard before the Board. On the face of it, I see no constitutional deprivation of property.

Based on the foregoing, it is my conclusion that the ban on backpacks is a valid exercise of discretion and that the policy may continue. So **ORDERED**.

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

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

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

4/12/96
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

4/15/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 17 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

/cat

LIST OF WITNESSES

For Petitioner:

Regina W. Townsend
James S. Buist
Leslie P. Henry
Sandra A. Hyde
Dorothy J. Norris
Elaine S. Lent
Julie M. Eger
Joan C. Tonnarelli
Dr. Dalen Showalter
Deborah A. Karuppan

For Respondent:

Ralph Dorio
Christopher W. Szabo
Michael J. Byrne
E.M.
B.W.M.

LIST OF EXHIBITS

Joint:

J-1 Audiotape of January 15, 1996 Board hearing

For Petitioner:

P-1 Accidental Injury Report for Dorothy J. Norris
P-2 Accident Report for D.S.
P-3 Accident Report for C.W.
P-4 Letter to Mrs. Karuppan, dated January 19, 1996
P-5 Medical Department Daily Record of October 13, 1994
P-6 Medical Department Daily Record of September 21, 1995
P-7 Medical Department Daily Record of November 3, 1995
P-8 Faculty Advisory Council Meeting, dated November 20, 1995
P-9 Parent Advisory Council Meeting, dated November 21, 1995
P-10 Letter to Parents from Joan C. Tonnarelli, dated December 4, 1995
P-11 Vote of teachers for backpack ban
P-12 Letter to Parents from Joan C. Tonnarelli, dated December 22, 1995

For Respondent:

R-1 Folder/map of William Annin Middle School
R-2 Photograph
R-3 Bureau of Fire Prevention, Inspection History Report
R-4 Newspaper articles
R-5 Minutes of PTO General Meeting, November 6, 1995
R-6 Copy of File Code 5610, Suspension, Board of Education, Bernards Township
R-7 Means of egress code section

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C. M., individually and as parent of minor child, E. M.,	:	DECISION
RESPONDENT.	:	

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

Respondent's exceptions essentially recast and reiterate his arguments advanced before the ALJ, again contending that any safety concerns established by the Board in support of its ban on backpacks are scant. Moreover, respondent notes that although the ALJ stated that boards enjoy a wide latitude in their policy making determinations and "***their decisions may not be disturbed unless arbitrary and capricious," (Respondent's Exceptions at p. 1, quoting Initial Decision at p. 7), he also recognized that some of the evidence presented by the Board with respect to the backpack ban was "contrived" and some areas of the record were "troubling." Respondent argues that when a record is "*** 'contrived' and 'troubling,' the ban is not only arbitrary and capricious, it is also patently unreasonable.***" (*Id.* at pp. 1-2)

Respondent highlights in detail those aspects of the record which the ALJ found "troubling," specifically, the Board's assertion that backpacks pose an emergency egress problem.

Respondent also asserts that much of the Board's "evidence" with respect to the safety concerns surrounding backpacks arose after E.M.'s suspension on November 16 and 17, i.e., the journal articles first appeared in a letter to parents dated December 4, 1995, and the problem of backpacks not fitting in wire baskets under desks was first mentioned at a Board hearing on January 15, 1996. Respondent states that on November 13, 1995, when the backpack ban was imposed, the only reason advanced for such ban was the "***fire and emergency egress problems" (Respondent's Exceptions at p. 4), which the ALJ all but discounted in his initial decision.

Respondent maintains that the ALJ's decision makes clear that any concerns of the Board regarding safety with respect to the use of backpacks are minimal and, therefore, he urges that the Board's action in instituting the ban was arbitrary and capricious and should be overturned.

In response, the Board asserts that respondent lifted two words out of the initial decision (e.g., "contrived" and "troubling") and imposed his own, out-of-context, interpretation to such words. Further, the Board argues that "***the Judge's use of the (sic) those words is wholly gratuitous and without factual support in the record." (Board's Reply Exceptions at pp. 1-2). It contends

> In the same paragraph in which Judge Metzger states that "some" of the evidence presented on behalf of the backpack ban is "contrived", *see* Initial Decision (Decision), p. 7, he also unequivocally holds that "at bottom there is a nexus between the ban and the interests of safety." *Id.* Moreover, he finds the testimony from the faculty "credible" and "accept[s] as fact that teachers and students have been injured by backpacks, that at least

> some teachers became apprehensive as a result, that backpacks have posed storage problems and that some students have used them irresponsibly." *Id.* In contrast to this clear articulation of facts supporting the backpack ban, nowhere does the Judge indicate which evidence he found contrived." (*Id.* at p. 2)

The Board maintains that, contrary to respondent's interpretation, the ALJ's use of the word "troubling" was indicating only that he was unpersuaded by the Board's evidence that backpacks pose an emergency egress problem and that their weight posed a health risk to students. The Board again proffers that the ALJ correctly "'accepted as fact' that backpacks have caused injuries, posed storage problems and have been used irresponsibly by students. Decision, p. 7. All of these reasons were cited by the Board in support of the ban." (Board's Reply Exceptions at p. 2) It further argues that these accepted facts, "[s]tanding alone, ***clearly demonstrate that the Board's imposition of the ban is a thoroughly appropriate exercise of its discretion.***" *(Id.)*

Upon a careful and independent review of the record in this matter, the Commissioner concludes that the Board has established, and respondent has failed to disprove, that its backpack ban is not arbitrary, capricious or unreasonable; thus, the Commissioner concurs with the ALJ's conclusion that such ban is a valid exercise of the Board's discretion. It is axiomatic that a board of education enjoys broad policy-making discretion in that "***[w]hen such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.***" *Thomas v. Board of Education of the Township of Morris*, 89 *N.J. Super.* 327, 332 (App. Div. 1965). Further, it must be remembered that in such matters the scope of the Commissioner's review is extremely narrow in that he may not substitute his

judgment for that of those who made the decision but, rather, can only determine *whether they had a reasonable basis* for their conclusions. (emphasis added) See *Kopera v. Board of Education of the Town of West Orange*, 60 *N.J. Super.* 288, 296 (App. Div. 1960).

The Commissioner finds that the record supports the Board's contention, and the ALJ's finding, "***that teachers and students have been injured by backpacks, that at least some teachers became apprehensive as a result, that backpacks have posed storage problems and that some students have used them irresponsibly." (Initial Decision at p. 7) As such, the Commissioner further concurs with the ALJ's determination that the Board's action in banning backpacks "***is rationally based***(Initial Decision at p. 9), and must, therefore, be sustained.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter. The within Board's ban on backpacks is determined to be a valid exercise of its policy-making discretion and, therefore, it is hereby ordered that such ban may continue in place.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 29, 1996
Date of Mailing, May 30, 1996

221-96

221-96R

CHRISTINE BUBLIN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

Petitioner, tenured teacher who retired from the position of English Teacher on an accidental disability pension but was later found fit by TPAF to return to employment, appealed Board's refusal to appoint her pursuant to *N.J.S.A.* 18A:66-40 to vacancy in position of media specialist, which she held prior to her transfer to English Teacher and in which she had been tenured. In prior initial decision, ALJ concluded she had effectively resigned and forfeited her tenure rights by accepting disability pension; thus, the Board had no obligation to reemploy her and petition was dismissed. Commissioner set aside initial decision, finding in light of Superior Court decisions in *Allen* and in *DiMuzio* that *N.J.S.A.* 18A:66-40 obliged District to reemploy petitioner when a vacancy arose in her former position of English Teacher; any other offer of employment was discretionary on part of the Board. Commissioner remanded matter for findings and recommendations on question of whether Board's refusal to appoint petitioner to media specialist position was arbitrary, capricious or unreasonable.

On remand, ALJ found that petitioner failed to demonstrate that the Board's action not to employ her for the position of media specialist was arbitrary, capricious or unreasonable. ALJ concluded that the evidence showed the Board's action was grounded upon professional judgment and was within its discretion. Petition was dismissed.

Citing *Bringhurst and Kornacki*, Commissioner adopted initial decision as his own.

May 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 889-94

AGENCY DKT. NO. 387-8/92

(ON REMAND, OAL DKT. NO. EDU 6846-92)

CHRISTINE A. BUBLIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

Respondent.

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

Daniel S. Popovitch, Esq., for respondent (Popovitch & Popovitch, attorneys)

Record Closed: December 27, 1995 Decided: April 11, 1996

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is on remand from the Commissions of Education (Commissioner) where he set aside the initial decision in the above captioned matter, and holding, in light of the Superior Court's decisions in IMO John J. Allen 262 N.J. Super. 438 (App. Div. 1993) and Board of Police Commissioners, City of East Orange v. PFRS, Di Muzio, (App. Div. Docket No. A-2629-87T8, unpublished opinion, May 18, 1989), that N.J.S.A. 18A: 66-40 obligated the Point Pleasant Borough Board of Education (Board) to reemploy petitioner, who had retired on an accidental disability pension from the position of tenured English Teacher, when a vacancy arose in her former position. The Commissioner further held that the Board had discretion to offer any other employment to petitioner, including the position of Librarian which she formerly held. The Commissioner remanded the matter for findings and recommendations on the question as to whether the Board's refusal to appoint petitioner to the Librarian position was arbitrary, capricious or unreasonable.

The plenary hearing was held on March 8, 1995, at the Point Pleasant Beach Municipal Court. The parties were granted leave to supplement the record by way of briefs and memorandum of law. The record closed on December 27, 1995. Extensions were granted in order to execute this initial decision.

STIPULATION OF FACTS

The Stipulation of Facts entered into by the parties and set forth in the original Initial Decision are repeated here:

Petitioner, Christine Bublin, was hired by the respondent, Point Pleasant Borough Board of Education, in September of 1969 as a teaching staff member, and, at the time of this employment, became enrolled in the Teachers' Pension and Annuity Fund, commonly referred to as TPAF. Petitioner received tenure as a teaching staff member in September of 1972. At all times while in the employ of the respondent, petitioner was properly certified as a teacher of English and teacher librarian by the State Department of Education. During the term of her employment, petitioner served first as an elementary school staff member under her teacher-librarian endorsement and thereafter, under the same endorsement in the high school, until June 30, 1981, when she was assigned to duties as an English teacher in the High School.

Petitioner continued on active status until January 18, 1982, which was the last day petitioner reported for work. At that time, petitioner was acting in the capacity of an English teacher. After January 18, 1982, until she received her disability retirement, petitioner was out on Worker's Compensation.

By certification filed on September 14, 1982 the Board certified to the TPAF that petitioner was permanently and totally disabled. On September 14, 1982, petitioner certified to the TPAF that she was incapacitated for further service as a teacher. On October 21, 1982, petitioner's disability retirement was confirmed by the TPAF to be effective November 1, 1982, and, on appeal, petitioner was finally awarded an accidental disability retirement.

By letter dated March 12, 1991, the Point Pleasant Borough Board of Education received notice from the State of New Jersey, Department of the Treasury, Division of Pensions, that the Board of Trustees of the Pension Fund had found that petitioner's disability had diminished to the point that she could resume her former duties as a teacher without restriction. Petitioner had also received a letter, dated March 11, 1991, advising that she was able to resume her duties as a teacher. At that time, there was no position available, either as an English Teacher or as a teacher librarian, and the Board neither contacted petitioner, nor did petitioner contact the Board of Education. Petitioner, however, accepted employment as a librarian with the South Amboy Board of Education beginning April 8, 1991, and sought reinstatement in the Teacher's Pension and Annuity Fund, which was granted. Petitioner was assigned a new TPAF number.

Since April 8, 1991, petitioner has remained in the employment of the South Amboy Board of Education, and has been offered a contract for the 1993-94 school year.

Thereafter, by letter dated April 13, 1992, petitioner applied for a position of elementary school librarian, which had become open in the Borough School system. By letter dated June 8, 1992, from the Board, petitioner was advised that she would not be hired for the position, and on August 14, 1992, petitioner filed this action, seeking the position of elementary school librarian for which she applied, together with other relief.

SUMMARY OF TESTIMONY

Petitioner testified on her own behalf asserting, among other things, that her educational background included: high school diploma from Manasguan High School; B.S. degree from Monmouth College in secondary English; 18 years of post graduate work at Newark State (now Kean) College for Media Specialist Certification. She commenced her employment with the Board in 1968 or 1969, prior to the completion of her undergraduate degree, as a teacher-librarian under a substandard certificate. The substandard certificate was subsequently converted to a standard certificate. Petitioner possesses teaching certificates in Secondary Education-English and an Associate Educational Media Specialist Certificate-Grades K through 12. The Associate Educational Media Specialist endorsement was issued to petitioner in 1991, where she was employed by the south Amboy Board of Education.

Petitioner testified that during the thirteen years in which she was employed by the Board, she was never subject to tenure charges, increment withholding, nor any type of disciplinary action. Petitioner testified that she was never advised or warned of, or disciplined, for her attendance record.

The two criticisms to which petitioner testified she received, regarded her use of prep time. The first criticism occurred during the 1976-1977 school year, from her then supervising principal, Mr. Moran. As a result of that criticism, an agreement was reached whereby petitioner would eat her lunch first and then use her prep period. Subsequent observation records prepared by Mr. Moran noted the organized condition of the library and do not contain any references to prep period conditions.

A second criticism occurred during the 1981-82 school year, at which time the vice principal, Mr. Phebus, expressed concern over the location of petitioner's prep period. These concerns were addressed when petitioner agreed to and commenced utilizing the library for her prep periods in accord with Mr. Phebus' request.

Petitioner testified that while she was employed by the South Amboy Board of Education during the 1992-93 school year, she observed a newspaper advertisement in the Asbury Park Press where the Board was seeking applications for a media specialist. She telephoned the number listed in the advertisement and spoke with Carol Clark, who knows nothing about petitioner. Petitioner follow up the telephone call with Ms. Clark by submitting a letter and resume' dated April 13, 1992.

Subsequently, in June 1992, petitioner received a standard form letter from the Board advising her that the position she sought had been afforded to another person. Petitioner contends she was never called for an interview nor did she talk with a principal or any other administrator prior to the Board's selection of someone other that petitioner.

Subsequently, petitioner contacted the New Jersey Education Association (NJEA) who referred her to present counsel. During the summer of 1992, petitioner advised Superintendent of Schools George Kane, that she was legally entitled to the position of Media Specialist, pursuant to advise petitioner had received from the NJEA.

Over objection by the Board's Counsel, petitioner's counsel offered a letter from Mr. Popovitch, Esquire, to Mr. Friedman, Esquire, dated October 18, 1994, which was moved into evidence as Exhibit P-2, and states:

> Please accept the following as a Statement of Reasons why the Board of Education chose not to re-hire Christine Bublin as a Librarian/Media Specialist.

> First, her performance as a Librarian, during the time she was a teaching staff member in the Point Pleasant Borough School System, was not satisfactory, which was a principal reason why her position was changed from Librarian to English Teacher in 1981, which was the last position she held in the School System. Her former principal, Dr. Carl Perry, would be able to offer testimony as to the problems that occurred, including her interaction with other personnel and her failure to use her preparation periods for preparatory work in the library, for which, she was reprimanded by a letter from Dr. Perry dated June 12, 1980.
>
> Second, Mrs. Bublin holds a Certificate as a Teacher of English and a Teacher Librarian. She does not hold the more current Certificate of Media Specialist which was the position sought to broader training in the use of all media, including audio visual aids and the like.
>
> Third, the Administration assumed that since under prior law her retirement was considered tantemount to resignation, the district had no obligation to offer the position to her.
>
> Fourth, in prior years, Mrs. Bublin had a less than satisfactory attendance record. In most recent years, she used practically all of her sick days as well as her personal days.
>
> All of the foregoing reasons would be supported by testimony, as indicated, as well as the documentation available in her personnel file. (P-2)

Petitioner testified, among other things, that she did not resign her employment position when she was granted disability retirement. Nor, she testified, did Ms. Clark or the Superintendent express to her any of the reasons set forth in P-2 when she applied for the media specialist position in 1992. She contends there was no interview prior to her receipt of the form letter advising her that another person had been selected for the position of media specialist.

On cross-examination, petitioner did not recall the receipt of a letter addressed to her from former Superintendent of Schools, Lawrence DeBellis, dated June 28, 1992, which stated that petitioner had been released to return to duty on March 9, 1982 by the Board's Worker's Compensation insurance company, however, petitioner failed to return to duty or give an explanation for her reasons not to return. (R-1) The document (R-1) was in petitioner's personnel file and was made available to her through discovery for this case.

Petitioner did recall receiving a letter from Dr. Carl L. Perry, Principal of Point Pleasant High School, dated June 12, 1980, in which Dr. Perry confirmed one of the recommendations he made to petitioner concerning her preparation work. Dr. Perry stated, among other things, that he would expect petitioner to spend the majority of her preparation time in the library in view of the fact that library work is very specialized which required access to library materials. (R-2)

Petitioner also recalled a Teacher Observation Record prepared by William Moran, dated February 1, 1977, wherein he stated, among other things, that:

> Suggestions have been made by me to help Mrs. Bublin use her working hours more efficiently, especially during times when children are not in the library. Since these suggestions were made I have not seen enough effort by Mrs. Bublin to make better use of time before classes in the morning, during preparation periods or after classes in the afternoon.
>
> When the class period had ended and the children left the library Mrs. Bublin had put on her coat and hat and left the room and the building explaining that she was, "going out to get a sandwich." This was done during her preparation period. I have sent Mrs. Bublin written directions explaining that staff-members were not permitted to leave the building during preparation periods.
>
> I recommend that Mrs. Bublin spend more time in planning and preparing lessons and work projects so that children derive maximum experiences there and routine library organization duties are carried out more efficiently.

> I am seriously concerned about the effect these deteriorating library conditions are having on the community. I hope Mrs. Bublin does everything possible to improve conditions. (R-3).

Petitioner submitted a response to Mr. Morvan's observation stating, in part, that:

> I have always eaten lunch first lunch even though the schedule lists that as prep. Since the students have been in all winter due to bad weather several 5th graders help in the library after lunch at 12:10 during their recess time. By eating lunch first period I am there to supervise them. Mr. Moran has now agreed to a change in the schedule to first lunch. (R-3)

Petitioner admitted she had received notice of the issue of her preparation time within a three year period. She also acknowledged receipt of a memorandum from Principal Moran, dated December 2, 1976, with respect to improving her efficiency in the library. (R-4)

Petitioner presented a Teacher Observation Record from Mr. Moran, dated March 7, 1977, in which Mr. Moran was generally complementary of petitioner's performance. (P-5) In a subsequent Teacher Observation Record, dated February 21, 1978, Mr. Moran made no reference concerning petitioner's preparation periods. (P-6) This observation indicated that the library appeared to be in better order.

Petitioner admitted that the letter she received from the TPAF, dated March 31, 1991, which granted her request to terminate her disability did not advise petitioner of any available position with the Board. (R-5) Petitioner also admitted that she had acquired a tenure status with the South Amboy Board of Education.

Superintendent Kane testified, among other things, that he had no knowledge that petitioner had applied for the position of Media Specialist. Rather, the procedure in effect for filling vacancies at that time involved the Board's Supervisor of Personnel who would arrange for a screening committee to accept applications for positions for which advertisements had been placed. The screening committee conducted a paper screen of all the applications, conduct interviews, and then recommended between three to five candidates to the Superintendent. Superintendent Kane did not serve on the screening committee.

Under normal circumstances, Superintendent Kane would receive the files of the finalist where he would conduct the reference check and follow up with a secondary interview. With respect to petitioner, since she was a former employee, a reference check was conducted early in the selection process. Superintendent Kane personally conducted the reference check of petitioner by contacting Dr. Perry, petitioner's last supervisor and principal in the Board's school district. Dr. Perry specifically stated to Superintendent Kane that the Board should not employ petitioner. Dr. Perry did not give Superintendent Kane a reason for not employing petitioner nor did Superintendent Kane did not ask Dr. Perry for a reason. Superintendent Kane ruled petitioner out as a candidate after speaking with Dr. Perry.

As far as Superintendent Kane knows, the screening committee considered petitioner's application for employment. Superintendent Kane made no recommendation to the screening committee regarding petitioner. Nor did he discuss her candidacy with the screening committee. It was his understanding that petitioner was not interviewed by the screening committee. Petitioner was neither interviewed by Superintendent Kane or the Board.

The Board acted upon Superintendent Kane's recommendation to employ a candidate other that petitioner for the position of Media Specialist. Superintendent Kane relied solely upon Dr. Perry's recommendation not to employ petitioner for the position. Superintendent Kane did not rely upon petitioner's past performance as illustrated by the observation's and evaluations in petitioner's personnel file. He asserted that petitioner's application for the position was treated no differently that any other application. The only difference was that Superintendent Kane checked with petitioner's last supervisor, Dr. Perry, because petitioner was a former employee.

I hereby adopt as my **FINDINGS OF FACT** the testimony of the above two witnesses.

ARGUMENTS OF THE PARTIES

PETITIONER'S POSITION

POINT I

THE BOARDS FAILURE TO REEMPLOY MS. BUBLIN IN THE POSITION OF MEDIA SPECIALIST WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE

While the discretionary determinations of local school boards are presumed valid and reasonable, a local board's decision will be subject to scrutiny and correction by the Commissioner of Education if the decision is arbitrary, capricious or unreasonable. Colts Neck v. Freehold High School, 270 N.J. Super 497, 505 (App. Div. 1994), Parsippany Troy-Hills Education Association v. Board of Education of the Township of Parsippany-Troy Hills, 188 N.J. Super 156 (App. Div.), certif. denied, 94 N.J. 527 (1983); Thomas v. Morris Township Board of Education, 89 N.J. Super 327, 332 (App. Div.) aff'd, 46 N.J.

246 (1965); Ramapo-Indian Hills Education Association v. Ramapo-Indian Hills Board of Education, 176 N.J. Super 35, 45 (App. Div. 1980); Kopera v. West Orange Board of Education, 60 N.J. Super 288, 294-95 (App. Div. 1960). This is particularly and obviously true, where as here, the Commissioner has remanded an ALJ's decision and directed that the Board's action be measured against this standard, and the law, as will be demonstrated infra, prohibits the Board from arbitrarily denying a recovered pensioner a vacant position.

The law governing this matter is set forth in Board of Police Commissioners, City of East Orange v. PFRS, DiMuzio, (App. Div. Docket No. A-2629-87T8, unpubl. op. May 18, 1989). In DiMuzio, the Court held that a recovered disability retirant must be appointed to his/her former position when there is a vacancy. The Court also addressed the issue of a recovered disability retirant's entitlement to other positions, and held that in some circumstances, the retirant may be entitled to such positions. The Court stressed that the legislative policy which underscores the disability retirement statue is to assure the reemployment of able bodied employees and to avoid the unnecessary expenditure of pension resources by paying disability benefits to a pensioner who is no longer disabled.[1] The Court in DiMuzio concluded that the employer may not arbitrarily refuse to assign the recovered retirant to such duty or position, nor may it defer action until he is no longer available.

In view of the Court's holding in DiMuzio, and the legislative intent as explained by the Court in DiMuzio, the statute requires that a recovered disability retirant be returned to any available duty, not just his former duty, unless there is a persuasive reason to deny such appointment. Otherwise, the legislative policy, i.e., to assure that able bodied employees be employed and avoid unnecessary expenditure of pension resources, would be frustrated.

[1] In DiMuzio, the Court interpreted the PFRS statute, N.J.S.A. 43:16A-8.2. However, that statute is worded identically to the TPAF statute, and consequently, the same considertions and statutory construction apply with equal force to the statute at issue in this matter.

Accord, In the Matter of John J. Allen, 262 N.J. Super 438, 444-445 (App. Div. 1993). (Police sergeant seeking reinstatement following disability retirement was returned to duty as an officer and not a sergeant and was denied seniority status. Reviewing the PFRS statute, the Appellate Division held that the law mandates that the recovered employee be returned to his former position).

In accord with DiMuzio, the Commissioner directed that the Board's refusal to appoint Ms. Bublin to the position of media specialist be reviewed by this Court to determine whether it was arbitrary, capricious or unreasonable.

In deciding whether an agency has acted arbitrarily, the factors to consider include:

> (1) "Whether the agency's action violated the enabling act's express or implied legislative policies;
>
> (2) Whether there was substantial evidence in the record to support the findings on which the agency based its action;
>
> (3) Whether in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made after weighing the relative factors. Williams v. Department of Human Services, 116 N.J. 102, 107 (1989; See also Non-Profit Affordable Housing v. Coatt, 265 N.J. Super 475, 479 (App. Div. 1993); Accord, Public Service Electric & Gas Co. v. New Jersey Department of Environmental Protection, 101 N.J. 95, 103 (1985).

The record in this matter demonstrates that the Board's actions were contrary to the statutory policy underlying the TPAF disability statue. Under N.J.S.A. 18A:66-40, when a retiree on ordinary disability retirement recovers, he or she shall report to her former duty or any other comparable duty which his/her former employer is willing to assign him or her. N.J.S.A. 18A:66-40(a).[2] Similar to the identically worded PFRS statute and in accord with DiMuzio and the Commissioner's first decision in this case, Ms. Bublin was entitled to be reinstated to either the position of English teacher, or if that position is unavailable, to the next available position, media specialist, unless there was a persuasive reason to deny such appointment.

The testimony at the hearing demonstrates that the Board acted arbitrarily and unreasonably in refusing to appoint Ms. Bublin to such duty. Ms. Bublin recovered from her disability and was certified by TPAF as capable of resuming her duties. The Board ignored her status as recovered (indeed, it argued that she had resigned), failed to consider her application. Moreover, it was not until this litigation that the Board attempted to justify its actions, and even then, the Board relied upon inapplicable statutes and caselaw.

Given the statutory policy articulated in DiMuzio, it is clear that the Board acted arbitrarily and unreasonable; rather than reemploying an able bodied pensioner and saving scarce pension resources, it rejected her application without any real reason. The arbitrary nature of the Board's action is compounded by the fact that even if the Court ignores the legislative policy set forth in DiMuzio and measures the Board's conduct by narrower

[2] N.J.S.A. 18A:66-40(a) provides as follows:

> If the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty which his former employer is willing to assign him, the beneficiary shall report for duty.

notions of arbitrary action, the Board acted arbitrarily because it failed to consider Ms. Bublin's credentials or past performance. The record is lacking in any evidence, much less substantial evidence, to justify the Board's action.

The above conclusion is both underscored and demonstrated by the record evidence. The Board and the Selection committee relied solely upon Mr. Kane's unsubstantiated and unfounded recommendation not to rehire Ms. Bublin. Mr. Kane's reference check was cursory, devoid of any supporting factual basis, and based upon a conclusory, unstantiated statement. Although Ms. Bublin's resume included several references, Mr. Kane instead informally contacted only her former principal, Dr. Perry, by telephone. During a brief telephone conversation, and without providing any reasons, nor commenting on Ms. Bublin's' abilities or her past performance, Dr. Perry advised Mr. Kane simply "not to hire her" (T:81). Without ever reviewing Ms. Bublin's resume, personnel file, personally interviewing her or obtaining her side of the story; resting his recommendation solely upon Dr. Perry's concluory opinion, Mr. Kane decided not to consider her application (T:85). The Selection Committee and the Board then acted on the recommendation of Mr. Kane (T:87). The Board's failure to consider such factors prior to reaching its decision to deny Ms. Bublin the position was not only unfair, it was patently arbitrary, capricious and contrary to statutory policy favoring the return of recovered disability retirants to active duty. These considerations prove the error of the Board's actions.

In addition, the arbitrary and unreasonable nature of the Board's action was compounded by the Board's sorry attempt to justify its actions in discovery, when it proffered a list of reasons why Ms. Bublin was not offered the vacant position. Those reasons were wholly unsubstantiated; indeed they were proven false.

The Board asserted that its decision to deny Ms. Bublin the position was justified in light of her alleged history of unsatisfactory performance, lack of proper endorsement for the position, alleged poor attendance history and the Board's belief that Ms. Bublin's retirement constituted a formal resignation. But the Board offered no proof that such circumstances existed, nor that such circumstances were considered when the Board decided not to offer Ms. Bublin the position. Indeed, Mr. Kane admitted that he did not consider those reasons at all (T:85).

For example, although the Board contended that Ms. Bublin had a history of poor performance, the record is devoid of any such evidence, and Mr. Kane admitted that neither he nor the Board relied upon such "record" (T:85). Indeed, the primary complaint concerning Ms. Bublin throughout her lengthy tenure at the Board was directed at her use of prep time (T:40-43), and on the two occasions on which this issue was raised, Ms. Bublin and her supervisor resolved the problem in a practical and expeditious manner (T:24-26, 40-43, 72-73).

The Board also contended that M. Bublin had a poor attendance record (P-2). But neither the Board nor Mr. Kane considered her attendance record in their decision (T:78-100), and Ms. Bublin testified without contradiction that at no time during her employment was her attendance record ever questioned (T:24).

As to the Board's assertion that Ms. Bublin lacked that proper endorsement, Ms. Bublin's application informed the Board that she had the proper endorsement (associate educational media specialist), and therefore that "reason" is similarly absurd.

Finally, the Board's reliance upon a claimed resignation is likewise unreasonable, since not such resignation exists, and the law is that a disability retirement does not constitute a resignation in this context. Thus, the record demonstrates that the Board ignored the legislative policy and acted unreasonably, and that even if the Board had considered the reasons it claimed it relied upon in discovery, it could not have reasonably denied Ms. Bublin the vacant position.

In sum, the arbitrary and unreasonable nature of the Board's action is underscored by its failure to prove the very reasons that it proffered in discovery to support its action; indeed its implicit admission that it did not rely upon them at all. Thus, with our consideration of the statutory policy, the Board's conduct was arbitrary, capricious and unreasonable. But if there can be any doubt, when measured against the applicable legislative policy, i.e., to return a recovered disability retirant to work and not waste pension funds, the Board's action was clearly arbitrary, capricious and unreasonable, disregarded that policy, and was contrary to the legislative policy. Accordingly, Ms. Bublin was and is entitled to the position in dispute.

THE BOARD'S POSITION

POINT I

THE ACTIONS OF THE BOARD WERE NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE

The primary reason why the Board did not re-hire Christine Bublin was set forth in as a first reason in the statement of reasons dated October 18, 1994. It was the opinion of her last supervisor, Dr. Carl Perry, who was her principal at the high school where she had previously been a Librarian and an English teacher, that her performance was less than satisfactory, and that he would not recommend her for a position.

The Superintendent, George Kane, testified as to the procedure in effect for filing vacancies in the school at the time. Mr. Kane indicated that there was a supervisor of personnel who would set up a screening committee to accept applications, and the screening committee would do a paper screen and then recommend three to five candidates to the Superintendent of Schools for interviews. (T76-22 to T77-7) Mr. Kane went on to testify that since Ms. Bublin was a former employee, it was easy to do a reference check on her, and that he contacted her last supervisor and principal, Dr. Carl Perry, to obtain Dr. Perry's recommendation. (T78-20 to T79-22) Mr. Kane testified that he relied upon Dr. Perry's recommendation, or lack of it, in eliminating Ms. Bublin as a candidate for the position. (T86-9 to 12)

Mr. Kane also testified that Mrs. Bublin's resume had come in and did go to Mrs. Clark's committee (T88-25 to T89-2). Mr. Kane also testified that the normal procedure for hiring was followed, and that Mrs. Bublin's name was never submitted for an interview based upon the committee review. (T90-1 to 24) Mr. Kane testified too that he was the one to actually perform the background check, and that it was his normal procedure, if an application involved a teaching position to go to the former employer and try to speak to the principal in the place they worked. (T94-9 to 21) Thus, the only testimony adduced throughout the entire hearing, from Mr. Kane, who Mr. Friedman made his own witness, was to the effect that all of the normal hiring procedures were followed, and that Mrs. Bublin's name was not put forth by the Committee, and that he had also advised the committee of the negative reference from her prior principal, Dr. Perry.

The fact that Mr. Kane did not go behind Dr. Perry's recommendation, and make an independent review of Ms. Bublin's record himself, is really of no consequence, since Mr. Kane was following the procedure that had been put in place by a Board policy for all hiring practices.

Indeed, the record amply substantiates Dr. Perry's refusal to recommend her for the position. In 1976, her then principal, Mr. Moran, gave Mrs. Bublin a letter with specific written directives for improving the organization and working of the library. (R-4 in evidence) In a February 1, 1977 evaluation (R-3 in evidence), Mr. Moran noted that he had not seen enough effort by Ms. Bublin to improve conditions, or to make better use of her time. On June 12, 1980, Ms. Bublin was again reprimanded for failure to spend her preparation period in the library. Finally, on June 28, 1982, the then Superintendent, Dr. Lawrence DeBellis, wrote to Ms. Bublin notifying her that she had been released to return to duty on March 9, 1982 by the Workers Compensation carrier and yet had not returned, and asked for reasons for her failure to return. (R-1 in evidence)

Mrs. Bublin testified that her only recollection of a concern being expressed about the use of her prep time was either the last year or prior to the last year that she worked. (T24-22 to T25-4) However, as already noted, the record reflects that the proper use of her prep time was an obviously related to the December 2, 1976 directive from Mr. Moran marked R-4 into evidence.

Simply because the decision to re-hire was based upon a subjective evaluation made by Dr. Perry, and related to the Superintendent, does not mean that it is arbitrary or capricious. In this case, the Board's actions would have to be considered as similar to the refusal to renew a non-tenured teacher. In such circumstances, the Commissioner and the State Board have recognized that the hiring authority, the district board, has wide discretionary authority, and that the subjective judgment of the administration could not be set aside absent a showing of bad faith. Bringhurst v. Cape May City Board of Education, 81 S.L.D. 564 (State Board of Education 1982) Further, the Court noted in Dennery v. Board of Education, 131 N.J. 626 (1963):

> "Courts will be vigilant to assure the proper application of the school laws and to forestall capricious or arbitrary administrative action. However, the Courts cannot supplant educators; they are not at liberty to interface with regulatory and administrative judgments of the professionals in the field of public education unless those judgments are palpably arbitrary or depart from governing law." (p. 643)

Although that case dealt with the question of tenure and creation of a new position, the principal is essentially the same. The administration of the school district must consider many factors in making a decision to hire or not to hire. The Superintendent, Mr. Kane, has indicated that great reliance is placed on a recommendation from a person's previous supervisor. There is nothing to suggest that reliance on such a recommendation is in any way arbitrary, capricious or even misplaced. To argue that the evaluation was subjective really has not merit, since, of necessity in any hiring situation, the administration must make a subjective evaluation to some extent. The fight credential alone do not necessarily make one eligible for a position.

There has been no showing of bad faith certainly, nor does it even appear that a claim of bad faith is being made. In the absence of such a showing, and the respondent having shown valid and substantial reasons for the refusal to hire, the claim of the petitioner should be dismissed.

DISCUSSION AND CONCLUSIONS

In his Decision and Order of Remand, the Commissioner clearly interpreted the controlling statute and case law arising from analogous statutes in other public pension systems to contemplate a mandatory return to the duties and status held by a disabled

retiree at the time of his or her retirement, when those duties are available (Commissioner's emphasis, slip opinion at 26). The Commissioner further held that the retirees return to other duties in the absence of a vacancy in the former position, was solely at the discretion of the employing Board. Thus, petitioner, herein, is entitled to a position of teacher of English when it becomes available. However, the Board had discretion as to whether or not it may choose to employ petitioner in a position other than that held by petitioner prior to her retirement. The standard to which the Board is required apply under DiMuzio supra. is that it "may not arbitrarily refuse" to assign petitioner to the alternative position but a refusal must be on a reasonable basis.

Here, the Board, through its Superintendent, established a procedure for screening candidates for positions with the Board which had been advertised. The Board's Supervisor of Personnel assigned a committee to conduct a paper screen, i.e., eliminate those applicants which did not meet the Board's criteria for the position. The screening committee conducted the initial interviews with those candidates which demonstrated the most promise for the school district and then recommended between three to five candidates to the Superintendent for his review. The Superintendent would conduct a background check and then interview those finalist he believed would make a contribution to the school district.

In the instant matter, however, the Superintendent recognized that petitioner had been a former employee of the Board. He believed that the prudent and effective method of learning more about petitioner's professional status was to contact petitioner's most recent supervisor in the school district for an assessment. Superintendent Kane telephoned Dr. Perry, petitioner's last supervisor and principal while employed by the Board, who advised the Superintendent not to employ petitioner to the position of Media Specialist. Superintendent Kane trusted Dr. Perry's professional judgment and, therefore, made no further inquiry. As a consequence, petitioner was not one of the finalist for the position of Media Specialist and was not recommended to the Board for the position by Superintendent Kane. Superintendent Kane relied upon Dr. Perry's professional integrity as the one who had observed and supervised petitioner during her last employment with the Board. A recommendation not to employ was sufficient for Kane. Also, petitioner did not pass the initial screen by the screening committee. She did not meet the Board's requirements for the position.

Our Supreme Court, when discussing the rationale for the probationary period under the tenure statutes, said in Cammarata v. Essex County Park Comm'n, 26 N.J. 404, 412 (1958) that:

> It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory written examination or through cursory personal interviews. Knowledge and intelligence do not alone (suffice).....
>
> The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy.....

Such an assessment is applicable here where Dr. Perry measured petitioner's fitness for the position because he had first hand knowledge of her day performance. Dr. Perry's rejection of petitioner was neither arbitrary, capricious or unreasonable but, rather, grounded upon professional judgment.

Petitioner had failed to demonstrate that the Board's action, through its Superintendent, was anything less than a reasonable decision. The decision not to employ petitioner was grounded upon the professional judgment of an educational leader who had the opportunity to work with petitioner, to observe and assess her performance, and to arrive at the conclusion that she was not the person for the position.

I **CONCLUDE**, therefore, that petitioner has failed to demonstrate that the Board's action not to employ her for the position of Media Specialist was arbitrary, capricious or unreasonable. I **CONCLUDE** that the evidence shows the contrary.

I **CONCLUDE**, that the action of the board, not to employ petitioner to the position of Media Specialist was within its discretion and, therefore should stand.

ORDER

Accordingly, the action of the Point Pleasant Borough Board of Education not to employ petitioner Christine A. Bublin to the position of Media Specialist upon her return from disability retirement is hereby **AFFIRMED** and the herein Petitioner of Appeal is **DISMISSED**.

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

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

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

11 April 1996
DATE

Lillard E Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4-12-96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 18 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

ai

WITNESSES

FOR PETITIONER:

CHRISTINE A. BUBLIN

FOR RESPONDENT:

GEORGE H. KANE

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 LETTER 4/13/92 TO CAROL CLARK FROM BUBLIN W/ATTACHMENT

P-2 LETTER 10/18/94 TO FRIEDMAN FROM POPOVITCH

P-3 CLAIMANTS DISABILITY SUPPLEMENTAL REPORT

P-4 LETTER 5/7/82 TO LETICIA HOULTON

P-5 TEACHER OBSERVATION RECORD, 3/7/77

P-6 TEACHER OBSERVATION RECORD, 2/21/78

FOR RESPONDENT:

R-1 LETTER 6/28/82

R-2 LETTER 6/12/80

R-3 TEACHER OBSERVATION, 2/1/77 FROM MORAN

R-4 MEMO 12/2/76 FROM PRINCIPAL MORAN TO BUBLIN

R-5 LETTER TO BUBLIN FROM TRAF 3/11/91

OAL DKT. NOS. EDU 889-94 and EDU 6846-92 (ON REMAND)

CHRISTINE BUBLIN,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply were filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner initially excepts to the Commissioner's conclusion in his prior decision, issued January 26, 1994, that she is not, as a matter of law entitled to the position of media specialist which became vacant and which the Board subsequently filled in 1992. (Petitioner's Exceptions at pp. 1, 2) Further, petitioner objects to the Administrative Law Judge's (ALJ) conclusion that the Board's decision not to appoint her to the disputed position was not arbitrary and capricious. (*Id.* at p. 2) In this regard, petitioner references her post-hearing brief which was well summarized in the initial decision on remand.

In its reply, the Board affirms its disagreement with the Commissioner's prior decision ordering a remand of this matter, in that the Board maintains there was no obligation to

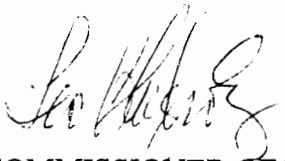
rehire petitioner since she had obtained employment in another school system. The Board further urges the Commissioner to adopt the initial decision of the ALJ on remand.

Upon careful and independent review of the record in this matter, which included a transcript of the hearing, the Commissioner finds no cause to disturb his prior ruling that petitioner's statutory entitlement to reemployment, upon TPAF's determination that she was able to return to work, is to the position of teacher of English, when those duties are available, as that is the position which petitioner held at the time of her retirement. Where the position from which petitioner retired is not vacant, she may be returned to other duties at the discretion of the Board.

As to the Board's refusal to appoint petitioner to the media specialist position, the Commissioner cannot find, under the circumstances herein, that the Board's apparent reliance upon the adverse recommendation of petitioner's former principal and supervisor was unreasonable, arbitrary or capricious. "It is *** well established that the school administrators and the Board have the right to make subjective judgments so long as they do so in good faith.***" *Ellen Bringhurst and Susan Kornacki v. Board of Education of the City of Cape May, Cape May County*, 1981 *S.L.D.* 564, 565.

Accordingly, the initial decision of the OAL on remand is adopted for the reasons expressed therein, and the petition is dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

May 29, 1996
Date of Mailing, May 30, 1996

222-96

SHAWNA D. WEBB,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning school bus driver contended the Board's action withholding her increment for the 1995-96 school year for alleged excessive absenteeism was unreasonable.

Citing *Kopera* and *N.J.S.A.* 18A:29-14, ALJ concluded that petitioner failed to prove by a preponderance of the credible evidence that the Board did not, in fact, have a reasonable basis for its increment withholding action or that the Board's action was arbitrary or capricious. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

May 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9794-95

AGENCY DKT. NO. 311-7/95

SHAWNA D. WEBB,

Petitioner,

v.

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

Respondent.

Shawna D. Webb, petitioner, *pro se*

Stephen J. Christiano, Esq., for respondent,

Record Closed: April 1, 1996 Decided: April 12, 1996

BEFORE **ARNOLD SAMUELS,** ALJ:

The petitioner, Shawna D. Webb, is a bus driver employed by the respondent, Board of Education of the town of West Orange, Essex County. On July 14, 1995, the respondent (Board) acted to withhold the petitioner's salary increment for the 1995-1996 school year. This is an appeal by Ms. Webb of the Board's action.

PROCEDURAL HISTORY

The petitioner filed her verified petition of appeal with the Commissioner of Education on July 31, 1995, alleging that the Board's withholding action was unreasonable because of failure to give her adequate notice and failure to afford her an opportunity to discuss or improve her absenteeism during the 1994-95 school year. An answer, denying the substantive allegations of the petition, and asserting affirmative defenses, was filed by the respondent on August 18, 1995.

On September 7, 1995, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. A hearing was held on April 1, 1996, in the OAL, Newark, New Jersey. The petitioner testified in her own behalf. Respondent did not call witnesses, but relied on ten exhibits that were marked in evidence, as identified in the exhibit list attached to this decision. Counsel for respondent also argued orally in summation. The record closed on April 1, 1996.

ISSUE

The issue to be resolved in whether the Board had a reasonable basis for the underlying factual conclusions that led to the withholding of petitioner's salary increment.

DISCUSSION OF THE EVIDENCE AND TESTIMONY

Testifying in her own behalf, the petitioner stated that she did not dispute the number of days she was absent from her duties as a bus driver during the 1994-95 school year. However, she alleged that the Board failed to follow its standard of disciplinary procedures in her case.

According to Ms. Webb, the usual disciplinary procedure consists of three written warnings after verbal counseling, followed by suspensions and then termination. She did not mention increment withholding as an option. Petitioner said that she only received one written warning, in April 1995. Ms. Webb stated that she was not suspended afterwards, but was simply notified that her salary increment for the following school year was being withheld. The petitioner also said that the disciplinary procedure related above was part of her union contract, as well as being a matter of Board policy. Ms. Webb questioned why the Board did not adhere to those standards. However, when asked, the petitioner said that she did not have a copy of the Board's policy or the union contract to illustrate the procedures that she said should have been applied to her absenteeism.

The petitioner also questioned the manner in which the Board calculated her absenteeism. She said that employees were allotted ten sick days each year. These ten sick days, all of which she had used, were added to the thirteen additional days that she was absent. Ms. Webb felt that the twenty-three days of calculated absenteeism should not have included the ten permitted sick days.

The petitioner noted that, while her salary increment was withheld because of twenty-three days of absence, another employee who had been absent for thirty days was terminated. However, she did not know if the procedure used to terminate that employee followed the policies she believed to have been violated. It seemed that Ms. Webb was arguing that she should have been suspended (although she did not suggest for how long) instead of having her increment withheld.

The respondent cross-examined Ms. Webb by utilizing documents that were marked in evidence. In her testimony, the petitioner acknowledged their accuracy. Exhibits R-1, R-2, and R-3 are warning notices relating to three days in June 1995, when the petitioner was late for work and did not call or did not appear for work after calling to say that she would be late. Exhibits R-4, R-5 and R-7 are memoranda that itemize each date during which the petitioner punched-in late for work during the 1994-95 school year. Reviewing these exhibits, Ms. Webb noted that many of the late

entries show that she punched-in late by no more than one or two minutes. The petitioner explained, logically, that on most of the late entries she was due at work at 1:30 p.m., but her punch-in time is recorded as 1:31 or 1:32. This was caused by the fact that many people lined up and waited up to use either one of the two available time clocks. She then appeared to be one or two minutes late, after waiting on line for at least several minutes. Ms. Webb said that the time clocks were not available for use before 1:30.

Exhibit R-6 shows that the petitioner received another notice of warning for not calling and not appearing for work on February 8, 1995.

The petitioner also acknowledged that her supervisor spoke to her individually about lateness at several meetings that were held during the year to discuss that subject.

Exhibit R-8 is a notice of a two-day suspension given to the petitioner on November 23, 1994, for receiving a speeding ticket and failing to report it. This notice also provided a history of seven warnings that were given to Ms. Webb between October 1993 and November 1994 for various infractions. Exhibit R-9 is a chart of the petitioner's attendance record for 1993-1994. It shows that she was absent from work for eighteen days during that school year. Assuming that the school year contains approximately 180 days, eighteen days of absence equals a ten percent absenteeism rate.

Exhibit R-10 is a chart of Ms. Webb's attendance record for the 1994-95 school year. This shows that she was absent for nineteen and one-half days plus one personal day; a rate of absenteeism of more than ten percent. Ms. Webb pointed out that in each of the two years discussed above, she was allotted ten sick days, so that in 1993-94, she had eight days of excessive absence above the ten allotted days, and in 1994-95 she was out nine and one-half days over and above the ten allotted sick days, excluding the personal day.

When asked about the reasons for her absences, Ms. Webb stated that she could not point to anything in particular, but she has three small children and has had occasional trouble with her car. She is aware of the fact that when she does not appear for work a spare driver must be used. She also admitted that her 1994-95 attendance record did not improve from the previous year.

FINDINGS OF FACT

Having heard the testimony, having reviewed the exhibits and considered the argument of counsel, I **FIND** that all of the facts stated in the foregoing discussion of the testimony and evidence were uncontroverted. Therefore, such facts are incorporated herein as findings of **FACT**.

LEGAL DISCUSSION AND CONCLUSIONS

A single statute controls a decision by a board of education to withhold a salary increment.

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. . . .
> [*N.J.S.A.* 18A:29-14.]

The leading case defining the factors to be weighed by the Commissioner of Education with respect to an increment withholding is *Kopera v. Board of Education of West Orange,* 60 *N.J. Super.* 288 (App. Div. 1960). The court there stated:

> [T]he scope of the Commissioner's review is, as respondents say, not to substitute his judgment for that of

> those who made the evaluation but to determine whether they had a reasonable basis for their conclusions.
>
> . . .
>
> [T]he burden of proving unreasonableness is upon the appellant. *Id.* at 296-97.

The foregoing standards have been analyzed and commented upon frequently:

> The purpose of the statute is thus to reward only those that have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold salary increment, the local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency." The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board. (citations omitted)
> [*Board of Education, Bernards Township v. Bernards Township Education Association,* 79 *N.J.* 311, 321 (1979).]

As stated above, the only question open for review is whether the Board had a reasonable basis for its factual conclusions. One who challenges the action of the Board that has withheld a salary increment must sustain the ultimate burden of demonstrating that the complained of withholding was arbitrary, capricious or unreasonable because the Board did not have a reasonable basis for its factual conclusion. The Board's determination may not be otherwise reversed.

The findings of fact above clearly underline the excessive absenteeism that adversely affected the petitioner's performance as an employee. On the question of the notice given to her, the documentary evidence shows that she received more than ample notice of her attendance problems, and she did not improve the clearly excessive absenteeism. (The many instances of lateness by one or two minutes, as shown on exhibits R 4, 5 and 7 do not lead to adverse inferences, because of the appellant's uncontested explanation.)

Although Ms. Webb claimed that the Board did not follow standards of progressive discipline, those standards were not proved, nor were they shown to be rigid guidelines that must be applied. In any event, it does not seem to be logical that the Board would limit its discretionary and statutory authority to withhold an increment.

It is therefore **CONCLUDED** that the petitioner failed to prove, by a preponderance of the credible evidence, that the Board did not in fact have a reasonable basis for its increment withholding action, or that the Board's action was arbitrary or capricious.

ORDER

It is therefore **ORDERED** that the respondent's action withholding the petitioner's 1995-96 employment increment be affirmed, and the petition is **DISMISSED**.

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

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

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

April 12, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

Shawna D. Webb

Exhibits:

R-1 Notice of Warning, dated June 9, 1995.

R-2 Notice of Warning, dated June 7, 1995.

R-3 Notice of Warning, dated June 5, 1995.

R-4 Memorandum Re: Late Punches for 1994-95 school term, dated April 6, 1995.

R-5 Notice of Warning - Excessive lateness, summary of lateness, dated March 22, 1995.

R-6 Notice of Warning, dated February 8, 1995.

R-7 Memorandum Re: Breakdown of Late Punches for 1994-95, dated June 9, 1995.

R-8 Notice of suspension, dated November 23, 1994.

R-9 Attendance record 1993-1994.

R-10 Attendance record 1994 - 1995.

OAL DKT. NO. EDU 9794-95

SHAWNA D. WEBB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the Respondent Board's determination to withhold petitioner's increment did not exceed the reasonable use of the Board's discretionary and statutory authority, pursuant to *N.J.S.A.* 18A:29-14 and *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

Accordingly, the Commissioner adopts the initial decision of the OAL for the reasons expressed therein and finds that the within Petition of Appeal must be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 29, 1996
May 30, 1996

223-96

MAUREEN LALLY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, nontenured curriculum coordinator, challenged Board's nonrenewal of her employment contract for the 1994-95 school year. Petitioner alleged the Board's action was in retaliation for having filed a grievance regarding gender discrimination in salaries paid to male and female administrators. Petitioner further alleged the Board's failure to continue her employment violated the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 to -8.

ALJ concluded that 1) the bringing of petitioner's CEPA action constituted a waiver of her retaliatory discharge claim before the Commissioner; 2) any failure by the Board to provide petitioner with a statement of reasons for her nonrenewal had been cured by discovery provided in this litigation; 3) the vote by a quorum of the Board was a valid legislative act; and 4) the Board was not obligated to accept the recommendation of its superintendent of schools in deciding not to renew petitioner's contract. (*Rotondo*) Board's motion for summary decision was granted; petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

May 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 9175-94
AGENCY DKT. NO. 331-8/94

MAUREEN LALLY,
Petitioner,
v.
CLARK BOARD OF EDUCATION,
Respondent.

Robert M. Schwartz, Esq., co-counsel, for petitioner
Lake & Schwartz, attorneys)

John G. Geppert Jr., Esq., co-counsel, for petitioner
(Wiley, Malehorn & Sirota, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: September 18, 1995 Decided: April 12, 1996

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

Statement of the Case

This is an appeal by a non-tenured school administrator who challenges the non-renewal of her employment contract for the 1994-95 school year. Originally, petitioner Maureen Lally ("Lally") advanced several legal theories in support of her claim for relief. Counts One, Two and Three of her petition alleged that respondent

Clark Board of Education ("Board") failed to renew her contract in retaliation for her having filed a grievance regarding alleged disparities in the salary paid to male and female administrators. Count Three further alleged that the lack of parity in pay constituted gender discrimination in violation of federal and state law.[1] Count Four alleged that the Board's failure to follow the recommendation of the superintendent of schools that her contract be renewed was "without any basis in fact and contrary to its legal authority." Count Five alleged that a vote by less than the full membership of the Board violated Lally's rights under *N.J.S.A.* 18A:27-1. Count Six alleged that the Board's decision should be overturned because petitioner received less than the three performance evaluations per year mandated by *N.J.S.A.* 18A:27-3.1.[2] Nine months after bringing her appeal to the Commissioner, Lally instituted a separate action in the Superior Court of New Jersey, Law Division, in which she alleges that the Board's failure to continue her employment violated the Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 34:19-1 to -8.

Presently, the matter comes before the Office of Administrative Law ("OAL") on the Board's motion for summary decision in its favor. At the outset, the Board contends that the waiver provision of CEPA, *N.J.S.A.* 34:19-8, precludes Lally from pursuing a substantially similar retaliatory-discharge claim before the State administrative agency. Additionally, Lally maintains that the remaining education issues properly before the

---

[1]Petitioner alleged that the Board's salary policies violated her rights under the Equal Pay Act, 29 *U.S.C.A.* § 206, as well as the Law Against Discrimination, *N.J.S.A.* 10:5-1 to -42. In February 1995, petitioner notified the OAL that she was voluntarily withdrawing the pay-parity issue set forth in Count Three of the petition. While there was disagreement at oral argument regarding the scope of this withdrawal, the OAL determined on March 8,1995 that this withdrawal represented an acknowledgment that: "Petitioner is not contending in this forum that she received a lower salary due to gender discrimination. In the event that petitioner is awarded damages, any calculation will be based on existing salary. However, petitioner reserves the right to argue that the nonrenewal of her contract for the 1994-95 school year was in retaliation for having asserted a discrimination claim."

[2] In her opposing papers, petitioner acknowledges that she did in fact receive three written evaluations during the 1993-94 school year. Therefore, she voluntarily withdrew Count Six.

Commissioner can be decided as a matter of law, without the need for any hearing to develop the facts. For the reasons which follow, the Board's motion for summary decision should be granted in its entirety.

Procedural History

On August 8, 1994, Lally filed her verified petition of appeal with the Commissioner. Respondent Board filed its answer on September 9, 1994. Thereafter, on September 19, 1994, the Commissioner transmitted the matter to the OAL for hearing as a contested case. Much later, on or about May 10, 1995, Lally filed her complaint and demand for jury trial in the Superior Court. On July 6, 1995, the Board filed a notice of motion, together with a supporting brief and exhibits, seeking to dismiss the administrative proceedings. Lake & Schwartz, petitioner's attorneys in the administrative matter, filed opposing papers on July 24, 1995. Counsel for the Board filed a reply on August 1, 1995. At the request of the OAL, petitioner's attorney in the court proceeding, Wiley, Malehorn & Sirota, filed a letter memorandum regarding the waiver defense on September 15, 1995. Board counsel and petitioner's two attorneys presented oral argument before the OAL on September 18, 1995.

Findings of Fact

All of the relevant facts needed for disposition of this motion are undisputed. For purposes of this motion, it will be assumed that the factual allegations set forth in the petition filed with the administrative agency are true. On the basis of that assumption, I **FIND:**

Maureen Lally began her employment as a curriculum coordinator in the Clark school district in July 1991. She served in that position for 1991-92, 1992-93 and

1993-94 school years. Since her contract was not renewed for 1994-95, she did not acquire tenure in the district.[3] In December 1993, Lally filed a grievance objecting that male administrators were receiving higher salary increases than female administrators for the 1994-95 school year. Insofar as the record reflects, that grievance was never fully resolved on its merits. Apparently Lally pursued the grievance to the sixth step of appeal set forth in the district's affirmative action grievance procedure.

Meanwhile, Lally received three favorable evaluations of her job performance as curriculum coordinator during the 1993-94 school year. In the final evaluation for March 1994, Superintendent of Schools Paul J. Ortenzio commented that her service over three years had been "exceptionally productive" and advised her of his intention "to present [her] name in nomination as a tenured employee in the Clark Public Schools[.]" On May 10, 1994, Superintendent Ortenzio notified Lally in writing that her employment would be discussed by the Board in closed session at its meeting on May 10, 1994. In addition, the letter advised Lally of her right "to request that this matter be discussed in public" and "to [attend] if you wish."[4]

The Board consists of nine members. Minutes for the meeting held on May 10, 1994 reflect that only eight members were present and one member was absent. Votes on the proposed resolution to accept the superintendent's recommendation to reappoint Lally as curriculum coordinator for the 1994-95 school year were as follows:

Ayes - 4
Nayes - 2
Abstentions - 2
Absent -1

---

[3] Teaching staff members do not acquire tenure unless they satisfy the strict statutory requirements, in this case employment for three consecutive years and one day. *N.J.S.A.* 18A28-5. *Picogna v. Cherry Hill Bd. of Educ.*, No. A-18-95 (N.J. Sup. Ct. Feb. 22, 1996).

[4] It was conceded at oral argument that Lally did not avail herself of the opportunity to attend the May 10, 1994 board meeting.

Since the proposal failed to garner at least five votes in favor, the resolution was recorded as having failed passage. One week after the board meeting, on May 17, 1994, Lally wrote to the present of the Board requesting a written explanation of the reasons for her nonrenewal. On May 25, 1994, Superintendent Ortenzio sent her a letter advising that her reappointment had not been approved because, "[p]ursuant to statute, a reappointment must be made by a majority of the full Board." In reply to Lally's inquiry, Board counsel sent a letter on June 7, 1994 informing her that "the decision to non-renew your employment for the 1994-95 school year was deemed to be in the best long-range educational interest of the School District." Insofar as the existing record discloses, Lally never sought further clarification or requested an opportunity to address the Board. On June 14, 1994 the Board accepted the recommendation of its superintendent to abolish the position of curriculum coordinator "in order to implement its new administrative configuration." Shortly thereafter, on August 8, 1994, Lally instituted the present administrative proceeding seeking reinstatement to the curriculum coordinator position "or its equivalent."

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE:** (1) that the bringing of Lally's CEPA action constitutes a waiver of her retaliatory discharge claim before the Commissioner; (2) that any failure by the Board to provide Lally with a statement of reasons for her nonrenewal has been cured by discovery provided in this litigation; (3) that the vote by a quorum of the Board is a valid legislative act; and (4) that the Board was not obligated to accept the recommendation of its superintendent of schools in deciding not to renew Lally's contract.

(1) Waiver of the Retaliatory Discharge Claim

Boards of education possess broad discretion in deciding whether or not a particular nontenured teaching staff member should be reengaged. *Donaldson v. North Wildwood Bd. of Educ.*, 65 *N.J.* 236, 246 (1974). There is no legal duty on the part of a

board to re-employ a teacher at the end of a contract term, except to the extent of constitutional or statutory limitations. *Zimmerman v. Newark Bd. of Educ.*, 38 *N.J.* 65, 75, *cert. den.* 371 *U.S.* 956, 83 *S. Ct.* 508, 9 *L. Ed.* 2d 502 (1963). Of course, a board cannot resort to discriminatory practices prohibited by statute or refuse to hire a teacher because of the exercise of constitutionally-protected rights. *Donaldson*, at 242. Absent constitutional constraints or legislation affecting the tenure rights of teachers, however, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. *Dore v. Bedminster Twp. Bd. of Educ.* 185 *N.J. Super.* 447, 456 (1982). Even a wrongful termination will not result in tenure, unless state or federal anti-discrimination laws have been violated. *Picogna v. Cherry Hill Bd. of Educ.*, No. A-18-95, slip op. at 14 (N.J. Sup. Ct. Feb. 22, 1996). Moreover, a school board's decision to reduce staff for economic reasons is a managerial prerogative that is nonnegotiable and nongrievable. *Jamison v. Morris Sch. Dist.*, 198 *N.J. Super.* 411, 415 (App Div. 1985); *In re Maywood Bd. of Educ.*, 168 *N.J. Super.* 45, 55 (App. Div. 1979), *certif. den.* 81 *N.J.* 292 (1979).

Here the thrust of Lally's petition is that she was not rehired in retaliation for having brought her gender-discrimination complaint. As petitioner's counsel aptly observes, "[t]he issue of retaliation runs throughout the petition." (petitioner's opposing papers, at 2). If Lally is successful in proving that the Board retaliated against her for demanding equal pay for women employees, then it would appear to be exactly the type of statutory violation where the Commissioner has jurisdiction to grant appropriate relief. *See N.J.S.A.* 10:5-12(d), declaring it to be unlawful "for "any person to take reprisals against any person because that person has opposed any practices or acts forbidden under [the Law Against Discrimination.]" However, the Board argues that Lally waived her right to seek relief before the Commissioner by asserting her CEPA claim in the Superior Court.

Enacted in 1986, the CEPA protects employees who "blow the whistle" on employers engaged in illegal or harmful activity. *Abbamont v. Piscataway Twp Bd. of Educ.*, 138 *N.J.* 405, 417-418 (1994). It prohibits employers from taking any retaliatory

action against an employee who "discloses or threatens to disclose" any activity, policy or practice which the employee reasonably believes is in violation of law or "who objects to or refuses to participate in" such activity, policy or practice. *N.J.S.A.* 34:19-3(a) and (c). Courts view the CEPA "as a reaffirmation of this state's repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections and a recognition by the Legislature of a preexisting common-law tort cause of action for such retaliatory discharge." *LePore v. National Tool & Mfg. Co.*, 224 *N.J. Super.* 226, 470 (App. Div. 1988), *aff'd* 115 *N.J.* 226 (1989), *cert. den.* 493 *U.S.* 954, 110 *S. Ct.* 366, 107 *L. Ed.* 2d 353 (1989).

The CEPA contains a waiver section, *N.J.S.A.* 34:19-8, which provides:

> Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law. *N.J.S.A.* 34:19-8.

Recently, the New Jersey Supreme Court ruled that this waiver provision should be construed narrowly to effectuate the overall legislative purpose of "mak[ing] it easier, nor harder, for a former employee to prevail on a retaliatory discharge claim." *Young v. Schering Corp.*, 141 *N.J.* 16, 24-26 (1995). Former employees should not be forced to choose between a CEPA claim and "other legitimate claims that are substantially, if not totally, independent of the retaliatory discharge claim." *Young*, at 25. Persuaded that the Legislature intended the waiver exception to curtail essentially cumulative remedial actions, the Court held that it "applies only to those causes of action that require a finding of retaliatory conduct . . . actionable under CEPA" and "does not apply to those causes of action that are substantially independent of the CEPA claim." Once a CEPA claim is instituted, however, any rights or claims for retaliatory discharge, regardless of the legal theory on which it is based, "are all waived." *Young*, at 29. In *Young*, the Court upheld the dismissal of plaintiff's common-law retaliatory discharge claim, but

preserved her right to pursue a separate contract claim for severance pay and various tort claims, such as defamation, slander and malicious interference with prospective employment opportunities, "that do not resemble the alleged CEPA violation and require different proofs than those needed to substantiate the CEPA claim." *Young*, at 31.

Other courts interpreting the waiver clause have reached the same result. Illustratively, in *Casper v. Paine Weber Group, Inc.*, 787 *F. Supp.* 1480, 1508-1510 (D.N.J. 1992), the federal district court determined that the CEPA waiver bars the plaintiff from also bringing a RICO claim "where the only injury alleged . . . is retaliatory discharge," but does not preclude employment discrimination and tort claims "based on separate and distinct legal theories from the statutory claim for retaliatory discharge." Similarly, in *Flaherty v. The Enclave*, 255 *N.J. Super.* 407, 412 (Law Div. 1992), the court declared that the CEPA waiver refers "specifically to the rights and remedies available if an employee is wrongfully discharged as a result of his or her disclosure activities" and does not extend to other causes of action involving different elements of proof. *See also, Blakey v. Continental Airlines, Inc.*, No. 93-2194, slip op at 5 (D.N.J. June 16, 1995), holding that the CEPA waiver does not preclude discrimination claims that "derive from separate sets of facts."

Although Lally makes vague generalizations about the Board's arbitrary, capricious and unreasonable action, the substance of the first three counts of her petition is that she was not reappointed as punishment for having complained about unequal pay. That contention is virtually identical to the charge in her CEPA complaint that the Board failed to renew her employment contract in retaliation for her affirmative action grievance. Both cases require proof of retaliatory discharge. In both cases, the primary remedy sought is reinstatement together with back pay. The remedy recoverable by a prevailing party in the Superior Court is at least as generous as the remedy recoverable before the Commissioner. Indeed, the Superior Court can award additional components of damage which the Commissioner may be unable to grant, including compensation for emotional distress, punitive damages, and counsel fees. Accordingly, since Lally's wrongful discharge claim is substantially similar to her CEPA

claim, Lally must be deemed to have waived her right to seek the relief requested in Counts One, Two and Three of her administrative appeal. *See Picogna v. Cherry Hill Bd. of Educ.*, 249 *N.J. Super.* 332 (App. Div. 1991).

(2) Failure to Provide Statement of Reasons for Nonrenewal

Under the caselaw, a nontenured teacher whose contract will not be renewed for the following school year may ask the school board to furnish a written statement of reasons. *Donaldson,* 65 *N.J.* at 245. This doctrine is codified at *N.J.S.A.* 18A:27-3.2, which entitles any teaching staff member who will not be offered a contract to:

> . . . request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.

When Lally wrote to the Board requesting such a statement, she received an uninformative reply from respondent's legal counsel that nonrenewal of her contract was in the district's "long-range educational interests." At this stage of the proceeding, it will be presumed, but not decided, that this contentless statement does not satisfy the requirements of *N.J.S.A.* 18A:27-3.2. *But see, Cirullo v. Hopewell Valley Reg. Sch. Dist,* 1989 *S.L.D.* 1186, 2291 (Comm'r March 6, 1989), holding that mere disagreement of opinion between petitioner and a school board regarding her skills does not rise to the level of a justiciable issue. Even if Lally were to prevail on this issue, the remedy would be to direct the Board to furnish her with a more specific statement of reasons, rather than the reinstatement which she is seeking. More to the point, Lally has already had full opportunity to utilize the discovery tools available in administrative matters to explore the Board's reasons for not continuing her employment. *N.J.A.C.* 1:1-10.1 to -10.6. Therefore, her request for a more specific statement of the reasons for her nonrenewal has become moot. *See Donaldson*, at 242, recognizing that a teacher who brings suit alleging nonrenewal on impermissible grounds would readily obtain a statement of reasons "in the course of customary discovery proceedings."

(3) Lack of a Vote by the Full Membership of the Board

Next, Lally argues that the Board's action is invalid because the full membership of the Board was not present at the time of the vote. In support of this assertion, Lally relies solely on *N.J.S.A.* 18A:27-1, which reads:

> No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him.

Preliminarily, it should be observed that language of the statute applies to staff members who are "appointed" and, therefore, has no bearing on Lally's situation of nonrenewal. As used in the statute, the phrase "majority vote of the full membership" means that more than half the membership must vote in the affirmative, not that every member of the board must vote. *Cf. Sellers v. East Orange Bd. of Educ.*, OAL Dkt. No. EDU 6756-81 (Comm'r Jan 26, 1983) (so construing identical language in *N.J.S.A.* 18A:29-14). Where, as here, the board is comprised of nine members, a motion must pass by at least five affirmative votes. It is irrelevant that Lally might have been appointed if the absent board member had attended and voted in her favor. The fact is that the motion to reappoint Lally did not garner enough votes to be adopted.

Only a quorum of the Board is necessary to hold a meeting. Absent a statute to the contrary, the common law rule in New Jersey and elsewhere is that "a majority of a public body constitutes a quorum." *Matawan Teacher's Ass'n v. Matawan Bd. of Educ.*, 223 *N.J. Super.* 504, 507 (App. Div. 1988). If Lally were right and a board cannot act without all members being present, then a single member could thwart the majority will simply by not showing up for the meeting.

(4) Failure to Follow Superintendent's Recommendation

Despite the superintendent's favorable recommendation, the Board failed by one vote to reappoint her. Lally urges that the Board lacked authority to reject the

superintendent's recommendation without articulating a rational basis for its action. Again, Lally's interpretation is premised on a misreading of the legal precedents. Earlier Commissioner's decisions had suggested that a board of education could only hire staff members recommended by the superintendent. That would have effectively vested the superintendent with veto power over any nomination. *See, e.g., Rotondo v. Carlstadt-East Rutherford Reg. High School Dist.*, 92 *N.J.A.R.* 2d (EDU) 376, 378 (Comm'r May 11, 1992), *aff'd* 92 *N.J.A.R.* 2d (EDU) 622 (St. Bd. May 8, 1992), holding that the chief school administrator controls "the flow of candidates" from which school boards may choose. Nonetheless, the board was never bound to select whatever candidate the superintendent happened to propose. Recognizing the board's "ultimate authority" to make appointments, the Commissioner acknowledged that the board was free to reject the initial nominee and request that the superintendent recommend another candidate. *See Brescia v. Pemberton Bd. of Educ.*, 1991 *S.L.D.* 506, 517 (Comm'r April 1, 1991). Thus, even under the most restrictive line of cases, the Board would have no legal obligation to reappoint Lally, regardless of whether she happened to be the superintendent's first choice for the job.

Subsequently, the Appellate Division reversed the Commissioner's ruling in *Rotondo* that would have limited a school board to the superintendent's choices, holding that such restrictions contravene the board's statutory power to make appointments. *Rotondo v. Carlstadt-East Rutherford Reg. High Sch. Dist.*, 276 *N.J. Super.* 36 (App. Div. 1994). Comparing a school board's general appointment powers conferred by *N.J.S.A.* 18A:27-1 to other areas in which a superintendent is given a greater role, the Appellate Division declared that if the Legislature had wanted the superintendent to control the appointment process it would have clearly said so.[5]

[5]Recently, the Legislature amended the law to add that a board of education shall appoint, transfer or remove a school employee "only upon the recommendation of the chief school administrator." *L.* 1995, *c.* 125. Generally, the legislative intent behind the amendment was seen as an effort to overturn the Appellate Division holding in *Rotundo* and to bar a local board from appointing a teaching staff member without the affirmative recommendation of the chief school administrator. *School Law Reporter* (Dec. 1995) Since the new act did not take effect until June 19, 1995, it does not govern the present situation where the decision not to reappoint Lally was made on May 10, 1994.

Applied to the present case, the reasoning of the Appellate Division strengthens the conclusion that the Board did not act arbitrarily, capriciously or unreasonably merely by failing to adopt the recommendation of the chief school administrator. In any event, support by the superintendent for Lally's reappointment is far from unambiguous. Just one month after the vote on Lally's reappointment, the superintendent recommended and the Board adopted a resolution to abolish the position of curriculum coordinator as of June 24, 1994. The Board may well have decided that it would be pointless to offer Lally a contract for an unneeded position which was soon to be abolished. Aside from the retaliatory discharge allegations which are duplicative of the CEPA claim, Lally points to no specific circumstances which tend to show that the Board acted arbitrarily, capriciously or unreasonably. A school board is not under any legal obligation to renew the contracts of all nontenured teaching staff members who do a good job. *Wyckoff Bd. of Educ. v. Wyckoff Educ. Ass'n*, 168 *N.J. Super.* 497, 501 (App. Div. 1979).

Order

It is **ORDERED** that the Board's motion for summary decision is granted.

And further **ORDERED** that Lally's petition before the Commissioner is dismissed, without prejudice to any claims raised by her in the Superior Court action.

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

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

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

April 12, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

MAUREEN LALLY,	:	
PETITIONER,	:	
	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the reply thereto were filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner asserts in her exceptions to the initial decision that: 1) She was not given a statement of reasons for her nonrenewal; 2) Her action before the Superior Court of New Jersey does not bar her from having an evidentiary hearing before the Commissioner of Education; and 3) The Board must articulate valid and sustainable reasons for rejecting the superintendent's recommendation to continue her employment. Petitioner's exception arguments essentially recast those presented before the Administrative Law Judge (ALJ). To the extent the arguments are supplemented or amplified, they are reviewed below.

Petitioner objects to the ALJ's conclusion that her claim of entitlement to a statement of reasons (with specifics) was rendered moot by the Board's compliance with

petitioner's discovery request during the course of the litigation. (Petitioner's Exceptions at p. 1) Petitioner reasons,

> ***while it is true that the Respondent answered discovery requests by the Petitioner, that doesn't somehow absolve the Respondent from its responsibility under the *N.J.S.A.* 18A:27-3.2. If it did, than [sic] no Petitioner would be able to move a case to a hearing once a board answered interrogatories.***
>
> ***The Court's decision *** undermines the purpose of the statute *** and opens the way for boards to abuse their authority.***
>
> (*Id* at p. 2)

Petitioner further asserts that she "***never alleged that the Respondent did not have the right to reject the Superintendent's recommendation." (*Id.* at p. 4) Rather, petitioner argues that she has maintained all along that once the Board chose to reject the superintendent's recommendation, it was obligated to articulate a basis for the rejection. (*Id.* at pp. 4, 5) That it did not "***articulate a rational legal basis" for its decision is evidence, petitioner contends, that the Board's action was taken in bad faith, and was arbitrary, capricious and unreasonable. (*Id.* at p. 5)

In its reply, the Board initially corrects two factual findings made by the ALJ. Here, the Board contends that, contrary to the ALJ's finding, petitioner received written notice by letter, dated May 4, 1994, of the Board's May 10, 1994 meeting. Additionally, the Board asserts that the ALJ erred in finding that petitioner did not attend the May 10, 1994 meeting. To the contrary, the Board states that it is undisputed, and the record so reflects, that petitioner did attend the May 10, 1994 meeting at which time her employment was not renewed by the Board. (Board's Reply Exceptions at pp. 1, 2)

The Board maintains that, contrary to petitioner's contentions, she received an adequate statement of reasons for her nonrenewal. Noting its responsibility to provide such a

statement pursuant to *N.J.S.A.* 18A:27-3.2, the Board notes, "***Judge Springer properly concluded that the Board satisfied its obligation under the statute." (Board's Reply Exceptions at p. 2) Moreover, the Board argues that, notwithstanding petitioner's assertions, "***the obligation imposed *** under *N.J.S.A.* 18A:27-3.2 is **not** somehow heightened in circumstances where the board rejects the recommendation of the school district superintendent." (emphasis in text) (*Id.*) Additionally, the Board warrants that the ALJ properly concluded that any deficiencies in the Board's statement of reasons were cured by the information which petitioner received during discovery. The Board continues,

> ***The Court's determination does **not** in any way undermine the purpose of *N.J.S.A.* 18A:37-3.2, as contended by Lally. *** In reviewing the Court's determination, the Commissioner is also urged to note that Lally does **not** contest the sufficiency of the information received during discovery, *i.e.*, she does **not** contend that that information fails to provide her with an adequate "statement of reasons" for her nonrenewal. Lally's mere disagreement with the stated reasons does not amount to a justiciable controversy.**** (emphasis in text) (citations omitted)
> (*Id.* at p. 3)

The Board further indicates that petitioner's exceptions fail to note that, even if the Commissioner determines the Board did not comply with the requirements of *N.J.S.A.* 18A:27-3.2, petitioner is not entitled to reinstatement or monetary damages. (*Id.* at pp. 3, 4)

The Board next argues that petitioner's action before the Superior Court of New Jersey precludes an evidentiary hearing before the Commissioner of Education on her claim of unlawful retaliation. (*Id.* at p. 4) Here, the Board asserts the ALJ properly found an identity between petitioner's claims in her Conscientious Employee Protection Act (CEPA) complaint before the Superior Court and in the within Petition of Appeal. Accordingly, the Board avers that CEPA's waiver provision is applicable, notwithstanding petitioner's belief that its

applicability hinges "***upon a claimant's explicit citation of CEPA in his or her pleadings.***" (*Id.* at p. 5) Rather, the Board argues,

> ***the waiver provision encompasses all causes of action (regardless of the underlying theory) which require a finding of retaliatory conduct actionable under the CEPA. *** In the decision below, Judge Springer properly determined that the retaliation claim contained in the petition of appeal is **identical** to that contained in Lally's Superior Court Complaint instituted under the CEPA. *** The facts underlying the two claims are identical. Accordingly, the instant situation presents a case which falls squarely within the parameters of *N.J.S.A.* 34:19-8. (emphasis in text) (citations omitted) (*Id.*)

Finally, the Board argues that, contrary to petitioner's exceptions, it *has* stated valid reasons for rejecting the superintendent's recommendation for renewal, both at the time of the nonrenewal and during the course of discovery. (*Id.* at p. 6) The Board maintains that its "reasons for rejecting the Superintendent's recommendation are one and the same as those given to Lally, in response to her requests for a statement of reasons under *N.J.S.A.* 27-3.2 ***." (*Id.*) Thus, the Board concludes that, inasmuch as its rejection of the superintendent's recommendation is not a constitutional violation or a statutory rights violation, petitioner, as a nonrenewed staff member, is not entitled to an evidentiary hearing before the Commissioner.

Upon careful and independent review of the record in this matter, the Commissioner finds petitioner's exception arguments to be unpersuasive, and determines to affirm the initial decision of the ALJ.[1]

Initially, the Commissioner concurs that petitioner has waived her right to an evidentiary hearing before the Commissioner by filing the action in Superior Court under CEPA since her Petition of Appeal does not present a cause of action which is "substantially

[1] The Commissioner notes that the Board's two factual corrections are supported by the record of this matter and, therefore, the initial decision is affirmed with such modifications.

independent" from that of the CEPA claim. *Young v. Schering Corp., supra*, at 29. The ALJ notes, "***the thrust of Lally's petition is that she was not rehired in retaliation for having brought her gender-discrimination complaint.***" (Initial Decision at p. 6) Indeed, as the ALJ further observed, it is petitioner's own submission which asserts that "***[t]he issue of retaliation runs throughout the petition.***" (Petitioner's Response to Respondent's Motion for Summary Decision, July 24, 1995 at p. 2)

The Commissioner, however, rejects the Board's assertion that "***Judge Springer properly concluded that the Board satisfied its obligation under the statute." (Board's Reply Exceptions at p. 2) Rather, the ALJ stated,

> When Lally wrote to the Board requesting such a statement [of reasons], she received an *uninformative reply* from respondent's legal counsel that nonrenewal of her contract was in the district's "long-range educational interests." At this stage of the proceeding, *it will be presumed, but not decided, that this contentless statement does not satisfy the requirements of N.J.S.A. 18A:27-3.2.* *** (emphasis added) (citations omitted) (Initial Decision at p. 9)

Contrary to the Board's reading of the initial decision, the ALJ declined to determine whether the Board's statement was in compliance with the pertinent statute, finding, instead, that any failure by the Board to provide petitioner with a statement of reasons for her nonrenewal has been cured by discovery provided in this litigation and petitioner's request for a more specific statement of reasons has now become moot. (*Id.* at pp. 5, 9) That the Commissioner also declines to rule on the Board's reply to petitioner's request is not, however, to be read as tacit approval of the vacuous statement which the Board boldly characterizes as a statement of reason(s) pursuant to *N.J.S.A.* 18A:27-3.2.[2] Such a statement could in fact be used to account for most actions taken

[2] The statement provided by the Board's counsel to petitioner reads as follows: "Dear Ms. Lally: This correspondence is in response to your letter sent to Martin Axelrad, Board President of the Clark Board of Education, dated 5/17/94. Your correspondence was referred to the undersigned for response on behalf of the Board

by the Board and does not offer the degree of disclosure to which a professional is entitled when a decision is made not to continue employment. See *Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236, 245 (1974).

As the ALJ correctly determined, and petitioner no longer disputes[3], the Board was not required to accept the superintendent's recommendation to renew petitioner's employment. However, while the Board is compelled to provide, if requested, "***a statement of the reasons for such nonemployment***" *N.J.S.A.* 18A:27-3.2, it is not required to articulate its basis for rejecting the superintendent's recommendation, if it chooses to do so.

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein and the within petition is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 30, 1996
Date of Mailing, May 30, 1996

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of Education. In accordance with *N.J.S.A.* 18A:27-3.2, please be advised that the decision to non-renew your employment for the 1994-95 school year was deemed to be in the best long-range educational interests of the School District. Very truly yours, ***" (Respondent's Brief in Support of Motion for Summary Decision, Exhibit 13)

[3] Notwithstanding the language in petitioner's exception arguments, her Petition of Appeal alleges, "The Respondent's action in rejecting the Superintendent's recommendation was without any basis in fact *and contrary to legal authority*." (emphasis added) (Petition of Appeal at p. 4, Count Four, Paragraph 4)

231-96

231-96

MAYWOOD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 3, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12038-95

AGENCY DKT. NO. 412-10/95

MAYWOOD EDUCATION ASSOCIATION,

Petitioner,

v.

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

Respondent.

Gregory T. Syrek, Esq., attorney for petitioner (Bucceri & Pincus, attorneys)

Stephen R. Fogarty, Esq., attorney for respondent (Fogarty & Hara, attorneys)

Record Closed: April 12, 1996 Decided: April 12, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

Petitioner appealed respondent's use of non-employees to provide educational services in the Gifted and Talented Program.

The Department of Education transferred this matter to the Office of Administrative Law (the OAL) on November 20, 1995. The OAL scheduled a hearing for July 29 and 30, 1996.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On April 12, 1996, they submitted the attached Stipulation of Settlement, dated March 21, 1996, which sets forth the terms of the settlement.

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

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

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

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

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

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

4/17/96
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

4/17/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 18 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

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Attorneys for Respondent

MAYWOOD EDUCATION ASSOCIATION, Petitioner, vs. MAYWOOD BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO. EDUOT 12038-95N AGENCY REF. NO. 412-10/95

MAYWOOD EDUCATION ASSOCIATION, and MAYWOOD BOARD OF EDUCATION.	BEFORE STATE OF NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION DOCKET NO. CO-96-172 STIPULATION OF SETTLEMENT

WHEREAS, the Maywood Education Association (hereinafter referred to as the "Association") filed a Verified Petition with the Commissioner of Education on or about November 20, 1995 alleging that the Maywood Board of Education's (hereinafter referred to as the "Board") use of non-employees

to provide educational services in its Gifted & Talented Program is not authorized by law or regulation; and

WHEREAS, the Board filed an Answer on or about November 3, 1995 and an Amended Answer on or about November 4, 1995 to the Verified Petition denying the allegations and stating that it had not violated law or regulation when in contracted with an independent contractor for the provision of instructional services for its Gifted & Talented Program for grades four through eight for the 1995-1996 school year; and

WHEREAS, on or about December 11, 1995 the Association filed an unfair practice charge with the Public Employment Relations Commission alleging that the Board violated the New Jersey Employer-Employee Relations Act, when it contracted with an independent contractor to provide service for its Gifted & Talented Program in grades four through eights during the 1995-1996 school year; and

WHEREAS, the Board filed a Statement of Position on behalf of the Board on or about January 24, 1996 in response to the unfair practice charge stating that its actions were in all respects proper and in accordance with statute, caselaw and school law decisions in this State, and therefore did not violated the New Jersey Employer-Employee Relations Act; and

WHEREAS, the parties wish to amicably resolve these disputes in the best interest of the Maywood School District, and upon certain terms and conditions to be stipulated in this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and the mutual promises and covenants of the parties set forth below, it is hereby agreed:

1. The Board agrees that it shall not renew its contract with Gifted Spectrum, Inc. or any other independent contractor or hire any non-employees for the provision of instructional services for the Gifted & Talented Program for the 1996-1997 school year.

2. The Association shall withdraw its Petition before the Commissioner of Education bearing OAL Docket No. EDUOT 12038-95N and Agency Reference No. 412-10/95.

3. The Association shall withdraw its unfair practice charge before the Public Employment Relations Commission bearing Docket No. AR-CO-96-172.

4. This Stipulation of Settlement is the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purpose. It is expressly said that both parties reserve their rights with regard to the underlying actions before the Commissioner of Education and the Public Employment Relations Commission. This Stipulation of Settlement and its terms shall not be introduced in any subsequent litigation by any party to this Stipulation of Settlement for any purpose whatsoever.

5. The parties recognize that each has been represented by counsel of its own choosing and that they sign this Agreement as their own voluntary act indeed, and that they

fully understand the duties and obligations contained herein. This Agreement shall be subject to the laws of the State of New Jersey.

6. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

7. All terms of this Agreement are deemed material. This document may not be altered, amended, or modified except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

MAYWOOD BOARD OF EDUCATION

John Otto

Dated: 3-21-96

WITNESS:

Ms. Sheila Conroy
Board Secretary/School
Business Administrator

Dated: 3/21/96

MAYWOOD EDUCATION ASSOCIATION

Harry Lewis, President

Dated: March 19, 1996

WITNESS:

Gregory T. Syrek, Esq.

Dated:

MAYWOOD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. Such approval, however, is contingent upon the clause in Term 4, wherein "***both parties reserve their rights with regard to the underlying actions***" as being interpreted and applied with the understanding that the parties' reservation of rights is only applicable in the event of a breach of the within settlement agreement and that the settlement otherwise reflects a final disposition in this matter. The Commissioner notes that this language is not intended to alter the settlement in violation of Term 7 but, rather, to clarify its intent.

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

COMMISSIONER OF EDUCATION

JUNE 3, 1996
DATE OF MAILING JUNE 3, 1996

232-96

232-96

D.T., on behalf of minor children, S.T. and S.T.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JUNE 3, 1996

OAL DKT. NO. EDU 7622-95

D.T., on behalf of minor children, S.T. and S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1996
DATE OF MAILING JUNE 3, 1996

233-96

233-96

CARLA RICHARDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 3, 1996

OAL DKT. NO. EDU 9798-95

CARLA RICHARDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on April 16, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1996
DATE OF MAILING JUNE 3, 1996

234-96

234-96

TONYA DANIEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 4, 1996

OAL DKT. NO. EDU 9797-95

TONYA DANIEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on April 16, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 4, 1996

DATE OF MAILING JUNE 4, 1996

235-96

RUTH A. CAHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 4, 1996

OAL DKT. NO. EDU 6140-94

RUTH A. CAHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 4, 1996

DATE OF MAILING JUNE 4, 1996

236-96

236-96

LOUIS J. COSTANZA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 4, 1996

OAL DKT. NO. EDU 6577-95

LOUIS J. COSTANZA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 4, 1996

DATE OF MAILING JUNE 4, 1996

237-96

237-96

OAL DKT. NO. EDU 9790

P. DARRELL MAIETTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 4, 1996

OAL DKT. NO. EDU 9790

P. DARRELL MAIETTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 4, 1996

DATE OF MAILING JUNE 4, 1996

238-96

238-96

CHARLES OATES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 4, 1996

OAL DKT. NO. EDU 8283-95

CHARLES OATES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 4, 1996

DATE OF MAILING JUNE 4, 1996

239-96

239-96

OAL DKT. NO. EDU 8033-95

JOAN IMPERIAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 6, 1996

OAL DKT. NO. EDU 8033-95

JOAN IMPERIAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 6, 1996

DATE OF MAILING JUNE 6, 1996

240-96

J.H. and N.H., on behalf of their minor child, E.O.,

PETITIONERS,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JUNE 5, 1996

OAL DKT. NO. EDU 359-96

J.H. and N.H., on behalf of their minor child, E.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 5, 1996
DATE OF MAILING JUNE 5, 1996

241-96

241-96

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

JUNE 5, 1996

OAL DKT. NO. EDU 8032

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 5, 1996

DATE OF MAILING JUNE 5, 1996

242-96

242-96

KAREN BALSAMO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 5, 1996

OAL DKT. NO. EDU 9770-95

KAREN BALSAMO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 5, 1996
DATE OF MAILING JUNE 5, 1996

243-96

243-96

TED STONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 6, 1996

OAL DKT. NO. EDU 10631-94

TED STONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 6, 1996

DATE OF MAILING JUNE 6, 1996

244-96

244-96

S.C., on behalf of his minor grandchild, T.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner alleged his minor grandchild was wrongfully denied admission to school due to a residency dispute.

Having considered the record, the testimony of witnesses, some false statements by petitioner and T.P's mother, the ALJ found that petitioner failed to present a *prima facie* case. Petition was dismissed and the Board was directed to assess petitioner for tuition for T.P.'s attendance in its school system pursuant to pertinent statute.

Commissioner concurred with the credibility determinations, findings and conclusions of the ALJ. Citing *Gunderson*, Commissioner adopted initial decision as his own and directed petitioner to pay the Board tuition for T.P., prorated to the time of her ineligible attendance in the school district.

JUNE 6, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8928-95

AGENCY DKT. NO. 324-8/95

S.C.,

ON BEHALF OF T.P., A MINOR,

Petitioner,

v.

BOARD OF EDUCATION

OF THE BOROUGH OF POINT PLEASANT,

Respondent.

Diana Anderson, Esq., for petitioner (Hiering, Hoffman & Gannon, attorneys)

Daniel Popovitch, Esq., for respondent (Popovitch & Popovitch, attorneys)

Record Closed: March 26, 1996 Decided: April 16, 1996

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

STATEMENT OF THE CASE

The petitioner, T.P.'s grandfather, alleges the following: Since at least 1983, T.P. has been "domiciled" in his residence in Point Pleasant Borough. Since at least 1983, he has been

"supporting [T.P.] gratis and will assume all personal obligations for [T.P.] relative to school requirements and . . . he intends . . . to keep and support [T.P.] gratuitously for a longer time than merely through the school term." N.J.S.A. 18A:38-1(b)(1). Due to "family or economic hardship," J.P.D. (petitioner's daughter and T.P.'s mother) is "not capable of supporting or providing care" for T.P. and T.P. is not residing with the petitioner "solely for the purpose of receiving a free public education" in the respondent Point Pleasant Borough Board of Education's (BOE's) schools. Ibid. Based upon these allegations, the petitioner claims that T.P. should continue in the BOE's school system. N.J.S.A. 18A:38-1.

The BOE submits that the petitioner has failed to make a prima facie case of compliance with N.J.S.A. 18A:38-1. That is, the BOE submits that the petitioner failed to submit the "sworn statements," etc., proving that T.P. has been and/or is domiciled in the petitioner's residence and that T.P. has a right to a free public education in the BOE's school system. The BOE claims that the petitioner should pay tuition for T.P.'s attendance in its school system, and claims that T.P.'s attendance in its school system should be ordered discontinued.

PROCEDURAL HISTORY

On August 18, 1995, the petitioner's letter (treated as a petition for relief) was filed with the Commissioner of the New Jersey Department of Education. On September 28, 1995, the BOE's answer and defenses were filed with the Department. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law where, on October 6, 1995, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On March 25, 1996, the case was heard in the Pine Beach municipal building. At the conclusion of the petitioner's case, the BOE moved for an order dismissing the case with prejudice for failure to make a prima facie case.

FINDINGS OF FACT

From 1950 to 1983, the petitioner, his wife and J.P.D., their daughter, resided in Hillsdale, New Jersey. In 1981, J.P.D. married D.P. and, because J.D.P. and D.P. were not economically self-sufficient, D.P. also moved in with the petitioner and his wife. T.P., J.P.D. and D.P.'s daughter, was born on November 3, 1981, while J.D.P. and D.P. were living in the petitioner's

Hillsdale house. While they all resided in Hillsdale, the petitioner paid T.P.'s private school tuition.

In 1983, the petitioner and his wife moved to Bayberry Lane in Point Pleasant Borough, and J.P.D., D.P. and T.P. remained in northern New Jersey.

By the spring of 1988, J.P.D. was separated from D.P. Thereafter, J.P.D. and D.P. were divorced and D.P. was ordered to pay weekly child support of $38. In 1988, J.P.D. and T.P. began to reside with the petitioner and his wife in the Point Pleasant Borough residence and T.P. entered the BOE's kindergarten. J.P.D. had no earned income, and the petitioner testified that he provided the "bulk" of T.P.'s support.

In late 1988 or early 1989, J.P.D. found employment as a part-time waitress and met W.D. She began to spend a few nights a week in W.D.'s residence, a single-family, two-bedroom residence in a borough adjacent to the Borough of Point Pleasant, about a half mile from the petitioner's residence. (The petitioner's attorney represented that there have been difficulties between J.P.D. and D.P. and, at her request, J.P.D.'s actual address will not be stated in this decision.) In 1994, J.P.D. and W.D. were married and J.P.D. gave birth to a son and, since 1994, J.P.D., W.D. and their son have resided in W.D.'s residence.

Given the breakup of J.P.D. and D.P. and their bad relationship thereafter, T.P. has endured a difficult childhood. To their credit, the petitioner and his wife have made some of their resources available to T.P. J.P.D. has hoped to avoid the disruption of a change in T.P.'s school. P-2.

The petitioner refused the BOE's request for copies of his tax returns. During the hearing of this case, the petitioner's attorney stipulated that J.P.D. claimed T.P. as a dependent on her tax returns for 1993 and 1994, and that the petitioner has not claimed T.P. as a dependent on his tax returns.

The petitioner testified that, from 1990 to 1994, T.P. spent no time at J.P.D.'s residence. However, later in his testimony, the petitioner said that because he was often "on the road," so that he did not really know whether T.P. spent time at J.P.D.'s residence.

The petitioner also testified that, until 1994, he was the only one involved with T.P.'s teachers, and that in 1994 he advised J.P.D. that she should become involved with them. However, contrary to the petitioner's testimony, the BOE's "Conference Record" shows the following: In April 1988, J.P.D. attended a conference with T.P.'s kindergarten teacher, and there is no record of the petitioner's involvement in any conference with the teacher. In November 1988, J.P.D. attended a conference with T.P.'s first-grade teacher, and there is no record of the petitioner's involvement in any conference with the teacher. In November 1989, J.P.D. attended a conference with T.P.'s second-grade teacher, and there is no record of the petitioner's involvement in any conference with the teacher. In September 1990, the petitioner attended a conference with T.P.'s third-grade teacher, and in November 1990, J.P.D. attended a conference with T.P.'s third-grade teacher. In November 1992 and April 1993, J.P.D. attended conferences with T.P.'s fifth-grade teacher, and in January 1993, the petitioner attended a conference with T.P.'s fifth-grade teacher. BOE-1.

Given J.P.D.'s residence outside of Point Pleasant Borough and her assumption of "obligations for [T.P.] relative to school requirements," the BOE (of which the petitioner was and is a member) raised the issue of T.P.'s domicile. N.J.S.A. 18A:38-1(b)(1).

By memorandum dated April 7, 1995, George Kane, superintendent of the BOE's school system, notified the petitioner of the requirements of N.J.S.A. 18A:38-1 and notified him that, pursuant to N.J.S.A. 18A:38-1, he and J.P.D. were required to submit sworn statements and documentation supporting their contention that T.P. was domiciled with the petitioner. BOE-5.

The petitioner and J.P.D. failed and/or refused to submit sworn statements to the BOE and, during the BOE's April 25, 1995 meeting, it determined that T.P. was not domiciled within the district and she should be removed from the BOE's school system. Consistent with the BOE's determination, by letter dated April 27, 1995, Mr. Kane notified J.P.D. of the following:

Pursuant to N.J.S.A. 18A:38-1, he had applied for removal of T.P. from the school system; she had a right to a hearing on the matter of domicile; and she had a right to appeal (to the Commissioner of Education) from the BOE's action relative to T.P.'s domicile, etc. BOE-6.

By letter to J.P.D. dated May 9, 1995, Mr. Kane confirmed the following: No hearing had been requested in response to his letter dated April 27, 1995; effective May 26, 1995, T.P. would be removed from the BOE's school system; and there was a right to appeal the removal to the Commissioner of Education. BOE-7.

By letter to J.P.D. dated May 12, 1995, Mr. Kane confirmed the following: On May 11, 1995, the matter of T.P.'s attendance in the BOE's school system had been reviewed; "[a]s a consequence of [the] meeting" he notified the principal of T.P.'s school that T.P.'s records should show her address to be J.P.D.'s (out-of-district); he would bring to the BOE's attention J.P.D.'s request that the BOE consider allowing T.P. to attend school in the BOE's system for the 1995-96 school year; and, since T.P. had "not been legally domiciled" in Point Pleasant Borough during the 1994-95 school year, "questions about tuition [would have] to be resolved." BOE-8.

The petitioner consulted with an attorney who, based upon information the petitioner provided, prepared an affidavit for submission to the BOE. On June 1, 1995, the petitioner and his wife executed an affidavit which was then submitted to the BOE. In the affidavit, the petitioner stated falsely that, in 1983, J.P.D. "came to reside" with him and his wife in Point Pleasant. In the affidavit, the petitioner also stated falsely that, since 1983, T.P. had "continued to reside" with him and his wife. In the affidavit, the petitioner also stated falsely that he and his wife "provide[d] for all of [T.P.'s] expenses including food, clothing and any incidental expenses." BOE-1, emphasis added. On June 1, 1995, also, J.P.D. signed a letter which was then submitted to the BOE; in the letter, J.P.D. stated falsely, "My ex-husband, while ordered to pay child support, rarely does and I do not believe I have received a payment from him in many years." P-2.

Consistent with N.J.S.A. 18A:38-1, after receipt of the petitioner's affidavit the BOE requested documentation, including tax returns, to support the contentions of petitioner and

J.P.D. However, the petitioner refused to submit them. (As noted above, during the hearing it was revealed that J.P.D. and not the petitioner claimed T.P. as a dependent, and that J.P.D. has received substantially all of the child support due from T.P.'s father.)

On T.P.'s "Emergency Health Card," dated September 6, 1995, J.P.D. was listed as one of three persons who could be contacted (at J.P.D.'s residence outside of Point Pleasant Borough) "[i]n case of emergency, illness or accident"; the other listed contacts were "nearby relative" M.K., and "neighbor or babysitter" K.A. The petitioner and his wife were not identified as persons to be contacted in an emergency. BOE-3.

By letter dated September 6, 1995, the assistant principal of the BOE's Memorial Middle School transmitted the school's "agenda book" to the students' "Parents." The letter stated that it was "very important" that each parent review the rules and regulations contained in the agenda book with his or her child. W.D. signed as T.P.'s parent, acknowledging review of the agenda book. BOE-4.

The school system sent to school students' parents the BOE's "Drug Abuse Policy" with a request that each parent read it, and W.D. signed as T.P.'s parent, acknowledging that he had read it. BOE-2.

The petitioner was not familiar with the above-noted "agenda book" and "Drug Abuse Policy." When asked to identify T.P.'s homeroom teacher, the petitioner could not do so.

J.P.D. testified as follows: Presently, she is employed as a part-time waitress and bartender and W.D. is a "subcontractor" carpenter. Her income is about $5,000 annually and W.D.'s income is about $25,000 annually. She, W.D. and their son reside in a single-family, two-bedroom house in a borough adjacent to the Borough of Point Pleasant. Her son suffers from a "medical problem" involving breathing difficulties, and he sleeps in J.P.D.'s and W.D.'s bedroom. T.P. has a bed in the other bedroom; however, J.P.D. described the second bedroom as her son's. She first testified that D.P. paid only about "half" of the child support ordered; however, later she admitted that D.P. has paid most of the child support. The child support is sent to J.P.D. at her

residence in the borough adjacent to the Borough of Point Pleasant. J.P.D. buys clothes for T.P. and provides her with "spending money." T.P. has had CPR training so that she can care for her stepbrother, and she does so several days a week; occasionally, T.P. stays overnight in J.P.D.'s home.

The findings of fact here are, in part, dependent upon the witnesses' credibility. Credibility depends upon the demeanor of a witness, but must also be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

Expecting that the BOE would rely upon it, the petitioner executed and submitted to the BOE an affidavit with significant relevant false statements regarding the domicile and support of T.P. and regarding assumption of all obligations for T.P. relative to school requirements. Expecting that the BOE would rely upon it, J.P.D. signed and submitted to the BOE a letter with a significant false statement regarding her ability to support and provide care for T.P. The petitioner refused to submit to the BOE "documentation" to support his affidavit ("sworn statement"), and J.P.D. refused and/or failed to submit a "sworn statement" and refused and/or failed to submit to the BOE "documentation" to support her statements in her letter. N.J.S.A. 18A:38-1(b)(1). The petitioner's testimony regarding the domicile and support of T.P. and regarding assumption of all obligations for T.P. relative to school requirements was contradicted by the above-described exhibits and by J.P.D.'s testimony. Given these circumstances and inconsistencies and based upon my observation of their demeanors, the petitioner and J.P.D. were incredible in significant parts of their testimony.

CONCLUSIONS OF LAW

N.J.S.A. 18A:38-1 states, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such

other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;

> (2) If the superintendent . . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.
>
> [Emphasis added.]

In considering this motion for dismissal for failure to make a prima facie case, the evidence must be viewed most favorably to the party who opposes the motion. N.J.A.C. 1:1-1.3(a), -12.1(a); R. 4:37-2(b); Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

For almost two months (from Mr. Kane's April 7, 1995 memorandum notifying the petitioner of the requirement of the sworn statements, etc., until the submission of the petitioner's affidavit and J.P.D.'s letter in June 1995), the petitioner and J.P.D. refused and/or failed to submit "sworn statement[s]" and "documentation to support the validity of the sworn statements" as required by N.J.S.A. 18A:38-1(b)(1). When the petitioner did submit his affidavit ("sworn statement") to the BOE, he refused to submit supporting "documentation," and J.P.D. continued to refuse and/or fail to submit a sworn statement and documentation as required by N.J.S.A. 18A:38-1(b)(1). Consequently, the petitioner knowingly failed the requirements of submission to the BOE of the "sworn statement[s]" and "documentation" supporting the claim that T.P. was domiciled with the petitioner. N.J.S.A. 18A:38-1(b)(1).

Also, since 1994 J.P.D. has conferred with T.P.'s teachers more often than the petitioner. BOE-1. J.P.D. and her friends, and not the petitioner, have been listed as persons to be contacted "[i]n case of emergency, illness or accident" involving T.P. BOE-3. W.D., and not the petitioner, has reviewed the school's "agenda book" and "Drug Abuse Policy" with T.P. BOE-4; BOE-2. J.P.D. has accepted substantial child support and declared T.P. a dependent, and the petitioner has not declared T.P. a dependent. Even if the petitioner's and J.P.D.'s testimony are considered to be credible and considered to supplement the affidavit and letter, nunc pro tunc, the petitioner has not "assume[d] all personal obligations for [T.P.] relative to school requirements," and J.P.D. is "capable of supporting [and] providing care" for T.P. N.J.S.A. 18A:38-1(b)(1).

Given the above, the petitioner has failed to present a prima facie case.

ORDER

I **ORDER** the petition and the petitioner's claims **DISMISSED WITH PREJUDICE**.

The BOE may assess the petitioner for tuition for T.P.'s attendance in its school system. N.J.S.A. 18A:38-1(b)(2).

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

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

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

April 15, 1996
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

4-22-96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 24 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Petitioner's exhibits:

P-1 Affidavit of S.C. and A.C., dated June 1, 1995

P-2 Letter from J.P.D. to Superintendent Kane, dated June 1, 1995

Respondent's exhibits:

BOE-1 Conference Record, 4/88 to 1/93

BOE-2 Acknowledgment of reading of Drug Abuse Policy, signed by W.D., 1995-96 school year

BOE-3 Point Pleasant Boro Public Schools Emergency Health Card, dated September 6, 1995

BOE-4 Letter from Memorial Middle School to "Parents," dated September 6, 1995, received by W.D.

BOE-5 Memorandum from Superintendent to S.C., dated April 7, 1995

BOE-6 Letter from Superintendent Kane to J.P.D., dated April 27, 1995

BOE-7 Letter from Superintendent Kane to J.P.D., dated May 9, 1995

BOE-8 Letter from Superintendent Kane to J.P.D., dated May 12, 1995

BOE-9 Order in the matter of J.P. v. D.P., Superior Court of New Jersey, Chancery Division, FD02252-87A, dated March 18, 1996

WITNESSES

Petitioner's witnesses:

S.C.

J.P.D.

Respondent's witnesses:

None

OAL DKT. NO. EDU 8928-95

S.C., on behalf of his minor grandchild, T.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to *N.J.A.C.* 1:1-18.4. The Board's reply, however, was untimely filed pursuant to *N.J.A.C.* 1:1-18.4(d) and is, therefore, not considered herein.

Petitioner maintains that he has satisfied the requirements of *N.J.S.A.* 18A:38-lb(1) so as to permit his granddaughter to be eligible for a free public education in the Board's school system. Petitioner asserts that the Administrative Law Judge's (ALJ) decision interprets the pertinent statute to require "*** a parent who is financially unable to support their [sic] child [to] abdicate all parental responsibility in favor of the party supporting the child." (Petitioner's Exceptions at p. 2) Petitioner continues,

> The court found, as a matter of fact, that the child's mother participated in parent/teacher conferences. Nowhere in the statute is it required that a parent refrain from participating in the child's life simply because he or she is unable to support the child. The court further noted that the child's mother received the drug policy and agenda book on September 6, 1995 ***. However, the court failed to note that the home address of the child was changed for the 1995-1996 school year as a result of the within matter, and that prior to this matter, all school notices were sent to petitioner's home. (*Id.* at p. 3)

Petitioner further contends, as to the letter which J.P.D. signed and submitted to the Board (Initial Decision at p. 5), that the letter was not a sworn statement and was prepared by an attorney for T.P.'s mother. (Petitioner's Exceptions at p. 4) Petitioner attests that the "inaccuracies" which were revealed regarding T.P.'s residency in 1983 concern a time which is not relevant to the within petition. (*Id.*)

As to J.P.D.'s ability to support her daughter, petitioner argues that J.D.P. receives $38 per week in child support, or $1,976 annually. Thus, petitioner contends that J.D.P.'s total annual income is approximately $6,976 per year which is "***an amount clearly insufficient to provide for all of the needs of the mother and a growing teenage girl." (*Id.*)

Petitioner concludes,

> The court has ruled that the petitioner failed to present a *prima facie* case because the child's mother still maintained contact and exercised some parental control over the child, and because the petitioner failed to submit the proper documentation as requested. However, these factors are irrelevant to the proceeding and contrary to the intent of the statute. The most important factor, the actual domicile of the child, was left unanswered. (*Id.* at pp. 4,5)

Upon careful and independent review of the record in this matter, which did not include a transcript of the hearing, the Commissioner concurs with the credibility determinations, findings and conclusions of the ALJ. The Commissioner initially finds that petitioner's argument that the ALJ failed to consider the issue of domicile is misplaced. This matter comes before him as an examination of petitioner's claim that he meets the statutory burden imposed by *N.J.S.A.* 18A:38-1b(1). Contrary to petitioner's assertion, this provision does *not* require an examination of the student's domicile, but rather offers a "test" which must be met by the resident, a domiciliary of the district, to affirm that the student, commonly referred to as an "affidavit student," is entitled to a free public education in the district. In this regard, the Commissioner determines that the ALJ properly found that petitioner failed to meet his required burden of proving by a preponderance of credible evidence that T.P. is entitled to a free public education in the district.

The Commissioner further finds nothing in the initial decision to support petitioner's contention that the ALJ reads the pertinent statute to require the parent or guardian of

an affidavit student to "abdicate all parental responsibility." Rather, the Commissioner notes that the statute is intended "***to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically *** those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile." *Gunderson v. Bd. of Education of the City of Brigantine*, 95 *N.J.A.R.* 2d (EDU) 39, 42, citing Sponsor's Statement, Senate Education Committee Statement and Governor's Conditional Veto Message to Senate Bill No. 1447 of 1993, enacted as *c.* 380. Moreover, as *Gunderson* established, the Commissioner will not unreasonably place form over substance by demanding that the mandated documents be produced where he is satisfied that other evidence sufficiently demonstrates the underlying requirements of the law are being met. *Gunderson* at 42. However, in the instant matter, petitioner fails to adduce evidence to so satisfy the Commissioner.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The Petition of Appeal is dismissed and petitioner is hereby directed to pay the Board tuition for T.P., prorated to the time of her ineligible attendance in the school district.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] In accordance with *N.J.S.A.* 18A:38-1b(1), tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance.

244-96

EDU #8928-95
C # 244-96
SB # 47-96

S.C., on behalf of his minor grandchild, T.P.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 6, 1996

For the Petitioner-Appellant, Kalac, Newman, Lavendar & Campbell (Francis J. Campbell, Esq., of Counsel)

For the Respondent-Respondent, Popovitch & Popovitch (Daniel S. Popovitch, Esq., of Counsel)

On June 6, 1996, the Commissioner of Education issued a decision dismissing the petition filed in this matter by S.C. (hereinafter "appellant"), who alleged that the Pt. Pleasant Board had wrongfully denied his grandchild a free public education in the district. The Commissioner directed appellant to pay tuition to the Board for the period of his grandchild's ineligible attendance in the district.

On July 8, 1996, appellant filed a notice of appeal with the State Board of Education.

10/2/96

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of his appeal was due on July 29, 1996, 20 days after the appeal was filed. On July 26, 1996, appellant requested a ten-day extension, until August 8, to file his brief. However, appellant failed to file a brief by that date. Consequently, by letter dated August 13, 1996, the Counsel for the State Board notified appellant that no appeal brief had been filed and that this matter was being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal. Appellant has still failed to file a brief in support of his appeal. Nor has he requested an additional extension of time for such filing.

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

October 2, 1996

Date of mailing OCT 04 1996

245-96

245-96

P.O'G., on behalf of minor daughter, D.O'G.,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioning parent contested punishment given to daughter, D.O'G., senior who allegedly assaulted a teacher. Punishment consisted of denial of attendance at senior prom, denial of participation in senior privileges and in graduation ceremonies.

ALJ concluded that petitioner failed to sustain her burden of proof in challenging the Board's determination. ALJ found that the actions of the Board were entirely within the parameters of its authority under *N.J.S.A.* 18A:37-2.1. Petition was dismissed.

Commissioner concurred with ALJ.

June 7, 1996

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3931-96

AGENCY DKT. NO. 144-4/96

P.O'G., AS GUARDIAN AD LITEM FOR

D.O'G.,

Petitioner,

v.

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent.

Richard Patter, Esq., for petitioner

(Lesnevich & Marano-Lesnevich, attorneys)

Louis E. Franzese, Esq., for respondent

(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: May 30, 1996 Decided: May 31, 1996

BEFORE **MARIA M. LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, on behalf of her daughter (D.O'G.) challenged the determination of the Ridgefield Park Board of Education (Board or BOE) barring her from attendance at the senior prom and from participation in graduation ceremonies on account of an assault by D.O'G. on a teacher who was clearly identifiable as being in the performance of her duties. The student, D.O'G., was suspended by the school administration, pursuant to statute and was barred from participation in those extracurricular activities in which she was then participating.

A Superintendent's hearing was held on January 16, 1996 at which time D.O'G. and her parents were advised of the mandatory expulsion hearing before the Board of Education.

At the expulsion hearing held on January 23, 1996, the Board determined that an assault did in fact occur and determined, in addition to the penalties already imposed, to bar D.O'G. from participation in all senior privileges, senior week activities and graduation. She was not expelled. On April 22, 1996, a petition was filed with the Commissioner of Education, alleging due process violations and excessive punishment. The petition was accompanied by an application for emergent relief. The matter was transmitted by the Department of Education, Bureau of Controversies and Disputes, to the Office of Administrative Law (OAL) as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 on April 24, 1996. The application for emergent relief was heard on April 30, 1996, and an order denying the relief sought was entered on May 15, 1996. A plenary hearing was scheduled for May 29, 1996.

On May 21, 1996, a prehearing telephone conference was held, the purpose of which was to clarify the scope of the plenary hearing. At that time, an order was entered stating that, because of the time constraints involved, the plenary hearing scheduled for May 29 would be treated as an appeal of the determination of the BOE

and a hearing *de novo*, which would be curative of any due process violations, would be conducted.

The issues to be resolved by the hearing were threefold:

a) did an assault occur?

b) was D.O'G. afforded due process?

c) was the penalty imposed by the B.O.E. unreasonable and arbitrary?

The burden of proving the assault by a preponderance of the evidence was the Respondent's; the burden then shifted to the Petitioner to demonstrate a failure of due process and for that the penalty imposed was arbitrary and unreasonable.

FINDINGS OF FACT

I make the following factual determinations, which are essentially uncontroverted, in this matter.

1. There was a meeting held at the Ridgefield Park Jr.- Sr. High School January 11, 1996 to discuss the cheerleaders' participation in a competition in Florida.

2. The meeting was permeated by tension and hostility despite the efforts of the administration to limit the scope of the discussion to whether the team would participate in the competition.

3. There was an altercation at the end of the meeting which involved, at minimum, petitioner, her daughter, and Ms. DeFlora, the former cheerleaders' coach who would be accompanying the team to Florida.

4. As a result of the altercation, the following day, D.O'G. was suspended by the high school administration for a ten-day period of time, from January 11 through January 26, 1996 and barred from those extracurricular activities in which she was then participating.

5. A meeting was held by the Superintendent of the Ridgefield Park Schools on Tuesday, January 16, which the student and parents attended, and at which the Superintendent informed them of the mandatory expulsion hearing.

6. The Board held the expulsion hearing on Tuesday, January 23, at which time it was determined that D.O'G. would not be expelled, but would be barred from participation in all senior activities, including the prom and graduation, in addition to the penalties imposed by the high school administration.

In addition to the foregoing uncontroverted factual determinations, based on the testimony and documentary evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I make the following further factual determinations:

7. The student, D.O'G., at minimum, attempted to strike Ms. DeFlora; however, it is clear from the testimony of the two parent witnesses, Ms. Bassano and Ms. Murray, as well as from the transcript of the Board proceedings, that D.O'G. did, in fact, strike Ms. DeFlora.

8. The student and her parents were notified of her due process rights by letter dated January 19, 1996. I find particularly unpersuasive the statement by Petitioners that she never saw the letter, in light of the testimony by her husband that he signed for it, brought it home, and gave it to her.

DISCUSSION AND LEGAL CONCLUSIONS

The statutory requirement that an expulsion hearing be held where an assault on a teacher has occurred is found at *N.J.S.A.* 18A:37-2.1 which provides, in pertinent part:

> Any pupil who commits an assault as defined pursuant to *N.J.S.A.* 2C:12-1, upon a teacher . . . acting in performance of [her] duties . . . shall be immediately suspended from school consistent with procedural due process pending expulsion proceedings before the local boe. (Emphasis supplied).

As defined by *N.J.S.A.* 2C:12-1, a person is guilty of assault if she attempts to cause or knowingly or purposely causes bodily injury to another. In this case, there is no question, based on the testimony of Ms. Bassano and Ms. Murray, that D.O'G.'s actions were deliberate, purposeful, and that D.O'G. attempted to, and did, in fact, strike Ms. DeFlora. Although Petitioner did testify that her daughter shoved her, the petitioner, into Ms. DeFlora, that action can be construed as a purposeful act. At the

time of the expulsion hearing, Ms. DeFlora stated that she had suffered bodily injury. (R-2 at p.4).

Petitioner sought to rely on discrepancies in the testimony of the respondent's eye witnesses to the incident to cast doubt upon whether or not an assault actually occurred. The discrepancies were adequately explained by the fluidity of the occurrence as well as by the logistics, *i.e.*, the location of the various parties in relation to each other and the furnishings in the room.

I **CONCLUDE**, therefore, that an aggravated assault, as defined by *N.J.S.A.* 2C:12-1b(5)(d) did occur, although the Board has elected to proceed on the basis of simple assault. Thus, the Board had no alternative but to convene an explusion hearing, pursuant to the provisions of *N.J.S.A.* 18A:37-2.1.

At the heart of Petitioner's challenge of the Board's action is the claim that D.O'G. was not afforded procedural due process. Although a factual determination has been made that D.O'G. and her parents were advised by letter dated January 19, 1996 of the procedural safeguards afforded a student facing expulsion, the argument that petitioner and her daughter relied on the advice of Dr. Rightmyer that counsel was not necessary must be addressed. This issue can only be resolved by analysis of the contradictory testimony of the O'G.'s and Dr. Rightmyer.

Petitioner and her husband both claimed repeatedly to have been told by the Superintendent of Schools that an attorney was not necessary at the expulsion hearing. I do not find this testimony to be credible for several reasons: First, the parents testified that they were of the opinion that the only penalty to be imposed was contained in the letter from Principal Koterba dated January 16, 1996. They further testified that at the meeting with the Superintendent on January 16, he advised them that the expulsion hearing was required. It is just not credible that parents receiving the news that their child faced expulsion would rely on a letter of even date to set the parameters of the penalty to be imposed. Furthermore, the testimony was that the

O'G.'s asked Dr. Rightmyer several times if counsel was required; however, no testimony was offered to the effect that, upon receiving the letter dated January 19, 1996, in which the students' due process rights were set forth, the inquiry was renewed. Thus, the testimony of the O'G.'s is that although they had received Koterba's letter of January 16, 1996 and, subsequently, the letter of January 19, 1996, which were contradictory of each other, they felt comfortable relying on the purported advice of Dr. Rightmyer in resolving the serious matter of possible explusion. According to Dr. Rightmyer, prior to this time, he did not know D.O'G.; it is, therefore, a reasonable inference to be drawn, that he did not know the parents or have an ongoing relationship with them. It is unfathomable that parents would rely on such advice in a situation which could conceivably affect their child's future, not only at Ridgefield Park Jr./Sr. High School, but with respect to admission to college.

Furthermore, Petitioner's mother, D.O'G.s grandmother, has been a member of the Board, intermittently, over the past 12 or 13 years. It is inconceivable that she would not know and advise her family members of the seriousness of the hearing they were facing.

It must also be noted that in an attempt to characterize the actions of the Board as unreasonable and arbitrary, testimony was offered that D.O'G. was told by Rightmyer that she was a political scapegoat; her grandmother also testified that there were factions against her on the Board and that this was not the first incident of "scapegoatism" she had endured. If Dr. Rightmyer did make such a statement and if there were other instances in which members of Mrs. DiArchangel's family were made scapegoats, the question arises: why would these parents go into an expulsion hearing without the protection of counsel?

For all of the foregoing reasons, I **FIND** that the testimony of both O'G.'s, mother and father, regarding their discussions with Dr. Rightmyer about the need for counsel is not credible and, therefore, is given no weight.

On the other hand, Dr. Rightmyer displayed a professional attitude, including a concern for the welfare of D.O'G. His demeanor was straightforward and his answers on both direct and cross-examinations were clear, firm and consistent. Furthermore, they were consistent with the documentary evidence presented by Respondent.

Thus, based on the evidence before me with respect to whether or not the O'G.'s were advised of the due process rights, I **CONCLUDE** that D.O'G. and her family were adequately advised by the letter dated January 19, 1996.

Finally, Petitioner argues that the punishment meted out by the Board in addition to the administrative penalties imposed far outweighs the seriousness of the act giving rise to the hearing. Petitioners' challenge of the Board penalty is predicated first on their contention that Petitioner believed, based on conversations with the Superintendent, that the only penalty which would be imposed was that outlined in Principal Koterba's letter of January 16, 1996, and second on the belief that the Board actions were unreasonable, arbitrary and politically retaliatory.

With respect to Petitioner's contention that the O'G.'s had received assurances from Dr. Rightmyer that D.O'G. would not be expelled and, further, that no additional penalty would be imposed, for the reasons set forth in full above, the testimony of the parents is not credible and, therefore, given no weight. There being no other legally competent evidence to support the Petitioner's contention, and in view of Dr. Rightmyers' testimony, I **CONCLUDE** that no such assurances were made.

The second prong of Petitioner's challenge of the Board action is the assertion that it is unreasonable, arbitrary and disparate. It is well recognized that a presumption of reasonableness attaches to Board action, *Boyle v. Riti*, 175 *N.J.Super.* 158, 166 (App. Div. 1980) and when a BOE acts within the parameters of its authority, its actions will not be disturbed absent a finding that the action was arbitrary, capricious or unreasonable. *N.A.C. v. Cedar Grove BOE*, 94 *N.J.A.R. 2d* 28. With respect to the reasonability of the Board's action, the obvious must be noted: the penalty is

considerably more lenient than that which the Board was empowered to impose. Notwithstanding the fact that the cumulative penalties were severe, albeit, the act for which they were imposed can only be characterized as egregious, the Board exercised its discretion in imposing a less severe penalty than permitted by statute. On its face, the action of the board was reasonable in the context of this factual predicate.

As support for the contention that the Board action was arbitrary and disparate, Petitioner presented evidence of another incident at the junior-senior high school last year in which a teacher was struck and injured while attempting to break up a fight among students. Apparently, the students involved were not subjected to an expulsion hearing. This evidence is unpersuasive for two reasons: first, it was presented as hearsay; although hearsay is permitted in this forum, there must be a residuum of legally competent evidence to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability. *UAPR* 1:1-15.7. In this instance, the only evidence presented with respect to the incident last year, through the testimony of Mr. Tondi, the RPEA President who became aware of the incident in his official capacity, was hearsay. There was no eyewitness or documentary evidence presented to support either the nature of the incident or the disciplinary action which followed.

The second reason this evidence is unpersuasive is on account of the differences in the circumstances of the two incidents. The incident last year involved a teacher injured because she was purportedly trying to break up a fight; the incident giving rise to this appeal, based on the testimony of Ms. Bassano and Ms. Murray in regard to the nature of D.O'G.'s behavior and demeanor as well as the aura of tension which permeated the meeting, was premeditated and deliberate. In addition, I find totally credible the testimony of Ms. DeFlora with regard to the student's behavior at a football game where she threw money and confetti at the teacher as well as using profanities; thus, the incident in question was the result of an ongoing series of confrontations of Ms. DeFlora by D.O'G, as well as deliberate, purposeful, premeditated behavior by D.O'G.

Thus, I **CONCLUDE** that the actions of the Board were entirely within the parameters of its authority under *N.J.S.A.* 18A:37-2.1 and that there was no abuse of discretion.

The Petitioner also argues that the action of the Board was, somehow, politically retaliatory because D.O'G.'s grandmother is a member of the BOE. In order for this argument to be successful, Petitioner would first have to demonstrate that the actions of the Board were unreasonable or arbitrary. In view of the foregoing conclusions, this argument is entirely without merit.

Therefore, I **CONCLUDE** that petitioner has failed to sustain her burden of proof in challenging the Board's determination and I **ORDER** that the action of the BOE be **AFFIRMED** and the appeal be **DISMISSED**, with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision will be issued without undue delay, but no later than forty-five days. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

OAL DKT. NO. EDU 3931-96

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

5/31/96
DATE

Maria M. LaFiandra
MARIA M. LA FIANDRA, ALJ

Receipt Acknowledged:

6/3/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 3 1996
DATE

Barbara A. Kerner
OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Witnesses:

For Petitioner:

P. O'G. (mother)
A. O'G. (father)
Barbara Brock
June Bauer Schmidt
Irene Koterba
Lorraine DiArchangel
Joseph Tondi

For Respondent:

Irene Koterba
Lisa DeFlora
Donna Bassano
Doris Ellen Murray
Dr. David Lee Rightmyer
A.O'G. (father)

Evidence:

R-1 Police Report
R-2 Transcript of hearing
R-3 Rightmyer certification
R-4 Letter dated January 18, 1996
R-5 Letter dated January 19, 1996
R-6 Memo dated January 16, 1996

P-1 Koterba letter dated January 16, 1996

OAL DKT. NO. EDU 3931-96

P.O'G., on behalf of minor daughter, D.O'G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge (ALJ) as articulated in the initial decision. The ALJ concluded, and the Commissioner concurs, that the School District acted within the scope of its authority under *N.J.S.A.* 18A:37-2.1. The Commissioner further concurs that petitioner failed to demonstrate by a preponderence of evidence that the exclusion of D.O'G. from senior activities, including graduation, was arbitrary, capricious, improper or taken in bad faith.

Accordingly, for the reasons expressed therein, the recommended decision of the OAL is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 7, 1996
Date of Fax and Mailing, June 7, 1996

252-96

252-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT REED,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF EGG HARBOR,	:	
ATLANTIC COUNTY.	:	

June 10, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO.: EDU 10744-94

AGENCY REF. NO.: 361-9/94

IN THE MATTER OF THE TENURE HEARING OF ROBERT REED, BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY.

Paul J. Carr, Esq., for the Board of Education (Murray & Carr, attorneys)

Allen S. Zeller, Esq., for respondent (Freeman, Zeller & Bryant, attorneys)

Record Closed: March 7, 1996 Decided: April 11, 1996

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of Egg Harbor Township (Board) certified tenure charges to the Commissioner of Education (Commissioner) pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -25, alleging that Robert Reed, a teaching staff member in the Board's employ, engaged in conduct unbecoming a teaching staff member.

This matter was transmitted to the Office of Administrative law (OAL) for determination as a contested case pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15, and the act creating the OAL, N.J.S.A. 52:14F-1 to -13. A prehearing conference was held at which, among other things, the issues to be determined were agreed upon by the parties and hearing dates were established. The hearing was held on March 7, 1996, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on March 7, 1996.

Prior to the hearing, held on March 7, 1996, the Board and respondent had been engaged in settlement discussions and negotiations. The terms of the Settlement Agreement, approved by the Board at its January 23, 1996, regular meeting, are set forth in pertinent part as follows:

1. Egg Harbor Township Board of Education will withdraw and dismiss the tenure charges filed against Robert Reed with prejudice and said charges cannot thereafter be the subject of any future disciplinary action against Robert Reed but will remain in his file solely as an explanation of the 120 days suspension already imposed.

2. Robert Reed will be reinstated to the 7th grade Silver Team teaching position effective no later that the beginning of the third marking period in 1996 and he will have restored to him all benefits, emoluments and prerequisites in accordance with the contract

and statutes with the exception of the loss of pay for the 120 days suspension period already served by him; subject to Administrative Law Judge approval and with no effect on Administrative or Board managerial prerogatives in accordance with law.

3. Mutual releases will be executed by both parties with regard to this matter and any civil litigation surrounding this matter.

4. Mr. Reed will issue the following statement once this matter is fully resolved, the tenure charges are dismissed and the settlement is approved by the Administrative Law Judge and Commissioner of Education.

> As a teacher and educator in the Egg Harbor Township School District for twenty-two (22) years, I wish to make a statement concerning my suspension.
>
> In April of 1994 an incident occurred in my seventh grade homeroom class where a student refused to participate in the salute to the American flag with other members of the homeroom class. The student also refused to either stand or sit quietly at her desk in accordance with my instructions to her; rather she became loud and argumentative and tried to leave the room, thus disrupting the flag salute and disobeying my instructions to her. As a result of the incident, I said the words, "Go back from where you came." These words were interpreted by the student and parents as a racial slur. I did not intend these words to be racial, but just a directive for her to return to her seat. In retrospect I should have used a better choice of words which could not have been misinterpreted. Because of this, major discrepancies arose and regrettably, the matter has escalated into a major controversy involving not only the Board and myself but the community as well.
>
> It is my sincere hope that all parties involved in this matter can reach a just and responsible settlement and avoid the indefinite perpetuation of any ill will that this dispute has generated. I wish to extend my sincerest thanks to all of the dedicated veterans and citizens who gave me their generous assistance and loyal support in this matter. (J-1)

At the hearing, respondent testified in a similar matter. He asserted he was aware of the charges against him and that he understood the terms and conditions of the settlement agreement, which he entered into voluntarily. He further understood that the settlement must be approved by the Commissioner before it may be full force and effect and, if approved, he waived his rights to any further hearings.

The parties stipulate that of the nine counts in the Statement of Charges against respondent, Counts one through Seven are background counts, all at which have been resolved. Count Nine is a catchall count and only Count Eight is the Statement of Charges.

CONCLUSIONS

It is recognized by this tribunal and the parties to this litigation that the Commissioner has exclusive authority to decide matters which arise under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -25. Pursuant to such authority, the Commissioner shall review and evaluate any settlement of tenure charges. It is the Commissioners exclusive authority to approve or disapprove of any settlement agreements reached by the parties involving tenure matters. In re Cardonick, 1983 S.L.D. at 849.

Having carefully considered the Cardonick criteria, as set forth by the State Board of Education. I **CONCLUDE** that the herein settlement agreement meets all requirements therein and is in the public interest. I **CONCLUDE**, therefore, that the herein settlement disposes of all the issues in controversy and should be approved.

Accordingly, I recommend that the Commissioner approve the terms and conditions of the herein settlement agreement and that the matter be **DISMISSED**.

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

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

11 April 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4-24-96
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 30 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ai

WITNESSES

FOR THE BOARD:

NONE

FOR RESPONDENT:

ROBERT REED

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS:

J-1 RE: EGG HARBOR BOARD OF EDUCATION V. ROBERT REED, 2/1, 1996

EDU 10744-94
J-1 EXH
7 MARCH 1996

Freeman Zeller Bryant
ATTORNEYS AT LAW

February 1, 1996

VIA FAX AND REGULAR MAIL

RONALD F. FREEMAN
ALLEN S. ZELLER
WAYNE R. BRYANT

GORDAN R. ERWIN
JAMES W. BURNS
BERTRAND C. HARRY
IRMA BRADLEY KLEIN
MATTHEW B. WIELICZKO
ROBERT SILVER
PETER P. SANCHEZ

KINGS ROAD PAVILION
124 MEIROSE AVENUE
P.O. BOX 000
CHERRY HILL, NJ 08003

609 428 6660
FAX 609 428 6314

Paul J. Carr, Esquire
P.O. Box 548
Toms River, New Jersey 08753

RE: Egg Harbor Board of Education v. Robert Reed
Our File No. 1341-121-94

Dear Mr. Carr:

I am in receipt of your letter of January 26, 1996 indicating that the Board has accepted the settlement offer proposed by Mr. Reed with a slight modification to paragraph 2 of the settlement proposal. As I understand it from our conversation and your letter of January 26, 1996, the request for the modification to paragraph 2 is to insure that the Board is not waiving its managerial prerogatives in this settlement; for example the Board will not be precluded at some time in the future to reassign Mr. Reed from the "Silver Team" if staffing or other reorganizational needs so require. With this understanding, I have no objection to including the requested change to paragraph 2.

Accordingly, please accept this letter as the terms of the Settlement Agreement reached by the parties and as approved by the Board during its meeting of January 23, 1996. As I understand it, this Agreement will be incorporated into the Board's resolution and will be submitted to Judge Law as well and can be made a part of his initial decision if he so chooses:

1. Egg Harbor Township Board of Education will withdraw and dismiss the tenure charges filed against Robert Reed with prejudice and said charges cannot thereafter be the subject of any future disciplinary action against Robert Reed but will remain in his file solely as an explanation of the 120 days suspension already imposed.

2. Robert Reed will be reinstated to the 7th grade Silver Team teaching position effective no later than the beginning of the third marking period in 1996 and he will have restored to him all benefits, emoluments and

perquisites in accordance with the contract and statues with the exception of the loss of pay for the 120 days suspension period already served by him; subject to Administrative Law Judge approval and with no effect on Administrative or Board managerial prerogatives in accordance with law.

3. Mutual releases will be executed by both parties with regard to this matter and any civil litigation surrounding this matter.

4. Mr. Reed will issue the following statement once this matter is fully resolved, the tenure charges are dismissed and the settlement is approved by the Administrative Law Judge and Commissioner of Education.

"As a teacher and educator in the Egg Harbor Township School District for twenty-two (22) years, I wish to make a statement concerning my suspension.

In April of 1994 an incident occurred in my seventh grade homeroom class where a student refused to participate in the salute to the American flag with other members of the homeroom class. The student also refused to either stand or sit quietly at her desk in accordance with my instructions to her; rather she became loud and argumentative and tried to leave the room, thus disrupting the flag salute and disobeying my instructions to her. As a result of the incident, I said the words, 'Go back from where you came.' These words were interpreted by the student and parents as a racial slur. I did not intend these words to be racial, but just a directive for her to return to her seat. In retrospect I should have used a better choice of words which could not have been misinterpreted. Because of this, major discrepancies arose and regrettably, the matter has escalated into a major controversy involving not only the Board and myself but the community as well.

It is my sincere hope that all parties involved in this matter can reach a just and responsible settlement and avoid the indefinite perpetuation of any ill will that this dispute has generated. I wish to extend my sincerest thanks to all of the dedicated veterans and citizens who gave me their generous assistance and loyal support in this matter."

Please contact me upon receipt of this letter so that we can arrange a conference with Judge Law to advise him as to the settlement reached in this matter.

Very truly yours,

Allen S. Zeller, Esquire

ASZ:pk
cc: Mr. Robert Reed

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT REED,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF EGG HARBOR,	:	
ATLANTIC COUNTY.	:	

The record of this matter and the initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed. The Commissioner finds that he cannot approve the settlement terms, inasmuch as they do not comport with the *Cardonick* standards for review of settlements in tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

First, the Commissioner finds that the settlement terms do not sufficiently set forth the nature of the charges, which the Commissioner notes included unbecoming conduct a teaching staff member, *as well as corporal punishment and other just cause*. *Cardonick* at 850. Second, the parties fail to provide the circumstances which justify settlement of these charges in the manner so agreed. (*Id.*) Third, there is no finding by the ALJ that this settlement is in the public's interest. (*Id.* at 850, 851) Such a finding is particularly relevant given the nature of the charges. It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of

why such charges can no longer be pursued or why it is now in the public interest not to pursue the charges. *In the Matter of the Tenure Hearing of Kenneth Smith, School District* of *the City of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification by the State Board on November 2, 1983, affirmed N.J. Superior Court Appellate Division January 30, 1986.

Moreover, it appears that the terms of the settlement have already been effectuated through respondent's return to school "***no later that [sic] the beginning of the third marking period in 1996 ***" (Initial Decision at p. 2) and the parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further settlement negotiations consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to plenary hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 10, 1996
Date of Mailing, June 11, 1996

252-96

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(252-96)

IN THE MATTER OF THE TENURE HEARING OF ROBERT REED, BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

APRIL 28, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4853-96

ON REMAND EDU 10744-94

AGENCY DKT. NO. 361-9/94

IN THE MATTER OF THE TENURE HEARING OF ROBERT REED, BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY

Paul J. Carr, Esq., for the charging Board of Education (Murray & Carr, attorneys)

Allen Zeller, Esq., for respondent (Freeman, Zeller & Bryant, attorneys)

Record Closed: January 30, 1997 Decided: March 6, 1997

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

This matter is on remand from the Commission of Education (Commissioner) who rejected a settlement between the parties asserting, among other things, that the settlement terms and conditions did not comport with the Cardonick standard for review of settlements in tenure matters. In re Cardonick, decided by the Commissioner April 7, 1992, aff'd State Board April 6,1993. 1990 S.L.D. 842, 846.

Specifically with respect to the instant matter, the Commissioner first:

> . . . finds that the settlement terms do not sufficiently set forth the nature of the charges, which the Commissioner notes included unbecoming conduct a teaching staff members, as well as corporal punishment and other just cause. Cardonick at 850. Second, the parties fail to provide the circumstances which justify settlement of these charges in the manner so agreed. (Id.) Third, there is no finding by the ALJ that this settlement is in the public's interest. (Id. at 850, 851) Such a finding is particularly relevant given the nature of the charges. It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue the charges. (Citation omitted) (Slip op. at p.8, 9.)

The Commissioner further admonished the parties for returning respondent to his employment position reminding the parties that settlement agreements of controverted matters are of no force and effect and may not be implemented absent his approval pursuant to N.J.A.C. 1:1-19.1. The Commissioner's ORDER OF REMAND is dated June 10, 1996.

On January 30, 1997, a hearing was held at the Atlantic City Office of Administrative Law (OAL) at which the parties spread upon the record the following stipulation:

I. INFORMATION RELATING TO THE STATEMENT OF CHARGES:

A. Counts One and Nine. These Counts were intended to be included in the Statement of Charges as "catch all" Counts of alleged conduct; the specific allegations of which were included and set forth in Counts Two through Eight.

B. Count Two: This involved a 1974 incident which related to the failure of Respondent to appear at bus duty during a snow storm. Respondent alleged that he had a lack of information and knowledge concerning the bus schedule. A reprimand was issued by the Principal.

C. COUNTS THREE AND FOUR: These Counts involve allegations of inappropriate restraint and contact with students in 1976. The facts relating to these incidents were never established. A written reprimand were issued by the Principal and Superintendent.

D. COUNT FIVE: This Count involved a 1977 allegation regarding misuse of sick days and failure to submit proper lesson plans. Respondent was docked one day of pay.

E. COUNT SIX: This Count involved a 1984 allegation of improper supervision of two students who were fighting amount themselves. The Board voted to withhold one year pay increment.

F. COUNT SEVEN: This Count involved a 1987 allegation of inappropriate minor contact with a student. The Board imposed a sanction of withholding a pay increment for one year. A petition of appeal contesting the Board action was filed by Respondent with the Commissioner of Education. The petition was subsequently withdrawn and the Administrative Law Judge in an initial decision in July, 1989 approved the withdrawal of the Petition under Docket No: EDU-7552-88. The Commissioner of Education also approved the Administrative law Judge's initial decision.

H. COUNT EIGHT: Count Eight involved a 1994 allegation of unbecoming conduct. This is the basis for the within certification of present tenure charges. The specific conduct alleged was detailed by the Administrative Law Judge in his decision on page 3, paragraph 4 and as set forth in Exhibit "J-1" marked in evidence. A statement was made by Respondent to a student from the doorway of his homeroom facing outward into the hall where the student had walked. The statement was not heard by any other student in the homeroom class nor was the statement within earshot of any students.

The parties further stipulate that upon completion of discovery in this matter and based upon all of the evidence, Respondent's comment was not a racial slur as originally alleged.

II. CIRCUMSTANCES WHICH JUSTIFY THE SETTLEMENT:

By stipulation and acknowledgment of the Board of Education and the Respondent, the allegation that Respondent uttered a racial slur to a student did not, in fact, occur. Rather, Respondent acknowledged using a poor choice of words which were misinterpreted by a disobedient student. The student ignored Respondent's proper request during homeroom period that she refrain from being loud and disruptive and that she return to her seat during the recital of the Pledge of Allegiance to the Flag. The student ignored Respondent's request and commenced to leave the classroom during the Pledge of Allegiance. Respondent's comment occurred while the student was outside the homeroom and was not heard by any other student. The student was sent to the Principal's office. The Principal imposed punishment of four hours of detention for her defiant and disrespectful conduct toward the Respondent as a result of her refusal to return to her seat after being directed to do so.

After completion of all pretrial discovery, the Board acknowledged and agreed that the circumstances of the Respondent's choice of words did not warrant certification of tenure charges but, rather, warranted a fine of 120 day's pay.

The parties further stipulate that under further disclosure of the facts, the Board does not feel that a poor choice of words would warrant a tenure dismissal.

The Board further acknowledged that final action has previously been taken in a proper manner regarding Counts two through Seven.

III. CONSENT OF THE PARTIES:

The Board approved the within settlement by a vote of eight in favor an one opposed at its meeting on January 24, 1996. Respondent has approved and consented to the settlement as set forth in the transcript of March 7, 1996. The parties further acknowledge that the settlement is in the public interest.

The parties further stipulate that Exhibit J-1 be entered in evidence and that the transcript of the March 7, 1996 proceeding be entered in evidence as Exhibit J-2.

The parties further stipulate that Respondent received full salary beginning the 121st day after the suspension and that Respondent did not have any other employment during the suspension period.

At the hearing held on January 30, 1997, the parties made reference to the transcript of the hearing held on March 7, 1996, where, among other things, respondent was thoroughly examined and cross-examined by counsel and by this tribunal concerning the charges and the consequences related thereto, together with the admonition that a settlement may not be effected until such time as the Commissioner sets forth his approval of its terms and conditions. Respondent was also advised that the Commissioner is obligated to advise the Board of Examiners of the tenure charges against him and that it may take further action against his teaching credentials.

The parties and especially the Board, represented that there was no intention to adopt the settlement terms and conditions prior to the Commissioner's approval. The Board asserted, credibly, that it returned respondent to his employment position prior to the Commissioner's approval for reasons of economy.

FINDINGS AND CONCLUSIONS

Based upon the testimony and the representations of counsel, together with other evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of respondent's testimony. I **FIND** the following FACT and make following CONCLUSIONS in this matter.

Pursuant to the Commissioner's concerns that, first, the Board's charges against respondent included unbecoming conduct as well as corporal punishment, the record demonstrates that facts related to these incidents were never established. Therefore, these charges were unsubstantiated and not material to the herein mater. I so **FIND** and **CONCLUDE**.

The Commissioner's second concerns, under Cordonick that the parties failed to provide the circumstances which justify a settlement of the instant charges is fully set forth in Section II above. I **FIND** and **CONCLUDE** that the circumstance which justifies the settlement is warranted and should be approved.

With regard to the Commissioner's third concern as to no finding by this tribunal that the settlement is in the public interest, I **FIND** and **CONCLUDE** that it is in the public interest to adopt the herein settlement agreement. This is so due to the fact that the charges are unclear and in dispute, with no corroborating supportive evidence to warrant a dismissal of respondent from his tenured employment position. While respondent admits he made a statement to a pupil which was a poor choice of words, there is no evidence that the speech was heard by anyone other than the pupil nor is there any evidence that the words were intended to be a racial slur, as alleged. I **CONCLUDE**, therefore, that the settlement is in the public interest and need not go forward to a hearing at the public expense.

Having considered the entire controversy in light of Cordonick, I **CONCLUDE** that the herein settlement agreement meets all of the requirements therein and is in the public interest for its adoption. I **CONCLUDE**, therefore, that the settlement disposes of all issues in controversy and should be approved.

Accordingly, I recommend that the Commissioner approve the terms and conditions of the herein settlement agreement and that the matter be **DISMISSED**.

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

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

6 March 1997
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3-14-97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 1997
DATE

Barbara A Kennedy
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

Joint Exhibits

J-1 Letter, dated 2/1/96 to Paul J. Carr, Esquire

J-2 Transcript of hearing held March 7, 1996

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

OAL DKT. NOS. EDU 4853-96 and EDU 10744-94 (ON REMAND)
AGENCY DKT. NO. 361-9/94

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT REED,	:	
BOARD OF EDUCATION OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF EGG HARBOR, ATLANTIC	:	DECISION ON REMAND
COUNTY.	:	
	:	

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

The Commissioner adopts the initial decision to approve the settlement terms, in that the ALJ has reviewed each of the issues raised on remand and determined that the proposed settlement comports with the *Cardonick* standard for review of settlements in tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the initial decision on remand is adopted as the final decision and this matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 28, 1997
DATE OF MAILING APRIL 28, 1997

253-96

253-96

A. O., on behalf of her minor children, M.F.O., R.O. and M.O.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

June 10, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 926-96
AGENCY DKT. NO. 30-1/96

A.O. ON BEHALF OF HER MINOR CHILDREN, M.F.O., R.O. AND M.O.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE,
Respondent.

Diane K. Smith, Esq., for petitioner (Somerset-Sussex Legal Services)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: April 16, 1996 Decided: April 16, 1996

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

This matter was transmitted to the Office of Administrative Law on May 7, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

The parties conferred at hearing, which was held on an expedited basis on April 4, 1996. After limited testimony was heard, the parties agreed that all factual disputes had been resolved.

The parties have agreed to settle this matter and have prepared the attached order indicating the terms of settlement.

I have reviewed the record and the settlement terms and I **FIND** the settlement fully disposes of all issues in controversy and is consistent with the law. The parties expressed their understanding of and their voluntary entrance into the settlement on the record.

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

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

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

16 APRIL 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 30 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

SOMERSET SUSSEX LEGAL SERVICES
By: Diane K. Smith, Esq.
Attorney for Mary Frances Ortiz, Robert Ortiz, Michelle Ortiz
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

OFFICE ON ADMINISTRATIVE LAW
OAL Docket # EDU-926-96
Agency # 30-1/96

ADA ORTIZ, parent, on behalf of Mary Frances Ortiz, Robert Ortiz, Michelle Ortiz, Petitioner	:	
vs	:	
SOMERVILLE SCHOOL DISTRICT, Respondent	:	ORDER
	:	

This matter being opened to the Office of Administrative Law by Somerset Sussex Legal Services, attorneys for Petitioner, Ada Ortiz, Parent, on behalf of Mary Frances Ortiz, Robert Ortiz and Michelle Ortiz, upon notice to McDonald, Rogers and Rizzolo, attorneys for the Somerville Board of Education, and the Administrative Law Judge having heard the testimony of Ada Ortiz and the parties having stipulated the admission of documentary evidence and it appearing that the Petitioner and her children have resided at 41 Orchard Street, Apartment #3, Somerville, New Jersey and 161 East Cliff Street, Somerville, New Jersey during the 1995-1996 school year, and it further appearing that the Petitioner and her children are domiciled in the Borough of

Somerville, and the parties having resolved their differences, and for good cause shown;

IT IS on this 16TH day of April 1996

ORDERED that Mary Frances Ortiz, Robert Ortiz and Michelle Ortiz are entitled to a tuition-free education in the schools of the Somerville School District and have so been entitled throughout the 1995-1996 school year.

Bruce R. Campbell

BRUCE CAMPBELL, ALJ

OAL DKT. NO. EDU 926-96

A. O., on behalf of her minor children, M.F.O., R.O. and M.O.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

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

COMMISSIONER OF EDUCATION

June 10, 1996
Date of Mailing, June 11, 1996

254-96

A.L. AND N.L., on behalf of minor, N.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, brother and sister-in-law of minor student N.L., alleged N.L. was wrongfully denied admission to school due to residency dispute.

ALJ dismissed matter for failure of petitioners to appear for the conference or otherwise prosecute the matter.

Commissioner set aside ALJ's conclusion that this matter must be dismissed. Based on letter sent by petitioners objecting to the dismissal, the Commissioner determined that there appeared to be some measure of confusion as to the timing of parties' telephone conference and, further, there was a Board motion left outstanding in the matter. Thus, interests of fundamental fairness require that this matter be returned to OAL for further proceedings.

June 10, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 12340-95
AGENCY DKT. NO. 405-10/95

A. L. AND N.L. ON BEHALF OF MINOR, N. L.,
Petitioners,
v.
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT,
Respondent.

A. L. AND N.L., *pro se*

Joanne L. Butler, Esq., for respondent
(Young, Dimero & Sayowitz, attorneys)

Record Closed: March 20, 1996 Decided: April 23, 1996

BEFORE **IRENE JONES**, ALJ:

Petitioners, A.L. and N.L., on behalf of N.L., appeals the April 1994 decision of the South Orange-Maplewood Board of Education that denied N.L. admission to its school district.

The matter was transmitted to the Office of Administrative Law for hearing on December 13, 1995. A telephone prehearing conference was scheduled for February 2, 1996. At that conference, the respondent was available but the petitioners were not. Petitioners have failed to contact the undersigned and have failed to answer the counterclaim. On March 20, 1996, respondent filed a certification and a proposed Order seeking a default judgment against the petitioners.

After a review of the this matter, I **FIND** that petitioner failed to appear for the conference or otherwise prosecute this matter. I further **FIND** that petitioner has been duly notified. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED** with prejudice. (Exh. A).

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

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

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

4/23/96
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

4/24/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 30 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

A.L. AND N.L., on behalf of minor, N.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) dismissing the instant petition for petitioners' failure to appear for conference or otherwise prosecute this matter have been reviewed. On May 13, 1996, petitioners filed a letter objecting to the ALJ's dismissal of this matter. By letter, dated May 14, 1996, from the Director of the Bureau of Controversies and Disputes, the Board was accorded an opportunity to respond to petitioners' submission and it duly filed such response on May 20, 1996.

Petitioners' contend that a telephone conference in this matter, originally scheduled "***on or about January 29, 1996 at 4:00 p.m.***" was subsequently postponed and rescheduled for February 2, 1996. Petitioners' maintain that they were available for the telephone conference on this date but it never took place. They further assert that when they telephoned the ALJ the following week, they were informed that a new date for the conference would be established but heard nothing further. Petitioners urge that they "have every intention of pursuing and prosecuting the case and ask that the case be reinstated to the active case list." (Petitioners' Letter at p. 1)

In response, the Board contends that, to the best of its belief, petitioners were unavailable for the scheduled conference call. It asserts that it is unable to respond to petitioners' contentions with respect to a conversation with the ALJ, but urges that it is highly unlikely that

"***circumstances were as alleged by Petitioner[s]" (Board's Reply Letter at p. 1), and urge that the ALJ's dismissal of this matter, under the circumstances, is entirely appropriate pursuant to *N.J.A.C.* 1:1-14.4 and -14.14. The Board observes, however, that although in her decision the ALJ references the Board's motion seeking default judgment against petitioners for their failure to respond to its counterclaim in this matter, she erroneously failed to take any action with respect to this motion in her decision. The Board urges, that under the circumstances existing here, the Commissioner should uphold the dismissal of the petition and grant the Board default judgment on the counterclaim.

Upon a careful and independent review of the record in this matter, the Commissioner cannot concur with the ALJ's conclusion that this matter must be dismissed. In that petitioners' letter raises allegations of the existence of some measure of confusion with respect to the timing of the parties' telephone conference, and in that there is also a Board motion left outstanding herein, the Commissioner determines that interests of fundamental fairness require that this matter be returned to the OAL for further proceedings consistent with *N.J.A.C.* 1:1-1 *et seq.*

Accordingly, the initial decision of the OAL is reversed and this matter shall be returned to the OAL for further proceedings, along with a request that this matter be heard on an expedited basis as it involves a residency dispute.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 10, 1996
Date of Mailing, June 11, 1996

254-96

268-97
(254-96)

A.L. and N.L., on behalf of minor child, N.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

MAY 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5968-96
AGENCY DKT. NO. 405-10/95

A.L. AND N.L. ON BEHALF OF MINOR N.L.,
Petitioners,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,
Respondent

Scott Leonard, Esq., for petitioners
(Leonard & Leonard, attorneys)

Joanne Butler, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: March 19, 1997 Decided: April 3, 1997

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 18, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for March 12, 1997 at the OAL in Newark, New Jersey. At the request of the parties, the hearing was adjourned for

purposes of settlement discussions and an agreement was reached. A stipulation of settlement was signed by the parties and was filed on March 19, 1997. The stipulation of settlement is attached hereto and made a part hereof.

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

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

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

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

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

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

4/3/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

April 10, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

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March 19, 1997

The Honorable Irene Jones
The Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: Levine v. South Orange-Maplewood Board of Education
Our File No.: 12459-0021

Dear Judge Jones:

Enclosed for filing please find the original and three (3) copies of the Stipulation of Settlement in the above referenced matter.

Kindly return two copies stamped filed in the enclosed envelope.

The Court's courtesy and attention in this regard have been greatly appreciated.

Respectfully submitted,

Joanne L. Butler

cc: Scott Leonard, Esq.
Encl.
JLB:cgs

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SCHENCK, PRICE, SMITH & KING
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Attorneys for Respondent South Orange/
Maplewood Board of Education

MAR 13 3 05 PM '97

ALEX & NELCIE C. LEVINE, Petitioners, v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, DR. JACQUELINE L. CUSACK, DR. R. LIEBER, and DR. J. WEISS, Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT NO. EDUOS-~~12340~~-95N Agency Ref. No. 405-10/95 **STIPULATION OF SETTLEMENT**
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Counterclaimant, v. ALEX & NELCIE C. LEVINE and SOLANGE LEVINE, Counterclaim Respondents.	

Petitioners Alex and Nelcie C. Levine and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, and Counterclaim Respondent Solange Levine, herein stipulate as follows:

1. The claims against individual Respondents Jacqueline L. Cusack, Dr. R. Lieber and Dr. J. Weiss were voluntarily dismissed by Petitioners on the Court's record on February 6, 1997.

2. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

3. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, and specifically release the other parties from any claims arising out of or related to these claims.

4. The pupil N.L. will be permitted to continue to attend District schools so long as she satisfies the statutory criteria set forth in N.J.S.A. 18A:38-1, et seq.

5. As a result of the foregoing, Petitioners hereby withdraw the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

Alex Levine

Alex Levine

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD

Nelcie C. Levine

Nelcie C. Levine

Solange Levine

Solange Levine

F:\APPS\SSOLDATA\WP\JLB\202909.1

OAL DKT. NOS. EDU 5968-96 and EDU 12340-95 (ON REMAND)
AGENCY DKT. NO. 405-10/95

A.L. and N.L., on behalf of minor child, N.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

MAY 21, 1997
DATE OF MAILING MAY 21, 1997

255-96

255-96M

IN THE MATTER OF THE CERTIFICATION OF DR. COLUMBUS SALLEY.	:	
AND	:	
DR. COLUMBUS SALLEY AND THE BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY, PETITIONERS,	:	COMMISSIONER OF EDUCATION DECISION ON MOTION
V.	:	
STATE BOARD OF EXAMINERS, NEW JERSEY STATE DEPARTMENT OF EDUCATION, RESPONDENT.	:	

For Petitioners-Movants, Schwartz, Simon, Edelstein, Celso and Kessler (Nicholas Celso, III)
For Respondent, Deborah T. Poritz, Attorney General (Michelle Lyn Miller, DAG)

This interim matter was opened by way of a motion filed on May 31, 1996, wherein petitioners (Dr. Salley and the Orange Board of Education) sought a stay of the Commissioner's letter determination of March 27, 1996, presently on appeal before the State Board of Education, advising that Dr. Salley was approved to serve as Acting Superintendent pursuant to N.J.A.C. 6:5-3.1 only until June 30, 1996, and that no further extensions of this approval would be granted. Specifically, petitioners seek approval for Dr. Salley to serve as Acting Superintendent until a final agency decision is reached on the underlying certification

issue presently in dispute before the Commissioner, and, in the event that such decision is adverse to Dr. Salley, the Commissioner's permission to have Dr. Salley remain in his acting capacity until such time as he can complete the test required by the Board of Examiners in order to issue a school administrator endorsement. Concurrently, petitioners also sought emergent relief in the form of issuance by June 30, 1996 of a Commissioner's decision on Dr. Salley's appeal, filed on April 29, 1996, of the State Board of Examiners' determination not to issue him a provisional school administrator certificate.

Briefly summarized, the factual background of this matter is as follows: Dr. Salley was offered a contract for employment by the Board as Superintendent of Schools, effective January 2, 1996. On or about December 29, 1995, the Acting County Superintendent advised that Dr. Salley could not assume the superintendency because he did not possess the required school administrator's endorsement, possessing instead, as the Board was aware and deemed appropriate, certification issued in 1981 as an executive superintendent. The Board then requested that the Commissioner permit the appointment of Dr. Salley in an acting capacity, pursuant to N.J.A.C. 6:5-3.1, for 90 days or until the certification issue was resolved. By letter dated January 2, 1996, the Commissioner responded to the Board's request, granting approval until April 1, 1996, on the condition that Dr. Salley immediately initiate the process for issuance of the required certification.

Dr. Salley received, on or about January 4, 1996, a determination from the Office of Teacher Certification and Academic Credentials in the Department of Education that he did not qualify for the present school administrator endorsement, together with instruction as to what requirements remained for him to satisfy; on or about January 31, 1996, he appealed this determination to the State Board of Examiners. Because the appeal was not resolved prior to April 1, the Board requested, and the Commissioner granted, in order to avoid "possible disruption during a critical period of the school year," a further extension of Dr. Salley's acting capacity until June 30, 1996; in doing so, however, the Commissioner noted that no extensions would be granted thereafter and that the district must take steps to procure an appropriately certified superintendent for the 1996-97 school year. On April 15, 1996, the Board of Examiners affirmed the Office of Teacher Certification's determination that Dr. Salley did not qualify for

the school administrator endorsement. The above-referenced appeal to the Commissioner was filed soon thereafter, as was the appeal to the State Board of Education of the Commissioner's letter determination, at issue herein, not to grant further extensions beyond June 30, 1996. Additionally, on or about April 25, 1996, petitioners filed an action in Superior Court, Law Division, where, on May 28, 1996, Judge Alvin Weiss dismissed their application for emergent relief, but retained jurisdiction over petitioners' complaint, scheduled a hearing for June 25, 1996, and, according to petitioners' papers, directed petitioners to seek emergent relief from the Commissioner in the interim.

In addressing the criteria for grant of both a stay and emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), petitioners argue that, in the absence of the requested relief, they will suffer irreparable harm. They further contend that they have a likelihood of success on the merits of the underlying appeal, and that the equities weigh in their favor. With respect to irreparable harm, petitioners argue that the Board will be deprived of the services of its chosen educational leader, and that loss of Dr. Salley's administrative expertise will adversely affect both operations and the children of the district in a manner that cannot be recompensed through monetary means. Dr. Salley, in turn, will lose his ability to practice his profession, and will be effectively deprived of his professional license, hence a valuable property interest, without due process of law. This has resulted, petitioners argue, both from the Department of Education's manner of applying its regulations so as to exclude persons certified as executive superintendents, and from the Commissioner's refusal, through imposition of a June 30, 1996 termination date, to accord Dr. Salley sufficient time to pursue his right to the administrative hearing which he never received from the Board of Examiners and to which he is entitled upon effective revocation of his certificate pursuant to N.J.A.C. 6:11-3.6. (Petitioners' Brief at 4-9)

With respect to likelihood of success on the merits, petitioners argue that they will prevail on their underlying certification claim, in that the requirements Dr. Salley had to fulfill to obtain executive superintendent certification either meet or exceed those required for the present school administrator endorsement, and Dr. Salley certainly would have qualified for the school administrator endorsement as it existed at the time he received his executive superintendent certification. Moreover, petitioners contend, the legislative history of applicable statutes and

regulations leads to the inescapable conclusion that executive superintendent is a higher level of certification which authorized, and authorizes in perpetuity, its holder to perform not only all the duties of a superintendent, but additional duties which the holder of the lesser school administrator endorsement cannot perform. (Petitioners' Brief at 9-14)

With respect to the equities, petitioners argue that the only hardship herein will flow to Dr. Salley and the Board, which will be forced to initiate a search for a new superintendent and operate the district with a less qualified person in command. The Department, in contrast, must merely make an accommodation of time to permit Dr. Salley to pursue the due process to which he is clearly entitled. (Petitioners' Brief at 14-15)

In reply, the State Board of Examiners (SBOE) initially notes that it takes no position on petitioners' request for a decision on the underlying certification matter by June 30, 1996, but that it "trusts the Commissioner will note the intricacies of the issues involved and the time lines accorded by the pertinent administrative regulations and will exercise his discretion in granting this motion accordingly." (Respondent's Reply Brief at 2) Additionally, SBOE notes that petitioners' request for a "stay" is illogical, and that the proper course of action would have been to ask the Commissioner to consider renewing, for an additional three-month term, his permission for Dr. Salley to serve in an acting capacity. Should that request have been denied, the issue would be ripe for appeal to the State Board of Education and application for stay by the Commissioner. (Id. at 5)

In addressing petitioners' arguments on the Crowe standards, SBOE contends that petitioners have improperly addressed the merits of their underlying certification appeal, when the decision they are seeking to stay is that of the Commissioner not to extend the deadline for Dr. Salley's service in an acting capacity. With respect to that decision, the record clearly demonstrates that the Commissioner's action was neither arbitrary nor improper, and was instead based on a determination to preserve the district's administrative continuity through the spring while ensuring action to obtain a fully certified chief school administrator by the opening of school in the fall. Therefore, petitioners cannot succeed on the merits of their appeal to the State Board. Additionally, petitioners have failed to show irreparable harm, in that Dr. Salley's possible employment crisis is of his own making, he cannot show any entitlement to his position

beyond the three-month extension already granted by the Commissioner, and the Board's contention that it cannot find a comparable educational leader does not rise to the level of irreparable harm sufficient to warrant emergent relief. Finally, with respect to equities, the community of Orange and the public interest generally will certainly be harmed by impeding procuration of a fully certified superintendent, and any harm to the Board is caused solely by its own failure to employ such a superintendent within the adequate time allotted. (Respondent's Reply Brief at 6-10)

Upon review and consideration, the Commissioner initially determines to construe petitioners' motion for stay as a request for reconsideration of the Commissioner's prior determination to deny a further three-month extension of permission for Dr. Salley to serve as superintendent in an acting capacity and as a request for such extension. He does so because he cannot "stay" the expiration of his approval under the terms of the controlling regulation, but can merely approve three-month extensions for a total period of up to one year, with any subsequent extension requiring action by the State Board of Education. N.J.A.C. 6:5-3.1.

Having so construed petitioners' motion, the Commissioner determines to grant the requested extension. The Commissioner finds that his earlier decision not to further extend Dr. Salley's termination date was well-grounded based on the circumstances as they existed at the time of the decision, when the State Board of Examiners had not yet ruled on Dr. Salley's qualifications and no appeal of the Board's decision had been filed with the Commissioner. However, the Commissioner also finds that subsequent events warrant reconsideration of that decision, given that the Board's determination was adverse to Dr. Salley and that petitioners' have, within the context of the present motion, offered arguments on the merits of the underlying certification appeal which reveal that their position is not a frivolous one, and which support their contention that Dr. Salley should be permitted to continue on his path of pursuing remedy before the Commissioner.

Accordingly, the Commissioner hereby vacates his prior determination not to renew Dr. Salley's service as acting superintendent beyond June 30, 1996 and extends this service for an additional three-month period, i.e., until September 30, 1996. Moreover, in order to effectuate prompt resolution of the underlying certification appeal, which is not amenable to

hearing and determination by the imminent date (June 30, 1996) requested by petitioners, a copy of this decision shall be forwarded to the Clerk of the Office of Administrative Law so as to advise that the Commissioner is requesting priority scheduling pursuant to N.J.A.C. 1:1-9.3 and, further, that the Commissioner consents to accelerated proceedings, should the parties and judge agree to such proceedings pursuant to N.J.A.C. 1:1-9.4. Should proceedings before the Commissioner on the underlying appeal not be concluded by September 30, 1996, the Commissioner will entertain a request from petitioners for an additional three-month extension pursuant to N.J.A.C. 6:5-3.1, to be assessed by the Commissioner based upon circumstances as they exist at that time.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The Commissioner notes that on June 11, 1996, petitioners submitted a Reply to Respondents' Response Brief. As no provision was made for such submission, these papers are not considered herein.

JUNE 12, 1996
DATE OF MAILING JUNE 13, 1996

256-96

256-96E

D.S., on behalf of daughter, D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent sought emergent relief permitting daughter, D.C., to participate in graduation ceremonies. D.C. was barred from participation due to insufficient course credits as student had violated Board's truancy policy.

Commissioner denied emergent relief, finding petitioner failed to meet *Crowe* standards. As to merits of the matter, Commissioner found that petitioner failed to demonstrate that the Board's action was unreasonable, arbitrary and capricious or taken in bad faith. Commissioner found that the Board provided D.C. not only with avenues of appeal, but with the opportunity to modify her conduct so as to be permitted to graduate in June 1996. Petition was dismissed.

JUNE 14, 1996

D.S., on behalf of daughter, D.C., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY TROY HILLS, MORRIS COUNTY, : DECISION

RESPONDENT. :

:

For Petitioner, D.S., *Pro Se*

For Respondent, Marie-Laurence Fabian, Esq. (Dillan, Bitar & Luther)

This matter was opened before the Commissioner of Education on May 20, 1996, by way of a Petition of Appeal filed by D.S., on behalf of her daughter, D.C. On May 22, 1996, petitioner filed a Motion for Emergent Relief seeking an order permitting D.C. to participate in graduation ceremonies from Parsippany High School on June 20, 1996.[1] Principal Melvin Zirkes, Ed.D., determined to bar D.C. from participation in graduation ceremonies due to insufficient course credits. It is herein noted that this matter was filed before the Commissioner prior to the Board's opportunity to take action to uphold the principal's decision. However, inasmuch as petitioner asserts that the Board has not responded to her request to appeal this matter, and in view of the need to expeditiously resolve this issue, the

[1] Petitioner's initial submissions erroneously identify the graduation date as June 15, 1996.

Commissioner determines to entertain petitioner's Motion for Emergent Relief, notwithstanding that there has been no final Board determination pursuant to *N.J.A.C.* 6:24-1.2(c). Additionally, the Board does not challenge petitioner's having taken appeal in this forum.

The Commissioner finds that this matter is appropriate for summary judgment in that no material facts are in dispute. Further, the Commissioner determines that the nature of the dispute is such that resolution of both the emergent question and the merits of this matter is best effectuated concurrently.

The Commissioner finds the following material facts. D.C. is a senior at Parsippany High School. Her credits in three courses, Physical Education, Cooperative Education (COE) and Drawing I, were withheld on or about December 1, 1995 pursuant to the District's published policy against truancy. D.C. appealed the withdrawal of her credits to the Board. By letter to the Board's Appeals Committee dated December 6, 1995, D.C. states, in pertinent part, "I understand that I made a serious mistake by being truant on Friday, December 1, 1995." (D.C.'s letter to Board's Appeals Committee, December 6, 1995) The Appeals Committee agreed to restore the credits in all D.C.'s subjects, provided that D.C. met the terms of a "student contract" setting forth behavioral expectations. D.C. signed the contract on January 22, 1996, as did Principal Zirkes, Vice Principal Meehan, and D.C.'s guidance counselor. D.C.'s mother signed the contract on January 23, 1996.

Thereafter, D.C. "broke the contract" by violating school rules. The Board asserts that, on March 27, 1996, D.C. left school premises in contravention of school policy. D.S. does not dispute that D.C. "***went off school property on her free period to get something to eat***." (Petition of Appeal at p. 1) However, D.S. asserts that D.C. was unaware that she was

not permitted to leave the campus on her free period. (*Id.*) D.S. and D.C. were then notified that violation of the student contract resulted in the loss of credits in all three courses, as identified above. However, pursuant to an informal appeal by D.S., and by letter dated April 18, 1996, Dr. Zirkes informed D.S. and D.C. that he was removing D.C.'s credit from Physical Education, but allowing her to receive credit for Drawing I and COE, if she did not violate any school rules between that date and the end of the school year. Dr. Zirkes informed D.C. that she could take Physical Education in summer school and receive her diploma upon receiving the results of the summer classes. Dr. Zirkes further notified D.C. that she could not march in the Parsippany High School June graduation exercises.

PETITIONER'S POSITION

Petitioner asserts that D.C. is entitled to emergent relief in that the punishment issued by the Board is harmful to D.C.'s self-esteem and educational growth. Petitioner further asserts that the potential harm to her daughter is more severe than the possible harm to the Board, inasmuch as the negative effects of D.C.'s failure to graduate in June will be "long term." (Petitioner's Motion for Emergent Relief) Petitioner affirms that her daughter is a good student who is liked by her teachers and her peers. She argues that a decision regarding a student's graduation "*** should be based solely on academic merit ***." (*Id.*)

As to the merits of the case, petitioner acknowledges that D.C. failed to attend school one day when she instead visited the Fairleigh Dickinson University Campus. (Petition of Appeal at p. 1) Petitioner further acknowledges that, later, D.C. "***went off school property on her free period to get something to eat ***." (*Id.*) However, petitioner contends that these incidents are not serious enough to warrant barring D.C. from participation in graduation

ceremonies. Petitioner further asserts that her pleas to the District "***have fallen on deaf ears***." (*Id.* at p. 2) Moreover, petitioner urges the Commissioner to be mindful of the hardships which D.C. has suffered and the significant progress she has made in school under difficult circumstances.

As to the student contract which D.C. signed in January, petitioner appears to argue that she was assured it would merely be a "scare tactic" and that D.C. would graduate in June. (*Id.*) When D.S. was informed that D.C. would not be graduating in June, she met with Principal Zirkes, and further asserts that she tried to speak with the superintendent, as well as to appeal this matter to the Board. Petitioner concludes,

> ***I feel that the punishment should fit the crime in any situation and this punishment is too severe and will only teach my daughter to have more anger and feel more let down. I am sure they can pick a punishment that will serve a purpose and will have less harmful effects in [sic] my daughter's education. (*Id.* at p. 3)

RESPONDENT'S POSITION

In response to petitioner's Motion for Emergent Relief, the Board argues that *R.F. v. Park Ridge Board of Education*, 93 *N.J.A.R.* 2d (EDU) 79, 81 establishes that participation in a graduation ceremony is a privilege which "***can be revoked for infractions of school rules ***." (Board's Brief in Opposition to Petitioner's Motion for Emergent Relief at p. 5) The Board contends that D.S. fails to establish that D.C. will experience irreparable harm if she is not permitted to march in the June graduation ceremonies, and "Petitioner has in no way established a likelihood of success on the merits***."[2] (*Id.*) The Board further notes that "[P]etitioner's assertions regarding harm to D.C.'s self esteem and educational growth are totally unsupported." (*Id.*) The Board continues,

[2] The Board's arguments as to the merits of this case are fully developed, *infra.*

> In weighing the relative hardships to the parties in this matter, the Commissioner must consider the goal of the school district when it disciplined D.C. Petitioner's position ignores the valuable lesson to be learned by D.C. and her peers that one must suffer the consequences of one's actions. The granting of emergent relief in this matter would unfairly strike a death blow to respondent's disciplinary policy. (*Id.* at pp. 5, 6)

As to the merits of the instant matter, the Board offers affidavits from Principal Zirkes and Vice Principal Meehan attesting to the facts. Principal Zirkes provides the following rationale for his decision:

> ***I was aware that D.C. intended to attend Morris County College in September and I did not wish to prevent her from starting college at that time. On the other hand, I wanted her to realize that she must accept responsibility for her actions. Moreover, it was important that she be dealt with in such a way that would send a message to the student body that repeated violations of school rules will not be tolerated. Therefore, I told her that she could obtain the necessary physical education credit to graduate over the summer and still begin college in September.*** (Zirkes' affidavit at pp. 2, 3)

Here, the Board asserts that D.C. first failed to comply with its anti-truancy policy and, later, with the Board's closed campus policy as published in the Parsippany High School Student and Parent Handbook. Thus, the Board maintains that it is within its discretionary power to appropriately discipline D.C. (Board's Brief at p. 4) Moreover, the Board warrants, "It is well established that the action of a Board of Education which 'lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.'" (*Id.*, citing *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960)

The Board also argues that the student contract which D.C. signed in January clearly indicated that violations of school rules would result in the loss of credit for the three

courses noted in the contract, COE, Drawing I and Physical Education. Nevertheless, Principal Zirkes permitted D.C. to maintain her credits in COE and Drawing I. (*Id.* at p. 1)

DISCUSSION AND CONCLUSIONS

In accordance with *N.J.A.C.* 6:24-1.5, a grant of emergent relief is considered an extraordinary remedy which can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The *Crowe* standard requires petitioner to demonstrate that D.C. will be irreparably harmed if not permitted to attend and participate in the graduation ceremony; that the legal right underlying petitioner's claim is settled; that petitioner has a substantial likelihood of prevailing on the merits of the claim; and that in balancing the interests of the parties, the harm to D.C. will be greater than the harm to the Board should the requested relief not be granted.

The Commissioner finds that petitioner has failed to meet any of the prongs set forth in *Crowe* and, thus, petitioner has not demonstrated entitlement to emergent relief. D.C.'s alleged injury from nonparticipation in graduation ceremonies does not constitute irreparable harm sufficient to warrant such extraordinary remedy. Moreover, it is noted D.C.'s status as a high school student does not afford her the legal entitlement to participate in extracurricular activities, such as a graduation ceremony. See *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, State Board of Education decision dated April 17, 1996, citing *Camden City Board of Education v. NJSIAA*, Docket #A-2802-91T2 (App. Div. 1992); *Burnside et al. v. NJSIAA*, 1984 *S.L.D.* 1695 (App. Div. 1984), *cert. denied* 101 *N.J.* 236 (1985). Clearly, the equities in this matter lie on the side of the Board which has adopted and published the pertinent policies and which has a significant interest in ensuring that

its disciplinary policies are implemented in such a way that violators understand there will be consequences for their misconduct.

As to the merits of this matter, the Commissioner observes that he cannot disturb the decision as to the denial of D.C.'s Physical Education credit unless D.S. has shown that it was unreasonable, arbitrary and capricious for the Board to have acted as it did under the circumstances. In the instant matter, petitioner has failed to demonstrate that the Board's decision was unreasonable, arbitrary and capricious or otherwise taken in bad faith. To the contrary, the Commissioner finds that the Board has provided D.C. not only with avenues of appeal, but with the opportunity to modify her conduct so as to be permitted to graduate in June 1996. Unfortunately, D.C. elected not to avail herself of this opportunity.

Accordingly, the Motion for Emergent Relief is denied and there being no outstanding issues requiring further resolution on the merits, the petition is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 14, 1996

DATE OF MAILING JUNE 14, 1996

258-96

258-96

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCIS SABO,	:	
ALBERT G. WAGNER YOUTH	:	COMMISSIONER OF EDUCATION
CORRECTIONAL FACILITY,	:	DECISION
STATE OF NEW JERSEY.	:	

JUNE 17, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8587-95
AGENCY DKT. NO. 185-5/95

IN THE MATTER OF THE TENURE HEARING OF FRANCIS SABO, ALBERT G. WAGNER, YOUTH CORRECTIONAL FACILITY, STATE OF NEW JERSEY.

Judith Lieberman, Deputy Attorney General, for petitioner, Albert C. Wagner Youth Correctional Facility (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Sharra Greer, Esq., for respondent Francis Sabo (Weissman & Mintz, attorneys)

Record Closed: April 23, 1996 Decided: April 30, 1996

BEFORE **DANIEL B. MCKEOWN,** ALJ:

This matter was transmitted to the Office of Administrative Law on September 20, 1995, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement based upon their signatures and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

April 30, 1996
DATE

Daniel McKeown
DANIEL B. MCKEOWN, ALJ t/a

Receipt Acknowledged:

May 1, 1996
DATE

DN Antanaitis Jr
DEPARTMENT OF EDUCATION

MAY 3 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

km

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
25 MARKET STREET
CN 112
TRENTON, NJ 08625-0112

CHRISTINE TODD WHITMAN
Governor

DEBORAH T. PORITZ
Attorney General

(609) 292-8582

April 19, 1996

Honorable Daniel McKeown, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, NJ 08625

Re: In the Matter of the Tenure Hearing of Francis Sabo,
Albert C. Wagner Youth Correctional Facility
OAL DKT. NO. 08587-95

Dear Judge McKeown:

Enclosed please find the signed Settlement Agreement in the above matter.

Very truly yours,

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY

By: Judith Lieberman
Judith Lieberman
Deputy Attorney General

dtn
cc: Sharra Greer, Esq.

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OFFICE OF ADMINISTRATIVE LAW

	)	HONORABLE DANIEL MCKEOWN OAL DKT. NO. EDU 08587-95
IN THE MATTER OF THE TENURE HEARING OF FRANCIS SABO, ALBERT C. WAGNER YOUTH CORRECTIONAL FACILITY	)	
	)	SELLETMENT AGREEMENT

The parties agree to settle this matter in accordance with the following terms:

1. Petitioning Department of Corrections shall withdraw the tenure charges against Respondent Sabo (Respondent).

2. Respondent's personnel file shall reflect that the tenure charges filed against him were withdrawn by the Department under a Settlement Agreement.

3. Respondent shall retire from his employment as a teacher with the Department of Corrections and he agrees not to seek renewal of active employment with that Agency.

4. The parties agree that this Settlement Agreement resolves all issues in controversy between them and that all such claims and counterclaims which may have arisen from such issues are mutually waived.

5. The Department of Corrections will pay Respondent $5,849.10 back pay for the period beginning December 11, 1995 and ending after the first half of the January 26, 1996 work day. In addition, the Department of Corrections agrees to compensate respondent for unused accumulated vacation and sick days.

6. The respondent will not receive any counsel fees, costs or any other monetary relief as a result of this settlement.

7. Between the date this Settlement Agreement is signed by the parties and its approval by the Commissioner of Education, Respondent agrees to use his accumulated vacation time. In the event his accumulated vacation time is exhausted, Respondent agrees to be placed on an approved leave of absence without pay by the Department of Corrections until the date of the Commissioner of Education's decision.

8. The parties agree to waive the filing of exceptions to the initial decision which would recommend the approval of the Settlement Agreement as a complete and final disposition of the matter.

9. Nothing contained within this Agreement shall be considered as precedent in other existing or future cases by the Department of Corrections.

10. The Department of Corrections agrees to submit a letter to the State Health Benefits Commission to suggest that respondent be compensated for insurance premiums paid by him between December 11, 1995 and the first half of January 26, 1996. However, the Department of Corrections has no authority or control over the ultimate decision of the State Health Benefits Commission.

11. The Department of Corrections will permit respondent to return to the Albert C. Wagner Youth Correctional Facility so that he may retrieve his personal belongings. Respondent must first provide at least 24 hours notice of his intent to enter the Facility and must do so during a regular day and during regular work hours. Respondent will be accompanied by an escort when he enters the Facility and retrieves his belongings.

12. The parties acknowledge that this Settlement Agreement may not be consummated until approval by the Commissioner of Education. Any disapproval by the Commissioner of Education shall not interfere with the rights of either party to pursue this matter further.

13. The Department of Corrections will respond to inquiries about the Respondent from prospective employers, other than the New Jersey Department of Corrections, by indicating only that respondent is retired and by stating the position he held, how long he held it and the salary he was paid.

Gerard Bellcastro 4/17/96
For the Department of Corrections (Date)

Thomas Shivers 4/17/96
For the Department of Corrections (Date)

Jos. E. Butler 4/18/96
For the Department of Corrections (Date)

Hans J. Sabol 4-3-96
Respondent (Date)

4-10-96
Respondent's Representative (Date)

OAL DKT. NO. EDU 8587-95

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCIS SABO,	:	
ALBERT G. WAGNER YOUTH	:	COMMISSIONER OF EDUCATION
CORRECTIONAL FACILITY,	:	DECISION
STATE OF NEW JERSEY.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846. Specifically, the proposed agreement provides no indication that the respondent teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

Accordingly, this matter is remanded to the OAL for modification, as above noted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 17, 1996
DATE OF MAILING JUNE 17, 1996

259-96

259-96

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY ANN BAUER,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF NORTH BERGEN,	:	DECISION
HUDSON COUNTY.	:	
_____	:	

JUNE 17, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4126-93
AGENCY DKT. No. 49-3/93

SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,
Petitioner,
v.
MARY ANN BAUER,
Respondent.

Robert A. Silber, Esq., for petitioner
(Giblin & Giblin, attorneys)

Harold A. Ruvoldt, Jr., Esq., for respondent
(Ruvoldt & Ruvoldt, P.A., attorneys)

Record Closed: April 10, 1996 Decided: April 29, 1996

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves the settlement of a contested case before the Office of Administrative Law (OAL) that had been consolidated with a related State Board of Examiners matter. The relevant details are as follows:

In July 1992 the School District of the Township of North Bergen, Hudson County, (North Bergen Board) filed a petition and Order to Show Cause with the State

Board of Examiners (State Board) for revocation of respondent Mary Ann Bauer's teaching certificate, based on allegations that the petitioner claimed credit hours and pay for home instruction that was not provided. The matter was transmitted to the OAL by the State Board of Examiners on October 5, 1992 as a contested case. OAL DKT. EDE 7696-92.

The School District of the Township of North Bergen subsequently prepared tenure charges of unbecoming conduct and other just cause against the respondent, based on the same allegations of misconduct that were contained in the State Board of Examiners matter.

After certification, the tenure charges were forwarded to the Commissioner of Education, who transmitted the matter to the OAL as a contested case in May 1993, approximately nine months after the petition had been filed with the Board of Examiners, asking for revocation of the teaching certificate.

Following several status conferences and prehearing procedures, the Board of Examiners case was placed on the inactive list, pending disposition of the tenure charge matter. However, it was later decided that it would be more expeditious to consolidate the two cases for hearing, since both matters were based on identical factual allegations against the petitioner.

The consolidated hearing began on February 7, 1994. A substantial period of delay interrupted the hearing because of substitution of counsel for respondent, additional conferences, illness of counsel and other interim proceedings. The hearings resumed at the end of 1994 and continued through August 24, 1995, for an aggregate total of ten days. Additional conferences and other proceedings followed, into 1996.

On the last day of plenary hearing, counsel for the North Bergen Board and for the respondent arrived at a settlement between them in the tenure case, wherein the respondent would resign immediately, effective July 1, 1996, with a sabbatical leave to begin on the first day of the 1995-96 school year. Other terms and conditions were incorporated into the agreement.

begin on the first day of the 1995-96 school year. Other terms and conditions were incorporated into the agreement.

Since the respondent's resignation would effectively end her position and tenure in the school district, and since, by virtue of the interim sabbatical leave, the respondent would no longer resume any instructional duties, the North Bergen Board indicated that such a resolution would put an immediate end to the considerable amount of time, effort, legal expense and administrative costs involved. The Board further stated that, because its objective was fully realized without a continuation of such costs and expenses, it was in its best interest to settle.

A copy of the stipulation of settlement between the school district and the respondent, filed in the OAL on April 10, 1996, is attached hereto and made a part hereof.

It is particularly noted that the settlement between the North Bergen Board and the respondent does not terminate or otherwise affect the continuation of the proceeding by the State Board of Examiners at the OAL against the respondent, relating to her teaching certificate. That matter will proceed to a conclusion.

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

1. The parties, School District of the Township of North Bergen and the respondent have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement, after severance of the case from the continuing Board of Examiners matter, fully disposes of the issues in controversy between these two parties.

I therefore **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1. I approve the settlement and therefore **ORDER** the parties to comply with the

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

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

April 29, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

May April 3, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 7 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF THE SECRETARY

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GIBLIN & GIBLIN, ESQS.
Two Forest Avenue
Oradell, New Jersey 07649
(201) 262-9500
Attorneys for School District of North
Bergen, Hudson County

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

OAL DOCKET NO. EDU 04126-93 N
AGENCY REF. NO. 49-3/93

IN THE MATTER OF MARY ANN BAUER, A TENURED TEACHING STAFF MEMBER, SCHOOL DISTRICT OF NORTH BERGEN HUDSON COUNTY.

Civil Action

STIPULATION OF SETTLEMENT

The parties to the above matter have agreed to an amicable resolution of this litigation. The resolution is based upon agreement as to the following:

1. The Respondent, Mary Ann Bauer, was employed by the Petitioner, School District of North Bergen as of September 1, 1982, and in due course became tenured.

2. It is alleged by the Board of Education that on a number of occasions during her employment, the Respondent submitted improper home instruction vouchers. It is alleged by the Respondent that this did not begin until prior practices by the Board led to an unfortunate misunderstanding between the parties.

3. As a result, the Board voted on March 17, 1993, to certify tenure charges against the Respondent, Mary Ann Bauer.

4. In addition to the time, legal and related administrative costs regarding the continuation of this matter, it is in the best interest of the school system to settle this matter, and the factual issues that legitimately exist and the teacher

within the public interest and adequately address the concerns of the school district and not reflect adversely on Mrs Bauer.

Based on the aforementioned, the parties hereby agree to resolve this matter on the following basis:

1. Mary Ann Bauer will immediately resign effective ~~the July 1st 1995 end of the 1993-1994 school year~~ July 1st 1996.

2. The Board shall respond in writing to any written request regarding the employment history of Mary Ann Bauer and shall ~~only~~ provide the following information:

(a) Starting date/ending date of her SALARY for 1996.

(b) Position held,

(c) A letter ~~from~~ the Language submitted by her Atty

3. Mary Ann Bauer shall be ~~entitled to receive all rights and benefits provided for in the parties' collective Bargaining Agreement, including but not limited to accumulated sick leave and pension~~ granted effective the 1ST DAY of the 1995-1996 school year A SABBATICAL LEAVE AT 25% PAY WITH ALL BENEFIT According to the Collective BARGAINING Agreement for People on SABBATICAL.

4. This Agreement represents a complete resolution of all issues outstanding between the parties. Neither party shall be entitled to any relief in this matter, other than the relief set forth in this Agreement, nor will the Board initiate or participate in placing further charges against Mary Ann Bauer.

5. The provisions of the Stipulation of Settlement are specifically conditioned on the approval by the Commissioner of Education of the acceptance of this Stipulation and the approval of any Order of Dismissal which may be recommended by the Administrative Law Judge. If the Commissioner shall reject the provisions of this Stipulation of Settlement and/or an Order of the Administrative Law Judge, then the parties shall revert to the

4 UNDERSTANDING THAT some MUTUAL misunderstandings MAY have lead to this dispute the BOARD SHALL PAY to Mrs. BAUER A Counsel Fee of Ten thousand DOLLARS.

position they were in, without prejudice to any and all matters then to be determined. In the interim IN View of the exigencies of the School year with the unique needs of the RS Special education students in North Bergen

GIBLIN & GIBLIN

DATED: ~~May 26~~ August 24, 1995

By _____
~~[redacted]~~ Robert A. Sibbee
Labor Counsel, North Bergen
Board of Education

~~MULLICA & MULLICA~~ Fischbein Badillo Wagner Itzler

DATED: 8/24/95

By _____
~~Victor F. Mullica~~ Harold Ruvoldt
Attorney for Respondent

DATED: 08/24/95

By Mary A. Bauer 08-24-95
MARY ANN BAUER, Respondent

OAL DKT. NO. EDU 4126-93

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY ANN BAUER,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF NORTH BERGEN,	:	DECISION
HUDSON COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JUNE 17, 1996
DATE OF MAILING JUNE 17, 1996

260-96

260-96

MILDRED JEAN COOKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	
	:	
RESPONDENT.	:	

JUNE 17, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
RECORD SEALED
OAL DKT. NO. EDU 8278-95
AGENCY DKT. NO. 289-7/95

MILDRED JEAN COOKE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO,
Respondent.

Barbara E. Riefberg, Esq., on behalf of petitioner (Baron & Riefberg, attorneys)

Carol A. Cannerelli, Esq., on behalf of respondent (Montgomery, McCracken, Walker & Rhoads, attorneys)

Record Closed: April 22, 1996 Decided: April 30, 1996

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out a petition filed with the Commissioner of Education, pursuant to *N.J.S.A.* 18A:30-2.1, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The parties have submitted a Confidential Settlement Agreement in the matter which has been sealed pursuant to *N.J.A.C.* 1:1-14.1(c). The agreement is not to be disseminated or reviewed, except as necessary for purposes of final agency action. Having reviewed the terms of the settlement and it appearing that it was entered into voluntarily and fully disposes of all issues in controversy, I

CONCLUDE that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are concluded.

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

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

4/30/96
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

5-2-96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

OAL DKT. NO. EDU 8278-95

MILDRED JEAN COOKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement. In so ruling, the Commissioner reiterates that this record shall be sealed pursuant to *N.J.A.C.* 1:1-14.1(c) and in accordance with the instructions of the Administrative Law Judge.

COMMISSIONER OF EDUCATION

JUNE 17, 1996
DATE OF MAILING JUNE 17, 1996

263-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT A. LILLO,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF EDISON,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

June 19, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 103-96

AGENCY DKT. NO. 454-11/95

IN THE MATTER OF THE TENURE HEARING OF ROBERT A. LILLO, BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

Francis X. Journick, Jr., Esq. for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Robert C. Krieger, Esq., for respondent (Wysoker, Glassner & Weingartner, attorneys)

Record Closed: April 22, 1996 Decided: May 3, 1996

BEFORE **BARBARA A. HARNED**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 12, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Dismissal Without Prejudice indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

May 3, 1996
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

5-6-96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 9 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095-0958
(908) 636-8000
Attorneys for Petitioner
Edison Township Board of Education

NEW JERSEY OFFICE OF
ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-00103-96S
AGENCY REF. NO. 454-11/95

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, Petitioner, v. ROBERT A. LILLO, Respondent.	On Referral from the Commissioner of Education, New Jersey Department of Education **STIPULATION OF SETTLEMENT AND DISMISSAL WITHOUT PREJUDICE**

The petitioner, Board of Education of the Township of Edison (the "Board"), and the respondent, Robert A. Lillo ("Lillo"), having conferred with respect to this matter and having mutually agreed upon certain terms by which this matter may be settled, such terms being set forth herein, it is hereby stipulated and agreed by and between the Board and Lillo as follows:

1. Lillo shall retire from the employ of the Board effective as of November 16, 1995. Within 10 days of the execution of this Stipulation of Settlement and Dismissal Without Prejudice by the parties, Lillo shall (1) formally notify the Board in writing of his retirement from its employ as of November 16, 1995 and (2) if he has not already done so, file an application with the Public Employee Retirement System ("PERS") for disability retirement as of November 16, 1995, which may include such other retirement benefits as may be available to Lillo from PERS. The Board shall cooperate in Lillo's application for disability retirement to PERS.

2. Within 15 days of the Board's receipt of the notice of retirement and a copy of the completed and executed retirement application filed with PERS required by Paragraph 1, the Board shall, consistent with law and the terms of the collective bargaining agreement which pertains to Lillo's employment by the Board, pay to Lillo (a) the sum of $20,543.60, less the usual tax and other salary deductions, which the parties agree represents the value of retroactive salary due to Lillo for the period from May 26, 1995 to November 16, 1995, and (b) the sum of $1,281.06, less the usual tax and other salary deductions, which the parties agree represents the value of Lillo's accumulated and unused vacation days as of November 16, 1995.

3. Lillo hereby waives all rights to continued employment or reemployment by the Board, including but not limited to any and all rights based on tenure and/or seniority and any and all rights to be recalled to employment by the Board or appear on any recall or other list of employees eligible for employment or reemployment by the Board. Lillo also hereby waives and releases any and all claims, whether known or unknown, against the Board which arise out of or relate to his employment by the Board, including but not limited to claims for unpaid salary or other employment benefits. Similarly, the Board hereby waives and releases any and all claims, whether known or unknown, against Lillo which arise out of or relate to his employment by the Board.

4. This matter is hereby dismissed without prejudice. Notwithstanding the foregoing and any provision in this Stipulation of Settlement to the contrary, should PERS deny Lillo's application for retirement, then (a) Lillo's retirement and notice thereof referred to in Paragraph 1 above shall be of no force nor effect, (b) the Board shall have the right to reinstate tenure charges against Lillo seeking the termination of his employment with the Board and/or such other relief as may be appropriate, including, but not limited to the recovery of the payment referred to in Paragraph 2 above, and (c) the waivers and

releases referred to in Paragraph 3 above shall be of no force nor effect and shall not be binding upon Lillo or the Board.

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for Petitioner
Edison Township Board
of Education

By: _____
FRANCIS X. JOURNICK, JR.

DATED: April 9, 1996

WYSOKER, GLASSNER & WEINGARTNER
Attorneys for Respondent
Robert A. Lillo

By: _____
ROBERT C. KRIEGER

DATED: April 7, 1996

OAL DKT. NO. EDU 103-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT A. LILLO,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF EDISON,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification by the State Board November 2, 1983,

affirmed N.J. Superior Court, Appellate Division, January 30, 1986. The present record contains no such explanation.

Moreover, it appears that the terms of the settlement have already been effectuated through respondent's retirement from the employ of the Board as of November 16, 1995, and his formal notification of the Board of same within ten days of the parties' execution of the within stipulation. (Stipulation of Settlement at p. 2, Item 1) The parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

Accordingly, the proposed settlement is rejected, and the Commissioner hereby remands this matter to the OAL for revision of the document and expansion of the record consistent with the concerns herein expressed. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 19, 1996
Date of Mailing, June 20, 1996

264-96

IN THE MATTER OF THE TENURE :

HEARING OF MICHAEL COLUCCI, :

SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION

BOROUGH OF WOOD-RIDGE, : DECISION

BERGEN COUNTY. :

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent Board Secretary/Business Administrator due to alleged mishandling of funds.

By order of Superior Court, respondent entered into pre-trial intervention program, conditioned upon several requirements, including resignation. ALJ dismissed matter and ordered it forwarded to State Board of Examiners for consideration of the revocation of respondent's certificate. ALJ did find that respondent was entitled to compensation for the period of October 12, 1994 to October 31, 1994 as respondent was entitled to resumption of full salary after the expiration of 120 calendar days from the certification of charges pursuant to *N.J.S.A.* 18A:6-14.

Commissioner adopted findings and determination in initial decision and ordered award of compensation and forwarding of matter to State Board of Examiners.

June 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8018-94
AGENCY DKT. NO.196-6/94

IN THE MATTER OF THE TENURE HEARING OF MICHAEL COLUCCI, BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY

Cherie L. Maxwell, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tishman, Epstein & Gross, attorneys)

Paul E Griggs, Esq., for respondent
(Paul E. Griggs, attorney)

Record Closed: November 6, 1995 Decided: May 2, 1996

BEFORE **IRENE JONES**, ALJ:

This matter concerns the disposition of tenure charges filed by petitioner, the Wood-Ridge Board of Education (BOE) against the respondent, Michael Colucci (Colucci). The BOE charged Colucci with unbecoming conduct in his position of

secretary/business administrator, of the BOE. An answer to the charges was filed by Colucci on May 18, 1994. On June 14, 1994, the BOE suspended Colucci without pay. Pursuant to *N.J.S.A.* 18A:6-14, the BOE certified tenure charges to the Commissioner of Education. On August 18, 1994, the Commissioner of Education transmitted the matter to the OAL for hearing as a contested case.

A prehearing conference was held at the OAL on October 13, 1994. Hearing dates were established for March, 1995. Prior to scheduled hearings, Colucci moved to have this matter placed on the OAL's inactive list for six months because of a pending indictment in Bergen County. Colucci contended that his testimony in this matter could impact his rights against self-incrimination. On March 16, 1995 an order of inactivity was entered by the undersigned.

On October 19, 1995, petitioner filed a motion seeking an order directing that the BOE pay him salary compensation for the period of October 12, 1994 through March 15, 1995. On November 6, 1995, the BOE filed an answer in opposition to the motion.

UNDISPUTED FACTS

The tenure charges alleged that Colucci engaged in inappropriate financial practices and actions involving the diversion and or payment of public funds in contravention of BOE policy and generally accepted accounting procedures. Specifically, Colucci was charged with diverting $1,334 from the student activities account for his personal use. Colucci did not record the transaction in the BOE financial records. Further, Colucci was charges with diverting a stipend from Region VII to the school district for personal use. Colucci accepted $500 from the BOE and failed to inform the BOE and the Region VII that he had previously paid himself $2,500 by writing an off-line check from the stipend for the 1989-90 school year. Colucci received $1,000 in excess compensation.

Thereafter, in July 1990, Colucci again wrote an off-line Region VII check payable to himself for $3,000. Said payment was contrary to established practice and

policy. In 1992-93, Colucci unilaterally incorporated a #,500 Region VII stipend into his annual salary. He reported an inflated base salary to the State pension system in contravention of both state pension and BOE policy. Colucci also misrepresented his salary to the BOE during his contract negotiations for the 1992-93 school term.

Colucci was also charged with submitting requests to the BOE for reimbursement for undocumented travel and activities outside the scope of his employment. Colucci allegedly failed to file 1099 forms for non-salary income derived from the BOE. Colucci also arranged for payment to himself from the BOE nonreimbursable insurance costs.

The amended statement of charges Colucci was charged with two counts of authorizing construction work in excess of bid amounts and without BOE approval, authorized and processed a purchase order without bidding. While the tenure charges were pending, Colucci was arrested and indicted on November 1, 1994 on charges of theft and official misconduct. Colucci was again suspended without pay effective as of the November 1, 1994 indictment. *N.J.S.A.* 18:6-8.3.

By order of the Superior Court of New Jersey on October 6, 1995, Colucci entered in the Bergen County Probation Department's pre-trial intervention program (PTI). Colucci's participation in said program was conditioned upon several requirements, including: a) Colucci was to immediately submit his resignation of employment from the Wood-Ridge School District b) The issue of possible revocation of Colucci's certificates was to be submitted to the State Board of Examiners for consideration c) Colucci is prohibited form using his certifications during the two-year period of pre-trial intervention; and d) Colucci was to repay to the Wood Ridge BOE the sum of $1,334.00.

Colucci submitted his resignation and it was accepted by the Wood-Ridge Board of Education. The BOE requests that the tenure proceedings be withdrawn and forwarded to the State Board of Examiners for consideration of the revocation of Colucci's education certification pursuant to *N.J.A.C.* 6:11-3.5.

ARUGMENT

Colucci asserts that he is entitled to back pay for October 11, 1994 through March 15, 1995. This period represent the time that he was suspended without pay. Colucci seeks the sum of $2,379.77. (R-1). In support of the motion, Colucci relies on *N.J.S.A.* 18A:6-14 which provides:

> ". . . the board may suspend the person against whom such charge is made with or without pay, but, if the determination of the charge by the commissioner of education is not made within 120 calendar days after the certification of the charges, excluding all delays which are granted and the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made..."

It is contended that because petitioner has withdrawn the tenure charges, a determination of the charges cannot be made for the period of suspension when respondent was entitled to be paid the amount of money demanded. Moreover, the repayment of funds by Colucci as a condition of his participation in the pre-trial intervention program (PTI) is not in any way related to the matter before the Commissioner, which involves an alleged violation of school laws. *N.J.S.A.* 18A:6-9, sets forth that the "The Commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under school law . . ." Enforcement of the obligation under PTI can only be through the Bergen County Probation Department or in a civil action, not through the Commissioner of Education.

Petitioner argues that Colucci has "unclean hands" since he has not made restituion as ordered by the PTI program. Further, petitioner asserts that the motion is out of time.

DISCUSSION AND CONCLUSION

Pursuant to *N.J.S.A.* 18A:6-11, respondent was suspended without pay on June 13, 1994 after the petitioner certified tenure charges against him. As an unindicted school employee who was subject to a tenure charge, respondent was expressly entitled to a resumption of his full salary after the expiration of 120 calendar days from the certification of charges. *N.J.S.A.* 18A:6-14.

Therefore, respondent was entitled to have his full salary reinstated on October 12, 1994. Nevertheless, the reinstatement of respondent's salary ceased on October 31, 1994 because the petitioner subsequently acted to suspend respondent without pay pursuant to *N.J.S.A.* 18A:6-8.3, effective as of respondent's November 1, 1994 criminal indictment.[i] As a result, respondent is entitled to receive the amount of salary he would have earned from October 12, 1994 through October 31, 1994. This amount, however, is to be reduced by any earnings respondent received during that period as a result of his being employed. Furthermore, respondent's salary should be diminished by an amount equal to the restitution mandated by the conditions of the respondent's PTI agreement ($1334.00).[ii]

Based on the above, I **FIND** that respondent is entitled to compensation for the period of October 12, 1994 to October 31, 1994 less an offset for wages earned during this period and any moneys owed the petitioner for restitution pursuant to the Superior Court Order.

It is therefore **ORDERED** that respondent pay the petitioner any compensation due after the offset. This matter is hereby **DISMISSED** and shall be forwarded to State Board of Examiners for the consideration of the revocation of respondent's certificates.

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[i] The 120 day time limit of *N.J.S.A.* 18A:6-14 only applies to suspensions based upon tenure charges, not those grounded upon criminal indictments.

[ii] It should be noted that the respondent's participation in PTI does not entitle him to back pay for the period he was suspended as a result of his criminal indictment. *See, Siciliano v. Camden County Vocational-Technical School Board of Education*, 93 *N.J.A.R.*2d 94, 96 (EDU) (Public policy is not served by awarding a school employee who entered PTI back pay when the employee was not improperly suspended).

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

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

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

5/2/96
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

5-7-96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 8 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL COLUCCI,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF WOOD-RIDGE,	:	DECISION
BERGEN COUNTY.	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) for the reasons expressed therein. In so ruling, the Commissioner affirms the ALJ's calculation of damages pursuant to *N.J.S.A.* 18A:6-8.3 and 6-14 and in consideration of the conditions of respondent's pre-trial intervention program (PTI) agreement.

IT IS hereby ORDERED that respondent be awarded compensation for the period of October 12, 1994 to October 31, 1994, less an offset of wages earned during this period and any moneys owed petitioner for restitution pursuant to the Superior Court Order. This matter is hereby dismissed and will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

265-96

DEC ELECTRIC, INC.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL HIGH SCHOOL DISTRICT AND USA ELECTRICAL CONTRACTORS, INC.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

June 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-ORDER
GRANTING RESPONDENTS'
MOTION TO DISMISS AS MOOT
OAL DKT. NO. EDU 10833-95
AGENCY DKT. NO. 451-11/95

DEC ELECTRIC, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL HIGH SCHOOL DISTRICT, and USA ELECTRICAL CONTRACTORS, INC.,

Respondents.

Richard W. Hunt, Esq., on behalf of petitioner, (Almeida & Hunt, attorneys)

Charles R. Iannuzzi, Esq., on behalf of respondent, Southern Gloucester County Regional High School District,

Matthew A. Zabel, Esq., on behalf respondent, USA Electrical Contractors, Inc. (Zabel and Associates, attorneys)

Record Closed: May 7, 1996 Decided: May 8, 1996

BEFORE **STEVEN C. REBACK,** ALJ:

This is an order resulting in an initial decision granting the respondent's motion to dismiss the petitioner's appeal as moot. For the following reasons the motion is **GRANTED.**

I

This matter was transmitted to the Office of Administrative Law by the Commissioner of Education (Commissioner) on November 29, 1995, as a result of the filing of a petition by DEC Electric, Inc., (DEC) seeking, among other remedies, emergent relief pursuant to *N.J.A.C.* 1:1-12.6.

Prior to the submission of the foregoing, DEC submitted directly to the Office of Administrative Law on November 17, 1995, a motion for substantially the same interim relief. Immediately thereafter respondent, Board of Education of the Southern Gloucester City Regional High School District (hereinafter "Southern Gloucester") on or about November 27, 1995 challenged the jurisdiction of the Office of Administrative Law to entertain DEC's motion, which challenge, in my opinion, was proper in that pursuant to the foregoing regulation, *N.J.A.C.* 1:1-12.6, an application for emergency relief must be made directly to the agency head - the Commissioner of Education - rather than to the Office of Administrative Law. Presumably recognizing the technical flaw in its motion, DEC submitted a supervening petition with the Commissioner of Education on November 27, 1992, which cured the jurisdictional defect and the matter was transmitted as noted. In addition, the subsequent petition also properly named as a respondent to the motion for interim relief not just Southern Gloucester (the only named respondent in the original petition) but also USA Electrical Contractors, Inc. (USA). USA did not submit a response to the motion for interim relief until moments before oral argument was conducted on December 4, 1995. Counsel for USA served both petitioner and co-respondent with the motion in advance of oral argument and presumably their arguments addressed the issues raised by Mr. Zabel. Oral argument was conducted at the Office of Administrative Law, Mercerville, New Jersey at 1:30 p.m. on December 4, 1995 at which time the record closed.

On December 6, 1995, I issued an order denying DEC's request for emergent relief which order is incorporated herein in its entirety. While I determined, pursuant to the dictates of *Crowe v. De Gioia*, 90 *N.J.* 126, 132-33 (1982) that the movant, DEC, was able to establish 2 of the 3

prongs necessary in order to grant such motion - the reasonable likelihood that it would prevail on the merits of a full plenary disposition of these proceedings, and that the remedy sought would be limited in scope and as temporary as possible so as to allow the parties opposing the motion not to suffer undue harm - I also concluded that DEC was unable to establish that it would suffer immediate and irreparable harm.

In substance the application for emergent relief sought by DEC was to restrain and/or enjoin respondent, Southern Gloucester County Regional High School District (Southern Gloucester) from effectuating the award of an electrical contract to respondent, USA Electrical Contractors, Inc. (USA) to perform a portion of the phase IV additions and alterations to Southern Gloucester Delsea Regional High School. DEC had alleged that USA, which submitted the lowest bid, was not Division of Buildings/Construction (DBC) qualified at the time the bids were opened and therefore was unfit as a matter of law to be awarded the contract. Because petitioner was DBC qualified and its contract bid was deemed the second lowest bid, DEC requested that the contract be awarded to it, as well as costs and reasonable counsel fees. DEC asserted that failure to grant the petition would cause immediate and reparable harm.

In the order denying emergent relief, it was held that USA did indeed fail to meet the statutory requirements for qualifications on November 2, 1995, the date the bids were opened. Specifically, USA lacked the required DBC qualification. It was therefore ordered that the contract awarded to USA was annulity. It was then provided in the order denying emergent relief:

> Given the foregoing conclusion however, does not result in a determination that DEC is entitled to the emergent relief requested. DEC has not and is unable to demonstrate that as a result of the nullity of the contract entered into between USA and Southern Gloucester, it has or will suffer immediate and irreparable harm. DEC does not have an entitlement to step into the shoes of USA and become the contracting party with Southern Gloucester on the contract.
>
> [*DEC Electric, Inc. v. Southern Gloucester County Reg. High Schl. Dist. Bd. of Educ. and USA Electrical Contractors, Inc.*, OAL DKT. EDU 10833-95, *Order Denying Emergent Relief*, (Dec. 6, 1995).]

Case law supports the conclusion that DEC was not automatically entitled to the contract particularly where the disparity between bids is significant, and DEC's bid exceeded USA's by more than $200,000[1]. Citing *George Harms v. Boro. of Lincoln Park,* 161 *N.J.Super.* 367 (Law Div. 1978)[2], my order also concluded that case law strongly suggested that Southern Gloucester had the option of either awarding the contract to DEC or reopening the bidding process. In view of these options it was determined that DEC had not suffered immediate and irreparable harm.

> If Southern Gloucester has decided to reopen the bidding process if it lost its argument in respect to the validity of the contract entered into between it and USA, as it implied it would at oral argument, petitioner has suffered no irreparable harm. Petitioner may be in an even better position than it was prior to the commencement of this litigation: DEC now has the opportunity to study the other submitted bids. Such knowledge could aid the petitioner if it decides to redraft its own bid. Therefore, in my view DEC has been unable to demonstrate under these circumstances irreparable or immediate injury.
>
> .....
>
> Accordingly, I **CONCLUDE** that DEC has failed to establish that as a result of the contract entered into between USA and Southern Gloucester being a nullity, it has suffered immediate and irreparable harm.
>
> [*DEC Electric, Inc. v. Southern Gloucester County Reg. High Schl. Dist. Bd. of Educ. and USA Electrical Contractors, Inc.,* OAL DKT. EDU 10833-95, *Order Denying Emergent Relief,* (Dec. 6, 1995).]

The Commissioner of Education, by decision dated December 26, 1995, adopted the order denying Petitioner's application for emergent relief "for the reasons expressed by the ALJ and this matter shall duly proceed for a hearing on the merits." *DEC Electric, Inc. v. Southern Gloucester County Reg. High Schl. Dist. Bd. of Educ. and USA Electrical Contractors, Inc.,* OAL DKT. EDU 10833-95, Order Denying Emergent Relief, (Dec. 6, 1995), *adopted,* Commissioner of Education (Dec. 26, 1995). Despite these decisions that the contract was null and void, the work

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[1] Pursuant to *N.J.S.A.* 18A:18A-36 a board of education may reject all bids.

[2] The *Harms* court held where lowest bid was invalid and the next lowest bid was $200,000 higher, the borough was directed to exercise its statutory option of rejecting all bids.

on the contract continued, which prompting DEC to attempt to have the Commissioner's decision enforced in Superior Court.

Two additional Commissioner's decisions have been rendered in this matter. The latter decision, dated March 26, 1996, explains the remaining procedural history to date and the Commissioner's position on the rebid of the contract, as follows:

> [The superior court judge was unwilling] to infer from the Commissioner's decision an explicit intent to declare the contract null and void notwithstanding his denial of emergent relief. Hence petitioner's motion for clarification, and the Commissioner's decision on motion dated February 8, 1996.
>
> In that decision, the Commissioner determined to reconsider his earlier determination because the ALJ's recommendation to deny emergent relief, which had been affirmed by the Commissioner, was clearly predicated on his belief that the Board would *rebid* the contract if emergent relief were denied. Indeed, having found the USA/Board contract a nullity, the ALJ expressly denied emergent relief because petitioner, which could not facially demonstrate an absolute entitlement to the contract at issue, was unable to show that it would be irreparably harmed *by a rebid.* However, the record on motion made it plain that, contrary to the Board's representations to the ALJ that it would rebid the project if emergent relief were denied, the Board *did not rebid* the project upon such denial but, instead, proceeded to pursue its contract with USA and allow it to begin electrical work at Delsea High School. Thus, the basis for both the ALJ's recommendation and the Commissioner's decision to affirm it had been so substantially altered that the Commissioner reconsidered petitioner's claim of irreparable harm, and found that petitioner had now succeeded in such a showing, thereby warranting emergent relief in the form of an express prohibition of further work on the disputed contract.
>
> As a consequence of the Commissioner's February 8, 1996 decision, the Board rebid the disputed contract and again determined to award it to respondent USA ..., rather than petitioner. Petitioner then applied for a Temporary Restraining Order in Superior Court, contending that the Commissioner's February 8 decision had prohibited a rebid. This request was denied. Petitioner then, through the present application, sought a "clarification" of the February 8 decision with respect to the Board's right to rebid, and a stay of any awarding and/or implementation of the contract resulting from the Board's proposed rebid. Responses to petitioner's motion were filed by both respondents.
>
> Upon review of the record of this matter and the papers filed with the present application, it is clear that the sole basis for petitioner's motion attacking the validity of any rebid contract is the erroneous belief that the Commissioner's

> decision of February 8, 1996 acted to prohibit the Board from rebidding the originally disputed contract. Given the history of this matter, such an interpretation would make little sense. To the contrary, the entire basis for the Commissioner's reconsideration of his earlier denial of emergent relief was the fact that the Board had continued with work on the contract *rather than rebidding*, as it was represented to the ALJ that the Board would, thus undercutting the underlying basis for both the ALJ's initial decision denying emergent relief and the Commissioner's subsequent affirmance thereof. Rather, the Commissioner's decision of February 8, as correctly construed by respondents, acted to give the Board a choice between a stay of work altogether *or* rebidding, the latter possibility clearly contemplated, permitted and even expected by both the ALJ and the Commissioner. That the Board chose the option of rebidding was a matter entirely within its own lawful discretion.
>
> Accordingly, there being no basis stated in the moving papers upon which to warrant stay of any rebid contract or resulting work, petitioner's Motion for Emergent Relief is DENIED and the underlying matter shall continue to proceed on its merits at the Office of Administrative Law as directed in the Commissioner's prior decision.
>
> [*DEC Elec., Inc. v. Bd. of Educ. of the Southern Gloucester County Reg. High Schl. Dist. and USA Electrical Construction Contractors, Inc.*, Decision denying Motion for Emergent Relief, Commissioner of Education (Mar. 26, 1996).]

Interspersed between the various decisions issued by the Commissioner and the issuance of this ruling were the submission of a variety of documents - both to the administrative law judge as well as to the Commissioner - some of which were at my request and other were unsolicited. The final submissions were received by my office on May 7, 1996, the date on which the record in respect to respondents' motion to dismiss closed.

II

The issues raised by DEC are undoubtedly moot. If Southern Gloucester had chosen the option of staying the work, a hearing would be necessary to determine, among other things, who would complete the project. This option was not chosen, however, and the contract was rebid. Only USA and DEC submitted new bids. USA was again the lowest bidder and was awarded the contract. There is no issue as to USA's qualifications at the time of the rebid and it does not appear that DEC challenges the award of the rebid contract on such basis. Petitioner's position continues, rather, to focus on the initial contract award.

In its letter brief in opposition to Respondents' respective motions to dismiss, Petitioner asserts that it "cannot lose its opportunity to argue that it was entitled to the award of the initial contract in this matter ... While the BOE has been allowed to rebid, it cannot be maintained that this was a ruling on DEC's entitlement to the contract on the merits, and the Commissioner's decisions expressly recognizes this." *Petitioner's Letter Brief in Opposition to the Motions to Dismiss,* dated April 9, 1996. Petitioner places great emphasis upon the Commissioner's statement at the conclusion of each decision that the "matter shall duly proceed for a hearing on the merits." The merits of the case, however, originally transmitted, which questioned the right or wrong of the first contract award, no longer exist because the contract was nullified and a new contract was entered into through a rebid of the project.

It is a well established doctrine of the courts "that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review," *Anderson v. Sills,* 143 *N.J.Super.* 432, 437 (Ch. Div. 1976), the reasons being

> First, for ... judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. Therefore, where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed.
>
> [*Ibid.*]

This doctrine is also adhered to by the Commissioner of Education who will not decide moot issues. *Pinkham v. Bd. of Educ. of the Boro. of South River,* 1974 *S.L.D.* 1103, 1110, *modified and affirmed,* 1975 *S.L.D.* 1119. The Commissioner has embraced

> the policy of the courts to refrain from advisory opinion, from deciding moot cases, or generally functioning in the abstract, and to decide only concrete contested issues conclusively affecting adversary parties in interest.
>
> [*Pinkham, supra,* 1974 *S.L.D.* at 1110-1111 (quoting *Moss Estate, Inc. v. Metal & Thermit Corp.*, 73 *N.J.Super.* 56, 67 (Ch. Div. 1962)).]

Since the first contract between the Respondents in this matter has been deemed null and void, it is no longer a "concrete contested" issue which affects the parties in this matter. The issue of Petitioner's entitlement to that contract is, therefore, moot. Thus, Petitioner's request to "be allowed an opportunity to be heard, for the first time, on the issue of its entitlement to the contract" should be dismissed.

Further support for the conclusion that this matter should be dismissed as moot may be found in the fact that DEC has requested relief in the form of damages and counsel fees which are unavailable. Damages are specifically prohibited by the Public Schools Contracts Law which provides:

> No action for damages shall lie against the State board, any State official, or any board of education or any of its officers because of any action taken by virtue of the provisions of this chapter.
>
> [*N.J.S.A.* 18A:18A-46.]

The public policy reasons for prohibiting the recovery of damages in a challenge to an award of a public contract were discussed in *M.A. Stephen Const. Co. v. Boro. of Rumson,* 125 *N.J.Super.* 67 (App. Div. 1973), in which the court said:

> [A] bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him. But such standing was granted simply and solely in order that the public interest might be served by compelling the lax

> or erring public official to properly perform his public trust. It was not thereby intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder.
>
> .....
>
> Nor should it be overlooked that, to allow the lowest responsible bidder to recover damages not only would violate and run counter to sound and long established principles of law, but also would invert the very policy and reasons which gave rise to the obligation of the public official to accept the bid proposal which best serves the pubic interest. Thus, where a public authority improperly rejects the lowest bid and awards the contract to the next lowest bidder, who performs the contract work before the ultimate resolution of the legal propriety of the rejection, to permit the low bidder to recover damages would simply twice penalize the public.
>
> [*Id.* at 74, 75-76.]

See also, Bokey, Inc. v. Bd. of Educ. of Frenchtown Boro., 93 *N.J.A.R.*2d (EDU) 118 (where the Hon. Joseph Fidler determined that the petitioner was not entitled to recover damages due to lost profits because the Public School Contract Law and case law prohibit any action for damages).

It is also well settled that the Commissioner's "jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws," *N.J.S.A.* 18A:6-9, does not include the authority to award counsel fees. *Balsley v. North Hunterdon Reg. High Sch.*, 225 *N.J.Super.* 221, 225 (App. Div. 1988). The *Balsley* court found that "[s]ince 1948, New Jersey has consistently adhered to the general principle that 'legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule, or contract'." *Id.* at 226 (citing *State, Dept. of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983)). An award of attorney fees is, therefore, unavailable in education matters.

Finally, DEC argues that there was no "cogent and compelling" reason to rebid the contract. Not only is this argument contrary to each of the Commissioner's three decisions in this matter, it is improperly asserted at this juncture of the case. As indicated in his March 26, 1996 decision, *supra,* the option of rebidding was a matter entirely within Southern Gloucester's own

lawful discretion. If Petitioner disagreed with that part of the Commissioner's decisions, which was binding, *N.J.A.C.* 6:24-1.14(b), it should have appealed to the State Board of Education as provided by *N.J.A.C.* 6:24-1.14(b) and 6:2-1.1. Petitioner had three opportunities to appeal but failed to do so. Consequently, the issue is again rendered moot since no effective relief can be granted.

The challenged first contract to which Petitioner claimed entitlement was declared null and void at every stage in this matter. As such, that contract is no longer a concrete contested issue for which any form of relief can be granted. Moreover, the relief requested by Petitioner, damages and attorney fees, is not available. Actions for damages are prohibited by the Public School Contract Law and the Commissioner lacks the jurisdiction to award attorney fees. Hence, the matter herein is moot and the motions to dismiss should be granted.

Accordingly, I **CONCLUDE** that the respondents have established by a preponderance of the relevant, credible evidence that DEC's appeal be and is hereby moot. Accordingly, the motion by respondents to dismiss the matter be and is hereby **GRANTED.**

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

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

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

5/10/96
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

May 14 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 10833-95

DEC ELECTRIC, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL HIGH SCHOOL DISTRICT AND USA ELECTRICAL CONTRACTORS, INC.,	:	DECISION
RESPONDENTS.	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that this matter is now mooted and that no damages are available, nor warranted, in the instant matter.

Accordingly, for the reasons expressed therein, the recommended decision of the OAL is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 19, 1996
Date of Mailing, June 20, 1996

267-96

GEOFFREY AND CECILIA SHREWSBURY, JOHN GATTUSO AND CARLA JARDIM,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY, AND ROBERT J. SOPRANO, SUPERINTENDENT,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents claimed entitlement to safe busing for their children pursuant to *N.J.S.A.* 18A:39-1 and *N.J.A.C.* 6:21-1.3.

Having considered testimony of witnesses and exhibits submitted, ALJ concluded that petitioners established that the decision not to extend minibus service to their homes was arbitrary and capricious. ALJ ordered Board to consider alternative possibilities for service for petitioners and to choose one within 60 days of final agency action.

Commissioner set aside initial decision of the ALJ. Citing *Schrenk,* the Commissioner found that travel to and from the bus stop was hazardous, but the provision for safe conditions of travel to and from bus stops is a municipal function. Commissioner found that petitioners failed to establish by a preponderance of credible evidence that the Board's decision lacked a rational basis or that the Board was treating petitioners' children differently from other children similarly situated. There was no allegation that the bus stop itself was unsafe. Thus, the Commissioner could not intervene and the initial decision must be reversed and the petition dismissed.

June 21, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8786-95

AGENCY DKT. NO. 381-9/95

GEOFFREY AND CECILIA SHREWSBURY,
JOHN GATTUSO AND CARLA JARDIM,

Petitioners,

v.

BOARD OF EDUCATION OF HOLLAND TOWNSHIP, AND ROBERT J. SOPRANO, SUPERINTENDENT,

Respondents.

Judith A. Babinski, Esq., on behalf of petitioners (Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco, attorneys)

Michael J. Rogers, Esq., on behalf of respondents (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: March 26, 1996 Decided: May 7, 1996

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of petitioners' application to compel the Holland Township Board of Education (Board) and its superintendent, Robert Soprano, to change their children's bus stop. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. A hearing was conducted on March 7 and 15, 1996, and the record closed on March 26, 1996, with receipt of the last post-hearing memorandum.

The question presented is whether the Board's refusal to accommodate petitioners' request was arbitrary and capricious.

Most of the facts are undisputed. Mr. and Mrs. Shrewsbury have two children, ages ten and nine, who attend school in Holland Township, and John Gattuso and Carla Jardim have children who will attend next year. They are neighbors on Shire Road. Holland Township is in a rural area that is characterized by a hilly topography; the Board does not permit school buses to travel on some Township roads, and that includes the portion of Shire Road along which petitioners reside. In 1991 the Board asked engineering consultant John F. Mullen, P.E., to review proposed routes on Bellis, Shire and Adamic Hill roads. He found that each contained steep slopes and sharp curves that were inappropriate for school-bus travel (R-11). Presently, a minibus stops some three-tenths of a mile south of petitioners' homes at the top of a hill in front of the Case driveway. There, it turns around and proceeds on its route. The minibus is designed for twelve students and two special education students.

Petitioners prepared a video of the section of Shire Road at issue (P-2). Although objections were sustained to comments from the camera operator, who was not a witness, the accuracy of the film itself was not contested. Shire Road has a 25 mph speed limit, but warning signs suggest a speed of 10 mph on the hill. From the hill crest, the road drops in grade, bends left, straightens, and then bends right and straightens, before reaching the Shrewsbury driveway. The sight distances from the driveway are approximately 200 feet in either direction (P-1). The road then banks right and straightens again before reaching the Gattuso/Jardim driveway. The sight distances from this area are approximately 400 feet in each direction. Further north there is a proposed turnaround on the side of the road, below which there are S curves. There is no

suggestion that the minibus travel through these; there are no children to pick up beyond the Gattuso/Jardim house. Shire Road is 17 to 18 feet wide at its narrow points and there are grades of up to 18 percent. There are neither sidewalks nor shoulders on Shire Road, and embankments and a retaining wall approaching the hill crest make it necessary to walk in the roadway. There are some yards that the children could walk across to their bus stop, but the owners have not been willing to permit such transit. Woods behind the houses that might serve as a path are leased by a hunting club.

The video also included other roads on which the Board's buses travel, for comparison purposes. The film shows Mr. Shrewsbury making a K turn on Bellis Road with a minibus. He testified that respondents make this turn with a full-size bus. During much of the turn the bus cannot see, or be seen by, oncoming traffic. The minibus also traveled down what is known as the "narrows" along River Road. This is a two-way, one-lane road that is steep and narrow. Mr. Shrewsbury again indicated that respondents permit this trip with a full-size bus. Petitioners also followed a full-size district school bus down Alfalfa Hill Road, another steep and winding Township road.

The Shrewsburys have been pressing for a change since 1988 when their oldest child was to begin kindergarten. In 1993 they offered to construct a turnaround on their property at their expense to accommodate a minibus. The estimated cost of this work was $3,500. In response the Board again retained Mr. Mullen as a consultant. His report of August 5, 1993, found that with clearing and paving, installation of proper signs and a few other minor changes, "a minibus could operate at this site" (P-1). He noted that this was a preliminary assessment and that further study might suggest additional requirements. This solution was under active consideration and was to come before the Board at its September 1993 meeting (P-7). Before that time, Mr. Soprano telephoned the Shrewsburys to make clear that the district's minibus was purchased primarily to transport special education students as required by law, and that if a time came when such children needed routes that did not make it convenient to travel Shire Road, the service would have to be discontinued. Upon hearing this the Shrewsburys withdrew their proposal. They remain willing to undertake the turnaround project if they are given assurances that the minibus will stop there.

Elwood B. Croll was the postmaster in Milford for twenty-three years and he delivered mail to Holland Township. Mr. Croll testified that he never had a problem on Shire Road. He had to be careful, though, in the area from the top of the hill down to the Shrewsbury home because the roadway is barely wide enough for two vehicles to pass. He testified that this part of Shire Road presents concerns similar to those he had when driving on Crab Apple Hill and Alfalfa Hill roads.

Sandra LePoidevin has been driving a sanitation truck up and down Shire Road weekly for the last ten years, and although the road is narrow, she has never had any difficulty.

Geoffrey Shrewsbury is an airline pilot and he and his wife also operate a small bus company that transports special education students. He usually carries one or two children at a time in an automobile, but he has owned a twelve-seat minibus that was parked on his property. Mr. Shrewsbury testified that he has never had a problem driving a minibus on Shire Road. He has also driven as a substitute driver for respondents on Alfalfa Hill and Crab Apple Hill roads, and these routes present more difficult line-of-sight problems and have steeper grades than Shire Road. Mr. Shrewsbury testified that he does not allow his children to walk to the bus stop. When he is available he drives them to school; otherwise Mrs. Shrewsbury, a district bus driver, takes them along on her route.

Cecilia VanSyckle Shrewsbury testified that she begins her bus route at approximately 7:45 a.m. Her children often come with her, but the bus is full and frequently they have no seats. Their scheduled pickup time at the Case driveway is 8:35 a.m., and it would be a ten-minute trip to school. Mrs. Shrewsbury drives on Crab Apple Hill and Alfalfa Hill roads, and she believed these were roughly equivalent to Shire Road. She has no problems driving a minibus on Shire Road.

Gary W. Dean is a civil engineer and he was admitted as an expert in traffic safety. Mr. Dean testified that the absence of sidewalks or shoulders and the presence of a retaining wall and mounded areas between petitioners' homes and the existing bus stop require the children to walk

in the roadway, which is dangerous. This is particularly the case near the crest of the hill, where pedestrians cannot be seen by oncoming traffic.

Mr. Dean felt that there were a few safe and feasible alternative bus stops. A dedicated turnaround in the Shrewsbury driveway would avoid any maneuvering in the roadway, and with some clearing would create adequate sight distances in either direction. A stop between the Shrewsbury and Gattuso/Jardim homes would provide sight distances of 400 feet in either direction, which is more than sufficient stopping distance for oncoming vehicles. A safe turnaround could be provided further north on Shire Road, off to the side of the road before the S curves. At that point, sight distances looking south would be about 350 to 400 feet, and looking north would be about 150 to 200 feet.

Mr. Dean was on Crab Apple Hill and Alfalfa Hill roads where respondents' buses do stop. Although he made no calculations there, his impressions were that these roadways presented sight-distance and grade problems comparable to or worse than those on Shire Road.

Arthur Cyphers has been the police chief in Holland Township since 1977. He acknowledged that he is not a traffic safety expert, but over time many plans have been floated to provide bus service for the Shrewsbury children, and he has been consulted by both sides. In 1993 he was asked about the possibility of a minibus turnaround on the Shrewsbury property. He testified that he did not think a minibus could traverse the hill safely to get to and from the turnaround. In a letter of June 21, 1993, he wrote to respondents as follows:

> It seems that now Mr. Shrewsbury has offered to provide an adequate turnaround off Shire Road on his property so that the minibus can pull into his driveway, turn around and then exit his driveway without the driver needing to back up anywhere on Shire Road. . . .
>
> Certainly, the use of a minibus changes the picture somewhat compared to September 1990 when I was asked my opinion of running (full size) school buses on Shire Road. We simulated a bus stop using Mr. Shrewsbury property on Tuesday morning and found that with a little work, a good line of sight in both directions

> could be obtained. This would probably allow a minibus to pull in and out of this location, under ideal situations, in a safe manner.
>
> There is still a serious consideration with this location in that the steep downhill grade at the driveway location, loose gravel, and weather conditions will all affect stopping distances for any traffic traveling north.
>
> I am somewhat concerned that an argument supporting the use of this location is that we have others more dangerous as apparently researched by Mr. Shrewsbury. This line of thinking could be dangerous and risky, as I would rather see the approach be, let's make these other stops safer or eliminate them entirely.
>
> If you are finding this somewhat inconclusive, you are indeed correct, for I believe you have difficult considerations and responsibilities to your transportation needs. It certainly would be easier to set a standard on safety if the responsibility of analyzing school bus stops was given to one person or group of persons who would scrutinize each stop based on a given formula or standard.
>
> [P-6; R-4.]

To the extent that his correspondence might lead to a conclusion that he thought the minibus stop on the Shrewsbury property acceptable, Chief Cyphers explained that the turnaround was a better solution than others suggested, but he was still not ready to endorse it.

Chief Cyphers wrote in a letter dated September 21, 1990 (R-3) that between 1980 and 1990, there were two one-car accidents and four two-car accidents on Shire Road. Since 1990 there has been one additional accident. Chief Cyphers acknowledged during cross-examination that some of these incidents did not involve injuries, and that some may have occurred on portions of Shire Road not involved in the instant appeal.

Kenneth M. Waisempacher has been head bus driver and mechanic in this district for ten years. The stop at the Case residence is as close to the Shrewsbury property as he can safely travel. Over the years he has done a few trial runs down the hill to various driveways, but the sight distances were always a problem. Shire Road is particularly bad in snow. He testified that there is excellent visibility on Crab Apple Hill Road. Adamic Hill Road is similar to Shire Road, and he does not travel down Adamic Hill Road.

Gerald Philkill serves as the municipal engineer in Holland Township. Although he has conducted a few traffic studies, this is not his area of specialization and he was admitted as an expert professional engineer. Mr. Philkill testified that the grades on Shire Road from the crest of the hill to the Shrewsbury property are approximately 15 to 16 percent, which means that for every 100 feet there is a 15- to 16-foot drop. This is fairly steep and a mechanical failure on the hill would be disastrous. A vehicle traveling at 25 mph on a 15 percent grade would scarcely have enough time to stop for a minibus standing at the Shrewsbury driveway. A turnaround in the driveway would be much safer. Adamic Hill and Crab Apple Hill roads are also hazardous.

Robert Soprano has been superintendent of schools in this district for twelve years. Safety is the primary concern in setting routes and he has been guided by Chief Cyphers, Mr. Waisempacher and Mr. Philkill. There are thirteen other students who live on S curves in the Township who are not presently served, and if the Board grants the Shrewsburys' door-to-door service, the families of these students will make like demands. This is the substance of the record.

Boards of Education have broad policymaking discretion and their decisions may not be disturbed unless arbitrary and capricious. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960); *Peary v. Barnegat Bd. of Educ.*, 93 *N.J.A.R.*2d (EDU) 798. It is undisputed that it is dangerous for children to walk along Shire Road, particularly in the area approaching the crest of the hill. The Board argues, however, that it has a Hobson's choice – either it must leave the Shire Road families north of the hill crest to their own devices, or place the children already on the bus in danger. That scenario would make for a difficult decision, but the facts are more subtle. Broken down, the risks that concern the Board are steep grades, winding curves limiting sight distances, narrow road widths that allow vehicles to wander into opposing traffic lanes, and turning within the roadway. The video in evidence makes fairly clear that Shire Road is not ideal for cruising; that is why it has a posted speed limit of 25 mph and a recommended speed of 10 mph on the hill (R-3). We know, however, that this is a hilly, rural community and in that context it does not appear that Shire Road is especially perilous. A minibus turnaround on the Shrewsbury property with clearing of vegetation would eliminate the sight distance and turnaround problem. The Board's first engineering consultant, Mr. Mullen,

approved this choice. Even Mr. Philkill could find little fault with this alternative. If a bus stop were established between the Shrewsbury and Gattuso/Jardim homes, sight distances would increase to 400 feet in either direction, and a safe turnaround is available at the side of the road before the S curves begin. That leaves some worry about the grade and curves near the top of the hill.

The law has a strong aversion to interference with local action, and had the record merely investigated Shire Road in isolation, I might still be required to defer to the Board's safety concerns. The video, however, is critical here. The Board authorizes other trips and maneuvers that are patently more risky then a ride down Shire Road. The K turn on Bellis Road is scary. For most of that operation the driver cannot see oncoming traffic or be seen. The Board allows a full-size bus to travel "the narrows" along River Road, which appears to be a harrowing ride. Alfalfa Hill Road is at least as steep, narrow and winding as Shire Road, and is probably worse. So long as the Board uses these routes, it cannot convincingly argue that it will not travel Shire Road out of an abundance of caution.

Based on the foregoing, it is my conclusion that petitioners have established that the decision not to extend minibus service to their homes is arbitrary and capricious. The record provides a few alternatives. The Shrewsburys have offered a minibus turnaround on their property. This is acceptable, but to make it work the Board must provide reasonable assurances that service will continue for the duration of the Shrewsbury children's tenure in the district. A stop between the Shrewsbury and Gatusso/Jardim driveways with a K turn to the north is also feasible. The Board has had ample time to consider these possibilities and it must choose one within 60 days of final agency action. There was some discussion of the dangers of Shire Road during foul weather. Under such circumstances the Board is free to apply any general policy it may have concerning roadway safety, as it would for other bus routes. So **ORDERED**.

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

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

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

5/7/96
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

May 8, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 10 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

/cat

LIST OF WITNESSES

For Petitioners:

Elwood B. Croll
Sandra LePoidevin
Geoffrey Shrewsbury
Gary W. Dean
Cecilia VanSyckle Shrewsbury
Arthur Cyphers

For Respondents:

Kenneth M. Waisempacher
Gerald Philkill
Robert Soprano

LIST OF EXHIBITS

For Petitioners:

P-1 Letter from Mullen to Soprano, dated August 9, 1993
P-2 Videotape
P-3 Photograph
P-4 Photograph
P-5 Traffic Safety And Engineering Evaluation
P-6 Letter from Cyphers to Holland Township Board of Education, dated June 21, 1993
P-7 GSGSB Bus Turnaround Project

For Respondents:

R-1 Photograph
R-2 Letter from Cyphers to Soprano, dated March 21, 1994
R-3 Letter from Cyphers to Holland Township Board of Education, dated September 21, 1990
R-4 Letter from Cyphers to Holland Township Board of Education, dated June 21, 1993
R-5
R-6 Policies and Procedures for Pupil Transportation
R-7 Engineer's Report, dated January 31, 1996
R-8 Transportation, File Code 3541.1
R-9 Transportation Routes and Services, File Code 3541.1

R-10 Transportation Routes and Services, File Code 3541.1
R-11 Letter from Mullen to Soprano, dated February 12, 1991
R-12 Holland Township School Transportation Routes, 1995/96
R-13 Copy of Parent and Pupil Handbook, 1994/95

GEOFFREY AND CECILIA SHREWSBURY, JOHN GATTUSO AND CARLA JARDIM,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY, AND ROBERT J. SOPRANO, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

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

The Board initially argues that the Administrative Law Judge (ALJ) failed to properly apply the law to the facts in the instant matter. (Board's Exceptions at p. 1) Underscoring that the responsibility for ensuring a safe roadway is a municipal, rather than an educational, concern, the Board asserts that there is no allegation by petitioners that the bus stop itself is unsafe. *(Id.)*

In reply, petitioners contend that the ALJ properly applied the facts to the law in this matter, in that the ALJ recognized that a board, while generally accorded the discretion to establish bus routes and bus stops, cannot adopt a policy which is discriminatory, arbitrary,

capricious or unreasonable. (Petitioner's Reply at pp. 1, 2) Petitioners assert that, contrary to the Board's written policy, the evidence adduced at trial clearly established that the stop provided by the Board was not the closest point to petitioners' homes where the "hazardous condition no longer exists." (*Id.* at pp. 2, 3) Petitioners continue,

> Indeed, Judge Metzger *** found that a number of reasonable and safe alternatives were available, including a stop and turnaround at the Shrewsbury driveway and a stop between the Shrewsbury and Gatusso/Jardim driveways with a K turn on Shire Road to the north. *** These alternatives would not entail bus travel on Shire Road's "S" curves and would save the Petitioners' children from the treacherous walk to their present bus stop. (*Id.* at p. 3)

Petitioners further claim that the Board's refusal to address this matter "***is motivated by the personal dislike for the Shrewsburys and their outspoken commitment to this safety issue." (*Id.*, note 1)

The Board next argues that although the ALJ did not find that it discriminated against petitioners by treating them disparately from other parents in the District, the ALJ nevertheless reasoned that inasmuch as there are other "risky" bus routes in the Township, the Board has acted arbitrarily and capriciously by refusing to extend bus service to petitioners' door. (Board's Exceptions at p. 2) Citing *Walters v. Mendham Township Board of Education, Morris County,* 1977 *S.L.D.* 854, the Board contends that the ALJ's conclusion violates precedent. In *Walters*, petitioners alleged that the route to the student's bus stop was hazardous and "*** that the Board's failure to accede to their demands to pick up the discharge their children at their respective driveways is *prima facie* arbitrary, capricious and unreasonable." (*Walters*, *supra*, a 855) However, the Board argues *Walters* established that "***the board may evaluate condition

in various areas in the school district and it was not the function of the Commissioner to substitute his judgment for that of the board of education.***" (Board's Exceptions at p. 2)

Petitioners counter that the Board misstates and misconstrues the initial decision. The ALJ's reasoning was not, asserts petitioners, predicated upon a finding that since there are other "risky" bus routes in the Township, then the Board's decision not to extend the bus route to the door of petitioners is arbitrary and capricious. (Petitioner's Reply at p. 4) Rather, petitioners argue that the ALJ was not persuaded that the Board's "**purported safety concerns formed a legitimate basis for denying Petitioners' request for a new bus stop.***" (*Id.*) Moreover, citing language from the initial decision found at page 8, petitioners contend that the ALJ *did* find that the Board treated them in a disparate manner from other parents in the District. (*Id.*) Petitioners reason that "***the Board's inconsistent and disparate application of its own policy is evident and merely exposes the arbitrariness and capriciousness of its decision ***." (*Id.* at p. 5)

The Board further warrants that the initial decision would require it to offer minibus services to the door of petitioners and to guarantee such bus service in good weather. (Board's Exceptions at p. 3) Here, the Board asserts,

> It is not in dispute that a full sized school bus cannot traverse this roadway where Petitioners' homes are located. The Superintendent testified, also without dispute, that the minibus currently stopping .3 mile from Petitioners' residences was purchased for physically handicapped children, although it does serve other students if convenient and appropriate. The ALJ has improperly invaded the domain of the Board of Education in determining that the district must provide minibus service to these homes.*** (emphasis in text) (*Id.* at p. 3)

In reply, petitioners maintain that the ALJ did not improperly invade the domain of the Board by requiring that it establish a bus stop at one of the two proposed alternative sites.

(Petitioner's Reply at p. 6) The Board already utilizes a minibus, petitioners assert, to service the existing route. Additionally, petitioners have offered the use of their vehicle in the event it is needed. (*Id.*)

Finally, the Board argues that it has fully complied with its statutory mandate to provide pupil transportation in accordance with *N.J.S.A.* 18A:39-1. It maintains that there is no allegation that the disputed stop is unsafe. (Board's Exceptions at p. 3) Therefore, the Board concludes that its decision not to extend bus service to the doors of petitioners is based upon legitimate safety concerns and is made within its considerable sound discretion. Urging the Commissioner to reverse the initial decision of the ALJ, the Board affirms, "The safety of other students on the minibus should not be jeopardized because the ALJ feels on the basis of a homemade videotape that there are other unsafe bus stops in the district, not the subject of this litigation, which may equal or exceed Petitioners' unsafe roadway conditions." (*Id.* at pp. 3, 4)

Petitioners maintain that the Board has not complied with its obligation to provide transportation to their children as required by law. (Petitioner's Reply at p. 7) Thus, petitioners reason, the ALJ's conclusion is "***amply supported in the record and did not rest merely on [their] so-called 'homemade videotape,' but was also firmly grounded upon the substantial weight of factual and expert testimony and the law." (*Id.*) Accordingly, petitioners urge the Commissioner to affirm the initial decision of the ALJ.

Upon careful and independent review, the Commissioner determines to reverse the initial decision of the ALJ, for the reasons set forth below. Initially, the Commissioner notes it is axiomatic that he cannot interfere with a board's decision where that decision is not prove unreasonable. *Kopera v. West Orange Bd. of Education, 60 N.J. Super.* 288, 296, 297. T

Commissioner further recognizes that local boards maintain "***wide discretion to promulgate pupil transportation policies, including school bus routes and stops, [although] they may not discriminate or act in a manner that is arbitrary, capricious or unreasonable." *Peary, supra,* at 798. The question herein is whether the Board's refusal to accommodate petitioners' request to change their children's bus stop constitutes an abuse of discretion. (Initial Decision at p. 2)

The Commissioner cannot find that the District's reliance upon the guidance of Chief Cyphers, Mr. Waisempacher and Mr. Philkill (*id.* at p. 7) as a basis for its decision is unreasonable. As to the evidence adduced at trial of other roads in the township on which the Board's buses travel, the Commissioner determines that such evidence consists essentially of competing impressions of comparably hazardous road conditions[1] and, consequently, is insufficient to overcome the Board's presumption of reasonableness, or to invalidate the Board's safety concerns regarding travel on Shire Road. Moreover, in view of the Board's undisputed testimony that there are thirteen students who, like petitioners, are living on "S" curves in the Township and are not presently served (*id.*), the Commissioner cannot find that the Board's policy discriminates against petitioners.

While it is undisputed that travel to and from the assigned bus stop is hazardous, as correctly noted by the Board, the provision for safe conditions of travel to and from bus stops is a municipal function. *Howard Schrenk et al. v. Board of Education of the Village of Ridgewood, Bergen County,* 1960-61 *S.L.D.* 185, 187. Further, as the Board indicates, there is no allegation that the bus stop itself is unsafe.

[1] Indeed, petitioners' civil engineer indicates that he made no calculations in this respect, but his impressions were that the Crab Apple Hill and Alfalfa Hill Roads presented sight-distance and grade problems comparable to or worse than those on Shire Road. (Initial Decision at p. 5)

Accordingly, in that petitioners have failed to establish by a preponderance of credible evidence that the Board's decision lacks a rational basis or that the Board is treating petitioners' children differently from other children similarly situated, the Commissioner cannot intervene, and the initial decision must, therefore, be reversed. The within petition is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 21, 1996
Date of Mailing, June 24, 1996

267-96

EDU #8786-95
C # 267-96
SB # 49-96

GEOFFREY AND CECILIA SHREWSBURY, JOHN GATTUSO, AND CARLA JARDIM,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY AND ROBERT J. SOPRANO, SUPERINTENDENT,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 21, 1996

For the Petitioners-Appellants, Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco (Judith A. Babinski, Esq., of Counsel)

For the Respondents-Respondents, McDonald, Rogers & Rizzolo (Michael J. Rogers, Esq., of Counsel)

This case involved a challenge by Geoffrey and Cecilia Shrewsbury, John Gattuso and Carla Jardim (hereinafter "petitioners"), residents of Shire Road in Holland Township, to the refusal by the Board of Education of the Township of Holland (hereinafter "Board") to relocate their children's bus stop closer to their homes.

As summarized by the Administrative Law Judge ("ALJ"), Holland Township is a rural area characterized by a hilly topography, and the Board does not permit school buses to travel on some Township roads, including that portion of Shire Road on which petitioners reside. A minibus currently stops approximately three-tenths of a mile south

4/2/97

of petitioners' homes near the crest of a hill, where it turns around and continues on its route. From the hill crest, Shire Road drops in grade and bends twice before reaching the Shrewsbury driveway. There are no sidewalks or shoulders on Shire Road between the Shrewsbury home and the crest of the hill, and, due to embankments and a retaining wall, it is necessary to walk in the roadway to get to and from the existing bus stop.

In 1993, the Shrewsburys offered to construct a turnaround on their property at their own expense to accommodate a minibus. They, however, withdrew their proposal after being informed by the district superintendent that any bus service to their home would have to be discontinued if route schedules did not make it convenient to travel on Shire Road. As indicated by the ALJ, the Shrewsburys remain willing to undertake the turnaround project if they have assurances that the minibus will continue to stop in front of their home during the duration of their children's attendance in the district's schools.

On May 7, 1996, the ALJ concluded that petitioners had established that the Board's refusal to extend minibus service to petitioners' homes was arbitrary and capricious. Taking into consideration the fact that Holland Township is situated on hilly terrain, the ALJ observed that the portion of Shire Road between the crest of the hill and petitioners' homes did not appear to be especially perilous for a minibus. Moreover, he found that a turnaround on the Shrewsbury property would eliminate any sight distance and turnaround problems. The ALJ further observed that the Board had authorized other bus routes and maneuvers that were patently more risky than a ride down Shire Road. Accordingly, he recommended that the Commissioner direct the

Board to choose one of the alternative possibilities for extending minibus service to petitioners' homes within 60 days of final agency action.

On June 21, 1996, the Commissioner rejected the ALJ's recommendation. The Commissioner found that there was no allegation that the bus stop itself was unsafe and stressed that the provision of safe conditions for children traveling to and from bus stops was a municipal function. Accordingly, he dismissed the petition, concluding that petitioners had failed to establish by a preponderance of credible evidence that the Board's action lacked a rational basis or that it was treating petitioners' children in a manner different than other children similarly situated.

Petitioners Geoffrey and Cecilia Shrewsbury filed the instant appeal to the State Board.[1]

After a careful review of the record, including the video tape submitted into evidence by petitioners,[2] we reverse the decision of the Commissioner. We agree with the ALJ that petitioners have demonstrated that the Board's action in refusing to extend its minibus service to their home was arbitrary and capricious under the circumstances.

As we stated in Peary v. Board of Education of the Township of Bamegat, 93 N.J.A.R. 2d (EDU) 798:

> Although district boards have wide discretion to promulgate pupil transportation policies, including school bus routes and stops, they may not discriminate or act in a manner that is arbitrary, capricious or unreasonable. Our review of the Board's action herein is not limited to the relative safety of the school bus stop...or the Board's jurisdiction over safety

[1] We note that John Gattuso and Carla Jardim, petitioners in the proceedings below, have not joined in the instant appeal. Consequently, our determination herein pertains only to petitioners Geoffrey and Cecilia Shrewsbury.

[2] Like the ALJ, we have not considered the commentary of the camera operator in determining this matter. See Initial Decision, slip op. at 2. We note further that the parties have not provided this agency with transcripts from the hearings held in the Office of Administrative Law in this matter.

> conditions of sidewalks and roadways within the Township. Rather, the broader issue is whether the Board abused its discretion in denying petitioner's request to reestablish the former bus stop...in this particular case.

See also Board of Educ. v. Kraft, 139 N.J. 597 (1995) (the State Supreme Court recognized the relevance of student safety in determining whether a walkway could be included in calculating remoteness from school); Nichols v. Board of Education of the Township of Wayne, Docket #A-3526-93T5 (App. Div. 1995), cert. denied, 142 N.J. 449 (1995) (where the route marked for measurement of remoteness had existing sidewalks and marked crosswalks, then the measurement must be based on the assumption that the children should use them).

Given the particular circumstances in the record before us, we agree with the ALJ that petitioners have demonstrated that the Board's action in this instance was arbitrary and capricious, particularly in view of the Shrewsburys' offer to construct a minibus turnaround on their property at their expense. As previously noted, our review herein is not limited to the safety of the existing bus stop or the Board's jurisdiction over safety conditions on the Township's roads. Rather, the standard is whether the Board abused its discretion in refusing to extend minibus service to petitioners' home.

As found by the ALJ, a minibus turnaround on the Shrewsburys' property would alleviate the Board's concerns regarding a sight distance and turnaround problem. It would also eliminate the need for a bus to continue down Shire Road or to navigate the sharp "S" curves located beyond petitioners' home. Moreover, while Shire Road between the current bus stop and petitioners' home does bend twice and drop in grade, we agree with the ALJ that it does not appear to be particularly perilous for a minibus.

Indeed, an engineering study conducted for the Board in 1993 concluded that, with certain specifications regarding the turnaround on petitioners' property, a minibus could safely operate to their home. Exhibit P-1, in evidence.

Nor do we find it reasonable for the Board to refuse to extend minibus service to petitioner's home on the basis of the potential hazards of this portion of Shire Road in poor weather conditions. As stressed by the ALJ, the Board is free to apply any general policy it may have concerning roadway safety in bad weather, as it would for other bus routes.

Accordingly, under the circumstances presented herein, we agree with the ALJ that petitioners have demonstrated that the Board's action in refusing to extend its minibus service to their home was arbitrary and capricious.[3] We therefore reverse the decision of the Commissioner and direct the Board to select one of the proposed alternatives for extending such service to the home of petitioners Geoffrey and Cecilia Shrewsbury.

S. David Brandt opposed.

Attorney exceptions are noted.

April 2, 1997

Date of mailing APR 02 1997

[3] Contrary to the contention of the Board in its exceptions to the report of our Legal Committee, our decision herein is not predicated upon a finding that there are other bus routes in the Township that are more dangerous than the road at issue in this case. We note further that our decision is limited to the specific facts in the record before us involving these particular petitioners. Thus, the Board's assertion in its exceptions that "13 [other] students who do not receive bus services in circumstances similar to petitioners will inevitably now insist upon door to door bus service" is immaterial to our determination.

269-96

269-96

IN THE MATTER OF THE TENURE	:	
HEARING OF LINDA LATONA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges against respondent school secretary based on alleged chronic absenteeism. Respondent did not appear at hearing.

Having considered the undisputed facts, the ALJ concluded that the record established that respondent's absenteeism was chronic and excessive and warranted her removal from her tenured position.

Commissioner concurred with the conclusion of the ALJ and directed respondent's termination from her position.

June 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6583-95
AGENCY DKT. NO. 173-5/95

IN THE MATTER OF THE TENURE HEARING OF LINDA LATONA, BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY

Matthew J. Michaelis, Esq., for petitioner Passaic Board of Education

No appearance by or on behalf of respondent Linda Latona

Record Closed: April 30, 1996 Decided: May 14, 1996

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

On or about May 19, 1995, the Passaic Board of Education certified charges of chronic and excessive absenteeism against respondent, Linda Latona. On June 1, 1995, respondent filed an answer denying the charges. Thereafter, on June 23, 1995, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on July 10, 1995, and a telephone prehearing conference was scheduled for August 3, 1995. The prehearing conference was adjourned to August 21, 1995, at the request of respondent's counsel at the time, Louis P. Bucceri, Esq. On that date, the issues were isolated and a hearing

was scheduled for March 15 and 18, 1996, at the OAL, 185 Washington Street, Newark, New Jersey. Notice of hearing dated November 30, 1995, was sent by the OAL to the parties' counsel.

Subsequent thereto, Mr. Bucceri moved to be relieved as counsel for respondent. After appropriate notice and opportunity to respond, he was relieved as counsel by order of the undersigned dated January 17, 1996. On the scheduled hearing date, March 15, 1996, respondent did not appear. The Certification in Lieu of Affidavit submitted with Mr. Bucceri's motion and served on Ms. Latona indicated that the hearing was scheduled to begin on March 15, 1996. Despite notice of the hearing from the OAL to Mr. Bucceri prior to his being relieved as counsel, and additional notice of the hearing from Mr. Bucceri to respondent, respondent failed to appear. The hearing proceeded in her absence. Respondent did not notify the OAL on that date or any date thereafter as to reasons for her nonappearance. On March 20, 1996, petitioner filed a memorandum of law which was sent to respondent by both regular mail and certified mail, return receipt requested. Respondent has not responded to this filing. The record closed on April 30, 1996.

The facts essential to a determination here are essentially undisputed. They may be summarized as follows:

1. Linda Latona is a secretary employed by petitioner, Passaic Board of Education, Passaic, New Jersey. Pursuant to the applicable contract respondent is entitled to 10 days sick time and 5 days personal time per fiscal year.

2. For the period September 1990 to March 14, 1996, respondent was absent 447 days.

3. For the period September 1990 through December 1990, respondent was absent 5 days.

4. For the period January 1991 through December 1991, respondent was absent 30 days.

5. For the period January 1992 through December 1992, respondent was absent 35 days.

6. For the period January 1993 through December 1993, respondent was absent 106 days.

7. For the period January 1994 through December 1994, respondent was absent 99 days.

9. For the period January 1995 through December 1995, respondent was absent 151 days.

10. For the period January 1996 to March 14, 1996, respondent was absent 21 days.

11. Respondent's absences exceed the contract allowance.

12. Respondent was made aware of the fact that her sick days and days out exceeded the contract allowance.

13. Respondent did not receive payment for her days absent in excess of the contract allowance.

Having considered the undisputed facts, I **CONCLUDE** that respondent's absenteeism was chronic and excessive and warrants her removal from her tenured position. *See In re Tenure Hearing of Crockett*, 94 *N.J.A.R.* 2d (EDU) 49 (wherein respondent had a total of 592½ days absent from 1979 until June 1993, and the same

was determined to constitute excessive absenteeism); *see also Camden Bd. of Educ. v. Rucker*, 94 *N.J.A.R.* 2d (EDU) 190 (wherein the administrative law judge concluded and the Commissioner of Education concurred that the principle of *res ipsa loquitur* applied, and respondent's chronic and excessive absenteeism warranted her removal from her tenured position); *In re Tenure Hearing of Ingram*, 94 *N.J.A.R.* 2d (EDU) 580.

Order

It is hereby **ORDERED** that respondent's appeal is dismissed and respondent is terminated from her position as secretary, Board of Education of the City of Passaic, for chronic and excessive absenteeism.

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

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

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

DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/14/96

DNA

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1996

Barbara A Harned

DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

For petitioner:

David W. McLean

For respondent:

None

List of Exhibits

For petitioner:

P-1 Passaic Board of Education Statement of Days Absent for Personal Illness for Linda Latona Relative to Tenure Dismissal Charges, prepared March 14, 1996

For respondent:

None

OAL DKT. NO. EDU 6583-95

IN THE MATTER OF THE TENURE	:	
HEARING OF LINDA LATONA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	
	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner concurs with the conclusion of the Administrative Law Judge (ALJ) that the record establishes that the within respondent's absenteeism was chronic and excessive and warrants her removal from her tenured secretarial position.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein. Respondent is hereby terminated from her position with the Board of Education of the City of Passaic.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* As noted in the initial decision, respondent did not appear for the March 15, 1996 scheduled hearing in this matter, nor did she reply to the Memorandum of Law filed with the ALJ by the Board on March 20, 1996.

June 26, 1996
Date of Mailing, June 26, 1996

270-96

270-96

P.H., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2885-96
AGENCY DKT. NO. 141-4/96

P.H. ON BEHALF OF MINOR CHILD, S.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR,
Respondent.

John M. Capasso, Esq., for petitioner

Paul Carr, Esq., for respondent (Murray & Carr, attorneys)

Record Closed: May 17, 1996 Decided: May 17, 1996

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

This matter was transmitted to the Office of Administrative Law on April 23, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. The transmission included a request for emergent relief.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof which is attached and fully incorporated herein.

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

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

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

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

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

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

17 MAY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

May 21, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 23 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

MURRAY & CARR, L.L.C.
One Hadley Avenue, P.O. Box 548
Toms River, New Jersey 08754
(908) 244-5551
Attorneys for Respondent, Egg Harbor
Township Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. EDUOS 02885-96S
Agency Ref. No. 141-4/96
Transmitting Agency: Dept. of Education

P.H. ON BEHALF OF MINOR CHILD, S.H.,	:	
Petitioner	:	
vs.	:	Civil Action
BOARD OF EDUCATION OF EGG HARBOR TOWNSHIP, ATLANTIC COUNTY,	:	STIPULATIONS OF SETTLEMENT
Respondent	:	

This matter having been brought before Honorable Bruce R. Campbell, A.L.J. on May 2, 1996, upon Petitioner's request for emergent relief, and in the presence of John M. Capasso, Esq., appearing on behalf of Petitioner and Paul J. Carr, Esq. of the firm of Murray & Carr appearing on behalf of Respondent; and the parties having testified as to the voluntariness of entering these stipulations and their satisfaction of representation by counsel, and Honorable Bruce R. Campbell, A.L.J. having been satisfied that the stipulations serve the best interest of S.H. and the best interest of the Egg Harbor Township School District as well as the public, and for good cause shown the parties do enter the following stipulations:

1. S.H. will remain on home bound instruction through the end of the 1995/1996 school year.

2. S.H. will re-enter the full program of the Egg Harbor Township 11th grade for the 1996/1997 school year beginning September, 1996 subject to successful participation in extra curricular programs, i.e. football, which participation shall become effective July 1, 1996. The athletic director at Egg Harbor Township School District will be notified of this stipulation immediately and S.H. will be notified of the program recommendations by the football coach

now so he may participate at his own expense and at a place off campus prior to July 1, 1996.

3. S.H.'s participation in any extra curricular activities will not interfere with his home bound instruction which will remain a priority until his return to the full program.

4. Petitioner's family will continue counselling through a licensed certified psychologist with a written interim report to be supplied to Respondent concluding that it is appropriate for S.H. to re-enter the school system. Counselling shall be at the cost of Petitioner.

5. If and when S.H. is discharged by his counsellor, a final report will be supplied to Respondent.

The foregoing represents all stipulations placed on the record in the presence of Honorable Bruce R. Campbell on May 2, 1996 as agreed to by the parties.

DR. PHILIP W. HEERY
Assistant Superintent of Schools
Present at Hearing as Agent for
the Egg Harbor Township Board of
Education

PAUL J. CARR, ESQ.
Attorney for Respondent

BRADLEY HARLEY
Parent of S.H.

PATRICIA HARLEY
Parent of S.H.

JOHN M. CAPASSO, ESQ.
Attorney for Petitioner

OAL DKT. NO. EDU 2885-96

P.H., on behalf of minor child, S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, which included a request for emergent relief, and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. There being no outstanding issues requiring resolution, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

June 26, 1996
Date of Mailing, June 26, 1996

271-96

L.Y., on behalf of minor child, E.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3008-96
AGENCY DKT. NO. 25-1/96

L.Y. on behalf of minor child, E.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

Sandra L. Lascari, Esq., for petitioner

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

Record Closed: May 3, 1996 Decided: May 9, 1996

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

Statement of Facts

On January 25, 1996, L.Y. on behalf of E.Y., filed a petition of appeal with the Commissioner of Education, alleging that L.Y. had filed a complaint for guardianship and custody of E.Y. Petitioner asked that E.Y. be admitted into the school district of South Orange and Maplewood. On February 21, 1996, respondent filed an answer, alleging that petitioner failed to satisfy the provisions of *N.J.S.A.* 18A:38-1 and E.Y.

was not entitled to a free public education in respondent's school district . Respondent further asserted that L.Y. was responsible for the tuition costs for the period of ineligible attendance for pupil E.Y. pursuant to *N.J.S.A.* 18A:38-1(b). On March 5, 1996, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15. and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on April 24, 1996, and a telephone prehearing conference scheduled for July 16, 1996. As a result of settlement conferences held between the parties, a settlement was reached and the prehearing conference was adjourned.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

May 7, 1996
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

May 15, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

YOUNG, DIMIERO & SAYOVITZ, P.C.
A Professional Corporation
Skyline Plaza
414 Eagle Rock Avenue
West Orange, NJ 07052
(201) 736-5200
Attorneys for Respondent South Orange/Maplewood Board of Education

MAY 3 11 48 AM '96

LYDIA YIKONA and EVAH YIKONA, Petitioner v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Respondent	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Docket No. 25-1/96 **STIPULATION OF SETTLEMENT**
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Counterclaimant v. LYDIA YIKONA and RICHARD MICHAEL YIKONA, Counterclaim Respondents	:	

Petitioner/Counterclaim Respondent Lydia Yikona and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of either party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to the other party's claim.

2. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorney fees and damages pursuant to any federal or State constitutional or civil rights claims and specifically release the other parties from any claims arising out of or related to these claims.

3. The pupil E.Y. will be permitted to continue to attend District schools so long as she satisfies the statutory criteria set forth in N.J.S.A. 18A:38-1, *et seq.*

4. As a result of the foregoing, Petitioners hereby withdraw the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

SANDRA L. LASCARI
Attorney for Petitioners

By: SANDRA L. LASCARI

YOUNG, DIMIERO & SAYOVITZ
Attorney for Respondent

By: JOANNE L. BUTLER

OAL DKT. NO. EDU 3008-96

L.Y., on behalf of minor child, E.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

June 26, 1996
Date of Mailing, June 26, 1996

272-96

272-96

JOHN COLLIER, III,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

June 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7278-95
AGENCY DKT. NO. 172-5/95

JOHN COLLIER, III,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN,
Respondent.

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

Karen A. Murray, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: May 15, 1996 Decided: May 15, 1996

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

This matter was transmitted to the Office of Administrative Law on July 13, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof which is attached and fully incorporated herein.

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

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

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

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

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

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

15 MAY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

May 21 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 22 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

SETTLEMENT AGREEMENT

This Agreement, made and entered into this 9th day of May, 1996, by and between **JOHN COLLIER, III** (hereinafter referred to as "employee") and the **CAMDEN BOARD OF EDUCATION** (hereinafter the "Board") to resolve amicably the dispute between the parties relating to John Collier III v. Camden Board of Education, EDU-7278-95S.

For the mutual covenants and considerations set forth below, the employee and the Board do hereby agree as follows:

1. The Board agrees to pay to the employee the gross amount of Eight Thousand Two Hundred Eleven Dollars and Eighty Cents ($8,211.80), subject to the standard and ordinary deductions. The net amount will be Four-thousand Seven Hundred and Six Dollars and One cent ($4,706.01).

The gross sum represents the difference between Fourteen Thousand Eight Hundred Four Dollars and Eighty Cents ($14,804.80), which is what the employee would have earned between September 1, 1994 and December 31, 1994, and Six Thousand Five Hundred and Ninety-Three Dollars ($6593.00), which represents the employee's unemployment compensation received from and including September 3, 1994 through January 7, 1995.

r The net amount represents the difference between Eight Thousand Two Hundred and Eleven Dollars and Eighty Cents ($8,211.80) and Three Thousand Five Hundred and Five Dollars and Seventy-Nine cents ($3,505.79), which represents the sum of the standard and ordinary deductions.

The breakdown of said deductions are as follows:

Federal Tax:	$2,023.64
State Tax:	$ 385.65
FICA:	$ 628.20
Unemployment Tax:	$ 24.86
Pension:	$ 410.59
Life Insurance:	$ 32.85

2. The Board agrees to recognize and credit the employee with seniority retroactive to September 1, 1994, and all seniority acquired prior to June 30, 1994.

3. The Board agrees to reimburse the Department of Labor, Bureau of Benefits Payment Control the unemployment payments received by the employee from and including September 3, 1994 through January 7, 1995.

4. The employee is entitled to all benefits, which include sick leave, pension credit and personal days, retroactive to September 1, 1994, and all benefits acquired prior to June 30, 1994.

5. The employee agrees to pay his share of the pension contribution and shall not be liable for the employee's share. The Board will contribute the employer's share as determined by the State.

6. This Settlement Agreement resolves all claims between the parties arising from the reduction in force at issue in this case.

7. This Agreement contains all of the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

IN WITNESS WHEREOF, the parties have signed, sealed, delive: and acknowledged this Agreement.

CAMDEN BOARD OF EDUCATION

By: Karen Murray
Karen A. Murray, Esq.

Date: May 9, 1996

For John Collier,

RAF
Richard Friedman, Esq.

Date: 5/9/96

John Collier
John Collier, III

Date: 5/9/96

OAL DKT. NO. EDU 7278-95

JOHN COLLIER, III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

COMMISSIONER OF EDUCATION

June 26, 1996
Date of Mailing, June 26, 1996

273-96

273-96

MATTHEW DENSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
WITHDRAWAL
OAL DKT. NO. EDU 3132-95
AGENCY DKT. NO. 27-2/95

MATTHEW DENSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,
Respondent.

Sanford R. Oxfeld, Esq, for petitioner
(Balk, Oxfeld, Mandel & Cohen, attorneys)

Luanne M. Peterpaul, Esq., for respondent
(Peterpaul & Corcoran, attorneys)

Record Closed: May 6, 1996 Decided: June 5, 1996

BEFORE **ARNOLD SAMUELS**, ALJ:

On February 16, 1995 the petitioner, Matthew Denson, filed a verified petition with the Commissioner of Education, claiming that he rescinded his resignation as a teacher in the respondent school district. The petitioner sought reinstatement and back pay. He also asserted a violation of the Americans with Disabilities Act. Respondent

filed an answer on March 13, 1995, denying the substantive allegations of the petition and asserting affirmative defenses.

On March 23, 1995, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

In a telephone conference with counsel on November 20, 1995 Mr. Denson's attorney advised that the petitioner had decided to withdraw his petition and to unconditionally resign his teaching position, subject only to reimbursement of the cost he had incurred for COBRA health insurance coverage.

On May 6, 1996 the parties filed a document entitled Stipulation of Settlement and Dismissal, signed by the petitioner and by the respondent's Board Secretary. The stipulation confirms the petitioner's unconditional written resignation and withdrawal, and it recites the foregoing reimbursement of health insurance coverage costs.

Based on the foregoing, it is **CONCLUDED** that sufficient cause has been shown by the petitioner for withdrawal of the petition that he filed against respondent.

It is therefore **ORDERED** that the withdrawal of the petition and dismissal of this contested case be approved, subject to approval by the Commissioner of Education.

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

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

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

June 5, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

PETERPAUL & CORCORAN

Attorneys at Law
One Cleveland Place
Springfield, New Jersey 07081

(201) 467-5888
Fax: (201) 467-2108

50 Park Place - Lobby
Newark, New Jersey 07102

Robert E. Corcoran
Luanne M. Peterpaul

*Please Reply To The Springfield Office

RECEIVED
STATE OF NEW JERSEY
OFFICE
MAY 6 12 04 PM '96

May 3, 1996

Honorable Arnold Samuels, A.L.J.
Office of Administrative Law
185 Washington Avenue
Newark, New Jersey 07102

re: Densen v. Board of Education of Township of Hillside, Union County
OAL Dkt. Number: EDU 03132-95N

Dear Judge Samuels:

Enclosed for filing is an original and one (1) copy of a Stipulation of Settlement and Dismissal with regard to the above-captioned matter. Please file and return one copy stamped "filed" in the self-addressed stamped envelope provided.

By copy of this letter I am forwarding a copy of the enclosed upon Sanford R. Oxfeld, Esq.

Thank you for your consideration in this matter.

Respectfully,

Luanne M. Peterpaul

Luanne M. Peterpaul

LMP/tee
cc: Sanford R. Oxfeld, Esq.

STATE REGISTERED MAIL
OFFICE
MAY 6 12 04 PM '96

BALK, OXFELD, MANDELL & COHEN, P.A.
50 Commerce Street
Newark, New Jersey 07102
(201) 642-0160
Attorneys for Petitioner

MATTHEW DENSEN, Petitioner, vs. **BOARD OF EDUCATION OF TOWNSHIP OF HILLSIDE, UNION COUNTY,** Respondent.	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY** **OAL Dkt. No. EDU 03132-95N** **Agency Ref. No. 27-2/95** **STIPULATION OF SETTLEMENT AND DISMISSAL**

WHEREAS, Petitioner Matthew Densen has mitigated his damages by obtaining employment elsewhere, and

WHEREAS, Petitioner Densen is accordingly desirous of withdrawing his Petition, and

WHEREAS, Petitioner Densen and Respondent, Board of Education of Hillside have achieved an amicable resolution of all aspects of this matter.

NOW, **THEREFORE**, IN FULL SETTLEMENT OF THE WITHIN MATTER, it is agreed as follows:

1. The Respondent Board shall reimburse Petitioner Densen the sum of $1500, which represents the cost of Petitioner Densen obtaining COBRA coverage for his health insurance.

2. Petitioner Densen unequivocally tenders his resignation to the Respondent Board effective November 30,

1994.

3. Petitioner Densen unequivocally withdraws his Petition in the within matter.

4. Petitioner Densen understands that the terms of this settlement must be approved by the Respondent Board as well as the Administrative Law Judge and the Commissioner of Education.

Dated: 11-30-95

Matthew Densen
MATTHEW DENSEN

BOARD SECRETARY, Hillside Public School

OAL DKT. NO. EDU 3132-95

MATTHEW DENSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and the initial decision of the Office of Administrative Law granting withdrawal of this matter, based on a joint stipulation of settlement of the parties, have been reviewed. The Commissioner approves the settlement terms and, as such, the withdrawal of this matter.

This matter is no longer deemed to be a dispute before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 26, 1996
DATE OF MAILING JUNE 27, 1996

274-96

274-96

OAL DKT NO. EDU 7182-94

H. VICTOR GILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Petitioner, former tenured superintendent who resigned from his position, contested Board's refusal to compensate him for accumulated vacation days. Board counterclaimed, asserting that petitioner owed tuition paid for his continuing education benefits.

ALJ found that petitioner resigned in conformity with statute and the Board accepted his resignation. Further, the Board had paid accumulated vacation time to others who left in similar circumstances. ALJ concluded that petitioner was entitled to reimbursement for vacation time in the amount of $5,862.09. As to the tuition owed, the ALJ found that petitioner must reimburse the Board for tuition advanced on his behalf in 1992-93 in the sum of $5,200 as the counterclaim was filed in time, within the 90 days subsequent to the filing of the petition.

Commissioner affirmed in part, reversed in part the initial decision of the ALJ. Commissioner concurred with the ALJ that the Board must pay petitioner the reimbursement for vacation time. Commissioner found, however, that the Board's counterclaim was untimely filed. Board should have filed its claim for reimbursement within 90 days of the notice sent by petitioner's attorney rejecting the Board's demand for reimbusement. (*Kaprow*)

JUNE 27, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7182-94

AGENCY REF. NO. 80-4/94

H. VICTOR GILSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY

Respondent.

Margaret C. Murphy, Esq., for petitioner

Louis J. Greco, Esq., for respondent

Record Closed: February 20, 1996 Decided: March 25, 1996

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Dr. Victor Gilson, contested the Dennis Township Board of Education's (Board) refusal to compensate him for accumulated vacation days after his resignation. The Board counterclaimed for tuition benefits it paid on petitioner's behalf.

The Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) on July 27, 1994, for determination as a contested case pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15, the act creating the OAL, N.J.S.A. 52:14F-1 to -13 and the act granting the Commissioner authority to determine controversies under the school law, N.J.A.C. 18A:6-9.

FACTUAL AND LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Petitioner was employed by the Board in 1987 as a principal in the district. He was promoted to the position of superintendent approximately one year later and, one year thereafter, he was given tenure in that position. He resigned from the position of superintendent, effective March 11, 1994, to become assistant superintendent in his hometown district, Bridgeton, New Jersey. At the time of his departure, Dr. Gilson submitted a letter of resignation which the Board accepted without objection.

The Board stipulated that petitioner had accumulated 19.5 vacation days as of the date he left the district and that the per diem rate of payment for those days was $300.62. Petitioner, therefore, alleges that the Board owes him $5,862.09 in payment for unused vacation time ($300.62 x 19.5 = $5,862.09).

The Board's refusal to pay petitioner for this unused vacation time is because he left his employment prior to the expiration of the school year notwithstanding the fact that petitioner resigned his position in conformity with N.J.S.A. 18A:28-8 by providing "at least 60 days written notice of his intention, ..."

The Board supports its contention that it does not owe petitioner accrued vacation time by reference to its Policy 4252 which appears to condition payment for vacation upon the employee serving the full term of his or her contract. It states in pertinent part:

> .... if an employee has served the full term of his/her contract and his/her contract with the district will not continue for any reason, the district shall

> grant either vacation time or salary in lieu of vacation, whichever the administration determines is in the best interests of the district.

In this case, petitioner resigned in conformity with the statute and the Board accepted petitioner's resignation. The petitioner's agreement with the Board is silent on the ability of an employee who resigns in conformity with the statute to receive accrued vacation time. This is similar to the circumstances in Lowe v. BOE City of Orange, Essex County, 93 N.J.A.R. 2d. (EDU) 789, aff'd 95 N.J.A.R. 2d. (EDU) 139 (App. Div. 1995).

The conditional phrase in the Board's policy must be directed to those situations in which an employee leaves his or her employment without giving the notice required by the statute. There was also some evidence that the Board had paid accumulated vacation time to others who left in similar circumstances and this was not rebutted.

I therefore, **FIND and CONCLUDE** that the petitioner is entitled to reimbursement of the 19.5 vacation days he had accumulated upon his resignation from the district.

I **FURTHER FIND and CONCLUDE** that this amount is the sum of $5,862.09.

The Board alleges that petitioner must reimburse it in full for tuition payments advanced on behalf of the petitioner because he did not complete his portion of the bargain. The agreement the petitioner made with the Board for tuition repayment requires the petitioner to work two years for each year tuition was advanced to him for continuing education. However, it also required that only the last years' tuition be reimbursed. The Board paid petitioner's tuition for three years as follows:

1990-91	$ 4,600.00
1991-92	4, 800.00
1992-93	5, 200.00
Total	$14, 600.00

In the meantime, petitioner worked for the Board until March of 1994 when his resignation was accepted. He, therefore, did not fulfill his obligation to work two years for every year his tuition was paid. He worked from 1990/91 through 1992/93, a total of three years. He did not complete the fourth year. His tuition was paid in three of these years. However, unless excused the petitioner must reimburse the Board the previous years' tuition. The previous years' tuition was $5,200. That this is the intent of the agreement is evident in the last line of the agreement: "should an employee resign (emphasis supplied) prior to fulfilling the one year obligation, (sic) the previous years Doctoral fees paid by the Board of Education will be reimbursed by the employee." The dispute centers on whether the obligation was excused.

Boards of Education are a "body corporate" and may only transact business according to law and regulation. N.J.S.A. 18A:10-1 et seq. The petitioner's contract and obligations thereunder, to have legal effect, must be adopted by resolution of the Board or be required by law.

No statute or regulation promulgated by the Commissioner or State Board of Education requires that tuition be advanced to an employee or, if advanced, to be repaid. If such an agreement exists it must be approved by the Board in regular session. The Board adopted a resolution approving petitioner's contract with the tuition agreement. It never adopted a resolution relieving the petitioner of his obligation to reimburse the Board.

Petitioner argues that the resolutions appearing in the Minutes of December 9, 1992 and November 10, 1993, support his position that the Board relieved him of any obligation to repay tuition advanced on his behalf under his contract of employment. The pertinent part of the Minutes are as follows:

> Mr. Gilson requested that the official Minutes for this meeting reflect that all references concerning his NOVA expenses/obligations would no longer appear in his contract.
>
> Furthermore, Mr. Gilson was to be given a *fourth* (sic) week's vacation as part of his contract agreement between himself and the Board of Education. Following this discussion, Mr. Penkethman moved, and Mrs. Payne

seconded a motion to approve the salary adjustments for unrepresented staff, for the 1992-93 school year, as follows:

Superintendent	
H. Victor Gilson	$67,261.000
.....	
.....	
Roll Call Vote	Motion Carried

One (1) "No" vote by Mr. LaPidus.

This paragraph merely reflects the fact that petitioner asked that his obligation to repay tuition "no longer appear in his contract" and that he be given a "fourth week's vacation." The resolution adopted salaries for petitioner and the rest of the school's unrepresented staff. These salaries were set forth in the Minutes, no document was attached or made a part of the resolution. This is not a resolution terminating petitioner's obligation under his contract. It is a resolution adopting employees salaries.

Testimony also reveals that in the blank space in the paragraph repeated above, between the words "... contract." and "Furthermore ...." There is a "white-out." In other words something was covered up with a white fluid used to hide mistakes in a typed document. Under the white out the impression of the following words can be seen according to testimony and a copy of the original document still in the hands of a Board member: "There was discussion on this matter but no formal vote was taken." It also appears that the word "*fourth*" in italics was typed over a whited out "third."

Thomas Cushane, the principal of the Dennis Township school, was the School Business Administrator and Board Secretary on December 9, 1992. He testified that he is the person who changed the Minutes by whiting out the words referring to a "discussion" but "no formal vote" and adding "fourth" over "third."

Cushane does not recall who directed him to make these changes. He suggested that it may have been the "attorney for the Board .... it may have been a member of the Board or the Board as a whole, you know, in executive session. I'm not sure."

He is not sure when it was done but "after his (petitioner's) departure, after notification was -- tending his resignation."

This change was not authorized in any Minute book of the Board.

In support of the petitioner's contention that the Minute book authorizes his release from liability for repayment of tuition, petitioner obtained the testimony at this hearing of only two of the eight Board members who were present at the meeting who think they voted to absolve him of liability. This is not even a majority.

Finally, the Minutes of November 10, 1993, ".... approve raises for support staff members as listed. This list is attached to, and considered part of these Minutes." The list is a schedule of school employees indicating annual salaries 1992-93 either ten month or twelve month, the rate, the percentage increase, the dollar increase, and the 1993-94 salary. There is a place indicating "Other Conditions." That place next to petitioner's name is blank, but after petitioner's name and salary appears the following notations:

1.	T.S.S.	$2,000
2.	Vacation	4 weeks
3.	School Calendar	
4.	Doctoral Program	NO OBLIGATION

Cushane, who prepared this document and the Board Minutes testified that the Board discussion and vote was concerned with "raises." He also said the Board approved "everything listed in the attached paper, which I did indicate was part of the Minutes." However, he clearly indicated that the Board's action and discussion concerned the adoption of raises. This could not have included a contractual term as unusual as is the term under consideration; the abatement of a tuition repayment agreement. A similar statement for another employee with a tuition repayment

agreement reads " _____ obligation." This indicates, since it is blank, that at least this person's obligation was not discussed. There is, therefore, no reason to think petitioner's obligation was discussed either.

It is as though the petitioner asked the Board for the moon and sixpence. The Board granted him sixpence. He cannot now complain that they meant to give him the moon. He was the Superintendent of the School. He had input into the agenda. If the Board Minutes of December 9, 1992, did not accurately reflect the Board's action in his opinion, a motion to correct the Minutes at the next Board meeting would have been the proper procedure to follow. A certified School Superintendent is charged with knowing the procedure.

The last issue remaining to be resolved is the petitioner's claim that the Board's counterclaim is untimely because it was not asserted within the 90 day Rule. N.J.A.C. 6:24-1.2(c). The 90 days cannot begin to run until a controversy or dispute appears. There must be a wrongful act. Nissman v. BOE of Long Beach Island, Ocean County, 272 N.J. Super. 373, cert. denied. 137 N.J. 315. In this case, the facts do not establish when the accrual of the Board's action began to run. It had a contract indicating only that the petitioner would have to reimburse the Board for tuition if petitioner failed to complete two years of employment for each year of tuition paid on his behalf. The contract was silent as to repayment. A dispute arose when petitioner filed his petition for reimbursement of accrued vacation. This counterclaim for tuition reimbursement was filed within the 90 days subsequent to the filing of the petition.

I therefore **FIND and CONCLUDE** that the petitioner must reimburse the Board for tuition advanced on his behalf in 1992-93 in the sum of $5,200. The Board may set off his claim for vacation pay against this debt. The balance is due petitioner.

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

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

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

3/25/96
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

3/29/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 4 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

VICTOR GILSON

EDNA J. PAYNE

CHARLES T. CAMP

CARL GALLELA NEWFIELD

FOR RESPONDENT:

THOMAS CUSHANE

CHARLOTTE SCRIVANI

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 TENURE AGREEMENT BETWEEN BOE AND VICTOR GILSON (2 PAGES)

P-2 BOE REGULAR MINUTES, WEDNESDAY, DECEMBER 9, 1992 (6 PAGES)

P-3 PAY STATEMENT FOR 3/18/94 FOR VICTOR GILSON

P-4 H. VICTOR GILSON SALARY BREAK-DOWN

P-5 DENNIS TWP. BOE REGULAR MEETING MINUTES NOVEMBER 10, 1993 (9 PAGES)

P-6 RESPONDENT'S ANSWERS TO SECOND SET OF INTERROGATORIES AND SECOND REQUEST FOR PRODUCTION OF DOCUMENTS (5 PAGES)

FOR RESPONDENT:

R-1 DENNIS TWP. BOE SUPERINTENDENT OF SCHOOLS JOB DESCRIPTION (6 PAGES)

R-2 DENNIS TWP. BOE VACATION/HOLIDAY POLICY

R-3 DENNIS TWP. BOE JOB DESCRIPTION - SUPERINTENDENT (5 PAGES)

R-4 EXECUTED TENURE AGREEMENT BETWEEN DENNIS TWP. BOE AND

VICTOR GILSON, SUPERINTENDENT

R-5 EXECUTED TENURE AGREEMENT BETWEEN DENNIS TWP. BOE AND VICTOR GILSON, CHIEF SCHOOL ADMINISTRATOR (2 PAGES)

R-6 EXECUTED EMPLOYMENT CONTRACT DATED 6/17/88 BETWEEN DENNIS TWP. BOE AND VICTOR GILSON, CHIEF SCHOOL ADMINISTRATOR (2 PAGES)

R-7 EXECUTED EMPLOYMENT CONTRACT DATED 5/22/87 BETWEEN DENNIS TWP. BOE AND VICTOR GILSON, PRINCIPAL

R-8 EXECUTED EMPLOYMENT CONTRACT DATED 2/12/87 BETWEEN DENNIS TWP. BOE AND VICTOR GILSON, PRINCIPAL

R-9 NOVA UNIVERSITY-ADMINISTRATORS CONTRACT, DATED 6/16/92

R-10 LETTER FROM DENNIS GROHMAN TO CHARLOTTE SCRIVANI, DATED 2/17/94

R-11 LETTER FROM BRUCE GORMAN, ESQ. TO CHARLOTTE SCRIVANI, DATED 2/23/94 (3 PAGES)

R-12 CORRECTIONS TO MINUTES OF DECEMBER 9, 1992

EXHIBIT A

AFFIDAVIT OF CHARLOTTE SCRIVANI

H. VICTOR GILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DENNIS, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. Reply exceptions were not filed by the Board.

Petitioner's exceptions challenge the factual findings of the Administrative Law Judge (ALJ), with regard to the issue of reimbursement of tuition payments, contending that there are a number of factual inaccuracies in the initial decision and that petitioner is not required to repay the Board of Education for tuition received in that the debt was discharged, or alternately, forgiven. (Petitioner's Exceptions at pp. 2-6) As an alternative argument, petitioner contends that the Board's policy for repayment of tuition must be applied to all similarly situated employees in the same manner, i.e., on a pro-rata basis, and offers a recalculation of tuition to be repaid. (*Id.* at pp. 9-11) In that this argument was advanced and considered by the ALJ, it is not more fully set forth herein.

Petitioner further excepts that the Board's counterclaim for tuition owed by petitioner is untimely in that it was filed beyond the 90-day filing period for appeals before the Commissioner as set forth at *N.J.A.C.* 6:24-1.2(c). In support of this contention, petitioner avers that the Board knew on February 23, 1994, that petitioner did not intend to repay the Board for tuition when it received a letter from Bruce Gorman, an attorney, which stated that petitioner rejected its proposal for tuition repayment. (Petitioner's Exceptions at p. 12) Moreover, petitioner avers that the Board absolutely knew on March 11, 1994 that petitioner was not going

to repay the tuition allegedly owed when he left the District's employ without making such repayment to the Board. (*Id.*) As the 90 days had run from March 11, 1994, as of June 9, 1994, the Board's counterclaim is time barred.

Upon a careful and independent review of the record, including transcripts of the hearings, the Commissioner concurs with the ALJ's finding that petitioner is entitled to reimbursement for vacation pay but reverses the conclusion of the ALJ who found that back tuition is owed to the Board in that the Board's counterclaim for tuition was untimely filed. The language of *N.J.A.C* 6:24-1.2(c) requires that actions brought before the Commissioner of Education be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party***which is the subject of the requested contested case hearing." This rule, which was promulgated by the State Board of Education, "***represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws." *Kaprow v. Board of Education of Berkeley Twp.,* 131 *N.J.* 572, 582 (1993). "***In addition, it represents a *reasonable* procedural requirement." (emphasis in text) *Kaprow at 583.*

In the initial decision, the ALJ dismissed petitioner's argument concerning this 90-day rule, finding that, "***the facts do not establish when the accrual of the Board's action began to run." The ALJ then determined that, the "dispute arose when petitioner filed his petition for reimbursement of accrued vacation." (Initial Decision at p. 7)

The Commissioner disagrees and finds that the Board had ample notice that petitioner was rejecting its demand to reimburse the Board for tuition by the letter dated February 23, 1994 from its attorney, Mr. Gorman. The Board should thus have filed its claim for reimbursement within 90 days of such notice. It has been established that even an unofficial and informal letter is sufficient to constitute adequate notice to a litigant and trigger the 90-day limitations period. *Kaprow* at 588. In *Kaprow*, a letter from the secretary of the local board constituted adequate notice under *N.J.A.C.* 6:24-1.2(c) and such was determined to constitute adequate notice. See, also, *Morris-Union Jointure Commission v. Board of Education of the Borough of South River, Middlesex County*, 92 *N.J.A.R.* 2d (EDU) 453 (letter to a board's attorney was deemed sufficiently unambiguous to constitute notice of action to commence the running of the 90-day statute of limitations) and *Nissman v. Board of Education of the Township of Long Beach Island, Ocean County*, 92 *N.J.A.R.* 2d (EDU) 621 (letter of termination

constituted adequate notice). Even assuming that the letter of February 23, 1994 was ambiguous, however, the Board should have filed its claim within 90 days of petitioner's departure from employment with the District on March 11, 1994. Only after petitioner filed for reinstatement of vacation pay did the Board assert as a counterclaim its claim for reimbursement of tuition. Thus, the Board's counterclaim was clearly untimely.

Lastly, no relaxation of the 90-day rule is warranted in this instance. As noted by petitioner's counsel, case law suggests that the applicable regulation must be construed strictly. See, e.g., *North Plainfield Education Association v. Bd. of Ed.*, 96 *N.J.* 587 (1984) and *J.R. Transportation Company, Inc. and A & A Charter Service, Inc. v. Board of Education of the State-Operated School District of Jersey City, Hudson County*, decided by the Commissioner March 8, 1996. The Commissioner has held that, "***[e]xceptions to the 90-day rule should however, be granted sparingly, and only where there exists compelling circumstances to justify enlargement or relaxation of the time limit.***" *Morris-Union, supra* at 455, quoting *Riely v. Bd. of Ed. of Hunterdon Cent. H.S.*, 173 *N.J. Super.* 109 (App. Div. 1980). The Commissioner has described these circumstances as follows:

> Where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination, and where a matter of significant public interest is involved. (citations deleted) *Miller v. Morris School District**** (Feb. 25, 1980).
>
> (*Morris-Union* at 455)

This present case involves a monetary dispute with facts decidedly not compelling enough to meet these stringent criteria. Further, the record does not present an explanation by the Board sufficiently compelling to justify its delay in filing its claim for reimbursement of tuition it believed to be due and owing.

Accordingly, the decision of the ALJ is affirmed in part and reversed in part and the Board is ordered to pay to petitioner $5,862.09, as calculated by the ALJ, as the full amount of his unused vacation time.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 27, 1996
DATE OF MAILING JUNE 27, 1996

280-96

280-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ROY TERRANOVA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE		DECISION
TOWNSHIP OF WAYNE, PASSAIC	:	
COUNTY.	:	

July 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1906-96
AGENCY DKT. NO. 26-1/96

IN THE MATTER OF THE TENURE HEARING OF ROY TERRANOVA, BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY

Stephen R. Fogarty, Esq., for petitioner
(Fogarty & Hara, attorneys)

Kathleen Naprstek, Esq., for respondent,
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: May 23, 1996 Decided: May 23, 1996

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

This matter involves tenure charges of unbecoming conduct certified by the Board of Education of the Township of Wayne ("Board") against Roy Terranova under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1.

Roy Terranova is a tenured teaching staff member employed by the district. By resolution adopted on January 23, 1996, the Board found the existence of probable cause to certify tenure charges which, if true, are sufficient to warrant dismissal or reduction in salary. Basically, the charges, as amended, allege that Terranova committed various acts constituting sexual harassment during the 1991-92 to 1994-95

school years. As a result of its determination, the Board suspended Terranova, without pay, effective January 24, 1996.

On January 25, 1996, the Board filed its written tenure charges with the Commissioner of Education ("Commissioner"). Respondent Terranova filed an answer on February 26, 1996. Subsequently, on February 29, 1996, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case.

Both parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the *State Board of Education in Cardonick v. Brooklawn Bd. of Educ.*, 193 *S.L.D.* ___ (St. Bd. April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest.

On May 23, 1996, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Terranova testified that he fully understood and voluntarily agreed to the terms of settlement. In addition, the parties have prepared a stipulation of settlement, which is attached and fully incorporated in this decision. The Board passed a resolution approving the settlement terms on April 29, 1996.

Based on my review of the records, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. It is predicted that the hearing in this matter would be long and arduous. The Board has filed a voluminous statement of evidence in support of its

charges. OAL has scheduled the matter to be heard on nine consecutive dates in November 1996. Board counsel advises that this estimate of the length of the hearing is unduly optimistic and that a hearing would be likely to last twice as long. Petitioner anticipates calling twenty-six witnesses to prove its charges.

2. Eight of the Board's intended witnesses are female students, between the ages of twelve and fourteen years old, who are alleged victims of sexual harassment. Another twelve children of tender years would be called by the Board as witnesses. Several parents have contacted Board counsel to express concerns about the emotional impact on their children of having to testify against their teacher.

3 Whether justified or not, some of the children have fears of retaliation in the event that the charges against their teacher are dismissed and he returns to a position of classroom authority over them.

4. Under the proposed terms of settlement, Terranova would resign from his position effective June 30, 1996. In exchange, he would receive his salary from January 24, 1996 through June 30, 1996 in the amount of $34,703. Since *N.J.S.A.* 18A:6-14 requires the Board to resume paying Terranova's salary after 120 days, which period is about to expire on June 24, 1996,* Terranova is legally entitled to compensation of $8,263 through the end of the current school year. Therefore, the net salary cost to the Board is $26,440.

5. In addition, the board has agreed to restore Terranova's salary increment for 1995-96 in the amount of $1,501 and to reimburse him for out-of-pocket expenses of $1,076 which he incurred to continue his health insurance coverage. In sum, the total cost of the settlement to the Board will be $29,017.

* Sentence should read,"Since N.J.S.A. 18A:6-14 requires the Board to resume paying Terranova's salary after 120 days, which period [is about to expire on June 24, 1996,] expired on May 24, 1996, Terranova is legally entitled to compensation of $8,263 through the end of the current school year. [Office of Administrative Law memorandum dated June 11, 1996.]

6. If the tenure matter proceeds to hearing, Board counsel conservatively estimates that Board's legal fees will be around $63,000. Moreover, Terranova has brought a separate grievance proceeding relating to the withholding of his 1995-96 salary increment and the Board is preparing to apply for a scope proceeding before the Public Employment Relations Commission. Board counsel estimates that legal fees for the increment withholding matter will be an additional $20,000. Thus, a realistic estimate of the Board's total legal fees to bring this matter to conclusion would be about $83,000.

7. Even under the best of circumstances, it is unlikely that the tenure hearing will be concluded before late fall or early winter. Then the administrative law judge will have forty-five days to prepare an initial decision and the Commissioner will have an additional forty-five days for review and issuance of a final decision. Regardless of whether it won or lost, the Board would incur the additional expense of paying Terranova's annual salary of $63,000 for the better part of the 1996-97 school year.

8. An essential provision of the agreement obligates Terranova to surrender all licenses and certificates authorizing him to teach in the State of New Jersey. Further, Terranova agrees that he will not oppose any action by the State Board of Examiners to revoke his teaching licenses or certificates and that he will not apply in the future for restoration of his teaching licenses and certificates.

9. Before entering into this agreement, Terranova fully understood his rights and had an adequate opportunity to consult with legal counsel.

10. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED.**

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

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

May 23, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5.29.96
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 30 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

STATE OF NEW JERSEY

RESOLUTION 31-96 MAY 23 2 09 PM '96

BE IT RESOLVED by the Township of Wayne Board of Education as follows:

1. ROY TERRANOVA shall be paid the amount of $37,280. representing his full salary for the 1995-1996 school year with his salary increment restored for the 1995-1996 school year; the retroactive amount of his 1995-1996 salary increment; and the amount of his insurance payments under COBRA during his suspension without pay.

2. The request of ROY TERRANOVA to tender his resignation with the Board of Education effective June 30, 1996, is hereby approved and accepted.

3. The terms, stipulations and conditions as established in a Settlement Agreement between the Board of Education and ROY TERRANOVA, which is annexed to this Resolution, are hereby adopted and approved by the Board of Education. The President and Secretary of the Board of Education are hereby authorized and directed to execute the attached Settlement Agreement, and any other documents necessary to effect said Settlement Agreement.

Certification

I hereby certify that the within Resolution was adopted by the Township of Wayne Board of Education at a meeting held on April 29, 1996, by a majority of the Board.

MOTION: C. Vergano SECOND: H. Weinberg
VOTE: 8-0
AYES: J. Durr, L. Katz, D. Pudup, J. Schweighardt, D. Vreeland, H. Weinberg, C. Herman, C. Vergano
NAYES: -0-
ABSTAIN: -0-
ABSENT: L. Wilbur

Dr. Rhua C. Ernst
Board Secretary

Dated: 4/30, 1996

STATE OF NEW JERSEY
MAY 23 2 09 PM '96
STATE OF NEW JERSEY

FOGARTY & HARA, ESQS.
23 Highland Cross
Rutherford, New Jersey 07070
(201) 935-0440
Attorneys for Petitioner,
Board of Education of the
Township of Wayne

	BEFORE THE COMMISSIONER
	OF EDUCATION/OFFICE OF
IN THE MATTER OF THE TENURE	ADMINISTRATIVE LAW
HEARING OF ROY TERRANOVA,	
BOARD OF EDUCATION OF THE	O.A.L. DOCKET NO.: EDUTH 01906-96N
TOWNSHIP OF WAYNE, PASSAIC	AGENCY REF. NO.: 26-1/96
COUNTY	
	SETTLEMENT AGREEMENT

WHEREAS, petitioner, Board of Education of the Township of Wayne (hereinafter referred to as the "Board") certified tenure charges against respondent, Roy Terranova (hereinafter referred to as "Terranova") for unbecoming conduct and suspended Terranova without pay on January 24, 1996; and

WHEREAS, said charges for unbecoming conduct were filed by petition with the Commissioner of Education on January 25, 1996; and

WHEREAS, Terranova filed an Answer to the petition on February 26, 1996, denying the charges filed against him; and

WHEREAS, the Board has withheld the salary increments of Terranova for the 1995-1996 school year based on Terranova's unbecoming conduct; and

WHEREAS, the parties agree that a settlement would benefit all witnesses, particularly young students, by allowing them to avoid the embarrassment and humiliation associated with testifying to the allegations against Terranova; and

WHEREAS, further litigation of these charges would necessitate the disruption of the Board's educational program due to the necessary absence of administrators and teachers for testimony at the hearing; and

WHEREAS, the Board would incur substantial financial costs by continuing this litigation that would significantly exceed the cost of this settlement; and

WHEREAS, the parties wish to amicably resolve their differences without the need to resort to any further litigation;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and the mutual promises and covenants of the parties set forth below, the parties hereby agree as follows:

1. Terranova hereby resigns his position of employment with the Board, together with all tenure and seniority rights, effective June 30, 1996, subject only to approval of this Agreement by the Board, the Office of Administrative Law and the Commissioner of Education. Terranova submits his resignation knowingly, voluntarily and irrevocably, free of coercion or duress, after consulting with counsel and receiving advice as to its ramifications. Terranova will sign an irrevocable letter of resignation from all employment with the Board in a form attached hereto as Exhibit A.

2. The Board, by resolution, will publicly accept the resignation of Terranova at its next regularly scheduled meeting. The form of the Board's resolution is attached hereto

SC

as Exhibit B.

3. The Board agrees to withdraw, with prejudice, its tenure charges in the above-captioned matter bearing O.A.L. Docket No. EDUTH 01906-96 and Agency Ref. No. 26-1/96, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

4. The Board will retroactively restore the salary increment of Terranova for the 1995-1996 school year, and such retroactive monies previously withheld by the Board in the amount of $1,501 will be paid to Terranova, after normal payroll deductions, upon final approval of this Agreement.

5. The Board will retroactively pay Terranova a sum equal to payments made by Terranova for insurance coverage under the Consolidated Omnibus Reconciliation Act of 1986 ("COBRA") during the period of his suspension without pay in the amount of $1,076.

6. The Board agrees to pay Terranova his full salary, from the date of his suspension without pay (January 24, 1996), including salary increment for the 1995-1996 school year, through June 30, 1996, the effective date of his resignation, in the amount of $34,703. All retroactive monies due Terranova from the date of his suspension without pay until final approval of this Agreement will be paid, after normal payroll deductions, upon final approval of this Agreement. Any remaining payments shall be paid in the normal course of business, net of normal payroll deductions.

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7. Terranova shall surrender any licenses and/or certificates that he may have or possess to teach in the public schools of the State of New Jersey, with the distinct understanding that the within matter will be transferred to the State Board of Examiners for purposes of revoking his certificate, and that he does not oppose such revocation. For the purpose of expressly demonstrating acceptance of the terms of this paragraph, an Affidavit of Terranova is attached hereto as Exhibit C.

8. Terranova agrees that he will at no time in the future apply for the restoration of his licenses and/or certificates and further agrees that he will at no time in the future teach or seek employment in any school, public or private, in the State of New Jersey or any other state in the United States of America.

9. Terranova hereby agrees to waive any and all claims he has, or could have, against the Board, its agents, employees, and representatives, including, but not limited to, claims for discrimination; contract, tort or constitutional violations; or attorneys' fees. Terranova shall execute a General Release in favor of the Board releasing the Board from all claims, liabilities or expenses to which it may be subject, arising from any claims or rights of Terranova. The form of this General Release is attached hereto as Exhibit D. Nothing in this Agreement or the documents referenced herein shall preclude either party from bringing an action to enforce

performance of any term of this Agreement should there be a default in performance.

10. Terranova agrees to withdraw, with prejudice, his action appealing the Board's decision to withhold the salary increments of Terranova for the 1995-1996 school year in the matter before the State of New Jersey Public Employment Relations Commission bearing the caption of Wayne Township Board of Education and Wayne Education Association, Docket No. AR-96-076 (R. Terranova/1995-96 Increment), subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

11. The parties acknowledge that this Agreement shall be submitted to the Office of Administrative Law and the Commissioner of Education for review and approval, and that the terms of this Agreement are expressly made subject to and contingent upon such review and approval. In the event that either agency disapproves and/or rejects any of the terms contained herein, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this Agreement.

12. The parties recognize that each has been represented by legal counsel or a representative of his or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. This Agreement shall be subject to the laws of the State of New Jersey.

13. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

14. Terranova hereby declares that he is of sufficient physical, mental and emotional capacities to understand and agree to all of the terms and conditions of this Agreement and agrees that he is and will continue to be bound by these terms and conditions in the future.

15. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS, WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

By: Rhua C. Ernst
Dr. Rhua C. Ernst
Board Secretary/Business Administrator

Dated: 4/29/96

WITNESS:

4/24/96
Robert A. Fagella

BOARD OF EDUCATION
TOWNSHIP OF WAYNE

By:
~~Dianne Vreeland~~
Board President
Christopher P. Vergonio

Roy Terranova

5g

EXHIBIT A

ROY TERRANOVA
P.O. Box 85
Newton, New Jersey 07860

Mrs. Dianne Vreeland
Board President
Wayne Township Board of Education
50 Nellis Drive
Wayne, New Jersey 07470

Re: Letter of Resignation

Dear Mrs. Vreeland:

Pursuant to the terms of the Settlement Agreement between the Township of Wayne Board of Education and myself, I hereby submit my irrevocable resignation from the position of teacher, effective June 30, 1996. This resignation is expressly conditioned upon the Board's compliance with the aforesaid Settlement Agreement and is of no force or effect, even if accepted, unless said Agreement is fully performed by the Board.

Sincerely,

Roy Terranova

Dated: 4/24/96, 1996

EXHIBIT B

RESOLUTION 31-96

BE IT RESOLVED by the Township of Wayne Board of Education as follows:

1. ROY TERRANOVA shall be paid the amount of $37,280. representing his full salary for the 1995-1996 school year with his salary increment restored for the 1995-1996 school year; the retroactive amount of his 1995-1996 salary increment; and the amount of his insurance payments under COBRA during his suspension without pay.

2. The request of ROY TERRANOVA to tender his resignation with the Board of Education effective June 30, 1996, is hereby approved and accepted.

3. The terms, stipulations and conditions as established in a Settlement Agreement between the Board of Education and ROY TERRANOVA, which is annexed to this Resolution, are hereby adopted and approved by the Board of Education. The President and Secretary of the Board of Education are hereby authorized and directed to execute the attached Settlement Agreement, and any other documents necessary to effect said Settlement Agreement.

Certification

I hereby certify that the within Resolution was adopted by the Township of Wayne Board of Education at a meeting held on April 29, 1996, by a majority of the Board.

Dr. Rhua C. Ernst
Board Secretary

Dated: 4/30, 1996

SK

EXHIBIT C

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

MAY 1 11 42 AM '96

FOGARTY & HARA, ESQS.
23 Highland Cross
Rutherford, New Jersey 07070
(201) 935-0440
Attorneys for Petitioner,
Township of Wayne Board of Education

IN THE MATTER OF THE TENURE HEARING OF ROY TERRANOVA, BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DOCKET NO.: EDUTH 01906-96 AGENCY REF. NO.: 26-1/96 **AFFIDAVIT OF ROY TERRANOVA**

Roy Terranova, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the respondent in the above-captioned matter, and hereby submit this Affidavit in accordance with the terms of the Settlement Agreement between myself and petitioner, Township of Wayne Board of Education.

2. Specifically, in accordance with the aforesaid Settlement Agreement, I hereby agree to surrender any licenses and/or certificates that I may have or possess to teach in the public schools of the State of New Jersey. I expressly and specifically understand that the within matter will be transferred to the State Board of Examiners for purposes of

revoking my certificate, and I do not oppose such revocation.

Roy Terranova

Sworn and subscribed to
before me this 24 day
of April, 1996.

Notary Public

Attorney at Law
State of NY

SN

EXHIBIT D

RELEASE

This Release, dated , 19 96 , is given

BY the Releasor(s) ROY TERRANOVA

referred to as "I",

TO TOWNSHIP OF WAYNE BOARD OF EDUCATION,
its officers, agents, servants, attorneys,
or employees or any one of them.

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

Any and all claims arising out of the employment relationship between Roy Terranova and the Board of Education of the Township of Wayne, including, but not limited to, any claims or causes of action pursuable before any state or federal court, agency, pension fund or any other adjudicative tribunal or authority.

This Release does not apply to any rights which Roy Terranova may have under the terms of the Settlement Agreement between Roy Terranova and the Board of Education of the Township of Wayne.

and other good and valuable consideration**

2. Payment. I have been paid or will be paid a total of $ 1.00 , in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

---------- ROY TERRANOVA ---------- (Seal)

---------- (Seal)

**the terms and conditions set forth in the Settlement Agreement between the Township of Wayne Board of Education and Roy Terranova.

STATE OF NEW JERSEY, COUNTY OF ESSEX SS.:
I CERTIFY that on 4/24/96 , 1996 ,

Roy Terranova
personally came before me and stated to my satisfaction that this person (or if more than one, each person):

(a) was the maker of the attached instrument; and
(b) executed this instrument as his or her own act.

(Print name and title below signature)
Robert Falcetti
Attorney-at-Law
State of NJ

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OAL DKT. NO. EDU 1906-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ROY TERRANOVA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF WAYNE, PASSAIC	:	
COUNTY.	:	

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

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. This matter will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to *N.J.A.C.* 6:11-3.6.

COMMISSIONER OF EDUCATION

July 1, 1996
Date of Mailing, July 1, 1996

284-96

284-96

W.G. and I.G., on behalf of minor children, P.R. and A.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

July 1, 1996

OAL DKT. NO. EDU 11372-95

W.G. and I.G., on behalf of minor children, P.R. and A.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner on June 13, 1996, by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. In light of correspondence from the Board's counsel to the Commissioner dated May 9, 1996, and from the OAL dated May 16, 1996, wherein it is indicated that counterclaim issues remain to be resolved, the Commissioner declines to approve withdrawal and determines to remand this matter to the OAL for further proceedings.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 1, 1996
Date of Mailing, July 1, 1996

285-96

285-96

DONALD MARRANDINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

July 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5451-95 AND
EDU 7843-95 (Consolidated)
AGENCY DKT. 157-5/95 and 226-6/95

DONALD MARRANDINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner, (Springstead & Maurice, attorneys)

Richard M. Salsberg Esq., for respondent, (Stanton, Hughes, Diana & Zucker, attorneys)

Record Closed: May 16, 1996 Decided: May 17, 1996

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

These matters were transmitted to the Office of Administrative Law on May 24 and July 27, 1995, respectively, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

17 May 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/30/96
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 4 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DONALD MARRANDINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF BRIGANTINE, ATLANTIC COUNTY,

Respondent.

AND

ORDER FOR CONSOLIDATION

OAL DKT. NO. EDU 5451-95

AGENCY DKT. NO. 157-5/95

OAL DKT. NO. EDU 7843-95
AGENCY DKT. 226-6/95

Alfred F. Maurice, Esquire for petitioner, (Springstead & Maurice, attorneys)

Richard M. Salsberg, Esquire for respondent, (Stanton, Hughes, Diana & Zucker, attorneys)

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

This matter having been opened to the court and for good cause shown; **IT IS** on this **17th** day of **MAY 1996 ORDERED** that the above captioned matters are herein **CONSOLIDATED** for purposes of trial.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6.

Lillard E. Law

LILLARD E. LAW, ALJ

ai

Stanton, Hughes, Diana & Zucker, P.C.
30a Vreeland Road, Suite 340
Florham Park, New Jersey 07932
201-514-1222
Attorneys for Respondent,
Board of Education of
the City of Brigantine

DONALD MARRANDINO,	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	OFFICE OF ADMINISTRATIVE LAW
v.	OAL DOCKET NO. EDU 7843-95 OAL DOCKET NO. EDU 5451-95
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, COUNTY OF ATLANTIC,	**STIPULATION OF DISMISSAL**
Respondent.	

IT IS hereby agreed to by and between counsel for Petitioner and counsel for Respondent that both of the above-captioned matters be dismissed with prejudice and without costs to any party.

SPRINGSTEAD & MAURICE, ESQS.
Attorneys for Petitioner

By: _____
Alfred F. Maurice

Date: 5/13/96

STANTON, HUGHES, DIANA & ZUCKER, P.C.
Attorneys for Respondent

By: _____
Richard M. Salsberg

Date: 5/15/96

SETTLEMENT AGREEMENT

AND

FULL AND FINAL RELEASE OF ALL CLAIMS

This Agreement is made and entered into this _____ day of April, 1996 by and between the Brigantine Board of Education (hereinafter the "Board"), the Brigantine Principals' Association (hereinafter the "Association"), and Donald Marrandino (hereinafter "Marrandino").

WHEREAS, Marrandino has instituted two separate actions before the Commissioner of Education of New Jersey, which allege that the Board wrongfully withheld Marrandino's salary and adjustment increments for the 1994-1995 school year and the 1995-1996 school year, and which actions were assigned OAL Docket Numbers EDU-05451-95S and EDU-07843-95S respectively, and both of which seek from the Board restoration of Marrandino to the appropriate step on the salary guide, back pay, pension credit, benefits and any other relief the Commissioner deems equitable; and

WHEREAS, the Association filed a Request for Submission of a Panel of Arbitrators with the Public Employment Relations Commission (the "Commission") on July 12, 1995, which alleges that the Board's withholding of Marrandino's 1995-1996 increment should proceed to binding arbitration; and

WHEREAS, the Board has instituted a Petition for Scope of Negotiations Determination with the Commission, Docket NO. SN-96-50, which alleges that binding arbitration of Marrandino's claim

pertaining to the withholding of his 1995-1996 increment should be restrained; and

WHEREAS, the Board contends that the aforesaid claims filed by Marrandino and the Association are without merit and denies engaging in any wrongful, unlawful or improper conduct; and

WHEREAS, the Board, the Association and Marrandino, while asserting their respective contentions in good faith, realize the uncertainty and time-consuming nature of litigation and desire to enter into a compromise agreement in order to avoid this uncertainty and the time and expense of litigation, which settlement will terminate all features of the claims for relief or causes of action which any party may have relating to the withholding of Marrandino's 1994-1995 and 1995-1996 increments.

NOW THEREFORE, in consideration of the mutual promises of the parties to this "Settlement Agreement and Full and Final Release of All Claims", the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

I. The Board will do as follows:

A. Effective July 1, 1995, the Board shall increase Marrandino's base salary by the sum of three thousand five hundred dollars ($3,500.00), which amount is in addition to the longevity Marrandino normally would receive, in compromise of all claims for damages in connection with Marrandino's allegations against the Board that the Board

wrongfully withheld his 1994-1995 and 1995-1996 salary and adjustment increments.

II. In return for the above commitments, Marrandino and the Association will do as follows:

A. Marrandino shall, through his attorney, dismiss with prejudice, as against the Board, OAL Docket No. EDU-05451-95S and OAL Docket No. EDU-07843-95S, filed with the Commissioner of Education of the State of New Jersey, and will not refile same following dismissal, and will not file any new complaints and/or charges against the Board for claims pertaining to the withholding of Marrandino's 1994-1995 and/or 1995-1996 salary and adjustment increments, except as necessary to enforce this Agreement; and

B. The Association shall, through its attorney, withdraw its Request for Submission of a Panel of Arbitrators, which was filed with the Public Employment Relations Commission, and will not refile same following dismissal, and will not file any new complaints and/or charges against the Board for claims pertaining to the Board's withholding of Marrandino's 1994-1995 and/or 1995-1996 salary and adjustment increments, except as necessary to enforce this Agreement; and

C. Marrandino and the Association irrevocably and unconditionally release and discharge the Board of and from any and all debts, obligations, claims, demands, judgment, or causes of action of any kind whatsoever, arising prior to the execution of this Agreement, in tort, contract, by statute or on any other basis, for compensatory, punitive or other damages, expense reimbursements, attorneys' fees or costs of an kind, including but not limited to all rights and claims, whether in law or in equity, which Marrandino or anyone acting on his behalf, or the Association or anyone acting on its behalf, has or might otherwise have had or asserted, pertaining to the Board's withholding of Marrandino's 1994-1995 and/or 1995-1996 salary and adjustment increments.

III. The provisions of this Agreement are severable and if any part is found to be unenforceable, the other portions shall remain fully valid and enforceable.

IV. It is understood and agreed by all parties that this Agreement is a settlement of disputed claims and that neither it nor the fact of settlement constitutes an admission of liability or wrongdoing or breach of duty on the part of any party.

V. The facts and circumstances giving rise to this dispute, the nature and terms of this Agreement, the discussions and negotiations leading thereto, and any subsidiary undertakings required by this Agreement, shall not be disclosed hereafter by

Marrandino, or anyone acting on his behalf, (except that Marrandino can discuss this agreement with members of his immediate family and attorneys) or by the Association, or anyone acting on its behalf, (except that the Association can discuss this agreement with its attorneys) without prior written consent of the Board, unless in response to a valid subpoena or an order of court.

VI. This Agreement contains and constitutes the entire understanding and agreement of the parties and supersedes and cancels all previous negotiations, agreements, commitments, and writings in connection herewith. The recited consideration constitutes the extent of the consideration for this Agreement and the releases read together are contractual and not a mere recital. This Agreement may not be released, discharge, abandoned, supplemented, changed or modified in any manner, orally or otherwise, except by an instrument in writing of concurrent or subsequent date signed by a duly authorized officer or representative of the parties to the lawsuit.

VII. This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey.

WHEREAS, the Board, the Association and Marrandino have reviewed this Settlement Agreement and have consulted with their respective attorneys; and

WHEREAS, the governing body of the Association and the governing body of the Board have approved the terms and conditions of this Agreement; and

WHEREAS, Marrandino has approved the terms and conditions of this Agreement;

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

THE BOARD OF EDUCATION OF
THE CITY OF BRIGANTINE

BY: Carol J. Callowhill
CAROL J. CALLOWHILL, PRESIDENT

Witness:

_____

BRIGANTINE PRINCIPALS' ASSOCIATION

BY: Donald A. Marrandino

Witness:

_____

Donald A. Marrandino
DONALD MARRANDINO

Witness:

_____

DONALD MARRANDINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

July 1, 1996
Date of Mailing, July 2, 1996

286-96

IN THE MATTER OF THE TENURE :
HEARING OF JANET WAGNER, :
SCHOOL DISTRICT OF THE : COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON, : DECISION
ESSEX COUNTY. :
:

July 2, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11048-95

AGENCY DKT. NO. 339-8/95

IN THE MATTER OF THE TENURE HEARING OF JANET WAGNER, BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY

Jeffrey A. Bennett, Esq., attorney for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Sanford R. Oxfeld, Esq., attorney for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: May 17, 1996 Decided: May 17, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioner, the Board of Education of the Township of Irvington (the Board), filed tenure charges against respondent, Janet Wagner (Ms. Wagner), a tenured Elementary School Teacher, for her termination on charges of chronic and excessive absenteeism.

On September 20, 1995, the Commissioner of Education transmitted this matter to the Office of Administrative Law for a hearing as a contested case. A hearing was scheduled for May 13, 1996.

At the hearing, the parties agreed to settle this matter and set forth the following settlement terms on the record:

1. Ms. Wagner shall submit to the Board an irrevocable letter of resignation resigning from her position as an Elementary School Teacher effective June 30, 1996;

2. The Board shall respond to any employment inquiry for Ms. Wagner and shall provide Ms. Wagner's length of service, final salary and a statement that her performance as a teacher was satisfactory. The Board shall not mention the tenure charges;

3. The Board will cooperate in providing whatever information is necessary for Ms. Wagner's pension or disability application;

4. The tenure charges are withdrawn and will not be mentioned by the Board;

5. The Superintendent shall recommend to the Board that it approve this settlement and that it pay to Ms. Wagner her increment for 1995; and

6. This settlement is subject to the approval of the Commissioner and the Board. The Board will meet on May 16, 1996 and the Board's attorney shall notify the undersigned by May 17, 1996 of the Board's determination.

After being placed under oath, Ms. Wagner stated that she fully understood and consented to all of the terms and conditions of the settlement.

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

1. The parties have voluntarily agreed to the settlement on the record.

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

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be **CONCLUDED.**

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

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

May 17, 1996
DATE

MARIE P. SIMONELLI,A.L.J.

Receipt Acknowledged:

5/31/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 31 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 11048-95

IN THE MATTER OF THE TENURE	:	
HEARING OF JANET WAGNER,	:	
SCHOOL DISTRICT OF THE		COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

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

The Commissioner approves the settlement terms* as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

*It is noted that the record confirms that Board approval, as contemplated by the settlement agreement, was accomplished on May 16, 1996.

July 2, 1996
Date of Mailing, July 2, 1996

288-96

S.P., on behalf of minor child, G.P., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning parent challenged Board's determination that his daughter, G.P., was not eligible for a free education in the District due to residency dispute.

ALJ found that although petitioner has a residence in the District, neither he nor G.P. is domiciled in the District. Thus, ALJ determined that until such time as petitioner is entitled to have his daughter attend the schools in the District free of charge pursuant to *N.J.S.A.* 18A:38-1, he has no right to free or reduced tuition. ALJ ordered petitioner to compensate the Board in the amount of $3,425, representing out-of-district tuition for the 1995-96 school year.

Commissioner concurred with the findings and determination of the ALJ and directed payment. Petition was dismissed.

July 3, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 179-96

AGENCY DKT. NO. #470-12/95

S.P. ON BEHALF OF MINOR CHILD

G.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF METUCHEN,

MIDDLESEX COUNTY,

Respondent.

S. P., petitioner, pro se

James E. Stahl, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: April 3, 1996 Decided: May 20, 1996

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter commenced on December 11, 1995 when S.P. as parent and guardian of G.P. (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education contesting the November 29, 1995 determination of the Board of Education of the Borough of Metuchen

(hereinafter respondent) pursuant to P.L. 1993, Chapter 380, that G.P. was not permitted to attend the public schools of the district free of charge. An answer was filed on behalf of respondent on January 2, 1996 and on January 18, 1996, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on February 28, 1996, at which time the following were identified as the issues for determination at hearing:

1. Is G.P. entitled to attend the schools in respondent's district free of charge pursuant to N.J.S.A. 18A:38-1?

2. If the answer to the previous question is no, is petitioner entitled to reduced tuition charges?

3. If the answer to question 1 is no, what is the amount of tuition payments owed by petitioner to respondent for the time of the student's ineligible attendance?

A hearing was scheduled for April 3, 1996, and took place as scheduled, whereupon the record closed.

FINDINGS OF FACT

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

Prior to 1993 petitioner resided with his wife and daughter, G.P., at 64 C. Street in Metuchen, New Jersey. After that time his wife and daughter continued to live in the residence until February 1995, when divorce proceedings between petitioner and his wife were finalized. In February 1995, petitioner's former wife and his daughter moved to Edison, New Jersey.

Petitioner became the sole owner of the property at 64 C. Street. After February 1995, the property has been occupied by petitioner's tenants.

Pursuant to the divorce decree, petitioner and his former wife have joint custody of G.P., "with the wife having primary physical and residential custody." G.P. spends Wednesdays and week-ends with petitioner at his current residence in Highland Park. During the other four days she resides with her mother in Edison. Petitioner's driver's license lists his Highland Park address. The last time petitioner voted in Metuchen was approximately five years ago. Petitioner has filed his income tax returns from his Highland Park address for the last two years.

Notwithstanding the fact that G.P. had moved with her mother to Edison in February of 1995, she continued to attend the public schools of Metuchen. By letter dated September 14, 1995, Edward M. Joyce, Principal of the Edgar School under the jurisdiction of respondent, wrote to petitioner's former wife as follows:

> We are writing to inform you, that in consultation with the office of the Business Administrator, we have determined that G. is not eligible to attend the Metuchen Public Schools. Our decision is based on the fact that G. resides with the custodial parent in Edison. Also, even though her father owns property within the district, this does not make her eligible. Of course, you may able to have her attend as a tuition student. You would need to make that decision sooner rather than later.
>
> Unfortunately, we must request that you make a decision in this matter, prior to September 22, 1995. We have both a legal responsibility and one of fairness in protecting the obligations of the community. We will consider the above date, as G.'s last day of attendance at Edgar School.
>
> Please call, if you have any questions, or if we can be of assistance.

Petitioner then contacted respondent by undated letter as follows:

> It was my pleasure speaking to you today, and thank you for faxing me the by-laws. As discussed, I wish to appeal your decision

> regarding tuition owed for my daughter, G., to attend Metuchen schools, which she has done for the last five years. As you know, my ex-wife, D.S., now resides in Edison. G. stays with me on weekends and we visit on Wednesdays. I have joint legal custody and claim her on my income taxes. I own the house on 64 C. Street, Metuchen, New Jersey, and pay the property taxes, which the school board benefits from. I pay more than 50% of G.'s support ($440.00 per month). Considering all of the above and also that I do wish G. to continue to attend the Metuchen schools and that my economical situation is poor, I request a reconsideration of your request for fee tuition of $3,425.00 per year. Any statements made above can be documented upon request (i.e. tax returns, deed, divorce decree, etc.). Please refer to section 18A:38-3, "If eligible except for residence may be admitted . . . with consent of the Board . . . with or without payment of tuition."
>
> Please reconsider your decision based on the above and per our discussion, my understanding is that G. may attend school without interruption pending your decision. I truly hope we can resolve this to all parties satisfaction at this level.
>
> Thank you for your time and consideration.

Respondent replied by letter dated September 21, 1995, as follows:

> Reference is made to your letter, received yesterday, requesting relief in the payment of tuition for your daughter. I spoke with Mr. Stahl, our Board attorney, who reiterated the Board's past position in cases of this nature.
>
> It is my understanding that your daughter, for whom you share joint custody with your former wife, currently resides in Edison (with her mother). It is also my understanding that your daughter stays with you on the weekends. Since you have rented your Metuchen property to a third party, the assumption is that your daughter, when with you, is at your Highland Park address. In accordance with N.J.S.A. 18A:38-1, the child must be domiciled within the district in order to attend the district's public schools. Since the child is domiciled outside of the district -- in Edison with her mother, or in Highland Park with you, she cannot attend the Metuchen Public Schools unless it is as a tuition paying student. If you wish for your daughter to continue attendance in Metuchen

> Public Schools, it will be necessary for you to enroll her as a tuition student.
>
> In the event that this decision is not acceptable, you have the right to request a hearing before the Board. Please advise as to how you wish to proceed in this matter.

A hearing before the Board of Education was held on November 7, 1995, following which Gennaro Lepre, Superintendent of respondent's district, wrote to petitioner, as follows:

> It is my responsibility to inform you that, although several members of the Board of Education sympathize with your situation and all considered the matter very carefully, sufficient support to authorize a forgiveness or reduction in tuition for G.'s attendance at Edgar School this year did not develop. For that reason, Board of Education Secretary Ellen Johnson has been asked to make a formal request for the tuition currently owed, and to establish a payment schedule for the rest of the school year. You should be hearing from her this week.

The within matter followed.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:38-1, the statute relevant to a determination in this matter, provides in pertinent part:

> Public schools shall be free to the following persons over 5 and under 20 years of age:
>
> (a) Any person who is domiciled within the school district;
>
> . . .

> (b)(2) If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent of administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. . . .
>
> . . .
>
> (d) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section.
>
> . . .

An individual may have many residences, if he or she is financially able to do so, but can have only one domicile. Miller vs. U.S. Fidel. & Guar. Co., 127 N.J. Super. 37, 42 (App. Div. 1974); Contínos v. Parsekian, 68 N.J. Super. 54, 58-59 (App. Div. 1961); DiFiore v. Erie-Lackawanna R.R. Co., 67 N.J. Super. 267 (Law Div. 1961).

> The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which

> whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. . . . Home is the place where a person dwells and which is the center of his domestic, social and civil life. . . . Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence. Matter of Unanue, 255 N.J. Super. 362, 374-5 (Law Div. 1991); See also, In re Jaffe, 74 N.J. 86, 90-91 (1977).

Petitioner acknowledges that his daughter's situation does not fit into any of the definitions set forth in N.J.S.A. 18A:38-1. He has not been domiciled in Metuchen since 1993; she has not been domiciled in Metuchen since February 1995, and although petitioner originally contended that he was entitled to have his daughter attend the public schools free of charge pursuant to subparagraph (d), because he had his "all-year round dwelling place within the district for one year or longer" up until 1993, it is clear that paragraph (d) refers to someone who currently maintains a dwelling place within the district but occasionally resides elsewhere. Petitioner does not fit within this category either.

Respondent argues that notwithstanding the fact that N.J.S.A. 18A:38-1 does not permit his child to attend the schools free of charge that he should be afforded some tuition relief because a large portion of his property taxes are comprised of school taxes (approximately $2,200) per year. He therefore requests that he not be required to pay the entire out-of-district tuition which respondent seeks to impose for the 1995-96 school year (respondent makes no claim for tuition for the months of March through June 1995) but rather that he be granted an offset of $2,200, representing the school taxes he pays as part of his property tax bill. Respondent asserts that since it is a small, well-managed school district, many parents who do not live in Metuchen would like to send their children to the Metuchen schools and therefore no waiver, reduction, or exception is possible in petitioner's case because many others, including owners of businesses in Metuchen who reside elsewhere, would then seek like setoffs for the portion of their property taxes attributable to school taxes. Although it is true, as petitioner points out, that N.J.S.A. 18A:38-3 provides that a non-resident may be permitted to attend the schools of the district with

the consent of the Board of Education upon such terms and with or without payment of tuition as the Board may prescribe, that statute clearly gives discretion to make those decisions to the Board of Education. Where an issue is one involving the exercise of a local board's discretion, the scope of the Commissioner's review is "not to substitute his judgment or that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). Actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Quinlan v. Board of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); K.L. Matawan/Aberdeen High School Dist., 91 N.J.A.R. 2d. (EDU) 74; M.G. v. Monmouth Regional High School, 91 N.J.A.R. 2d. (EDU) 38. Respondent's conclusion that to grant petitioner's request would open a flood gate of similar requests cannot in any way be judged arbitrary or unreasonable. Until such time as petitioner is entitled to have is daughter attend the schools in respondent's district free of charge pursuant to N.J.S.A. 18A:38-1, he has no right to free or reduced tuition.

For all of the foregoing reasons, it is hereby **ORDERED** that petitioner compensate respondent in the amount of $3,425.00, representing out-of-district tuition for the 1995-96 school year.

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

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

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

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

May 20, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

May 20, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 22 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioner:

P-1 Answers to interrogatories

For respondent:

None

WITNESSES

For petitioner:

S. P.

For respondent:

None

OAL DKT. NO. EDU 179-96

S.P., on behalf of minor child, G.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) for the reasons well expressed therein. In so finding, the Commissioner concurs that, pursuant to *N.J.S.A.* 18A:38-1, G.P. is not entitled to a free public education in the Metuchen School District, and that petitioner must reimburse the District for the period of G.P.'s ineligible attendance.

Accordingly, petitioner is directed to remit to the Board $3,425 representing out-of-district tuition for the 1995-96 school year in accordance with the ALJ's recommendation, and the within appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

*Just prior to issuance of this decision, petitioner filed exceptions requesting the Commissioner to exempt him from the provisions of the applicable statute. However, the Commissioner is without authority to grant such relief.

July 3, 1996
Date of Mailing, July 3, 1996

288-96

EDU #179-96
C #288-96
SB # 48-96

S.P., on behalf of minor child, G.P.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 3, 1996

Decision on motion by the Commissioner of Education, July 25, 1996

For the Petitioner-Appellant, S.P., pro se

For the Respondent-Respondent, James B. Smith, Esq.

S.P. (hereinafter "petitioner") seeks a stay of the Commissioner of Education's decision in this matter dated July 3, 1996. In his decision, the Commissioner adopted the Administrative Law Judge's conclusion that petitioner's daughter, G.P., was not entitled to a free public education in the Metuchen school district and that petitioner, as a result, was obligated to pay $3,425 to the Metuchen board representing out-of-district tuition for the 1995-96 school year. On July 25, 1996, the Commissioner denied petitioner's request for a stay of that decision.

In support of his motion, petitioner contends that requiring the payment of tuition for his daughter to attend public school in Metuchen is "grossly unfair and should be

9/4/96

illegal." Petitioner alleges that he and his daughter will suffer irreparable harm in the event a stay is not granted in that "our quality of life would be irreparably affected." Petitioner alleges that the harm to his daughter in being uprooted from the "secure and constant knowledge that she may continue to attend the school and environment she loves" would outweigh any harm to the Board. Petitioner further maintains that since he is paying property taxes on a rental property he owns in Metuchen, his daughter would not be getting a "free ride."

Inasmuch as we agree with the Commissioner that petitioner's application fails to meet the standards that would entitle him to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny his motion for a stay.

Like the Commissioner, we find that petitioner has failed to demonstrate a reasonable probability of prevailing on the merits of his appeal. Petitioner does not claim to be domiciled within the Metuchen school district, N.J.S.A. 18A:38-1(a), and he has provided no legal basis under any other provision of that statute for his contention that his daughter is entitled to a free public education in that district. The mere fact that petitioner owns a rental property located within the district does not, under the terms of the statute, provide his daughter with a legal entitlement to attend the public schools of Metuchen free of charge. See Board of Education of the Borough of Fort Lee v. Kintos, decided by the State Board of Education, April 13, 1994, aff'd with modification, Docket #A-4944-93T5 (App. Div. 1995), reconsidered and clarified, Docket #A-4944-93T5 (App. Div. 1995).

In addition, G.P.'s preference to remain in the Metuchen school district does not demonstrate irreparable harm justifying the extraordinary relief sought. There is no

dispute that G.P. can continue to attend public school in Metuchen as a tuition student. Moreover, any financial harm to petitioner resulting from such attendance can be adequately addressed by monetary damages in the event that he ultimately prevails on the merits of his case.

Accordingly, for the reasons stated, we deny petitioner's motion for a stay of the Commissioner's decision dated July 3, 1996.

September 4, 1996

Date of mailing SEP 06 1996

288-96

EDU #179-96
C #288-96
SB # 48-96

S.P., on behalf of minor child, G.P.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 3, 1996

Decision on motion by the Commissioner of Education, July 25, 1996

Decision on motion by the State Board of Education, September 4, 1996

For the Petitioner-Appellant, S.P., pro se

For the Respondent-Respondent, James B. Smith, Esq.

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

October 2, 1996

Date of mailing OCT 04 1996

289-96

289-96

N.C., on behalf of minor niece, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

July 5, 1996

State of New Jersey
Office of Administrative Law

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1257-96
AGENCY DKT. NO. 10-1/96

N. C. ON BEHALF OF MINOR NIECE, M.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT,

Respondent.

Jeffrey I. Bronson, Esq., for petitioner
(Bell, Adubato & Ligham, attorneys)

Joanne L. Butler, Esq., for respondent
(Young, DiMiero & Sayovitz, P.C.)

Record Closed: May 15, 1996 Decided: May 21, 1996

BEFORE **MARIA MANCINI LaFIANDRA,** ALJ:

STATEMENT OF THE CASE

N.C., on behalf of her minor Niece, M.C., appeals the determination of the South Orange-Maplewood Board of Education denying M.C. permission to continue to attend schools in the district. This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education, Bureau of Controversies and Disputes on January 23, 1996, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The matter was set down for hearing on July 3 and July, 16, 1996. Prior to the scheduled hearing dates, the parties amicably agreed to settle this matter and have prepared the attached settlement indicating the terms of settlement.

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

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

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

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

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

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

forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

5/21/96
DATE

Maria M LaFiandra
MARIA MANCINI LaFIANDRA, ALJ

Receipt Acknowledged:

May 24, 1996
DATE

N. J. Catanzaro Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 28 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

jrp

YOUNG, DIMIERO & SAYOVITZ, P.C.
A Professional Corporation
Skyline Plaza
414 Eagle Rock Avenue
West Orange, NJ 07052
(201) 736-5200
Attorneys for Respondent South Orange/Maplewood Board of Education

N.C. on behalf of his minor minor niece, M.C., Petitioner	**STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. 1257-96 AGENCY REFERENCE NO. 10-1/96**
v.	
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Respondent	**STIPULATION OF SETTLEMENT**

Petitioner Nathanael Charles and Respondent Board of Education of the School District of South Orange and Maplewood herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of either party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to the other party's claim.

2. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorney fees and damages pursuant to any federal or State constitutional or civil rights claims, and specifically release the other parties from any claims arising out of or related to these claims.

3. The pupil M.C. will be permitted to continue to attend District schools so long as she satisfies the statutory criteria set forth in N.J.S.A. 18A:38-1, *et seq.*

4. As a result of the foregoing, Petitioner hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice.

BELL, ADUBATO & LIGHAM
Attorneys for Petitioner

JEFFREY J. BRONSON

Dated: 5/6/96

YOUNG, DIMIERO & SAYOVITZ
Attorneys for Respondent

JOANNE L. BUTLER

Dated:

OAL DKT. NO. EDU 1257-96

N.C., on behalf of minor niece, M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

COMMISSIONER OF EDUCATION

July 5, 1996
Date of Mailing, July 8, 1996

290-96

290-96

SHIRLEY FELDMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY, AND BRUNO ARIETTA AND PHYLLIS HAY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, private citizen and taxpayer, sought removal of two Board trustees for improperly approving expenditures of public funds by the former superintendent.

ALJ concluded that petitioner did have standing as a taxpayer and citizen to petition the Commissioner to remove respondents. ALJ, however, found that petitioner did not allege any facts which would disqualify respondents from serving on the Board under the school laws, the recall election statute, or the forfeiture law. Thus, the ALJ concluded that there was no genuine issue of material fact and petitioner was precluded as a matter of law from asserting an Open Public Meetings Act violation. Respondents' motion to dismiss was granted; petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

July 5, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ON MOTION TO DISMISS

OAL DKT NO EDU 6668-95

AGENCY DKT NO 159-4/95

SHIRLEY FELDMAN

Petitioner,

v.

BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY, BRUNO ARIETTA AND PHYLLIS HAY,

Respondents,

Shirley Feldman, *pro se*

Scott K. McClain, Esq., for respondents
(Winne, Banta, Rizzi, Hetherington & Basralian, attorneys)

Record Closed: May 14, 1996 Decided: May 15, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

Petitioner, Shirley Feldman, seeks the removal of respondents, Bruno Arietta and Phyllis Hay, from the Board of Education of the Bergen County Special Services School District (Board). Petitioner contends that in their capacities as trustee of the

Board, Arietta and Hay improperly approved expenditures of public funds by the former Superintendent James Lederer.

Respondent asserts that petitioner lacks standing to pursue an administrative action against respondents, Arietta and Hay. Respondent also maintains that the alleged facts do not support a basis for removal of a school board member.

On June 26,1995, the matter was transferred to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On February 20, 1996, the Board moved for summary decision. Petitioner filed a response on March 15, 1996.

FINDINGS OF FACT

The following facts are not disputed:

1. Petitioner is a resident of Waldwick, New Jersey.

2. Respondent Board was established by the Bergen County Board of Chosen Freeholders for the education and treatment of handicapped children. *N.J.S.A.* 18A:46-29.

3. The Board consists of six persons appointed by the Director of the Board of Chosen Freeholders and two *ex officio* members.

4. Respondent Hay was appointed as a trustee of the Board and her term expires on June 30, 1996.

5. Respondent Arietta was appointed as a trustee of the Board and his term expires on June 30, 1997.

6. In July 1994, an independent CPA firm issued a report on its review of the fiscal policy of the Board and questioned certain excessive spending by the then Superintendent of Schools, James B. Lederer. Thereafter, the Board hired special counsel to investigate the allegations of misspending.

7. The Bergen County Prosecutor's Office conducted an investigation of alleged official misconduct by Lederer. In July 1995, the Bergen County Grand jury indicted Lederer for theft. The State's criminal charges against Lederer are pending.

8. The Department of Education, Office of Compliance (Department), conducted an investigation to determine whether Lederer abused the Board's American Express charge card. During the course of the investigation, the scope broadened to include a number of other allegations of abuse in the district. In November 1995, Department issued its report.

The Department made the following findings:

> Dr. Lederer abused his position by converting district assets to his own personal use.
>
> District records relevant to the above findings were deliberately destroyed at Dr. Lederer's instructions.
>
> Neither the board nor the business administrator proved effective as a control over Dr. Lederer's abusive spending.
>
> The activities in which the district became involved indicate that the board failed to govern and provide oversight in the district, and the administration did not manage district affairs in compliance with State statute and code, and district policies and procedures.
>
> In almost every interview, each board member praised Dr. Lederer and treated the matter under investigation as a minor miscue for which they share no responsibility.
>
> [Investigative Report, State of New Jersey, Dep't of Educ., Office of Compliance, Investigation Unit, Bergen County Special Services District, (Nov. 1995).]

Additionally, the Department made the following recommendations to specific findings:

FINDING: The superintendent abused his district charge card privileges.
RECOMMENDATION: The board, having failed to exercise appropriate oversight of the personal expenditures credited to the district, is directed to take the following action:

1. Close out all accounts on those existing district charge cards distributed for individual use;

2. Amend board policy, as necessary, to reflect elimination of the use of district charge cards. Employees may use their personal charge cards and submit expense vouchers for reimbursement; and

3. Review the superintendent's travel and expense vouchers prior to payment. This will eliminate the problem of having a subordinate approve a superior's travel and expense vouchers.

FINDING: The superintendent and business administrator failed to maintain documentation of incurred district expenses.

RECOMMENDATION: The board is directed to establish, implement and monitor those procedures relevant to travel and reimbursement of travel and business expense pursuant to *N.J.S.A.* 18A:19-2.
[Investigative Report, State of New Jersey, Dep't of Educ., Office of Compliance, Investigation Unit, Bergen County Special Services District, (Nov. 1995).]

9. Based on the facts which gave rise to the indictment of Lederer, petitioner filed a petition on April 9, 1995, before the Commissioner of Education seeking to remove Hay and Arietta from the Board.

Position of Petitioner:

Petitioner alleges that Hay and Arietta, acting in their capacities as trustees of the Board, improperly approved expenditures of public funds by former Superintendent Lederer. Specifically, between 1988 to 1994, Lederer inappropriately charged personal expenses to the Board's American Express credit card account. Petitioner further

contends that the Board Trustees routinely approved the charges and expense account reimbursements submitted by Lederer without supporting documentation.

Petitioner submits that the conduct of Hay and Arietta violated school laws and demonstrated a pattern of waste, mismanagement, and misappropriation of public funds. Thus, petitioner urges the Commissioner to remove respondents Hay and Arietta from office.

Petitioner also alleges that on December 20, 1994, the Board improperly went into closed session and discussed and revised the district's policy regarding public inspection of non-exempt records. Petitioner submits that the Board's action violated the Open Public Meetings Act, *N.J.S.A.* 10:4-1 to -21.

Respondents' Positions:

Respondents assert the following affirmative defenses: (1) that the Commissioner lacks jurisdiction in this matter; (2) that petitioner lacks standing; (3) that petitioner has failed to state a claim upon which relief may be granted; and (4) that petitioner has failed to comply with the statutory prerequisites to make a valid challenge of the Board's action under the Open Public Meetings Act.

DISCUSSION

I

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate:

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts. The traditional concept of summary judgment is:

> designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact regarding disposition at a trial. [*Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 74 (1954)].

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Ibid.* Thus, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion, the papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

Recently, the New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520 (1995), applied the summary judgment standard employed by the federal courts and held that:

> when deciding summary judgment motions trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential material as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial.
>
> Under this new standard, a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' *Liberty Lobby, supra*, 477 *U.S.* at 249, 106 *S.Ct.* at 2511, 91 *L.Ed.*2d at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. *Liberty Lobby, supra*, 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed.*2d at 213. The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' *Liberty Lobby, supra*, 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed.*2d at 214, the trial court should not hesitate to grant summary judgment. [*Id.* at 540].

Under *Brill,* once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to

raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. If the evidence, along with reasonable inferences, could sustain a judgment in favor of the nonmovant the motion must be denied.

II

The Board asserts that petitioner lacks the requisite standing to seek removal of Arietta and Hay. Petitioner, a private citizen and taxpayer, does not have an actual stake in the matter and cannot demonstrate that she will be personally harmed as a result of allegedly wrongful actions by respondents. Thus, the petition must be dismissed.

Petitioner avers that funding for the school district is provided by state and county tax dollars and local districts. Thus, as a citizen, taxpayer and a resident of Waldwick, she has a vested interest in the State public schools.

The New Jersey Administrative Procedure Act permits "any interested person" to challenge the applicability of any statue or rule enforced or administered by an agency, *N.J.S.A.* 52:14B-8. The law is based upon a venerable tradition of liberal application of standing criteria. *Crescent Park Tenants Ass'n v. Realty Equity Corp. of N.Y.*, 58 *N.J.* 98 (1971). Standing inheres to "all persons who are directly affected by and aggrieved as a result of the particular action sought to be brought before the courts for review." *Elizabeth Federal S.&L. Assn. v. Howell,* 24 *N.J.* 488, 500 (1957). Moreover, "in cases involving substantial public interest, the courts have held that 'but slight public interest, added to and harmonizing with the public interest' is sufficient to give standing." *Id.* at 499

Taxpayer status has been recognized as the basis for standing. *Silverman v. Board of Ed., Tp. of Milburn,* 134 *N.J. Super.* 253 (Law Div. 1975), *aff'd.*, 136 *N.J. Super.*, 435 (App. Div. 1975). Further, taxpayers and citizens were found to have standing to challenge the manner in which funds were used by a government entity. *Vail Mut. Assoc. v. Speaker of House,* 107 *N.J. Super.* 517, 527 (App. div. 1969), *aff'd.* 58 *N.J.* 40 (1971), and *Albert F. Ruehl Co. v. Bd. of trustees, Industrial Ed.*, 85 *N.J.*

Super. 4 (Law Div. 1964). Spending questions and the exercise of power by public bodies are issues that taxpayers have traditionally raised and challenged. See *Essex Cty. Wel Bd. v. Dept. of Inst. and Agencies*, 147 *N.J. Super.* 546 (App. Div. 1977); *Karcher v. Brenden T. Byrne,* 146 *N.J. Super.* 532 (Law Div. 1977).

The evidence supports petitioner's assertion that respondents Arietta and Hay, in their capacity of board members, repeatedly approved the expenses charged to the district's American Express credit card account by Superintendent Lederer. Moreover, they approved the expenditures without supporting documentation to substantiate that the expenses were district related. Indeed, the Department's Investigative Report found that the "board failed to govern and provide oversight in the district, and the administration did not manage district affairs in compliance with State statute and code, and district policies and procedures". Moreover, "neither the board nor the business administrator proved effective as a control over Dr. Lederer's abusive spending". Further, "each board member praised Dr. Lederer and treated the matter under investigation as a minor miscue for which they share no responsibility."

The improper expenditure of funds and payment of claims by local school boards violate school laws and policies; and, directly affects the public interest. I **CONCLUDE** that petitioner has standing as a taxpayer and citizen to petition the Commissioner to remove respondents Arietta and Hay.

III

Petitioner maintains that the public "is entitled to a reasonable expectation that an appointed school trustee will be held accountable for their improper approval of funds." Petition at 16. Thus, the Commissioner "has a duty to ferret out appointed trustees who demonstrate a pattern of waste, mismanagement and misappropriation". *Ibid.*

The Board asserts that there are no statutory or other means by which private citizens may remove members of boards of education. Specifically, petitioner does not allege any facts which would disqualify respondents Arietta and Hay from serving on the board under the school laws, the recall election statute, or the forfeiture law,.

Respondents Arietta and Hay have been appointed to fixed terms of service pursuant to law. The power of the appointing authority to remove the holder of a public office during his term must be expressly conferred upon the appointing authority by the Legislature. *Golaine v. Cardinale*, 142 *N.J. Super.* 385 (Law Div. 1976), *aff'd.* 163 *N.J. Super.* 453 (App. Div. 1977). Moreover, considering "the overriding demand of public policy that officers be protected in the performance of their offices during their terms, the power to remove, once conferred, may only be exercised in strict compliance with the procedural and substantive provisions of the applicable statute". *Id.* at 393-394.

The criteria for removal of members of boards of education are explicitly set forth in *N.J.S.A.* 18A:12-3. Board membership ceases when the member no longer resides within the District, has missed three consecutive meetings of the board without cause, or holds another office in a county governing body. *Ibid.* Board members who are convicted for any indictable offense and lose their right to vote under *N.J.S.A.* 19:4-1 or have been convicted of false swearing under *N.J.S.A* 18A:12-2.2 become disqualified to hold office. I also agree that the stringent criterion to recall an elected official under *N.J.S.A.* 19:27A-1 provides the relief sought by petitioner. Moreover, respondents Arietta and Hay have not been convicted of any crimes under *N.J.S.A.* 2C:51-1. Thus, they are not disqualified under the forfeiture of office law.

I have also considered petitioner's position that board members are subject to removal for prohibited conduct under the "School Ethics Act", *N.J.S.A.* 18A:12-21. Indeed, the Legislature finds and declares that:

> a. In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure uniform maintenance of those standards among them.
>
> [*N.J.S.A.* 18A:12-22]

Standards of ethical conduct require the local school board members act consistent with school laws and policies. The Commissioner can sanction board members with reprimand, censure, suspension or removal. *N.J.S.A.* 18A:12-29. Petitioner has not filed a complaint with the school ethics commission; thus, respondents cannot be removed for an alleged violation of this act.

Under the Public School Education Act, *N.J.S.A.* 18A:7A-15, the Commissioner and the State Board have broad powers to implement whatever measures they deem appropriate to remedy educational deficiencies within the district. "The responsibility for specifying such measures is explicitly placed upon the State board and there is nothing in the statute or elsewhere in Title 18A which suggests that the State board may not carry out this responsibility through its designated agents." *In re Trenton Bd. of Ed.,* 176 *N.J. Super.* 553, 564 (App. Div 1980).

Here, the State Department of Education has already dealt with the conduct of the board members. The Department documented official misconduct by the former superintendent and fiscal mismanagement by board members. Specifically it found that the board did not demonstrate effective control over Dr. Lederer's abusive spending, failed to exercise appropriate oversight of the personal expenditures credited to the district, failed to govern and provide oversight in the district and, in almost every interview, each board member praised Dr. Lederer and treated the matter under investigation as a minor miscue for which they share no responsibility. Therefore, the Department concluded that the Board "failed to exercise appropriate oversight of the personal expenditures credited to the district" and ordered the Board to adopt a corrective action plan. The Department reviewed and accepted the Board's corrective action plan.

Thus, I **CONCLUDE** that there is no genuine issue of material fact.

I further **CONCLUDE** that petitioner is precluded as a matter of law from asserting an OPMA violation. Remedies for nonconforming action under the OPMA, *N.J.S.A.* 10:4-15 provide:

> a. Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act.
>
> b. Any party, including any member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to challenge any action taken by a public body on the grounds that such action is void for the reasons stated in subsection a. of this section, and if the court shall find that the action was taken at a meeting which does not conform to the provisions of this act, the court shall declare such action void.

Petitioner has not satisfied the time limitations which require the petition to be filed within forty-five days after the action sought to be voided has been made public. Petitioner's claim is also time-barred under *N.J.A.C.* 6:24-1.2(c). The regulation requires petitioner to file a petition no later the 90th day from action by the district board of education which is the subject of the requested contested case hearing.

Accordingly, it is **ORDERED** that respondent's motion to dismiss the petition pursuant to *N.J.A.C.* 6:24-1.2 be **GRANTED** and petitioner's motion is **DISMISSED.**

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

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

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

May 15, 1996
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

May 24, 1996
DATE

D. N. Cantanaites /lp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 28 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU 6668-95

SHIRLEY FELDMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY SPECIAL SERVICES SCHOOL DISTRICT, BERGEN COUNTY, AND BRUNO ARIETTA AND PHYLLIS HAY,	:	DECISION
RESPONDENTS.	:	

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

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that petitioner has proffered no basis on which the Commissioner can grant the relief she seeks.

Accordingly, the Commissioner adopts the initial decision of the Office of Administrative Law and finds that the within Petition of Appeal must be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 5, 1996
Date of Mailing, July 8, 1996

291-96

291-96

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

PETITIONER,

V.

NEW JERSEY STATE BOARD OF EDUCATION ET AL.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

AND

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

PETITIONER,

V.

NEW JERSEY STATE BOARD OF EDUCATION ET AL.,

RESPONDENTS.

July 5, 1996

JUN 7 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, New Jersey 07102
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KEN R. SPRINGER,
ADMINISTRATIVE LAW JUDGE

May 28, 1996

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Re: *Bayonne Bd. of Educ. v. State Bd. of Educ., et al.*
OAL Dkt. No. EDU 6021-94
Hackensack Bd. of Educ. v. State Bd. of Educ., et al.
OAL Dkt. No. EDU 5721-94

Dear Counsel:

Statement of the Case

These consolidated cases involve similar constitutional challenges to the method of distributing state school aid from 1993-94 to the present. Both petitioners attack the constitutionality of the Public School Reform Act of 1993 ("PSRA"), *L.* 1993, *c.* 7, and the 1994 Appropriation Act, *L.* 1994, *c.* 67, as applied to their particular facts. Petitioner Bayonne Board of Education ("Bayonne") contends that the State's use of outdated enrollment figures in determining a local district's share of foundation aid and categorical aid violates the thorough and efficient clause ("T & E") of the state constitution, *N. J. Const.*, art VIII, §4, para. I, as well as the equal protection clauses of the federal and state constitutions, *U.S. Const.*, amend XIV and *N.J. Const.*, art VII, §4, para. 1 and 5. In addition, Bayonne alleges that state education officials abused their discretion by adopting an arbitrary, capricious and unreasonable interpretation of the

applicable legislation. Petitioner Hackensack Board of Education ("Hackensack") contends that the State's use of outdated enrollment data in determining categorical aid violates T & E and the equal protection clauses.

The matter now comes before the Office of Administrative Law ("OAL") on a motion by respondents State Board of Education ("State Board"), Dr. Leo Klagholtz, Commissioner of Education ("Commissioner") and Brian W. Clymer, State Treasurer, to dismiss the petitions on four grounds: (1) that the claims are moot because the Quality Education Act, *N.J.S.A.* 18A:8d-1 to 37, has already been declared unconstitutional; (2) that the petitions fail to state a claim for which relief can be granted under the T & E clause; (3) that the petition fails to allege facts sufficient to support an equal protection claim; and (4) that the Department of Education was merely performing a ministerial duty and lacked any discretion in the distribution of state aid.

For the reasons which follow, the motion to dismiss the T & E and abuse-of-discretion claims will be granted and the motion to dismiss the equal protection claims will be denied.

Procedural History

On April 14, 1994, Hackensack filed a petition with the Commissioner. One month later, on May 11, 1994, Bayonne filed a petition seeking similar relief. In June 1994, the Commissioner transmitted both cases to the OAL for a consolidated hearing. Prior to hearing, on December 1, 1994, respondents filed a notice of motion to dismiss, together with supporting certification and brief. Bayonne filed opposing papers, consisting of certification and brief, on February 28, 1995 and Hackensack on March 2, 1995. Respondents filed a reply brief and supplemental certification on March 28, 1995. The OAL conducted oral argument on May 2, 1995.

General Background Facts

Understanding of the issues requires familiarity with certain terminology of school financing law. In response to a series of court challenges culminating in *Abbott v. Burke*, 119 *N.J.* 287 (1990) (*Abbott II*), which declared the Public School Education Act of 1995, *N.J.S.A.* 18A:7A-1 to -33, unconstitutional as applied to poorer urban districts, the Legislature enacted the Quality Education Act of 1990, *N.J.S.A.* 18A:7D-1 to - 37, ("QEA"). [1] State aid under QEA includes foundation aid, categorical aid, and transportation aid.

[1]Thirty poor urban districts have been identified as "special needs districts" by demographic measurements of low socioeconomic status. *Abbott v. Burke, 119 N.J.* 287 (1990) at 335 n. 15. Special needs districts have unique requirements for supplemental education programs and services that are greater than of wealthier districts. *Abbott v. Burke*, 136 *N.J.* 444 (1994), at 453-454.

Foundation aid, which supports regular education, is distributed according to the relative wealth of local districts. It is designed to bridge the gap between each district's "maximum foundation budget" and its "local fair share." A district's maximum foundation budget, an amount representing the typical cost of providing a quality regular education, is determined by a statutory formula based on a district's "resident enrollment," weighted to reflect the increase in cost of educating pupils as they advance to higher grades. *N.J.S.A.* 18A:7D-6. The "fair share" which each district is expected to fund from local appropriations is derived by a calculation ranking all districts in terms of equalized property values and aggregate personal income of their residents. *N.J.S.A.* 18A:7D-7. In general, foundation aid is the primary type of funding under QEA to carry out the Supreme Court's directive of achieving substantial equivalence between the richer and poorer districts in per-pupil expenditures for regular education. *Abbott v. Burke*, 136 *N.J.* 444, 449 (1994) ("*Abbott III*). Bayonne received foundation aid in 1993-94 and 1994-95, but Hackensack did not qualify since its residents are above the statewide average in property wealth and personal income.[2]

"Categorical aid" is geared to specific programmatic categories, such as special education, *N.J.S.A.* 18A:7D-16 and -17, bilingual education, *N.J.S.A.* 7D-21, county vocational education, *N.J.S.A.* 18A:7D-21.1 and a category previously called "compensatory education" and now known as "at-risk pupils." *N.J.S.A.* 18A:7D-20. Regardless of wealth, each district receives a fixed amount of categorical aid to defray the excess costs of meeting the special needs of students in these categories. Although tied to a particular program for funding, categorical aid is unrestricted so that a district may allocate such money for other educational purposes. Transportation aid is distributed according to a formula which reflects the typical cost of transporting students, and includes various elements, such as population, density of the region and district size. *N.J.S.A.* 18A:7D-18.

Historically, allocation of state aid has been based on resident student enrollment in each local district on October 15 of the prebudget year. Put differently, there has always been a one-year time lag in enrollment data used for state-aid distribution. During the first two years under QEA (1991-92 and 1992-93), this practice continued. Petitioners have no problem with the use of such relatively current data. They do not challenge their aid allotment for 1992-93, which was based on enrollment figures as of October 15, 1991.

Starting in 1993-94, however, the State effectively froze future aid at the enrollment figures previously existing on October 15, 1991. Under the Public School Reform Act of 1993, each district which is not a special needs district was entitled to foundation aid "in an amount equal to the product of the foundation aid which the district received in the 1992-93 school multiplied by 1.04." *L.* 1993, *c.* 7, §2d. Similarly, each district was entitled to categorical aid "in an amount equal to the amount of [categorical aid] which the district received in the 1992-93 school year." *L.* 1993, *c.* 7

[2] Hackensack did receive "transition aid," a declining annual subsidy intended to grant every district a 6% increase in 1991-92 and phase in the QEA over several years. *N.J.S.A.* 18A:7D-33.

§2b. Each district was entitled to transportation aid "in the amount the district received in the 1992-93 school year" plus its proportionate share of a $4 million increase in that aid category. *L.* 1993, *c.* 7, §2b.

Likewise, the Appropriations Act for 1994-95 provided that, except for special needs districts, foundation aid "shall be the same as for the entitlement amount for the district in 1993-94." *L.* 1964, *c.* 67. Entitlements for categorical aid and transportation aid for 1994-95 were also "the same as for the entitlement amount for the district in 1993-94." As a practical matter, this meant that the October 1991 enrollment figures used to calculate state aid for 1992-93 also formed the basis for most state aid in 1993-94 and 1994-95.

(1) Mootness

Respondents maintain that the relief sought by petitioners is moot because the New Jersey Supreme Court in *Abbott III* has already declared the Quality Education Act unconstitutional and has given the Legislature until September 1996 to enact a new formula to be implemented by the 1997-98 school year. Accordingly, respondents contend that it is unnecessary to declare the same act unconstitutional twice. Further, respondents urge that existing funding mechanisms are merely "interim measures" and, since the contours of any new funding formula are unknown at the present time, could only be reviewed hypothetically.

Contrary to respondents' assertions, *Abbott III* is not dispositive of the particular issue raised by petitioners in this litigation. In *Abbott III*, the Supreme Court dealt with the lack of parity of educational expenditures between the special needs districts and more affluent districts. Neither Bayonne nor Hackensack are special needs districts covered by the remedy fashioned by the Supreme Court in *Abbott III*. Instead, they seek to litigate an entirely separate concern, whether the freezing of state aid without regard to changes in student enrollment violates the constitutional rights of districts that have experienced increased enrollment. Bayonne highlights this distinction by emphasizing that it is not complaining about inequalities in the QEA's first two years of operation, which was the focus of the Court's attention in *Abbott III*, but rather about subsequent amendments which severed the link between funding and enrollment. *Abbott III* did not address this question, which was never before the Court.

While respondents make a strong argument that relief awarded by courts in school-funding disputes has consistently been prospective, that is not a persuasive reason for dismissing petitioners' claims at this early stage of the proceedings. For one thing, it is premature to speculate on the nature of a possible remedy before the facts are fully known or any legal rights have been established. In some circumstances, courts have awarded retroactive relief limited to those litigants who have incurred the burden and expense of challenging an illegal practice that affects others as well. *See Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 83 (1982) (tenure rights for part-time, remedial and supplemental teachers). *See also*, *Ramirez v. Amsted Indus.*, 86 *N.J.* 332, 357 (new standard of liability for successor corporation).

Even if retroactive relief were unavailable, petitioners would still be entitled to an authoritative ruling to provide guidance for future aid allotments. Unless the State can offer assurances that the objected-to feature will be eliminated in future funding mechanisms, petitioners are entitled to create a record before the administrative agency so that a court might render a determination of their rights. Petitioners are not asking for an advisory opinion on some abstract or theoretical question. Both Bayonne and Hackensack assert that they were shortchanged in state aid in 1993-94 and 1994-95 and will continue to receive less than their fair share in the foreseeable future. Thus, as Hackensack's counsel aptly phrased it, the continuing controversy over the method of aid distribution is "alive and well."

(2) Failure to State a Claim Under the T&E Clause

New Jersey's State Constitution mandates that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." *N.J. Const.*, art VIII, §4, para. 1. Both Bayonne and Hackensack allege in Count I that the QEA is unconstitutional as applied because it does not furnish sufficient funding to provide a thorough and efficient education to the children in their respective districts.

Generally, a motion to dismiss for failure to state a claim should be granted "in only the rarest of instances." *Printing Mart v. Sharp Electronics*, 116 *N.J.* 739, 772 (1989). When reviewing pleadings to determine whether or not they state a claim, "the inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." *Printing Mart*, at 746. Administrative agencies should follow the example of courts, which carefully search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *Lieberman v. Port Auth.*, 132 *N.J.* 76, 79 (1993). As one case articulated the legal standard, the test is whether a cause of action is "suggested" by the facts. *Velantzas v. Colgate-Palmolive Co.*, 109 *N.J.* 189, 192 (1988). However, dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. *Rieder v. N.J.. Dep't of Transp.*, 221 *N.J. Super.* 547, 552 (App. Div. 1987).

Successful challenges to the funding system on T&E grounds have been brought on behalf of disadvantaged children who have demonstrated that the education they are receiving does not adequately "equip a child for his role as a citizen and as a competitor in the labor market." *Abbott II*, at 313. *See also Robinson v. Cahill*, 62 *N.J.* 473, *cert. den. sub. nom. Dickey v. Robinson*, 414 *U.S.* 976, 94 *S.Ct.* 292, 38 *L.Ed.* 2d 219 (1973). Illustratively, the record in *Abbott II* reflected that none of the poor urban districts met the state standard for mastery of basic skills and drop-out rates in some urban high schools were as high as 47%. *Abbott II*, at 369-70.

In marked contrast, the petitioners in this litigation make no claim that they are delivering an inferior education to their own students. Far from it, Bayonne acknowledges in paragraph 16 of its petition that:

> Despite its low per pupil expenditures and the disproportionate number of special needs students, [Bayonne] has managed to provide an excellent education to its public school students. The Bayonne school district has passed Respondent State Board of Education's monitoring process both times it has been subjected to this scrutiny, and Bayonne High School has passed its most recent Middle States Evaluation.

Using similar language, Hackensack asserts in paragraph 17 of its petition that:

> Despite financial pressures faced by the district due to Respondents' actions, students from Hackensack High School continue to excel. Eighty-eight percent of its graduates go on to post secondary education, including some of the finest colleges in the nation. Petitioner's drop out rate is under 4%. More than 90% of the students pass the High School Proficiency Test for the first time, and all pass by their senior year. SAT scores of college bound students exceed 1000. Petitioner's students have been successful in both academic and athletic competitions and have won awards in both arts and theater.

Viewed most indulgently and affording petitioners the benefit of every favorable inference, the pleadings simply do not allege any facts that might conceivably support a finding of a T&E violation. Unlike the plight of the urban districts in *Abbot II*, petitioners do not portray a level of education "of significantly inferior quality" and "tragically inadequate." (at 357-359.) At oral argument, petitioners suggested that they are unable to plead the facts with any greater degree of specificity, especially before completion of discovery, because they do not really know the legal definition of what constitutes "a thorough and efficient education." Analytically it is difficult to comprehend how petitioners can claim that their students are being deprived of a thorough and efficient education without knowing what one is. Whatever substantive meaning may be given to that term, the constitutional standard cannot be said to have been violated in the case of students who are receiving "an excellent education" or who "continue to excel" in academic and co-curricular pursuits.

Since the parties have presented matters outside the pleadings, respondents' motion should be treated, in the alternative, as one for summary decision. *See R.* 4:6-2. Like its summary-judgment counterpart in a judicial proceeding, a motion for summary decision should be granted where the papers, including any affidavits or certifications filed by the parties, "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). Recently, the New Jersey Supreme Court adopted a new approach making it easier for courts to grant summary-judgment motions. Essentially,

the judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 533 (1995). Succinctly stated, the inquiry is "whether the evidence is so one-sided that one party must prevail as a matter of law." *Brill* at 533. While credibility determinations still belong solely to the factfinder, the motion judge must engage in a certain amount of sifting and evaluation of evidential materials. If there exists a single unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact. *Brill,* at 540.

Careful review of the papers filed by petitioners reveals the complete absence of any factual underpinning for the alleged T&E violations. In his affidavit, Bayonne Business Administrator Clifford Doll offers a detailed recitation of the district's increasing enrollment and its static state aid, but does not connect this data to any perceived decline in the quality of education which its students enjoy. Assistant Superintendent Peter Capone of Hackensack points to numerous budget cuts which the district has incurred over five years, but also fails to establish any adverse effect on its ability to prepare students for the duties of citizenship or to compete successfully on the job market. Nothing in petitioners' documents provides any basis for finding that either district is delivering a substandard or inadequate education. Indeed, Bayonne's brief argues that it has been able to attract a large influx of transfer students by offering an educational system so good that it many parents move into the district. Accordingly, the facts are so one-sided that petitioners' T&E claim must be dismissed.

(3) Equal Protection of the Law

In Count II of their petitions, Bayonne and Hackensack allege that the state aid-distribution formula contravenes the equal-protection guarantee under both federal and state constitutions. While their constitutional claims are substantially similar, the two districts emphasize different classifications.

Bayonne draws a distinction between local districts with declining enrollment (which continue to receive categorical aid based on students no longer there) and districts with increasing enrollment (which receive no additional categorical aid but must educate a larger number of students.) According to Bayonne, this policy of rewarding declining districts at the expense of growing districts is irrational and serves no identifiable state interest. In particular, Bayonne asserts that such disparate treatment cannot be justified on the basis of fiscal constraints, since the same amount of state aid could be distributed more fairly and equitably.

Hackensack, on the other hand, draws a line between students receiving programmatic services, such as special, remedial or bilingual education, and students "in the non-categorical portion of plaintiff's educational program." Basically, Hacksack argues that the requirement to deliver state-mandated services without adequate state funding has forced it to make severe budget cuts in its regular education program.

Notwithstanding that these categories are overlapping (since students eligible for categorical programs may also participate in the regular program), Hackensack's point is that the funding formula causes an unfair diversion of money from regular education to make up the shortfall in the costs of unfunded mandates. Hence, the distribution method does not promote the stability in funding which respondents say it is intended to achieve.

Much of respondents' argument in support of its motion deals with the standard of review applicable in this particular context. Respondents urge that the situation is governed by the "rational-basis" test, rather than the stricter level of scrutiny pertaining in cases involving "fundamental interests" or "suspect categories." It is unnecessary, however, to decide what level of scrutiny is appropriate in this setting. Even if one assumes that the state need only show a rational basis to uphold the legislative judgment, petitioners have made a preliminary showing that the classification operates to harm their students without advancing any legitimate state objective. It is not a satisfactory answer to say that petitioners have the ability to raise funds through local taxation and, if necessary, can seek a cap waiver. Although the Legislature does not necessarily have to appropriate any specific amount of categorical aid in the first place, it cannot adopt a distribution system that discriminates against some school districts for no rational purpose. Nor does the lack of restrictions on a district's use of categorical funds serve to immunize the scheme against constitutional attack. Instead, it underscores the inequity of letting districts with fewer categorical students devote categorical-aid money to other uses, while districts with more such students must take money away from their regular educational programs. At the least, petitioners are entitled to develop a factual record before the state administrative agency, so that later they may attempt to persuade the judicial branch of government that the aid-distribution formula should be declared unconstitutional. *Abbott v. Burke*, 100 *N.J.* 269 (1985); *Paterson Redev. Agency v. Schulman*, 78 *N.J.* 378, 386 (1979).

(4) Abuse of Discretion By State Officials

Lastly, Bayonne alleges in Count III of its petition that respondents' "arbitrary, capricious and unreasonable" interpretation of the controlling legislation constitutes an abuse of discretion by state officials. Respondents maintain that the statutory language confers no discretion and that state officials are merely performing a ministerial act.

Apart from vindication of an underlying constitutional principle, Bayonne has no independent right to demand that the Legislature appropriate any particular sum of money for support of its local school system. Bayonne tacitly recognizes as much when it argues that its abuse-of-discretion claim must necessarily be adjudicated as part of its equal protection challenge. Viewed in this light, Bayonne's abuse-of-discretion issue is a variation of the general proposition that an administrative agency may be able to resolve a dispute entirely on statutory grounds, and thereby avoid the need for judicial review of any constitutional questions. *Schulman*, 78 *N. J.* at 387. If an ambiguous statute is susceptible of two interpretations, one consistent with

constitutional doctrine and the other not, then the interpretation which is constitutional must be adopted. Otherwise, however, the state officials cannot refuse to enforce a legislative enactment which they regard as undesirable or unwise. Since Count III adds nothing to the issues already raised as part of the equal protection claim in Count II, the additional count is unnecessary and detracts attention from the real issue in this case.

Order

It is **ORDERED** that respondents' motion to dismiss Count I of both petitions and Count III of Bayonne's petition is granted.

And further **ORDERED** that respondents' motion to dismiss Count II of both petitions is denied.

Very truly yours,

Ken R. Springer
Administrative Law Judge

KRS/al

This order may be reviewed by the Commissioner, Department of Education, either upon interlocutory review, pursuant to *N.J.A.C.* 1:1-14.10, or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EDUCATION ET AL.,	:	DECISION ON MOTION
RESPONDENTS.	:	

AND

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE BOARD OF EDUCATION ET AL.,	:	
RESPONDENTS.	:	

The record of this matter and the order of the ALJ have been reviewed on an interlocutory basis pursuant to N.J.A.C. 1:1-14.10, by request of respondents made on June 14, 1996 and granted on June 24, 1996. Opposing papers were filed by the petitioning Bayonne Board of Education.

In their moving papers, respondents (hereinafter "the State") urge affirmance of the ALJ's order in most respects, but seek reversal of that portion of the order denying the State's motion to summarily dismiss petitioners' equal protection claim. That claim, the State contends, should have been dismissed, as were petitioners' thorough and efficient clause and arbitrary and capricious action claims, rather than being permitted to go forward to hearing.

Initially, the State contends that the ALJ erred in finding petitioner's equal protection claims to be severable from their thorough and efficient (T&E) claims. In their pleadings or supporting papers, the State argues, both petitioners had specifically premised their equal protection claims on the

purported denial of a thorough and efficient education that resulted from the State's alleged violation. Thus, when petitioners' thorough and efficient claims were found to be without merit and dismissed, so, too, should have the equal protection claims based upon them.

The State then renews its arguments as to the applicable standard for judging an equal protection claim in this context, contending once again that, as the "disadvantaged class" does not constitute a suspect class, the State need only show that a rational basis exists for the challenged action in order to prevail against petitioners. In this regard, after noting that there is no requirement for state aid to necessarily be distributed on a per pupil basis, the State argues that

> For the past few years, during this interim period between the QEA and the soon to be enacted permanent funding formula, the Legislature made a decision not to fund strictly on a per pupil basis but rather to base funding, in large part, on the prior years' entitlement. Providing this level of stability in state school funding during a transitional period can hardly be viewed as "irrational". While petitioners may not agree with the wisdom of the course selected the Legislature, that disagreement does not convert a school aid distribution scheme based on prior years' funding into a constitutionally defective one. Barone (citation omitted) ("As long as the classification scheme by the Legislature rationally advances a legitimate governmental objective, it need not be the wisest, the fairest, or the one we would choose. It is not for the courts to determine if there is a better way to allocate resources under these programs.")

(Respondents' Letter Request, at 11; citations and references to prior briefs omitted)

A further basis for dismissing petitioners' equal protection claims, the State contends, is found in the doctrine of justiciability. These claims should be considered non-justiciable both because the form of relief petitioners seek either has already been provided (i.e., a declaration that QEA is unconstitutional) or is not available in this forum, as retroactive payments cannot remedy the alleged "harm" to the constitutional rights of affected students. Moreover, viewing this case as an opportunity to obtain "guidance for future aid allotments" in effect constitutes an advisory opinion which should not be provided, and, in any event, such "guidance" would be merely speculative. This is so in that the provisions at issue cannot be examined in a vacuum, and interim aid measures have changed in each year since QEA was declared unconstitutional, with a new, permanent formula soon to be in place.

In opposing papers, the Bayonne Board of Education (hereinafter "Bayonne") initially contends that respondents' request should be rejected as untimely filed, and that there is no extraordinary circumstance herein that would justify the extreme remedy of summary dismissal on an interlocutory basis rather than after the conduct of a full factual hearing, which has been scheduled for three days in November and will not impose a significant burden on respondents. Bayonne then posits that the ALJ correctly decided the equal protection issue, so there is no basis for reversal in any event. Specifically, the ALJ correctly found that there was an independent basis for petitioners' equal protection claims

separate and apart from their T&E claims, i.e., whether the State action challenged had any rational basis, and that petitioners had made a preliminary showing sufficient to move those claims forward to hearing. Bayonne urges the Commissioner to reject the State's vague and unsubstantiated claim of "stability," contending that

> ***Respondents are in effect asking the Commissioner of Education to accept that their unexplained one word rational basis - "stability" - is sufficient, as a matter of law and without providing any factual content to the one word, to dismiss a constitutional equal protection claim. Under any jurisprudential standard of constitutional litigation, such a decision would be dangerous to say the least. Would any judge dismiss an equal protection claim based upon a factual conclusion that there was a rational basis for the State's action without the State providing that basis, and without any facts having been offered to establish the basis? Again, the question answers itself, but that is exactly what Respondents are asking the Commissioner of Education to do in this case.
>
> (Bayonne's Letter Memorandum in Opposition to Request, at 7-8)

With respect to the State's justiciability arguments, Bayonne posits these to have been fully addressed in prior briefs, and properly assessed by the ALJ.

Upon review and consideration, the Commissioner reaches a conclusion different from that of the ALJ. The Commissioner instead finds that the State has, in its papers before the ALJ and on interlocutory review, established a rational basis for its challenged actions, so that petitioners cannot succeed in their equal protection claim and no purpose would be served by proceeding to full factual hearing.

Initially, the Commissioner rejects Bayonne's argument that the request for interlocutory review was untimely filed. N.J.A.C. 1:1-14.10 expressly provides that such applications are to be made within five working days from a party's *receipt* of a the written or oral order at issue, a regulation clearly intended to compel prompt action upon first knowledge of an adverse ruling. There is no contention here that any oral order or other notice preceded the ALJ's written decision, which was received by the State's representative on June 7, 1996, notwithstanding that it may have been received by Bayonne on May 30, 1996. Within the context of the controlling regulation (cf., for example N.J.A.C. 1:1-18.4), mailing dates or calculations of constructive receipt are not applicable; thus, the State's request of June 14, 1996 was timely filed on the fifth working day following actual receipt of the ALJ's order. The Commissioner further finds that where an unsuccessful motion for summary judgment has been made, it is not inappropriate for the movant to seek review of, or for the Commissioner to reverse, denial of such motion in the interest of avoiding the time and expense of plenary hearing, where a sufficiently compelling basis for the proposed action is set forth in the papers on interlocutory appeal.

As to the substance of parties' positions on petitioners' equal protection claims, the Commissioner concurs, and the parties do not dispute, that the appropriate test to be met by the State is ability to demonstrate a rational basis for its actions. In the Commissioner's view, the following excerpts from the State's motion papers amply provide such a basis:

> ***In the instant case, it is clear that the funding scheme for the past two years has been driven by economic concerns. The Legislature has provided some short-term stability in State aid to districts while dealing with severe fiscal restraints and making progress in terms of the Abbott mandates. By funding based on last year's entitlements, the Legislature has protected districts from reductions in aid during a difficult fiscal period when Statewide aid to schools, for the first time in recent history, is not increasing. Clearly economic and administrative concerns support the Legislature's actions.***
>
> Over the past two years, the Legislature has chosen to provide State aid for public education based on prior years' aid. Although this might not be optimum public policy and may result in certain inequities, it is certainly not an irrational way of proceeding. Any unfairness in the distribution scheme is far outweighed by the economic need and administrative convenience of proceeding in this manner on an interim basis while the Legislature undertakes the difficult task of creating a new funding formula consistent with the mandates of Abbott II and III.***
>
> ***[Petitioners claim] that the Legislature's decision to provide level funding to districts that have experienced enrollment declines is completely arbitrary and therefore makes the funding scheme irrational.***Providing school districts some stability in State aid during transition periods is neither irrational nor arbitrary. Hold harmless aid provides an opportunity for districts to adjust to decreasing enrollments over time and further recognizes that gains and losses in student enrollment do not automatically result in incrementally corresponding budget changes.***
>
> (Respondents' Brief in Support of Motion to Dismiss, at 22-25; Respondents' Reply Brief, at 12-13; citations omitted)

The Commissioner thus is not persuaded by petitioners' contention that use of prior enrollment data, or holding districts harmless through level funding, is inherently arbitrary because it benefits districts with declining enrollment while harming districts with increasing enrollment. While the scheme at issue herein may in fact result in some inequity in individual cases, and while petitioners may believe, and may even be prepared to demonstrate, that there are better and more fair means to accomplish the ends sought by the Legislature, as set forth above, there clearly exists a rational basis for the Legislature to have proceeded as it did. Mere disagreement with the means chosen by the Legislature cannot serve as a basis to overturn the scheme it has designed to create fiscal predictability and administrative ease during a transition period between funding laws, and the existence of some disparity through application of that scheme cannot rise to the level of constitutional violation on equal protection grounds where it has already been established that no showing was made of inability to provide T&E as a result of the alleged violation.

Accordingly, the Commissioner affirms the determination of the ALJ to dismiss petitioners' thorough and efficient and arbitrary action claims, but reverses the determination not to dismiss petitioners' equal protection claims and instead dismisses the petition in its entirety. There being no further proceedings necessary in this matter, the file is requested to be returned to this agency by the Office of Administrative Law pursuant to N.J.A.C. 1:1-3.3.

IT IS SO ORDERED.

ACTING COMMISSIONER

Date of Issue - July 5, 1996
Date of Mailing - July 8, 1996

291-96

EDU #5721-94 AND #6021-94 (consolidated)
C # 291-96
SB # 51-96

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

PETITIONER-APPELLANT,

V.

DR. LEO KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS-RESPONDENTS,

AND

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

PETITIONER-APPELLANT,

V.

DR. LEO KLAGHOLZ, COMMISSIONER OF EDUCATION, BRIAN W. CLYMER, NEW JERSEY STATE TREASURER, AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Acting Commissioner of Education, July 5, 1996

For the Petitioner-Appellant Board of Education of the City of Bayonne, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

For the Petitioner-Appellant Board of Education of the City of Hackensack, Sills, Cummis, Zuckerman, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

12/4/96

For the Respondents-Respondents, Nancy Kaplen, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter was initiated by separate petitions, one filed on April 14, 1994 by the Hackensack Board of Education and one filed on May 11, 1994 by the Bayonne Board of Education. The cases were transmitted to the Office of Administrative Law for hearing, where they were consolidated because both involved constitutional challenges to the method by which the Department of Education distributed State aid from the 1993-94 school year to the present.

Before hearing, the Deputy Attorney General representing the State respondents[1] filed a motion to dismiss both petitions. By decision of May 28, 1996, the Administrative Law Judge ("ALJ") directed dismissal of petitioners' claims that the distribution of foundation and categorical aid for the years in question had been in violation of the State constitution's mandate for the provision of a thorough and efficient system of public schools. He also directed dismissal of Bayonne's claim that State education officials had abused their discretion by their interpretation of the applicable legislation when distributing State aid during the years in question. However, finding that petitioners were at least entitled to develop a factual record, the ALJ denied that part of the motion to dismiss which related to the equal protection clause of the State and Federal constitutions.

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[1] Petitioners named the Commissioner as respondent in his capacity as the chief executive officer of the Department of Education and official agent of the State Board. Petition of Hackensack Board of Education dated April 13, 1994, and Petition of Bayonne Board of Education, dated May 9, 1994. Petitioners also named the State Board as the statutory head of the Department vested with general powers to supervise and control public education in New Jersey. Id. Additionally, Hackensack named State Treasurer Brian W. Clymer because he is "responsible for making [S]tate aid payments to local school districts." Petition of Hackensack Board of Education, dated April 13, 1994. It however appears that the State Board and the State Treasurer were named only nominally and that, therefore, neither has been involved in the litigation in this matter.

State respondents sought interlocutory review of the ALJ's determination from the Commissioner of Education pursuant to N.J.A.C. 1:1-14.10. The Commissioner granted such review and, on July 5, 1996, Acting Commissioner Richard DiPatri rendered his decision on behalf of the Commissioner. See N.J.S.A. 18A:4-33 and N.J.S.A. 18A:4-34. The Acting Commissioner affirmed that part of the ALJ's determination dismissing petitioners' claims that the State respondents had violated the constitutional mandate for a thorough and efficient education and those claims relating to abuse of discretion by State education officials. However, he reversed the ALJ's determination that petitioners were entitled to litigate their equal protection claims and, instead, dismissed the petitions in their entirety.

Both petitioners appealed to the State Board of Education from the Acting Commissioner's determination to dismiss their equal protection claims.

After carefully reviewing the arguments of the parties and the record that has been developed so far in this matter, we reverse the Acting Commissioner's determination to dismiss petitioners' equal protection claims and remand this matter to him for such proceedings as are necessary to resolve these claims.[2]

We do not retain jurisdiction.

S. David Brandt opposed.

December 4, 1996

Date of mailing DEC 06 1996

[2] We note that such claims pertain to both the method by which the Department of Education distributed State aid during the years in question and whether the Department acted arbitrarily in applying that method to petitioners.

291-96

EDU #5721-94 and #6021-94 (consolidated)
C # 291-96
SB # 51-96
EDU #1431-97
C # 459-97
SB # 80-97

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

PETITIONER-APPELLANT,

V.

DR. LEO KLAGHOLZ, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS-RESPONDENTS,

AND

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

PETITIONER-APPELLANT,

V.

DR. LEO KLAGHOLZ, COMMISSIONER OF EDUCATION, BRIAN W. CLYMER, NEW JERSEY STATE TREASURER, AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Acting Commissioner of Education, July 5, 1996

Remanded by the State Board of Education, December 4, 1996

Decision on remand by the Commissioner of Education, September 2, 1997

3/4/98

For the Petitioner-Appellant Board of Education of the City of Bayonne, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

For the Petitioner-Appellant Board of Education of the City of Hackensack, Sills, Cummis, Zuckerman, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

For the Respondents-Respondents, John Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter was initiated by separate petitions, one filed on April 14, 1994 by the Hackensack Board of Education and one filed on May 11, 1994 by the Bayonne Board of Education. The cases were transmitted to the Office of Administrative Law ("OAL") for hearing, where they were consolidated because both involved constitutional challenges to the method by which the Department of Education distributed State aid from the 1993-94 school year to the present.[1]

After the matter had been scheduled for hearing in OAL, the Deputy Attorney General representing the State respondents[2] filed a motion on their behalf seeking dismissal of both petitions. By decision of May 28, 1996, Administrative Law Judge ("ALJ") Ken Springer directed dismissal of some of petitioners' claims, specifically those alleging that the distribution of foundation and categorical aid for the years in question had been in violation of the State constitution's mandate for the provision of a thorough

[1] Specifically, petitioners challenged distribution of State aid under the Public School Reform Act of 1993, L.1993, c.7, and the Appropriations Act for 1994-95, L.1994, c. 67.

[2] Petitioners named the Commissioner as respondent in his capacity as the chief executive officer of the Department of Education and official agent of the State Board. Petition of Hackensack Board of Education, dated April 13, 1994, and Petition of Bayonne Board of Education, dated May 9, 1994. Petitioners also named the State Board as the statutory head of the Department vested with general powers to supervise and control public education in New Jersey. Id. Additionally, Hackensack named State Treasurer Brian W. Clymer because he is "responsible for making [S]tate aid payments to local school districts." Petition of Hackensack Board of Education, dated April 13, 1994. It appears, however, that the State Board and the State Treasurer were named only nominally and that neither, therefore, has been involved in the litigation in this matter.

and efficient system of public schools and Bayonne's claim that State education officials had abused their discretion by their interpretation of the applicable legislation when distributing State aid during the years in question. However, Judge Springer denied that portion of the State respondents' motion to dismiss petitioners' claims related to the equal protection clause of the State and Federal constitutions, finding that petitioners were at least entitled to develop a factual record based on those claims.

The State respondents sought interlocutory review of Judge Springer's determination from the Commissioner of Education. The Commissioner granted such review and, on July 5, 1996, the Acting Commissioner rendered a decision on behalf of the Commissioner. The Acting Commissioner affirmed that part of Judge Springer's determination dismissing petitioners' claims that the State respondents had violated the constitutional mandate for a thorough and efficient education and those claims relating to abuse of discretion by State education officials. However, the Acting Commissioner reversed Judge Springer's determination that petitioners were entitled to litigate their equal protection claims and, instead, dismissed the petitions in their entirety.

Both petitioners appealed to the State Board of Education from the Acting Commissioner's determination to dismiss their equal protection claims.

On December 4, 1996, after carefully reviewing the arguments of the parties and the record that had been developed thus far in the matter, the State Board reversed the Acting Commissioner's determination to dismiss petitioners' equal protection claims. We then remanded this matter to the Commissioner for such proceedings as were necessary to resolve petitioners' remaining claims, including those claims pertaining to the method by which the Department of Education had distributed State aid during the

years in question and whether the Department had acted arbitrarily in applying that method to petitioners. See State Board's decision, slip op. at 3, n.2.

The matter was then transmitted once again to the Office of Administrative Law, and plenary hearings were scheduled for October 7, 1997. However, prior to hearing, a Deputy Attorney General made renewed efforts on behalf of the State respondents to obtain dismissal of this matter by filing two separate motions to dismiss. Administrative Law Judge Stephen Weiss denied both of these motions in a letter decision dated August 5, 1997.

Judge Weiss rejected the State respondents' argument that the claims involved had been rendered moot as a result of the enactment of the Comprehensive Educational Improvement and Financing Act ("CEIFA"). In doing so, he found that the issue had been decided when the State Board remanded the matter to be heard so that a full and adequate record could be developed. As expressed by Judge Weiss:

> With regard to the State's argument that the equal protection claim lodged by [petitioners] is moot, I adopt the position...that in fact this very issue was intended by the State Board of Education in its remand to be heard at the OAL so that a full and adequate record could be made. The fact that the Legislature recently enacted a new, permanent funding formula does not negatively impact the need to decide the issues remanded to me even though the funding formulas challenged in the original petitions were interim in nature and no longer obtain. The fact that the challenged funding mechanisms no longer exist does not, in my view, contra-indicate a hearing to determine whether or not their implementation during the school years in question visited legal harm on the [petitioners]. If they did, appropriate relief, even now, would be warranted. The general proposition that relief in school funding litigation generally has been prospective only does not apply with full force and effect to the instant context which, I submit, is more narrowly confined to the specific alleged deficiencies that were visited upon petitioners. The fact that the State now is moving

> forward with a revised, permanent funding formula (albeit recently found to be deficient in some parts) is not dispositive.

Letter Decision of ALJ Weiss, dated August 5, 1997, slip op. at 1-2.

Judge Weiss also rejected the State respondents' contention that retroactive relief could not be granted because it would require the appropriation of amounts greater than those provided in the new funding formula and could not change the impact of a violation under the interim funding schemes.

He further found that the petitioning school districts did not lack standing, rejecting the State respondents' argument that as "creatures of the Legislature," rather than "persons," district boards of education lacked standing to bring actions such as this against the State. In addition, Judge Weiss stressed that accepting the State respondents' approach would require him to ignore both Judge Springer's decision and the direction provided by the State Board in its remand.

In rejecting the State respondents' arguments, Judge Weiss emphasized that "the essential purpose of an OAL hearing is to establish a factual record for the agency to review, and possibly the courts thereafter," and reiterated that "to grant the State's motion at this point would forever deprive petitioners of an opportunity for a hearing which, I believe, the State Board has required be given to them." Id. at 2.

The State respondents then sought interlocutory review from the Commissioner, who once again granted their request. Characterizing the State Board's decision as an affirmance of ALJ Springer's decision, the Commissioner found that Judge Springer's decision that the matter was not moot clearly flowed from his concern that petitioners could not be denied the opportunity to address the eventuality that they would not

receive their fair share in the foreseeable future. The Commissioner then found that CEIFA fundamentally altered the posture of petitioners' claims in that regard so that the State Board's affirmance of Judge Springer's decision no longer had any validity. Concurring with the State respondents that no retroactive relief could result from the proceedings, and finding that "no purpose would be served by such proceedings," Commissioner's decision, dated September 2, 1997, slip op. at 3, the Commissioner reversed the determination of Judge Weiss and dismissed the petitions. As a result, he found it unnecessary to reach Judge Weiss' conclusions on standing.

Both Hackensack and Bayonne have once again appealed to the State Board. After closely reviewing the arguments of counsel, as well as the decisions of Judges Springer and Weiss, we once again remand this matter to him for transmittal to OAL for initial determination.

We stress that, as pointed out by Judge Weiss, Judge Springer was specific in addressing the issues presented to him by the State respondents when, in his letter decision of May 28, 1996, he denied their motion to dismiss this matter in its entirety. As set forth in Judge Springer's decision:

> Contrary to respondent's assertion, Abbott III [Abbott v. Burke, 136 N.J. 444 (1994)] is not dispositive of the particular issue raised by petitioners in this litigation....Neither Bayonne nor Hackensack are special needs districts covered by the remedy fashioned by the Supreme Court in Abbott III. Instead they seek to litigate an entirely separate concern, whether the freezing of state aid without regard to changes in student enrollment violates the constitutional rights of districts that have experienced increased enrollment. Bayonne highlights this distinction by emphasizing that it is....[complaining] about subsequent amendments [to the QEA] which severed the link between funding and enrollment. Abbott III did not address this question, which was never before the Court.

Letter Decision of ALJ Springer, dated May 28, 1996, slip op. at 4.

Judge Springer also rejected the State respondents' arguments that the award of prospective relief by courts in the ongoing school-funding litigation warranted dismissal, finding that:

> [This argument] is not a persuasive reason for dismissing petitioners' claims at this early stage of the proceedings. For one thing, it is premature to speculate on the nature of a possible remedy before the facts are fully known or any legal rights have been established. In some circumstances, the courts have awarded retroactive relief to those litigants who have incurred the burden and expense of challenging an illegal practice that affects others as well. (Citations omitted.)

Id.

Judge Springer further concluded that:

> Even if retroactive relief were unavailable, petitioners would still be entitled to an authoritative ruling to provide guidance for future aid allotments. Unless the State can offer assurances that the objected-to feature will be eliminated in future funding mechanisms, petitioners are entitled to create a record before the administrative agency so that a court might render a determination of their rights. Petitioners are not asking for an advisory opinion on some abstract or theoretical question. Both Bayonne and Hackensack assert that they were shortchanged in state aid in 1993-94 and 1994-95 and will continue to receive less than their fair share in the foreseeable future. Thus...the continuing controversy over the method of aid distribution is "alive and well."

Id. at 5.

As Judge Weiss concluded, if petitioners establish that the method used by the Department of Education for distributing State aid in 1993-94 and 1994-95 violated any applicable requirements of law or that the Department acted arbitrarily in applying that

method, the issue of whether the enactment of CEIFA has in fact corrected such deficiencies may nonetheless remain.

Therefore, for the reasons stated herein, as well as those expressed by Judge Weiss, we once again remand this matter to the Commissioner for transmittal to the Office of Administrative Law for such proceedings as are necessary to develop a record and to resolve petitioners' claims.[3] At the same time, based on advice to us from the Attorney General's Office, we direct that the proceedings before the ALJ clarify the precise nature of the claims being asserted by these two school districts at this point so as to permit the Commissioner, and the State Board in the event of an appeal from that determination, to settle all questions relating to their standing. In this respect, we specifically direct that the proceedings consider and resolve whether, and to what extent, the parties are raising State or federal constitutional claims, including equal protection violations under the New Jersey and United States Constitutions, and to what extent their claims are being pursued on behalf of the districts themselves or the districts' students.

Daniel J. P. Moroney opposed.

March 4, 1998

Date of mailing MAR 06 1998

[3] We note that such claims appear to pertain to both the method by which the Department of Education distributed State aid during the years in question and whether the Department acted arbitrarily in applying that method to petitioners. We note also that in the event petitioners prevail on the merits of their claims, the relief to which they ultimately would be entitled would be subject to any limitations imposed by law.

293-96

293-96 SEC

IN THE MATTER OF WAYNE WURTZ,	:	
BOARD MEMBER, PAULSBORO	:	COMMISSIONER OF EDUCATION
BOROUGH, GLOUCESTER COUNTY.	:	DECISION
	:	

JULY 9, 1996

IN THE MATTER	:	**Before the School**
	:	**Ethics Commission**
OF	:	
	:	**Docket No.: C01-96**
WAYNE J. WURTZ, SR., Respondent	:	
PAULSBORO BOARD OF ED.	:	**DECISION**
	:	

PROCEDURAL HISTORY

James Sabetta filed the above-captioned complaint with the School Ethics Commission on January 22, 1996. Commission staff forwarded the complaint to Wayne Wurtz for a response on February 2, 1996. The School Ethics Commission received Mr. Wurtz's answer on February 23, 1996. Because respondent appeared to admit to the allegations in the complaint, although he denied the legal ramifications, respondent and complainant were asked if they were in agreement that the facts set forth were accurate. The Commission received no response and followed up with telephone calls. Neither party's attorney raised any factual issues that would require a hearing before the Office of Administrative Law.

The Commission initially scheduled the case for the April meeting of the Commission, but it postponed hearing the case due to other pressing matters. The Commission informed the parties that their case would be heard on May 28, 1996, and they had the right to appear and present witnesses if they so desired. Neither expressed interest in doing so.

FACTS

On the basis of the pleadings and the records submitted, the Commission finds the following facts to be undisputed.

1. Respondent was elected to the Paulsboro Board of Education on April 18, 1995. He was seated as a board member at the meeting of April 25, 1995. He had not previously served as a board member in any district.

2. At the time of his election, his wife was employed by the Paulsboro Board of Education as a classroom aide. She had previously been employed by the board as a lunch aide and served in that capacity from approximately 1978 to 1987, when she was hired as a classroom aide.

3. At the June 13, 1995, meeting of the Paulsboro Board of Education, the Superintendent recommended employment of substitute teachers and teacher's aides for the 1995-1996 school year. The recommendation was to hire 32 aides including Mrs. Wurtz. The Superintendent recommended Mrs. Wurtz for employment at $8.11/hour for 5.5 hours per day, 5 days per week.

4. Two other board members moved and seconded the recommendation of the Superintendent. Mr. Wurtz voted for the resolution accepting the Superintendent's recommendations including the hiring of his wife. The nine board members present passed the resolution unanimously.

5. Mr. Wurtz later realized that he should not have voted and acknowledged his error at the November 14, 1995, board meeting.

ANALYSIS

Complainant set forth that respondent violated N.J.S.A.18A:12-24 of the School Ethics Act, but did not set forth a particular subsection of the act. The subsections that are applicable to the above facts are N.J.S.A. 18A:12-24(b), (c), and (f).

Subsection (b) provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others.

The facts set forth indicate that Mrs. Wurtz had been employed by the district for many years as an aide. She continued to receive an hourly wage for the work that did not increase substantially. There are no facts to indicate that she was unqualified for the position nor that she would not have acquired the position if it were not for her husband's position on the board. Therefore, her employment by the board was not unwarranted and we cannot find that respondent misused his position in such a way as to violate subsection (b).

For similar reasons, we cannot find a violation of subsection (f). Subsection (f) provides:

> No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public,..., for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated.

There are no facts to indicate that Mr. Wurtz tried to influence anyone in the hiring of his spouse or otherwise took any action to have her recommended for the position. The facts actually indicate that Mrs. Wurtz was entitled to the employment as an aide with the board of

education and she would have received the position without any assistance from Mr. Wurtz. Thus, we can not find that he used his public office to secure financial gain for himself or his spouse in violation of subsection (f).

In contrast, subsection (c) focuses on the public's perception of a conflict. It provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

Even if Mr. Wurtz did not see his wife's name within the resolution to hire aides, he knew that she was an aide and that alone should have alerted him to check for her name within the list. He then had the choice to either abstain on the vote for the entire list or to ask that his spouse be considered separately so that he could abstain on her appointment. His failure to do so resulted in his voting on a matter in which the public reasonably perceived that he had a direct financial and personal involvement that impaired his objectivity or independence of judgment

For the foregoing reasons, the School Ethics Commission finds probable cause of a violation of N.J.S.A. 18A:12-24(c).

DECISION

The Commission has considered respondent's defense that his vote for his spouse was inadvertent and partially caused by his lack of experience on the school board at the time he voted. It has also considered the length of his spouse's employment with the board and the fact that no significant promotion was at stake. Last, the Commission notes that all board members were in favor of the appointment without any influence by Mr. Wurtz. For all of the foregoing reasons, the Commission finds that respondent violated N.J.S.A. 18A:12-24(c) but recommends that the Commissioner of Education impose the lowest penalty of a reprimand for the violation.

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 225 East State Street, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Respectfully submitted,

Paul C. Garbarini/djp

Paul C. Garbarini
Chairman, School Ethics Commission

Resolution Adopting Decision -- C01-96

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and if applicable, has considered the arguments raised by parties in subsequent submissions; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on May 28, 1996

Lisa James-Beavers
Executive Director

IN THE MATTER OF WAYNE WURTZ,	:	
BOARD MEMBER, PAULSBORO	:	COMMISSIONER OF EDUCATION
BOROUGH, GLOUCESTER COUNTY.	:	DECISION
	:	

The initial decision of the School Ethics Commission together with the recommended sanction adopted by the Commission have been reviewed. This matter comes before the Commissioner of Education to impose a sanction, pursuant to *N.J.S.A.* 18A:12-29(c), upon Wayne Wurtz (Wurtz), member of the Board of Education of Paulsboro (Board), based upon a finding by the School Ethics Commission that Wurtz violated the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.*

BACKGROUND

The Commission determined not to transmit this matter to the Office of Administrative Law in that it found that no material facts were in dispute and, therefore, an evidentiary hearing was not warranted. At its meeting on May 28, 1996, the Commission concluded that Wurtz violated the School Ethics Act, *N.J.S.A.* 18A:12-24(c), by voting for his wife's employment as a classroom aide in the District. The Commission recommended reprimand as the appropriate penalty for the violation. The parties were accorded thirteen (13) days from the date on which the Commission's decision was mailed to them[1] to submit

[1] The record indicates that the Commission's decision was mailed to the parties on May 30, 1996.

comments to the record with respect to the Commission's proposed sanction for the Commissioner's consideration in his determination of an appropriate penalty herein. No comments were filed by either of the parties.

CONCLUSIONS OF LAW

The School Ethics Commission found that Wurtz violated *N.J.S.A.* 18A:12-24(c)[2] by casting a vote for a Board resolution to employ classroom aides for the 1995-96 school year, one of which was his wife. The Commission reasoned

> Even if Mr. Wurtz did not see his wife's name within the resolution to hire aides, he knew that she was an aide and that alone should have alerted him to check for her name within the list. He then had the choice to either abstain on the vote for the entire list or to ask that his spouse be considered separately so that he could abstain on her appointment. His failure to do so resulted in his voting on a matter in which the public reasonably perceived that he had a direct financial and personal involvement that impaired his objectivity or independence of judgment.
>
> (School Ethics Commission Decision at p. 3)

Although concluding that the casting of such vote violated the Act, the School Ethics Commission duly considered Wurtz' defenses in this matter as mitigating factors with respect to the imposition of a penalty. Specifically, his contention that his vote was inadvertent and, to some extent, caused by his lack of experience as a board member at that particular time, the long length of his wife's prior employment with the Board, along with the fact that this particular vote did not accord her any significant promotion, and, finally, in that the appointing resolution was unanimously passed by the Board without influence of any kind being exerted by Wurtz, led the Commission to recommend that the least severe penalty, reprimand, be imposed.

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[2] This provision specifies: "No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment."

COMMENTS TO THE COMMISSION'S DECISION

As previously noted, neither party chose to submit comments with respect to the Commission's recommended penalty for the Commissioner's consideration.

COMMISSIONER'S DETERMINATION

Upon review of the Commission's findings of fact and conclusions of law, by which the Commissioner is bound in making his determination in this matter, and the penalty recommended by the Commission, the Commissioner concurs with the Commission's recommendation. Under the circumstances existing herein, the Commissioner agrees that the least severe penalty, reprimand, which consists of a letter from the Commission rebuking respondent for having breached the standards of conduct prescribed by *N.J.S.A.* 18A:12-21 *et seq.* (*N.J.A.C.* 6:3-9.2), is the appropriate penalty to be imposed.

Accordingly, IT IS hereby ORDERED that Board Member Wayne Wurtz be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 9, 1996
DATE OF MAILING JULY 9, 1996

294-96

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

PETITIONER,

V.

L.-C. G. and H. G., on behalf of minor child, A.T.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

JULY 9, 1996

OAL DKT. NO. EDU 8277-95

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

PETITIONER,

V.

L.-C.G. and H. G., on behalf of minor child, A.T.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 9, 1996

DATE OF MAILING JULY 9, 1996

295-96

295-96

B.P. AND E.P., on behalf of their minor grandchild, D.B.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

JULY 9, 1996

OAL DKT. NO. EDU 11619-95

B.P. AND E.P., on behalf of their minor grandchild, D.B.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 9, 1996

DATE OF MAILING JULY 9, 1996

296-96

296-96

JOSEPH IPPOLITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

JULY 9, 1996

OAL DKT. NO. EDU 3130-95

JOSEPH IPPOLITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 9, 1996
DATE OF MAILING JULY 9, 1996

297-96

297-96 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF M.L.S.	:	DECISION
_____	:	

JULY 9, 1996

OAL DKT. NO. EDU 10835-95

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF M.L.S.	:	DECISION
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on May 8, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 9, 1996

DATE OF MAILING JULY 9, 1996

298-96

298-96

JAY CLAUSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CHATHAMS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 10, 1996

OAL DKT. NO. EDU 9799-95

JAY CLAUSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CHATHAMS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1996

DATE OF MAILING JULY 10, 1996

299-96

299-96

FRANK JAMES WHITE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
GINA ROSAMILIA, SALVATORE GONCALVES, WILLIAM ICKLAN AND DARLENE MATTIA,	:	
INTERVENOR-RESPONDENTS.	:	

SYNOPSIS

Petitioner, former Supervisor of Physical Education and Health whose position was abolished in 1992, alleged he was entitled to the newly created position of Supervisor of Elementary Education (K-8) held by a nontenured teaching staff member, Intervenor Rosamilia, or to any principal position held by three other intervenors.

ALJ concluded that petitioner failed to establish by a preponderance of credible evidence that he was entitled by virtue of tenure either to the position of Supervisor of Elementary Education (K-8) held by Intervenor Rosamilia or to the principal positions held by the other intervenors. ALJ concluded that petitioner's claim to the position of Supervisor of Elementary Education (K-8) had to be rejected as petitioner did not possess the requisite elementary education endorsement. ALJ further found that petitioner could not claim the position of principal if he never served in that position as principal is one of the separately tenurable positions specifically enumerated in the statute, *N.J.S.A.* 18A:28-5. (*Nelson*) Petition was dismissed.

Commissioner adopted findings and determination in the initial decision as his own, noting that even though *Nelson*, as cited in the Initial Decision, was recently reversed by the Superior Court of New Jersey, the Legislature adopted, and the Governor signed into law, A-2153, amending *N.J.S.A.* 18A:28-5 to clarify that tenure in the enumerated positions (including the separately tenurable position of principal) shall accrue only by employment in the particular position.

JULY 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

OAL DKT. NO. EDU 540-94

AGENCY DKT. NO. 415-12/93

FRANK JAMES WHITE,

Petitioner,

v.

BLOOMFIELD BOARD OF EDUCATION,

Respondent,

and

GINA ROSAMILIA, SALVATORE GONCALVES WILLIAM ICKLAN AND DARLENE MATTIA,

Intervenor-Respondents.

Robert M. Schwartz, Esq., for petitioner (Lake & Schwartz, attorneys)

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Robert B. Rottkamp, Jr. Esq., for intervenor-respondents (Rottkamp & Flacks, attorneys)

Record Closed: March 28, 1996 Decided: April 9, 1996

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

This matter originally was transmitted to the Office of Administrative Law by the Department of Education as a contested case in January 1994. Thereafter, the petitioner filed an Amended Petition, and the Board filed an Answer to the Amended Petition. An Answer to Amended Petition also was filed by the four intervenors. Their intervention stemmed from the fact that the administrative positions put in jeopardy by the Amended Petition where those which were held by the intervenors, three of them being principal positions and the fourth the position of supervisor held by Ms. Rosamilia.

The Amended Petition alleged that for a period of two years and ten months prior to June 30, 1992, when it was abolished, Mr. White served as Supervisor of Physical Education and Health and that the Board, in September 1993, in derogation of his tenure and seniority rights, named a nontenured teaching staff member, Rosamilia, to the newly created position of Supervisor of Elementary Education (K-8). Since September 1992, following abolition of his position, White had taught physical education at Bloomfield High School. The essence of the answers filed by the Board and the four intervenors was that the personnel actions taken in the case about which petitioner complained were all accomplished in accordance with applicable laws and regulations. In addition, the Answers alleged that the duties and responsibilities as well as the job qualifications for the position of Supervisor of Elementary Education (K-8) which was awarded to intervenor Rosamilia, were different in quality from the position held by White and, secondly, that in any event he was not qualified either to hold the supervisor's position or any principal position held by the three other intervenors.

A plenary hearing was conducted by me on October 30, 1995 and testimony was received on that date from petitioner on his own behalf and, on behalf of the respondent Board, by Dr. Tryjankowski who had been the Assistant Superintendent in charge of curriculum during the period of time when the abolition of White's position took place and the new supervisory position was created.

Following the conclusion of the testimonial portion of the hearing I established a schedule for the filing of briefs. The issuance of this Initial Decision has been delayed by the fact that the running of time for me to decide the case temporarily was "tolled" in order to permit the parties to address an issue which I raised, *sua spontae,* concerning whether the new position was an "approved" title. I wrote to counsel and all replied that in their judgment there was no issue with respect to the concern I raised, at least none that required any further attention by us in this case. The issue I raised had to do with whether or not the new position needed the County Superintendent's approval under *N.J.A.C.* 6:11-3.3(b). That concludes my summary of the procedural history. I will now briefly summarize the testimony.

TESTIMONY

Mr. White testified first. However, prior to taking the stand all counsel entered into a detailed Joint Stipulation of Facts with several attached exhibits which I will incorporate by reference at this juncture. The transcript of my oral decision will, at this point set out the Joint Stipulation of Facts. That Joint Stipulation, which contains twenty two paragraphs and thirty four documents attached as exhibits, was marked as Exhibit J-1 in evidence just before Mr. White testified.

A. Joint Stipulation (Exhibit references deleted)

1. The Petitioner, Frank James White (herein, "Mr. White"), holds the following certificates issued by the New Jersey State Board of Examiners:

   (a) Instructional Certificate, with the following endorsements: Physical Education teacher (in the elementary and secondary schools) and Automobile Driver Education teacher and,

   (b) Administrative Certificate, with the following endorsement: Principal/Supervisor .

2. The Intervenor Gina Rosamilia (herein, "Ms. Rosamilia") holds the following certificates issued by the New Jersey State Board of Examiners:

   (a) Instructional Certificate, with the following endorsement: Elementary School teacher; and,

   (b) Administrative Certificate, with the following endorsement: Supervisor .

3. The Intervenor Salvatore Goncalves (herein, "Mr. Goncalves") holds the following certificates issued by the New Jersey State Board of Examiners:

   (a) Instructional Certificate, with the following endorsements: Elementary School teacher; and,

   (b) Administrative Certificate, with the following endorsement: Principal/Supervisor

4. The Intervenor William Icklan (herein, "Mr. Icklan") holds the following certificates issued by the New Jersey State Board of Examiners:

   (a) Instructional Certificate, with the following endorsement: Elementary School teacher; and,

   (b) Instructional Certificate, with the following endorsement: Teacher of Art; and,

   (c) Administrative Certificate, with the following endorsement: Principal

5. The Intervenor Darlene Mattia (herein, Ms. Mattia") holds the following certificates issued by the New Jersey State Board of Examiners:

(a) Instructional Certificate, with the following endorsement: Elementary School teacher; and,

(b) Instructional Certificate, with the following endorsement: Teacher of Reading; and,

(c) Educational Services Certificate, with the following endorsement: Reading Specialist; and,

(d) Administrative Certificate, with the following endorsement: Principal/supervisor.

6. The following is Mr. White's employment history in the Respondent's School District:

(a) 1958-59 and 1959-60 school years: Physical Education teacher at the elementary school level;

(b) 1960-61 school year through November, 1989: Physical Education teacher (including Health and Automobile Driver Education) at the high school level; and,

(c) November, 1989 through 1991-92 school year: Supervisor of Health (grades 9-12) and Physical Education (grades K-12); and,

(d) 1992-93 school year through the present: Physical Education teacher at the high school level.

7. A copy of Mr. White's employment/position card, reflecting his employment history through the 1994-95 school year, is attached . . . ."

8. Mr. White's position of Supervisor of Health and Physical Education was abolished by the Respondent, pursuant to a legitimate reduction in force, undertaken at the conclusion of the 1991-92 school year. As a result of the abolishment, Mr. White reverted to the position of Physical Education teacher at the high school level, the position which he held prior to his appointment to the aforesaid supervisory position. A copy of the resolution reflecting the aforementioned actions taken by the Respondent are attached hereto . . . ."

9. Mr. White has never been employed in the Respondent's School District in the position of Principal, at any grade level.

10. Mr. White has never been employed in the Respondent's School District in a position of Elementary School teacher requiring the Elementary Education endorsement described at *N.J.A.C.*. 6:11-6.2(a)6, but [for two school years] he has been employed as a physical education teacher in the elementary school. See paragraph 6(a).

11. Mr. White has never been employed in the Respondent's School District in a position with a twelve (12) month term of employment.

13. The following is the employment history of Ms. Rosamilia in the Respondent's School District:

    (a) 1980-81 through 1992-93 school year: Elementary School teacher (grades 1 and 6); and,

    (b) 1993-94 school year through the present: Supervisor of Elementary Education (grades K-8).

14. A copy of Ms. Rosamilia's employment/position card, reflecting her employment history through the 1994-95 school year, is attached . . . ."

15. The Respondent advertised the position of Supervisor of Elementary Education (grades K-8) during the summer of 1993. Attached hereto is a copy of the following documentation evidencing the advancement:

(a) in-District posting, dated June 29, 1993; and,

(b) invoice, dated July 4, 1993, from The Star Ledger, and copy of advertisement appearing in The Star Ledger .

16. In response to the aforementioned advertisement, Mr. White submitted an application for appointment to the position of Supervisor of Elementary Education (grades K-8). Attached hereto is a copy of the following documentation evidencing Mr. White's application and the School District's response to same:

(a) Letter from Mr. White to Dr. Elaine Tryjankowski, Assistant superintendent of Schools (herein, "Dr. Tryjankowski to Mr. White, dated July 12, 1993; and,

(b) Letter from Dr. Tryjankowski to Mr. White, dated July 29, 1993; and

(c) Letter from Mr. White to Dr. Tryjankowski, dated August 5, 1993, together with Mr. White's resume as an attachment thereto.

17. In response to the aforementioned advertisement, Ms. Rosamilia submitted an application for appointment to the position of Supervisor of Elementary Education (grades K-8). Attached hereto is a copy of the following documentation evidencing the application: letter from Ms. Rosamilia to Dr. Tryjankowski, dated July 12, 1993, together with Ms. Rosamilia's resume as an attachment thereto.

18. At its regularly-scheduled meeting of August 30, 1993, the Respondent voted to appoint Ms. Rosamilia Supervisor of Elementary Education (grades K-8) for the 1993-94 school year, effective September 1, 1993. Attached hereto is a copy of the following documentation evidencing the appointment:

    (a) minutes of Respondent's August 30, 1993 meeting (relevant sections); and,

    (b) Letter from Dr. Edward J. Glickman, Superintendent of Schools, to Ms. Rosamilia, dated August 31, 1993.

19. Since the start of the 1992-93 school year, to the present, Mr. Goncalves has been employed by the Respondent as Principal of the Berkeley Elementary School. A copy of Mr. Goncalves' employment/position card, reflecting his employment history through the 1994-95 school year, is attached hereto.

20. Since October 7, 1991, to the present, Mr. Icklan has been employed by the Respondent as Principal of the Demarest Elementary School. A copy of Mr. Icklan's employment/position card, reflecting his employment history through the 1994-95 school year, is attached hereto.

21. Since the start of the 1992-93 school year, to the present, Ms. Mattia has been employed by the Respondent as Principal of the Watsung Elementary School. A copy of Ms. Mattia's employment/position card, reflecting her employment history through the 1994-95 school year, is attached hereto.

22. Attached hereto is a copy of the job description for each of the following positions:

(a) High School Principal; and,

(b) Middle School Principal; and,

(c) Elementary School Principal

B. For Petitioner

Petitioner, as noted, testified that at the beginning of September 1992, following the abolition of his previous position as Supervisor of Physical Education and Health, he was employed as a physical education teacher in a ten month position at Bloomfield High School. He also testified that while serving as a high school physical education teacher he had sought employment in other school districts, both in and outside New Jersey.

On cross-examination he first identified some of districts to which he had applied for employment. He also noted that during the summer he earns approximately $2500 to $3,000 operating a basketball camp for elementary school age children at Bloomfield High School. Essentially, that was the sum and substance of his testimony at the hearing since the Joint Stipulation contained the vast array of facts necessary to my making a decision in the case.

C. For Respondent

The Board then presented the testimony of Dr. Elaine Tryjankowski who, during the school years in question, was the Assistant Superintendent in charge of Curriculum and Staff Development. Prior to coming to Bloomfield she had held supervisory positions in Freehold Township, Middletown Township, Orange and West New York. A primary function carried out as the Assistant Superintendent included the obligation, as she put it, to consider the task of restructuring the administrative apparatus in the Bloomfield public schools in order more effectively to deliver educational services to its students. She especially identified a need to overhaul and redevelop the elementary

K-8 structure in order more effectively to deal with the fact, as she put it, that Bloomfield was a district in transition from a "somewhat suburban" to a "somewhat urban" school district which was reflected by the rise in minority enrollment and also the infusion of many students who spoke languages other than English. Those changes in the nature of the district, she said, required that special attention be given to the need to restructure the elementary aspect of the program and so, as a result of that study, a new position of Supervisor of Elementary Education (K-8) was established which I will discuss shortly. Prior to the creation of that position it is my understanding that the only elementary level supervisory position was a K-8 Supervisor of Mathematics. Therefore, in order to carry out what she identified as the Board's need to respond to changes in the make up of the student body, and to make the transition smoother, it was suggested that a broad elementary supervisory position be created to be filled by someone who could demonstrated what she described as a "depth and breadth" of knowledge in teaching urban elementary school students, including familiarity with the concepts, for example, of cooperative learning and the delivery of basic skills instruction.

Accordingly, during the summer of 1993 the position of Supervisor of Elementary Education (K-8) was developed and publicly advertised by way of job description posting and advertisements in the newspaper. The position required two certificates, supervisory and instructional. Several candidates applied for the position, including Mr. White. Tryjankowski, and the then Superintendent of Schools, interviewed two of the candidates as finalists: the intervenor-respondent Gina Rosamilia (who was awarded the position) and a Ms. Andioli. Both Rosamilia and Andioli had been employed in Bloomfield for several years as elementary classroom teachers and were certified as supervisors, but neither held supervisory positions. Although Mr. White applied for the position he was screened out of the finals since, according to the testimony of Ms. Tryjankowski, it was not felt he had the type or kind of credentials that the senior administrators believed necessary for the new position.

Following their review of the final two candidates, the Superintendent and Dr. Tryjankowski jointly recommended Rosamilia's appointment to the position of

Supervisor of Elementary Education (K-8) even though Andioli also had a strong instructional experiential background. As Dr. Tryjankowski put it, it was "a hard choice". However, both she and the Superintendent jointly felt that Rosamilia clearly had demonstrated leadership in the classroom and had particularly good instructional skills. This latter aspect was felt to be particularly important because the new supervisor was to be involved heavily in staff development, including the mentoring of teacher performance in the classroom. So too, the area of writing skills was felt to be especially important and an experienced classroom teacher was sought in light of the ongoing curriculum transition from "whole language" to "holistic writing". This was of special concern since Bloomfield's K-8 students, according to the witness, had begun to demonstrate some inadequacies on the State's early warning tests and the witness believed that extensive training in the holistic method would be needed. Moreover, the new position required that the person to be appointed have experience and involvement in text book selection and it was felt that after thirteen years experience Ms. Rosamilia would certainly have the necessary background in that respect as well.

Other critical aspects of the newly created position also particularly commended Rosamilia for the appointment according to the witness since she was familiar with K-8 students from her long experience in the classroom and she knew how to test their ability to apply their skills to every day tasks. Rosamilia also was knowledgeable in basic skills testing and had worked as well with the academically talented. On balance, then, her background, her classroom teaching experience and her other credentials, according to the witness, marked her as the best candidate for the new position. On cross examination the witness agreed that she had never interviewed White as a final candidate for the new position. In addition, she conceded that the job description for the position did not literally require either elementary teaching experience or elementary supervisory experience.

That concludes my review of the rather limited testimony in the case - that's not meant as a criticism - the very detailed Joint Stipulation of Facts went a long way toward eliminating the need for a lot of testimony.

DISCUSSION

The following then is my discussion of the issues in the case. This case turns on the question of whether White, who was a tenured employee who held supervisory and instructional certificates, should have been appointed to the position instead of Rosamilia who had never served in a supervisory capacity although she was certified. Thus, it is important to analyze the requirements of the new position very closely. The posted job description sets forth that the following credentials were required; (a) a New Jersey "Supervisor Certificate"; (b) a New Jersey "Instructional Certificate"; (c) a Master's Degree; and (d) five or more years of "Elementary (K-8) Teaching and/or Elementary Supervisory Experience". In addition, a variety of performance responsibilities were articulated in writing and included: supervision of Middle School and Elementary School Instruction in Language Arts, BSIP, A/T, Social Studies and Library; a working knowledge and experience in Cooperative Learning and Whole Language; In-service Training in areas of responsibility; and assistance in budget preparation and inventory control. Those performance responsibilities are set out in Exhibit 21 of the Joint Stipulation. In addition to those, there was a wide range of other performance responsibilities set forth in Exhibit 19 of the Joint Stipulation which I will list below:

Performance Responsibilities

1. Supervise instructional programs. Responsible for district supervision of elementary curriculum, instruction, and use of instructional materials.

2. Program coordination. Coordinate programs of instruction between various elementary schools and the Middle School.

3. Curriculum. Conduct an on-going analysis of courses with each program with regard to scope, structure, content, and method of presentation, and where change or improvement is deemed necessary for more effective learning, make recommendations accordingly.

4. Materials. Make recommendations in the selection and use of textbooks, instructional materials, and equipment.

5. Use of instructional aids, special programs. Provide direction in effective use of such special instructional aids as audio-visual presentations, and in the integration of specialized subject areas.

6. Stimulation. Encourage staff in areas of experimentation, innovation, enrichment, and analysis of course objectives.

7. Work cooperatively with the BSIP Coordinator in overseeing BSIP related activities.

   a. Provide information to the BSIP coordinator for the timely completion of BSIP applications and evaluations.

   b. Observe and evaluate the performance of BSIP teachers.

   c. Make recommendations for the acquisition of necessary instructional supplies and materials.

   d. Assist in the development of preparations for Chapter I monitoring.

   e. Assist in the identification, placement and evaluation of students in need of remedial instruction.

8. Articulation. Work cooperatively with secondary supervisors in order to ensure district wide articulation of curriculum and instructional materials.

9. Curriculum assistance. Assist the classroom teachers in the development of course outlines and content.

10. Recruiting, screening. Assist in the recruiting, interviewing, screening, and assigning of professional job applicants.

11. Guidance of Principals. Work cooperatively with the principals of the elementary schools in effective supervision and evaluation of staff.

12. Orientation. Work cooperatively with the Principals in the orientation of new teachers and student teachers.

13. In-service training. Conduct in-service training programs in various areas of the program as required.

14. Observe and evaluate teachers as assigned and integrate with observations or evaluations performed by administrative staff. Develop intervention strategies for instructional improvement as needed.

15. Testing. Provide leadership and coordination in analyzing and interpreting student achievement in district and state testing programs.

16. Meetings, literature. Keep abreast of trends and practices in various subject areas through attendance at professional meetings, liaison with other districts, and continual perusal of professional literature.

17. Counsel staff. Serve as a counselor to he elementary staff on matters of curriculum and instruction, including discussion of any individual problems they may have in the area.

18. Assist in budget preparation and inventory control in assigned areas.

19. Assist in upholding and reinforcing administrative regulations and Board policy.

20. Perform other duties as assigned by the Director of Curriculum and Instruction (Joint Stipulation, Exhibit 19).

The main argument offered by petitioner is that although respondent contends to the contrary, it is quite clear that an instructional certificate with an elementary educational endorsement was not explicitly required by the Board with respect to the qualifications needed for the new position of Supervisor of Elementary Education (K-8). He insists that since he met all of the explicit literal qualifications for the position, and it is not disputed that as of September 19, 1993 he had tenure as a supervisor and Rosamilia had not, he, and not she, was entitled to have been appointed to the new position. Beyond that, he also argues that even if I determine that either expressly or by clear implication an elementary education endorsement was required for the new position; nevertheless, pursuant to several decisions of the Commissioner of Education in, for example, *Timko v. Bridgewater-Raritan Regional School District;* 94 *N.J.A.R.* 2d (EDU) 475, adopted/rejected, 94 *N.J.A.R.* 2d (EDU) 481, Dec. on remand, 94 *N.J.A.R.* 2d (EDU) 1484, adopted 95 *N.J.A.R.* 2d (EDU) 12; *Herbert v. Middletown Township Board of Education;* 1989 SLD _____, dec. 7/25/89; *Schaffer v. South Orange-Maplewood Board of Education*, 1988 SLD _____, dec. 3/14/88, and other cases such a requirement constituted a prohibited "local qualification" which could not be used by the Board to interfere with or to undermine his overriding statutory entitlement to the position by virtue of his tenure.

The Board, on the other hand, takes the position contrary to White's claim that first of all he lacks one of the minimal requirements for the appointment to the new position in that he does not possess the required elementary education endorsement on his instructional certificate. That, of course, is an issue whether or not such a requirement is either literally or by implication in the job description. In this respect, the Board also relies on the decision in the *Timko* case, supra, as well as the decision in *Polo v. Board of Education of the Vocational School of the County of Bergen,* 93 *N.J.A.R.* 2d (EDU) 498, adopted 94 *N.J.A.R.* 2d (EDU) 36, aff'd 95 *N.J.A.R.* 2d (EDU) 105. According to the Board, a teaching staff member who, like petitioner, has been "riffed" simply may not assert a tenure and/or seniority claim to a position when he or she does not possess the appropriate certificate (including endorsement) for the position. The Board believes that the cases relied upon by White are distinguishable

since the petitioners in all those cases, in fact, did possess the requisite certification, including endorsements, for service in the position.

A seminal case in this area, of course, is the Appellate Division's decision in *Capadilupo v. Board of Education of West Orange,* 218 *N.J. Super* 510 (App. Div. 1987) in which the Appellate Division assessed the rights of tenured versus nontenured employees and held that a tenured teacher seeking reinstatement is entitled to preference in a RIF as against a non-tenured applicant with the same certification. In order, therefore, for White to make a valid tenure entitlement claim to the position he must demonstrate, according to the Board, that the position is one for which both by certification and endorsement he qualifies. Since it is not disputed that petitioner does not possess an elementary endorsement, disposition of this case as I indicated will be determined largely by whether such a requirement existed and/or was properly imposed.

Petitioner certainly is correct that neither the job description, the in-district posting nor the newspaper advertisement clearly and expressly indicate that one of the requirements for the new position was an elementary education endorsement. Indeed, some confusion regrettably was introduced with respect to this issue beyond that already included by the fact that the minimum requirement set forth in the both the in-district posting and in the newspaper advertisement differed from the actual job description. Specifically, the first two required "and/or elementary/supervisory" whereas the job description omitted the word "elementary" from that phrase. On cross examination, Tryjankowski explained that the omission was an inadvertent oversight and that elementary supervisory experience obviously was intended to be included as demonstrated by the fact that both the in-district posting and the newspaper advertisement did contain that critical term.

Based upon my consideration of the testimony and the documentary evidence, I entertain little doubt, at the very least, that an elementary educational endorsement implicitly was required as witnessed by the clear description of the need for five or more

years of elementary teaching and/or elementary supervisory experience. While it is true that the phrase "Elementary Teaching and/or Elementary Supervisory Experience" is somewhat ambiguous, the ambiguity was cured by Tryjankowski's explanation during the course of her testimony that in creating the supervisory positions the administration unquestionably considered an elementary education endorsement a necessary minimal requirement for the job. Her very description of why Rosamilia and Andioli were the final two candidates following a careful screening process adds emphasis to that conclusion. However, this finding does not end the inquiry. At further issue is whether the criterion was proper.

As the New Jersey Supreme Court noted in *Dennery v. Board of Education of Passaic County Regional School District,* 131 *N.J.* 626 (1993), broad discretion generally is afforded to the local administration in its decision to establish certification requirements for certain positions unless competent evidence is produced to demonstrate that the exercise of this discretionary authority in establishing the particular certification requirements were "anomalous, arbitrary or irrational". *Dennery, supra,* 131 *N.J.* at 638. It is clear that given the circumstances and the nature and qualities of the duties of the new supervisory position of Supervisor of Elementary Education (K-8), it was neither arbitrary, capricious, unreasonable or irrational for the Board to require as a condition for the newly created position that the successful applicant should have an elementary educational endorsement. The areas of responsibility subsumed in the new position included, as I noted, language arts, basic skills and several other critical areas, not to mention whole language and cooperative learning. Clearly, the educational areas of responsibility for this vital new position had to include common branch subjects under the elementary endorsement, including reading, writing, arithmetic and spelling.

Moreover, the listed performance responsibilities further reinforce that view. Although some were generally administrative, such as policy development, several of the others emphatically are instructional in nature. Some of them I have mentioned are generally those which include the necessity for oversight, review and analysis of what takes place in the classroom and also in-service training and the evaluation of

classroom teachers. As Tryjankowski observed during her testimony, the new supervisor would be expected not only to provide sample lessons to aid in staff development, but equally as important the need for follow through in the classroom in order to mentor teachers through the process. So too, other enumerated performance responsibilities obviously call for instructional experience and knowledge at the elementary level, including curriculum assistance, development of intervention strategies and so forth. Possession of a elementary education endorsement clearly is important for this new position.

However, even though I find that it is important and was an appropriate requirement and was contained in the postings by reasonable implication, at least, the question nevertheless remains whether or not the imposition of this qualification can be relied upon to, as Mr. White put it, usurp or undermine his claimed superior statutory right to the supervisory position by virtue of his tenure. We cannot lose sight of the fact that he was a tenured supervisor who served in such a position while Rosamilia did not.

It is well established that while the school laws permit local boards to establish qualifications beyond the threshold criteria set forth in the statute and regulations for promotion to a particular assignment, see, *e.g.*, *N.J.S.A.* 18A:1-1; *N.J.S.A.* 18A:6-38; and *N.J.A.C.* 6:11-6.1 *et seq.*, the desire to employ or retain individuals, no matter how well intentioned, with additional qualifications locally created cannot be used to defeat tenure and seniority rights conferred by the legislature on teaching staff members. See, *e.g.*, *Herbert v. Middletown Board of Education, supra.* However, in the circumstances of this case, White's argument with regard to his challenge to the imposition of a "local qualification" must fail. In particular, his reliance upon the decisions in the *Herbert* and other cases seem to me to be misplaced in light of the State Board of Education decision in *Timko*, *supra*. In that case the two petitioners alleged that the respondent violated their tenure rights when it abolished their respective supervisory positions incident to a reorganization and failed to appoint them to either of two newly created positions: Supervisor of Fine Arts and Music (K-12) and Supervisor of Staff Development (K-12). Both of those new positions required both a supervisory endorsement and a relevant instructional certificate. The Commissioner,

relying upon the State Board holdings in the *Herbert* and *South River* cases, reversed the Initial decision of the administrative law judge and held, as to Mr. Timko that imposition of the additional requirement of an instructional certificate with corresponding endorsements constituted unlawful local requirements that could not be permitted to override his statutory tenure rights. The State Board, in reversing and remanding to the Commissioner for further fact finding, determined that the Commissioner had not correctly interpreted and applied the *Herbert* and *South River* cases and explained its view as follows:

> "In *South River*, the District Board sought to employ a teacher of Computer Literacy (K-5), with qualifications that included, in addition to the required instructional certificate, at least nine credits in Computer Science. We concluded that the petitioners therein, tenured teachers with instructional certification in elementary education would have been dismissed in a reduction in force, had entitlement under the school laws and implementing regulations to the controverted assignment notwithstanding their lack of the computer science credits desired by the Board. We found no authority that would permit the Board to establish qualifications beyond those established by the regulations controlling certification so as to render inapplicable categories established by the seniority regulations themselves.
>
> "In *Herbert,* the District Board sought to employ a supervisor of special services who not only possessed certification as a supervisor but also was qualified to teach in the special education field. The record in that case, however, did not provide any indication that the duties attending that particular assignment were of a such character to require possession of an instructional certification in special education in addition to supervisory certification. Thus, citing the *South River* case the State Board in *Timko* concluded in the *Herbert* case that the desired requirement by the Board of expertise could not defeat the statutory tenure rights of the petitioner. The State Board then concluded that in *Herbert* we determined only that instructional certification was not required for service in that particular supervisory assignment".

> That language is contained in *Timko*, 94 *N.J.A.R.* 2d (EDU) at 482-483.

In the *Dennery* case the Supreme Court held that a dual certification requirement imposed by the Board did not unlawfully infringe upon the tenure rights of teaching staff members. In her appeal, *Dennery* questioned the legality of that local dual certification requirement and in upholding the local requirement the Supreme Court noted as follows:

> The dual-certification requirement is not expressly authorized by any regulation. . . . Neither, however, is that requirement prohibited by any regulation. The Commissioner and State Board approved the establishment of this position. They were satisfied in this case that the dual certification requirements for the position of class supervisor as established by the district was sound. Consequently, the courts need not and should not second guess the educational expertise and wisdom of the administration in approving the creation of the new position and prescribing its qualifications. *Dennery*, *supra*, 131 *N.J.* at 638. (Emphasis added).

Thus, both the State Board of Education in *Timko*, and the New Jersey Supreme Court in *Dennery*, have recognized that additional requirements in the context of newly created supervisory positions, even if locally imposed, do not necessarily infringe upon statutory tenure rights. Thus, I conclude that the Board's requirement in this case, either expressly and most certainly by reasonably clear implication, of an elementary education endorsement with respect to the new position in my judgment was perfectly appropriate and lawful and does not constitute a prohibited local qualification. To the contrary, that requirement seems to me to be so basic as to be among the essence of the new position.

Another possible ground for rejecting petitioner's claim is the Board's argument that the petitioner does not even have the requisite five (5) years of elementary teaching and/or elementary supervisory experience required in the in-district posting and job description listings. The Board points out that White's employment history

reveals that he taught physical education at the elementary level for just two years - in 1958-59 and 1959-60 - and beginning in September 1960 through November 1989 his physical education teaching experience is at the secondary level only. From November 1989 through the end of the 1991-92 school year, of course, he was Supervisor of Health and Physical Education (grades 9-12 for Health and K-12 for Physical Education) and when that position was abolished, as I previously noted, he reverted to his previous position as teacher of physical education, but again at the secondary level, where he has remained since. According, therefore, to the Board, White does not have five or more years of elementary teaching and/or elementary supervisory experience since even a cursory review of his employment history reveals that he served for only two years as a elementary school teacher and accrued less than three years as a supervisor at the elementary level.

Although the Board's argument has much to commend it, I am reluctant to embrace it. While I have determined pursuant to the *Timko* and *Dennery* decisions that additional certification and endorsement qualifications may be imposed so long as they are educationally appropriate and not prohibited by any statute or regulation, it is arguable that they should not be stretched to situations where, as here, temporal experiential qualifications, in this case five years, beyond certification and endorsement are involved. In other words, while a minimum number of years of elementary teaching experience might make some good common sense *vis-à-vis* the position in issue, I am not ready to agree that that is a local qualification that can pass muster under any circumstances. So, while I see its merit, I am not relying upon the Board's argument with respect to its claim that Mr. White did not meet that requirement.

Accordingly, then, based upon the stipulated facts and the testimony of Tryjankowski and for the additional reasons set forth in this oral decision, I **CONCLUDE** that petitioner's claim to the position of Supervisor of Elementary Education (K-8) must be rejected.

Petitioner also is claiming entitlement to any one of the principal positions held by the other three intervenors, Goncalves, Icklan and Mattia. Reliance for this claim is placed upon the language from the decisions in *Ellicott v. Bd. of Educ. of Frankford,* 251 *N.J. Super.* 342 (App. Div. 1991), and in the *Dennery* and *Capadolupo* cases, *to wit*; an educator who has attained tenure by virtue of his requisite service will have tenure with respect to all positions under the particular certificate.

In my view, none of the cases relied upon by the petitioner support the proposition, in particular, the decision in *Ellicott.* In any one of the separately tenurable positions specifically enumerated in the statute, *N.J.S.A.* 18A:28-5, including principal, tenure, I believe, can accrue only as a result of actual work experience in the position within the scope of the certificate. In this respect I would direct counsel to the decision in *Nelson v. Oldbridge Township*, 95 *N.J.A.R.* 2d, (EDU) 257. In this case, as in the *Nelson* case, to hold that White has a claim to the position of principal, a position in which he has never served, cannot be accepted. The decision in *Nelson* referred to the claim there as "ludicrous". I am not willing to go that far but I would agree that to uphold White's claim to the principal's position would, as the *Nelson* decision pointed out, result in a situation that is "detrimental to sound educational policy". Indeed, *Nelson* is one of the most recent in a long line of decisions at the administrative agency level determining with respect to tenure rights attached to the positions specifically enumerated in *N.J.S.A.* 18A:28-5 that a person actually must serve the requisite three years with commencement of a fourth year in order to obtain tenure with respect to the enumerated position (exclusive of a promotion when the time frame is shortened). I would cite counsel, in that respect, to the decisions in *Schaefer v. Lakewood Bd. Of Ed.*, 93 *N.J.A.R. 2d* (EDU) 741; *Halpern v. Delran Bd. of Ed.*, 94 *N.J.A.R. 2d* (EDU) 22; and *Skowronski v. Jackson Township Bd. of Ed.*, 94 *N.J.A.R. 2d* (EDU) 208. There are, of course, many others. Incidentally, with respect to the decision in *Skowronski*, although I alerted counsel to the possibility that I may want to ask them about it before rendering this oral decision, I determined not to do that. However, I would note that in the State Board decision in the *Skowronski* case, which was rendered on June 7, 1995, the State Board determined to reject the claims of, I believe, two intervenors represented by Mr. Schwartz (Wetzel and Pollack) that they should have had a

superior claim to the supervisory titles in which they actually were retained. The language in *Skowronski* that interests me is as follows:

> "The record indicates that petitioner had achieved tenure as a supervisor by March 17, 1992, the date of the RIF and that the intervenors Wetzel and Pollack had not. The job descriptions adopted by the Board for the supervisory titles in which Wetzel and Pollack were retained did not include a requirement for an instructional certificate in addition to possession of an administrative certificate qualifying the individual to serve as a supervisor. Nor does the Board contend that the duties are such as to require possession of a particular instructional endorsement. Consequently, inasmuch as petitioner [Skowronski] was tenured as a supervisor and possesses the appropriate certification qualifying him for the supervisory assignments at issue, he had entitlement based upon his tenure status to be retained in those assignments following a RIF as against non-tenured individuals". (Emphasis added).

Thus, the State Board ordered Skowronski reinstated to one of the supervisory positions held by Wetzel and Pollack. The point here is that the State Board reinforced the notion that it is perfectly appropriate for boards of education to locally impose sound, educationally defensible local conditions - it's not new law but it is yet another reference to the fact that boards have those rights and, as I indicated earlier, the so-called local qualification imposed here - the elementary endorsement - fits squarely within that category. I think that the State Board in *Skowronski* was saying - they did not address the issue because the Jackson Board did not pursue it - but by even mentioning that the board could have done so it seems to me to lend further credence to the propriety of local qualifications which do not literally stem from the statute or the regulations but make good sense in an education context. Therefore, the petitioner's tenure in this matter, as I have determined, is one of supervisor only and since he has never served as a principal he therefore holds no entitlement by virtue of his tenure to the positions held by intervenors Goncalves, Icklan and Mattia.

CONCLUSION AND ORDER

Accordingly, in light of the stipulated facts, the testimony and the applicable case law I reviewed, as well as other decisions, I **CONCLUDE** that petitioner has failed to establish by a preponderance of the credible evidence that he is entitled by virtue of tenure either to the position of Supervisor of Elementary Education (K-8) held by Rosamilia or to the principal positions held by Goncalves, Icklan and/or Mattia. Accordingly, I **ORDER** that his amended petition of appeal be **DISMISSED**.

That concludes my oral determination. In accordance with the provisions of Title 1 of the Administrative Code (*N.J.A.C.* 1:1-18.2) a transcript of this oral transcript will be prepared and mailed to the parties.

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

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

END OF TRANSCRIPT

I, Marie V. Hackett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Stephen G. Weiss' oral decision rendered in the above matter on Thursday, March 28, 1996.

April 9, 1996
DATE

Marie V. Hackett
MARIE V. HACKETT

April 9, 1996
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

4/15/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

mh

APPENDIX

Witnesses:

For petitioner

Frank James White

For Respondent

Dr. Elaine Tryjankowski

Exhibits:

J-1 Joint Stipulation of Facts with 34 attached Exhibits

FRANK JAMES WHITE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
GINA ROSAMILIA, SALVATORE GONCALVES, WILLIAM ICKLAN AND DARLENE MATTIA,	:	
INTERVENOR-RESPONDENTS.	:	

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

Petitioner argues in his exceptions that: 1) As a tenured supervisor, he is entitled to the position of Supervisor of Elementary Education (SEE); and 2) His tenure as a supervisor arising under his administrative certificate entitles him to the position of principal held by nontenured teaching staff members. (Petitioner's Exceptions at p.1) To the extent petitioner merely recasts and reiterates his contentions already on record before the

Administrative Law Judge (ALJ), neither those arguments, nor the Board's reply thereto is summarized herein.

Petitioner initially asserts that the ALJ's failure to recognize his tenure entitlement to the SEE position on the basis of his lack of an elementary endorsement is both factually and legally erroneous "***because the job description on which the qualifications for the position ought to be predicated did not require an Elementary Endorsement, and *** the court gave a greater entitlement to a nontenured staff member over that of a tenured staff member***" absent a showing that the elementary endorsement was necessary to perform the duties of the position. (*Id.* at pp. 4, 5) Petitioner then recites the holdings in *Timko*, *supra;* *Herbert*, *supra;* and *Galbraith v. Board of Education of the Lenape Regional High School District*, decided by the Commissioner January 12, 1996, to buttress his claim of entitlement to the SEE position by virtue of his tenure and seniority (over Intervenor Rosamilia) as a supervisor, and because possession of an elementary education endorsement was not established to be necessary to perform the job. (*Id.* at pp. 5-8) Petitioner concludes,

> That the Board may have desired that the successful applicant have the Elementary Endorsement is of no consequence. That the nontenured person appointed has more elementary experience *** is irrelevant. What is relevant is that the Supervisor Endorsement qualifies the Petitioner to serve as a Supervisor of Elementary Education as much as it qualifies him to serve as a Supervisor of Secondary Education. Not unlike the Principal Endorsement which is also K-12 and also without grade level delineation, the Supervisor Endorsement is K-12 and does not have any subject area specialization." (Id. at pp. 8, 9, citing to *Schienholz v. Ewing*, 1990 *S.L.D.* 1809)

The Board's reply arguments assert, *inter alia*, that it presented both testimonial and documentary evidence which clearly support the ALJ's finding that the SEE position properly required possession of an Elementary Endorsement. (Board's Reply at pp. 3, 4, 5)

The Board maintains that the initial decision is consistent with the principles articulated in *Capodilupo*, *supra*, and *Dennery*, *supra*, in that petitioner does not hold a tenure entitlement to the SEE position or to a principal's position. (*Id.* at p. 3) The Board, therefore, reasons

> Given the overwhelming amount of evidence proffered by the Board, Judge Weiss properly concluded that the required possession of an Elementary Education endorsement, in addition to supervisory certification, was within the Board's prerogative and was neither arbitrary, capricious nor unreasonable.***
>
> In so ruling, Judge Weiss did *not* give a nontenured teaching staff member greater rights than those possessed by a tenured staff member. Rather, the ruling is consistent with the well-settled principle that a riffed teaching staff member cannot assert a tenure entitlement claim to a position for which he/she does not possess the requisite certification. *** (citations omitted) (emphasis in text) (*Id.* at pp. 5, 6)

The Board further contends that petitioner misconstrues the holding in *Timko*, *supra*, and that petitioner's reliance upon *Herbert*, *supra; Galbraith*, *supra;* and *Schienholz*, *supra,* is misplaced in that these cases are factually distinguishable. (*Id.* at pp. 6, 7)

Upon careful and independent review of the record in this matter, the Commissioner determines to adopt the initial decision of the ALJ. Initially, the Commissioner concurs with the ALJ's conclusion that petitioner's claim to the SEE position fails, in that the Board's requirement for an elementary education endorsement was an appropriate and lawful prerequisite to the position, and it is undisputed that petitioner does not hold such an endorsement. (Initial Decision at pp. 20, 21) The Commissioner finds petitioner's exception arguments in this regard to be unpersuasive.

The Commissioner further concurs that petitioner is not entitled, by virtue of his tenure acquired under his supervisory endorsement while serving in the position of Supervisor of Physical Education and Health, to claim one of the principal's positions held by the

intervenors. This conclusion, the Commissioner notes, is compelled by recent amendments to *N.J.S.A.* 18A:28-5, which clarify that the positions enumerated in the amended statute, including that of principal, are "separately tenurable."[1]

Accordingly, the Commissioner affirms the initial decision of the ALJ, with clarification as noted above, and dismisses the Petition of Appeal in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] By letter dated May 7, 1996, the parties and intervenor were notified that the Superior Court of New Jersey, Appellate Division had reversed the holding in *G. Michael Nelson v. Board of Education of the Township of Old Bridge*, 95 N.J.A.R. 2d (EDU) 257, thereby abandoning the long-standing administrative practice of recognizing the positions specifically enumerated in *N.J.S.A.* 18A:28-5 as "separately tenurable." See *G. Michael Nelson v. Board of Education of the Township of Old Bridge*, decided by the Superior Court of New Jersey April 29, 1996, Appellate Division, A-6441-94T5. The parties and intervenor were therein provided 10 days from receipt of said notice to submit arguments to the Commissioner as to the relevancy of the *Nelson* holding on the instant matter. The Board filed timely arguments. However, petitioner's arguments were untimely filed on May 29, 1996, having received his notice on May 10, 1996, return receipt number Z-291-596-619. Intervenors' arguments were also untimely filed on May 28, 1996, since they received notice on May 10, 1996, return receipt number Z-291-596-617. Accordingly, neither petitioner's not intervenors' arguments were reviewed. However, on June 10, 1996, a bill was introduced into the Legislature amending *N.J.S.A.* 18A:28-5 to clarify that tenure in the enumerated positions shall accrue only by employment in the particular position. The bill, A-2153, was signed into law on June 28, 1996.

JULY 12, 1996
DATE OF MAILING JULY 12, 1996

299-96

EDU #540-94
C #299-96
SB # 52-96

FRANK JAMES WHITE,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,

RESPONDENT-RESPONDENT,

AND

GINA ROSAMILIA, SALVATORE GONCLAVES, WILLIAM ICKLAN AND DARLENE MATTIA,

INTERVENORS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, July 12, 1996

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

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nathanya G. Simon, Esq., of Counsel)

For the Intervenor-Respondent, Rottkamp & Flacks (Robert J. Rottkamp, Esq., of Counsel)

For the amicus curiae New Jersey School Boards Association, Michael F. Kaelber, Esq.

The State Board of Education grants the motion for leave to appear as amicus curiae filed in this matter by the New Jersey School Boards Association pursuant to

2/5/97

N.J.A.C. 6:2-2.1. The School Boards Association is directed to submit its brief within ten days of the date of this decision.

February 5, 1997

Date of mailing FEB 07 1997

299-96

EDU #540-94
C #299-96
SB # 52-96

FRANK JAMES WHITE,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT-RESPONDENT,	:	STATE BOARD OF EDUCATION
	:	DECISION
AND	:	
GINA ROSAMILIA, SALVATORE GONCLAVES, WILLIAM ICKLAN AND DARLENE MATTIA,	:	
INTERVENORS-RESPONDENTS.	:	

Decided by the Commissioner of Education, July 12, 1996

Decision on motion by the State Board of Education, February 5, 1997

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

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nathanya G. Simon, Esq., of Counsel)

For the Intervenor-Respondent, Rottkamp & Flacks (Robert J. Rottkamp, Esq., of Counsel)

For the amicus curiae New Jersey School Boards Association, Michael F. Kaelber, Esq.

Frank James White (hereinafter "petitioner"), a tenured teaching staff member, alleged that the Board of Education of the Township of Bloomfield (hereinafter "Board")

5/7/97

had violated his tenure rights when it abolished his position as Supervisor of Physical Education and Health during a reduction in force and failed to reappoint him as either a principal or as the Supervisor of Elementary Education, positions held by nontenured individuals. Petitioner challenged the Board's requirement for possession of an instructional certification in elementary education, in addition to certification as a supervisor, in order to serve as the Supervisor of Elementary Education.

On April 9, 1996, an Administrative Law Judge ("ALJ") recommended dismissing the petition, finding that petitioner had failed to demonstrate his entitlement to the claimed positions. The ALJ found that possession of an elementary endorsement, in addition to certification as a supervisor, was required by "reasonably clear implication" in the Board's job postings for the Supervisor of Elementary Education position, and that it was not arbitrary, capricious or unreasonable for the Board to include such a requirement. The ALJ observed that some of the duties of the position were instructional in nature, including the oversight, review and analysis of classroom activities, in-service training and the evaluation of teachers. The ALJ found that possession of an elementary endorsement "clearly is important for this new position." Initial Decision, slip op. at 18. Consequently, the ALJ concluded that petitioner had failed to demonstrate his entitlement to the Supervisor of Elementary Education position.

The ALJ also recommended rejecting petitioner's claim to a principal's position, stressing that "principal" was a separately tenurable position under N.J.S.A. 18A:28-5 and that petitioner had not achieved tenure in that position.

On July 12, 1996, the Commissioner of Education adopted the findings and conclusions of the ALJ, and dismissed the petition. The Commissioner agreed that petitioner's claim to the Supervisor of Elementary Education position failed "in that the Board's requirement for an elementary education endorsement was an appropriate and lawful prerequisite to the position." Commissioner's Decision, slip op. at 29. The Commissioner also concurred with the ALJ's conclusion that petitioner had no entitlement to a principal's position. The Commissioner noted that although the Appellate Division had recently abandoned the long-standing practice of recognizing the positions specifically enumerated in N.J.S.A. 18A:28-5 as separately tenurable, Nelson v. Board of Educ. of Old Bridge, Docket #A-6441-94T5 (App. Div. 1996), rev'd, __ N.J. __ (1997), recent amendments to that statute had clarified that the positions enumerated in the statute, including principal, were indeed separately tenurable.

Petitioner filed the instant appeal to the State Board.

After a careful review of the record, we affirm in part and remand in part the determination of the Commissioner.

Initially, we agree with the Commissioner's determination that petitioner had no entitlement by virtue of tenure to a principal's position. We add only that, subsequent to the Commissioner's decision in this matter, the state Supreme Court reversed the decision of the Appellate Division in Nelson, supra. The Court held that our interpretation of N.J.S.A. 18A:28-5, requiring service in the separately-listed positions in order to achieve tenure in them, represented a proper interpretation of the statute and sound educational policy. The Court also found that there was no "manifest injustice" in applying the amendment to N.J.S.A. 18A:28-5 retroactively. Consequently, petitioner

herein, who had not achieved tenure as a principal, had no entitlement to reinstatement as a principal.

However, we set aside the Commissioner's determination rejecting petitioner's claim to the Supervisor of Elementary Education position, and remand for further proceedings in accordance with our decision herein. It is now well established that while the school laws permit a district board to establish qualifications beyond the threshold qualifications established by statute and regulation for employment in a particular assignment, the desire to employ or retain individuals with such additional qualifications cannot defeat the tenure and seniority rights conferred by statute on teaching staff members. South River Education Association v. Board of Education of the Borough of South River, decided by the State Board, November 4, 1987; Herbert v. Board of Education of the Township of Middletown, decided by the State Board, August 1, 1990.

In this case, the fact that possession of an instructional certification in elementary education may be "important" for service as the Supervisor of Elementary Education, or that the Board required such certification by "reasonably clear implication," or that the inclusion of such a requirement was not "arbitrary and capricious" is not determinative of petitioner's challenge to that requirement. Rather, the standard is whether the duties attending the Supervisor of Elementary Education position at issue were of such character as to require possession of an elementary education endorsement, in addition to certification as a supervisor, in order to be authorized by statute and regulation to perform such functions. Timko v. Bridgewater Raritan Regional School District, decided by the State Board, 94 N.J.A.R.2d (EDU) 481,

83. Inasmuch as the Commissioner did not determine whether the specific duties of the position were of such nature as to require possession of an endorsement in elementary education, we find it necessary to remand this matter to him for a determination of petitioner's claim to the Supervisor of Elementary Education position under the proper legal standard.[1]

We therefore affirm the Commissioner's determination to dismiss petitioner's claim to a principal's position, and remand this matter to the Commissioner for further proceedings consistent with our decision herein regarding petitioner's claim to the Supervisor of Elementary Education position.

We do not retain jurisdiction.

May 7, 1997

Date of mailing MAY 09 1997

[1] We note that there is no indication in the record that the job description for this position was forwarded to the County Superintendent for approval of the dual certification requirement. N.J.A.C. 6:11-3.3(b).

300-96

MARY KAY SCOLA AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 10, 1996

OAL DKT. NO. EDU 2389-95

MARY KAY SCOLA AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1996

DATE OF MAILING JULY 10, 1996

301-96

301-96

KATHLEEN LOPES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

JULY 10, 1996

OAL DKT. NO. EDU 9791-95

KATHLEEN LOPES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1996
DATE OF MAILING JULY 10, 1996

302-96

302-96

G.S., on behalf of his minor son, E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 10, 1996

OAL DKT. NO. EDU 11729-95

G.S., on behalf of his minor son, E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1996
DATE OF MAILING JULY 10, 1996

303-96

P.R., on behalf of minor nephew, R.P.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JULY 10, 1996

OAL DKT. NO. EDU 1511-96

P.R., on behalf of minor nephew, R.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on June 4, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1996
DATE OF MAILING JULY 10, 1996

304-96

304-96

ANTHONY CAVANNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

JULY 10, 1996

OAL DKT. NO. EDU 2370-95

ANTHONY CAVANNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1996

DATE OF MAILING JULY 10, 1996

305-96

305-96

JOSEPH GRACEFFO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 10, 1996

OAL DKT. NO. EDU 5148-95

JOSEPH GRACEFFO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1996

DATE OF MAILING JULY 10, 1996

306-96

306-96

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
GARFIELD, BERGEN COUNTY.	:	

JULY 10, 1996

OAL DKT. NO. EDU 4683-95

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
GARFIELD, BERGEN COUNTY.	:	

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1996
DATE OF MAILING JULY 10, 1996

310-96

310-96

H.M. AND L.M., on behalf of their minor children, J.M. AND J.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In consolidated matters, petitioning parents contested Board's determination that their children, J.M. and J.M., were not domiciled in Freehold Township and, thus, not entitled to free public education in the Township. Board sought to dismiss petition and to assess petitioners tuition payments for ineligible period of attendance.

ALJ found that petitioners' children were not domiciled within the Township Board's school district and should be excluded from the Board's schools at the conclusion of the 1995-96. ALJ ordered the Borough Board of Education to accept and enroll the children for the 1996-97 school year and thereafter. ALJ concluded that the claim of equitable estoppel against the Board was not appropriate herein. ALJ further concluded that under the facts and circumstances of this matter, petitioners should not be assessed any tuition payments for the period J.M. and J.M. attended the Township Board's schools.

Commissioner adopted findings and determination in initial decision with modification. Commissioner concurred with the ALJ that petitioners failed to meet their burden of proving by a preponderance of credible evidence that their children were entitled to a free public education in the Township Board's school district. He found that petitioners, pursuant to the requirements set forth under *N.J.S.A.* 18A:38-1b(2), were liable for tuition for the period of time in which their children were ineligible to attend school in respondent's system. Commissioner agreed with the ALJ that the doctrine of equitable estoppel was not appropriate to employ in this instance. Petition was dismissed and petitioners were ordered to compensate Board for period of ineligible attendance.

JULY 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9907-94
AND EDU 8036-95
(CONSOLIDATED)
AGENCY DKT. NO. 371-9/94
AND 295-7/95

H.M. AND L.M., ON BEHALF OF THEIR MINOR CHILDREN, J.M. AND J.M.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY,

Respondent.

Gregory W. Boyle, Esq., for petitioners, (Ronan, Tuzzio, Giannone & McGuire, attorneys)

Martin J. Anton, Esq., for respondent

Record Closed: May 9, 1996 Decided: May 16, 1996

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, the parents of J.M. and J.M., two minor children, claim that they pay real estate taxes to both Freehold Borough and Freehold Township and, therefore, their children should be permitted to attend the public schools governed by the Board of Education of the Township of Freehold (Township Board) tuition free. The Township Board, in its Answer and Counter Petition of Appeal, denies that petitioners are domiciled in its school district. The Township Board seeks an order from the Commissioner of Education (Commissioner) to dismiss petitioners' petition and assess tuition payments for all periods petitioners' children attended the Township Board's schools when they were ineligible to do so.

The matters were transmitted to the Office of Administrative law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -13. By way of an order issued by this tribunal dated August 22, 1995, the matters were consolidated. Prehearing conferences were held on December 24, 1995 and June 15, 1995. The hearing scheduled for November 13, 1995, was adjourned and rescheduled for April 29 and 30, 1996. The hearing was held on April 29, 1996, and the parties requested leave to submit post hearing memoranda. The last submission was received on May 9, 1996, which constitutes the closing of the hearing record.

ISSUES

The issues to be determined by this tribunal are these:

1. Whether petitioners are domiciled within the jurisdiction of the Township of Freehold?

2. If not, what tuition is due and owing the Township Board for the education of petitioner's children?

FINDINGS OF FACT

Base upon the testimony and other evidence adduced at the hearing and having given fair weight thereto, I **FIND** the following **FACTS**:

Petitioners, Harry Scott Mount and Lorelei Mount, husband and wife, in or about August 23, 1988, purchased the property known as 134 Center Street, Freehold, New Jersey. The property consists of two parcels known as Lot 46, Block 43, Tax Map of the Township of Freehold; Lot 3, Block 70, Tax Map of the Borough of Freehold (P-4). The two story frame dwelling sits on Lot 3, Block 70 in the Borough of Freehold (R-1, R-2). The dwelling is located approximately 20 feet from Center Street with a concrete walk leading to a wood covered porch. Behind the dwelling lies a wood deck attached to the rear of the house. There is also an above ground swimming pool located on Lot 3, Block 70, in Freehold Borough. On the Township side of the property, Lot 46, Block 43, are two truck containers used as sheds (R-2).

In February or March 1991, Petitioner Lorelei Mount enrolled her daughter, J.M., in the Township Board's public kindergarten school. She testified that the children of the prior owners of the property known as 134 Center Street, attended the Township public schools, which was a consideration for the purchase of the property. When petitioner enrolled J.M. in the Township school she was required to submit J.M.'s medical records, birth certificate and proof of residence. Petitioner supplied the school with all of the necessary documentation, supplying it with copies of her utility bills and driver license issued by the New Jersey Department of Motor Vehicles. The driver license and utility bills indicated petitioner's residence to be 134 Center Street, Freehold, New Jersey. There was no distinction between the Township or Borough indicated on the documents petitioner presented to the Township Board's authorities nor was there any indication by the Township school authorities that J.M.'s enrollment was improper.

J.M. attended the Township Board's schools for kindergarten and grade one without any notice that her attendance was improper. J.M. traveled to her school by way of the Township Board's school bus, which stopped in front of petitioner's home. When J.M. attended school in September 1993, for her second grade education, the school authorities did not advise petitioner that J.M.'s attendance was improper.

In October 1993, while J.M. was enrolled in second grade, petitioners received a letter, dated October 13, 1993, from the Township Board's attorney. The Board's attorney advised petitioners that their home was located in Freehold Borough and, therefore, J.M. was not entitled to attend the Township's schools (P-3).

Petitioner Lorelei Mount testified, without any proofs, that subsequent to receipt of the Board's attorney's letter of October 13, 1993, she spoke with a principal of the Borough's schools. She asserted that the Borough school principal would not accept J.M. as a pupil because there was no change of address.

Subsequent to petitioner's receipt of the attorney's October 13, 1993 letter, petitioner Lorelei Mount registered her son, J.M., at the Township Board's Burlington Elementary School where his sister, J.M. attended. Petitioner asserted she registered her son upon the advise of the school's principal.

Petitioner admits that she is registered to vote in Freehold Borough and that she and her husband pay taxes on their home to Freehold Borough. They also pay taxes to Freehold Township on the parcel of land that contains the sheds.

LEGAL ARGUMENTS OF THE PARTIES

PETITIONER'S POSITION

POINT I

NOTIONS OF EQUITABLE ESTOPPEL PRECLUDE RESPONDENT FROM PREVENTING JESSICA AND JOSEPH MOUNT FROM CONTINUING THEIR EDUCATION IN THE FREEHOLD TOWNSHIP SCHOOL SYSTEM FOR THE REMAINDER OF THE 1995/1996 SCHOOL YEAR.

The doctrine of equitable estoppel is applied "only in very compelling circumstances," Timber Properties, Inc. V. Chester Twp., 205 N.J. Super. 273, 278 (Law Div. 1984): where the interests of justice, morality and common fairness clearly dictate that course. Gruber v. The Mayor and Township Comm. Of Raritan Twp., 39 N.J. 1, 13 (1962). See also Palantine I v. Planning Bd., 133 N.J. 546, 560 (1983).

In In Re Allstate Insurance Co., 179 N.J. Super. 581, 583 (App. Div. 1981), the New Jersey Appellate Division recognized that estoppel may be evoked against public bodies "to prevent manifest wrong and misjustice and where it would not hinder or prejudice essential governmental functions."

The New Jersey Supreme Court in Palantine, supra., set forth the requisite elements for establishing a claim of equitable estoppel. The Palantine Court stated that a plaintiff needs to prove substantial detrimental reliance, justified and reasonable reliance, and prejudice sufficient to permit a Court to apply the estoppel doctrine in order to fairly balance the competing interests of the parties. Palantine I, at 563.

In the instant matter, Mr. and Mrs. Mount certainly have justifiably and reasonably relied on the Freehold Township school officials' initial acceptance and registration of J.M. as a student in the Township school system. J.M. enrolled in kindergarten in the Township school system in 1991. Upon completing the necessary registration forms, Mrs. Mount provided the Township school officials with her correct address. Moreover, Mr. and Mrs. Mount received their first notice from the Township Board regarding J.M.'s ineligibility more than two (2) years after J.M.'s enrollment at the Township school. In addition, this tribunal must take note of the fact that Mr. and Mrs. Mount and J.M. are greatly prejudiced by the action taken by the Board in that had Mrs. Mount known prior to enrolling J.M. in the Township school that she belonged in the Borough school, the Mounts could have enrolled their children in the Borough system. However, as a result of the Board's failure to bring the present matter to the Mounts' attention at the appropriate time, i.e., upon Mrs. Mount registering J.M. into kindergarten at the Township school, the Borough schools will not now accept the Mount children.

Mrs. Mount spoke with a Freehold Borough school official to inquire whether she could transfer J.M. to the Freehold Borough school. The Borough school official informed her that he believed the Borough school would not accept J.M. for two reasons: (1) the Township school had already accepted J.M. in 1991; and (2) the Borough schools accept transfer students upon a change of residence. The Mounts have resided at the same address during these entire proceedings.

It is apparent that the only persons who are looking out for the best interests and well being of J.M., the daughter, and J.M., the son, are their parents. J.M., the daughter, has been attending the Township school for four (4) years now, and J.M., the son enrolled in the Township school at the start of the present school year. J.M. and J.M. are both familiar with the Township school and have established friendships with their fellow

students and with their teachers. Also, the Mount children are involved in activities and developed many interests. J.M. the daughter is now nine years old. J.M. the son has already begun kindergarten. It would be quite disruptive, to say the least, if J.M. and J.M. were forced to transfer schools in mid-school year. Moreover, a Township school official advised the Mounts to register J.M. the son in the Township school and allow the instant matter run its course.

As there is no New Jersey case law on point regarding equitable estoppel as it applies to school districts and their policy regarding alleged non-resident students, the Court may look to other jurisdictions for guidance.

In Burdick v. Independent School Dist., 702 P. 2d 48, 53 (Okla. 1985), the Court held that two school districts were estopped from compelling the threatened transfer of the children from the one school district to another. This holding was predicated on the fact that the children obtained the status of de facto students of a school district.

The issue in Burdick was whether under the facts of such case, there was some prevailing public interest which will except it from the Oklahoma rule that estoppel does not apply against the State, political subdivisions or agencies, unless such action would further some principal of public policy or interest. New Jersey case law also recognizes a similar principle. The Burdick Court stated that facts and circumstances surrounding the Burdick children's situation "...impel us to conclude that the students occupied the status of de facto Mid-Del students." Burdick, at 53.

The Court in Burdick noted that "protection of such a de facto status implicates sufficient public policy considerations to afford here a basis for interposing estoppel against a public agency." Burdick, at 54. The Burdick Court defines de facto student as follows:

> One who, upon full and truthful disclosure of information concerning his entitlement to the educational services sought, was accepted, without reservation, as legally qualified for enrollment, although there was then in existence a later-discovered legal infirmity. Id. At 53.

The facts in Burdick are as follows:

The Burdick children attended school in the Mid-Del School District for a five-year period. Burdick, at 51. During such period, their attendance was unquestioned. Id. at 52. Upon learning that the Burdicks lived in District 89, and not in the Mid-Del School District, the officials at the Mid-Del School District informed the Burdicks that their children could not attend their schools "because the boundary line on which they lived had been changed." Id. Furthermore, the Court in Burdick, noted that "the Burdicks," after full and truthful disclosure, entertained an honest belief, kindled and acquiesced on by Mid-Del and District 89 officials, that they lived in the Mid-Del School District." Id. at 53. The Burdicks purchased their home and enrolled their children in the Mid-Del school district based upon their belief that this was the proper school district. Id. at 55. Additionally, the Burdick court took into consideration that the Mid-Del school buses passed right by the Burdicks' house; the Burdick children rode the Mid-Del buses; and the Burdicks voted in Mid-Del School District elections. Id. at 53.

In Burdick, the District 89 School District argued that the application of the estoppel argument was contrary to Oklahoma's public policy regarding school districts in that "students generally must attend schools maintained by the school district in which they reside." Id. However, the Burdick, Court reasoned that:

> the public interest clearly favoring the position of the Burdicks is that of ... promoting continuity of attendance once a residential status had been honestly established and openly maintained in a given school system, and there has been no intervening change in its legal boundaries. Id. at 54.

The Burdicks "honestly established and openly maintained" a residential status in the Mid-Del school district. Clearly, there are many similarities between the case at bar and Burdick. In the instant case, a minor child was enrolled in the Township school for two years before the Freehold Township school district sought any action. Even though the time frame in Burdick was a five-year period, (Burdick, at 52) the Mount child has suffered detrimental reliance in that she spent two years enrolled in the Freehold Township school system, which the Court must regard as a significant amount of time, especially considering the age of the child.

As in Burdick, J.M.'s attendance at the Township school during this two-year period was unquestioned. The children, in Burdick, rode the Mid-Del bus. The Mount children ride the Freehold Township school buses to school. In addition, as in Burdick, the Mounts disclosed all information regarding the location of their residence and did so honestly and openly. Therefore, when the officials at Freehold Township school district noted the Mounts' address, it should have questioned them as to whether they lived in the Borough or the Township. In Burdick, the Burdicks enrolled their children in the Mid-Del school district based upon the belief that that was the proper school district. Likewise, the Mounts enrolled their children in the Township schools base upon the belief that they were eligible to attend such schools; Mr. and Mrs. Mount pay taxes to Freehold Township, and their property located in Freehold Township is adjacent to the Borough property and has improvements on it, i.e., a vegetable garden, toys, etc.

The New York Supreme Court, Appellate Division, addressed a similar issue in Crowe v. McFarland, 525 N.Y.S. 2nd 429 (App. Div. #3 Dept. 1988). The Crowe court held that the motivation of land owners in purchasing an adjoining lot in another school district, so that the school district boundary would run between two parcels, was immaterial with respect to their right to choose the district in which they would enroll their children. Crowe, at 431. The court in Crowe also held that the fact the deed by which the land owners conveyed the two lots to themselves as a single parcel might be inoperative, it did not alter the fact that they owned land on which their residence was located and through which the school district boundary ran. Id.

The issue in Crowe was whether the petitioners, the land owners, qualified for the statutory designation under Education, Law Section 3230(1). Id. at 430. Education Law Section 3203(1) provides in relevant part:

> ...when the division line between adjoining school districts intersects property on which a single-family dwelling unit is located, the owner-occupant of such dwelling may designate a school in either of such districts as the school his children will attend, with all of the school privileges afforded resident pupils, without payment of tuition. Crowe at 430.

The facts surrounding the Crowe matter are as follows:

In June, 1995, the petitioners purchased a single-family home located on a 4-acre parcel in Canajorharie, Montgomery County, New York. They resided there with their three children. Id. at 430. According to the Real Property Tax Map of Montgomery County, the 4-acre parcel was located wholly within the Cherry Valley School District, within the boundary line between the Cherry Valley School District and The Canajorharie School District (hereinafter "Canajorharie") running along a part of the eastern boundary line of petitioner's land. Id. In July 1985, petitioners gave the required statutory notice

naming Canajorharie as the school district of choice for their children to attend during the 1985-1986 school year. Id. On September 26, 1985, after their children already began classes at Canajorharie, the respondent, the Board of Education of Canajorharie Central School District (hereinafter "Board"), rejected the designation on the basis that the petitioners property was "bounded" but not intersected by the boundary line between the two school districts." Id. Therefore, the Board assessed non-resident tuition against the petitioners and allowed their children to attend Canajorharie for the entire 1985-1986 school year.

On January 15, 1986, petitioners purchased a 0.1-acre parcel which adjoined their 4-acres on the East, along the boundary lines separating the two school districts. The following day, petitioners executed a deed as grantors conveying the land that they previously owned and the additional parcel bought the day before to themselves as grantees. The deed described the parcels as one single parcel. According to Montgomery County's Real Property Tax Map, the boundary line between the two school districts thus intersected petitioners' original 4-acres and the 0.1-acre lot purchased in January 1986.

In July 1986 petitioners again gave written notice to the Board naming Canajorharie for attendance by their children in the 1986-1987 school year. However, the Board refused to admit the children unless the petitioners paid the prior year's tuition bill. Id. at 430. The Crowe court, upon review of the statutory language, agreed that the motivation of an owner in purchasing in an adjoining parcel which crosses a school district boundary is immaterial. Id. at 431. While the Crowe court noted the Lower Court's concern that the Board's tuition would be frustrated by such a transaction, the Court observed that the Education Law provided a mechanism to ensure that any school taxes collected be forwarded to the school district actually providing the education services. Id. at 431.

The Board in Crowe argued that since the petitioners' residence was located only on the original parcel, the statutory intersection requirement was not satisfied. Id. However, the Crowe court recognized that the petitioners "do own taxable property, albeit required through separate deeds, on which their residence is located and through which the boundary line between the two school districts run." Id. The court in Crowe, in defining relevant taxable property owned by the petitioners, recognized that the entire contiguous parcel on which the residence is located, i.e. both the 4-acre and 0.1 acre parcels should be considered. Therefore, the Crowe court found that according to the Montgomery County Real Property Tax Map, the boundary line between the two school districts intersects the contiguous lots owned by petitioners on which their home is located. Thus, the Crowe court found that according to the Montgomery County Real Property Tax Map, the boundary line between the two school districts intersects the contiguous lots owned by petitioners on which their home is located. Thus, the Crowe court compelled the Board to admit petitioners' children as resident students of the Canajorharie School District. Id. at 430-31.

The facts in Crowe are similar to the facts in the instant matter with respect to the ownership of taxable property. In Crowe, the petitioners' own taxable property on which their residence is located and through which the boundary line separates the school districts. Likewise, the Mounts' property lies in both Freehold Township and Freehold Borough. The Mounts' property is listed in a single deed as being "in the Township of Freehold and in Freehold Borough." Moreover, the Mounts pay property taxes to the Township of Freehold, which include an assessment for school tax. Therefore, this tribunal must order the Board to admit J.M. and J.M. as resident students of the Township of Freehold School District.

Although there is not an ordinance in New Jersey that provides the relief provided in Education Law Section 3203 (1) Crowe court's rationale is instructive.

Accordingly, equity requires that the Board be estopped from requiring the children to transfer school in mid-year. Mr. and Mrs. Mount honestly believed that their children belonged in the Township school for the aforementioned reasons. However, if this tribunal finds that that J.M. and J.M. are ineligible and should not remain in the Freehold Township school system, then this tribunal should order the Borough schools' Board of Education to accept the Mount children. In addition, Mr. and Mrs. Mount should not be assessed any tuition for the years J.M. and J.M, attended the Freehold Township schools in that the Mounts detrimentally relied upon the Township's initial acceptance of J.M. into their schools.

POINT II

ASSUMING ARGUENDO, THAT THE COURT FINDS THAT THE MOUNT CHILDREN ARE NON-RESIDENTS OF FREEHOLD TOWNSHIP, THE BOARD MUST BE EQUITABLY ESTOPPED FROM COLLECTING BACK TUITION AND PREJUDGMENT INTEREST FROM MR. AND MRS. MOUNT.

The Freehold Township Board of Education must be equitably estopped from collecting tuition and prejudgement interest allegedly owed by Mr. and Mrs. Mount for their children's allegedly improper enrollment in the Township schools. As previously noted in Point One Petitioners' Brief, the Mounts enrolled J.M. in the Township school after the school officials granted her application. The Mounts could have attempted to enroll their daughter in the Freehold Borough school system had she been advised immediately by the Township school officials that an issue existed as to which school system the children belonged. The Board accepted J.M. as a student in the Township school for the two years following her initial registration. In 1993, the Board, for the first time, informed the Mounts that they must remove their child from the Township school and pay tuition for those two years during which she was allegedly ineligible as a student.

Again, as there is no New Jersey Case Law regarding this issue we may look to other jurisdictions for guidance. In Teel v. Hamilton-Wendlam Regional School Dist., 433 N.E. 2nd 907 (App. Div. 1982), the Appeals Court of Massachusetts concluded that the Teel child was not a resident of Hamilton but that the school district was not entitled to reimbursement for tuition. In 1971 the Teels purchased a house located on a Hamilton-Essex town line. Although portions of their house are located in Hamilton and in Essex, the house itself is almost fully located in Essex. On May 3, 1971, Mrs. Teel filled out an application from for her son's attendance in kindergarten class in the Hamilton public school system. Teel at 908. In 1975, she sought her daughter's enrollment in kindergarten.

In late August of 1975, a bus driver for the Hamilton School District, while laying out his bus routes for the kindergarten children, noticed that the town line had to be crossed to pick up the Teel's daughter. He notified the school authorities, who then notified Mrs. Teel and commenced an action to exclude the Teel children from its schools. Id. At 909. During the proceedings, Mrs. Teel testified that, "I do everything I can do within the law, as far as I know, to reside in Hamilton." Id.

The Teel Court examined the Trial Judge's findings and noted that:

> The Judge found that from 1971 forward '[e]veryone here involved has acted in good faith' and that the '[p]laintiff has not mislead the defendent.' As to [the Teel's son's] educational cost from 1971 through 1975, the judge further found that 'a separate reason for such denial is that all the facts were available to both parties during these years, yet the defendant educated [the Teel's son] as a resident of Hamilton.' [The trial Judge] concluded '[s]ince both parties treated [the Teel son] as a resident of Hamilton during those years, the defendant cannot now ask for payment for that education.' Id. at 910.

The Teel court held that the school district was not entitled to recover tuition for a student's attendance where the student's ineligibility to attend that school district was based on good faith but incorrect assumption that the student was a resident of that district. The Teel court stated:

> 'the blunders now being corrected, the verities of the transaction are revealed as they were from the beginning. We think the better view is that in the light of its present knowledge the court will stay its hand and leave the parties where it finds them.' Teel at 912, quoting Atlantic Coast Line RY v. Florida, 295 U.S. 301, 314, 55 S. Ct. 713, 718, 79 L. Ed. 1451 (1935).

Therefore, the Hamilton School District was not entitled to recovered tuition for the Teel child's attendance.

The instant matter and the Teel action are similar in that the children's attendance in their respective school districts was based on a good faith but incorrect assumption that the children were residents of that school district. The Petitioners' Brief provides a thorough account of the facts and events which led the Mounts to believe that their daughter and son were properly attending the Township School System.

It is respectfully submitted that the Board's request for tuition for those periods of time when J.M. and J.M. were allegedly ineligible to attend the Township school is beyond all notions of justice and fairness for several reasons.

Mr. and Mrs. Mount pay property taxes to the Township of Freehold, which includes an assessment for school taxes.

Furthermore, the Board did not decide that J.M. was no longer to be enrolled as a pupil in the Township school until 1993. This tribunal should not permit the Board to collect tuition for the time period the Mount children attended the Township school as both the Board and the Mounts believed that J.M. was properly enrolled in the Township school.

Moreover, J.M. and J.M. should be permitted to attend the Township school tuition-free until this matter is resolved. It would not be in the best interests of either child to remove them from school during these proceedings as it would greatly disrupt their education and learning experience. Moreover, the Freehold Borough schools would not accept J.M. as a transfer student because she initially enrolled and was accepted into the Township school system in 1991. Also, a Township school official advised the Mounts to enroll J.M. the son in the Township school system. Therefore, where were J.M. and J.M. supposed to attend school?

In addition, the Board is not entitled to pre-judgment interest pursuant to N.J.A.C. 6:24-1.16 as is claimed in the Board's Counter-Petitioner. N.J.A.C. 6:24-1.16 states in pertinent part:

> pre-judgment interest shall be awarded by the Commissioner when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or had been determined to have been taken in deliberate violation of statute or rule.

N.J.A.C. 6:24-1.16(c). The evidence will show that the Mounts have neither acted in bad faith nor deliberately violated a statute or rule as required by the Code. At all times, the Mounts have been open and forthright with their address. The record is devoid of any facts which would support a pre-judgment interest award.

Therefore, the Board should be estopped from collecting tuition from Mr. and Mrs. Mount for the years 1991 to the present. The Board's inaction, coupled with the honesty of the Mounts in disclosing their proper address, as well as their payment of property taxes (which includes school taxes) prohibits the Board from seeking of back tuition for the attendance of J.M. and J.M. in the Township of Freehold school system.

THE BOARD'S POSITION

POINT I

THE PHYSICAL LOCATION OF THE PETITIONER'S HOUSE IN FREEHOLD BOROUGH IS DISPOSITIVE OF THE ISSUE OF DOMICILE.

Pursuant to N.J.S.A. 18A:38-1(b), petitioner bears the burden of establishing domicile within the respondent's school district by a preponderance of the evidence. The uncontroverted evidence of the respondent placing the petitioner's abode entirely within the boundaries of Freehold Borough is prima facie evidence of domicile.

In Laufer v. Board of Education of the Township of Scotch-Plains-Fanwood Regional School District, 1970 SLD 424, the Commissioner was faced with a situation where petitioners property straddled two municipalities. The entrance to the property was in Scotch Plains, but the home itself was located entirely in Plainfield. The Commissioner observed:

> In the instant matter, it is clear that petitioners' true permanent home is entirely situate on land in Plainfield. The Commissioner holds that the fact that another piece of land in another municipality is contiguous with the land on which petitioners house rests, the whole comprising petitioners property, is of no importance in a determination of where petitioners children are domiciled. Their domicile is clearly in Plainfield. In this place, the family abides, and the fact is prima facie evidence that this is the place of their legal residence. Lea v. Lea, 28 N.J. Super. 290 (1953); Snyder v. Callahan, 3 N.J. Mis. Rep. 269; Brueckmann v. Frignica, 152A 780, 9 N.J. Mis. 128 (1931); Marsteller v. White, 1938 S.L.D. 30, Laufer 1970 S.L.D. at 427.

In Duckett v. Max Shaw Superintendent of Schools and Board of Education of South Orange-Maplewood, 1978 S.L.D. 411, the Commissioner followed Laufer notwithstanding stipulated facts demonstrating ties by the petitioner to the district in which they sought to have their children educated.

Petitioner in Duckett voted in South Orange, their property received municipal services from South Orange and fronted on South Orange. Petitioners attended church in South Orange and their social, personal and business affiliations were all in South Orange. Their property was in both South Orange and in the City of Orange. However, petitioners home was entirely located in the City of Orange. Notwithstanding all the other indicia of domicile to the contrary, the Commissioner held:

> The Commissioner finds that petitioners true permanent home is entirely situated on land in the City of Orange (J-1). The Commissioner determines that the facts in the instant matter are so similar to those in Laufer supra. To render petitioners claims stare decisis and so holds. Accordingly, the petitions dismissed and the Commissioner enters summary judgment on behalf of the South Orange Maplewood Board of Education. 1978 S.L.D. at 412-413.

POINT II

IF THE PETITIONERS HAVE NOT PROVEN THEIR DOMICILE IN FREEHOLD TOWNSHIP, TUITION AND PREJUDGMENT INTEREST MUST BE AWARDED.

N.J.S.A. 18A:38-1(b) states in pertinent part as follows:

> ...If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. See also Fort Lee Board of Education v. Kintos93 N.J.A.R. 2d (EDU 837, 843) (Commissioner has power to assess tuition).

The term "shall" when used in a statute is construed as being mandatory and imperative not directory and there is no discretion to do otherwise than the statute commands. Swiney v. Department of Treasury, Division of Pensions, 84 N.J. Super. 186 (App. Div. 1984), State v. Duva, 192 N.J. Super. (Law Div. 1983).

The statute requires payment for all periods of ineligible attendance. As the statutory notes to N.J.S.A. 18A:38-1 indicate, the district is:

> ... required to be paid for period of ineligible attendance rather than for periods of time beginning with the board's request for a sworn statement.

While the statutory note deals with the situation contemplated by a child living with one other that the parent pursuant to a sworn statement, the intent is clear that the Board's inaction is not an estoppel or bar to recovery. In this case, the Board can not be estopped for periods of time prior to the board's discovery of the non-domiciling status of the petitioner.

Even from a purely equitable rather than legal viewpoint, it would make no sense to do otherwise. Where as here the petitioners only indicated their residence as Freehold rather than Freehold Township or Freehold Borough as between the two parties, petitioners were in a better position to know the true municipality of domicile. In fact, R-1 in evidence, the survey obtained by the petitioners on purchasing their property, clearly shows petitioners abode as being in Freehold Borough. The petitioner possessed this knowledge at the time of registration of their first child and are chargeable with knowledge of the legal effect of the survey.

Estoppel prohibits a party from repudiation of a previously taken position when another party has relied on that position to his detriment. Housing Authority of the City of Atlantic City v. State, 188 N.J. Super. 145 (Ch. Div. 1983). The idea being that it is inequitable for a party to change the rules of the game after inducing the other to rely on something else. Here the petitioner led the Board to believe she was a domiciliary by failing to disclose her true status for which she is chargeable with knowledge. She can not now be heard to say that because the Board was duped into acquiescence, that this acquiescence is binding on the Board. Finally, in regard to prejudgment interest, the same should be awarded pursuant to N.J.A.C. 6:24-1.16(c)1 as there was no basis for the Mount's to deny payment of tuition to the Board due to the fact that petitioners knew from the time they obtained their survey in 1988 that their home was entirely situate in Freehold Borough and have presented no evidence in contravention. This litigation served only to prolong the period of time that petitioners children would attend respondent's school district.

DISCUSSIONS AND CONCLUSIONS

Pursuant to N.J.S.A. 18A:38-1, petitioners have the burden of proof, by a preponderance of the evidence, that their children are eligible for a free public education in the Board's schools. Petitioners failed to carry their burden in the instant matter. Rather, petitioners contend that there was no question of impropriety raised by the Board's personnel when they enrolled their daughter, J.M., in the Board's elementary school. In fact, they assert, they were led to believe that their conduct was at all times proper and in accordance with the law when the Board continued to allow J.M. to be enrolled in its schools. As a consequence of the Board's actions, petitioners now claim that it is estopped from asserting its claim that their children are illegally enrolled or that petitioners are responsible for any tuition payments to the Board.

Equitable estoppel operates to prevent a party from disavowing its previous conduct if such a repudiation would violate the demands of justice and good conscience. Carslen v. Masters, Mates and Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979); Connel v. American Funding Ltd., 231 N.J. Super. 409, 416 (Ch. Div. 1987). Equitable estoppel can arise from any type of "conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything." State v. U.S. Steel Corp., 22 N.J., 341, 358 (1956), quoting from 3 Pomeroy on Equity Jurisprudence ξ802 (5th ed. 1941); Royal Association v. Concannon, 200 N.J. Super. 84, 92 App. Div. 1985) (Landlord's express permission to allow tenant to obtain and keep dog was sufficient to bind landlord).

Petitioners acknowledge that estoppel is not applied as readily against a governmental entity as against a private party. See Guidebook to Chancery Practice in New Jersey, Hon. William A. Dreier, J.A.D. (3rd ed. 1991). Notwithstanding, petitioners contend that the Board's inaction for two years while their daughter J.M. attended its schools and its school bus picked up and delivered J.M. to school and home precludes the Board from now excluding both of their children from its schools or from assessing any tuition payments from them.

The facts in this matter demonstrate that petitioners' children are not bona fide residents nor domiciled within the Board's school district. The facts clearly show that petitioners' residence lies within the jurisdiction of Freehold Borough and not within Freehold Township. Petitioners have failed to show that the Board or its agents knew that petitioners' children were attending its school illegally. In the matter of I.P. v. Leonia Borough Board of Education, 63 N.J.A.R. 2d (EDU)128, the parents of a nonresidential pupil were ordered by the Commissioner to pay tuition for the period the pupil illegally attended the respondent's schools.

Having carefully considered the entire record before me, and in light of the Commissioner's holding in Laufer, supra., I **FIND** and **CONCLUDE** that petitioners' children, J.M. and J.M., are not domiciled within the Board's school district.

Therefore, I **CONCLUDE** that petitioners' children should be excluded from the Board's schools at the conclusion of the 1995-96 school year and enrolled in the Board of Education of the Borough of Freehold public schools commencing with the 1996-97 school year.

I **CONCLUDE** that the claim of equitable estoppel against the Board is not appropriate here and, therefore, petitioners' arguments in support thereof are hereby rejected.

I **FURTHER CONCLUDE** that, under the facts and circumstances of this matter, petitioners should not be assessed any tuition payments for the period J.M. and J.M. attended the Board's schools. Nor should petitioners be liable for any prejudgment interest costs.

ORDER

Accordingly, it is **ORDERED** that petitioners children shall be excluded from attendance at the Board's school commencing at the close of the 1995-96 school year.

It is **ORDERED** that the Board of Education of the Borough of Freehold accept and enroll petitioners children for the 1996-97 and thereafter as legally domiciled within the Borough of Freehold.

It is **FURTHER ORDERED** that the Board of Education of the Township of Freehold assess no penalties or tuition payments against petitioners.

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

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

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

16 May 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/30/96
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 4 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ai

WITNESSES

FOR PETITIONER:

LORELI MOUNT

FOR RESPONDENT:

RONALD W. POST
WILLIAM MARK HORVATH

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 LAWYERS TITLE INSURANCE CORPORATION, INSURANCE POLICY
P-2 DEED, AUGUST 23, 1988, BLOCK 43, LOT 46 FREEHOLD TWP. AND BLOCK 70, LOT 3 FREEHOLD BOROUGH
P-3 LETTER, OCTOBER 13, 1993 TO PARENTS OF JESSICA MOUNT FROM MARTIN J. ANTON, ESQ.
P-4 RONALD W. POST SURVEYING, INC., AUGUST 17, 1995

FOR RESPONDENT:

R-1 LAND SURVEYING LOT 46, BLOCK 43, FREEHOLD TOWNSHIP
LAND SURVEYING LOT 70, BLOCK 70, FREEHOLD BOROUGH

H.M. AND L.M., on behalf of their minor children, J.M. AND J.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Board excepts to the Administrative Law Judge's (ALJ) failure to assess petitioners with penalties and tuition. Underscoring the non-discretionary language set forth in *N.J.S.A.* 18A:38-1b(2)[1], the Board argues, "***The term 'shall' when used in a statute is construed as being mandatory and imperative *** and there is no discretion to do otherwise [than] the statute commands." (citations omitted) (Board's Exceptions at p. 2) Thus, inasmuch as the ALJ concluded that petitioners had not met their burden to demonstrate that their children were entitled to a free public education, and the ALJ further found that the doctrine of equitable

[1] The statute reads, in pertinent part, "If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner *shall* assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district." (emphasis added)

estoppel was not appropriately applied in this matter, the ALJ should have assessed petitioners tuition. In this regard, the Board further asserts that the ALJ failed to note in his initial decision that document R-3, "***a summary of calculations prepared and testified to by the Respondent's Business Administrator, W. Mark Horvath, which calculated Respondent's claim for tuition for the two children involved at $32,706.00 through April 16, 1996 ***" was admitted into evidence. (*Id.* at pp. 1, 2)

In response, petitioners assert that the ALJ properly concluded that neither penalties nor tuition should be assessed in this instance. Petitioners identify the following findings of fact which, they contend, support the ALJ's conclusion: that L.M. enrolled her daughter in the Board's school system in 1991; that L.M. testified the prior owners of her home sent their children to respondent's school system; that, upon enrolling J.M., L.M. provided all necessary documentation; that L.M.'s driver's license and utility bill offer no distinction between Freehold Township and Freehold Borough; that J.M. attended kindergarten and first grade in the Township without any notice that her attendance was improper; that the Board's bus picked up J.M. in front of petitioners' home each day; that after receiving the Board's notice of October 13, 1993, petitioner was told by the Borough's school principal that J.M. would not be accepted to a school in the Borough; that petitioners' son was registered in the Board's school system after its notice of October 13, 1993; and that petitioners pay taxes to Freehold Township on the parcel of land they own which contains several sheds. (Petitioner's Reply at pp. 1, 2)

Petitioners further claim that they have been "***unduly prejudiced by the Township's excessive delay [in] notifying them as to this issue ***." (*Id.* at p. 3) Petitioners emphasize that they have not intentionally or fraudulently sent their children to the Township

schools, knowing that they reside in another district. Rather, they relied upon the Board's acceptance of their daughter, J.M., into its system and the subsequent acceptance of their son when "***the Township was fully aware of its position as to the [M.] children's alleged inability for enrollment there.***" (*Id.*) Thus, petitioners urge the Commissioner to adopt the initial decision of the ALJ.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the ALJ, with modification. While the Commissioner concurs that petitioners have failed to meet their burden of proving by a preponderance of credible evidence that their children are entitled to a free public education in respondent's school system, he finds and determines that petitioners, pursuant to the requirements set forth under *N.J.S.A.* 18A:38-1b(2) are liable for tuition for the period of time in which their children were ineligible to attend school in respondent's system.

The Commissioner agrees with the ALJ that the doctrine of equitable estoppel is not appropriate to employ in this instance. (Initial Decision at p. 22) As petitioners themselves recognize, estoppel may be applied "against public bodies only to prevent 'manifest wrong and injustice' ***." *In re Allstate Insurance Co., supra*, at 593. The Commissioner notes that "[t]he applicability of the doctrine of estoppel against public agencies and officials is quite limited, [so as] to guard against use thereof to injure the public interest." *Tubridy v. Consolidated Police and Fireman's Pension Commission,* 84 *N.J. Super.* 257, 264 (App. Div 1964). Thus, it is necessary to weigh the nature and extent of petitioners' reliance upon the Board's action or inaction against the public interests involved. (*Id.*) In the instant matter, it is undisputed that the Board accepted and enrolled J.M. in its school system for the 1991-92 school year and that petitioners provided

the requisite documents upon such enrollment. That the Board, however, was silent until October 13, 1993 does not necessarily justify the operation of estoppel, absent a showing by petitioners that the Board was aware of petitioners' violation and did not act, (see *Kennedy v. City of Newark*, 29 *N.J.* 178, 191,192 (1959)), or that petitioners reasonably relied on the Board's (or its agent's) affirmative representation that enrollment in the District, given petitioners' residency status, was proper.[2] See *Atlantic City Housing Auth. v. State*, *supra,* at 149; *Foley Machinery Co. v. Amland Contractors, Inc.*, 209 *N.J. Super.* 70, 75 (App. Div. 1986). Here, mere acquiescence is insufficient to buttress an estoppel claim.

Further, petitioners were aware upon the purchase of their property in 1988 that the property straddled the Borough and Township lines (Exhibits P-1 and P-4). They do not dispute that their dwelling is entirely situated in the Borough of Freehold. Additionally, petitioners pay taxes on their home to Freehold Borough, and petitioner L.M. admits that she is registered to vote in the Borough. (Initial Decision at p. 4) As the Board indicates, the petitioners were, therefore, in a better position to know the true municipality of their domicile. (*Id.* at p. 19)

The Commissioner finds that under the circumstances in this matter, to prevent the Township Board from taking action to remove petitioners' children from its school system, or to prevent the Board from collecting tuition, by application of estoppel would offend the public's interest in ensuring that local boards of education are charged with educating only those children

[2] The record shows that petitioners' sought to have their son admitted for the 1995-96 school year, after the initial Petition of Appeal was filed in this matter. On July 18, 1995, the Board notified petitioners that their son could not be admitted, in that he was not domiciled in the District. (Petitioner's Post-hearing Brief at p. 2 and Board's Post-hearing Brief at p. 1) The Board advised petitioners of their right to contest its determination, stating also, "You should be further advised that if the Petition is filed and the child is admitted, the Board will seek tuition from you for all periods of ineligible attendance in the event that the Commissioner rules in favor of the Board." (Board's letter dated July 18, 1995) Petitioner then filed a second Petition of Appeal on behalf of her son, which was later consolidated with the first petition, at the request of the parties. The Board warrants, "Petitioner's son was admitted to the Freehold Township Schools pending a determination on these matters." (Board's Post-hearing Brief at p. 1)

whose parents/guardians are domiciliaries of the district. Consequently, pursuant to *N.J.S.A.* 18A:38-1b(2), the Commissioner must find that petitioners are liable to the Board for tuition for J.M. and J.M. from the start of the 1991-92 school year through the end of the 1995-96 school year.[3] However, in consideration of the standards set forth at *N.J.A.C.* 6:24-1.16 for awarding pre-judgment interest, the Commissioner declines to so assess petitioners.

Accordingly, the initial decision of the OAL is affirmed, with modification, as set forth above. The Petition of Appeal is hereby dismissed, and petitioners are ordered to compensate the Board in an amount equal to tuition due and owing for the attendance of J.M. and J.M. in the Board's School District, prorated to the time of their ineligible attendance.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] It is herein noted that the Board, while informing petitioners by letter dated October 13, 1993 that J.M. was ineligible to attend school in the District, did not provide petitioners with a hearing until August 24, 1994. Although petitioners do not claim, and the Commissioner will not find, that such delay justifies application of the doctrine of laches to prevent the Board from removing petitioners' children and claiming tuition due, the Commissioner nonetheless admonishes the Board to expeditiously attend to the requirements set forth in *N.J.S.A.* 18A:38-1.

310-96

EDU #9907-94 and #8036-95 (consolidated)
C # 310-96
SB # 54-96

H.M. AND L.M., on behalf of their minor children, J.M. AND J.M.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 15, 1996

For the Petitioners-Appellants, Ronald W. Sage, Esq.

For the Respondent-Respondent, Martin J. Anton, Esq.

In August 1988, petitioners, H.M. and L.M., purchased a property on Center Street in Freehold. The property consisted of two parcels, one of which was located in Freehold Township and the other in Freehold Borough. The house was situated entirely on the parcel located in the Borough. The parcel located on the Township side of the property contained two truck containers used as sheds. In 1991, petitioners enrolled their daughter, J.M., in kindergarten in the Township's public schools for the 1991-92 school year and supplied the district with proof of residency.

In October 1993, petitioners received a letter from the attorney for the Freehold Township Board of Education (hereinafter "Board" or "Township Board") advising them

4/2/97

that since their house was located in Freehold Borough, J.M. was not entitled to attend school in the Township. In August 1994, following a hearing, the Township Board determined that petitioners were not domiciled in the Township and ordered the removal of J.M. from the Township's schools.

In September 1994, petitioners filed the instant petition with the Commissioner of Education, alleging that J.M. should be permitted to attend school in Freehold Township. In July 1995, petitioners filed a second petition, which was consolidated with their initial petition, alleging that their son, J.M., should also be permitted to attend the Township's schools. The Township Board filed a counter-petition seeking tuition from petitioners for the period of their children's ineligible attendance.

On May 16, 1996, an Administrative Law Judge ("ALJ") found that petitioners were not domiciled in the Township since their residence was located within the jurisdiction of Freehold Borough and that petitioners had failed to show that the Township Board had known that their children were attending its schools illegally. Consequently, he recommended that petitioners' children be excluded from the schools of Freehold Township at the conclusion of the 1995-96 school year. The ALJ further found that equitable estoppel was not applicable to these facts. However, he concluded that, under the particular circumstances herein, petitioners should not be assessed tuition.

On July 15, 1996, the Commissioner adopted the ALJ's recommended decision with modification. The Commissioner concurred with the ALJ that petitioners had failed to demonstrate that their children were entitled to a free public education in the Township's schools. As a result, the Commissioner concluded that petitioners were

liable to the Board for tuition for the 1991-92 through 1995-96 school years, the period during which their children had attended school in the Township. The Commissioner also agreed that equitable estoppel was not applicable in this instance, noting that the Board's silence until October 1993 did not necessarily justify the operation of estoppel absent a showing that the Board had been aware of petitioners' violation and failed to act or that petitioners had reasonably relied on an affirmative representation by the Board that their children's enrollment in the district was proper. The Commissioner found "mere acquiescence...insufficient to buttress an estoppel claim." Commissioner's Decision, slip op. at 28.

Petitioners filed the instant appeal to the State Board, contending that the Board should be equitably estopped from recovering tuition for the period at issue under the unique circumstances presented herein.

After a thorough review of the record, including the transcript of the hearing held in the Office of Administrative Law in this matter,[1] we reverse that portion of the Commissioner's decision that directed petitioners to pay tuition to the Township Board for the period of their children's attendance in the Township's schools.

Petitioners' property, as previously noted, consisted of two parcels, one of which was situated in Freehold Township, the other in Freehold Borough. Petitioners provided the Township Board with all requested proofs of residency at the time they enrolled their daughter, J.M., in kindergarten in 1991, and there is nothing in the record to indicate that petitioners had acted with fraudulent intent to mislead the Board into

[1] We note that the hearing transcript was not forwarded to the Commissioner by the Office of Administrative Law until September 30, 1996, after the Commissioner had already rendered his decision in this matter.

permitting their children to attend school in the Township. Moreover, we stress that petitioner L.M. testified without contradiction that the children of the previous occupants of their home had attended public school in the Township. Tr. 4/29/96, at 15. She indicated that such information was a consideration in their purchasing the property. Id.

Under these particular circumstances, we find that petitioners reasonably relied upon the Township Board's acceptance of their daughter, J.M., as a student in 1991, and conclude that fundamental fairness dictates that the Township Board be estopped from collecting tuition from petitioners for the years of their children's attendance. See East Orange v. Bd. of Water Com'rs., etc., 41 N.J. 6, 19 (1963) (equitable principles of estoppel may be applied against public bodies where the interests of justice, morality and common fairness dictate that course); State, Dept. of Envir. Protection v. Stavola, 103 N.J. 425, 436 n.2 (1986) (any administrative agency in determining how best to effectuate public policy is limited by applying principles of fundamental fairness). Cf. Whasun Lee v. Board of Education of the Township of Holmdel, Docket #A-653-95T5 (App. Div. 1996); Board of Education of the Borough of Fort Lee v. Kintos, Docket #A-4944-93T5 (App. Div. 1995).

Accordingly, we reverse that portion of the Commissioner's decision directing petitioners to pay tuition to the Township Board for the 1991-92 through 1995-96 school years.

Attorney exceptions are noted.

April 2, 1997

Date of mailing APR 02 1997

311-96

311-96 DHPR

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF A.F.J.	:	DECISION ON REMAND
_____	:	

JULY 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 144-96
AGENCY DKT. NO. DHP#-461
ON REMAND FROM
OAL DKT. NO. EDU 8580-95

ANTHONY F. JAMES,
Petitioner,
v.
NEW JERSEY STATE
DEPARTMENT OF EDUCATION,
Respondent.

Anthony F. James, petitioner, *pro se*
New Jersey State Department of Education, respondent, appearing pursuant to *N.J.A.C.* 1:1-5.6

Record Closed: May 15, 1996 Decided: May 29, 1996

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 5, 1995, the State Board of Education (Board) rendered a decision which remanded this matter to the Commissioner of Education for a hearing in order to provide the petitioner, Anthony F. James, the opportunity to establish a record in support of his contention that he has satisfied the standard for rehabilitation pursuant to *N.J.S.A.* 18A:6-7.1. Rehabilitation pursuant to the foregoing statute directs itself to an individual who seeks school employment and who has a criminal history record. Presumably, the Commissioner of Education had determined in advance of the State Board's remand that Mr. James was unable to establish rehabilitation and the Board granted Mr. James's request for a full hearing on the issue, noting in passing that the statute at issue expressly requires consideration of the date of the offense rather than the date of the conviction, which had apparently been relied upon by the Deputy Commissioner when his decision denying Mr. James's effort at demonstrating rehabilitation was rendered. Thereafter, the matter was transmitted to the Office of Administrative Law as a contested case on September 20, 1995.

Mr. James's appeal was scheduled to proceed to plenary hearing at the Office of Administrative Law on November 14, 1995. Mr. James did not appear at that time and the matter was returned to the agency as required under *N.J.A.C.* 1:1-14.4. On December 20, 1995, the Commissioner of Education remanded the matter to the Office of Administrative Law, indicating that "the record reveals that prior to the hearing, on November 13, 1995, petitioner filed notification that he would not be present at the November 14, 1995 hearing because of job responsibilities." Decision on remand, December 20, 1995 at 1.[1] Thereafter, the matter was rescheduled and heard at the Office of Administrative Law on May 15, 1996, at which time the record in these proceedings closed.

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[1] My office never received any communication, of any kind, from Mr. James prior to the November 14, 1995 hearing, or thereafter. In addition, the file does not contain such communication. Had such communication been received by my office, I would have perfunctorily granted the adjournment, given that no appearance by the respondent is necessary in this matter, and no inconvenience would have resulted. I am not at all suggesting that Mr. James did not submit such letter, but I am indeed curious as to how the Commissioner determines that letters sent requesting adjournments to the Office of Administrative Law are indeed sent and are indeed received.

ISSUES AND BURDEN OF PROOF

In order for an individual to demonstrate that he has been rehabilitated such that he is no longer disqualified from school employment or service because of a prior criminal conviction, he must demonstrate the following under subdivision e of *N.J.S.A.* 18A:6-7.1

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

In respect to establishing his rehabilitation, the burden rests solely and exclusively on the petitioner: Mr. James must prove by clear and convincing evidence that he shall no longer be disqualified from school employment on the basis of his prior criminal record.

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the operative facts in these proceedings. If a factual dispute presents itself, I shall set forth its adversarial basis, arrive at an explicit finding of fact, and give reasons to support that finding.

Accordingly, I **FIND**:

Anthony James, the petitioner, has a criminal record. In or about 1971, while a full-time student at Rutgers University, James was charged with breaking and entering with intent to kidnap. He "turned himself in," according to his testimony, and was placed on 3-months probation. Mr. James was 23 years-old at the time of the charge. Now, some 25 years later, at the age of approximately 48, Mr. James explained the circumstances of the charge.

The incident occurred during the epicenter of the civil rights revolution. On campus during this period was an Organization of Black Students (OBU).[2] James explained that it was an extremist organization and that one of its objectives was to separate Black students from their white counterparts, particularly when members of different races shared a common dormitory. One of its tactics was to harass and threaten Black students, such as James who did share a room with a white student. James and others, after being victimized by this kind of activity, physically entered the room of one of these students and took him out and essentially held him hostage for approximately 4 hours. He admitted that during this time he and others threatened this individual with bodily harm, although no physical harm was ever inflicted. After 4 hours the student was released. As a result of this conduct, James was charged with the crimes previously enumerated, and after he surrendered himself to authorities he was placed on 3 months probation. In addition, Rutgers University suspended him for 1 month and following that suspension in 1973, he was awarded a bachelor of arts degree with a major in political science.

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[2] The name of the group is based on my recollection and may not be entirely accurate.

Following his graduation from college, James sunk into a dark hole. During his last years at Rutgers University, he became addicted to heroin, first "mainlining" drugs and then inhaling the substance. As a result of his addiction and the need to support his habit, he became involved in drug trafficking. In 1979, James was arrested and charged with possession heroin with intent to distribute, possession of marijuana, and possession of a weapon - what is described as a sawed-off shotgun.

James explained that the shotgun was an antique family heirloom and although it was operable, it was found in his house as an incident to a search warrant executed by law enforcement and it was unloaded.

It took 3 years for these charges to result in a conviction. In 1982 James was sentenced to 4 years each of the weapons charge and for the heroin charge and 3 years for possession of marijuana, the sentence to run concurrently. In spite of what on the surface are very serious charges, he received a modified sentence on January 8, 1982 handed down by the Honorable Arthur S. Meredith, J.S.C. The sentence and the reasons for it are part of the case file submitted by respondent. It is noted in passing that the judge indicated *inter alia* that while James had initially denied being a drug user, he since that original denial had admitted his heroin addiction. As a result the Court indicated:

> In light of your otherwise good background and further, in view of the fact that the court is convinced that you are serious about curing your addiction by successfully completing a residential drug program, this court will suspend the sentence heretofore imposed and place you on probation on the condition that you successfully complete a residential drug program.

As a consequence of this sentence, the petitioner entered a drug rehabilitation program, the Integrity House, in Newark, New Jersey and on June 9, 1984 was awarded a certificate of graduation from the program. Based upon his testimony, the petitioner has been drug free since the early 1980s through the intervention of Integrity House and his successfully completing its program. Indeed, from 1982 through February of 1983, Mr. James was *employed* by Integrity House as intake interviewer/counselor and was responsible for drug counseling and making

recommendations to the courts in respect to individuals who were admitted to the program because of substance abuse.

The 1979 offenses previously discussed were the last criminal convictions Mr. James sustained.[3]

From 1985 through 1988 Mr. James served as the Director of the Alternative to Juvenile Incarceration Program under the auspices of the Urban League of Union County. In this capacity, the petitioner was responsible for working with a variety of youngsters who were referred by the Department of Corrections, the Probation Department, the public school system, the courts as well as the Division of Youth and Family Services. These youths presumably had gotten into trouble with the criminal justice system and became part of the Alternative to Juvenile Incarceration Program, in lieu of the possibility of going to prison. Mr. James's resume notes that as Director of the program, he was responsible for developing and supervising its various components; training and developing a program of guided group intervention; creating a model program; and a variety of other aspects of the overall organization.

Sometime previous to this employment, Mr. James also held 2 positions for a short period of time. From 1983 through early 1984, he was employed as an employment specialist/career counselor for the Morrow Project, in New Brunswick, New Jersey. In this capacity Mr. James worked with individuals who had gone through the criminal justice process to assist them in a variety of areas of need such as job placement, trouble shooting, and conducting motivation and self-awareness seminars. At about that same time he also held a position as the Director of training and placement services for the Epilepsy Foundation of New Jersey. The petitioner indicates in his resume that as part of his responsibilities he interfaced with various corporations and the private sector on behalf of his clientele to fight against discrimination in employment and

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[3] I note that in the file transmitted to the Office of Administrative Law, the documents indicate that on October 27, 1993 James was charged with possession of "certain weapons" and the matter was pending in Union Municipal Court. The file nevertheless indicates that the Office of the Prosecutor of Union County dismissed these charges against Mr. James on January 12, 1994, in their entirety. A note in the file also indicates that James's assertion was that there was a knife found in the glove compartment of a family member's automobile. In any event, the 1983 arrest and charges associated with them were withdrawn by the county prosecutor and should not be viewed as evidence of any wrongdoing by the petitioner.

was also responsible for acting as a spokesperson for the Foundation through news conferences, lectures and networking.

From 1988 through to 1990, Mr. James served as the Director of the Youth Partnership Program at the Grant Avenue Community Center in Plainfield, New Jersey. In this position, he worked with high school age youngsters - presumably troubled - referred through the same entities who had referred individuals to the Alternative to Juvenile Incarceration Program. Mr. James was responsible for a variety of the aspects of the program, including its educational component, budgeting, developing a family crisis intervention procedure, and networking with the various public entities from whom the youngsters were recommended.

Mr. James indicated that his last position as the Director of the Youth Partnership Program, ended in 1990 because the political administration under whom he served changed and he was replaced by a representative of the new political administration.

It is clear that from the time that Mr. James successfully completed his drug rehabilitation program and began his employment as an intake interviewer and counselor for that program - Integrity House - the petitioner's professional goals were intertwined with social consciousness, reform, and working within the system to assist troubled youngsters and those in need. He continued to maintain this objective following the loss of his position as Director of the Youth Partnership Program but, as he indicated in his testimony, as the decade of the 90s began the source of funding for many of these publicly funded programs simply evaporated. As a consequence, he experienced enormous difficulties in continuing his pursuit of employment in the areas of social reform and public service.

At about this same time, James married Deborah E. Williams-James and they purchased a home - fulfilling the American dream - and with it assumed a significant mortgage. In order to make ends meet and to earn a living, James was forced to find employment in areas in which, while he may not have had the passion, he had the need. He worked several jobs at the same time - selling automobiles. He, with the assistance of his wife, published a book (its my recollection that it was published by Vintage Press) in 1989 and has begun a cottage industry in marketing greeting cards and other ventures. It is perhaps because of the nature of his employment from

1990 to the present, that he was unable to provide the Deputy Commissioner with the kind of recommendations that were alluded to in the letter of February 6, 1995, in which the latter notes that "the letter submitted on your [petitioner's] behalf are primarily general letters of reference which are dated from 1983 through 1988, and do not specifically address the subject of your appeal." [Letter Richard A. DiPatri, Deputy Commissioner to petitioner, February 6, 1995].

It should also be noted that indeed Mr. James was previously employed as a full-time substitute teacher from 1973 through 1976 with the Plainfield public school system working in the high school and teaching courses ranging from physical education to history. It is my understanding that in none of the positions which Mr. James occupied was he ever terminated.

Mrs. James testified on his behalf. Of course, one would expect a wife to testify to support her husband; nevertheless, I found her candor, articulateness, intelligence and honesty to significantly override any assumption that one might make that a wife's testimony on behalf of her husband is inherently unbelievable and should be disregarded.

Mrs. James is a success story in her own right. She holds a bachelor of arts degree in marketing management and has been employed for over twenty years in the pharmaceutical industry, fifteen of those for Johnson & Johnson and for the last 5 years for Bristol-Meyers where she has been primarily performing the function of training professional staff in a variety of areas. She attested to the validity of Mr. James rehabilitation as well as his strength. She noted for example that he has 2 grown children born out of wedlock and that he is close to both of them, particularly his son who is 26 years of age. Indeed, Mr. James has recently become a grandfather. She noted his responsibilities in respect to his children - when one of them was experiencing difficulties, James took him into his home. She also noted that both her and Mr. James's parents are suffering from terminal illnesses and that she and her husband are both dedicated to maintaining the best care possible for them. She further indicated that in spite of the various pressures placed upon Mr. James, both private and professional, he has never wavered and never, never has he on any level, physically, emotionally or intellectually, even remotely felt a desire to return to drugs. James confirmed this, indicating that not since 1982, when he satisfactorily completed his drug rehabilitation program, has he had any desire or need to turn to drugs.

In my opinion, Mr. James has affirmatively demonstrated by clear and convincing evidence, that he has been rehabilitated from his criminal record and he should no longer be disqualified from school employment in the capacity of a substitute teacher. The offenses for which Mr. James was found guilty, are serious. Nevertheless, the explanation in respect to the first offense - breaking and entering with intent to kidnap - sounds far more serious than it actually are. Holding a Black extremist on Rutgers University campus hostage for 4 hours and threatening him with bodily harm if he, or his group, continued to harass James and other Black students who elected to room with white students, is indeed wrong and criminal but, it is also a far cry from what one typically thinks of in terms of burglarizing a residence and kidnapping an individual. Apparently, the criminal justice system viewed this in the same light when it imposed a 3-month suspended sentence on Mr. James for these crimes. The University also did not deem his conduct to be significantly relevant when it imposed a 1-month suspension and permitted James to continue his matriculation and eventually awarded him a bachelors degree in political science.

It will also be recalled at the time James was 23 years of age, and in 1971, America was in the midst of a civil rights revolution of which, to some extent James's conduct was a part.

James's involvement with heroin speaks for itself. What reduced him to that level was never explained. Drugs, of course, are an abomination in our culture and have been for approximately a half-century. Drugs are pandemic and heroin was the drug of choice by so many inner-city youths in the late 60s and early 70s. Mr. James was but one such youth. He became addicted and, according to his testimony, which was unrebutted, began selling drugs to support his addiction. He initially denied being an addict when faced the possibility of incarceration, he owned up to his addiction and in respect to all of the charges - including the possession of the shotgun - was permitted to serve a period in a residential rehabilitation facility. James recovered from his addiction. He has been drug free for approximately 14 years. The offense itself occurred some 17 years ago. It will be recalled that pursuant to the remand the Board properly noted that it is the date of the *offense*, not the date of the sentencing, that is to be measured when assessing rehabilitation. While I was disturbed about the weapons charge, I accept Mr. James's representation that it was a family heirloom, that it was unloaded, and that it was simply in his house when police exercised their search warrant to find drugs. Moreover, the criminal justice

system, which obviously had a more intimate involvement with the charge than I, concluded that its severity was not commensurate with incarcerating Mr. James.

Mr. James's offenses were isolated in respect to their nature, and neither was ever repeated.

Mr. James's experience and activities following his successful defeat of his addiction have already been chronicled. He served honorably and passionately for a variety of social programs, most of which had as their objectives helping kids, such as James, who had gotten into trouble, either through use of drugs or otherwise. He intervened with the cooperation of various public agencies to give those kids a second chance without having to face jail. Those social programs appear to have become significantly extant as a result of the evaporation of public sector funds. As a result James, rather than sinking back into a hole, did all he could to earn a living and pay his mortgage. He sold use cars. He wrote a book. He is engaged, with the assistance of his wife, in the creation of a home industry involving greeting cards and other pursuits. He is doing all he can to keep going. He is fortunate to have a loving, supportive, and strong wife who stands by him and with him in this regard. Now he wants to continue the activities, which are dear to his heart, involving young people and keeping them out of trouble. It is my judgment, that Mr. James having been an addict some fifteen years ago can play as significant a role in teaching high school youngsters, as can his knowledge of political science or other subject areas. In a strange and ironic way, James is a role-model. As a young Black man growing up in the midst of the civil rights revolution, he struggled to obtain the distinction of a college degree and in doing so he literally was brought face-to-face with racism and he responded to it inappropriately. He then confronted the anathema of heroin addiction and overcame that. Since those early years, his middle years have been spent productively and since 1990 he has found himself at sea. But he has not drowned. He is still searching for a way to become a productive, passionate citizen and to contribute to his society in a fashion that will benefit it as well as reward him. He has elected to that do that by attempting to become a substitute teacher in the public school system. In my view, whatever risks there may be in allowing Mr. James to pursue that endeavor - and I believe the risks are few if any - are far out weighed by the talents that he brings to bear, his experiences, his dedication, and the passion and energy that he demonstrates.

Accordingly, I **CONCLUDE** that the petitioner has affirmatively demonstrated by clear and convincing evidence that pursuant to *N.J.S.A.* 18A:6-7.1(e) he has been rehabilitated from his criminal history record. It is therefore **ORDERED** that the petitioner is no longer disqualified from employment in the public school system as a substitute teacher.

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

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

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

5/30/96
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

5/31/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 4 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On behalf of petitioner:

Anthony F. James

Deborah E. Williams-James

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF A.F.J.	:	DECISION ON REMAND
	:	

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

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusion of the Administrative Law Judge (ALJ) that the within appellant has demonstrated rehabilitation by clear and convincing evidence in accordance with *N.J.S.A.* 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws.[1] It is observed that in reaching this decision, the Commissioner had no cause to question the ALJ's assessment of appellant's credibility as such assessment is not belied by the record. Moreover, it was the ALJ who had the opportunity to hear appellant's sworn testimony and to observe his demeanor, so that he was in the optimum position to make such determination.

[1] In affirming the ALJ's decision, the Commissioner is constrained to note that the remand of the instant matter, on December 20, 1995, was based upon a letter in the record that was forwarded to the Commissioner for review, from appellant to Judge Reback, dated October 27, 1995 and stamped in as received by the OAL on November 13, 1995. This letter stated that appellant would not be present at the November 14, 1995 hearing because of job responsibilities. While the Commissioner recognizes that the ALJ may never have received this notification, it was and remains a part of the record considered by the Commissioner in reaching both his prior determination and the present determination.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision as the final decision in this matter and appellant is deemed qualified for school employment as a substitute teacher. The file for this matter is herewith forwarded to the State Board of Education, as it has retained jurisdiction in the within matter in its decision dated July 5, 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 15, 1996
DATE OF MAILING JULY 15, 1996

313-96

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board disputed budget reduction made by respondent Department of Education. The Department reduced the Board's state aid for the 1994-95 school year, but deferred the reduction until the 1996-97 school year. The aid reduction occurred because the "1994-1995 Appropriations Act required that the statewide total for debt service had to be maintained at the same amount as the 1993-1994 level ...." Board claimed the state aid reduction would prevent it from providing its pupils with a thorough and efficient education as constitutionally mandated.

ALJ found that the Board opposed the Department's summary decision motion but failed to raise any issues of material fact that warrant a plenary hearing. ALJ concluded that the Department successfully argued that the reduction in state aid comported with the State's funding provision which, although declared unconstitutional, still must be relied upon until September 1996. ALJ found that the application of equitable estoppel was inappropriate as the Board was timely notified of the reduction. In addition, a $925,000 municipal donation was properly considered as miscellaneous revenue. ALJ concluded that the Board's ability to provide a thorough and efficient education was not inexorably threatened by the reduction.

Commissioner concurred with the ALJ that the Department was entitled to summary judgment and adopted the findings and determination in initial decision as his own.

JULY 18, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8275-95

AGENCY DKT. NO. 336-8/95

BOARD OF EDUCATION OF THE

TOWNSHIP OF LACEY, OCEAN COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

OFFICE OF FINANCE,

Respondent.

Christopher J. Vaz, Esq., for petitioner (Arthur Stein and Associates, attorneys)

John K. Worthington, Deputy Attorney General, for respondent (Deborah T. Poritz, Attorney General of New Jersey)

Record Closed: May 14, 1996 Decided: May 29, 1996

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

The Lacey Township Board of Education ("Board"), petitioner, requested the Commissioner of Education to resolve a dispute between the Board and the Department of Education ("Department"), respondent.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 through -13. After notice, a prehearing conference was held by telephone on November 17, 1995. The parties subsequently stipulated all facts necessary and the matter proceeds on cross motions for summary judgment.

After filing of its final papers, the Board wrote to the judge on May 9, 1996, asking to supplement the record. The supplemental papers indicate the voters of Lacey Township defeated the proposed school budget for 1996-1997 at the polls on April 16, 1996, by 525 votes; 12% of the proposed increase in the amount to be raised by tax levy is attributable to the Department's decision to reduce debt service aid to the Lacey District for 1996-1997; the district faces pupil population growth and facilities expansion; salaries and operational costs are rising, and all of this is exacerbated by the Department's decision to reduce debt service aid. In 1994, the municipal government donated funds to the school budget with the express intent to reduce local property tax increases. The Department's reduction of debt service aid unreasonably contravenes that goal.

The Department immediately responded, arguing that the submission was out of time, the Department is entitled to judgment as a matter of law, the effect on the tax rate is irrelevant and the Board in any event fails to show a nexus between the asserted tax increase and the reduction of debt service aid. Because no competent evidence has been submitted on pupil population growth or the other assertions, even if the tribunal were to determine that the budget defeat has any bearing on the case, the absence of any proofs renders the argument meaningless and the Board's submission still must be rejected.

For the reasons set forth in the analysis to follow, the additional submission, even if accepted, has no effect on the outcome of the main issue.

FACTUAL BACKGROUND

The Department reduced the Board's aid for the 1994-1995 school year, but deferred the reduction until the 1996-1997 school year. The aid reduction occurred because the "1994-1995 Appropriations Act required that the statewide total for debt service had to be maintained at the

same amount as the 1993-1994 level . . .." Respondent's moving papers, February 16, 1996, at 1. The immediate and practical result was that the Department had to recalculate the aid it would provide to all school districts. The Lacey Board's aid was reduced by $274,273. The Department contends that the reduction would not have been so severe were it not for a large donation from the governing body. The Township gave $925,000, designated for debt reduction. It appears that the reduction in aid would have been less drastic had the $925,000 been appropriated to the Board's current expense budget.

The Board says the Department's decision is flawed for several reasons. First, the Department based the reduction on the Quality Education Act, N.J.S.A. 18A:7D-1 through -37 (QEA), which the New Jersey Supreme Court declared unconstitutional in Abbott v. Burke, 136 N.J. 444 (1994). Second, the Department failed to given the Board timely notice of the reduction. The Board had, in fact, set its 1994-1995 budget. Consequently, the Board argues, the Commissioner should equitably estop the Department from reducing State aid. Third, the Department erroneously determined that a municipal donation was not local tax effort for debt service aid purposes. Last, the Department's actions will have a deleterious effect on the Board's ability to provide a thorough and efficient education.

The Department counters that the QEA is the only procedure it has to determine State aid for debt service. The Board's equitable estoppel argument must fail because the Office of Administrative Law is not authorized to exercise equitable powers. New Jersey courts recognize that the application of equitable estoppel against governmental entities should be avoided in most instances. The Department also contends that the Board did have timely notice of the reduction because it would not occur until a subsequent budget year. The Board's contention that the Township's donation should be labeled local taxes, not miscellaneous revenue, also must fail because the Board itself labeled the funds as miscellaneous revenue. The Township appropriated funds to the Board from the local tax levy and then separately donated funds to debt service from another source. Last, the district's pupils will not be denied a thorough and efficient education because of the aid reduction. The Board can recoup the lost funds, if necessary, through a tax increase.

DETERMINATION

Does the Commissioner of Education have jurisdiction?

It is well settled that the Commissioner does not have jurisdiction unless the controversy comes under the school laws. In Balsley v. North Hunterdon Bd. of Educ., 117 N.J. 434, 438 (1990) the Court held "The State's education laws provide that the Commissioner of Education has jurisdiction to determine all controversies and disputes arising under those laws." This comports with N.J.S.A. 18A:6-9 which, in relevant part, provides that "[t]he Commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws . . . ."

The question, then, is whether any provision of the school laws vests jurisdiction in the Commissioner to determine this matter. The QEA provides the necessary basis. The language of the act suggests the Commissioner should take an active role in funding decisions. For example, N.J.S.A. 18A:7D-26 provides that each year, "within seven days following the transmittal of the budget message to the Legislature by the Governor . . ., the Commissioner shall notify each district of the maximum amount of aid payable to the district . . .." This is a school law. Logically, the Commissioner would have concomitant authority to hear disputes that arise under it.

Other grounds exist for finding jurisdiction in the Commissioner. The Board claims the State aid reduction will prevent it from providing its pupils with a thorough and efficient education as constitutionally mandated. The ability, or not, of the Board to provide that education vests jurisdiction in the Commissioner. In fact, the New Jersey Supreme Court held that "although the Commissioner has no express authority to order the budget increases, the power was derived from his duty to assume that every school district provides a thorough and efficient education." Board of Educ. v. Mayor and Council, 116 N.J. 305, 319 (1989), citing In re Upper Freehold Regional School Dist., 86 N.J. 165, 272 (1981). Whether the State aid reduction affects the Board's ability to provide a thorough and efficient education raises issues requiring the Commissioner's expertise, thus vesting jurisdiction in the Commissioner.

Should Either Motion for Summary Decision be Granted?

The Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 through -21.6, provide that a motion for summary decision may be granted "if the papers and discovery which have been filed together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). To rebut a motion for summary decision, an adverse party "to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." Id. The administrative rule governing summary decision is essentially the same as the New Jersey Court Rule that provides for summary judgment. See, R.4:46-2. The legal principles that have developed relating to summary judgment apply to administrative proceedings.

In Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed grants of summary judgment and stated the following standard:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . .."

See also, Contini v. Board of Educ. of Newark, 286, N.J. Super. 106, 122 (1995) in which the court applied the Brill standard to matters heard in the administrative forum.

In the present case, the Department's motion for summary decision will be granted. The Board has failed to raise any issue of material fact. This conclusion is reached by application of the Brill standard: the evidential materials presented are insufficient to resolve the dispute in the Board's favor and fail to raise any material fact issues warranting plenary hearing.

A. Quality Education Act

The Board claims the Department's funding decision was based on the QEA and any funding decisions made under the act are invalid because the Supreme Court declared the act unconstitutional. The Department recognizes that the QEA has been declared unconstitutional, but maintains that it has no other mechanism for determining State aid and thus must rely upon certain parts of the act.

The Board is correct about the high court's ruling. The QEA has been declared unconstitutional; however, the Legislature and the Governor do not have to adopt a replacement funding mechanism until September 1996. The Abbott Court stated that ". . . if a law assuming such substantial equivalence, approximating 100%, for school year 1997-1998 and providing as well for special educational needs is not adopted by September 1996, we will consider applications for relief." Abbott at 449. The QEA remains the only basis the Department has to determine funding decisions, at least until September 1996 or until a new funding procedure is in place. Furthermore, because the funding decision in controversy relates to the 1994-1995 school year, the QEA would control.

B. Equitable Estoppel

The Board urges that the Department be equitably estopped from reducing aid to the Board. The Department contends this argument is inapplicable in the present context. The Department relies on a number of decisions suggesting that courts should, in most cases, refrain from applying equitable estoppel against governmental entities. Respondent's moving papers at 10.

New Jersey courts start with the same premise as the Third Circuit: equitable estoppel should not be invoked against public entities except to prevent manifest injustice. W.V. Pangborne & Co. v. N.J. Dept. of Transportation, 116 N.J. 543, 553 (1989), held the Department of Transportation was not estopped from asserting a statute of limitations defense to an electrical contractor's claim for further work done pursuant to an already completed contract. The New

Jersey Supreme Court has adopted the Restatement (Second) of Torts definition of equitable estoppel by stating that equitable is

> the effect of the voluntary conduct of a party whereby he is precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse . . .. Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979).

Therefore, the basic requirements for claiming equitable estoppel against another--intentional misrepresentation and detrimental reliance thereon--must be proved against the State. Citizens for Equity v. N.J. Dept. of Environmental Protection, 252 N.J. Super. 62, 79-80 (App. Div. 1990), aff'd. 126 N.J. 391 (1991).

However, since estoppel against the government may be detrimental to the public interest and could interfere with essential governmental functions, O'Malley v. Dep't of Energy, 109 N.J. 309, 316 (1987), New Jersey courts require a claimant to prove more than just the basic elements of estoppel. (In O'Malley, the court held that the Department of Energy was not estopped from returning an employee to his permanent position, when a promotional examination was not administered between the date of his provisional appointment and date of "demotion". The court referred to the Civil Service Act of 1986, N.J.S.A. 11A:1, in holding that a failure to administer a timely civil service examination does not vest a provisional appointee with the right to retain the provisional appointment until such time as the examination is given. Id. at 316.). Courts have focused on the intentional misrepresentation requirement. The party to be estopped must have "knowingly and intentionally [misrepresented] . . ." Id. at 317. This intent can be seen where the governmental agent "engages in conduct that is calculated to mislead the plaintiff . . ." W.V. Pangborne & Co. v. N.J. Dept. of Transportation, 116 N.J. 543, 553 (1989). Even if the conduct itself does not mislead, however, intentional misrepresentation by the government can be found if a public official knew or should have known of materials facts, but that official acted as if he or she did not have this knowledge (thus causing a misrepresentation). State Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473, 499 (1983) (public officials with knowledge of material

knowledge of material facts could ratify the action of private parties, and that ratification could effect an estoppel by a third party.)

Moreover, the "intent" requirement is further defined by the Court's ruling that "the party seeking the benefit of estoppel [against the State] has the burden of establishing that an officer of the State, conscious of the State's true interest and aware of the private owner's misapprehension, stood by while the private owner acted in detrimental reliance." Newark v. Natural Resources Council, Dept. of Environmental Protection, 82 N.J. 530, 545 (1980) (citing O'Neill v. State Highway Dept., 50 N.J. 307 (1967)). Words such as "conscious" and "aware[ness]" connote intentional conduct.

Thus, in addition to the traditional equitable estoppel elements, New Jersey state courts also require a showing of intentional misrepresentation or other intentional misconduct - or at least a negligent disregard as to the consequences (detrimental reliance) of the acts - by the government in order for a claimant to be able to assert equitable estoppel against the government. This requirement is nearly tantamount to the "affirmative misconduct by the government" standard promulgated by the Third Circuit. Therefore, even though New Jersey state courts have not expressly adopted the precedent established by the Third Circuit, the state courts' standards parallel those of the Third Circuit. Due to the policy reasons discussed earlier, New Jersey has therefore imposed a great burden on any individual who desires to equitably estop the government.

With this standard in mind, equitable estoppel cannot succeed against the State. The Board indeed may have detrimentally relied on the initial State aid amount announced; however, there is no indication that the Department knowingly and intentionally lulled the Board into reliance thereon. In fact, evidence indicates that the initial aid figure the Department gave the Board was preliminary and, thus, subject to change. Specifically, N.J.S.A. 18A:7D-26 provides:

> Annually, within seven days following the transmittal of the budget message to the Legislature by the Governor, . . . the Commissioner shall notify each district of the maximum amount of aid payable to the district under the provisions of P.L. 1990, c.52 . . . in the succeeding year and shall notify each district that is subject to the provisions of section 85 of P.L. 1990, c. 52 . . . of the district's maximum permissible local levy budget for the succeeding year. The actual aid payment to each district shall be determined after the district's budget is adopted. [Emphasis added.]

Although school districts adopt final budgets based on the preliminary aid figures, they know that any State aid reduction will not affect that year's budget. Instead, the district takes the reduction from a subsequent budget. This gives the school district time to prepare for the revenue loss.

C. Donation

The Board claims the Township gave the Board the additional $925,000 in order to avoid or reduce a tax levy. The Board relies on the transcript of the Township Council meeting at which the donation was discussed. The transcript does show that council members as well as citizens viewed the donation as a mechanism for tax relief. Petitioner's moving papers, March 15, 1996, at 8.

The Department does not dispute the intent of the donation. However, the funds were taken from surplus sources in the municipal budget rather than raised by local tax levy. Respondent's reply papers of March 19, 1996, at 3. Consequently, the funds reduced the Board's State aid amount. The Department argues that the clear language of N.J.S.A. 18A:7D-3 supports its contention. The statute says

> "Net debt service" means the balance after deducting all revenues from the school debt service budget of the school district and the school debt service amount included in the municipal budget, except the amounts to be raised by local taxation and State aid.

The language is clear. Net debt service is determined after deducting all revenues from the debt service budget. The only exceptions are funds raised through local taxation and funds from

State aid. In this case, the funds did not come from an appropriation of tax monies to school debt service accounts. The funds came from municipal budget surplus. In the 1994-1995 school year, approximately $13 million was appropriated to the schools from local tax revenue. An additional $925,000 was given to the schools, but it did not come from local taxation or a school debt account, whether school or municipal. It came from another source. The Department correctly labeled this miscellaneous revenue and properly considered it in determining the Board's State aid amount.

D. Thorough and Efficient Education

The Board maintains that the reduction in State aid will negatively affect its ability to provide a thorough and efficient education to its pupils because it will either have to cut programs or raise taxes. The Department disagrees and asserts the Board need only seek a slight tax increase to recover the lost revenue. Although this will detrimentally affect the taxpayers, it does not detrimentally affect the Board's pupils.

Of all the issues raised by the Board, this might raise fact questions. However, applying the Brill analysis, the Board's argument must fail. Even viewing the evidence in a light most favorable to the Board, the evidence suggests that the reduction in State aid will not automatically prevent the Board from providing a thorough and efficient education. As it has conceded, the Board need only raise its school taxes if it believes that the aid reduction will cramp its ability to provide this level of education. And, as a final note, not even a budget defeat at the polls automatically and ipso facto makes this impossible.

CONCLUSION AND ORDER

The Board opposes the Department's summary decision motion but fails to raise any issues of material fact that warrant plenary hearing. The Department has successfully argued that the reduction in State aid comports with the State's funding provision which, although declared unconstitutional, still must be relied upon until September 1996 and in any event was in place at the time the present controversy arose. The application of equitable estoppel is inappropriate here: the Board was timely notified of the Department's reduction decision. In addition, the

$925,000 municipal donation was properly considered as miscellaneous revenue. Finally, the Board's ability to provide a thorough and efficient education is not inexorably threatened by the reduction.

Summary judgment is entered for the New Jersey Department of Education. The petitioner of appeal is **DISMISSED**. It is so **ORDERED**.

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

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

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

29 MAY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/3/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 5 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

ej

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FINANCE,	:	DECISION
RESPONDENT.	:	

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

The Board's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that the Board is not able to advance a thorough and efficient education to its pupils based on the Department's reduction of its state aid. It argues that "the Department of Education and the Administrative Law Judge misinterpreted and misapplied *N.J.S.A.* 18A:7D-3" in that it, "does not on its face require that municipal surplus be included as 'revenue' for purposes of debt service aid calculations." (Board's Exceptions at p. 5) From these arguments, the Board infers that the Department must be precluded from reducing the Board's state aid for debt service.

The Board further excepts that the Department's interpretation and application of *N.J.S.A.* 18A:7D-3 was made without sufficient notice to petitioner. It argues that the ALJ limited its argument concerning notice in the initial decision in that,

> ***the "insufficient notice" alleged by Petitioner was intended to allege that the Department of Education's interpretation of *N.J.S.A.*

> 18A:7D-3, insofar as it did not consider a municipal donation from municipal surplus as local tax effort, was made without sufficient notice.*** (Board's Exceptions at p. 8)

The Board further avers that the ALJ misapplied the summary judgment standard as set forth in *Brill, supra.* (Board's Exceptions at p. 10) The Board contends that the ALJ's statement that the evidence suggests that the Board can provide its students a thorough and efficient education without the money at issue is an insufficient basis to decide the case. Lastly, the Board states that the ALJ misapplied the Doctrine of Equitable Estoppel, which protects public entities except where it would result in manifest injustice, because "[P]etitioner is not a private party and does not stand in the shoes of a private party." It further argues that the Board relied to its indisputable detriment on the initial aid calculations supplied by the Department. *(Id.* at p. 11)

In reply exceptions, the Department attempts to refute each point raised in the Board's exceptions first stating that the donation by the Board to the school district was intended for debt service. The Board could have appropriated the amount required for debt service from local taxation but chose not to do so. "Instead," it avers, "the Petitioner sought to reduce taxes and must live with the consequences of that decision." (Department's Reply Exceptions at p. 8) With regard to the Board's claim of improper notice, the Department avers that the Board's state aid was adjusted in the prior year and, thus, petitioner was aware of the process and that adjustments would be made to the state aid for debt service after the school districts completed their budgets. Thus, based on the Board's previous experience, the Department argues that the Board's "argument concerning a lack of notice must be rejected." (*Id.* at p. 9)

The Department next sets forth reasons why the ALJ correctly applied the proper summary decision standard. (*Id.* at p. 10) First, it argues that the Board offered no evidence to demonstrate that its students would be denied a thorough and efficient education without the money at issue. Secondly, it points out that both parties moved for summary decision and, therefore, the Board cannot argue that it was inappropriate in this case.

Finally, the Department contends that the Doctrine of Equitable Estoppel was not incorrectly applied in this case. Moreover, it argues that "regardless of the estoppel standard applied, Petitioner failed to establish that the Department concealed or misrepresented a material

fact that was relied upon by the Petitioner to its detriment" but rather applied the definition of "net debt service" in *N.J.S.A.* 18A:7D-3 as written. (Department's Reply Exceptions at p. 12)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the Department is entitled to summary judgment based on applicable law. See *N.J.S.A.* 18A:7D-3 and *Brill, supra,* and *Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J.* 67 (1954).

The Commissioner is further satisfied that the ALJ sufficiently addressed the timeliness and estoppel issues in the initial decision and that the Board's exceptions in this regard are without merit.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and dismisses the within Petition of Appeal.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 18, 1996
DATE OF MAILING JULY 19, 1996

313-96

EDU #8275-95
C # 313-96
SB # 50-96

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,

PETITIONER-APPELLANT,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FINANCE,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 18, 1996

For the Petitioner-Appellant, Arthur Stein & Associates (Christopher J. Vaz, Esq., of Counsel)

For the Respondent-Respondent, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

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

December 4, 1996

Date of mailing DEC 06 1996

petitioner's desire to rescind his resignation was after receipt of the July 17, 1995, letter from his attorney which is attached hereto as Exhibit "F". This firm, as counsel for the respondent Board, responded to petitioner's counsel letter by letter, dated July 31, 1995, attached hereto as Exhibit "G"). This letter to petitioner's attorney merely reiterated that the respondent Board had formerly accepted petitioner's resignation letter on August 30, 1994, effective July 1, 1995. Accordingly, petitioner's attorney was advised that the respondent Board considered petitioner retired effective July 1, 1995.

On or about October 26, 1995, petitioner filed a Petition of Appeal to the Commissioner of the Department of Education seeking to rescind his employment resignation and reinstatement to a position with the respondent Board of Education. On or about March 15, 1996, petitioner filed an Amended Petition of Appeal again seeking reinstatement with the respondent and also back-pay, salary, other benefits and attorney fees. By this Motion for Summary Decision, respondent seeks dismissal of the Petition of Appeal for the reasons provided herein.

POINT I

THE PETITIONER OF APPEAL IS TIMED BARRED PURSUANT TO THE PROVISIONS OF N.J.A.C. 6:24-1.2(C)

N.J.A.C. 6:24-1.2(c) is essentially a statute of limitations for school controversies and disputes and provides as follows:

> The petitioner shall file a petitioner no later that the 90th day from he date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

It is now well-settled law in the State of New Jersey that the Commissioner of the Department of Education, and the State Board of Education, have the authority to adopt the so-called 90 day rule and that said rule is a valid enforceable regulation. Kaprow v. Berkeley Township Board of Education, 225 N.J. Super. 76 (App. Div. 1992), aff'd 131 N.J. 572 (1993); Nissman v. Board of Education, 272 N.J. Super. 373 (App. Div. 1994). In fact, the Commissioner of Education and the Courts have held on numerous occasions that failure to comply with the requirements of N.J.A.C. 6:24-1.2(c) must result in dismissal of a Petition of Appeal. Kaprow, Id; Nissman, Id. North Plainfield Educ. Ass'n v. Board of Educ. North Plainfield Borough, 96 N.J. 587 (1984); Riely v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980); Portee v. Newark Board of Education, 94 N.J.A.R. 2d (EDU) 381; Raymond v. River Edge Borough Board of Education, 94 N.J.A.R 2d (EDU) 203; Sasse v. Board of Education Borough of Point Pleasant, 92 N.J.A.R. 2d (EDU) 339. Thus, the focus of this Court is properly placed upon the application of the so-called 90 day rule to the particular facts of this case.

Each and every one of the petitioner's allegations of wrongful acts by respondent emanates from the meeting conducted on January 15, 1994. Petitioner asserts that respondent wrongfully placed him under duress at this meeting and that as a result of such duress, or misrepresentations by respondent, petitioner submitted his resignation letter of February 10, 1994. Petitioner admits knowing that respondent would not act upon this resignation letter until its August 1994 meeting. (See Point 25, page 7 of petitioner's amended appeal.) Furthermore, petitioner admits that as of September 1, 1994, he had knowledge of the acceptance of his resignation by the respondent Board of Education. (See Point 27, page 7 of petitioner's amended appeal and letter to petitioner from Michael J. Ritacco dated, August 31, 1994, attached hereto as Exhibit "D").

Assuming arguendo the veracity of petitioner's allegations, it is respectfully submitted that the respondent Board took final action on the subject of petitioner's resignation at its August 30, 1994 meeting. Furthermore, the August 31, 1994 letter of

on which the consequences of the act is directly felt by the employee ..." Thus, it is respectfully submitted that the proper focus of this Court is upon the allegedly wrongful act of respondent's acceptance of a resignation letter which emanates from alleged acts of duress and/or misrepresentation.

It is not necessary for this Court to decide whether the Board acted correctly at its August 30, 1994 meeting. Rather, this Court must acknowledge that the respondent Board had the right to know within 90 days whether its action would be challenged. Nissman, supra. at page 380. "The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements." Kaprow, Supreme Court Decision, supra. at page 582.

In our case, the respondent formally acted upon petitioner's resignation letter. The petitioner's admits prior knowledge of this action as well as subsequent notification by letter dated August 31, 1994. Petitioner does not allege any additional wrongful acts by respondent subsequent to its final action on August 30, 1994. In fact, petitioner's resignation letter (Exhibit "C") and rescission letter (Exhibit "E") do not reference any alleged duress or misrepresentations. Rather, petitioner's rescission letter is premised upon his failure to obtain other employment due to medical reasons. Allegations of duress and misrepresentations do not arise until the filing of the petitioner in question which of course was subsequent to the attainment of legal counsel. In any event, the respondent School Board has the right to proceed with the administration of its large school district without litigation occurring over one year subsequent to its final action.

The 90 day rule provides finality in education matters. Kaprow, supra. at page 583. It provides a measure of repose essential to the proper and efficient administration of the school laws. Id. at page 582. Certainly, it provides a school Board with some stability in dealing with its financial affairs. It has stood the test of numerous reviews from the

Commissioner and Courts of our State, including the Supreme Court. See Kaprow Id. at page 583. It is respectfully submitted that the petitioner in this case had ample opportunity to file a claim within the allotted 90 day period. He failed to do so. The respondent has the right to expect the benefits provided to a school Board by virtue of the time honored 90 day rule.

In view of the above, it is respectfully submitted that petitioner failed to file his Petition of Appeal within 90 days from the date of his receipt of notice of the Board's final action, namely, September 1, 1994 and, therefore, said petition is barred pursuant to the provisions of N.J.A.C. 6:24-1.2(c).

POINT II

THE PETITION OF APPEAL IS BARRED BY OPERATION OF LAW

It is well-established law in the State of New Jersey that a resignation and/or retirement may not be unilaterally rescinded once same is accepted by a local school board. An acceptance effectively terminates employment and, therefore, the withdrawal of the resignation is ineffectual. Andrews v. Lamb, supra; Cutro v. Hazlet Township Board of Education supra; Fisher v. East Orange Board of Education, C.D. 5-88, 11 Jan. 88; Hanley v. East Brunswick Board of Education, C.D. 157-88, 9 Jun. 88. Of note, cases in this area include resignation for the purposes of retirement. Sathan v. North Brunswick Board of Education, supra.; and Murray v. Northern Highlands Regional Board of Education, supra. On the other hand, it is likewise well-established that a resignation may be withdrawn before it is accepted. Kozak v. Board of Education of the Township of Waterford, 1976 S.L.D. 633.

There are several cases which consider factual circumstances that affect the application of the above established general rule. In Hall v. Jefferson Township Board of

Education, 125 N.J. 299 (1991), the Court held that an early retirement notice could be rescinded. The primary basis for this holding was the past practices of the Board. Apparently, such rescissions had generally been routinely permitted. In addition, the Court noted that the ability to rescind could be impacted by provisions of a collective bargaining agreement. In Cutler v. Parsippany Troy Hills Board of Education, N.J. Super. (App. Div. A-1464-90T3, 27 Jan 92 rev's 1990 S.L.D. 725), the Court permitted rescission of an early retirement because the notice represented a conditionally tended resignation pursuant to a collective bargaining agreement provision. The operation of the condition was permitted to result in rescission of the notice. Petitioner does not allege any obligations by the Board pursuant to the terms of a collective bargaining agreement, or past Board practices and, thusly, Hall and Cutler are not applicable to the instant case.

In view of the above, and petitioner's appeal, it is assumed that petitioner will argue that he should be permitted to withdraw his resignation based upon the equitable remedy of rescission. The primary case supporting use of such an equitable remedy in cases of retirement and/or resignation appears to be Evaul v. Board of Education of City of Camden, 35 N.J. 244 (1961). In this case, petitioner was a tenured teacher with twenty-five years of service. She had differences with her supervisor and staff members, over her workload and other issues, which lead to a meeting with the school principal, Superintendent, and the President of the Local Board of Education. The forty minute-meeting was heated and acrimonious." Evaul, supra. at page 246. The petitioner was extremely distraught and later the same day, a Friday, met with the Superintendent and announced "I can't take anymore of this and I have a few thousand, I'll resign." Ibid. at page 247. The Superintendent advised her not to be hasty and to think it over until Monday. However, the petitioner wrote a resignation note, placed it on the secretary's desk and left. The resignation note refers to false accusations and attacks on her reputation. Id. The petitioner was unaware that a special meeting of the school board was scheduled for that very night. It was at this meeting that the local board accepted petitioner's resignation.

Despite the above factual circumstances the Evaul Court noted, at page 249, that "the record does not disclose any conduct by the school officials which amounts to duress." However, the Court ordered reinstatement because "It was an extraordinary concatenation of events which resulted in a loss to appellant of her tenure, seniority and pension rights acquired during twenty-five years of service." Id. The Court summed up the events by mentioning the emotional meeting with her department head followed immediately by the unanticipated and tempestuous confrontational meeting noted above. The resignation was an impetuous act induced by a distraught condition. The emotionally charged words used in the resignation note evidence of her condition. Unknown to petitioner, the Board met and accepted her resignation that very night. Without such a meeting, her prompt attempt at rescission, two days later, would have been effective. Lastly, the Court noted that her prompt rescission resulted in the Board not taking any action in reliance upon her resignation.

It is especially submitted that the instant case is easily distinguished from Evaul, the leading case for equitable rescission of resignations. In the instant case, the meeting of January 15, 1994 was not an impromptu affair. Rather, it was a prearranged meeting at which petitioner was represented by the President of the employee union. Certainly, the head of the union was aware of petitioner's rights and alternatives. At the very least the Union President could assure that petitioner was not railroaded as alleged in his Petition of Appeal. In any event, petitioner's resignation was not an impetuous act. He took about a month to think things over before submission of his resignation on February 10, 1994. Furthermore, he was aware that respondent Board was not going to act upon the resignation until its August meeting. Thus, petitioner had ample time to reconsider and was not surprised by the Board's acceptance of his resignation on August 30, 1994. It is also noteworthy that petitioner's resignation letter (Exhibit "C"), as well as his rescission letter (Exhibit "E") do not bear any evidence of duress or emotional distress resulting from the meeting of January 15, 1994. Lastly, unlike Evaul, where rescission was attempted two days later, the petitioner waited until July 28, 1995, some one and a half years, to

attempt rescission. Additionally, petitioner did not file his Petition of Appeal until October 1995 over one year since the date of the Board's acceptance of the resignation.

In view of the above, it is respectfully submitted that for purposes of this Motion undisputed facts lead to the conclusion that the equitable remedy of Evaul is not applicable to the present case. Under circumstances more disturbing that those alleged in the instant case, the Evaul Court noted no duress, and the instance case lacks the unique compilation of circumstances noted in Evaul. Thus, the record is void of sufficient allegations to properly justify utilization of the equitable remedy of rescission. Therefore, it is concluded that the general rule of law which prohibits unilateral rescission after a Board's acceptance of a resignation and/or retirement must as a matter of law be applied to the instant case.

Assuming arguendo that this Court accepts an argument from petitioner that the 90 day period of N.J.A.C. 6:24-1.2(c) begins with the alleged July 1995 denial of rescission, it is respectfully submitted that, in such event, the general rule of law which prohibits rescission of resignations or retirements after a Board's acceptance must still be applied. A conclusion that the 90 day period emanates from the date of the alleged July denial of petitioner's rescission request can only be reached if the Court concludes that the Board's denial of rescission is the wrongful act which this appeal. If the allegations of duress or misrepresentations trigger the appeal, it would be barred by the 90 day rule as discussed in Point I herein. Certainly, it would be inequitable for this Court to allow petitioner to argue that the alleged wrongful act of refusal to rescind applies for purposes of the 90 day rule, but the alleged acts of duress or misrepresentation, inapplicable for the 90 day rule, still apply to avoid the general rule that a resignation or retirement cannot be unilaterally rescinded after a Board's acceptance. It would seem that such a result effectively allows petitioner to have his cake and eat it too.

In view of the above, it is respectfully submitted that the general rule of law which prohibits unilateral rescission of a resignation and/or retirement after a Board's acceptance

must be applied to the instant case and, therefore, the Petition of Appeal should be dismisses.

POINT III

THE PETITIONER OF APPEAL IS BARRED BY EQUITABLE PRINCIPLES

The doctrine of laches is an equitable principle which has been defined by the Courts as a "delay for a length of time, which unexplained and unexcused is unreasonable under the circumstances and has been prejudicial to the other party." Old Republic Insurance Company v. Currie, 284 N.J. Super. 571, 577 (Ch. Div. 1995); citing West Jersey Title and Guaranty Company v. Industrial Trust Company, 27 N.J. 144 (1958).

In the instant case, petitioner filed his resignation on February 10, 1994. Obviously, petitioner was well aware of the events which had occurred at the January 15, 1994 meeting. He was represented at the meeting by the President of the union. It would seem reasonable that the purpose of the union President at the meeting was to advise petitioner of all his rights as an employee of respondent school Board. In any event, petitioner was present at the meeting and, therefore, had one month subsequent to the meeting petitioner filed his resignation letter.

The one month period between the date of the meeting and petitioner's resignation letter provided ample opportunity for consideration of all available options. There was sufficient time to discuss the matter with union officials, or other, and obtain advice. Certainly, there was more than enough time to consider the events of the meeting of January 15, 1994.

Petitioner readily admits knowledge of the fact that the Board was not to act upon his resignation letter of February 10, 1994 until its August 1994 meeting. Without being

repetitious, it is respectfully submitted that again this time duly provided petitioner ample opportunity to consider all options and weigh his alternatives. It should also be remembered that in June of 1990, petitioner's former position as food services instructor had been eliminated. Thus, he had personal knowledge of all the relevant procedures and employee rights resulting from such an elimination.

Despite the above, petitioner's resignation letter contains no hints of duress or misrepresentations. In fact, at its August 30, 1994 meeting, the Board had every reason to believe petitioner had simply retired. The petitioner had not provided a single shred of evidence or indication to the contrary. Thus, the Board fairly relied upon the submitted retirement/resignation letter, and inaction by the petitioner, in acting to accept the submitted letter. The respondent relied upon this retirement in proceeding with administrative plans for its schools. If petitioner had notified the Board, prior to its August 30 meeting of his intent not to retire, the Board may have gone through the required procedures for elimination of his position for reasons of economy. At such time, petitioner would have been afforded all his rights as a tenured teacher, just as he was on the prior occasion. However, the petitioner's silence deprived the Board of the opportunity to consider all options and take appropriate action the best interests of the school district.

Petitioner despite prior knowledge of his rights and the circumstances of the meeting of January 15, 1994, chose to sleep on his rights. He admits prior knowledge of the Board's August 1994 consideration of his resignation and formal receipt of notification of the Board's acceptance of his resignation on September 1, 1994. Still he continued to sleep on his rights through the entire 1994-1995 school year. It was not until July 28, 1995, that an attempt was made to rescind his resignation. Even his resignation letter did not inform the Board of any alleged acts of duress or misrepresentation at the meeting of January 15, 1994. These allegations first appeared only in the Petition of Appeal filed on October 26, 1995, or nearly two years after the January 1994 meeting.

Often denial of a claim based upon the equitable doctrine of laches hinges upon reasonable reliance to its detriment by the adverse party. State, DEPE v. Dopp, 268 N.J. Super. 165, 176 (App. Div. 1993); citing Lavin v. Hackensack Board of Education, 90 N.J. 145 (1992); Notch View Associates v. Smith, 260 N.J. Super. 190, 207 (Law Div. 1992). The Board in the present case reasonably relied upon the petitioner's resignation letter and acted accordingly. It treated the petitioner properly in light of his retirement and administered its schools accordingly. Yet petitioner through his appeal seeks retroactive application of tenure rights, back-pay and reinstatement. Thus, reliance upon the actions of petitioner has obviously placed respondent in a position of potential detriment.

As discussed by the Court in Notch View, supra. at page 207, the same factual circumstances that result in application of the doctrine of laches can effectively create an estoppel. "Estoppel by laches" is defined as a failure to do something which should be done or to claim or enforce a rift at a proper time." Id. Petitioner in the present case with full knowledge of the events of January 15, 1994, union representation, and personal knowledge of the position elimination process allowed respondent to rely upon his resignation letter. Furthermore, petitioner continued to sleep on his rights for nearly two years. Petitioner now seeks to punish respondent for its good faith reliance by retroactive application of tenure claims, back-pay and reinstatement. It is respectfully submitted that application of such rights at this time is barred in equity. The delay by petitioner is too inequitable and operates as an estoppel against his present claims. Id.; State v. DEPE. Supra, at pages 175-176.

"Equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use." Sears Mortg. Corp. V. Rose, 257 N.J. Super. 33, 47 (App. Div. 1992), rev'd on other grounds, 134 N.J. 26 (1993). Whether the argument contained herein is classified as laches, estoppel by laches or equitable estoppel is really immaterial. The important fact is that it is simply unfair for this Court to allow petitioner or assert his appeal at this time. The delay is filing the appeal is inexcusable and unreasonable under the factual circumstances as

described above. Respondent Board, in good faith, relied upon the resignation letter, and the inaction of petitioner relative to same. Permitting the petitioner, some two years later, to assert claims will unfairly prejudice respondent.

In view of the above, it is respectfully submitted that the Petition of Appeal is barred by equitable principals and, therefore ,should be dismissed.

PETITIONER'S POSITION

STATEMENT OF FACTS

Petitioner, Charles E. Willson, III ("Petitioner") (DOB 5/31/44) was initially employed on or about September 1, 1970 by the Toms River Regional Schools Board of Education as a certified teacher. Petitioner was subsequently tenured and served primarily, although no exclusively, as a food services instructor until February 10, 1992 when he as transferred to the respondent's Alternate School Learning Center ("Alternate School") as an employment orientation/food program teacher. The Alternate School served special needs pupils in grades nine to twelve who had experience serious learning and/or conduct problems in the conventional high school program. See Affidavit which is attached hereto made a part hereof and marked Exhibit "A". Petitioner's annual evaluations, since his initial employment, were in all instances, prior to this assignment, satisfactory. Exhibit "A".

Petitioner held at the time of this assignment and still holds, a valid New Jersey Instructional Certificate with the endorsements of: teacher of baking; teacher of commercial food/serving; teacher of production, personal or service occupations; teacher of commercial food preparation. Petitioner also held at the time of this assignment, and still holds, a valid Educational Services Certificate with endorsements of: coordinator of apprentice programs; coordinator cooperative industrial education and a valid Administrative Certificate with endorsements of: supervisor, principal/supervisor; and,

assistant executive superintendent/specialization in supervision and curriculum. Exhibit "A".

Petitioner's duties in this position were generally to provide pupils with an instructional program in food preparation and, as a part of an outcome of the instructional program, to feed each day approximately fifty (50) pupils and ten (10) adult staff members. Exhibit "A". Steven Finkelstein ("Finkelstein") was the Director and Administrator of the Alternate School. Petitioner's evaluation for the 1992-93 school year, which included his performance in this new assignment was satisfactory. Exhibit "A".

Petitioner subsequent to this new assignment and prior to January 15, 1994, several times expressed concern to Finkelstein regarding the problems associated with petitioner's dual responsibilities of providing an instructional program for his special needs pupils and at the same time, feeding all pupils and staff members in the Alternate School. Exhibit "A". Also petitioner, during this period, expressed concern to Finkelstein regarding funds which had been budgeted for petitioner's instructional program and then reallocated to other school-wide purposes, thereby increasing the tension between the aforementioned responsibilities of petitioner in his assignment. Exhibit "A".

During this same period and continuing to on or about January 15, 1995, Finkelstein was critical of petitioners teaching performance expressing concern about such and sending at least two (2) memoranda critical of petitioner's performance as a teacher. Exhibit "A". A copy of these memoranda are attached hereto, made a part hereof and marked Exhibit "B". Finkelstein made no classroom observations of petitioner. Exhibit "A".

On or about January 1, 1994, petitioner was informed by Finkelstein that Finkelstein and Senior Assistant Superintendent John Garrabrant ("Garrabrant") were to meet with petitioner regarding alleged problems that petitioner was having teaching pupils.

Exhibit "A". Petitioner requested that Jay Wilkinson ("Wilkinson"), President of the Toms River Education Association, attend the meeting as he believed it was to be a disciplinary meeting. Exhibit "A". On or about January 15, 1994, petitioner was summoned to a meeting which included Garrabrant, Finkelstein, Robert Rapp ("Rapp"), who was Supervisor of Business and Technology and petitioners immediate supervisor and Wilkinson. Exhibit "A". At all times pertinent to this matter Finkelstein, Garrabrant and Rapp were agents, employees, and officers of respondent. Exhibit "A". During the meeting Garrabrant who was the spokesperson for respondent informed petitioner that petitioner was to submit his resignation effective at the end of the 1994-95 school year, or respondent will curtail petitioner's institutional program and terminate petitioner effective the end of the current year in June 1994. Exhibit "A". Petitioner was also informed by Garrabrant that he was not qualified for any other positions with respondent and consequently he would be unemployed upon termination. Exhibit "A". Respondent continues to state that determination in its answer to the petitioner's petition. Petitioner was also informed that resignation at the end of his twenty-fifth year of service (June 1995) was desirable as he obtained additional benefits upon retirement after twenty five years of service. Exhibit "A". Respondent did not offer petitioner an option to be placed on a preferred eligibility list if he was terminated as he is entitled to under N.J.S.A. 18A:28-9 et seq. and indeed this option was precluded by implication of Garrabrant's statement that there were no other positions for which he was qualified. Exhibit "A". Petitioner was given no option other than those stated to him by Garrabrant. Exhibit "A". Petitioner was 48 years old at the time of the meeting. Exhibit "A". Petitioner is not eligible to retire with benefits until he is 55 years of age in 1999. Exhibit "A". Petitioner faced the loss of employment upon termination at the end of school year 1993-94 or loss of employment at the end of school year 1994-95. Petitioner was aware of respondent's animus toward him as embodied in Finkelstein's conversation and memoranda. Exhibit "A". Petitioner's wife was, at the time of this meeting and is now, an employee of respondent and he was concerned that she remain uninvolved in any issues he might raise with respondent. Exhibit "A". Under the duress of these threatening statements and

conditions and on the basis of there threatening statements and conditions, petitioner had no alternative but to submit is resignation on or about February 10, 1994. Exhibit "A".

Petitioner subsequent to submitting his resignation was informed that his resignation would be acted upon by respondent Board at the August 1994 school board meeting and such resignation was acted upon by respondent Board at the August 30, 1994 meeting.

These threatening statements and conditions in full force and affect upon petitioner from January 15, 1994 to the end of the school year 1994-1995. Exhibit "A". Petitioner was still subject to termination by respondent. Exhibit "A". The animus of Finkelstein continued. Exhibit "A". See letter of October 6, 1994 from Finkelstein to petitioner which is attached here and made a part hereof and marked Exhibit "C". Petitioner was still years away from eligibility for retirement with benefits and his wife was still employed by respondent. Exhibit "A". On March 29, 1994 and January 15, 1995, petitioner was injured when he intervened to stop a fight between students at the Alternate School and petitioner continues to experience pain from these injuries. Exhibit "A".

Prior to June 30, 1994, Rapp observed petitioner's classroom performance and met with petitioner to discuss the observation and his evaluation for school year 1993-94, which evaluation was determined by Rapp to be satisfactory. Exhibit "A". During that conference, petitioner also inquired of Rapp whether the respondent was still insisting on petitioner's resignation and was informed by Rapp that as far as he knew such was the case. Exhibit "A".

Petitioner received notice of the respondent's acceptance of is resignation on or about September 2, 1994.

On or about June 27, 1995, petitioner in an effort to remedy his situation, requested in writing that his resignation be rescinded. Exhibit "A". Respondent denies

receiving the letter but admits receiving a copy of such letter on July 17, 1995. A true and correct copy of petitioner's request and proof of delivery by Federal Express is attached hereto, made a part hereof and marked Exhibit "D".

On or about July 17, 1995, the petitioner requested a letter confirming petitioner's continuing employment by the respondent, a copy of this letter is attached hereto, made a part hereof and marked Exhibit "E".

On or about August 2, the petitioner received a letter from respondent which in effect denied: petitioner's rescindment of his resignation; petitioners reinstatement and, in effect terminated his employment. A copy of this letter is attached hereto, made a part hereof and marked Exhibit "F". Petitioner seeks other employment but has not been successful in obtaining a satisfactory position. Exhibit "A".

On or before August 30, 1994, the date of respondent's acceptance of petitioner's resignation, the Board had a vacant position titled Community Action Program Coordinator ("CAP") for which petitioner is qualified. Exhibit "A". Respondent did not disclose such vacancy to petitioner. Exhibit "A".

On October 26, 1995, petitioner filed his Petition of Appeal.

Petitioner learned upon receipt of answers to interrogatories from respondent on March 3, 1996 that petitioner is qualified for the CAP position by virtue of his certification, experience and tenure. Exhibit "A". See correspondence dated June 9, 1995 from Garrabrant to Wilkinson which is attached hereto, made a part hereof and marked Exhibit "G".

Also petitioner learned since filing his petition that respondent has an individual named Joseph Arminio who is employed at respondent's East High School in a position

which was present in the school district during the 1994-1995 school year and for which petitioner is qualified for by tenure, certification and experience. Exhibit "A".

Petitioner has through supplementary interrogatories sought to obtain additional information regarding other positions within respondent's school district, for which petitioner may be qualified, but as yet has not received answers to these interrogatories. Exhibit "A".

Petitioner filed an Amended Petition of Appeal on March 15, 1996. Petitioner seeks reinstatement, backpay, salary and other benefits, and attorneys fees based upon two causes of action; duress (Count I) and in the alternative Misrepresentation (Count II).

POINT I

THE PETITION OF APPEAL IS NOT BARRED BY OPERATION OF LAW AS PETITIONER SEEKS RELIEF THROUGH THE EQUITABLE POWERS OF THE COURT IN THAT HIS RESIGNATION IS VOID AND, IN THE ALTERNATIVE, VIOLABLE BECAUSE OF RESPONDENT'S WRONGFUL CONDUCT

Petitioner seeks relief in this matter on the basis of the Court's equitable powers to set aside petitioner's resignation as void or rescind (Rescission) petitioner's resignations as voidable and grant petitioner reinstatement among the relief.

Petitioner's resignation is void in that it was submitted under circumstances which constitute duress and in the alternative is voidable because petitioner was induced to submit his resignation by an equitable misrepresentation made by respondent's agents.

Petitioner submitted his resignation on February 10, 1994, which was effective July 1, 1995. Petitioner's resignation was submitted under duress by respondent and therefore

is void and not binding. Gobac v. Davis, 62 N.J. Super., 148 (Law Div. 1960); Brunnquell v. Scotch Plains Reg. Board of Education, 1987 S.L.D. (rem'd of St. Bd. of ed.); Milk Drivers & Dairy Emp. Local No. 680, 133 F. Supp. 336 (D.C.N.J. 1955).

In the alternative petitioner and respondent entered into a contract which was executory based upon the terms offered by respondent in the meeting of January 15, 1994 whereby petitioner was to submit his resignation, effective July 1, 1995, and in consideration respondent was not to terminate petitioner.

Petitioner then submitted his resignation effective July 1, 1995, and respondent did not terminate petitioner at the end of the 1993-1994 school year. Black's Law Dictionary, Fifth Ed., at 290-291, "Contract" Cohn v. Fisher, 118 N.J. Super. 286 (1972).

Petitioner's resignation pursuant to this agreement was induced by a material misrepresentation and is voidable. Jewish Center of Sussex Cty. V. Whale, 86 N.J. 619.(1981) Restatement (Second) of Contracts ξξ 159, 161, 162 (2) and 164 (1).

In Gobac the plaintiff, a tenured investigator for the New Jersey Division of Alcoholic Beverages who, during an interview with his superior, arranged for the purpose of discussing his complaints regarding working conditions, was presented with a request to submit his resignation or face dismissal because he allegedly "tipped off" a license of the Division about a pending investigation. The defendant cited the advantages of a resignation over a termination. Plaintiff submitted his resignation at the conclusion of the conference which was accepted by defendant. Plaintiff was not offered the opportunity for a termination hearing which he was entitled to as a tenured employee. Plaintiff subsequently rescinded his resignation and requested reinstatement which was refused by defendant. Plaintiff then sued for reinstatement and back pay. The Court determined that the resignation was obtained under duress, declared it void, and reinstated plaintiff. The Court's analysis is instructive in this matter. In defining duress the Court stated:

> Duress in its more extended sense means that degree of constraint or danger, either actually inflicted or threatened and impending, sufficient in severity or in apprehension to overcome the mind or will of a person of ordinary firmness, according to the earlier rule, but now, by the weight of modern authority, such as in fact works control of the will. *** In the modern view, moral compulsion or psychological pressure may constitute duress, if, thereby, the subject of the pressure is overborne and he is deprived of the exercise of his free will. The question is whether consent was coerced; that is, was the person complaining "induced by the duress or undue influence to give his consent, and would not have done so otherwise." *** The tendency of the more recent cases, and the rule comparing with reason and principal, is that any "unlawful threats" which do "in fact overcome the will of the person threatened, and induce him to do an act which he would not otherwise have done and which he was not bound to do, constitute duress."

Gobac at 157 citing to Rubenstein v. Rubenstein 20 16t 359.

Discussing the test to be invoked in the determination of whether or not duress was employed, the court further stated:

> It would seem to be basic to the legal concept of duress, proceeding as it does from the unreality of the apparent consent, that the controlling factor be the condition at the time of the mind of the person subjected to the coercive measures, rather than the means by which the given state of mind was induced, and thus the test is essentially subjective.

Id. at 157 citing to Rubenstein.

The Court stated:

> The test of duress is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed - the fear which made it impossible for him to exercise his own free will. Threat must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person, and must have that effect; and the act

> sought to be avoided must be performed by such person while in such condition.

Id. at 158 citing to Fountain v. Bigham, 235 Pa. 35, 84A. 131 (Sup. Ct. 1912).

The Court determined that an essential element of duress is that the threat or pressure exerted upon the individual is wrongful. Id. In considering wrongful the Court stated:

> The act or conduct complained of need not be "unlawful" in the technical sense of the term; it suffices if it is "wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse." It was said in a recent case that duress is tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. And the "state of a man's state of mind is as much a fact as the state of his digestion."

Id. at 158 citing to Rubenstein.

In Brunnquell the Court heard the matter on remand of the State Board of Education in an evidentiary hearing to determine whether a resignation was a product of duress. Petitioner Brunnquell submitted his resignation to respondent Board and it was accepted. Approximately five months after such acceptance petitioner filed a petition seeking rescission of his resignation on the basis of its involuntariness.

The Court opined:

> It is basic that a resignation from one's employment, thereby waiving all accrued rights to employment, must be knowingly and voluntarily proffered without duress or coercion. A resignation may be withdrawn at any time before it is accepted, but after the resignation has been accepted it is effective as against the subsequent attempt to withdraw, even though the teacher attempts to withdraw before the effective date of his resignation. If duress is established then the resignation and acceptance may be void.

Brunnquell at 16 (emphasis added).

The facts in this matter are analogous to Gobac. Like Gobac, petitioner was a tenured employee. Exhibit "A". Petitioner had rendered satisfactory service for 23 years. Id. Following a change in administrators petitioner then found himself subject to critical evaluation and animus from Finkelstein despite his previous record of satisfactory performance. Id. As in Gobac was informed that his teaching problems were to be subject of a meeting with his superiors all of whom were administrative officers of respondent Board. Id. As in Gobac, petitioner was told to resign with an effective date in the future or he would be terminated prior to that effective date. Id. As in Gobac, petitioner was given no other choices. Id. Respondent did not offer to place petitioner on a R.I.F. list if he was terminated at the end of the school year 1993-1994 or at the end of the 1994-1995 school year. Id. Petitioner has this right as a tenured teacher. Id. Moreover, petitioner was told that there were no positions for which he was qualified thus precluding any reasonable consideration by petitioner of placement on a R.I.F. list as an alternative to resignation. Id. Petitioner has since discovered that he is qualified for, at least, two positions. Id. As in Gobac, petitioner was advised of the benefits of resigning as opposed to being terminated. Id. This conduct was clearly so oppressive in petitioner's circumstances as to constrain his free will to refuse respondent's offer to resign. Id. The duress continued in full force and effect from January 15, 1995, when petitioner sought to rescind his resignation and return to work. Id. Petitioner was still subject to termination by respondent. The criticism by Finkelstein continued. Id. and Exhibit "C". Petitioner was still years away from retirement and his wife was still employed by respondent. Id. Petitioner was injured in two school related matters. Id. Rapp informed him that respondent still insisted on his resignation. Id. As in Gobac the circumstances under which petitioner resigned constitute duress and, petitioner requested his letter of resignation be withdrawn prior to its effective date. Id. As in Gobac, respondent Board refused such request of petitioner and petitioner was wrongfully terminated.

Respondent cites Eval v. Board of Education of City of Camden, 35 N.J. 244 (1961) in its argument that rescission should not be granted in this matter. Petitioner does contend that upon closer examination, the Court in Eval recognized a plaintiff's right to set aside or rescind, based upon equitable principles including duress among others when it stated "Although the record does not disclose any conduct by the school officials which amounts to duress *** we think that the circumstances of this case required the reinstatement of the appellant on equitable principles." Id. at 249. Consequently petitioner's resignation was submitted under duress and should be set aside as void. Gobac; Brunnquell.

In Jewish Center of Sussex County v. Whale, supra., plaintiff, a religious congregation, sought rescission of its contact of employment with defendant, a rabbi. Defendant applied for the position of rabbi with plaintiff congregation. He submitted a brief resume to plaintiff and met with the congregation. Defendant's application stated that he was employed during the years of 1970-1977.

Following negotiations the parties entered into an employment contract. Approximately four months after entering into this agreement, plaintiff discovered that defendant was a convicted felon who, within the period wherein he reported employment on his resume, had been convicted and confined to a federal penitentiary, and disbarred as an attorney.

After discovering these additional facts about defendant, plaintiff rescinded the employment contract and notified defendant. Plaintiff filed suit alleging fraudulent misrepresentation. There were no allegations of unsatisfactory service against defendant. The trial court granted plaintiff summary judgment.

Defendant appealed arguing that plaintiff had failed to establish materiality of the misrepresentation and, defendant's intent to defraud or any injury suffered by plaintiff as a

result of defendant's conduct. The Appellate Court affirmed and defendant appealed. In affirming, the New Jersey Supreme Court stated the following:

> Every fraud in its most general and fundamental conception consists of the obtaining of an undue advantage by means of some act or omission that is unconscientious or a violation of good faith. Id. at 64 citing to 3 J. Pomeroy, A Treatise on Equity Jurisprudence 421 (5th ed. 1941).
>
> Depending on the remedy sought, an action for fraud may be either legal or equitable in nature. Id. citing to Commercial Cas. Ins. Co. v. Southern Sur. Co., 100 N.J. E.q., 92, 96 (Ch. 1926), aff'd, 101 N.J. E.q. 738 (E.& A. 1927); 3 J. Pomeray, at 419.
>
> A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to is detriment. Id. citing to Foont-Freehendeld v. Electro-Protective, 126 N.J. Super. 254 at 257 (App. Div. 1973), aff'd 64 N.J. 197 (1974).
>
> The elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom *** are not essential if plaintiff seeks to prove that a misrepresentation constituted only equitable fraud. Id. at 625 citing to Equitable Life Assurance Soc'y v. New Horizons, Inc. 28 N.J. 307 at 314 (1958) and Metropolitan Life Ins. Co. v. Tarnowski, 130 N.J. E.q. 1,3 (E. & A. 1941).

The Court's reasoning is instructive in our matter. The Court stated that plaintiff had met its burden of proving equitable fraud as it sought an equitable remedy, rescission of the employment agreement and therefore scienter did not have to be proved. Id. Further, defendant's application contained false representation as to his experience during 1970-1977. Id. The court determined that the representation was material in that it related to plaintiff's defendant intended plaintiff's to rely on the information in the application in considering its employment decision. Id.

Further proof of reliance, the Court reasoned, was that plaintiff had made no inquiry of defendant which would have reasonably required defendant to advise plaintiff of his disbarment and conviction. Id. at 626.

With respect to defendant's allegations that plaintiff suffered no damage, the Court stated:

> He contends that inasmuch as plaintiff failed to prove actual damage, its motion for summary decision based on fraud must fail. This argument misconstrues the nature of equitable fraud. Actual loss in the financial sense is not required before equity may act: equity looks not to the loss suffered by the victim but rather to the unfairness of allowing the perpetrator to retain a benefit unjustly conferred. Thus in awarding an equitable remedy like rescission, the claimant's actual damage is only one factor to be considered.

Id. at 626 citing to Prosser, The Law of Torts at 732 (4th ed. 1971).

Petitioner's situation in this matter is analogous to the plaintiff in Jewish Center. Petitioner, like plaintiff in Jewish Center, entered into an agreement with respondent's agents pertaining to his employment. Black, Cohn. Like plaintiff in Jewish Center he was offered as an inducement a misrepresentation which was material and upon which it was reasonable for him to rely, given the person making the assertion. In Jewish Center, the misrepresentation it was the defendant regarding his past work experience upon which it was reasonable for plaintiff to rely in determining whether to employ defendant. In our matter it was Garrabrant's assertion that there were no positions for which petitioner was qualified and Garrabrant's failure to disclose prior to August 30, 1994.

In summary, the Petition of Appeal is not barred by operation of law as petitioner seeks relief through the equitable powers of the Court in that his resignation is void and in the alternate voidable because of respondent's wrongful conduct.

POINT II

THE PETITION OF APPEAL IS TIMELY UNDER N.J.A.C. 6:24-1.2(c) AND, IN THE ALTERNATE, WARRANTS RELAXATION OF THE 90 DAY RULE IN ACCORDANCE WITH N.J.A.C. 6:24-1.15.

N.J.A.C. 6:24-1.2 (c) states in pertinent part "the petitioner shall file a petition no later that the 90th day from the date of receipt of the notice of a final ... ruling to other action by the district board ... which is the subject of the requested case hearing." Id.

Petitioner's resignation is void and without legal effect in that it was submitted under duress and in the alternate voidable in that it was induced by a misrepresentation by respondent. Point I. The duress continued until at least the end of the school year 1994-1995. Point I; Exhibit "A". The misrepresentation was discovered March 2, 1996. Id.

In this matter the notice of final ruling and/or action of the respondent was received on August 2, 1995. Exhibit "F". Petitioner's Petition of Appeal was filed on October 26, 1995 and thereby timely.

Petitioner rescinded his resignation and sought reinstatement on June 27, 1995 Exhibits "A" & "D". Further, petitioner sought confirmation of his continued employment in his counsel's letter of July 17, 1995. Exhibits "A" & "E". Petitioner was notified on August 2, 1995 that: his resignation was not rescinded; that he was not reinstated and he was considered retired which terminated petitioner's employment. Exhibit "A".

It is the notice petitioner received on August 2, 1995, from which petitioner appeals to the Commissioner of Education. However, one of the wrongful acts which has its source in respondent's conduct, on January 15, 1995 and from which appeal is made is respondent's precluded from going forward with his claim. Martin v. Rochells Park Twp.,

144 N.J. Super. 216 (App. Div.) 1976. The same should be true in this matter and N.J.A.C. 6:24-1.2(c) should not bar petitioner's Amended Petition from a hearing on the merits.

Respondent relies on Nissman v. Board of Ed. 272 N.J. Super. 373 (App. Div. 1994) in support of its agreement that the final act giving rise to a claim for relief by petitioner is that notice of acceptance of petitioner's resignation which was received by petitioner on or about September 1, 1994. This case is to be distinguished from our matter. In Nissman the petitioner was a non-tenured employee who claimed she had earned tenure rights under N.J.S.A. 18A:28-5. In our matter petitioner is a tenured employee whose rights have been abrogated by the wrongful conduct of the respondent wherein the resignation submitted under duress and induced by a material misrepresentation.

In the alternate if the Court determines that petitioner's Petition is barred by N.J.A.C. 6:24-1.2(c), and petitioner maintains that it is not, then the 90 day rule should be relaxed in these circumstances to avoid an inappropriate and unjust preclusion of petitioner's appeal.

N.J.A.C. 6:24-1.5 states in pertinent part "The rules may be relaxed or dispensed with in any case where a strict adherence thereto may be deemed appropriate *** or injustice may result."

Equitable consideration can trigger N.J.A.C. 6:24-1.5. Polaha v. Buena Reg. Sch. Dist. 212 N.J. Super. 628 (App. Div.) 1986. Brunnquell v. Scotch Plains School Dist. 1987 S.L.D. 327 (on rem'd of St. Bd. of Ed.). In this matter petitioner seeks the equitable relief setting aside his resignation as void because it was submitted under duress and in the alternate granting his rescindment because the resignation was induced by a material misrepresentation. Point I.

Based upon the facts of this matter to preclude petitioner from going forward with his Petition and being heard by the Court, could be inappropriate and unjust.

Consequently, it is respectfully submitted that the within Petition of Appeal is timely and not barred by N.J.A.C. 6:24-1.2(c) and, in the alternative, the Court should relax the 90 day rule of response as provided for in N.J.A.C. 6:24-1.15.

POINT III

RESPONDENT'S ARGUMENT THAT PETITION OF APPEAL IS BARRED BY LACHES OR PRINCIPLES OF ESTOPPEL IS WITHOUT MERIT

Respondent contends that the equitable doctrines of laches and estoppel bar petitioner's claim.

In defining laches, the New Jersey Supreme Court stated that this equitable principle which maybe invoked as a defense when a party delays in acting on his rights "involves more that mere delay, and mere lapse of time. There must be a delay for a length of time which unexplained and inexcusable, is unreasonable under the circumstances and is prejudicial to the other party," West Jersey Title and Guaranty Company v. Industrial Trust Co. 27 N.J. 144 at 153 (1958).

Clearly laches is not an affirmative defense in this matter. Petitioner submitted his resignation under duress by respondent which continued until he requested rescindment and sought reinstatement. Point I, Exhibit "A".

Petitioner did not sleep on his rights before or after the August 30, 1994 acceptance of his resignation by respondent he remained under the duress which resulted in his submitting his resignation to respondent. When petitioner requested rescindment of his resignation on June 27, 1995 this delay in exercising his right was merely nine (9)

months after he received notice of respondent's acceptance on or about September 2, 1994. Exhibits "A" & "D". The delay was excusable and reasonable under the circumstances.

Furthermore petitioner did not learn the Garrabrant's assertion that he was not qualified for any other position with respondent was not in accordance with the facts, and a misrepresentation, until March 2, 1996 when he promptly thereupon amended his petition without delay.

The delay of time (9) months was not prejudicial to respondent. Respondent's agents knew that there was at least one other position for which petitioner qualified. Respondent had ample time to consider its options and take appropriate action in its best interest after petitioner's request for rescindment and reinstatement. Respondent had opportunity to grant or deny petitioner's request for rescindment. If granted then it had ample time to reinstate petitioner and/or terminate him and place him on an R.I.F. list providing him opportunity to exercise his rights as a tenured teacher including his seniority rights to the position(s) for which he was qualified by certification and experience.

Respondent argues further that petitioner's claim is barred by laches when this doctrine hinges upon equitable estoppel and cites to State, DEPE v. Dopp, 268 N.J. Super. 165 (App. Div. 1993). The Court in Dopp defined equitable estoppel as "the effect of the voluntary conduct of a party whereby the party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, as against the other person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse." Id. at 176.

Equitable estoppel does not apply in our circumstances. Petitioner's conduct in not asserting his right to rescindment was not voluntary. It was the result of duress. Point I; Exhibit "A". Respondent was not prejudiced by petitioner's notice of rescindment. Moreover, respondent did not reasonably rely in good faith upon petitioner's resignation.

It knew that at the time of, and/or before respondent accepted petitioner's resignation that its assertion that petitioner was not qualified for any other position was not in accordance with the facts and it knew or should have known that petitioner was coerced into submitting his resignation. Point I; Exhibit "A".

Therefore, the Petition of Appeal filed by petitioner is not barred by laches or laches combined with equitable estoppel and should not be dismissed. West Jersey Title Company; Dopp.

POINT IV

SUMMARY DECISION IS NOT WARRANTED AS THERE EXIST ISSUES OF MATERIAL FACT AND RESPONDENT IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

Respondent's motion for Summary Decision is brought pursuant to N.J.A.C. 1:1-12.1 et seq.

Summary Decision should be granted where there are issues of material fact and the moving party is not entitled to judgments as a matter of law. The Court in Judson v. Peoples Bank and Trust Co. Of Westfield, 17 N.J. 67 (1954) stated: "The role of the judge in [summary decision] ... is to whether there is a genuine issue as to a material fact, but not to decide the issue if he finds it exist" Judson 73. The rule in Judson has been embodied into Court Rule 4:46-2 wherein states:

> The motion for summary judgment shall be *** rendered forthwith if the pleading, depositions, answers to interrogatories and admissions *** show that there is no genuine issue of matter fact challenged and the moving party is entitled to judgment as a matter of law. Id.

The language of R. 4:46-2 has been further incorporated into N.J.A.C. 1:1-12.5(b) which in pertinent point provides:

> [Summary Decision] may be rendered if the papers *** filed together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. When a motion for summary judgment decision is made and supported an adverse party in order to prevail must by responding affidavit set forth specific facts showing there is a genuine issue which can only be determined in an evidentiary proceeding.

Id. at 74.

All inferences of doubt are drawn against the movant in favor of the opponent of the motion. Id. at 75.

In the recent decision of Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the Court set the standard to be applied when deciding a Motion for Summary Judgment.

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the nonmoving party.

Id. at 523.

Application of these rules shows that there are issues of material fact in this and respondent is not entitled to Summary Decision as a matter of law. Plaintiff in his verified petitioner and in his Affidavit has stated material facts to show that his resignation was a product of duress which continued until he requested rescindment. Point I. Exhibit "A".

Duress is an ultimate fact pervading all respondent's arguments for Summary Decision and petitioner's opposition to respondent's motion.

Petitioner was told to resign effective the end of the school year 1995 or he would be terminated at the end of the school year 1993-1994. Id. Respondent contends that it suggested that petitioner resign at the end of the 1995 school year because he would have attained the twenty-five years necessary for retirement. This is a material fact in controversy which goes to the element of duress.

Further the ultimate fact of duress is in conflict. Petitioner has stated facts which constitute duress. Respondent does not dispute the facts which go to duress but nevertheless concludes that duress is not an element in its motion. Duress is a subjective matter and therefore to be determined in an evidentiary hearing by the trier of fact. Gobac at 157 citing to Rubenstein; Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 20 (App. Div. 1987).

Respondent's misrepresentation is an ultimate fact in pervading all respondent's arguments for Summary Decision and petitioner's position to respondent's motion. Petitioner has stated facts which show that there was a misrepresentation made by respondent which induced petitioner's resignation. Point I, Exhibits "A" & "F". Respondent does not dispute the facts going to the misrepresentation but concludes nevertheless that misrepresentation is not an element in this motion. Misrepresentation is an element to be determined in an evidentiary hearing by the trier of fact. Judson at 76.

Petitioner seeks answer by way of interrogatories to other positions which are present in the school district and may provide additional argument in support of misrepresentation if not opportunity for his employment. Exhibit "A". These interrogatories have not as yet been answered and should be prior to a decision on this motion. Id.

Consequently, respondent's motion for Summary Decision should be denied as there are genuine issues of material fact and respondent is not entitled to judgment as a matter of law.

DISCUSSIONS AND CONCLUSIONS

In Kaprow, supra. Justice Garibaldi, writing for the Court, observed and stated:

> The Legislature's broad delegation of power to the Commissioner and the State Board, particularly N.J.S.A. 18A:6-26, encompasses the authority to establish a time limitation for the resolution of disputes under the school laws. The limitations period provides a measure of repose, an essential element in the proper and efficient administration of school laws. It stabilizes the relationship between teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation periods gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any backpay requirements. Certainly, for the Commissioner to find that the efficient administration of a school system requires the stability offered by the ninety day limitation period is reasonable. N.J.A.C. 6:24-1.2(c) represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws. It falls within the scope of statutory authority granted to the Commissioner and the State Board and is valid. Id. at 582.

Thus, the authority of the State Board to promulgate, adopt rules, N.J.A.C. 6:24-1.2(c) among them, is clearly established.

Further at 587, Justice Garibaldi continued to observe and hold that:

> Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to "know and that the communicating party has a duty to communicate. See, Burns v. West Am. Corp., 137 N.J. Super. 442, 446, 349 A.2d. 142 (Dist. Ct. 1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety day limitations period. See, Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 467, 158 A. 2d. 49 (App. Div. 1960). A limitations period has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Federal Ins. Co. 90 N.J. 108, 112, 447 A. 2d. 163 (1982). The second purpose is to " 'penalize dilatoriness and serve as a measure of repose' " by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div. 62 N.J. 111, 115, 299, A. 2d. 394 (1973)).
>
> When a plaintiff knows or has reason to know that he has a cause of action against an idenitifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell, supra. 62 N.J. at 115, 299 A 2d. 394]
>
> Adequate notice under N.J.A.C. 6:24-1.2 should accommodate both purposes. That is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post RIF cause of action. See, Burd v. New Jersey Tel. Co., 76 N.J. 284, 291, 386 A.2d. 1310 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." Borough of Park Ridge v. Salimone, 21 N.J. 28, 48, 120 A.2d. 721 (1956).

The uncontested facts of this matter clearly demonstrates that on February 13, 1990, the Board adopted a resolution to abolish petitioner's position of Food Services Instructor, effective June 30, 1990, for reasons of economy pursuant to N.J.S.A. 18A:28-9. Petitioner's name was placed on the Board's eligibility list for re-employment in the event the position was re-established by the Board. Petitioner was then assigned as a permanent substitute at the Board's High School East at his prior level of pay and benefits. On or about February 10, 1992, petitioner was transferred and assigned as an employment orientational food program teacher at the Board's Alternate Learning School Center. Subsequently, the Board considered the abolition of petitioner's position.

Petitioner attended a meeting on January 15, 1994, with his union representative and members of the Board's administrative staff. Petitioner was advised that the food service at the Alternative School would continue for one additional academic year, which would provide petitioner with 25 years of service in the pension system. On February 10, 1994, petitioner submitted his resignation for purposes of retirement, effective July 1, 1995. On August 30, 1994, the Board, at its regular monthly meeting, accepted petitioner's resignation effective July 1, 1995. Petitioner was so advised by letter, dated August 31, 1994.

Pursuant to the holding in Kaprow, petitioner's receipt of the Board's action by letter dated August 31, 1994, triggered petitioner's "receipt of the notice of a final order, ruling, or other action" by the Board. N.J.A.C. 6:24-1.2(c). Notwithstanding that petitioner continued in the Board's employ subsequent to its action to accept his resignation, for retirement purposes, the Board's action on August 30, 1994, was final. Thus, petitioner was given adequate notice of the Board's action. Accordingly, any challenge to the Board's action by petitioner was required to be filed before the Commissioner on or before November 29, 1994. Petitioner did not file his Petition of Appeal before the Commissioner until October 27, 1995, eleven months subsequent to the date which he was required to have filed his complaint.

Petitioner's attempt to rescind his resignation by way of letter dated June 28, 1995, did not act as a bar to the 90 day rule. As the Court said in Kaprow,

> Kaprow's attempt to resolve his claim through negotiations with the Local Board is irrelevant. It does not negate the fact that he received adequate notice on February 23, nor does it toll the running of the limitations period. (Citations omitted) Id. at 588.

Thus, petitioner was advised of the Board's action of August 30, 1994, on August 31, 1994. Pursuant to N.J.A.C. 6:24-1.2(c), he had ninety days in which to challenge the Board's action. He did not do so in a timely manner. Petitioner's attempt to rescind his resignation is, pursuant to Kaprow, irrelevant. Id. 588. Even if it was not, his attempt to rescind the Board's action was out of time.

There is nothing in the herein record to indicate any duress applied to petitioner in order to provide him with the opportunity to resign for retirement purposes. The record is too the contrary, where petitioner is complementary to the Board.

I **CONCLUDE,** therefore, pursuant to N.J.A.C. 6:24-1.2(c), and the holding in Kaprow, supra., that petitioner's challenge to the Board's action in accepting his resignation for the purpose of retirement is out of time.

I **CONCLUDE** that as a matter of law, petitioner is precluded from advancing his claim. I **CONCLUDE**, therefore, that it is not necessary to address the remaining issues of this matter.

I **CONCLUDE** that summary decision should be entered on behalf of the respondent Board and that the herein matter should be **DISMISSED.**

ORDER

Accordingly, pursuant to N.J.A.C. 6:24-1.2(c) and the holding in Kaprow, supra., it is **ORDERED** that **SUMMARY DECISION** be **ENTERED on BEHALF of the BOARD of EDUCATION of the TOMS RIVER REGIONAL SCHOOL DISTRICT.**

It is **FURTHER ORDERED** that the herein matter be and is hereby **DISMISSED.**

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

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

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

31 May 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

6/3/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 6 1996
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 10695-95

CHARLES E. WILLSON, III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner's exceptions recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), *i.e.,* that the Board induced his resignation by misrepresentation and, therefore, the 90-day time limitation of *N.J.A.C.* 6:24-1.2(c) should not be applied. The Commissioner determines that petitioner's exception arguments were fully considered and correctly addressed by the ALJ in his initial decision and these will not, therefore, be revisited herein.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the ALJ that petitioner's challenge to the Board's action of accepting his resignation for retirement purposes is out of time for the reasons articulated by the ALJ in his initial decision.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 18, 1996

DATE OF MAILING JULY 19, 1996

315-96

315-96

RICHARD F. CONNOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former Athletic Director (AD) now in the newly created position of Director of Athletics and Activities (DAA), alleged the Board transferred him to the new position for the 1994-95 school year and improperly reduced his salary. Petitioner alleged the Board violated his tenure rights as the two positions were basically the same.

ALJ concluded that petitioner's .6 tenured position as AD was not abolished but continued intact. Accordingly, the ALJ concluded that petitioner continued to hold his tenured supervisory position on at least a .523 basis, and because *N.J.S.A.* 18A:6-10 provides that tenured employees may not be dismissed *or reduced in compensation* from or in their tenured positions (in the absence of removal pursuant to tenure charges -- not an issue in this matter), he found that the Board could not pay petitioner less for performing the very same duties than it paid him for performing them in the 1993-94 school year. It was ordered that the Board compensate petitioner in an amount equal to the difference between the salaries which he actually received in the 1994-95 and the 1995-96 school years and $69,318, the salary he should have received per annum.

Commissioner concurred with the ALJ's findings and conclusions. Commissioner agreed that the record supported the conclusion that the AD position continued to exist intact, notwithstanding the Board's contention as to the more expansive nature of the DAA position, which the Commissioner found to be sufficiently addressed by the ALJ. Commissioner, like the ALJ, placed no reliance upon the *Nelson* Appellate Division decision. Commissioner directed Board to compensate petitioner.

JULY 18, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11973-94

AGENCY DKT. NO. 429-10/94

RICHARD F. CONNOR,

Petitioner,

v.

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

Respondent.

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

Nathanya G. Simon, Esq., for respondent (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Record Closed: January 17, 1996 Decided: June 3, 1996*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on October 26, 1994, when Richard F. Connor (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination

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* Extensions of time for issuing the initial decision were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

that the Board of Education of the Township of Cinnaminson (hereinafter respondent) had violated his tenure rights by reducing his annual salary. An answer and affirmative defenses were filed on behalf of respondent on December 6, 1994, and on December 13, 1994, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on June 6, 1995. Pursuant to respondent's request, a prehearing order which had been issued on June 9, 1995, was amended on June 21, 1995 and the amended order set forth the following issues for determination at hearing:

1. Did respondent impermissibly reduce petitioner's salary in violation of N.J.S.A. 18A:6-10, N.J.S.A. 18A:28-5 and 28-6?

2. If the answer to issue number one is yes, what is the appropriate remedy?

3. Is the petition time-barred by the provisions of N.J.A.C.* 6:24-1.2(c)?

4. Is the petition barred by the doctrines of waiver and/or estoppel?

The hearing was scheduled for October 18, 1995 and took place as scheduled. Following the close of testimony, the record remained open for the receipt of written submissions. Simultaneous initial submissions were filed on behalf of each party on January 5, 1996. Respondent's post-hearing reply brief and petitioner's letter memorandum reply were both received on January 17, 1996, whereupon the record closed.

* Respondent has specifically abandoned this issue and accordingly, it will not be addressed herein.

FINDINGS OF FACT

Prior to the commencement of testimony, the parties entered into the following stipulations:

1. The Petitioner holds the following certificates issued by the New Jersey State Board of Examiners:

   (a) Instructional Certificate as Secondary School Teacher of German (Exhibit J-1); and

   (b) Principal/Supervisor Certificate (Exhibit J-2).

2. For the 1968-69 school year through the 1971-72 school year, the petitioner was employed in the Cinnaminson School District as a high school teacher of German, on a full-time basis, pursuant to his Instructional Certificate. During the 1971-73 school year, the petitioner was not in the District, as he was a Fulbright Exchange Teacher in Germany. The petitioner returned to the District, as a full-time teacher of German, for the 1973-74 school year and he continued to serve in that position through the 1989-90 school year.

3. As a result of his years of service in the position, the petitioner acquired tenure as a teacher. During his period of employment as a teacher of German, the petitioner was compensated in accordance with the salary guide established for teachers.

4. For the 1990-91 school year through the 1992-93 school year, the petitioner was employed by the Cinnaminson School District in a hybrid position: part of the petitioner's work day was spent teaching high school German in the middle school and part of the work day was devoted to service as the Athletic Director at Cinnaminson High School (herein, "AD"). For the 1993-94 school year, the petitioner was employed by the Cinnaminson School District in a hybrid position: part of the petitioner's work day was spent teaching high school German and part of the workday was devoted to service as the AD. The petitioner's service as

AD was rendered pursuant to his "Supervisory Certificate". A copy of the job description for the AD position is attached hereto as Exhibit J-3.

5. As a result of his years of service in the AD position, the petitioner acquired tenure as a Supervisor. A copy of the letter from Dr. Joseph Carol (former Superintendent of Schools) to the petitioner, dated May 7, 1992, wherein the aforementioned tenure acquisition is recognized, is attached hereto as Exhibit J-4.

6. During his period of employment as part-time AD and part-time teacher of German, the petitioner's annual salary was based upon his placement on the negotiated teachers' salary guide plus a stipend, which stipend was paid on a semiannual basis (i.e., twice per year: December and June) during the 1990-91 school year. For the 1990-91 school year, the AD position was an extra-duty position under the Cinnaminson Education Association Agreement (1989-1991) and, the stipend was not part of the petitioner's total annual salary. Beginning with the 1991-92 school year and continuing through the 1993-94 school year, while the AD position was a 10-month plus 10 days position, for which a stipend was added to the teacher guide salary, the stipend was included in the petitioner's 10-month annual salary, payable over a 12-month time period, pursuant to the negotiated agreement between the respondent and the Cinnaminson Supervisor's Association. See Exhibit J-5.

   Beginning with the 1994-95 school year, as a result of his appointment as Director of Athletics and Activities (herein, "DAA"), the petitioner was no longer included in the Supervisor's bargaining unit of the School District.

7. For the 1993-94 school year, the petitioner worked a 10-month, 10 day school year and received an annual salary of $62,704.00, based upon the following service: .6 (AD) and .4 (teacher of German). Memoranda from Mr. Timothy R. Wade, the Superintendent of Schools, to the petitioner, dated June 29, 1993 and August 2, 1993, reflecting the aforementioned service and salary, are attached hereto as Exhibits J-6 and J-7, respectively.

8. During the spring and summer of 1994, the petitioner had numerous conversations and meetings with Superintendent

Wade and Dr. Harold Melleby, Jr., the Principal of Cinnaminson High School, regarding the abolishment of the AD position and the creation of a new, full-time position entitled Director of Athletics and Activities. The petitioner participated in the development of a job description for the DAA position, making recommendations about the job description's content and wording. Also, in his conversations with Superintendent Wade, among other things, the petitioner was informed and knew about the salary to be established for the DAA position.

9. Principal Melleby requested the creation of the DAA position, which was approved by the Respondent's Personnel Committee. A copy of the "Personnel Requisition Form", and cover memorandum, authored by Principal Melleby are attached hereto as Exhibit J-8.

10. The abolishment of the AD position, and the creation of the DAA position, was based upon the following needs of the School District: the need to consolidate high school activities, the need to reduce the high school vice principal's duties (in order to allow that individual to work more with technology, which was the intended primary focus of that position) and the need to remedy lost teaching time (during the 1993-94 school year, the petitioner missed over 40 teaching periods, as a result of his AD duties). A copy of the memorandum from Superintendent Wade to the respondent, dated July 22, 1994, setting forth the rationale for the aforementioned reorganization, is attached hereto as Exhibit J-9 (relevant portions only).

11. The Cinnaminson School District advertised the DAA position in or about July of 1994, with employment in said position to commence on September 1, 1994. A copy of the posting for the DAA position is attached hereto as Exhibit J-10. The petitioner applied for appointment to the DAA position. A copy of a memorandum from the petitioner to Superintendent Wade, dated June 28, 1994, wherein the petitioner expresses his ". . . intention to accept the new supervisory position (i.e., the DAA position . . .", but does not waive his right to protest the salary reduction of approximately $7,000.00, is attached hereto as Exhibit J-11. Also attached hereto is a "letter of interest" submitted by the petitioner to Principal Melleby, dated "received" July 15, 1994 (Exhibit J-12).

12. Following Principal Melleby's receipt of several applications for the position, and the conduct of interviews, the petitioner was recommended by Dr. Melleby for appointment as DAA. A copy of the memorandum from Dr. Melleby to Mr. Wade, dated July 25, 1994, containing the recommendation, is attached hereto as Exhibit J-13. Mr. Wade subsequently recommended the petitioner to the respondent for appointment to the DAA position.

13. At its regularly-scheduled meeting of July 26, 1994, based upon the recommendation of Superintendent Wade, the respondent approved the following items: the abolishment of the AD position, the creation of the DAA position, a twelve month position, (together with the adoption of a job description for said position) and the appointment of the petitioner as DAA for the 1994-95 school year, effective September 1, 1994, at an annual salary of $58,000.00. A copy of the minutes from the respondent's meeting (relevant portions only), and the job description for the DAA position, are attached hereto as Exhibits J-14 and J-15, respectively.

During the summer of 1994, without creating any legal entitlement, and as an accommodation to the petitioner, Superintendent Wade and the respondent agreed that the pro-rata payment to the petitioner, for the months of July and August, would be based on the annual salary of $64,999.00, and that, effective September 1, 1994, with his appointment to the new DAA position, the petitioner's annual salary would be $58,000.00, pro-rated through June 30, 1995.

14. The petitioner received written notification of the action taken by the respondent at its July 26, 1994 meeting, by way of a letter from Superintendent Wade, dated August 1, 1994, a copy of which is attached hereto as Exhibit J-16. The petitioner's appointment as DAA, for the 1994-95 school year, was confirmed in a memorandum from Superintendent Wade, dated August 8, 1994, a copy of which is attached hereto as Exhibit J-17.

15. The respondent has not certified any tenure charges against the petitioner.

16. After being notified of his appointment as DAA for the 1994-95 school year, and his annual salary in that position, the petitioner did not seek alternative employment elsewhere.

17. For the 1995-96 school year, the petitioner continues to serve as the DAA and receives an annual salary of $60,030.00.

In addition to the foregoing, the following additional relevant facts appeared from the testimony of the only witness at the hearing, Timothy R. Wade, respondent's Superintendent of Schools, and from the documents marked into evidence.

At the conclusion of his first year as principal of the high school Harold Melleby, Jr., spoke to Mr. Wade, Superintendent of Schools, about a possible reorganization of his staff. As a result of this discussion, the position of Director of Athletics and Activities was created, the purposes behind which were confirmed by Mr. Wade in his weekly update to the Board of Education on July 22, 1994 as follows:

> This position was approved by the Personnel Committee and was requested by the High School Principal. The current Athletic Director also teaches German two periods per day. His Athletic Director duties caused him to miss over 40 class periods per last year. This loss of teaching time combined with the need to remove duties from the Vice Principal and to consolidate all of the activities at the High School is the reason for the position. The development of the Director of Athletics and Activities will take work away from the Vice Principal and give him time to work with technology which was the basis for the position.
>
> The combined cost, both teaching and athletic director, was over $65,000 last year. The new position salary was set between $55,000 and $60,000. We had hoped to reduce the Department Chair cost to the point where we would accomplish this. The main cost for the position is the cost for .4 German teacher to take the teaching load of the athletic director, this is about $20,000. We did have some savings from the Department Chair negotiations and we will save the cost of the substitute teacher used to cover the

> German class. There is an extra cost of $11,000 which is reflected in the total listed above. (J-9 in evidence)

The position was posted as a vacancy for September 1, 1994. The posting read in pertinent part:

> Director of Athletics and Activities at Cinnaminson High School to oversee and coordinate the High School's athletic and extracurricular activities. Twelve month position with salary in accordance with the provisions of the negotiated agreement and Board policy. Applicants must have experience as a classroom teacher (minimum of three years) and coach, Masters Degree or equivalent, and New Jersey certification as an administrator. . . . (J-10 in evidence)

Mr. Wade testified that "certification as an administrator" was commonly understood in his district to mean an Administrative Certificate with a principal endorsement. In a memo dated July 25, 1994, Dr. Melleby reported to Mr. Wade that four persons had applied for the position; one was not interviewed because he did not possess a principal endorsement. The memo concluded with the following recommendation:

> I am recommending that Rich Connor be employed as Cinnaminson High School's Director of Athletics and Activities. Of the candidates interviewed, Mr. Connor was superior. Rich's experience as an Athletic Director, outstanding organizational skills, effective oral and written communications skills and human relation skills will assist him greatly in serving in this new capacity.
>
> If you have any questions, please contact me. (J-13 in evidence)

It was Mr. Wade's opinion that the new position "Director of Athletics and Activities" was similar to the position Vice Principal. The basis for this opinion appeared to be the fact that a number of the performance responsibilities listed in the job description for Director of Athletics and Activities had previously been responsibilities of the vice-principal. The job descriptions for

"Director of Athletics and Activities" as well as the position previously held by petitioner, "Athletic Director," are attached hereto and made a part hereof as if set forth herein at length.

APPLICABLE LAW AND DISCUSSION

Petitioner asserts that the position "Director of Athletics and Activities" is actually the same position as "Athletic Director" and that, therefore, when respondent transferred him for the 1994-95 school year to the position Director of Athletics and Activities and reduced his salary from $64,999 to $58,000, it violated his tenure rights.

Tenure is a legislative status, not a contractual one, and in order to be protected by the status, a teaching staff member must have met the precise conditions articulated in the statute. In order to acquire tenure in any position in the public schools in any district, the teaching staff member must be a citizen of the United States (N.J.S.A. 18A:28-3), must hold an appropriate certificate for the position, issued by the State Board of Examiners, in full force and effect (N.J.S.A. 18A:28-4) and, pursuant to N.J.S.A. 18A:28-5, must hold employment in the district for:

> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years.

Prior to amendment in 1962, the tenure statute set forth only four tenure eligible positions: teacher, principal, assistant superintendent, and superintendent, and no rights of tenure attached to any gradation within any one of those designations. See, Lascari v. Board of Education of

Borough of Lodi, 36 N.J. Super. 426 (App. Div. 1955), wherein is was held that the position of vice principal had no tenure, and, therefore, where the teacher, after serving as vice-principal, was transferred to regular teaching duties without loss of salary, he was not deprived of his tenure status which was merely that of a teacher. This was specifically changed by the 1962 amendment to the statute which provided in pertinent part:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses. . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation. . . . (Emphasis added.)*

That tenure is acquired in a particular position is made clear by the effect of N.J.S.A. 18A:28-6, which was also part of the 1962 amendment, and provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purposes; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

* Further amendments were made to this statute in 1991 but are not relevant to a determination of the issues herein.

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

The parties have stipulated, correctly, that petitioner has tenure in the district as a teacher and as a Supervisor (Athletic Director).

Respondent denies, however, that petitioner has tenure rights to the position Director of Athletics and Activities and repeatedly recites in its written argument that the position Director of Athletics and Activities differs materially from the former position Athletic Director in nearly all respects, including job duties and certification requirements. Respondent's position in this regard is compromised somewhat by the imprecise language used in the posting and job description, however. There is no "administrator's certificate" or "certification as an administrator." Consistent with N.J.S.A. 18A:6-38, the State Board of Examiners issues only three educational certificates: the Instructional Certificate, the Administrative Certificate and the Educational Services Certificate. All other "certificates" referred to in case law and by educators are actually "endorsements" on one of the foregoing three certificates. The following four endorsements may be issued on a New Jersey Administrative Certificate:

> (a) School administrator: This endorsement is required for any position that involves services as a district-level administrative officer. Such positions shall include superintendent, assistant superintendent, executive superintendent and director. Holders of this endorsement are authorized to direct the formulation of district goals, plans, policies, and budgets, to recommend their approval by the district board of education, and to direct their district-wide implementation. Holders of this endorsement are authorized to recommend all staff appointments and

other personnel actions, such as terminations, suspensions, and compensation, including the appointment of school business administrators, for approval by the district board of education. Holders of this endorsement are authorized to direct district operations and programs, and to supervise and evaluate building administrators and central office staff, including school business administrators. They are also authorized to oversee the administration and supervision of school-level operations, staff and programs.

(b) Principal: This endorsement is required for any position that involves service as an administrative officer of a school or other comparable unit within a school or district. Such positions shall include assistant superintendent for curriculum and instruction, principal, assistant principal, vice-principal and director. Holders of this endorsement are authorized to direct the formulation of goals, plans, policies, budgets and personnel actions of the school or other comparable unit, to recommend them to the chief district administrator, and to direct their implementation in the school or other comparable unit. Holders of this endorsement also are authorized to direct and supervise all school operations and programs, to evaluate school staff, including teaching staff members pursuant to N.J.A.C. 6:3-1.19 and 1.21, and to direct the activities of school-level supervisors.

(c) Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.

(d) School business administrator: This endorsement authorizes the holder to perform duties at the district level in the areas of financial budget planning and administration, insurance/risk administration, purchasing and financial accounting and reporting, and may include other responsibilities as: plant planning, construction and maintenance; personnel administration; administration of transportation and food services; and central data processing.

Notwithstanding the word "Director" in petitioner's former job title, the certification required was an Administrative Certificate with a Supervisor's endorsement. See also, N.J.S.A. 18A:26-2.1, effective July 1, 1994, which requires all candidates for appointment to positions as "director of athletics" in any public secondary school to possess a supervisor's endorsement, not a principal's endorsement. Although petitioner also holds a principal's endorsement, his service in the district prior to appointment to the position in question had never been in a position requiring a principal endorsement, and accordingly if the position title Director of Athletics and Activities actually requires a principal endorsement, pursuant to recent decisions of the Commissioner, upon the reduction in force, petitioner would not have been able to transfer his tenure rights obtained under his Administrative Certificate, supervisor's endorsement, to claim a position requiring a principal's endorsement (notwithstanding the fact that he actually possessed the principal's endorsement.) Schaefer v. Bd. of Educ. of Lakewood, 93 N.J.A.R. 2d (EDU) 741. See also language in Halpern v. Bd. of Educ. of Delran, 94 N.J.A.R. 2d (EDU) 22 and Brenner v. Bd. of Educ. of Middlesex, 96 N.J.A.R. 2d (EDU) 81. The more difficult question, and the legal analysis involved, concerning whether petitioner would have been entitled to claim tenured entitlement to the entire 1.0 position entitled Director of Athletics and Activities need not be addressed under the facts of the within matter,* however, because I **CONCLUDE** that petitioner's .6 tenured position, Athletic Director, has not been abolished but continues to exist intact. This conclusion is

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* If it were necessary to address the issue, since the position "Director" is not an enumerated position title in N.J.S.A. 18A:28-5, I would hold that pursuant to Ellicott v. Board of Educ., 251 N.J. Super. 342 (App. Div. 1991) an employee who holds tenure under an Administrative Certificate by virtue of service rendered under a supervisor's endorsement should be able, in a RIF, to transfer tenure rights to claim the position Director, a State Board created position, as long as the employee also holds an endorsement appropriate for the position, i.e., either the School Administrator or Principal endorsement. See discussion in Brenner v. Middlesex Township Board of Education, 96 N.J.A.R. 2d (EDU) 81, 83-84. Although the Commissioner has agreed that "Director" does not equal "principal" for tenure purposes, Brenner, supra, (and therefore would presumably reject respondent's argument herein that "Director" equals "vice principal" for tenure and seniority purposes) on previous occasions he has disagreed that tenure rights under the Administrative Certificate may be transferred to any other position (even State Board created) for which the employee holds an appropriate endorsement. See Halpern and Schaefer, supra.

supported by a simple review of the two job descriptions attached hereto. Each and every one of the 26 performance responsibilities set forth on the Athletic Director job description appears verbatim on the Director of Athletics and Activities job description. Clearly, some of the additional performance responsibilities of the Director of Athletics and Activities relate to supervision of other extra-curricular activities, but some others appear to be merely restatements or rewordings of the duties of the former Athletic Director position; see, for example, #37, advises the principal as to personnel performance, particularly when district standards are not met, and #39, makes recommendations for non-renewal or termination of employment. Even spreading petitioner's Athletic Director responsibilities over a 12-month period, rather than 10 months and 10 days, the total commitment still equals more than half of the job responsibilities in the new title (ten months and ten days equals .872 years x .6= .523). Accordingly, I **CONCLUDE** that petitioner continues to hold his tenured supervisory position on at least a .523 basis, and because N.J.S.A. 18A:6-10 provides that tenured employees may not be dismissed or reduced in compensation from or in their tenured position (in the absence of removal pursuant to tenure charges - not an issue herein), I further **CONCLUDE** that respondent may not pay petitioner less for performing these very same duties than it paid him for performing them in the 1993-1994 school year.

J-7 in evidence shows that petitioner's compensation for the 1993-94 school year, during which he served as .4 teacher of German and .6 Athletic Director, was calculated as follows:

1992-93	Base Salary	$50,076
5.1%	Increase	2,554
Stipend A.D.		10,074
1993-94 Salary		$62,704

Although the word "stipend" is used in these calculations, the evidence, including Superintendent Wade's testimony, clearly establishes that the additional money was simply treated as salary for all intents and purposes; the respondent recognized petitioner's tenure rights to the .6 A.D. position as a supervisor and even recognized that in reality the position consumed more than .6 of

petitioner's time (note that he missed teaching over 40 German classes during 1992-93 because of his AD duties). Therefore, the portion of his 1993-94 salary attributable to his AD duties may be calculated as follows: .4 x $52,630 (base salary) = $21,052 as .4 German Teacher; $62,704 - 21,052 = $41,652 as AD.

Based upon all of the foregoing, I **CONCLUDE** that respondent must compensate petitioner for the 1994-95 school year and thereafter in an amount not less than $41,652 for .523 of his Director of Athletics and Activities position. The remaining .477 of the position, if compensated at a prorated portion of the $58,000 annual salary awarded to the entire position by respondent, would command a salary of $27,666, making petitioner's total annual salary $69,318, commencing with the 1994-95 school year.

Respondent's affirmative defenses are hereby **DISMISSED** as totally without merit. The idea that petitioner should somehow be responsible for failure to mitigate damages makes no sense at all when viewed in the context of the 12-month nature of the DAA position, in which, respondent's Superintendent candidly acknowledged, petitioner has been doing more work for less pay than in past years; when, exactly, was petitioner supposed to do other work in mitigation? Respondent's estoppel/waiver defense is likewise without merit; J-11 in evidence, dated June 28, 1994 clearly articulates petitioner's acceptance of the DAA position, subject to his continuing right to protest his salary reduction of approximately $7,000.* Petitioner did not waive this right or take any action which would bar him from pursuing it in the future.

Although respondent's purpose in setting the annual salary for Director of Athletics and Activities, i.e., to curtail budgetary costs, is a laudable one, it may not accomplish its purpose at the expense of its tenured employee. Nevertheless, I do not believe that there is any evidence to establish that respondent's actions herein were motivated by bad faith or were taken in deliberate

* Petitioner's calculation of $7,000 was apparently based upon $64,999, the salary he would have received for the 1994-95 school year if he had continued to function as .4 teacher of German and .6 AD.

violation of petitioner's tenure rights. Accordingly, I **CONCLUDE** that petitioner has not established entitlement to pre-judgment interest pursuant to N.J.A.C. 6:24-1.16(c)1.

For all of the foregoing reasons, it is hereby **ORDERED** that respondent compensate petitioner in an amount equal to the difference between the salary which he actually received in the 1994-95 school year ($58,000) and $69,318, plus an amount equal to the difference between the salary he actually received in the 1995-96 school year ($60,030) and $69,318. It is further **ORDERED** that respondent continue to compensate petitioner in an amount not less than $69,318 per annum for performance of these duties.

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

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

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

June 3, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/3/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 6 1996
DATE

Barbara A Harnedl
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

Joint:

J-1 Petitioner's Instructional Certificate with secondary school teacher of German endorsement

J-2 Petitioner's Administrative Certificate with principal/supervisor endorsements

J-3 Job description for Athletic Director (2 pages)

J-4 Letter from Joseph Carol, Ed. D., Superintendent, to petitioner, dated May 7, 1992

J-5 Agreement between Cinnaminson Township Board of Education and the Cinnaminson Supervisor's Association 1994-94 (2 pages)

J-6 Memorandum from Timothy R. Wade, Superintendent, to petitioner, dated June 29, 1993

J-7 Memorandum from Timothy R. Wade, Superintendent, to petitioner, dated August 2, 1993

J-8 Memorandum from Dr. Melleby re: Posting Director of Athletics and Activities, dated July 6, 1994 with personnel requisition form attached

J-9 Portion of weekly update memo, July 22, 1994 (3 pages)

J-10 Posting of vacancy for Director of Athletics and Activities, dated July 11, 1994

J-11 Memorandum from petitioner to Timothy R. Wade, Superintendent of Schools, dated June 28, 1994

J-12 Hand-written letter from petitioner to Dr. Hal Melleby, dated July 15, 1994

J-13 Memorandum from Dr. Melleby to Timothy R. Wade, Superintendent, dated July 25, 1994 re: Recommendation Director of Athletics and Activities

J-14 Portions of Board Minutes from July 26, 1994

J-15 Job description for Director of Athletics and Activities (4 pages)

J-16 Letter from Timothy R. Wade, Superintendent, to petitioner, dated August 1, 1994

J-17 Memorandum from Timothy R. Wade, Superintendent, to petitioner, dated August 8, 1994

WITNESSES

For petitioner:

None

For respondent:

Timothy R. Wade

J-3 EV 10-18-95 H-26 MKD

TITLE:	Athletic Director
QUALIFICATIONS:	Experience as a teacher and coach in the public schools. Supervisory Certificate
REPORTS TO:	Principal
SUPERVISES:	Coaches and cheerleader sponsors in interscholastic and intramural activities.
JOB GOAL:	To provide students with the opportunity to participate in extra-curricular athletic activities

PERFORMANCE RESPONSIBILITIES:

1. Organizes and administers the overall program of extra-curricular athletics, both intramural and interscholastic.
2. Observes and evaluates coaching staff, writes evaluation reports, and conducts conferences at the direction of the principal.
3. Keeps the community aware of the athletic program.
4. Assumes responsibility for the organization and scheduling of all interscholastic athletic events.
5. Hires officials and policemen, as required, and assumes general responsibility for the proper supervision of home games.
6. Arranges transportation for athletic contest participants.
7. Develops and implements appropriate rules and regulations governing the conduct of athletic activities.
8. Accepts responsibility for supervision of all home athletic events and other events as designated by the principal.
9. Provides the principal with regular reports on the athletic program.
10. Maintains regular communications with NJSIAA and attends all meetings of the league, as required.
11. Informs coaches of policy or rule changes. Verifies physical and academic requirements of eligibility of participation in each sport.
12. Prepares and administers the athletic program budget.
13. Requisitions supplies, uniforms, and equipment for athletic programs in cooperation with appropriate staff members.
14. Supervises the cleaning, storage, and care of all athletic equipment.

PERFORMANCE RESPONSIBILITIES:

15. Provides the Director of Facilities with a schedule for preparation and maintenance of all facilities, including playing fields and areas.

16. Supervises all ticket sales and fund-raising events connected with the athletic program and assumes responsibility for proper handling and accounting of moneys involved.

17. Arranges all details of visiting teams' needs.

18. Makes necessary arrangements for the use of nonschool playing fields and facilities.

19. Arranges practice schedules for the coaches.

20. Provides for the physical examination of all athletes prior to the beginning of each season.

21. Administers the insurance program covering school athletes and assumes responsibility for processing reports and claims.

22. Keeps records of the results of all high school athletic contests and maintains a record file of all award winners, stating the date and type of award, including athletic scholarships.

23. Plans and supervises a seasonal recognition program for school athletes.

24. Assists in recruiting, interviewing, screening, and recommending qualified persons for coaching positions.

25. Shares responsibility for student control of the gym lobby in the rear area of the building and in the athletic field area beginning at 7:40 A.M.

26. Performs such other duties as may be assigned by the principal.

TERMS OF EMPLOYMENT: Ten month contract plus two weeks in summer. Salary determined in accordance with the provisions of the negotiated agreements and Board policy.

EVALUATION: Performance on the job will be evaluated in accordance with Board policy, the evaluation procedures established by the Administration, and negotiated provisions of the master Agreement between Cinnaminson Teachers' Association and Cinnaminson Board of Education and State law.

Revised 12/1/88

J-1SE
10-18-91
MKO

TITLE: DIRECTOR OF ATHLETICS & ACTIVITIES H-26

QUALIFICATIONS: Experience as a classroom teacher (minimum of three years) and coach; Masters Degree or equivalent; certification as an Administrator.

SUPERVISES: Coaches, extra-curricular advisors, trainer, equipment manager and athletic department aide.

JOB GOALS: (1) to provide students with the opportunity to participate in extra-curricular activities; (2) to assist the professional staff in achieving recognized goals in the High School and the District

PERFORMANCE RESPONSIBILITIES:

1. Organizes and administers the overall program of extra-curricular athletics, both intramural and interscholastic, for grades seven to twelve.
2. Oversees and evaluates all extra-curricular activities.
3. Assumes responsibility for the organization and scheduling of all interscholastic athletic events and other extra-curricular activities.
4. Coordinates all fund-raising activities.
5. Keeps the community aware of the school's athletic and activities programs.
6. Hires officials and police officers, as required, and assumes general responsibility for the proper supervision of home games.
7. Arranges transportation for athletic contest participants.
8. Maintains and coordinates the monthly school calendar of events.
9. Observes and evaluates coaching staff and extra-curricular advisors, writes evaluation reports, and conducts conferences at the direction of the principal.
10. Develops and implements appropriate rules and regulations governing the conduct of athletic and other extra-curricular activities.
11. Accepts responsibility for supervision of all home athletic events and other events as designated by the principal.

12. Provides the principal with regular reports on the athletic program and other extra-curricular activities.

13. Maintains regular communications with NJSIAA and attends all meetings of the league, as required.

14. Informs coaches of policy or rule changes. Verifies physical and academic requirements of eligibility of participation in each report.

15. Prepares and administers the athletic program budget.

16. Requisitions supplies, uniforms, and equipment for athletic programs in cooperation with appropriate staff members.

17. Supervises the cleaning, storage, and care of all athletic equipment.

18. Provides the Director of Facilities with a schedule for preparation and maintenance of all facilities, including playing fields and areas.

19. Supervises all ticket sales and fund-raising events connected with the athletic and activities programs and assumes responsibility for proper handling and accounting of monies involved.

20. Arranges all details of visiting teams' needs.

21. Makes necessary arrangements for the use of non-school playing fields and facilities.

22. Arranges for building usage by various school groups.

23. Arranges practice schedules for all coaches.

24. Provides for the physical examination of all athletes prior to the beginning of each sports season.

25. Administers the insurance program covering school athletes and assumes responsibility for processing reports and claims.

26. Keeps records of the results of all athletic contests and maintains a record file of all award winners, stating the date and type of award, including athletic scholarships.

27. Plans and supervises recognition for school athletes.

28. Assists in recruiting, interviewing, screening, and recommending qualified persons for coaching advisory positions.

29. Shares responsibility for student control in the building as well as the athletic and extra-curricular events.

30. Attends all varsity football games, home and away, all varsity and junior varsity home basketball games, all home varsity and junior varsity wrestling matches, and other games as designated by the High School Principal.

31. Coordinates and maintains an Athletic Hall of Fame.

32. Assists in planning and coordinating school assemblies.

33. Coordinates the affairs of the Alumni Association.

34. Provides information for the "Board Report" and Superintendent's Report.

35. Serves in a participating or leadership role on school-wide committees at the direction of the administration.

36. Participates in interviewing candidates for coaching and advisory vacancies.

37. Advises the principal as to personnel performance, particularly when District standards are not met.

38. Arranges in-service programs for coaches and prepares a written evaluation for these programs.

39. Makes recommendation for non-renewal or termination of employment.

40. Prepares purchase requests and sets priorities for purchase.

41. Helps recruit scholarships applicable to the department.

42. Performs such other duties as may be assigned by the Principal or his designee.

TERMS OF EMPLOYMENT: Twelve month contract; twenty vacation days. Salary determined in accordance with the provisions of the

negotiated agreements and Board policy.

EVALUATION: Performance on the job will be evaluated annually and in accordance with Board policy and State Law.

Approved by Board of Education: 7/26/94

OAL DKT. NO. EDU 11973-94

RICHARD F. CONNOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by both petitioner and the Board. Replies were also timely filed by both parties in accordance with *N.J.A.C.* 1:1-18.4.

The Board initially objects to the Administrative Law Judge's (ALJ) factual finding on page eight of the initial decision with respect to the nature of the newly created Director of Athletics and Activities (DAA) position. The Board contends that the ALJ "***implies that Mr. Timothy Wade *** was the only individual to view the [DAA] position as being akin to a vice principalship.***" (Board's Exceptions at p. 2) However, the Board asserts that this view was shared by Principal Melleby, as well, which is "particularly noteworthy," since Dr. Melleby, along with Mr. Wade, created the position and established its performance responsibilities. (*Id.*)

The Board next takes exception to the ALJ's finding that "***it used 'imprecise language' in the DAA posting and job description, when describing the minimum qualifications

for holding the position.***" (*Id.*) Notwithstanding that *both* the posting and the job description employ the phrase, "certification as an administrator," (J-10 and J-15, in evidence), the Board maintains that Mr. Wade's unrefuted testimony established that the phrase "***is commonly understood to mean possession of a **Principal's Endorsement** on the Administrative Certificate." (emphasis in text) (*Id.* at p. 3) The Board further argues that petitioner, as a long-time employee of the District was "undoubtedly aware" that the DAA position required possession of a principal's endorsement rather than a supervisor's endorsement. (*Id.*) Thus, the Board affirms that the ALJ's "***insinuation that the DAA position does not 'actually require' possession of a Principal's Endorsement" is without factual basis. (*Id.*) Moreover, the Board argues the ALJ's insinuation is without legal basis in that the administrative nature of the position compels the possession of a principal's endorsement. (*Id.*)

In response to the ALJ's discussion of petitioner's hypothetical tenure claim to the position of DAA found at the footnote on page 13 of the initial decision, the Board argues,

> ***[W]here the director's position requires possession of a Principal's Endorsement, the Commissioner has held that the position is a principalship, or vice-principalship, for the purposes of tenure acquisition and reemployment rights. *** Given these rulings, the Board submits that its position in this case, *i.e.*, that the DAA position is the tenure equivalent of a vice principalship, is legally and factually sound. (citations omitted) (*Id.* at p. 4)

The Board further objects to the ALJ's conclusion that petitioner's tenured position as Athletic Director (AD) "...has not been abolished but continues to exist intact." (*Id.* at p. 4, citing Initial Decision at p. 13) Here, the Board argues, *inter alia*,

> **While it is true that the performance responsibilities contained on the AD job description also appear on the DAA job description, they are **not** repeated verbatim. Although Judge Duncan alluded to this fact, *** she failed to expressly recognize that the job duties previously assigned to the AD have been **expanded** in two separate

> respects: the DAA's duties extend beyond athletics and beyond the confines of the high school ***. (emphasis in text) (*Id.)*
>
> ***In comparing the AD and DAA job descriptions, Judge Duncan failed to note the substantial difference in the number of duties required to be performed in these positions. The DAA is charged with 42 job duties, whereas the AD was only required to perform 26 functions.*** The increased number of duties is attributable to the fact that, in addition to performing the duties previously assigned to the AD, the DAA is also charged with performing duties previously assigned to the high school vice principal, such as building-wide budgeting and scheduling functions.*** (*Id.* at p. 5)

The Board identifies additional evidence which supports its claim that the DAA position is materially different from the AD position: The DAA position requires possession of a Principal's endorsement, whereas the AD position required possession of a supervisor's endorsement; the AD position was a part-time, ten-month, plus two weeks, position, while the DAA position is a full-time twelve-month position; the AD's duties were confined to the high school, while the DAA's duties extend beyond the high school; and petitioner, while in the AD position was a member of the supervisor's collective bargaining unit, but ceased to be a member after his appointment to the DAA position. (*Id.* at pp. 5, 6) Thus, the Board maintains that the AD position was properly abolished and the DAA position is an entirely new position, akin to that of a vice principalship "for purposes of tenure acquisition and reemployment rights." (*Id.* at p. 6) In that petitioner did not have a tenure entitlement to the DAA position, the Board reasons that his tenure rights were not violated when it appointed petitioner to the DAA position at an annual salary which was lower than he previously received in the AD position. (*Id.* at pp. 6, 7)

In reply to the Board's exceptions, petitioner insists there is nothing in the record which supports the Board's claim that he was aware that the DAA position required the possession of a principal's endorsement rather than a supervisor's endorsement. (Petitioner's

Reply at p. 3) Moreover, petitioner argues that the ALJ properly conducted a review of the job performance responsibilities of the DAA and AD, inasmuch as the job description for the DAA position does not specify what endorsement on the administrative certificate is required, and because the certification issue is in dispute. (*Id.* at pp. 3, 4)

As to the job performance analysis, petitioner contends, notwithstanding that the DAA's position contained 42 listed duties and the AD's position identified 26 duties,

> ***Respondent has never demonstrated that Petitioner did not perform those [additional] duties while in the [AD] position or that performance of those additional duties requires a principal's endorsement rather than a supervisor's endorsement. Mr. Wade, himself, testified at the hearing that he could not delineate what the DAA's duties are, nor could he determine what percentage of Petitioner's time is now spent on duties he previously performed as Athletic Director and what percentage of time is spent on "new" duties***. ***Moreover, most of the additional duties set forth in the DAA job description, such as preparing purchase requests, recruiting scholarships and interviewing and selecting coaches are the types of duties mentioned in the Senate Education Committee statement which accompanied Senate Bill No. 2343, L.1991, c.17, codified at *N.J.S.A.* 18A:26-2.1. That act requires all candidates for appointment to positions as "director of athletics" in any public secondary school *** to posses a supervisory certificate ***. (*Id.* at pp. 4, 5)

Petitioner's exceptions consist essentially of a concurrence with the initial decision, together with an alternative legal basis for affirmance. Petitioner provides,

> ***[T]he ALJ's decision is supported and compelled by the recent decision of the Superior Court, Appellate Division in *Nelson v. Bd. of Ed. of Old Bridge Township*[1], Superior Court, Appellate Division (Unreported, 1996). The *Nelson* decision buttresses and supports the ALJ's decision, and constitutes an additional ground

[1] Here, relying upon language set forth in *Dennery v. Board of Education of the Passaic County Regional High School District #1*, 131 *N.J.* 626 (1993), the Superior Court determined that Nelson, who held both principal and supervisory endorsements to his administrative certificate and who attained tenure under his supervisory endorsement while serving as Chairman of the Industrial Arts Department at the high school, must be appointed to a principal's position over a nontenured individual, notwithstanding that Nelson never served as a principal. (*Nelson, supra*, slip. op. at pp. 8, 9)

> for affirmance of the ALJ's decision. ***(Petitioner's Exceptions at p. 1)

Petitioner recognizes, however, that the *Nelson* decision is unnecessary to his case, since the initial decision may be affirmed for the reasons set forth by the ALJ. (*Id.*)

In response, the Board avers that the *Nelson* holding is inapposite to the instant matter. The Board urges the Commissioner to reject petitioner's contention that *Nelson* supports the initial decision in that the ALJ did not base her decision on *Nelson*, nor did she find that petitioner held a tenure entitlement to the new position on the basis of his tenure accrued as a supervisor. (Board's Reply at p. 2) The Board also contends that *Nelson*, as an unpublished decision, should not constitute binding precedent, in accordance with *New Jersey Rules of Court*, R. 1:36-3. (*Id.* at p. 3) In the alternative, the Board argues that the Appellate Division erred in *Nelson* and, as such, its decision should not influence the Commissioner's decision in the instant case. (*Id.* at p. 4) Here, the Board maintains that the Appellate Division

> failed to abide by the governing standard of review and failed to accord due deference to the State Board. It is well established that an administrative agency's decision is **not** to be reversed by a court, **unless** " . . . (it) is arbitrary capricious, unsupported in the record, or in violation of express or implicit legislative policies."*** (emphasis in text) (citations omitted) (*Id.*)
>
> ***The State Board's decision in *Nelson* was neither unreasonable, unsupported by the record or violative of any legislative will. Indeed, it was entirely **consistent with well-settled precedent**. In contrast, the Appellate Division's holding is entirely based upon *dictum* contained in another case. (emphasis in text) (*Id.* at p. 5)

Finally, the Board argues that if the Commissioner finds that *Nelson* was properly decided by the Appellate Division, the holding therein should only be given prospective effect, and should not be applied to this or any other case pending at this time. (*Id.* at p. 8)

Upon careful and independent review of the record in this matter, which included a copy of the transcript from the hearing held on October 18, 1995, the Commissioner concurs with the ALJ's findings and conclusions.[2] The Commissioner agrees that the record supports the conclusion that the AD position "continues to exist intact," (Initial Decision at p. 13), notwithstanding the Board's contention as to the more expansive nature of the DAA position, which the Commissioner finds to be sufficiently addressed by the ALJ's analysis and concomitant calculations. (*Id.* at p. 14) In so holding, the Commissioner, like the ALJ, places no reliance upon the Appellate Division's decision in *Nelson, supra.*[3]

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the Board is directed to compensate petitioner in conformance with the final decision herein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

[2] The Commissioner notes, however, that he specifically does not reach to the question of whether petitioner would have been warranted in claiming a tenure entitlement to the DAA position, as per the ALJ's footnote discussion at p. 13.

[3] In any event, the holding in *Nelson, supra*, was effectively negated by the enactment of *P.L.* 1996, *c.* 58, which amends applicable statute to provide that enumerated positions are separately tenurable.

315-96

EDU #11973-94
C # 315-96
SB # 55-96

RICHARD F. CONNOR,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, July 18, 1996

For the Petitioner-Respondent, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Schwartz, Simon, Edelstein, Celso & Kessler (Nathanya G. Simon, Esq., of Counsel)

The State Board of Education has reviewed the proposed settlement submitted by the parties in this appeal and finds it to be in accord with the principles expressed in Cardonick v. Board of Education of the Borough of Brooklawn, decided by the State Board of Education, April 6, 1983. The State Board therefore approves the settlement in this matter.

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

317-96

L.F. AND S.F., on behalf of their minor child, M.F.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, JAMES RICCOBONO AND JOSEPH MC GARRY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents contended punishment imposed on their son, M.F., who was involved in a bomb hoax at a high school, was arbitrary, capricious and unreasonable. Petitioners sought awards for damages, legal and professional fees and reprimands for school officials for excessive punishment against M.F.

ALJ dismissed requests for damages as there is no authority in law for the award requested. ALJ also dismissed that portion of the petition that involved actions that occurred prior to August 29, 1995 as untimely filed. ALJ found that the Board followed policy, provided due process throughout and considered all input from petitioners. ALJ found that petitioners did not prove that the Board's actions were beyond its powers or were arbitrary, capricious or unreasonable. ALJ found no evidence of bad faith. Petition was dismissed.

Commissioner concurred that the record was sufficient to establish that the Board's determination concerning M.F. was not arbitrary, capricious or unreasonable. Commissioner affirmed ALJ's determination to dismiss petitioners' claim for damages as the Commissioner is not legislatively authorized to award damages. With regard to the timeliness issue, Commissioner found it unnecessary to reach to the question of whether those allegations were deemed untimely filed. Petition was dismissed.

JULY 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12640-95

AGENCY DKT. NO. 457-11/95

L.F. AND S.F. ON BEHALF OF
THEIR MINOR CHILD, M.F.,

Petitioners,

v.

BOARD OF EDUCATION OF
BRIDGEWATER-RARITAN REGIONAL,
JAMES RICCCOBONO AND
JOSEPH MCGARRY,

Respondents.

L.F. and S.F., petitioners, *pro se*

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

Record Closed: April 22, 1996 Decided: June 5, 1996

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

Parents of a pupil who admitted taking part in a bomb hoax at Bridgewater-Raritan High School seek an order of the Commissioner of Education:

(1) reprimanding the high school principal for "poor judgment, vindictive behavior" and providing M.F. "with less than a full and thorough education;"

(2) reprimanding the superintendent of schools similarly;

(3) nullifying the Board's resolution in this matter;

(4) directing reimbursement of legal fees incurred in dealing with the school and district;

(5) reimbursement of fees paid to a consulting psychologist; and

(6) award of $90,000 per petitioner damages, "trebled as punitive if provided for by law," for severe mental anguish and emotional suffering.

The Board has answered the charges, to the extent they can be responded to, and asserts four affirmative defenses:

(1) failure to state a claim upon which the Commissioner can grant relief;

(2) many of the claims are untimely (*N.J.A.C.* 6:24-1.2(c));

(3) the Commissioner lacks jurisdiction to entertain damage claims, award of legal and professional fees and reprimands; and

(4) it did not act in an arbitrary, capricious or unreasonable manner or act contrary to law herein.

The matter was transmitted by the Department of Education to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was conducted by telephone on February 8, 1996. The Board was directed to move for dismissal of the fourth, fifth and sixth of petitioners' demands. The Board so moved for the reason that the Commissioner of Education does not have the authority to grant the requested relief. The Board also moved to dismiss all claims in the petition of appeal predating August 30, 1995, for the reason that they are time barred under *N.J.A.C.* 6:24-1.2(c), which requires filing within ninety days of the action complained of.

The petitioners amended their pleading and filed papers responsive to the Board's motion. By order dated April 12, 1996, this judge ordered so much of the petition as requests damages

DISMISSED because there is no authority in law for the award requested. As to the 90-day rule question, the determination was similar. The petitioners presented no competent reason for failing to file in a timely manner. So much of the petition as speaks to actions that occurred prior to August 29, 1995 was **DISMISSED**.

The petitioners requested interlocutory review of the Commissioner of Education who declined by letter dated April 29, 1996.

Plenary hearing was held on April 22, 1996, in the Branchburg Municipal Court. Prior to taking testimony, the parties stipulated that no action was taken by the school against two other boys involved in the incidents that led to discipline of M.F.

Nancy Sobelson, a board member at the time certain bomb threats were communicated to the schools, testified. She described her reaction as a mixture of fright with some anger. There was considerable disruption of the schools. Articles appeared in a local newspaper. Although the incidents occurred at about the same time as bombing of the Federal building in Oklahoma City, the witness never connected M.F. with the accused perpetrator in that case.

Among other things, the witness stated that the Board received oral reports from the Superintendent concerning how the suspended pupils were progressing on home instruction. The witness believed that the F's were sincere and heard no other board member express any feeling to the contrary. Recommended punishments were increased. The Board very much wanted a letter of apology, but the family and their psychologist were against the idea. The Board's warning concerning further incidents came from genuine anxiety, not a desire to punish or hurt M.F.

Community service hours were increased from forty to sixty-six. M.F. was involved in two incidents, another pupil in one. A apology to the Board only, that is, not for publication, was received. The same recommendations as to both pupils were received before hearing. Some parents contacted board members. The witness received one or two telephone calls, but they were not an influence.

The Board's attorney raised an objection that the hearing was based on one issue, which was whether the punishment was appropriate. The Board has policies concerning the progress of discipline but does not have a list of offenses and punishments. The objection was sustained.

The witness stated that the Board's policy on suspension and expulsion were followed. In its final deliberations, the Board considered the fact that M.F. was a "first offender." The Board also considered reports from teachers and M.F.'s apparent lack of intent to cause harm. The witness believed the family to be truthful and sincere. At the time threats were made, the witness knew nothing of M.F.'s intent. In fact, she believed he had no intent to cause harm, but felt it was irrelevant. The absence of intent may have been discussed when considering if M.F. were a danger to himself or others.

The witness believed M.F. was truthful to police. She and the whole Board considered the criminal justice disposition of the case. No Board member said that the criminal disposition was enough.

The Board discussed the fact that M.F. had been out of school for the months of May and June 1995. The Board also discussed the fact that M.F. had done well academically while on home instruction. The Board also knew the family had told administrators several times that the family wanted M.F. back in school and were not concerned for his safety if he were to reenter the student body.

The Board relied on information and recommendations from administrators. The witness could recall no Board member saying that a two-month suspension was enough in these circumstances. The Board was aware of and did consider M.F.'s community service. Their concern was that there be a fair balance between the seriousness of the offense and the punishment, but that the punishment not be overreaching. The Board listened to guidance and teaching professionals. The witness expressed the idea that punishment is a part of caring.

The Board did not consider what other boards have done concerning bomb scares. The Board was aware that other pupils were charged, but did not conduct hearings concerning the others because the outcome of the legal process had not yet been reported to the school.

The high school principal testified that he did not know who sent the threat or the depth of the threat. He felt not anger but serious concern for pupils. He tried to find out who was responsible for the threat and then would focus on punishment. Later, punishments would be considered and if rehabilitation were needed, it would be recommended.

Because the threat was communicated by telephone facsimile, investigation was taken over by police. The witness personally wanted to see a full legal penalty invoked on the criminal side.

A meeting was arranged in May 1995 after M.F. was released by police authorities. The meeting was conducted at the Board building with the parents in attendance. At the meeting, the witness explained the information he had and the source of the information he had. He announced that M.F. was suspended pending Board hearing. The parents expressed concern about the loss of school time. The witness stated that, as part of the suspension procedure, the parents could pick up M.F.'s homework or could have it mailed to the home. He was asked if home study were an option and he indicated that it was. After S.F. complained of the arrangement, home study was provided.

The witness further testified that the administration and Board considered psychological evaluations and recommendations of other professionals in the school system. A series of proposals was made, including community service. All persons considering the question recognized that M.F. had a "clean" disciplinary record. None had any knowledge of his intent at the time, however.

The Board discussed the situation in closed session. The witness was not asked to comment. He knew M.F.'s age and that entered his considerations to come extent. He also knew M.F. had been out of school for a period and had been ordered not to enter upon school grounds while on home instruction.

The witness has received ten or twelve telephoned bomb threats over the years. These were single threats, with no follow up and the witness never learned who made the threats.

The witness also stated that pupils at the school were quite aware of the threat. There was no dramatic decline in attendance, however.

THE ARGUMENTS

The Petitioners

The petitioners allege that the Board did not make the reasoned, fair and just decision the petitioners are entitled to. The closeness in time to the Oklahoma City tragedy influenced the Board's reactions. According to the testimony, many factors were considered, but some were not.

The Board should have considered more what the petitioners say are the relevant factors and, if the Board had done so, it could not have come to the decision it did.

The principal said under oath that he wanted to see the most extreme criminal punishment possible. This is a malicious response because a boy "attacked" the principal's school.

At one point the petitioners asserted, "It seemed they really didn't care about us" and "we couldn't take it any more, we had to fight back." The petitioners see the Board holding an unfair position in that the victim was also the judge and jury. The petitioners stress that they are not trying to visit any negative effects on other pupils.

The Board

Board Policy 5125 and Rule 5125 are clear. If the principal believes a suspension of ten days or more is needed, the principal must refer the matter to the superintendent and Board. What the petitioners call an informal meeting was what the rules call an informal hearing. The full due process hearing is provided later. Mr. and Mrs. F. came to the informal meeting with their attorney. The process continued. Letters attached to the petition confirm discussions between the petitioners' counsel and the Board's counsel. In addition, the petitioner's counsel suggested that a bomb threat is not a suspension offense and that virtually no additional punishment should be necessary.

At M.F.'s hearing, the Board attorney made clear that he could not guarantee any particular Board vote. What happened after July 27, 1995 was arranged by the attorneys.

The Board did want a penalty phase hearing. Charges were prepared. See attachment B-1 in Exhibit R-1. In addition, there was a child study team evaluation, B-2 in R-1, a letter from M.F. to the Juvenile Judge, B-3 in R-1 and administrative recommendations concerning M.F., B-4 in R-1.

The petitioners seem to be concerned that the Board exceeded the recommendations of its administrators. This shows the process working as it should. Administrative recommendations are recommendations only. The Board would and did make the final decision.

The Board considered all that the petitioners submitted as well as the recommendations submitted by its staff. The transcript shows that the Board was careful, caring and interested, not vindictive and not absent good faith. The Board and administration followed policy, provided due process throughout and took and considered all input from the petitioners. The Board sat as a body and deliberated (R-2). The Board's action was reasonable under the circumstances, reasonable under the statutes, reasonable under administrative code and reasonable under case law.

DETERMINATION

It must first be observed that as the petitioner's point out, no Board disciplinary action has been taken against others. That is because the Board has not been advised of a criminal justice disposition in any case other than M.F.'s. And in M.F.'s case, there was no Board disciplinary action until after the Board was advised of the criminal justice disposition.

If the statements to the effect that the Board did not seem to care about the family are an attempt to portray the perpetrator as victim, they fail. And of course the Board enjoyed a superior position in the dealings. It is a political subdivision of the State and the Legislature has invested certain powers in it. Whether a traffic offense, a school-related matter or a capital crime, the person brought before authority can ask no more than due process. And it has long been established that the essential elements of due process of law are notice, an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. *DiMaio v. Reid,* 132 *N.J.L.* 17, 18 (Sup. Ct. 1944); *Twining v. New Jersey,* 211 *U.S.* 78, 53 L.Ed. 97 (1908). That is precisely was what afforded petitioners here. There was no unseemly haste. It is clear that matters proceeded in an orderly fashion. The Board did not consider its penalties until after the petitioners had been heard and until after the criminal justice procedure ran its course.

The petitioners do not like the outcome of the case below and undoubtedly will dislike the result here. Nevertheless, they have not carried the burden of showing that the Board's actions were either beyond its powers or were arbitrary, capricious or unreasonable. The Legislature clearly has invested in boards of education the power to invoke penalties for those who disrupt the good and order of the schools. Nothing in what was done by the Bridgewater-Raritan Board of Education shocks the conscience.

Every local board of education is required to enforce the rules of the state board of education; to make, amend and repeal rules for its own operations; to perform all acts and do all things consistent with law necessary to the proper conduct, equipment and maintenance of the public schools, *N.J.S.A.* 18A:11-1, and to perform a wide range of permissive duties. Boards are responsible to the Commissioner of Education and the courts for the legality of their acts; they are responsible to their constituents for the wisdom of their acts. The mere allegation of arbitrary

action is insufficient to overturn a board of education decision. A presumption of validity attaches to board actions taken within the compass of their authority and will no be overturned unless clearly arbitrary, capricious or unreasonable. *Thomas v. Morris Township Board of Educ.*, 89 *N.J. Super.* 327 (App. Div. 1965), aff'd o.b. 46 *N.J.* 581 (1966); *Kopera v. West Orange Board of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960); *Boult and Harris v. Board of Educ. of Passaic*, 1939-49 SLD 7, 13, aff'd St. Bd. of Ed. 15, aff'd 135 NJL 329 (Sup. Ct. 1947), 136 NJL 521 (E&A 1948).

Despite the petitioners' emotional investment in this matter, I can find no evidence of an exercise of bad faith or a shocking abuse of discretion on the part of the Board. Absent such a showing, this judge and the Commissioner cannot interpose their judgment for that of the Board. The exercise of the Board's discretion in the performance of the duties imposed upon it is not subject to interference or reversal unless the Board violates the law or acts in bad faith. *Kenney v. Board of Educ. of Montclair,* 1939 SLD 647 (1935), aff'd St. Bd. of Ed. 649, 653 (1935).

Having carefully reviewed all documents and testimony in this matter, I **FIND** and **CONCLUDE** that, without more, the petitioners cannot prevail. I **FIND** the Board's actions herein within the clear compass of authority granted to boards of education by the Legislature. I **FIND** no evidence of bad faith. I **CONCLUDE**, therefore, that the petition is without merit.

Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

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

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

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

5 JUNE 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/6/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

WITNESSES

For Petitioners:

Nancy Sobelson
James Riccobono

For Respondent:

None

EXHIBITS

For Petitioners:

P-1 Letter, June Weisberg, Family Court Intake, Superior Court, Somerset County, to Board, June 1, 1995 and response by James Riccobono, Principal, June 9, 1995

P-2 Attendance Summary, Bridgewater-Raritan High School, April 16 - May 4, 1995, 3 pp.

For Respondent:

R-1 Transcript of Proceedings, In re: Disciplinary Hearing in the Matter of M.F. before the Bridgewater-Raritan Regional Board of Education, August 16, 1995, 75 pp. with four exhibits attached.

R-2 Board resolution re: M.F., August 29, 1995, 3 pp.

R-3 Board Policy No. 5125 and Administrative Rule 5125, January 1995, 7 pp.

OAL DKT. NO. EDU 12640-95

L.F. AND S.F., on behalf of their minor child, M.F.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, JAMES RICCOBONO AND JOSEPH MC GARRY,	:	DECISION
RESPONDENTS.	:	

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

Petitioner's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), again contending, *inter alia,* that the Board imposed an excessive punishment upon their minor child, M.F., for participation in a bomb hoax at the school. Petitioners further charge that their son's punishment compared to that imposed upon students in other New Jersey school districts for similar or worse incidents is more severe and, thus, not warranted. (Petitioners' Exceptions at p. 3) Also, petitioners except to the ALJ's finding that the punishment imposed upon M.F. does not shock the conscience and object that the standard for Commissioner's review must reach to such a level. (*Id.* at p. 4) Lastly, petitioners request that the Commissioner review the subject of the Motion for Interlocutory Review concerning timeliness and damages.

In reply, the Board points out that while petitioners characterize M.F.'s punishment as excessive, "***nowhere in the exceptions do petitioners state which one or more of the five conditions of the Board Resolution*** are excessive, unreasonable, arbitrary, capricious or contrary to law." (Board's Reply Exceptions at p. 4) The Board attempts to illustrate this point by setting forth each punishment imposed by Board resolution and describing petitioners' reaction to each punishment, noting that not one met with strong objection of petitioners. (*Id.* at pp. 4-8)

The Board then renews its arguments concerning the subject of timeliness, averring that the ALJ was correct in dismissing from consideration on summary decision all matters which occurred prior to August 29, 1995, because such issues were untimely filed under the 90-day rule which is strictly construed and measured from the day the cause of action accrues citing, *Bettencourt v. Board of Education of the Township of Old Bridge*, 1988 *S.L.D.* 1787, 1790-91 and *Riely v. Hunterdon Central High School Board of Education,* 173 *N.J. Super.* 109 (App. Div. 1980). (Board's Reply Exceptions at p. 9) *Davenport v. Butler Board of Education*, 92 *N.J.A.R.* 2d (EDU) 614, 616 (Board's Reply Exceptions at p. 10) The Board argues that relaxation is only warranted in three instances:

> "where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination and where a matter of significant public interest is involved." *Valanzola v. Bd. of Ed. of the Borough of Wood-Ridge*, 1989 *S.L.D.* 1821, 1855 [citing the Commissioner's decision in *Miller v. Morris School District****** (Feb. 25, 1980)].
>
> (Board's Reply Exceptions at pp. 10-11)

However, the Board argues that petitioners did not present any reasons for relaxation of the 90-day rule. (*Id.* at p. 11)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that respondent Board's determination concerning M.F.'s punishment may not be upset unless it can be demonstrated to be patently arbitrary, capricious or unreasonable. *Kopera, supra, at 294.* The Commissioner notes petitioners' objection to this standard but reiterates that a presumption of reasonableness attaches to a board's actions. See *Boyle v. Riti*, 175 *N.J. Super.* 158, 166 (App. Div. 1980). Moreover, it

has long been held that the determination of a public entity is presumed to have been lawful, reasonable and in good faith. *Van Itallie v. Franklin Lakes*, 28 *N.J.* 258, 269 (1958). The Commissioner finds that the record herein is sufficient to establish that the Board's determination concerning M.F. was not arbitrary, capricious or otherwise improper.

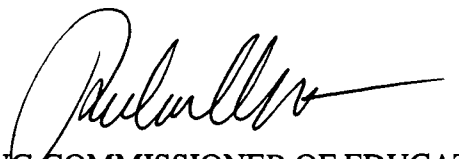
Pursuant to *N.J.A.C.* 1:1-14.10(j)2, the Commissioner is authorized to review the Order for Interlocutory Review issued by the ALJ at the conclusion of the contested case and, therefore, finds it appropriate to grant petitioners' request for such review at this time.

The Commissioner affirms the ALJ's determination to dismiss petitioners' claim for damages in this matter concurring that the Commissioner is not legislatively authorized to award damages. *Balsley v. North Hunterdon Board of Education*, 117 *N.J.* 434, 442 (1990). See also *Poole v. Passaic County Regional School District No. 1 Board of Education,* 1977 *S.L.D.* 1179; *McLean v. Glen Ridge Borough Board of Education et al.,* 1977 *S.L.D.* 311.

With regard to the issue of timeliness, the Commissioner finds that even granting, *arguendo,* that petitioners' allegations arising from incidents dating prior to the 90th day before the filing of this petition were deemed as true, the outcome of this matter would remain unchanged. Therefore, the Commissioner finds it unnecessary to reach to the question of whether these allegations should be deemed untimely filed.

Accordingly, for the reasons expressed in the initial decision and decision on motion, as modified herein, the Commissioner affirms the initial decision of the OAL and hereby dismisses the within matter.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

JULY 22, 1996

DATE OF MAILING JULY 22, 1996

319-96

319-96

HOWARD EFFEREN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured custodian who was dismissed for unbecoming conduct, sought back pay allegedly owed as a result of tenure proceedings. Petitioner sought back pay for the period from November 11, 1993, which was the 121st day subsequent to the date on which petitioner was suspended without pay (July 13, 1993), until July 17, 1995, the date of the Commissioner's decision on the tenure matter.

ALJ concluded that the 90-day period of limitations contained in *N.J.A.C.* 6:24-1.2(c) was not applicable in this case and that laches, the entire controversy doctrine, *res judicata*, collateral estoppel, and waiver should not be applied. ALJ concluded that petitioner was entitled to back pay pursuant to *N.J.S.A.* 18A:6-14, subject to mitigation totaling $12,418.31 for the period from November 11, 1993 through July 16, 1995. ALJ also concluded that petitioner's motion for summary decision should be granted and the Board's motion should be denied.

Commissioner adopted findings and determination in initial decision and directed mitigated compensation for petitioner.

JULY 22, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11772-95

AGENCY DKT. NO. 401-10/95

Remand of

EDU 6487-94

AGENCY DKT. NOS. 775-7/93 &

308-8/93

HOWARD EFFEREN,

Petitioner,

v.

BERGENFIELD BOARD OF EDUCATION,

Respondent.

Harold N. Springstead, Esq., for petitioner
(Springstead & Maurice, attorneys)

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

Record Closed: April 12, 1996 Decided: May 29, 1996

BEFORE **DIANA C. SUKOVICH**, ALJ

PROCEDURAL HISTORY

On October 3, 1995, Howard Efferen (Efferen or petitioner) filed a petition with the State Department of Education (DOE) seeking back pay from the Bergenfield Board of Education (Board or respondent). The Board filed an answer on October 18, 1995, and the DOE transmitted the matter to the Office of Administrative Law (OAL) on October 27, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Telephone conferences were conducted throughout the proceedings. The parties determined that the matter could be resolved based upon stipulations and motion papers. A hearing scheduled for April 11, 1995 was adjourned at the request of the parties.

Petitioner filed a motion for summary decision on February 29, 1996. The Board filed a cross-motion for summary decision and a response in opposition to Efferen's motion on March 11, 1996. On March 28, 1996, Efferen filed a reply to the Board's cross-motion. The Board filed a response to petitioner's reply on April 8, 1996; and Efferen, a certification in opposition to respondent's certification, on April 11, 1996. The parties filed a joint stipulation of facts on April 12, 1996, on which date the record was closed.

NATURE OF THE CASE

The issues raised in the current matter must be considered in the context of prior disciplinary action by the Board against Efferen.

On June 19, 1993, respondent's superintendent filed tenure charges and a sworn statement of evidence against Efferen. Thereafter, the Board passed a resolution on July 13, 1993 certifying tenure charges and seeking dismissal of

respondent. Efferen was suspended without pay. The DOE transmitted the matter to the OAL for determination. *Bergenfield Bor. Bd. of Educ. v. Efferen*, 95 *N.J.A.R. 2d* (EDU) 304, 305.

On August 23, 1993, the Board filed a petition for declaratory judgment with the DOE, which was also transmitted to the OAL. It was consolidated with the matter previously transmitted. Petitioner filed a motion for summary decision on February 10, 1994. *Ibid.*

The tenure charges consisted of two counts of unbecoming conduct. Count One alleged that on July 29, 1992, respondent had criminal sexual contact with his 25-year-old stepdaughter, who was alleged to be mentally handicapped, and that on January 25, 1993, he pled guilty to a charge of criminal sexual conduct, in violation of *N.J.S.A.* 2C:14:3(b). The Board's petition for declaratory judgment sought rulings that petitioner was disqualified for employment or service under Title 18A of the New Jersey Revised Statutes, pursuant to *N.J.S.A.* 18A:6-7.1, by virtue of a judgment of conviction dated March 10, 1993, and that he forfeited his employment, pursuant to *N.J.S.A.* 2C:51-2, by virtue of the judgment of conviction. *Ibid.*

This judge issued an initial decision (ID) on April 25, 1994, granting petitioner's motion for summary decision as it pertained to forfeiture and denying the motion as it pertained to disqualification. I also ordered that respondent be terminated from his position, but did not address the merits of the tenure charges. *Id.* at 308. The Commissioner issued a decision on June 24, 1994, remanding the matter for a hearing wherein respondent would be permitted to present proof relating to all of the relevant circumstances surrounding the crime for which he was convicted. *Id.* at 309.

I issued a decision on remand on June 5, 1995, determining that the offense to which respondent had pled guilty did not result in a forfeiture of his position, that the circumstances underlying the plea constituted unbecoming conduct, and that termination was an appropriate discipline. *Bergenfield Bor. Bd. of Educ. v. Efferen*, 95 *N.J.A.R. 2d*, (EDU) 457, 464. The Commissioner issued a final decision on July 17,

1995, affirming the initial decision and terminating petitioner, effective that date. *Id.* at 465.

Petitioner thereafter requested of the Board back pay for the period from November 11, 1993 until July 17, 1995. Efferen forwarded additional correspondence and documents regarding his request, on August 15, 1995, and filed a motion for summary decision on August 18, 1995 with this judge. I thereafter advised the parties that because an ID had been issued, I did not have jurisdiction over the matter. Petitioner thereafter filed a petition with the DOE seeking back pay. The issues currently pending are whether petitioner should be granted back pay, and if so, for what time period.

STIPULATIONS

The parties entered into the following stipulations:

1. On or about June 9, 1993,[1] the Board filed tenure charges against Efferen.

2. On or about July 13, 1993, respondent passed a resolution certifying charges to the Commissioner, and the said charges were deemed filed on July 21, 1993 (Agency Reference No. 275-5/93).

3. On or about August 2, 1993, Efferen filed an answer to the charges with the Commissioner, which answer was deemed filed August 3, 1993 (Agency Reference No. 275-7/93).

4. On or about August 23, 1993, respondent filed a petition for declaratory judgment (Agency Reference No. 308-8/93).

5. On or about September 7, 1993, Efferen filed an answer to the petition for declaratory judgment (Agency Reference No. 308-8/93).

6. On October 20, 1993, a telephone status conference was held among counsel for the Board and Efferen and the presiding judge.

[1]This date is in error.

7. On or about January 13, 1994, a notice of plenary hearing was forwarded by the OAL to the parties, listing April 7 and 8, 1994 as the dates for hearing. The nature of proceedings stated "Charges of unbecoming conduct against tenured custodian based on conviction for criminal sexual conduct." (Agency Reference No. 275-7/93; OAL Dkt. No. EDU 08099-93N).

8. On or about January 13, 1994, a Notice of Plenary Hearing was forwarded by the OAL to the parties, listing April 7 and 8, 1994 as the dates for hearing. The nature of proceedings stated "Board seeks Judgment of forfeiture based upon custodian's conviction for criminal sexual contact." (Agency Reference No. 308-8/93; OAL Dkt. No. EDU 8672-93N).

9. On or about February 7, 1994, respondent filed a motion for summary decision, in the consolidated matters, which motion was deemed filed February 9, 1994.

10. On or about March 1, 1994, Efferen filed an answer to the motion for summary decision.

11. On or about April 25, 1994, the Honorable Diana C. Sukovich issued summary decision in favor of the Board, holding that Efferen had forfeited his employment.

12. On or about June 24, 1994, the Commissioner remanded the matter for a full hearing enabling Efferen to present proof of relevant circumstances surrounding the crime for which he was convicted to reach a determination as to whether he had forfeited his public employment and for a hearing on the merits of the outstanding tenure charges if he did not forfeit his employment.

13. The remand was transmitted to the OAL for a determination as a contested case, as confirmed by notice of filing dated July 20, 1994.

14. On November 18, 1994, counsel to the Board wrote to Judge Sukovich, requesting a conference call to address the pending issues.

15. On December 1, 1994, a telephone status conference was held among the parties' counsel and ALJ Sukovich.

16. On December 2, 1994, Efferen's counsel sent a letter to the Board's counsel, advising of the *Olek* decision.[2] The correspondence speaks for itself.

17. The Notice of Plenary Hearing was forwarded to the parties on or about December 9, 1994, and a hearing on remand was conducted on or about March 16, 1995.

18. On or about June 5, 1995, Judge Sukovich issued her ID following the hearing, holding that Efferen did not forfeit his position, but affirming Count One of the tenure charges, thus warranting termination of employment.

19. On or about July 17, 1995, the Commissioner affirmed the ID of the administrative law judge.

20. On or about August 3, 1995, counsel for Efferen forwarded correspondence to the Board's counsel, seeking back pay for Efferen from November 11, 1993 until the date of the decision of the Commissioner of Education of July 17, 1995.

21. On or about August 15, 1995, counsel for Efferen forwarded additional correspondence and documents relative to the request for back pay.

22. On or about August 18, 1995, petitioner filed a motion for summary decision, seeking reimbursement for back pay.

23. On or about September 7, 1995, Judge Sukovich advised the parties that the OAL had no jurisdiction to review the motion.

24. On or about September 22, 1995, the DOE advised the parties that no action would be taken on the motion as the matter should be presented via petition of appeal.

25. On or about October 3, 1995, Efferen filed a petition seeking reimbursement of back pay.

26. On or about October 18, 1995, the Board filed an answer to the petition.

27. To date, the Board has not issued any back pay to Efferen in response to the request of counsel.

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[2]The pertinent case is *The Matter of the Tenure Hearing of Robert Olek, School District of the City of Garfield, Bergen County*,- S.L.D. (December 23, 1994).

FINDINGS OF FACT

Based upon a review of the motion papers and the pleadings, I **FIND** the following to be additional facts.

The possibility that petitioner might be filing a motion regarding his salary status was discussed by his counsel during the December 1, 1994 telephone conference.

In his August 31, 1995 letter, Efferen's counsel referenced the Commissioner's July 17, 1995 decision, as well as the fact that tenure charges had been certified on July 13, 1993. Counsel advanced the positions that Efferen should have been restored to the payroll as of November 11, 1993 and that Efferen was entitled to one year, eight months, and six days' pay, less earnings, pursuant to *N.J.S.A.* 18A:6-14. Counsel concluded by noting that documentation of earnings would be supplied and requested that the Board advise if it were its position that Efferen was not entitled to the funds in question, so that action could be taken before the Commissioner.

Petitioner's counsel provided documentation regarding Efferen's earnings during the period in question with the August 15, 1995 letter. More specifically, counsel stated that petitioner had earned $2,976.09 in 1993 and $9,442.22 in 1994, totaling $12,418.31, which should, counsel argued, be deducted from the amount petitioner should have received in payment of salary. Counsel concluded by requesting that the Board advise of its position. The documentation consisted of earnings statements from various employers of Efferen.

DISCUSSION

A motion for summary decision may be granted if the papers and any discovery demonstrate that no genuine issue exists regarding any material fact and that the moving party is entitled to prevail as a matter of law. Summary decision shall be

granted if the adverse party fails to meet his/her burden in setting forth specific facts establishing a genuine issue of material facts, which can only be determined at an evidentiary hearing. *N.J.A.C.* 1:1-12-5. For the reasons hereinafter discussed, I am persuaded that petitioner's motion should be granted; and respondent's motion, denied.

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. No individual shall be dismissed if he/she is under tenure of office, position, or employment in a public school system, except for certain specified reasons. Such action can only be taken after a hearing pursuant to applicable statutory provisions, subsequent to written charges of the cause of complaint. *Id.* at §6.10.

Upon certification of charges, a local board may suspend the person against whom such charges are made, with or without pay. If a determination is not made by the Commissioner within 120 days after certification thereof, the full salary of the individual in question shall be paid. The applicable statutory provision provides as follows:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension. *Id.* at §14. (emphasis added).

Petitioner seeks back pay for the period from November 11, 1993, which is the 121st day subsequent to the date on which petitioner was suspended without pay, until July 13, 1993. Respondent argues that Efferen is not entitled to any remuneration because petitioner did not comply with *N.J.A.C.* 6:24-1.2, which, the Board argues, is applicable in the current matter. Respondent also argues that petitioner cannot obtain the relief requested based on the applications of laches, the entire controversy doctrine, *res judicata*, collateral estoppel, and waiver. I am not persuaded by the Board's arguments.

To initiate a contested case for the Commissioner's determination, a copy of a petition shall be served on the respondent and proof of service and the petition and copies thereof shall thereafter be filed with the DOE. *N.J.A.C.* 6:24-1.2(a). The petition shall be filed:

> . . . no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. *Id.* at §(c).

The 90-day rule applies if the action in question is not based on a statutory entitlement. *North Plainfield Educ. Assn. v. Bd. of Educ.*, 96 *N.J.* 587 (1984) (*North Plainfield*). *West New York Bd. of Educ. v. Lydia Gilmartin*, 1990 *S.L.D.* 619. The Court in *North Plainfield* held that teachers' petitions for salary credit for time spent on sabbaticals were barred by the 90-day rule. Interpreting applicable statutes, the Court concluded that the increments were not based on a statutory entitlement because they were subject to annual performance evaluations. In reaching this conclusion, the Court contrasted credits for military service, which credits were deemed to be statutory entitlements.[3]

[3]The applicable statute provides that individuals who served in the military unit or naval service of the United States or of New Jersey shall be entitled to receive equivalent years of employment credit. *N.J.S.A.* 18A:29-11. (emphasis added).

A suspended employee's right to his/her salary, subject to any mitigation, commencing the 121st day of suspension, where no determination has been made by the Commissioner, is a matter of statutory right. *N.J.S.A.* 18A:6-14 on its face has mandatory application, and there are no exceptions. This conclusion is also supported by the decision in *The Matter of the Tenure Hearing of Robert Olek, School District of the City of Garfield, Bergen County* - S.L.D. (December 23, 1994) (*Olek*). In that case, the Commissioner noted, in part, applying *N.J.S.A.* 18A:6-14, that: ". . . . there is simply no basis on which to lawfully deny respondent's entitlement to salary while the charges against him are being heard pursuant to N.J.S.A. 18A:6-10 et seq. To the extent that such entitlement is perceived as inappropriate, remedy lies with the Legislature rather than with the Commissioner, who cannot grant a relief outside of the bounds of law." (*Olek* at 2).

I am persuaded that the 90-day period of limitations contained in *N.J.A.C.* 6:24-1.2(c) does not apply in this case. It is therefore not necessary to consider the other issues raised in this respect.

Laches is a defense applicable when there is delay, unexplained and inexcusable, in enforcing a known right, and prejudice results to the other party because of that delay. *Gladden v. Public Employees' Retirement System Trustee Bd.,* 171 *N.J. Super.* 363 (App. Div. 1979). Laches requires knowledge of a right and prejudice to the other party as a result of a delay in enforcing the right. The policy behind the doctrine of laches is the discouragement of stale claims. *Ibid.*

The determination of whether a claim is stale is based on whether a party had a reason to assert a claim at an earlier date but failed to do so. *Berkeley Dev. Co. v. Great Atlantic & Pacific Tea Co.,* 214 *N.J. Super.* 227 (Law Div. 1986). The length of the delay, whether the delay was reasonable or unreasonable, and changing conditions of the parties during the delay are factors to be considered. *Enfield v. FWL, Inc.,* 256 *N.J. Super.* 502 (Ch. Div. 1991) (*Enfield*). However, notwithstanding the amount of any delay, a primary factor is any prejudice resulting from such delay:

> The most important factor that must be established to support a finding of laches is prejudice to the defendant . . . Mere lapse of time is not enough to constitute laches, however, a 'long lapse of time, if unexplained, may create or justify a presumption against existence or validity of plaintiff's rights'. . . Laches depends on more than inexcusable delay in asserting a claim; it depends on inexcusable delay causing undue prejudice to the party against whom the claim is asserted . . . One who would invoke laches must show a delay which has subjected that party to a disadvantage in asserting and establishing their claimed right or defense caused by their detrimental reliance on their adversary's conduct. *Enfield* at 522-523 (citations omitted).

The party claiming laches bears the burden to show that he/she was prejudiced by the other party's delayed assertion of claims without excuse or explanation. *Allstate Ins. Co. v. Howard Savings Inst.*, 127 *N.J. Super.* 479 (Ch. Div. 1974).

For the reasons discussed hereinabove regarding *N.J.A.C.* 6:24-1.2(c), I am persuaded that the Board's arguments for the application of laches are without merit. Efferen, as noted, had a statutory right to resumption of his salary; he did not have to advance claims in this respect. In fact, respondent was under an obligation to resume payment of salary. The Board, an entity subject to the jurisdiction of the DOE, should have known of its obligation. The fact that petitioner did not raise issues in this respect until the Commissioner's final determination on the merits of the charges did not constitute a delay. In addition, the Board has not established any resulting prejudice to it.

For similar reasons, I am not persuaded by the Board's arguments regarding application of the entire controversy doctrine, *res judicata,* and collateral estoppel. The entire controversy doctrine is a judicial policy seeking to compel litigants to consolidate their claims arising from a single controversy whenever possible. *Thornton v. Potamkin Chevrolet*, 94 *N.J.* 1 (1983). In determining whether the doctrine should apply, the crucial question is whether the claims asserted derive from a single transaction or a series of related transactions, a portion of which was disposed of by

final judgment in an earlier law suit. The *Malaker Corp. v. First Jersey Nat'l Bank*, 163 *N.J. Super.* 463 (App. Div. 1978).

Res judicata is a principle of law barring a party from relitigating a second time that which was previously fairly litigated and determined finally. The general requirements for application of *res judicata* are a final judgment by a court or tribunal of competent jurisdiction and an identity of issues, parties, cause of action, and thing sued for. *City of Hackensack v. Winter*, 162 *N.J. Super.* 1 (App. Div. 1978), *modified on other grounds*, 82 *N.J.* 1 (1980). Collateral Estoppel is that branch of the broader law of *res judicata* which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action.

A common theme among these three doctrines is that they seek to ensure that all claims arising from a controversy be asserted and resolved in the same cause of action. However, petitioner's claim for back pay was not a controversy in the prior administrative matters, which involved the question of whether petitioner had forfeited his position or could be terminated because of unbecoming conduct. Neither party raised, or litigated, issues pertinent to resumption of salary, and I am not persuaded that such should have been included in those proceedings. As discussed hereinabove, petitioner had a statutory right to reinstatement of salary, subject to any mitigation. The amount of salary in question, as well as of any income which he earned during the period in question, could not be known until a final determination on the merits was rendered. In fact, if the Board did not prevail on the substantive merits of the charges, petitioner arguably would have been reinstated, with back pay to the date of reinstatement. Respondent's assertion that it had a right to have the issue of back pay previously settled is not persuasive. In addition, respondent has shown no prejudice because of any argued delay.

For similar reasons, I am persuaded that waiver does not apply in this case. Waiver involves an intentional relinquishment of a known right. It must affirmatively appear that the party charged with a waiver knew his/her rights and deliberately

intended to relinquish them. *Allstate, supra.* Respondent has not established that petitioner intentionally or voluntarily relinquished his statutory entitlement to back pay, and it is not clear that he could legally do so.

I am persuaded that Efferen is entitled to back pay, subject to mitigation, for the period from November 11, 1993 through July 16, 1995. Respondent does not dispute that petitioner earned a total of $12,418.31 during the time in question, and I am persuaded that such amount should be deducted from the total amount of back pay to which he would otherwise be entitled.

CONCLUSIONS

I **CONCLUDE** that the 90-day period of limitations contained in *N.J.A.C.* 6:24-1.2(c) is not applicable in the current matter, that laches, the entire controversy doctrine, *res judicata*, collateral estoppel, and waiver should not be applied in this case, and that petitioner is entitled to back pay, pursuant to *N.J.S.A.* 18A:6-14, subject to mitigation totaling $12,418.31, for the period from November 11, 1993 through July 16, 1995. I also **CONCLUDE** that petitioner's motion for summary decision should be granted and that respondent's motion for summary decision should be denied.

ORDERS

It is hereby **ORDERED** that petitioner's motion for summary decision be and is hereby **GRANTED**, that respondent's motion for summary decision be and is hereby **DENIED,** and that respondent provide back pay to petitioner for the period from November 11, 1993 through July 16, 1995, subject to mitigation totaling $12,418.31.

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

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

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

May 29, 1996
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

6/6/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

HOWARD EFFEREN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were filed pursuant to *N.J.A.C.* 1:1-18.4.

The Board initially challenges the ALJ's conclusion that the 90-day rule found at *N.J.A.C.* 6:24-1.2(c) is inapplicable, as the within action is based on statutory entitlement. (Board's Exceptions at p. 2) Asserting that her conclusion is erroneous, the Board cites *Amato v. Board of Education of the Hudson County Area Vocational-Technical School*, 1986 *S.L.D.* 94 and *Sasse v. Board of Education of the Borough of Point Pleasant*, 92 *N.J.A.R.* 2d (EDU) 339 to buttress its claim that the Commissioner has applied the 90-day rule in cases "***where the complained of action arises from a statutory entitlement.***" (Board's Exceptions at p. 2) Moreover, the Board recasts its argument, as set forth before the ALJ, that *Olek, supra*, is not dispositive in this matter, arguing that "[t]he Commissioner determined in Olek that the motion

was strictly limited to resumption of Olek's salary as of December 1, 1994. The Commissioner did not rule on Olek's entitlement to full back pay, if any.***" (*Id.* at pp. 2, 3)

The Board further excepts to the ALJ's dismissal of its argument that summary decision is appropriate based upon the doctrines of entire controversy, *res judicata*, collateral estoppel, laches and waiver. (*Id.* at p. 3) Here, the Board argues, *inter alia*, that the instant matter "fits squarely" within the entire controversy doctrine, since petitioner's claim for back pay derives from the Board's action in bringing tenure charges against him and the Board's consequent suspension of pay. (*Id.*) The Board continues,

> *Res judicata* also precludes resolution of the pending Petition for back pay as Petitioner's entitlement to continued employment was at issue in the prior action. The companion entitlement is whether Petitioner should have received salary during that period of time within which the tenure proceedings were pending. Petitioner's rights regarding continued employment and continued compensation should have been litigated within the same action.*** (*Id.*)

Additionally, the Board reasserts its arguments as to the applicability of the doctrines of collateral estoppel, waiver and laches. (*Id.* at pp. 3, 4)

Finally, the Board maintains that the ALJ erred in determining that the Board has not established that it is prejudiced by its having to now litigate the back pay issue. (*Id.* at p. 4) Rather, the Board asserts

> ***this conclusion is erroneous, particularly in light of the significant expenditure by the Board of Education relative to the prior proceeding, at the several levels of administrative and agency review. To be compelled, at this juncture, to devote substantial monies to litigate this matter, which should have been litigated previously, is an inappropriate outlay of public funds.*** (*Id.*)

In reply, petitioner maintains that the 90-day rule does not apply in this matter since "***there was no final order, ruling or action by the respondent which triggered the 90 day

limitation.***" (Petitioner's Reply Exceptions at p. 1) Moreover, petitioner asserts that the Board's reliance upon *Amato, supra*, is misplaced, in that it was the Board in this matter which brought the previous action against petitioner; "[petitioner's] claim for back pay surfaced only when the Commissioner affirmed the tenure dismissal.***" (*Id.* at p. 2) Petitioner argues that to accept the Board's view that the back pay issue should have been raised in the course of the prior proceeding is to accept that "***in every tenure dismissal case, testimony must be produced on what could be meaningless and irrelevant issues as to salary, offsets, and good faith efforts to seek employment, even though the employee is eventually dismissed.***" (*Id.*) Thus, contrary to the Board's assertion that he delayed filing for back pay for two years, petitioner contends he was not entitled to the back pay until the Commissioner issued a ruling on the tenure charges.

Upon careful and independent review of the record in this matter, the Commissioner determines to adopt the initial decision of the ALJ, as he is not persuaded by the Board's arguments that either the 90-day rule or the doctrines raised as defenses to this claim, *supra*, should apply under the circumstances herein.

Accordingly, the Commissioner adopts the initial decision of the ALJ for the reasons expressed therein and directs the Board to immediately compensate petitioner with back pay, subject to mitigation,* for the period from November 11, 1993 through July 16, 1995.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

* As noted in the initial decision, the Board does not dispute that petitioner earned a total of $12,418.31 during the period November 11, 1993 through July 16, 1995. (Initial Decision at p. 13)

319-96

EDU #11772-95
C # 319-96
SB # 56-96

HOWARD EFFEREN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, July 22, 1996

For the Petitioner-Respondent, Springstead & Maurice (Harold N. Springstead, Esq., of Counsel)

For the Respondent-Appellant, Schenck, Price, Smith & King (Joanne L. Butler, Esq., of Counsel)

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

December 4, 1996

Date of mailing DEC 06 1996

320-96

320-96

IN THE MATTER OF THE TENURE	:	
HEARING OF HUGO VICARI, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY VOCATIONAL-TECHNICAL	:	DECISION
SCHOOL DISTRICT, HUDSON COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent principal for alleged sexual harassment of a teacher and a student during a summer program in 1994.

Having considered the evidence and the testimony of witnesses, the ALJ determined that the testimony of the witnesses charging harassment was credible. ALJ, thus, concluded respondent had engaged in conduct which was unbecoming of a school administrator. ALJ found that the appropriate penalty was dismissal from his employment.

Upon review of the record, including the hearing transcripts, the Commissioner concurred with the ALJ's credibility determinations and resultant conclusions. Commissioner concurred that the Board had established by a preponderance of credible evidence that respondent engaged in conduct unbecoming a school administrator. Moreover, Commissioner found that the incidents were sufficiently flagrant to warrant dismissal. (*Redcay*; *In re Sammons*) Commissioner ordered dismissal of respondent from his tenured position of school principal and directed matter to be forwarded to State Board of Examiners for further appropriate action.

JULY 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO EDU 11977-94

AGENCY DKT NO. 466-11/94

IN THE MATTER OF THE TENURE HEARING OF HUGO VICARI, HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY.

Gregory T. Syrek, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Alexander W. Booth, Jr., Esq., for respondent
(Brownstein, Booth & Barry, attorneys)

Record Closed: December 4, 1995 Decided: June 3, 1996*

BEFORE **MARYLOUISE LUCCHI-MC CLOUD**, ALJ:

This matter concerns tenure charges brought against respondent, Hugo Vicari, which was certified by Frank Garguilo, superintendent of the Hudson County Area Vocational-Technical School Board of Education on September 7, 1994. The matter was then presented by way of resolution by the Board of Education dated October 20, 1994 and certified to by the secretary of the Board, Carl Ferrigno. A certificate of determination was then submitted to the Commissioner of Education on October 26, 1994. An answer was filed by respondent and received at the Department of Education on November 10, 1994. On December 13, 1994, the matter was transmitted to the

Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on June 27, 28, and 30, 1995, as well as September 6, and 8, 1995. A final hearing date was scheduled to occur at the conclusion of October 1995. However, by way of letter dated October 20, 1995, it was determined that counsel jointly agreed that no further testimony would be necessary and that a conference would be scheduled by telephone on October 23, 1995. On that date, a stipulation of facts was received by the undersigned, concluding the testimonial and evidentiary portion of the case. The record, however, remained open for posthearing submission by the parties at their request until December 4, 1995, at which time the record closed.

The record having closed on December 4, 1995, would have given the undersigned a 45-day period in which to issue an initial decision with the Department of Education which would have expired on January 18, 1996. An order of extension was granted for good cause changing the date due for the initial decision in this matter to January 18, 1996. A second order of extension for good cause was also granted extending the time frame to March 4, 1996. A third request for an order of extension was ultimately granted due to the undersigned's extremely heavy case load as well as the need to review the transcripts in the matter and the undersigned's jury duty service, thereby extending the time file the initial decision until June 2, 1996.*

STIPULATION OF FACTS

At the onset of the hearing, both parties entered into a stipulation of facts. Those facts are as follows:

1. Hugo Vicari began working for petitioner Board of Education in 1974.

2. There have been no prior disciplinary proceedings against Hugo Vicari.

In addition to the stipulation of facts prior to the onset of the case, a subsequent stipulation of facts was entered into by the parties at the conclusion of the case and filed with the undersigned on October 23, 1995. Those facts read as follows:

1. If called to testify in this matter, Mary Robinson, Ann Gherardi, Doris Liguori, and Marie Zapulla would each state that she knows Hugo Vicari, has had dealings with him and, based on those dealings, find him to be truthful and to have an excellent character.

2. If called to testify in this matter, Lester Concannon, Donald Cicero, and Julie Sinatra would each testify that he/she knows Hugo Vicari and that Vicari's reputation in the community for truth and veracity is excellent.

As these facts have been stipulated to by the parties, I hereby **FIND** them to constitute operational facts in this case.

CHARGES

The charges certified by the school board are that Hugo Vicari, a principal at the Hudson County area vocational technical school and a principal of the summer program during 1994 sexually harassed a teacher and a 17-year-old student. It was additionally charged that he publicly and inappropriately reprimanded a maintenance employee. The Board of Education alleges that this conduct constitutes conduct unbecoming a professional school administrator and seeks either dismissal or a reduction in salary pursuant to *N.J.S.A.* 18A:6-10.

UNDISPUTED FACTS

In addition to those facts stipulated to above I **FIND** the following to be undisputed facts in this case:

Respondent is certified in elementary education, biological science, health administration, principal, reading specialist, supervisor and school administrator. Since 1972 his educational background includes receipt of a bachelor of arts degree as well as a masters degree in reading in 1973 and a masters degree in health administration in 1974 as well as work in a doctoral program at Rutgers University and attendance at numerous seminars.

Respondent first began his employment by petitioner in 1974. He has regularly and continuously been employed by the board of education since that time and has been appointed to a number of positions since that date. Those positions include

1. Executive Assistant to the Superintendent
2. Chief Administrator of the Jersey City Career Institute
3. Director of Planning
4. Principal at Jersey City Center
5. Principal of the Adult School (North Hudson Center)
6. Principal assigned to the Bayonne Center
7. Principal assigned to the Central Office (1992 to the time of the hearing)

During the period discussed respondent also was on a sabbatical for one a half years.

In addition to responsibilities during the school year, respondent was also assigned to a summer program operated by the Board of Education during the summers of 1992, 1993 and 1994.

As these facts are uncontested I **FIND** them to also constitute operational facts in this case.

TESTIMONY

The testimony of Sharon O'Reilly was taken during this case. As of the time of the hearing Ms. O'Reilly was attending Columbia University full time in order to obtain her MSW. She had been, according to her testimony employed part time since the spring of 1993 with the Hudson County Vocational School. She stated that her first part time job was as a baking instructor evenings one evening per week for each semester with North Bergen.

The witness testified that in the summer of 1994 she got a job with the Board of Education subsequent to a letter written to the Superintendent, Frank Gargiulo. With respect to the summer program in 1994 she began work on July 6 of that year and that was the day upon which she met respondent, Vicari. He was introduced to her by Mr. Steiner and she testified that she asked if he were a teacher to which he responded "No, I'm the janitor" and laughed. After that he clarified that he was the principal.

The witness testified that there was interaction between the two of them regarding the fact that they were neighbors. To which respondent stated that he liked Irish girls and that they were his type. She also testified that he indicated that they should "get together" sometime.

Ms. O'Reilly testified that a day or two later she encountered Mr. Vicari on the school grounds and he once again initiated the idea that they should "go out." She stated that her response that she was not comfortable dating a supervisor and his answer was that they were "transient visitors in each other's lives and this was short period of time" and that she should look at it in that manner.

The summer program was scheduled to last for six weeks.

The witness testified that there was also a conversation between herself and the respondent as to whether or not she had an extra key to her apartment and needed someone to do her laundry which she initially dismissed as a lack of social skills.

The witness was teaching a class in measurements on July 12, 1994 and she heard respondent walk up. At that time she had a box with chalk and rulers and he walked into the room. According to the witness respondent said that he had heard she was doing measurements and he then said, "Do you want to measure me?" This comment was accompanied by a gesture with arms back and a pelvic tilt. According to the witness she said no and snapped a ruler which she had in her hands.

During the summer program there were also field trips every Friday in groups. On July 15, 1994 there was one scheduled and the witness's field trip was to be to Teterboro, New Jersey. Students had tee shirts for these specific trips which were kept in a guidance counselor's office. The witness stated that some showed up without their tee shirts for the field trip. She herself was in the office to photocopy something and Mrs. Reynolds was trying to get into the locked office to secure the tee shirts. The wall or partition did not reach the ceiling and as a result the witness climbed up on the file cabinet in order to climb over. Respondent came in and the witness came down from the file cabinet. The witness testified that she put her left hand down and respondent took the hand while alighting from the file cabinet. She had to lean into respondent because he took her right hand. She stated that her back was to the file cabinet and then both of respondent's hands were on her back "in an embrace." She stated that she put a hand between them but that they were close enough that she could feel his breath. She was unable to estimate the time that this took but was very surprised.

Ultimately somebody did secure the tee shirts and she went back to the cafeteria and went on the field trip after recovering her composure.

On that date she states that she and another individual went to a video store because the field trip concluded early due to the weather. She later saw the respondent and according to the witness he asked her if she was excited earlier. She walked away AND he came up to her and said, "You know I almost kissed your neck before." According to Ms. O'Reilly she ignored the comment and then the respondent stated, "Do you think you can handle an Italian stud like me?" He followed up by asking once again if she was excited earlier and she stated that she was not. According to the witness he said, "Well then you have to give me another chance because I know I can make you excited."

The witness acknowledged having been reprimanded for bringing cookies into the cafeteria and only giving the cookies to her students who had baked the cookies. She agreed that this was sloppy.

The witness also testified about an incident involving a janitor by the name of Mike who was in his late teens or early twenties and she believed to be a mongoloid or impaired individual. She stated he had a lack of social skills.

The witness testified that there was an incident on July 28, 1994 between the respondent and Mike. This incident was in the office of Mr. Meyers and he was present along respondent with herself. She stated that Mike came in and was told by the respondent that he was a disgusting human and was fat and that if he kept eating in that manner he would die. According to the witness she told Mike that he did not have to listen to this and that he was fine.

This witness also testified that she received a visit from Mr. Panepinto on August 2, 1994 at her home. He stated that this was due to a mix-up in a memo. According to the witness Mr. Panepinto pressured the witness into telling him about any meeting which she might have had regarding these incidents.

On cross-examination the witness denied ever asking coworkers about respondent's marital status or ever stating that she wished to "go out" with him. She did state that after certain comments were made she spoke with a friend, John Holoduke on July 20, 1994. She also indicated that she told Peter Flinchback in general terms that she may have been pressed up against a file cabinet but did not give specifics.

The witness acknowledged that respondent never directly evaluated her performance in her job.

Testimony was also given from Janet Reynolds who works as an attendant aide during the regular school year in the North Bergen office and has worked for six or seven consecutive summers. In 1994 she worked in Jersey City. Her location was in the area of the guidance offices. The witness is acquainted with Mr. Vicari and lives in the same town in which he lives.

Ms. Reynolds stated that up until the summer of 1994 she considered them to be friends as well as the principal with supervision for her at one time. They never had a social relationship of any kind.

In the summer of 1994 Mr. Vicari was the principal and the witness got a ride to work with Mr. Gonzalez. Then she met Sharon O'Reilly during the summer of 1994 school program and began getting rides with her.

The witness recalled an incident involving tee shirts for a field trip. The respondent came in and indicated that the tee shirts were needed and was told that they were locked. Respondent then left and Ms. O'Reilly came in and stated to the witness that she was going to get the tee shirts. Ms. O'Reilly stood on the file cabinet looking over and the witness indicated to her not to do that. The respondent walked in and at some point had his hands around Ms. O'Reilly's waist and according to this

witness Ms. O'Reilly had her hands upon Mr. Vicari's shoulders. The witness remembered respondent saying something including the word "feel." She states that they did not immediately separate physically. She described Ms. O'Reilly as leaning back because it was a low filing cabinet. The situation made the witness uncomfortable. According to her there was no one else there that she recalled until someone else came in with a ladder. After that Mr. Gallagher also arrived. The witness describes the two as being in that position for somewhat in excess of a minute. The janitor came in at which time the two separated and Judy Didden also came in. In describing the contact after the attempt to obtain the tee shirts the witness stated that respondent walked over to help Ms. O'Reilly down. Ms. O'Reilly drove the witness home that night.

This witness states that on occasion she observed respondent in the parking lot in the vicinity of Ms. O'Reilly and would observe Ms. O'Reilly roll her eyes and "exhale." The witness did not recall being present at any time about a comment involving a ride home or carpooling.

Mary Katherine Karolis testified that as of the time of the hearing she was attending Monmouth University and had turned eighteen. She had previously worked the summer at the vocational technical school, while 17 years old, through a program by which she was paid $5.05 per hour. This began sometime after the July 4, 1994 weekend.

The witness testified that she first met respondent on the first meeting day and everyone was talking. According to her he introduced himself, touched her hand and possibly her hair and stated that she was very attractive. During the early part of the program she testified that he would state audibly in the halls where other people could hear, "You have to stop calling at night. I know you want me." According to Ms. Karolis these statements were made in front of other individuals. During this entire period of time she was seventeen years of age and a student working through a special program.

She also testified that he stated "One more year and you are mine." The witness denied every having called at night and stated that once while speaking with Mr. Vicari she asked him what was for lunch and his response was "Hmmmm" which she interpreted to be as if she were.

The witness also stated that there was an incident when she was walking with another individual and respondent came up and took her arm and said to the other individual "Can I borrow her for an hour and take her back in a room and give her back." According to the witness this also made her feel uncomfortable.

Later at home she told her mother, a neighbor and a neighbor's grandson who is either a police officer or a sheriff's officer. He then took her to the office at the vocational technical school to explain what had happened but she does not recall to whom it was explained. The witness acknowledged that she never told the respondent himself that his actions made her uncomfortable. She did state that after the visit of the family friend the behavior ceased.

Michael Pecklers also testified during the hearing. He is an employee of the Hudson County Vocational Technical schools and has worked there for 20 years. He stated that his office had received a call by Peter Flinchbaugh who was a teacher in the commercial foods area. He was also called into the Superintendent, Frank Gargulo's office regarding allegations that had been made against the respondent. He acknowledged that Mr. Flinchbaugh had told him that he had no firsthand knowledge of incidents.

Michael Symzak testified that he was an employee of the vocational technical school and had been so for fifteen years. As of the time of the hearing he was the vocational assessment manager. In 1994 he was the program coordinator for the summer program with the respondent. He worked five days a week between 8:30 a.m. and 4:30 p.m. He stated that at the end of the day on one occasion a security person

came to get him and said that someone from the "prosecutor's office" was present. He spoke with that individual and the individual stated that the matter was not official business. The person did say that it dealt with an "employment counselor" named "Kate."

Mr. Symzak testified that his response was that he did not know who if anyone was harassing her.

He stated that the individual returned on another day and informed him that respondent was the individual referred to. Respondent was not present at the time. The witness went to see "Kate" (Ms. Karolis) that respondent had been making comments to her and that if he would just stop it would be the end of the matter. The individual never returned to speak with him.

On cross-examination Mr. Symzak acknowledged that he spoke with respondent the day after his visit to Ms. Karolis and told respondent about the visit he had received as well as the fact that he had spoken Ms. Karolis and Ms. Karolis' mother. He also acknowledged having told respondent that if the conduct stopped everything would be resolved.

The witness also stated that he also spoke with the respondent about incidents involving Sharon O'Reilly. During these conversations the witness testified that respondent told him that Ms. O'Reilly came in and complained that students were throwing out food and she said that she was going to write a letter. He indicated that there is a regulation that they must get certain food.

During the second week of the program respondent came to the witness and talked to him. At that time respondent said that he had asked O'Reilly to perform either hall or bathroom duty and she had wanted to know why she was being "picked on." At

that time respondent suggested that a list be prepared to show that these duties were done fairly and the witness did so.

At approximately the third week of the program respondent had indicated to him that by giving cookies to only some students and not all it could cause fights. The witness testified that he told respondent he had given permission that the cookies be given out. This matter was later discussed with Ms. O'Reilly by the witness who told her that respondent had a concern that not all students got cookies and she did not respond.

The witness did not recall any other conversations with respondent regarding Ms. O'Reilly.

The witness did acknowledge that he knows a Michael Ianico who worked for the school board. The only observations he made as the interactions between respondent and "Michael" were friendly and in the nature of a greeting.

The witness did acknowledge having a discussion with Katie and states that he had concerns about her. According to him she seemed lethargic and most times he went into the office and she had her head on the desk. He testified that he would go into the office approximately two to three times per week. He indicated that he spoke with Vicari and the respondent asked what their function was since they were under OET for the purposes of the CETA program in which she participated. The witness recounted that respondent stated he had concerns about "Katie" (Ms. Karolis) sleeping, playing cards and games. The witness stated that since the program is not actually part of the school they would have no ability to reprimand for perceived infractions.

The respondent called witnesses providing a different view of events including John C. Holoduck who is employed by the Hudson County Vocational Technical School as an instructor. He testified that a grant provided by the Department of Labor gives a

stipend to the school and also provided breakfast and a lunch program. There were also Friday field trips to different locations. He first met Sharon O'Reilly on the first day meeting. According to him Ms. O'Reilly asked him about respondent's marital status and whether or not he was "seeing anybody." The next conversation he recalls was during the first half of the program in which he stated that she referred to any conduct by respondent as "nothing" and referred to it as "only what normally happens between men and women." According to him she did not take the matter further. During the last half of the program he testified that he had told her that if she felt aggrieved by any conduct he would go through the process with her. According to him she stated that she was taking care of the matter.

The witness acknowledged having discussions with respondent regarding Ms. O'Reilly in which he said that he (Vicari) thought that her performance had been less than standard.

The witness recounted what occurred on July 15, 1994 involving tee shirts for students. He states that he was present and walking down the hallway with Loretta Burnett and when he arrived at the area of the guidance office four people exited. These included Mr. Gallagher, Ms. O'Reilly, Judy Didden and respondent. According to the witness they "virtually ran over me." He stated that he stepped out of the way and that Mr. Gallagher had a box on one shoulder. He characterized them as smiling and joking and included Ms. O'Reilly in his characterization. He indicated that he did not hear Ms. O'Reilly say anything nor did he hear her speak about this event at a later time.

The witness testified that Ms. O'Reilly had been assigned to teach mathematics. He stated that a complaint had been made outside the cafeteria regarding Ms. O'Reilly having stopped two African-American students who asked if it was appropriate for a teacher to be "yelling" at them. He stated that respondent was present. He also indicated a second complaint made to him which he conveyed to the respondent. This

involved students located in the parking lot in what he referred to as "the heat". He stated that he was confused as to why they were there, however, determined that the lessons included walking out measurements in the parking lot and measuring dimensions of the lot itself.

The witness was also familiar with Michael Ianico whom he states has Down's Syndrome and was a student who worked during the summer program. According to the witness Ianico seemed to "stuff his face." He saw him on a Friday with his mouth stuffed so that his cheeks were puffed out. He states, however, that he never discussed this with the respondent. This witness never observed any interaction between respondent and Michael Ianico other than in the nature of greetings

The witness acknowledged that he has known respondent since January 1989 which was the witness's first year of employment with the district and that the respondent was responsible for evaluating him for approximately three years. During that time period the witness received exceptional reviews from the respondent. During 1993 and 1994 he shared an office with respondent from January through summer school in Jersey City. He acknowledged a personal and professional relationship with respondent and states that he thinks highly of the respondent. The witness also wrote a letter which was marked for identification (P-2) dated May 17, 1995 to respondent's counsel. In that letter none of the conversations to which he testified were recounted. The letter also did not include any complaints regarding Ms. O'Reilly.

The witness also acknowledged that the four individuals, including respondent and Ms. O'Reilly whom he saw exit the office after the attempt to obtain tee shirts were seen only briefly by him. All returned and according to him all were smiling.

The witness also acknowledged that the two complaints he mentioned regarding Ms. O'Reilly had never been seen as troublesome to the extent that he might have to

take some form of disciplinary action. He also never saw Ms. O'Reilly discipline students nor raise her voice to any students.

Samuel Casio who is a janitor at the Jersey City facility between 2:00 p.m. and 10:00 p.m. testified that he knows Michael Ianico and has known him for at least six years. Mr. Ianico had been a student at the school and then graduated. At that point he became involved in maintenance and was working in that capacity in the summer of 1994. Mr. Casio was able to state that he had an awareness that Mr. Ianico enjoyed eating a lot.

Mr. Casio stated that he has never been present during any discussion between respondent and Mr. Ianico although he had seen respondent and Mr. Ianico "high five" in greeting and hug on occasion. Casio stated that Mr. Ianico at no time complained about respondent and that Mr. Ianico is "a likable kid."

Loborio Matrachia who is the building engineer in Jersey City and chief administrator for the non-instructional aspect of the schools also testified. As of the time of the hearing he had been in this position for two years which included the summer of 1994 during which time he worked between 7:00 a.m. and 3:00 p.m.

He too knows Michael Ianico and stated that he was hired as a janitorial apprentice after graduation. As of the time of the hearing Mr. Ianico had been employed for two and one-half years by the school.

The witness testified that he has seen respondent and Mr. Ianico interact in a cordial manner. According to the witness respondent shook "everyone's" hand in the morning and Mr. Ianico was included. He did not observe respondent act inappropriately toward Mr. Ianico and at no time in the summer of 1994 did Mr. Ianico indicate that he had any problems with respondent. Mr. Ianico had come to him with a personal problem in 1993 having nothing to do with respondent and they discussed it.

In the summer of 1994 the witness neither talked to Mr. Ianico nor his family about any problems that were being experienced. This witness has monthly contact with Mr. Ianico's family or, more regularly, if Mr. Ianico should need something particular.

The witness did recall a conversation with respondent during the summer of 1994 regarding hot dogs. The witness testified that respondent came and told him that a tray had been left out in the cafeteria with hot dogs and that Mr. Ianico was eating them. According to the witness Mr. Ianico usually gives the lunch which he brings to work to him and then the witness then returns it to him at lunch time.

The witness did recall respondent coming up to Mr. Ianico and asking him not to eat any more hot dogs. He further stated "if you overeat you could die." According to the witness the tone of conversation was low and the respondent appeared concerned. The witness saw Mr. Ianico later that afternoon and his demeanor was as usual.

Matrachia stated that Mr. Ianico is considered "special" and has a difficult time communicating verbally. His difficulty is more pronounced with strangers and he is not talkative with people he does not know.

Judy K. Didden a bus attendant for the Hudson County Vocational Technical School testified. During the summer of 1994 she was working in the attendance office as a "Girl Friday" which included running errands. She indicated that she had first met Sharon O'Reilly in the summer of 1994 and had known the respondent in passing for approximately four years prior to the hearing.

The witness was able to recall the day involving the tee shirts which were locked in an office. She had tried to locate a key as had others. At some point Ms. O'Reilly volunteered to retrieve the tee shirts. She got on a desk and according to this witness and respondent told her not to do so and that he would get the shirts. She stated that he then helped Ms. O'Reilly off the desk. She could not recall exactly where his hands

were while he was helping Ms. O'Reilly off the desk nor did she hear him say anything to Ms. O'Reilly nor she to him. Some time after that a ladder was produced. At that point respondent went over the partition and retrieved the shirts and according to the witness the entire group left the office area laughing.

The witness testified that she never saw respondent do anything inappropriate or put his arms around Ms. O'Reilly. She also stated that prior to leaving the room she observed nothing unusual about Ms. O'Reilly's demeanor.

The witness acknowledged on cross-examination that on that particular day she did leave the office area to collect attendance cards. She also recalls leaving the office and asking the security guard for a key. He was at the security desk which is in another part of the building. She estimates that she was gone for approximately ten minutes. When she was ultimately unable to find the key she returned and told respondent but does not recall where that conversation took place. It was after this that they began looking for a ladder by asking other individuals.

The witness acknowledged that she does not recall what sequence of events she saw first. She stated that Ms. O'Reilly was on a desk rather than on a file cabinet but then acknowledged that she was not sure which it was. She also did not recall if Janet Reynolds was present in the office at the time of the incident. The witness was also unable to recall whether respondent climbed a ladder to get the tee shirts or climbed over onto the desk or used a file cabinet. The witness did confirm that she saw respondent help Ms. O'Reilly to get down and then ultimately recalled that Ms. O'Reilly's hands were on respondent's shoulders and that respondent had both of his hands around her waist.

The witness also acknowledged having telephoned Ms. O'Reilly about being questioned regarding the case and being told "all you can do is answer honestly."

Robert Gallagher who has been a guidance counselor for the past five years was working as a counselor in 1994. He worked five days a week between 8:00 a.m. and 3:00 p.m. He testified that he has known the respondent for 20 years through school. He had met Ms. O'Reilly in the summer of 1994. It was his office that was used during the summer which contained tee shirts discussed. He testified that he was present during attempts to retrieve the tee shirts and observed the respondent help Ms. O'Reilly down from a desk. He stated that she had her hands on his shoulders and he had his hands on her waist. According to this witness respondent fell back a step or two and asked something like could she "feel the floor." According to him it appeared that she fell a little too close to him and the entire transaction took approximately ten or fifteen seconds. This witness testified that he did not see anything he deemed to be inappropriate. He did confirm that he was unable to see Ms. O'Reilly's face nor judge her demeanor afterwards.

Kevin Myers, Jr. testified that he was employed by the school district as a crisis teacher dealing with discipline problems as well as the Jersey City track coach and a history teacher. He also had a summer job with the Hudson County Vocational Technical School as disciplinarian.

The witness acknowledge that he knows Michael Ianico and had observed respondent and Ianico interact in the summer of 1994. He stated that one afternoon in he summer of 1994 the respondent and he were talking about discipline and guidance when Mr. Ianico came to the office. He recalls respondent telling Mr. Ianico that he should stop eating so much because he could die. This witness stated that he too had concerns about Ianico's eating habits because he would sit and "just eat." He indicated having seen Ianico eat four or five sandwiches on one occasion. The witness stated that during the conversation he was able to see Mr. Ianico's expression which did not change. Ms. O'Reilly was also in the room According to this witness she never said anything to the respondent at that time about the interaction. She did however indicate to the witness that she felt respondent should not speak to Mr. Ianico in that manner.

The witness said that he did not wish to get involved and did not see anything wrong in what had occurred.

On cross-examination the witness acknowledged that Ms. O'Reilly was upset at what had occurred. He characterized it as a different point of view.

Frances Bojar who is also an employee and was working in the summer of 1994 as a reading and writing teacher testified. Bojar met Ms. O'Reilly the first week of the summer program. According to Bojar Ms. O'Reilly asked if the witness knew if the respondent "was available" and that there were others at the table although Bojar does not recall whom.

Ms. Bojar indicated that she was present on one occasion during a conversation between Ms. O'Reilly and the respondent in the cafeteria. She stated that Ms. O'Reilly and the respondent were standing approximately one foot away at which time respondent asked if there was a carpool or if he could get a ride. According to this witness Ms. O'Reilly said there was a "reserved seat on her lap." The witness stated that she though this odd. On cross-examination the witness acknowledged that the statement regarding a reserved seat was not in an affidavit which was marked P-(ID) which she wrote about the events. She acknowledged that this is a significant fact. She also acknowledged that the statement about Mr. Vicari's "availability" was also not in the affidavit. She states that she just "forgot" about these things.

Joseph Panepinto who was the director of grants for the school district and director of the summer program also testified. He stated that prior to the summer of 1994 Ms. O'Reilly visited him and expressed an interest in the program and asked what she might be able to do. His conversations with Ms. O'Reilly took place between April and June 1994 and before the start of the program.

The witness has known the respondent for somewhere 25 and 30 years and states that he has total supervision over running the school. He testified to discussions with respondent regarding O'Reilly's job performance. The first was in the beginning of the program regarding the manner in which the program was being run, the second was the incident regarding cookies which has already been discussed. The third was about giving juice at field trips although he never spoke to Ms. O'Reilly about this.

This witness stated that respondent specifically told him he felt that Ms. O'Reilly had threatened him although he remembered no details during his testimony regarding any conversations regarding threats. He also confirmed going to speak to Ms. O'Reilly at her home about the concerns that had been voiced and testified that he told her that he hoped that the summer program would not be affected by whatever was going on. He also acknowledged that he told her he hoped "all troubles would go away". He explains this by stating that he was referring to the problems that he been brought forth by Ms. O'Reilly as well as his own mother's illness.

The witness testified that he is acquainted with Michael Ianico and the interactions observed between respondent and Ianico were cordial. He also stated that he knows Kate (Ms. Karolis).

This witness acknowledged that he is a close friend of the respondent although he stated that they never socialized. He is upset that respondent is in trouble and would want to "fairly" help respondent. He also acknowledged that he had a concern that the situation might have a negative impact on the summer program and was also concerned about his friend, Mr. Vicari. Beyond this he did acknowledge saying "I wish all troubles would go away." He stated that he had never told Ms. O'Reilly, prior to that statement or after, that the statement had anything to do with his ill mother. According to him it was an expression of personal feelings and not a message for Ms. O'Reilly although stated to her at her home.

He stated that during the summer program he had never been to the home of any other teacher for professional reasons. He denied that the purpose was that he wanted to speak with her and not be seen by others.

This witness reiterated several times that he was proud of the summer program and did not want anything to happen which would jeopardize it.

The respondent, Hugo Vicari also testified in this case. In addition to his credentials which have been indicated as undisputed facts above he discussed the factual scenario which gave rise to the charges in this case. He testified that his responsibility in the summer of 1994 was the day-to-day operation of the program. His daily routine consisted of shaking each student's hand and giving them a statement which he referred to as a morale booster. It was his impression that the students responded to this. He also gave an inspirational speech each morning and the students were seated in an auditorium. This took between six and fifteen minutes. The students then went to breakfast and it was his responsibility to see that this was carried out in an orderly fashion.

Respondent testified that he first met Ms. O'Reilly on the first day of the summer program when students were present. According to him she approached him angry with certain specifics of the program. He also stated that she said that nothing was running right at the school and wanted the name of a person to write to in order to close the program. He then spoke with Ms. O'Reilly during the lunch period.

Respondent testified that he met with Mr. Panepinto near the cafeteria later and told him that he had a teacher "fraught" with anger who wanted to close the program. He states that he never introduced himself as the janitor in a joking manner and spoke to her approximately eight times about her job. One of those was outside the cafeteria when she approached him and asked if he had read a write up on a student. According

to him she stood directly in front of him with her right hand clenched and stated "He threatened me like I am threatening you." He mentioned this incident to Mr. Panepinto.

Respondent also brought the question of lavatory duty to the attention of Mr. Panepinto. He testified that he had asked Ms. O'Reilly to help during the second week of school. She indicated to him that she was being picked on and there were others. She walked away from him.

During the third week of the program respondent stated that there was a question of cookies at lunch time and he was in the rear of the cafeteria when he saw four or five tables becoming unruly. He later found out that students from other tables were going to a specific table and taking away their cookies. The respondent said that he told the students that if any student struck another student they would be expelled and thereby defused the situation. Approximately fifteen minutes later he spoke with Ms. O'Reilly in the corridor and told her that as a result of her distribution of cookies an "unruly situation" had been caused. He then testified that there were other events that gave him concern.

Respondent indicated that he spoke with Ms. O'Reilly during the second week in July with only the two present. This took place in the cafeteria during lunch time because several of the students had come to him complaining that she was "yelling" at them. He indicated that he was told she had said she would have them thrown out and they would lose their stipend. He testified that he told her that he would desist with any disciplinary matters and she said nothing.

According to the witness additional complaints came from two students that Ms. O'Reilly had been "berating" them. Although he states that he did not talk to her, he did bring to the attention of Mr. Panepinto the first "yelling incident" and said they should work with her to give her better techniques. He even stated that he would teach a class for her although he never did.

He stated that there was a complaint during the second week of the program from an instructor that Ms. O'Reilly should monitor her conversations around male employees. When this was discussed with her he indicated that her reply was "What's the harm." He states that nothing else was said.

At the end of the third week in July he received a complaint according to his testimony and had a conversation with Ms. O'Reilly. In that incident he had advised her that a teacher reported that she was making physical advances and touching. He informed her that he would have to bring this to the attention of the Superintendent to which she replied, "Your phone number is unlisted." He states that he subsequently found that her conduct was unacceptable and was going to notify the Superintendent. Although he tried to meet with the Superintendent on six to eight occasions he was unable to do so. According to him the Superintendent refused to meet with him. Respondent acknowledged that none of the concerns to which he has testified including this last allegation of physical advances and touching were ever put in writing. When asked why they were never put in writing the respondent answered "I didn't know if it was legal to actually put in writing a sexual advancement. I didn't know what the law was." He also indicated that there were no memos of any concerns and the reason given was that he was advised not to do so by Mr. Panepinto, Mr. Symzak and Mr. Holoduck.

Respondent denies ever suggesting that he and Ms. O'Reilly get together sometime nor having asked her out on a date. He did accuse Ms. O'Reilly of stating that, in the carpool situation, a reserved seat was located on her lap for him. He also denied using the phrase "transient visitor" with respect to Ms. O'Reilly although he did recall using the phrase with the whole school. His testified as follows:

> "I was giving my daily sermon in the morning and I was advising students that we are all transient visitors, but our results will be permanent."

Respondent denied ever discussing keys to any apartment or the doing of wash with Ms. O'Reilly. The only conversations beyond that which had been detailed so far respondent testified was cordial.

With respect to the incident involving the tee shirts respondent stated that he did observe Ms. O'Reilly on top of a desk looking over the partition and that he told her to get down. He states that she put her hand on his shoulder and the other hand on his other shoulder and got off the desk. He also acknowledges having put his hands around her waist and testified that he lost his footing for a few seconds and having asked her if she could feel the floor. She responded yes and he states that he immediately released her. He denies ever having put his arms around her back nor pressing her up against the file cabinet.

Vicari testified that he also knows Michael Ianico who is a pre-apprentice maintenance worker and worked in the summer of 1994. He states that he had concerns regarding Ianico and observed him gorging himself on hot dogs. in the cafeteria. He states that his concerns are because Ianico was "physically challenged" and the witness is afraid that he might choke to death.

Respondent also testified to a conversation in which Mr. Ianico, himself and Ms. O'Reilly were present along with Mr. Myers. At that time he stated that he was concerned with Mr. Ianico's eating habits and the possibility of choking. He testified that the did not recall anything said by Mr. Myers nor by Ms. O'Reilly. The respondent recounted other incidents of observing Mr. Ianico eating in a manner which he described as giving him concern but states that Ms. O'Reilly never spoke to him about the matter. The respondent testified that he spoke to Mr. Ianico's father by telephone about the problem and that the response on the part of the father was appreciative.

FINDINGS OF FACT

Having listened to the testimony and observed the demeanor of the witnesses and having taken into account all of the evidence in this case I **FIND** that this case turns solely and exclusively on the credibility of the witnesses.

I **FIND** that Sharon O'Reilly's testimony about the manner in which she was spoken to and the harassing conduct was credible. This is reinforced by the fact that not until the time of the hearing and time of these charges were any incidents of poor performance or improper behavior on the part of Ms. O'Reilly documented. The only incident of performance which the administration believed to have been improper was what shall be termed "the cookie incident." This is not an incident which shows extreme bias on the part of O'Reilly toward respondent. Additionally any complaints about food and procedure were never discussed by respondent by his own admission with O'Reilly.

There is no question that Vicari, in his position, had supervisory control of the program of which O'Reilly was working. While he may not have been the individual to write specific evaluations for her he certainly had the ability to make known his feelings about her performance and generate any type of discipline since he was the individual in charge.

It is not credible that respondent did not write up any complaints about any of the incidents he alleges by O'Reilly because others told him not to do so. Respondent portrayed himself on the stand as very much the leader of the school, as giving inspirational speeches to all and being totally in charge. That does not square with the idea that he had to consult with numerous people and accede to their wishes.

The complaints by Ms. O'Reilly against respondent involved a series of incidents starting on the first week of the summer program and regard respondent expressing an interest in dating her while he was her supervisor. It is **FOUND AS FACT** that Ms. O'Reilly was a credible witness and communicated that she was not interested in doing so. It is also **FOUND AS FACT** that an inappropriate remark accompanied by a gesture inviting Ms. O'Reilly to measure respondent in his pelvic region also occurred.

Further, it is **FOUND AS FACT** that the incident described by O'Reilly regarding the file cabinet was inappropriate behavior on the part of respondent. The mere gesture of helping her down from the file cabinet would have entirely appropriate. The helping her down from the file cabinet and holding her in what was characterized as an embrace coupled with a subsequent conversation in which respondent said, "Do you think you can handle an Italian stud like me?" and having been asked if she was excited shows how clearly inappropriate the conduct was.

With respect to Katherine Karolis her testimony is also found to be credible and **FOUND TO BE FACT.** Ms. Karolis was a seventeen year old student entrusted to the school system. The fact that she was working through a federal CETA program is of no moment to this case. Respondent was the principal of the school in which she was working. The testimony of Ms. Katherine Karolis is hereby accepted as **FACT.** Respondent comported himself in an inappropriate and unbecoming way in regard to this young lady.

The only remaining question is that of the incident involving statements made to Mr. Ianico. I **FIND AS FACT** that statements were made by respondent regarding Mr. Ianico and his manner of eating. It has not been shown that those statements were demeaning but there exists evidence in equipoise that the statements were of health concerns toward Mr. Ianico. As a result the allegation that they were humiliating statements toward an employee, to wit , Mr. Ianico, has **not** been proved in the case.

CONCLUSION

Based upon the foregoing findings of fact I **CONCLUDE** that respondent, Hugo Vicari has engaged in conduct unbecoming a school administrator as charged by the school district. I further **CONCLUDE** that this case turns solely and exclusively upon the witnesses and their credibility at the time of the hearing. Having concluded that respondent has engaged in the conduct described above which was unbecoming of a school administrator, I further **CONCLUDE** that this conduct was in the form of sexual harassment toward both a teacher and a seventeen year old student. As a result, I **CONCLUDE** that dismissal pursuant to *N.J.S.A.* 18A:6-10 is appropriate in this case.

ORDER

It is hereby **ORDERED** that respondent be dismissed for engaging in conduct unbecoming a professional school administrator and that he therefore be **DISMISSED.**

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

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

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

6/3/96
DATE

MARYLOUISE LUCCHI-MC CLOUD, ALJ

Receipt Acknowledged:

6/6/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 7 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am/md(FV)mxl

APPENDIX

Witnesses

For petitioner:

Sharon O'Reilly
Janet Reynolds
Mary Kathryn Karolis
Michael Pecklers
Michael Symczak
Alexander Zeniuk

For respondent:

John C. Holoduck
Samuel Cascio
Laborio Matrachia
Judy K. Didden
Robert Gallagher
Kevin Meyers, Jr.
Frances Bojar
Joseph Panepinto
Hugo Vicari

Evidence All For Identification Only

P-1 Sworn statement of Sharon O'Reilly
P-2 May 17, 1995 Letter-Holduk (3 pp.)
P-3 Affidavit, September 30, 1995 of F. Bojar
P-4 Phone Message, August 12, 1994

R-1 Handwritten Statement of Samuel Cascio, October 23, 1994 (2 pp.)

IN THE MATTER OF THE TENURE	:	
HEARING OF HUGO VICARI, HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY VOCATIONAL-TECHNICAL	:	DECISION
SCHOOL DISTRICT, HUDSON COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. However, while the Board's time period in which to reply to petitioner's exceptions, as established by regulation, was authorized to be extended from June 26, 1996 until June 28, 1996, said reply was not received until July 2, 1996. Accordingly, the Board's reply is not considered herein.

Respondent asserts that the initial decision: fails to comply with the requirements of *N.J.S.A.* 52:14B; fails to examine the evidence relating to the motives of the Board's chief witnesses; fails to address credibility issues presented regarding the Board's witnesses; improperly upholds the tenure charge based on the allegations by Sharon O'Reilly; and improperly sustains the tenure charge based on the allegations of Mary Kathryn Karolis. Respondent additionally excepts to the Administrative Law Judge's (ALJ) barring of testimony which was beneficial to respondent and to the ALJ's conclusion that dismissal is the appropriate penalty in this matter. To the extent respondent's exceptions offer arguments which were not included in his post-hearing brief, such arguments are summarized below.

Respondent contends that the initial decision does not conform to the requirements set forth under *N.J.S.A.* 52:14B-10(c) and (d) in that, while the initial decision contains a summary of testimony of the witnesses, "***there is no real discussion of the evidence contrary to the recommended conclusions or any indication of the basis for rejecting this contrary evidence.***" (Respondent's Exceptions at pp. 1, 2) Citing *State Dept. of Health v. Tegnazian*, 194 *N.J. Super.* 435 (App. Div. 1984) for the proposition that an ALJ's recommendation and the agency's determination must be accompanied by basic findings of fact sufficient to support them (*State Dept.* at 442, 443), respondent argues that the initial decision, with insufficient discussion, essentially rejects the evidence adduced by his witnesses "***merely by stating that it involves a credibility decision.***" (*Id.* at p. 3)

Respondent also asserts that the initial decision does not properly examine the hostile motives of the Board's chief witnesses. (*Id.*) Respondent continues,

> Many of the issues raised regarding the behavior of O'Reilly and Karolis are corroborated by other witnesses. Yet the initial decision does not take these matters into account when determining to accept the credibility of these witnesses. In short, Vicari has established that the witnesses against him had reasons to invent charges against him. After all, in the present age, allegations of sexual harassment against a male superior are a method for destroying a career. The prospect that the allegations were created to thwart disciplinary action because of poor performance should have been addressed in the initial decision. (*Id.* at p. 4)

Respondent sets forth a series of incidents which he maintains "call into question" the credibility of the Board's witnesses. (*Id.* at p. 5) He argues that the ALJ's conclusion should be rejected as "it is contrary to the weight of the evidence presented, is based on incorrect credibility determinations and fails to take into account the full picture in terms of the behavior of O'Reilly," or the numerous errors in Karolis' testimony. (*Id.* at pp. 7, 13)

Respondent reasons that, since all credibility determinations in the initial decision favor the Board, "***a conclusion should be reached that the trial court improperly barred evidence regarding the behavior of O'Reilly.***" (*Id.* at p. 16) Here, respondent claims that he

> ***spoke to O'Reilly about a complaint he received regarding physical advances made by O'Reilly toward a male staff member. ***However, the subject of these advances, who initiated the complaint to [him], was barred from testifying as to the specifics of O'Reilly's behavior. (*Id.* at pp. 16, 17)

Thus, respondent contends this matter should be remanded for purposes of admitting such evidence.

In the alternative, respondent argues that, even assuming the Board has established a basis for its charge, dismissal is not warranted and is, under the totality of circumstances, an inappropriate sanction. (*Id.* at p. 17) Respondent maintains that the initial decision contains no rationale for the imposition of the "**ultimate sanction of termination ***." (*Id.* at 18) Referring to his employment with the Board and to the variety of administrative positions he has enjoyed, respondent concludes that "[t]here is nothing in the initial decision to suggest that [his] spotless employment record and lengthy service were, in any way, considered when the recommended penalty was determined.***" (*Id.* at pp. 18, 19) Thus, respondent argues that the initial decision of the ALJ should be rejected and the within charges should be dismissed.

Upon careful and independent review of the record in this matter, which included the transcripts from the hearing at the OAL[1], the Commissioner finds no basis either in the transcripts or in the record as a whole to challenge the ALJ's credibility determinations and resultant conclusions and, therefore, concurs that the Board has established by a preponderance of credible evidence that respondent has engaged in conduct unbecoming a school administrator.

[1] Hearing dates were June 27, 1995, June 28, 1995, June 30, 1995, September 6, 1995 and September 8, 1995.

(Initial Decision at p. 27) Moreover, the Commissioner finds that the ALJ's findings of fact, as set forth on pages 25 and 26 of the initial decision, are amply supported by the testimony, both as it appears in full in the transcripts and as it is thoroughly and accurately summarized in the initial decision, and that such findings support the ALJ's ultimate conclusion. Quite contrary to the circumstances present in the matter of *State Dept. of Health v. Tegnazian*, *supra*, where the ALJ's decision recommending dismissal of all but a single charge against a nursing home administrator was found to be "highly conclusory" in its form, and amounting "to judgments rather than statements of fact," *State Dept.* at 446, the Commissioner determines that the initial decision herein provides "***the interested parties and any reviewing tribunal of the basis on which the final decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extra-legal considerations." *State Dept.* at 443, citing *Application of Howard Savings Institution of Newark*, 32 *N.J.* 29, 52 (1960).

As to the appropriate penalty, the Commissioner has considered respondent's apparently unblemished record and extended employment with the Board, but nonetheless determines that the incidents proven to have occurred, while seemingly few in number, are "sufficiently flagrant" to warrant dismissal. *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943); aff'd 131 *N.J.L.* 326 (*E. & A.* 1944) The Commissioner further finds that respondent's actions in this matter evidence a lack of self-restraint and controlled behavior which are compelled by his position as a professional employee in a public school system holding great influence over the lives of children. See *In re Sammons*, 1972 *S.L.D.* 302, 321. This is particularly so in that respondent, as a principal, has a higher responsibility as a building leader.

Accordingly, the initial decision of the OAL, directing that respondent be dismissed from his tenured position as a school principal as the appropriate penalty in this matter, is adopted for the reasons expressed therein.[2] This matter shall be forwarded to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

[2] It is herein noted that while the initial decision recounts the testimony of "Kevin Myers, Jr." the witness's actual name is "Eben Myers." (Respondent's Exceptions at p. 1) Additionally, the Commissioner notes that the initial decision erroneously identifies Gregory T. Syrek, Esq. as the attorney for petitioner, rather than respondent, and Alexander W. Booth, Jr., Esq. as the attorney for respondent, rather than for the petitioning Board. Thus, the initial decision is affirmed with appropriate modification.

JULY 22, 1996
DATE OF MAILING JULY 23, 1996

320-96

EDU #11977-94
C # 320-96
SB # 59-96

IN THE MATTER OF THE TENURE :
HEARING OF HUGO VICARI, HUDSON : STATE BOARD OF EDUCATION
COUNTY VOCATIONAL-TECHNICAL : DECISION
SCHOOL DISTRICT, HUDSON COUNTY. :

Decided by the Commissioner of Education, July 22, 1996

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Brownstein, Booth & Barry (Alexander W. Booth, Jr., Esq., of Counsel)

On October 20, 1994, the Board of Education of the Hudson County Area Vocational-Technical School (hereinafter "Board") certified tenure charges of unbecoming conduct against Hugo Vicari (hereinafter "respondent"), a tenured teaching staff member, alleging that respondent had sexually harassed a teacher in the district's summer program and a 17-year-old student-employee while he was serving as principal of the district's summer school program in 1994. The Board also charged that respondent had inappropriately reprimanded a maintenance employee.

On June 3, 1996, an Administrative Law Judge ("ALJ") found that the Board had proven by a preponderance of the credible evidence that respondent had sexually harassed the teacher and the student-employee. Stressing that the case turned on the credibility of the witnesses, the ALJ found the testimony of both the teacher, Sharon

July 1, 1998

O'Reilly, and the student-employee, Mary Katherine Karolis, to be credible. The ALJ, however, concluded that the Board had not demonstrated that respondent had inappropriately reprimanded the maintenance worker, finding that the statements made by respondent had not been demeaning, but, rather, were in the nature of health concerns directed towards that employee. The ALJ concluded that respondent's conduct in sexually harassing the two women was sufficiently flagrant to warrant his dismissal from his tenured employment.

On July 22, 1996, the Commissioner adopted the findings and conclusions of the ALJ. The Commissioner agreed that dismissal of respondent from his tenured position was the appropriate penalty under the circumstances.

Respondent filed the instant appeal to the State Board, claiming that the Board had not met its burden of proving the sexual harassment charges.[1]

After an exhaustive review of the record, including the transcripts of the hearing held in the Office of Administrative Law, we reverse the decision of the Commissioner on the points of appeal before us. Based on our review of the evidence, we conclude that the Board has not met its burden of demonstrating the truthfulness of the tenure charges alleging sexual harassment by a preponderance of the credible evidence.

The pivotal episode alleged by O'Reilly–and the only incident for which there are eyewitness accounts–occurred on July 15, 1994, prior to a field trip. According to O'Reilly, she had climbed onto a file cabinet in order to hoist herself over a wall partition

[1] Since the Board has not filed a cross-appeal from that portion of the Commissioner's decision dismissing the tenure charge alleging that respondent had inappropriately reprimanded a maintenance worker, the appeal before us is limited to the Commissioner's determination that the Board had proven the sexual harassment charges.

to obtain access to a locked office in which tee shirts for the trip were stored.[2] Respondent informed O'Reilly that someone was getting a ladder, and he proceeded to help her down from the file cabinet. According to O'Reilly, "...I kind of bent down like in a squat position and Mr. Vicari grabbed my right hand, but instead of grabbing it with his right hand, he grabbed it with his left. So then when I went to hoist myself off the file cabinets, I kind of had to lean into him. He took a step forward and it took not even a second for me to touch the ground. And I put my toes out to touch and he pressed up against me. And he put his head right by my neck so I could kind of feel him breathing." Tr. 6/27/95, at 25-26.

O'Reilly testified that respondent pressed her against the file cabinet and put his hands around her back in an "embrace." She could not estimate the amount of time in which she was held in this position, except to indicate that she was surprised and that "it seemed like a very long time." Id. at 27. She indicated that she put her hands in between them in order to free herself.

According to O'Reilly, respondent then asked her to walk back to the cafeteria with him but that she had refused, thinking that "there was no way I wanted to walk back with him." Id. at 28. She related that respondent left the room without her and that Janet Reynolds, an attendance aide in the district who had witnessed the incident, then told O'Reilly that she "shouldn't let [respondent] do that to you." Id. at 29.

Reynolds, who was called as a witness by the Board, testified that after O'Reilly had jumped down from the file cabinet, she and respondent "didn't separate like, they were close together and [respondent] was talking to her." Id. at 94. She heard

[2] We note that there is some disagreement among the witnesses regarding whether O'Reilly had climbed onto a desk or a file cabinet in her attempt to retrieve the tee shirts.

respondent say something to O'Reilly with the word "feel" in it. She testified that respondent and O'Reilly remained together with respondent's hands on O'Reilly's waist and O'Reilly's hands on respondent's shoulders. Reynolds indicated that the incident lasted "[a] little more than a minute," id. at 99, and that it made her feel uncomfortable. She stated that respondent and O'Reilly separated after a maintenance worker came in with a ladder. Although O'Reilly testified that Reynolds had told her immediately after the incident that she "shouldn't let [respondent] do that to you," id. at 29, Reynolds gave no indication of such a conversation. Instead, Reynolds indicated that she was not aware of what O'Reilly had done after the incident, stating only that O'Reilly had left with respondent and the others. Id. at 112.

Robert Gallagher, a counselor in the district's summer program, testified that respondent "was helping [O'Reilly] down from the desk and his hands were around [her] waist and she was holding him by the shoulders as she came down from the desk. And she was on the floor and he like fell backwards a little bit when I saw him, he like went back a step or two and he just says, are you okay? Are you okay or can you feel the floor? Something to that effect, when he was--when she was on the floor." Tr. 6/28/95, at 136. Gallagher indicated that O'Reilly's hands were on respondent's shoulders and "[i]t looked like she was just placed on the floor when he went back a little bit and he like--he was like releasing her when he kind of, you know, had his hands on her waist and he fell back. So she fell, you know, a little close to him, I guess, when he was trying to set her on the floor." Id. at 137. Gallagher stated that he had not seen respondent do anything inappropriate.

Judy Didden, who worked in the attendance office, also testified that she had not seen respondent do anything inappropriate.

John Holoduek, a teacher in the summer program, testified that respondent, O'Reilly, Gallagher and Didden had passed him in the hallway immediately after retrieving the tee shirts and that they all were smiling and joking. Holoduek stated that O'Reilly was "[s]miling. Acting like the rest." Id. at 24. He also indicated that O'Reilly had asked him during the first week of the summer program about respondent's "marital status, whether or not he was dating or seeing anyone." Id. at 12.

Frances Bojar, a teacher, testified that O'Reilly had asked her during the first week of the summer program whether respondent was "available." Id. at 176. She also indicated that she had overheard a conversation between respondent and O'Reilly in which respondent had asked O'Reilly "if there was a carpool or if he could have a ride to school" and that O'Reilly had responded that "there was a reserved seat on her lap." Id. at 179. Bojar acknowledged that those alleged incidents were not included in a sworn statement she had given to respondent's attorney in September 1994.

Respondent testified on his own behalf and denied any inappropriate behavior. According to respondent, O'Reilly "put her hand on my shoulder--one hand on my shoulder and she put the other hand on my other shoulder, she got off the desk. I put my hands around her waste [sic]. I lost my footing for a few seconds. I asked her if she could feel the floor. She said yes. And I immediately released her." Tr. 6/30/95, at 168. Respondent denied putting his hands around her back or pressing up against her. He acknowledged that they were "face to face, because when I stumbled, I turned my body and then I made sure she was firmly aground and then I released her." Id. at 169.

Although O'Reilly initially denied having asked anyone at the school about respondent's marital status, tr. 6/27/95, at 67, she was recalled as a witness by the Board towards the end of the hearing and acknowledged that she had asked Holoduek and also possibly Bojar "[b]ecause I figured if I knew then the next time [respondent] come [sic] onto me I could say, listen, I know you're married. And maybe he would stop coming onto me." Tr. 9/8/95, at 157-58.

While we recognize that there is evidence in the record which is inconsistent with the version of the tee shirt incident offered by respondent–notably Ms. Reynolds' testimony regarding the duration of that incident–it is the Board which has the burden of demonstrating the truthfulness of the tenure charges by a preponderance of the credible evidence, see In re Polk, 90 N.J. 550 (1982), and we are unable to conclude on the basis of the record before us that the Board has met that burden. There is significant credible evidence in the record which contradicts and in other ways fails to corroborate the version of events related by O'Reilly. Although, for example, O'Reilly testified that she had refused respondent's offer to walk back to the cafeteria with him, Reynolds indicated that O'Reilly had left with respondent, and Holoduek testified that respondent and O'Reilly had passed him in the hallway immediately after retrieving the tee shirts and that they were smiling and joking.

Moreover, although Reynolds testified that respondent and O'Reilly had failed to separate after respondent had helped her down from the filing cabinet, her testimony did not verify that such situation had resulted from improper conduct by respondent, particularly in view of respondent's assertion, which was supported by Gallagher, that he had stumbled. Nor, as previously noted, did Reynolds corroborate O'Reilly's

testimony that Reynolds had told her immediately after that incident that she "shouldn't let [respondent] do that to you." We note, in addition, that O'Reilly did not report any of the alleged incidents to district authorities at the time of the incidents.

While we are aware of our obligation to accord due consideration to the fact that the Administrative Law Judge had the opportunity to observe these witnesses, see Quinlan v. Board of Education of North Bergen Township 73 N.J. Super. 42, 50-54 (App. Div. 1962), we are not bound by the ALJ's assessments of the substance of the testimony or her evaluation of the factors bearing upon credibility. E.g., In the Matter of the Tenure Hearing of Barry Deetz, decided by the State Board of Education, November 7, 1984, aff'd, Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 321 (1986). Moreover, we recognize our responsibility as the ultimate administrative decision-maker in this case to determine the validity of the charges, and we reiterate that the Board had the burden of demonstrating their truthfulness. On the basis of the record before us, we are unable to conclude that it has done so.

O'Reilly further alleged in a sworn statement included in support of the Board's tenure charges that respondent "right from the beginning of school...made advances to me and asked if I would go out with him." She alleged, in addition, that respondent had made a bodily motion to her "implying that I should measure his genital area." She also averred in her statement that after the alleged tee shirt incident, respondent had approached her and "asked 'Were you excited before.' I ignored him. A short while later he approached me again and said 'I have to know if you were excited before.' I answered 'No, I wasn't.' He said 'then you have to give me another chance, I know I could get you excited.'" At hearing, respondent denied those allegations, and there is

no independent evidence to corroborate these particular instances of alleged misconduct. See In the Matter of the Tenure Hearing of David C. Borrelli, decided by the State Board of Education, June 1, 1994, aff'd, Docket #A-5627-93T3 (App. Div. 1995). Given our concerns regarding O'Reilly's version of the tee shirt incident, we are also unable to conclude that the Board has demonstrated the truthfulness of these particular charges.

In addition, we find that the Board has failed to demonstrate the truthfulness of the incidents alleged by Ms. Karolis. Karolis testified that she had initially met respondent at school on the first day of the summer program during a meeting for counselors and teachers. She stated that when respondent introduced himself to her, he touched her hand, and possibly her hair, told her she was attractive and then introduced her to the counselors. Karolis further testified that respondent would see her in the hallway and say, "you have to stop calling at night. I know you want me, but you have to stop calling me." Tr. 6/27/95, at 120. According to Ms. Karolis, these statements were made in front of other individuals, although none were produced during the hearing. She also testified that respondent told her, "...you're 17 one more year and your--you have no chance, you're mine, or whatever." Id. In addition, Karolis testified with respect to an alleged incident in which she was walking down the hallway with a counselor when respondent came up, took her arm and said to the counselor: "[C]an I borrow her for an hour and take her in the room and then I'll give her back." Id. at 125. She indicated that this made her feel uncomfortable.

We are unable to conclude on the basis of the record before us that the Board has proven the charge of unbecoming conduct with regard to Karolis. The Board did

not produce any witnesses to corroborate Karolis' allegations, despite the fact that several of the alleged statements were made in front of others. See Borrelli, supra. Moreover, in the absence of proofs providing the context for respondent's alleged comments, we are unable to conclude that the Board has demonstrated that respondent intended to sexually harass Karolis.

Accordingly, we find that the Board has failed to satisfy its burden of proving the sexual harassment charges against respondent by a preponderance of the credible evidence. We therefore reverse the decision of the Commissioner on the points of appeal before us[3] and direct the Board to reinstate respondent to his tenured position with back pay and other emoluments, less mitigation.[4]

Attorney exceptions are noted.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

[3] See supra note 1.

[4] We note that the Board filed a request for oral argument on June 22, 1998, after exceptions to the Legal Committee's report had been filed and reviewed. We deny the Board's belated request as not necessary for a fair determination of this matter. N.J.A.C. 6:2-3.2.

321-96

321-96

OAL DKT. NO. EDU 8280-95

SANDRA BJERRE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAMPTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, part-time Teacher of Library Skills, alleged the Board improperly terminated her from her employment violating her tenure rights. Board contended petitioner was terminated for failure to obtain the required certification of Educational Media Specialist or Associate Educational Media Specialist despite notification by the Board. She subsequently acquired an emergency certificate in September 1995 and was rehired. Petitioner claimed she was entitled to a full-time teaching position under her Instructional Certificate with an Elementary Endorsement.

ALJ found the Board had no choice but to attempt to hire an individual holding the appropriate certificate for the library position. Although petitioner claimed the position consisted mainly of instructional duties, ALJ found the positions of teacher and media specialist are substantially distinct. (*Wallen*) Thus, petitioner was not entitled to a teaching position and petition was dismissed.

Commissioner concurred with the findings and determination in initial decision that petitioner was not entitled to a teaching position. Commissioner concurred that summary judgment was appropriate and ordered petition dismissed.

JULY 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8280-95

AGENCY DKT. NO. 298-7/95

SANDRA BJERRE,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HAMPTON, HUNTERDON COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Robert J. Merryman, Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: April 17, 1996 Decided: June 3, 1996

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Sandra Bjerre, petitioner, alleges and the Hampton Board of Education, respondent, denies that the petitioner has achieved a tenure status and has been improperly terminated.

The matter was joined before the Commissioner of the Department of Education and transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 through -13. Following several conferences, the parties now stipulate all

necessary facts and the Board moves for summary judgment. Moving and responsive papers were timely filed, the last being received on April 17, 1996.

The Board argues that the petitioner was hired in February 1991 as Teacher of Library Skills. This was a four-tenths-time position. Upon hire, the petitioner was advised, in writing, by the Superintendent that she was expected to pursue course work toward the required certificate for the position. Board's Exhibit A. When hired and at all pertinent times, the petitioner held an Instructional Certificate with an Elementary Endorsement.

The petitioner served as Teacher of Library Skills for the remainder of the 1990-91 school year and was renewed in the position for the 1991-92, 1992-93 and 1993-94 school years. For each of those years, the position remained a four-tenths-time position. At the time the petitioner was renewed for the 1994-95 school year, the position was changed to a five-tenths-time position.

Annual performance evaluations and professional improvement plans for 1991 and 1992 refer to the need for the petitioner to take the necessary course work to obtain the necessary certificate for the Teacher of Library Skills position. Board Exhibits B, C, D and E. It appears the petitioner did not take the courses and did not obtain the required certificate and/or endorsement. In September 1995, she acquired an emergency certificate.

The Hampton School District was monitored by the New Jersey Department of Education in early 1995. *N.J.A.C.* 6:8-4.1. School officials met with officials of the Hunterdon County Superintendent of Schools to review the process. The superintendent was informed that the Board was in violation of certain regulations because the individual providing library skills and services was not properly certified. The superintendent requested confirmation of this in writing which was supplied by letter dated June 30, 1995 from the County Superintendent. The letter states that, in order to provide library skills and services to pupils, the district must employ an individual with either an Educational Media Specialist or Associate Educational Media Specialist certificate. Board's Exhibit F.

The superintendent consulted officials from the County office about the status of the petitioner's employment. He was advised that the petitioner could continue in her position under

an Emergency Associate Educational Media Specialist Certificate, only if the district advertised for the position and was unable to find a suitable candidate with a permanent credential.

Acting upon this information, the Board voted on July 11, 1995 to terminate the petitioner's contract on 60 days' notice The position of Library Skills Teacher was advertised in local newspapers. After no suitable certified candidate was found, the petitioner was offered the position on the condition that she obtain the required emergency certificate. The petitioner did so and returned to the same position for the 1995-96 school year at the same salary that she would have earned if she had not been terminated. The petitioner currently serves in this position.

The petitioner never held the required certificate for the position until she obtained an emergency certificate in September 1995. The petitioner does not claim a tenure right to the position she held for four and one-half years. Instead, she claims a tenure right to teaching positions in which she never served and which require a certificate different from the certificate required for the Teacher of Library Skills position.

As Teacher of Library Skills, the petitioner handled many instructional duties. She would have provided instruction to pupils in the library. This instruction was addressed directly to library skills. However, while instructional duties were part of her position, the petitioner also had other required duties involving the operation of the library. No formal job description exists covering these duties; however, the superintendent has prepared a summary of those duties. Board Exhibit I. The position requires much more than instructional duties. Among other things, the petitioner is responsible for operation of the library including the reviewing and selection of new materials, preparation of the library budget, supervising the media computer system, assisting teachers in the selection of books and other materials, and maintaining a cataloging system for the media center.

Summary decision is appropriate in this matter because there are no facts in dispute and the matter can be decided as a purely legal question. The petitioner was properly terminated for her failure to hold the required certificate for the position of Teacher of Library Skills. Petitioner has no tenure right to a teaching position because she never served as a full-time teacher.

Therefore, the Board's motion for summary decision should be granted and the motion should be dismissed.

The petitioner argues that the Board has impermissibly terminated her employment as a tenured teacher while at the same time retaining non-tenured teachers in violation of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 through -33. The petitioner has been employed by the Board since February 1991, as a teacher of library skills. She was required to hold and does hold an Instructional Certificate with Elementary Endorsement. As a result of her certification and employment, the petitioner acquired tenure with the Board under her Instructional Certificate which extended to the full scope of her Elementary Endorsement.

On July 11, 1995, the Board resolved to terminate the petitioner's employment. At that time, the Board retained teachers serving under Elementary Endorsements who were not tenured. The Board's stated reason for termination was that the petitioner did not hold the required certificate for the position of Teacher of Library Skills. Instead of reassigning her to another teaching position, and crediting her certification endorsement and the fact that her duties were primarily instructive in nature, the Board summarily terminated her employment. She presently serves in her former capacity as Teacher of Library Skills under an emergency certificate.

The petitioner began employment as a part-time teacher. Her employment contract, dated February 1, 1991, states she was employed as a Library Skills Teacher and that she holds an appropriate teaching certificate. Petitioner's Exhibit B. The petitioner holds an Instructional Certificate issued by the State Board of Examiners with an endorsement as an Elementary Teacher for grades K-8.

The petitioner's subsequent employment contracts each provided that she was employed to teach in the public schools. Petitioner's Exhibit C. Her contract was renewed each year up to and including the 1994-95 school year. In 1994-95, the position was increased to a five-tenths-time position.

By letter dated April 18, 1995, the Superintendent informed the petitioner she had achieved tenure and that on April 11, 1995, the Board acknowledged her tenure status. Petitioner's Exhibit D.

The district's teacher seniority list characterizes the petitioner as an elementary teacher. Petitioner's Exhibit E. Despite her tenure status, her certification and endorsement, on or about July 11, 1995, the Board resolved to terminate her employment. The Board gives as its reason that the petitioner was required, as a Teacher of Library Skills, to possess one of two particular media specialist certifications. The petitioner possessed neither. Therefore, according to the Board, she could not be retained. Petitioner asserts that there is no indication as to what, if any, documentation the Board provided to the County Superintendent with respect to the duties she actually performed as a teacher of library skills. It is not clear whether the Board indicated to the county office that the board had long considered the petitioner a teacher.

Aside from the Board's consistent categorizations and characterizations, an examination of the petitioner's duties reveals that she was engaged largely in the instruction and training of pupils. She asserts that much of the actual "library responsibilities" such as ordering materials and administering the budget were completed on her own time. In other respects, her day was similar to if not identical with that of other elementary teachers.

In addition, the petitioner was required to attend teacher meetings, workshops and training sessions, she was required to attend Back to School Night and was assigned a time for parent conferences. In 1993, along with other Hampton teachers, she attend a Whole Language Conference in Vermont. In the 1992-93 school year she instructed sixth, seventh, and eighth graders in mathematics and basic reading skills for five hours per week and she assisted in the preparation of the upper grades for the Iowa Tests with respect to the study skills and maps skills sections.

Finally, the petitioner denies that she was ever told by the Superintendent of any one else that she was required to obtain library certification. The Superintendent never indicated prior to May 1995 that a library certification was a required condition for continued employment.

This tribunal should deny the Board's motion because there are many disputed factual issues of a material and substantial nature. Therefore, summary decision is inappropriate. Because the petitioner's duties were instructive in nature, she was entitled to tenure as a teacher. Importantly, the Board never advised the petitioner that a library certification was a required condition of employment. Accordingly, this tribunal should reject the Board's arguments, to the extent that they are equitable arguments, and deny summary decision. At least, the failure to obtain the supposedly required certification is a debatable question that is more appropriately considered within the context of a plenary hearing.

The Board's reliance on the County Superintendent's findings is misplaced, because there is no evidence that the County Superintendent reviewed the factual circumstances surrounding the petitioner's position. Accordingly, summary decision should be denied and the matter should proceed to plenary hearing.

DETERMINATION

The Board's Exhibit I, a letter from the Superintendent to the petitioner dated February 3, 1991, states, among other things:

> I will be presenting your name to the Board of Education at our February 12th meeting for appointment to a 40% position as Library Skills teacher effective February 1, 1991 through June 30, 1991. . . .It is understood that you will pursue course work toward possibly an Associate Education Media Specialist, (School Librarian).

Thus, it is clear that the petitioner had notice of the requirement to work toward a Media Specialist certificate from the State Board of Examiners and no teaching staff member may acquire tenure in any position unless she or he is the holder of an appropriate certificate, *N.J.S.A.* 15A:28-4 and unless she or he is or becomes a citizen of the United States, *N.J.S.A.* 18A:28-3. Any teaching staff member who does not hold an appropriate certificate can be dismissed without charges or a hearing. *N.J.S.A.* 18A:28-14. Part-time teachers may acquire tenure if they

otherwise meet statutory criteria for tenure acquisition. Certificated teaching staff members often are referred to by the all inclusive term "teachers". Simple reference to a person as a teacher is dispositive of nothing.

The petitioner was hired while she held an Elementary Endorsement. She knew she had to work towards the Media Specialist credential. She did not. She achieved tenure in the district in a part-time capacity upon serving three years and one day in position within a period of four calendar years. A calendar year is 12 months and need not commence on January 1.

The New Jersey Department of Education, through its Hunterdon County Office, monitored the district in early 1995. As part of a meeting to go over the results of the monitoring, the superintendent was informed that the individual providing library skills and services must hold a Media Specialist or Associate Media Specialist credential. By this time, the petitioner had had four years in which to work toward acquisition of that credential. It appears, however, that she had done nothing in that regard.

Inasmuch as the Department of Education is not a named party herein, I must presume that the petitioner challenges only the action of the Hampton Board of Education.

The Board did not merely rely upon the findings presented by State monitors, it properly believed itself bound by them. The Department of Education stated that the petitioner's position required the individual to hold a certificate as an Educational Media Specialist or Associate Educational Media Specialist. This was confirmed to the superintendent by the County Superintendent by letter dated July 30, 1995. Board's Exhibit F. When the Board terminated the petitioner, she did not hold the required certificate for the position, she had not made good faith efforts to acquire the certification for the position and she could not remain in the position. In *Timko v. Bridgewater-Raritan Reg'l School Dist.*, 94 *N.J.A.R.* 2d (EDU) 483, decision on remand 94 *N.J.A.R.* 2d (EDU) 484, aff'd St. Bd. of Ed. 95 *N.J.A.R.* 2d (EDU) 12, the State Board of Education clearly said, "It is the county superintendent's determination that establishes the certification required for such assignments, rather than the district board." *N.J.S.A.* 18A:27-2 provides:

> Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment, not withstanding that the term of such employment shall not then have expired.

When the County Superintendent sent notice that the petitioner was not properly certified for her position, her employment relationship ceased as a matter of law. Even if the Board had taken no official action, her contract with the Board was void. "A contract for the employment of a teacher who is not properly certified as required by statute is void." *Delgado v. Union City Board of Education*, 93 *N.J.A.R.* 2d (EDU) 744.

The Board had no choice but to attempt to hire an individual holding the appropriate credential once it was advised that the position that the petitioner held must be filled by an individual with either an Educational Media Specialist or Associate Educational Media Specialist certificate. That the petitioner has acquired an emergency certificate and has been rehired to the position is not relevant to the determination of this matter. What remains to be addressed is whether she could have exercised a tenure right to a full-time teaching position. This question seems to have been put to rest by the Commissioner and the State Board in *Wallen v. Rancocas Valley Reg'l High School Board of Education,* 92 *N.J.A.R.* 2d (EDU) 670, aff'd St. Bd. of Ed. 92 *N.J.A.R.* 2d (EDU) 303. Wallen earned tenure as a librarian and media specialist. Her position was eliminated as a result of a reduction in force. Wallen then claimed a tenure right to an English teacher position held by a nontenured person. Wallen held both an instructional certificate with an English endorsement and an educational services certificate with a media specialist endorsement. Wallen claimed that, for tenure purposes, she was a teacher who taught in the library. The Commissioner rejected the argument and found that the only position in which Wallen had been employed was that of librarian and media specialist. The Commissioner held that she earned tenure only under her educational services certificate as media specialist. This was not affected in any way by the petitioner's contention that she was really a teacher for tenure purposes by virtue of her duties and the fact that the media specialist endorsement requires an instructional certificate. The Commissioner concluded that "[w]hile it is certainly true that both petitioner's

position and her training included a significant instructional component, it is equally true that the positions of "teacher" and "media specialist" are substantially distinct." 92 *N.J.A.R.* at 674. The State Board affirmed.

So it is here. *Wallen* controls on the issue.

For the foregoing reasons I **FIND** and **CONCLUDE** that no essential facts are in dispute in this matter and that the legal issue must be decided in favor of the Board. Therefore, it is **ORDERED** that the present petition be and is here by **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3 JUNE 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

June 5, 1996
DATE

D. N. Contaxis/jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 7 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

Petitioner:

A. Letter, Bjerre to School, January 16, 1991

B. Employment contract, February 1 - June 30, 1991

C. Employment contracts, September 1, 1991 - June 30, 1992; September 1, 1992 - June 30, 1993

D. Letter, Lubben to Bjerre, April 18, 1995

E. Hampton School District Seniority List, January 8, 1992

F. Annual Performance Evaluation, June 2, 1994

G. Sample lesson plans

H. Teacher Observation Form, April 7, 1994, reviewed April 18, 1994

I. Letter, Lubben to Bjerre, February 3, 1991

Board

A. Letter, Lubben to Bjerre, February 3, 1991

B. Annual Performance Evaluation, June 5, 1991

C. Professional Improvement Development Plan, June 5, 1991

D. Annual Performance Evaluation, June 2, 1991

E. Professional Improvement/Development Plan, June 2, 1991

F. Letter, Sopko to Lubben, June 30, 1995

G. Excerpt and resolution, Board minutes, July 10, 1995

H. Employment contract, September 1, 1995 - June 30, 1996

I. Performance Responsibilities for Lubben, December 11, 1995

SANDRA BJERRE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAMPTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions incorporate arguments advanced before the ALJ, contending, *inter alia*, that petitioner is entitled to a teaching position within respondent's District as she has acquired tenure by virtue of her service as a teacher of library skills. (Petitioner's Exceptions at pp. 1-2) Petitioner excepts that the ALJ failed "to take into account the long held and now axiomatic principle that tenure may accrue in two categories simultaneously***" and "***since [petitioner's] duties were predominantly instructive (*i.e.* teaching), she simultaneously accrued tenure as a teacher while ***she performed her duties as teacher of library skills." (*Id.* at p. 2) Petitioner further avers that the ALJ failed to consider the nature of petitioner's duties but instead relied on facts "created by the Board of Education specifically for this litigation.***" (*Id.* at p. 3) While petitioner concedes that library duties are part of her position, she argues that her duties were "primarily" instructive in nature. (*Id.*) Petitioner avers the ALJ further erred in accepting the summary of duties as prepared by the Board in that she strongly disagrees with its content. (*Id.*) Petitioner also avers that "at no time

did the Board specifically mandate that [petitioner] obtain the [associate media specialist] certificate." (*Id.*)

In sum, petitioner excepts to the ALJ's awarding of summary judgment averring that there remain issues of material fact to be determined and that the ALJ wrongly concluded that summary judgment was appropriate. (*Id.* at p. 4)

In reply, the Board argues that *Wallen, supra* makes it clear that even though a position requiring an educational media specialist endorsement or an assistant educational media specialist endorsement includes teaching duties, this fact will not make the position that of a teacher for tenure purposes. (Board's Reply Exceptions at p. 1) Thus, an individual who holds such a position will have no right to a teaching position; nor will the fact that petitioner performed instructional duties make her a tenured elementary teacher. (*Id.*)

The Board further contends that the fact that petitioner may have handled instructional duties is not determinative of the tenure rights she acquired and that the position in *Wallen*, just as the position in the instant matter, included a significant instructional component. (at 674) The Board further avers that all media specialists are required to possess an instructional certificate pursuant to *N.J.A.C.* 6:11-11.18. Thus, following petitioner's logic, any individual who holds an assistant media specialist endorsement would automatically have a tenure right to a teaching position. The Board avers that this very argument was considered and rejected by the Commissioner and the State Board of Education in *Wallen.* (Board's Reply Exceptions at p. 2)

Lastly, the Board rebuffed petitioner's argument that a question of whether petitioner was required to obtain a certificate remains an issue. The Board avers that whether petitioner was advised by the Board to obtain such endorsement (and maintains that she was so advised), she was required to obtain the necessary certificate for her position *as a matter of law.* See, *e.g., Sydnor v. Board of Education of the City of Englewood, Bergen County,* 1976 *S.L.D.* 113, 117. (Board's Reply Exceptions at p. 2)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner is not entitled to a teaching position for the reasons expressed therein. The ALJ considered the claims presented in petitioner's briefs, including petitioner's assertions that she was primarily a teacher. (Initial Decision at p. 5) The ALJ next analyzed these claims against the applicable statutes and determined regardless of

whether petitioner performed instructional duties, petitioner did not possess the requisite certification for her position and that without such certification, petitioner could not accrue tenure. *N.J.S.A.* 18A:28-4 and *N.J.S.A.* 18A: 28-14

The Commissioner is further satisfied that the ALJ based such determination on applicable case law. The State Board decision in *Wallen, supra,* squarely addresses the issues presented in this case and stands for the proposition that the positions of teacher and media specialist are substantially distinct. 93 *N.J.A.R.* 2d *(EDU)* 301. Thus, whether petitioner held an instructional certificate and performed instructional duties is not determinative of the petitioner's tenure rights where the county superintendent has duly determined that the position in question requires the educational services certificate.*

Lastly, the Commissioner concurs with the ALJ's conclusion that the Board's failure to "specifically mandate" that petitioner obtain appropriate certification as a media specialist does not justify an alternate finding. This argument was specifically rejected in *McAneny v. Board of Education of the School District of the Chathams,* 92 *N.J.A.R.* 2d *(EDU)* 208, aff'd State Board of Education 212 in that

> ***the regulations requiring appropriate certification ***were in effect throughout the entire period of Appellant's employment by the Chatham Township Board of Education*** as was the regulation which clearly and unambiguously specifies the scope of authorization to teach under the home economics endorsement.*** In the face of these regulations, any reliance Appellant placed on the Board's ignorance can not be regarded as reasonable. (at 213)

In the present case, the regulations concerning media specialists and associate educational media specialists, set forth at *N.J.A.C.* 6:11-11.17, -11.8 and -11.19, were also in place when the present petitioner began her employment with the Board and these remain specific in their scope. Thus, the Commissioner is unpersuaded by petitioner's argument that the Board failed to provide her with notice that certification was necessary, as such notice, which, even assuming *arguendo* and contrary to the ALJ's findings, petitioner had not received, would not be determinative in the present matter.

* As correctly noted by the ALJ, petitioner may not herein challenge the County Superintendent's determination itself without having named him as a respondent.

Accordingly, the Commissioner concurs that Summary Judgment was appropriate in the instant matter and hereby orders that the within Petition of Appeal be dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 22, 1996

DATE OF MAILING JULY 23, 1996

321-96

EDU #8280-95
C # 321-96
SB # 53-96

SANDRA BJERRE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAMPTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 22, 1996

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq. and Edward H. O'Hare, Esq., of Counsel)

For the Respondent-Respondent, Parker, McCay & Criscuolo (John E. Collins, Esq., of Counsel)

Sandra Bjerre (hereinafter "petitioner") had been employed part-time since February 1991 by the Board of Education of the Borough of Hampton (hereinafter "Board") as a "Library Skills Teacher" under her instructional certification in elementary education. However, following monitoring by the Department of Education, the Board was notified by letter dated June 30, 1995 from the Hunterdon County Superintendent of Schools that, in order to offer library studies/services to students, it was required to employ an individual who possessed certification as either an educational media specialist or an associate educational media specialist. On July 11, 1995, the Board voted to terminate the petitioner's employment since she did not hold the appropriate certification for the position as determined by the County Superintendent.

July 5, 2000

The petitioner filed a petition of appeal with the Commissioner of Education, alleging that she had achieved tenure as a teacher as a result of her employment in the district and that the Board had violated her tenure rights when it terminated her employment and failed to assign her to a full-time position within the scope of her teaching certificate.

The Board filed a motion for summary decision with the Administrative Law Judge ("ALJ"), contending that the petitioner's employment had properly been terminated and that she had no tenure rights to a teaching position.

On June 3, 1996, the ALJ, finding that there were no material facts in dispute, recommended granting the Board's motion and dismissing the petition. The ALJ found that the petitioner had been put on notice by the Board in 1991 that it was necessary for her to work towards acquiring an educational media specialist endorsement and that she had failed to do so. He asserted that "[w]hen the Board terminated the petitioner, she did not hold the required certificate for the position, she had not made good faith efforts to acquire the certification for the position and she could not remain in the position." Initial Decision, slip op. at 7. The ALJ stressed: "When the County Superintendent sent notice that the petitioner was not properly certified for her position, her employment relationship ceased as a matter of law. Even if the Board had taken no official action, her contract with the Board was void." Id. at 8.

In reliance upon Wallen v. Rancocas Valley Reg'l High School Board of Education, decided by the Commissioner of Education, 92 N.J.A.R.2d (EDU) 670, aff'd, State Board of Education, 92 N.J.A.R.2d (EDU) 303, the ALJ further determined that the petitioner had no entitlement by virtue of tenure to reinstatement in a teaching position,

observing that "the positions of 'teacher' and 'media specialist' are substantially distinct." Id. at 9.

On July 22, 1996, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition. The ALJ agreed that "regardless of whether petitioner performed instructional duties, petitioner did not possess the requisite certification for her position and that without such certification, petitioner could not accrue tenure....Thus, whether petitioner held an instructional certificate and performed instructional duties is not determinative of the petitioner's tenure rights where the county superintendent has duly determined that the position in question requires the educational services certificate." Commissioner's Decision, slip op. at 13-14. The Commissioner further agreed with the ALJ that "the Board's failure to 'specifically mandate' that petitioner obtain appropriate certification as a media specialist does not justify an alternate finding." Id. at 14. The Commissioner pointed out that the regulations governing educational media specialists were "specific in their scope," and he was "unpersuaded by petitioner's argument that the Board failed to provide her with notice that certification was necessary, as such notice, which, even assuming arguendo and contrary to the ALJ's findings, petitioner had not received, would not be determinative in the present matter." Id.

The petitioner filed the instant appeal to the State Board, arguing that the Commissioner had improperly granted summary decision to the Board.

After a thorough review of the record, we affirm the decision of the Commissioner as clarified herein.

Under the standard established In Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995), "a determination whether there exists a 'genuine issue' of material fact that

precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party....If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact....The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' [citation omitted] the trial court should not hesitate to grant summary judgment." The Court emphasized that the thrust of its decision was "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

On the basis of the parties' submissions, we conclude that there exists a "single, unavoidable resolution of the alleged disputed issue of fact," warranting grant of the Board's motion. Even granting all favorable inferences to the petitioner, we find that she has not set forth a genuine issue of material fact under the standard articulated in Brill, and we agree that the Board was entitled to summary decision.

There is no dispute that a significant portion of the petitioner's duties was instructional in nature. However, Thomas S. Lubben, the Chief School Administrator in the district, averred in a certification filed with the Board's motion that he had directly supervised the petitioner and that, in addition to her instructional duties, the petitioner had also been responsible for the operation and supervision of the school library. In an attachment included with his certification, Lubben elaborated on the specific duties the petitioner had been required to perform, which included: maintaining a system for cataloging media center materials; routinely reviewing and culling the entire media

collection; assisting teachers in the selection of books and other instructional materials; evaluating and selecting new media center materials; coordinating the program with the Hunterdon County public library; preparing and administering the library budget; and supervising the library aide.

In a certification filed in response to the Board's motion, the petitioner countered only that: "I disagree that the purported duties set forth [in Lubben's certification] accurately reflect my responsibilities and assignments." Petitioner's Certification, at 5. She did not provide any specifics regarding which duties she alleged were not part of her job functions. Nor did she offer a counterstatement of her responsibilities, listing only those functions which she contended were instructional in nature. We note in that regard that "[b]are conclusions in the pleadings, without factual support in the tendered affidavits, will not defeat a meritorious application for summary judgment." Gherardi v. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958). Indeed, the petitioner did not deny that a portion of her duties included responsibility for the operation of the library, averring that "[m]uch of the actual 'library responsibilities,' i.e., ordering materials, administering the budget, etc., was completed on my own time." Id. at 3. Moreover, in response to interrogatories expounded by the Board, the petitioner acknowledged that, in addition to her teaching duties, she had also performed functions "relating to the operation of the library," including "collection development, budgeting, interlibrary loans, ordering and arranging books and magazines, supervising aide, reviewing mail and correspondence, and responsibility for organization, procedures, and statistics." Answer to Interrogatories, at 4.

We reject the petitioner's contention that the Commissioner should not have considered the document filed with Lubben's certification in which he detailed the

petitioner's duties. The petitioner argues that this document should have been disregarded since it was not prepared until after she had filed her petition in this matter. We find no merit to the petitioner's contention. There is no proscription to the preparation of such a document in support of the Board's motion for summary decision, and the petitioner, in filing her response to the Board's motion, had a full opportunity to refute the specific duties contained in that document and/or to provide her own version of her job responsibilities.

Nor is this result altered by the petitioner's contention that the Board had viewed her position as instructional in nature and had not required her to acquire certification as an educational media specialist.[1] As previously stated, the County Superintendent determined that the library skills position held by the petitioner required certification as an educational media specialist or an associate educational media specialist in order to be qualified to perform the functions thereof.[2] Thus, even if the Board had viewed the position as instructional and had not required the petitioner to acquire an educational media specialist endorsement, it is the County Superintendent's judgment as to the appropriate certification which is determinative.[3] As a result, once the County

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[1] We note that the petitioner was advised by Chief School Administrator Lubben in a letter dated February 3, 1991 that: "It is understood that you will pursue course work toward possibly an Associate Education Media Specialist, (School Librarian)." In a performance evaluation of the petitioner prepared by Lubben in June 1991, he specified as an area needing improvement or development: "Begin to enroll in courses that will enable you to be certificated as a school librarian." In a Professional Improvement/Development Plan provided to the petitioner in June 1992, it was indicated that her attainment of library certification "was delayed and will be repeated in 1992-93."

[2] N.J.A.C. 6:11-11.17 provides that an educational media specialist endorsement is required "for any person who is assigned to develop and coordinate educational media services in the public schools. Educational media are defined as all print and nonprint resources and the equipment needed for their use."

[3] We correct the Commissioner's assertion that the petitioner was required to name the County Superintendent as a party to this matter if she wanted to challenge his certification determination. Although the county superintendent is charged with responsibility in the first instance for determining the appropriate certification for service in an unrecognized position title, N.J.A.C. 6:11-3.3(b), the State Board of Education has the ultimate administrative authority for determining certification requirements, South

Superintendent determined that the position required educational media specialist certification, which the petitioner did not possess, her employment could properly be terminated. "The services of any teaching staff member who is not the holder of an appropriate certificate...may be terminated without charge or trial...." N.J.S.A. 18A:28-14. We stress, in addition, that "[n]o teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position...." N.J.S.A. 18A:28-4.

Accordingly, we affirm the decision of the Commissioner as clarified herein.

Attorney exceptions are noted.[4]

Maud Dahme and Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

River Education Association v. Board of Education of the Borough of South River, decided by the State Board, November 4, 1987, aff'd, Docket #A-1695-87T8 (App. Div. 1990); Pezzullo v. Board of Education of the Township of Willingboro, decided by the State Board, March 1, 1989, appeal dismissed, Docket #A-4006-88T1 (App. Div. 1989), and there is no requirement that a petitioner join the county superintendent in order to challenge a certification requirement. Zachau v. Burlington County Vocational and Technical Schools, decided by the State Board of Education, September 4, 1996.

[4] We note that our Legal Committee granted the Board's request for leave to file exceptions to the Committee's report in this matter beyond the ten day period established by N.J.A.C. 6A:4-1.17, and that we have therefore considered the exceptions filed by the Board on June 6, 2000 in determining this case.

322-96

322-96

DANIEL P. CARROLL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, temporary painter, contested Board's action denying him a permanent position due to its nepotism policy as petitioner's father-in-law supervises all painters.

ALJ found that Board's decision to enforce the policy was not to be invalidated even though it did not enforce the policy at the outset. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JULY 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8806-94

AGENCY DKT. NO. 360-8/94

DANIEL P. CARROLL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON,

Respondent.

Lawrence E. Popp, Esq., on behalf of petitioner (Casale and Popp, attorneys)

Giuffre M. Hollingsworth, Esq., on behalf of respondent (Sumners, Council, George & Dortch, attorneys)

Record Closed: May 10, 1996 Decided: June 6, 1996

BEFORE **STEVEN C. REBACK,** ALJ:

PROCEDURAL HISTORY AND FACTS

Petitioner, Daniel Carroll, worked as a temporary painter for the Trenton Board of Education (Board) from July 1992 to March 1994 (with a brief layoff in 1993). When a permanent position became available in August 1993, petitioner applied for the job. The Board,

however, refused to interview petitioner because his employment would violate the Board's policy against nepotism. This issue arose when the Board discovered that petitioner's father-in-law supervised all painters. The Board's policy excluded any individuals whose employment would place them under the direct or indirect supervision of a family member. Since the nepotism policy, according to the Board, did not apply to temporary employees, petitioner remained in his position. Petitioner would not, however, be eligible for a permanent painter's position.

On August 31, 1994, the petitioner, as a pro se litigant, filed a petition of appeal with the Commissioner of Education. The Board submitted its answer on August 31, 1994 and on September 13, 1994, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Following numerous, unsuccessful settlement conferences and resolution of issues of discovery, it was agreed that the Board would move for summary decision. It did so by motion submitted on or about July 18, 1995. On August 4, 1995, Mr. Carroll submitted his response opposing the motion and on August 24, 1995, the Board, through its counsel, advised me by letter that it would not submit any reply. Finally, on October 10, 1995, I issued an 8-page ruling denying the Board's motion for summary decision, concluding that issues of material fact remained. A plenary hearing was conducted in the matter at the Office of Administrative Law, Mercerville, New Jersey on March 18 and 19, 1996, at which time petitioner was represented by counsel.

With the conclusion of the testimonial phrase of these proceedings, counsel were allowed to submit closing written argument. Mr. Hollingsworth submitted a letter brief on behalf of the respondent on April 16, 1996, and Mr. Popp, on behalf of the petitioner, made his written submission on April 25, 1996. On May 10, 1996, Mr. Hollingsworth advised my office that he would not be responding to Mr. Popp's submission. Accordingly, the record in the matter closed on the latter date, May 10, 1996.

At the hearing, petitioner claimed that he should not have been denied the opportunity to interview for the permanent position. In support of his argument, he maintained that the nepotism policy did not apply to him since he is related to his supervisor by marriage only. Additionally, petitioner argued that the policy has been applied in a discretionary manner by the Board. In fact, petitioner maintained that there are a number of Board employees under the

direct or indirect supervision of family members. Finally, petitioner contended that the Board refused to consider him for subsequent temporary positions because of petitioner's challenge to the Board's action.

In response, the Board maintained that the Commissioner lacks jurisdiction to resolve this matter since the petitioner raises issues outside the scope of school law. Petitioner's only reliance, according to the Board, would be on the statutory tenure provisions, yet, they afford no protection because of petitioner's position and temporary status. The Board argued that petitioner merely raised a contractual issue; however, as decisional law indicates, such contests are beyond the reach of the Commissioner. Finally, the Board contended that the nepotism issues raised by the petitioner also fall outside the Commissioner's jurisdiction since they concern matters not contemplated in the School Ethics Act (*N.J.S.A.* 18A:12-21 et seq.)

ANALYSIS

Local Boards are bound by the School Ethics Act [hereinafter Act] (*N.J.S.A.* 18A:12-21 et. seq.). The goal of this Act, according to the Legislature, is to protect the public's trust in their elected and appointed officials. *N.J.S.A.* 18A:12-22(a). Specifically it declared that in order "[t]o ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them." *N.J.S.A.* 18A:12-22(b). Thus, the Act precludes certain school administrators, Board officials and their immediate families and relatives from undertaking specified activities that might impinge upon this public confidence. *N.J.S.A.* 18A:12-24.

According to the Act, an "Administrator" means:

> ...any officer, other than a board member, or employee of a local school district who (i) holds a position which requires a certificate that authorizes the holder to serve as school administrator, principal, or school business administrator; or (ii) holds a position which does not require that the person hold any type of certificate but is responsible for making recommendations regarding hiring or the purchase or acquisition of any property or services by the local school district; or (iii) holds a position which requires a certificate

> that authorizes the holder to serve as supervisor and who is responsible for making recommendations regarding hiring or the purchase or acquisition of any property or services by the local school district. *[N.J.S.A.* 18A:12-23].

Additionally, the Act defines a "Board member" as "...any person holding membership, whether by election or appointment, on any board of education other than the State Board of Education." Id. The Act also provides that "Member of immediate family" means "the spouse, or dependent child of a school official residing in the same household." Finally, it defines "Relative" as "the spouse, natural or adopted child, parent, or sibling of a school official." Thus, it is apparent that the Act imposes limitations only upon specified groups. If a local board wishes to expand upon these limitations, it must enact its own nepotism policy. Doing so, however, is a decision that must be made at the local level and is not mandated by state law.

The Trenton Board of Education recognized the importance of stemming nepotism. In fact, it declared that "in our representative form of government it is essential that the conduct of members of the Board of Education, local school administrators and each employee of the District, hold the respect of and confidence of the people." *Trenton BOE School Ethics Policy*, October 26, 1992 at 1. Thus, the Board enacted its School Ethics Policy [hereinafter "Policy"]. The Policy expands upon the School Ethics Act. Like the Act, the Board's policy includes school administrators, board members, and their family members. Unlike the Act, however, the Policy encompasses those family members *related by marriage*. Thus the Policy defines "immediate family" as the "spouse, child [natural or adopted or dependent], guardian, sibling, father, mother, sister, brother, son or daughter, or related by marriage." *Trenton BOE School Ethics Policy*, October 26, 1992 at 2.

It should be noted that the School Laws do not preclude the enactment of such policies. In fact, such policies are within the managerial prerogative of local boards. *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 *N.J.* 17, 23 (1973). Further, *N.J.S.A.* 18A:11-1 provides that boards of education shall "make, amend, and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools...." Since the Board's policy is not inconsistent with the Act, it is a legitimate application of the Board's power.

Petitioner claims that the Board has had a nepotism policy in effect since 1987. [Petitioner's Brief of April 19, 1996 at 3]. The Board has not, however, enforced this policy until recently. Thus, certain employees, who clearly fall within the purview of the Policy, remain in their positions, while he has been refused full-time employment. In support of this contention, petitioner produced evidence in respect to several employees, all of whom were hired in the Summer of 1992. Petitioner claims that these employees fell under the Policy, even before its amendment in 1992 to include non-blood relatives. Therefore, petitioner maintains, such an inequitable application must invalidate the policy.

Respondent counters that it was unaware that the Policy had been violated in the past, until a Board employee directed the Board's attention to employees hired in contravention of the Policy. The Board did take steps, however, to ensure that any future hiring would not contravene the Policy. "...it is clear that the Board took reasonable steps after July, 1992, to ensure that the Policy would be strictly enforced in the future." [Respondent's Brief of April 15, 1996 at 10]. These changes were enacted prior to petitioner's application for full-time employment. Therefore when Petitioner applied for a full-time position in August 1993, he was denied because of the Policy. Those employees to whom petitioner alludes, were hired prior to the revised application procedures. As respondent noted "...the actions taken by the Board to correct the problem were prospective, and were not designed to penalize employees who were hired in permanent positions prior to August, 1992." [Respondent's Brief of April 15, 1996 at 10].

New Jersey courts recognize that a governing body's past failure to enforce an applicable policy does not preclude current enforcement, unless the party opposed to the policy can show a "studied policy not to enforce." *Abrahams v. Civ. Serv. Comm.*, 65 *N.J.* 61 (1974); *Communications Workers of America v. Treffinger*, No. ESX-L-1980-96, slip op. at 30 (Law. Div., May 9, 1996). "A 'studied policy not to enforce' will be found where there is evidence of the government's official knowledge of violations of the ordinance in conjunction with the government's nonenforcement of the ordinance." *Treffinger* at 30. There is no evidence that the Board has evinced a "studied policy not to enforce." In fact, evidence suggests that the Board, once made aware of the nepotism violations, altered its policy to prevent any future infractions.

The Board "revised its employment applications [and] took steps to increase employee awareness of the Policy..." [Respondent's Brief of April 15, 1996 at 10]. Moreover, those Board members who actually violated the Policy were subjected to an investigation. *Id.* Thus the Board's policy is in no way invalid nor is its application arbitrary.

Petitioner also seeks compensatory damages arising from his dismissal if he prevailed. Such damages "...serve as recompense for the loss sustained. The essential purpose is to make plaintiff whole to the extent possible. This is true whether the wrong inflicted lies in tort or contract. The goal is to restore the plaintiff to the extent possible to the same position he or she was in prior to the occurrence of the wrong." *Maul v. Kirkman*, 270 *N.J.Super.* 596, 618 (App.Div. 1994). It is well-settled, however, that only certain damages are within the Commissioner's authority. Thus, the Commissioner cannot award punitive damages, *North Bergen Fed. of Teachers v. Bd. of Educ. of Bergen*, 1975 *S.L.D.* 461, 467; counsel fees, *Balsley v. North Hunterdon Bd. of Ed.*, 117 *N.J.* 434, 442-443 (1990); or legal costs *Lilenfield v. Bd. of Ed. of Watchung*, 1977 *S.L.D.* 315, 323. Moreover, the payment of any damages other than lost earnings, *McLean v. Bd. of Educ. of Glen Ridge*, 1977 *S.L.D.* 311, 314, or restoring an increment improperly withheld, *Smith v. Bd. of Ed. of Hamilton*, OAL DKT. EDU 5468-87, adopted in part and rejected in part on other grounds, Comm. of Educ. (April 21, 1988), is not within the Commissioner's authority. Therefore, if petitioner is seeking lost earnings or improperly withheld increments, then this tribunal has the authority to award such damages, otherwise, other damages are outside the Commissioner's authority.

CONCLUSION

The Trenton Board of Education enacted a nepotism policy which expanded upon the School Ethics Act (*N.J.S.A.* 18A:12-21 et. seq.). The decision to do this was not mandated by any education law and, in fact, was done at the discretion of the Board.

Even though the Board had enacted a nepotism policy, it did not abide by it at the outset. Thus a number of Board employees were hired in contravention of the Policy. Once made aware of these infractions, the Board altered its practice to conform to the Policy. Since the Board did

not evince a "studied policy not to enforce" its nepotism policy, the Board's decision to now enforce the policy is not and shall not be invalidated.

Finally, petitioner seeks certain damages from the Board. It should be noted that the Commissioner may not award compensatory damages except for lost salary increments or back wages resulting from unlawful suspensions or dismissals. Moreover, the Commissioner cannot award punitive damages, counsel fees or legal costs.

For all of the following reasons the petitioner's appeal is hereby **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/10/96
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/10/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 13 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

On behalf of petitioner:

Daniel P. Carroll

Richard Spera

Michael Papero

On behalf of respondent:

Esteban Garcia

EXHIBITS

Jointly submitted:

J-1 Respondent's policy in respect to nepotism, October 26, 1992 (4 pages)

On behalf of petitioner:

P-1 Letter from Trenton Superintendent to Nicholas Foggia, August 10, 1992 (with attachments)

P-2 Letter from Assistant Superintendent to William Miller, August 10, 1992 (with attachments)

P-3 Letter from respondent's superintendent to Michael Flaherty, August 10, 1992 (with attachments)

P-4 Letter from Yvette Weiss, Esquire to Mrs. Carroll, February 8, 1995

On behalf of respondent:

R-1 Petitioner's application for employment, July 6, 1992 (5 pages)

R-2 Petitioner's application for employment, July 29, 1993 (6 pages with letter attachment)

R-3 Job description for the position Painter Journeyman (2 pages), September 3, 1993

R-4 Memorandum to Mr. Esteban Garcia from the Director of Personnel, July 14, 1993

R-5 Memorandum from E.J. Garcia to Assistant Superintendent John Fox, July 23, 1993

R-6 Memorandum from Elizabeth DeMatteo to Shirley Brooks, July 27, 1993

R-7 Memorandum from Elizabeth DeMatteo to Richard Spera, September 8, 1993

OAL DKT. NO. EDU 8806-94

DANIEL P. CARROLL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions submitted by petitioner were untimely pursuant to *N.J.A.C.* 1:1-18.4, having been filed on July 2, 1996, in response to an initial decision mailed to the parties on June 13, 1996, and are, therefore, not herein considered.

Upon a careful and independent review of the record of this matter, the Commissioner concurs with the conclusion of the Administrative Law Judge that the within Board's action in denying petitioner full-time employment pursuant to its nepotism policy was not arbitrary, capricious or unreasonable nor, under the circumstances existing in this matter, was the policy discriminatorily applied by the Board.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein, and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 25, 1996
DATE OF MAILING JULY 26, 1996

326-96

326-96

ROBIN HODES JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10158-94
AGENCY DKT. NO. 406-10/94

ROBIN HODES JACOBS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Roger B. Jacobs, Esq, for petitioner
(Jacobs and Koch, attorneys)

Stephen J. Christiano, Esq., for respondent

Record Closed: May 3, 1996 Decided: June 5, 1996

BEFORE **ARNOLD SAMUELS**, ALJ:

On October 3, 1994 the petitioner, Board of Education of the Town of West Orange, Essex County, filed a verified petition with the Commissioner of Education, challenging the respondent's denial of courtesy busing from home to private school for the 1993-94 and 1994-95 school years, on behalf of the petitioner's two children, J.J. and R.J.

On October 19, 1994 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13.

A prehearing conference was held at the OAL on March 10, 1995, and a prehearing order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing, which was scheduled for October 8 and 9, 1995.

By letter dated April 26, 1995, petitioner's attorney withdrew the petition as to J.J., one of the two children involved. The contested case relating to R.J. remained.

On the first hearing date, November 8, 1995, a stipulation of facts, exhibit J-1, was marked in evidence. However, the parties then conferred for purposes of settlement, and a mutually satisfactory agreement was reached. A written agreement was to await confirmation by the Police Department and the beginning of performance on behalf of the Board. After some delay, the Stipulation of Settlement, dated May 2, 1996, was signed by the parties and by their attorneys. A copy of the stipulation, filed in the OAL on May 3, 1996, is attached hereto and made a part hereof.

I therefore **FIND** as follows:

1. The parties have voluntarily agreed to the settlement, as evidence by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law; and I therefore **ORDER** that the parties comply with terms and conditions of the stipulation of settlement. These proceedings are hereby concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 5, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
MAY 3 3 42 PM '96

BOARD OF EDUCATION
WEST ORANGE, NEW JERSEY 07052
TELEPHONE: 201-736-1636
FAX: 201-736-5984

STEPHEN J. CHRISTIANO
BOARD ATTORNEY

49 MOUNT PLEASANT AVENUE

May 2, 1996

Arnold Samuels
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

RE: Jacobs v. Board of Education
of the Township of West Orange
OAL Docket No. EDU 10158-95

Dear Judge Samuels:

Enclosed please find a fully executed Stipulation of Settlement relative to the above.

Very truly yours,

Stephen J. Christiano

Stephen J. Christiano
Board Attorney

SJC:bd

c: Roger B. Jacobs, Esq.

Enc.

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
MAY 3 3 42 PM '96

Stephen J. Christiano
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(201) 736-1636
Attorney for Respondent

ROBIN HODES JACOBS,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
	:	OAL DOCKET NO. EDU 10158-95
Petitioner,		
vs.		
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,	:	STIPULATION OF SETTLEMENT
Respondent.		

The parties having amicably adjusted this matter, it is hereby stipulated as follows:

1. The petition is dismissed with prejudice.
2. The West Orange Police Department shall maintain a crossing guard at the intersection of Gregory and Northfield Avenues.
3. The crossing guard shall be present at all times, excepting sudden illness or emergency, the Solomon Schechter Day School is in session. A copy of the Police Department's letter to Superintendent Tarnoff, dated March 22, 1996, is attached hereto and made a part hereof.

4. Respondent shall, on a random basis, monitor the situation to ensure that the crossing guard is present at the said intersection at times consistent with the Solomon Schechter school calendar.

Dated: 5/2/96

James J. Krieger,
on behalf of Respondent

Dated: 5/2/96

Stephen J. Christiano,
Attorney for Respondent

Dated:

Robin Hodes Jacobs,
Petitioner

Dated:

Roger B. Jacobs,
Attorney for Petitioner

WEST ORANGE POLICE DEPARTMENT
66 Main Street
West Orange, New Jersey 07052

Tel: (201) 325-4030
Fax: (201) 669-5504

William Webb
Director of Police

Samuel A. Spina
Mayor

March 22, 1996

Mr. Jerry P. Tarnoff
Superintendent of Schools
West Orange Board of Education
179 Eagle Rock Avenue
West Orange, New Jersey 07052

Dear Jerry:

I am in receipt of your letter dated March 12, 1996 with regard to there being a crossing guard at the corner of Northfield and Gregory Avenue. Kindly be advised that whenever Solomon Schechter School is in session there will be a crossing guard at that corner.

Should you have any questions with regard to the above, please feel free to contact me.

Very truly yours,

William Webb,
Director of Police

c: Mayor Samuel A. Spina
Lieutenant Anthony Giasullo

WW:kad

3d

OAL DKT. NO. EDU 10158-94

ROBIN HODES JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 26, 1996

DATE OF MAILING JULY 26, 1996

328-96

328-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ELBERT SMITH,	:	
HUDSON COUNTY AREA	:	COMMISSIONER OF EDUCATION
VOCATIONAL TECHNICAL SCHOOL,	:	DECISION
HUDSON COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against vocational teacher for allegedly physically assaulting students and engaging in a pattern of verbal abuse.

ALJ concluded that in two of the seven incidents of alleged assault, the Board did prove that physical contact occurred but not in a manner intended to harm the students. Moreover, respondent did use language which constituted unbecoming conduct. ALJ found that while the incidents did lead to the conclusion that respondent was guilty of unbecoming conduct, mitigating circumstances existed and termination would have been unduly harsh. Thus, the ALJ ordered respondent reinstated at the same annual salary as he was paid at the time of his suspension without benefit of any employment and adjustment increments that he might have been entitled to during the intervening period of time. Respondent was also to forfeit the 120 days' pay withheld during his suspension and was not to be credited any benefits up to the time of reinstatement.

Citing *In re Fulcomer*, the Commissioner concurred with the ALJ concerning the proof of unbecoming conduct and the penalty recommended. The Commissioner, however, modified the initial decision, noting that as respondent had no entitlement to an award of increment during his period of suspension, such employment and adjustment increment loss must be prospectively applied.

JULY 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4736-94

AGENCY DKT. NO. 56-3/94

HUDSON COUNTY AREA
VOCATIONAL-TECHNICAL SCHOOL,
HUDSON COUNTY,

Petitioner,

v.

ELBERT SMITH,

Respondent.

Alexander W. Booth, Jr., Esq., for petitioner
(Brownstein, Booth & Barry, attorneys)

Vickie A. Donaldson, Esq., for respondent

Record Closed: April 18, 1996 Decided: June 6, 1996

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves tenure charges filed by the petitioner, Hudson County Area Vocational-Technical School, Hudson County, against respondent, a tenured teaching staff member, for dismissal or reduction in compensation pursuant to *N.J.S.A.* 18A:6-10 to -29.

PROCEDURAL HISTORY

The petitioner, Board of Education of the Hudson County Area Vocational-Technical School, Hudson County, (Board) certified and filed tenure charges with the Commissioner of Education against the respondent, Elbert Smith, on March 17, 1994. The statement of charges alleges that respondent is guilty of unbecoming conduct, which, if true, would warrant dismissal or reduction in salary. An answer, denying the charges and asserting affirmative defenses, was filed by the respondent on May 4, 1994.

On May 13, 1994, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held on September 20, 1994, resulting in the entry of a prehearing order, dated October 7, 1994, fixing hearing dates, providing for discovery, and regulating other procedural matters connected to the forthcoming hearing. A five-day hearing was held at the OAL in Newark, New Jersey, in May 1995. Many witnesses testified, including the respondent, Elbert Smith. Twelve documentary exhibits were marked in evidence for the respondent. An itemized list of the exhibits is contained in the Appendix attached hereto, as is a list of the witnesses. (At the conclusion of the hearing, respondent's attorney retained the exhibits, which were to be returned with her posthearing brief. The exhibits have not been sent to date, despite requests by letter and by telephone.) Posthearing briefs were requested of both parties. The petitioner's brief was filed at the end of December 1995. The respondent's attorney has not filed a brief to date, despite several extensions that were requested and granted. After waiting more than a reasonable time for the respondent's submission, the record was closed on April 18, 1996.

ISSUES

The issues, as set forth in the prehearing order, are:

a. Did the acts of the respondent, as alleged in the charges, constitute unbecoming conduct or other just cause for dismissal or reduction in pay, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*?

b. If the charges or any of them are proved, is the penalty of dismissal justified or should a different penalty be imposed?

The general tenure charge, sworn to by Frank Garguilo, superintendent of the Hudson County Area Vocational-Technical School, as transmitted to the Commissioner of Education, is:

> 1. Elbert Smith has been employed as a teacher at Hudson County Area Vocational Technical School (HCAVTS) for the past thirteen (13) years.
>
> 2. He is properly certified and has acquired tenure.
>
> 3. According to information I have received, he has during the past year physically assaulted seven of his students and engaged in a pattern of verbal abuse.
>
> 4. This conduct is unbecoming of a professional teacher as that term is used in *N.J.S.A.* 18A:6-10 and merits the teacher's dismissal.

The more specific charges are contained in the sworn statement of Anthony Ingenito, dean of students, who certified as follows:

> 1. I am employed as Dean of Students by the Hudson County Area Vocational Technical School and am assigned to the Earl Byrd Center in Jersey City, New Jersey.

2. On January 10, 1994 I conducted separate interviews with six classified special education students concerning behavior of their teacher Elbert Smith in the classroom.

3. J.P., a ninth grade student, advised me that on two occasions during this school year, Mr. Smith had punched him in the chest.

4. F.R., a twelfth grade student, advised me that in April of 1993 Mr. Smith had physically assaulted him.

5. E.J., a ninth grade student, advised that in October 1993 he was struck in the chest and cursed at by Mr. Smith.

6. M.C., a ninth grade student, advised that in September 1993 he was physically assaulted by Mr. Smith.

7. H.P., a ninth grade student, advised that in October 1993 he was physically assaulted by Mr. Smith.

8. L.O., a ninth grade student, advised that on January 7, 1994 he was physically assaulted by Mr. Smith.

9. On January 31, 1994, I interviewed K.C., a ninth grade student, who advised me that on three occasions during this school year he was physically assaulted by Mr. Smith.

10. I am attaching hereto and incorporating by reference my typewritten notes of these interviews as well as memoranda to Ms. Mendolla. I am excising the full names of the students from these documents and just leaving initials.

11. All of these students have advised me that Mr. Smith regularly engages in a pattern of verbal abuse including cursing at his students.

TESTIMONY AND EVIDENCE

Michael J. Pecklers, assistant to the board secretary, testified about reports he had received from other administrators relating to problems that were reported to them by a series of students. Mr. Pecklers then interviewed the students who had complained about incidents in the school, the "Jersey City Center," involving Mr. Smith.

According to Mr. Pecklers, a student, L.O., told him that on January 7, 1994, he and another student were tossing a football around in Mr. Smith's homeroom. The respondent took the ball away and put it into an anteroom at the back of the classroom. According to the report, L.O. wanted to retrieve his ball at the end of the day. He went into the room, picked up the ball and held it behind him so that Mr. Smith, who had asked for it, could not reach it. According to the account given to Mr. Pecklers, the respondent then threw L.O. on the ground and closed the anteroom door on the hood of the student's sweatshirt. When Mr. Smith would not open the door, L.O. slid out of the shirt, spit at Mr. Smith and cursed at him. L.O. then went to see the principal and the school nurse.

Mr. Pecklers said that L.O. told him that the respondent often cursed at students, calling them "m..... f....." and saying that they would never make anything of their lives. In addition, he reported that Mr. Smith often called the principal, Barbara Mendolla, a "red-headed bitch" when he heard her voice on the intercom.

Mr. Pecklers testified that he interviewed another student, K.C., who told him that, in addition to cursing, the respondent once struck him in the chest when they were in the gym locker room.

A third student interviewed by Mr. Pecklers was M.C., who was in Mr. Smith's physical education class. M.C. told Mr. Pecklers that he once needed to see the nurse about a hand injury, and that the respondent struck him and refused to give him the pass to go to see the nurse.

A fourth student, E.J., told Mr. Pecklers that, on one occasion, he entered Mr. Smith's class to request a pencil, and the respondent told him never to come into his class again or he would "f... him up."

Another student, H.P., reported to Mr. Pecklers that he was once running in the gym while wearing new, slippery sneakers. He said that he did not stop running when

Mr. Smith told him to, and the respondent then "put him down" and put his knee into his chest.

When cross-examined, Mr. Pecklers acknowledged that his investigation involved speaking to the students in question, the principal, and three or four faculty members. He said he took notes and reported orally to the superintendent, not in writing. In addition, Mr. Pecklers admitted that he did not speak to Mr. Smith or include him in his investigation, and he did not review any of the students' records.

The hearsay testimony of Mr. Pecklers consisted solely of the accounts given to him by the students he interviewed. He did not interview Mr. Smith, and he did not have any personal knowledge of the incidents related to him by the students.

K.C., a student, was in Mr. Smith's gym class in 1994. Mr. Smith also taught him graphic arts and video production. He testified that the respondent called him, and other students, names such as "jackass," "bitch," and "m..... f....." in the classroom, and that the respondent would often tell him to "shut the f... up." K.C. also related one incident that he said occurred as he was entering the gym locker room. He said that he previously had grabbed, and held onto, a low basketball rim, and Mr. Smith followed him into the locker room and hit him in the chest, with his fist, twenty or more times. K.C. testified that he reported the incident to the dean and to Mr. Pecklers.

When cross-examined, K.C. said that he had been punched hard enough by Mr. Smith to affect his breathing, but he did not tell his parents about the incident until after the investigation by Mr. Pecklers. K.C. also said that the respondent once grabbed his neck and pinched it, and that on another occasion he pushed him onto the classroom floor. When asked about the cursing, K.C. said that he first heard Mr. Smith use profanity about three weeks after he entered the respondent's class in September 1993.

K.C. admitted that he has been in trouble several times at school, that he has been sent to the principal's office for fighting, and that he has incurred in-school

suspensions. He also acknowledged that he was suspended once for bringing a knife to school.

L.O. was a ninth-grade student at the time of the incidents he testified about. Mr. Smith was his vocational teacher in December 1993 and January 1994. L.O. testified about the football incident, except that he denied having thrown the football in the classroom. (This was contrary to the account given by Mr. Pecklers.) He said that he put the football away when Mr. Smith asked him to, but another student took it and threw it hard against the door. According to L.O., Mr. Smith then took the ball away and kept it in the adjoining anteroom, or closet, for the balance of the school day. The day ended early because of a snowstorm, and L.O. acknowledged having taken the ball back at that time, against Mr. Smith's wishes. He said that he put the ball behind him and leaned on it against a wall, unwilling to return the ball when Mr. Smith asked for it.

Then, according to L.O., the respondent pushed him to the floor, took the ball and closed the door while L.O. was still on he floor. L.O.'s hood was stuck under the door, so he unzipped the jacket and slid out of it. He acknowledged that he spit, threw an eraser and cursed at Mr. Smith. He then went to the principal's office and reported the incident.

L.O. also testified that respondent often used profanity when he spoke to the students, for example, "stop that f..... playing."

H.P., a student in the respondent's gym class, testified that in October 1993 he was running in the gym, chasing a friend, and that the respondent put his foot and hand out and dropped him to the floor. H.P. said that Mr. Smith then put his knee into his chest and told him to "sit his ass down." He said that he was wearing new sneakers at the time of the incident, although he did not explain what connection that had to the incident. H.P. also said that the respondent often used "the F word" with students.

J.P., a student, also testified about the football incident involving L.O. His version differed from that of L.O., to some extent. J.P. said that he and L.O. were

throwing the ball back and forth in the classroom when Mr. Smith took it and put it into the back room. Although he was present, he did not see the entire incident at the end of the school day, but he knew that L.O. took the ball and the respondent wanted it back. J.P. testified that he did not know how L.O. ended up on the floor, but he saw him there with the ball in his possession. That was when the respondent closed the door and L.O.'s hood was caught under it. He saw L.O. get out of his jacket and stand up. However, he did not see if Mr. Smith touched L.O. during the incident.

J.P. said that Mr. Smith once touched him aggressively. According to the witness, the respondent wanted him to sit down, and he poked him. J.P. stated that he said "don't touch me," whereupon Mr. Smith poked him again, then pushed him over three desks and onto the floor.

J.P. also testified that he has heard Mr. Smith use profanity and curse at students. He said that when the principal's voice came over the loudspeaker the respondent would refer to her as that "f..... red-headed bitch."

Another student, B.G., testified about an encounter he once had with Mr. Smith. He said that the respondent put his arms around his neck from behind and held him in a headlock, causing him to have trouble breathing. When cross-examined, B.G. acknowledged that he was "pretty bad" in Mr. Smith's classroom, but he said that he wasn't doing anything to have caused the teacher to grab him from behind. B.G. was not one of the students included in the charges against the respondent.

Another student, also not involved in the charges, J.G., testified that she saw Mr. Smith hold B.G. in a headlock. This was the incident referred to above. She indicated that she and B.G. were riding on and playing with a supply cart; Mr. Smith wanted B.G. to stop, and asked him to do so about three times. The teacher then touched B.G. (This account of the incident contradicts B.G.'s testimony that he wasn't doing anything and was surprised when Mr. Smith came up behind him.)

J.G. also testified that Mr. Smith would curse in front of the students, using the word "f..." often. She said that the respondent once said "I don't give a f... about the red-headed bitch. I have more degrees than her."

Barbara Mendolla, principal of the Jersey City Center at Hudson County Area Vocational-Technical School, was Mr. Smith's supervisor at the time of the events in question. She testified that L.O. came to her on January 7, 1994, at the end of the shortened school day, and told her about an incident involving a football that had occurred with Mr. Smith. According to Ms. Mendolla, L.O. said that the respondent tried to get a football from him, but L.O. kept it away by putting it behind his back. L.O. told her that Mr. Smith then pushed him down, took the ball and put it in the closet. L.O.'s hood became caught in the door when Mr. Smith closed it, but when L.O. asked him to open the door so he could get his hood out, the respondent laughed at him. L.O. admitted to Ms. Mendolla that he was very angry, and that he spit, kicked the door and cursed.

Ms. Mendolla said that Mr. Smith denied the account given by L.O., and he wrote a report about the incident after the weekend. She then interviewed several other students who had been nearby, and they all confirmed L.O.'s version.

In order to follow up on the above, Ms. Mendolla turned the matter over to Anthony Ingenito, dean of students, since disciplinary action was his responsibility. Mr. Ingenito reported back to her, generally confirming L.O.'s version. Ms. Mendolla then went back to Mr. Smith with that information, and he replied, "Perhaps I pushed him too hard." Ms. Mendolla said that he had previously denied using any physical force.

Ms. Mendolla acknowledged that most of the classified students who were involved in the reported incidents are often difficult to manage, but she stated that teachers are advised that they should never put their hands on a student. She also knew specifically, from L.O.'s mother, that L.O. was a problem, but she felt that situations with difficult students could be handled without the use of physical force.

Ms. Mendolla indicated that until the investigation of the subject charges, she had never before received student complaints about any of her staff, including Mr. Smith.

Ms. Mendolla also testified about her own history with the respondent. She knew that Mr. Smith had applied unsuccessfully for her job more than once, and that he criticized her in writing, accusing her of using poor judgment and disparaging her administrative acuity. Even so, Ms. Mendolla denied having a tense relationship with the respondent.

Ms. Mendolla spoke about an earlier incident that happened when students had been fooling around in Mr. Smith's classes, and he sent a letter to their parents, with copies to her and to Mr. Ingenito. She thought that the respondent was insubordinate by sending the letters directly to the parents without clearing them first with the administration. Ms. Mendolla said that she was Mr. Smith's supervisor for only a little more than a year. She described the respondent as arrogant and self-confident, but said she does not dislike him.

The Board rested its case after Ms. Mendolla completed her testimony. Respondent then moved to dismiss the charges as to E.J. and M.C., because the only testimony relating to these two students was hearsay from Mr. Pecklers. A decision on the motion was reserved, pending completion of the entire case.

At that point, however, the petitioner withdrew the charges relating to F.R.

Irvin B. Herrick, a teacher who worked with the respondent in the Hudson County Area Vocational-Technical School for fifteen years, testified that he never heard the respondent use profanity, except for the words "damn" and "hell," during all of those fifteen years. In addition, Mr. Herrick stated that he never heard the respondent demean a student. On one occasion in the late 1980s, Mr. Herrick saw Mr. Smith become angry about something, but he nevertheless behaved professionally.

Mr. Herrick also said that he knew L.O., who was in his class in 1993-94. He described that student as disruptive in class and unwilling to take orders, in addition to causing other problems. Mr. Herrick stated that he often needed to send L.O. to Mr. Ingenito for disciplinary action, such as detention.

When cross-examined, Mr. Herrick was asked additional questions about some of the other students. He said that K.C. was "off the wall," and often behaved inappropriately. Mr. Herrick had him removed from the classroom many times, for being disruptive, erratic and hostile. Even so, he never touched him or cursed at him, and he described him as "a little upsetting, but a good kid."

Doreen Bryant, a physical education and health teacher, taught alongside of Mr. Smith in the gym in 1993-94. She was asked to describe some of the student complainants. Ms. Bryant characterized K.C. as having a quick temper and having engaged in many fights. She said that he was often in trouble and started many incidents. L.O. was described as smart, quick-tempered, prone to fighting and argumentative.

More importantly, Ms. Bryant testified that Mr. Smith was always professional, and that he took care of necessary business in a proper manner. She never heard him curse.

When cross-examined, Ms. Bryant acknowledged that she and Mr. Smith did not work together for a period of twenty weeks during the 1993-94 school year because they taught separate health classes. She knew from the beginning that the classified students were difficult, and she was trained to deal with them.

Lynn Fedele, an English teacher, used the same classroom as Mr. Smith. Although she did not see the L.O. incident involving the football, she noted that Mr. Smith looked frazzled when she went to the classroom to get her coat. He told her to

be careful with the door because there was spit all over it. Ms. Fedele looked and saw a large quantity of spit on the door.

Ronald Courts is a teacher's aide who was assigned to Mr. Ingenito in 1993-94. His job was to monitor and screen students before Mr. Ingenito saw them for disciplinary purposes. Mr. Courts said that L.O. "was always there" (meaning in Mr. Ingenito's office). He recalled that, on the day of the football incident, Mr. Smith brought L.O. to him to wait for Mr. Ingenito. L.O. told him that he had previously gone to see the school nurse. Mr. Smith related what had happened and then went to see Mr. Ingenito about the incident, while L.O. waited. Mr. Courts also recalled that L.O. told him that Mr. Smith himself had first taken L.O. to see the nurse. The end result was that Mr. Ingenito suspended L.O. for three days, leaving him in Mr. Courts's custody.

When asked to describe Mr. Smith, Mr. Courts said that he was not the type of person who would curse or use violence against students. He said that Mr. Smith has a large vocabulary and uses it extensively. Mr. Courts acknowledged that he and Mr. Smith were friends at school.

Ronald Courts also spoke about K.C., whom he described as a chronic problem, someone who was sent to his office every other day. Mr. Courts said that K.C. was excitable and easily became violent. Although Mr. Courts had a lot of contact with K.C., the young man never told him that Mr. Smith hit him.

S.C., another student witness not involved in the charges, testified about some conversations he overheard while he was having lunch with several of the students involved in the charges, plus one other student who previously testified for the Board, but also is not involved in the charges. S.C.'s testimony was taken on Monday, May 22, 1995. The conversations he testified about took place during the previous week, after the first two hearing days and after the complaining students had testified.

According to S.C., while he was having lunch with L.O. and B.G., the latter said that he hated Mr. Smith and that he would "get Smith out." In addition, S.C. testified that B.G. said that Mr. Smith "didn't do anything to him." On another occasion soon thereafter, he heard M.C. say that he had been to court "to get Smith."

S.C. further testified that J.P. told him that B.G. had made his testimony up.

Another student witness not involved in the charges, J.P.-2, also testified. (J.P.-2 is a different student than J.P., who previously testified and is one of the students involved in the charges.) This witness testified to a conversation he overheard in the school lunchroom sometime during the week immediately preceding his testimony, and after the first two hearing days (which included the student testimony) had been completed. J.P.-2 said that both L.O. and one of the other students involved in the charges said that they were "trying to get Mr. Smith out."

Referring to a conversation he was involved in with a group of students during the same week, J.P.-2 testified that B.G. stated: "I just want to get him [Mr. Smith] out of here because I don't like him." Then, during the same conversation, when B.G. was asked by S.C. if Mr. Smith ever touched him, B.G. answered "no."

When cross-examined, J.P.-2 said that during the previous year B.G. told him that Mr. Smith did touch him, and he was surprised by B.G.'s recent denial

J.P.-2 also said that he likes Mr. Smith. Nevertheless, he indicated that he heard Mr. Smith curse a lot in gym class, when he was aggravated. When asked about the specific words he has heard Mr. Smith use when cursing, J.P.-2 related words such as "damn" and "shit," which were not the same words testified to by the students involved in the charges.

Norma Howard, another teacher, testified that she overheard a heated discussion on January 7, 1994, among Mr. Smith, L.O. and Anthony Ingenito. She said that L.O. was upset and emotional, constantly spewing a variety of obscenities, such as

"f... this and f... that." She said that it had something to do with a ball, and that the conversation continued for a while. It seemed to her that L.O. wanted to get back at Mr. Smith for something. Describing the situation further, Ms. Howard said that L.O. kept pacing back and forth and cursing. Mr. Ingenito was writing, and Mr. Smith was standing there, continually asking for a chance to speak.

When asked to describe Elbert Smith, Ms. Howard said that he was honorable, hardworking, and had the best interests of the students at heart. She never heard him use bad language. Describing L.O., Ms. Howard said that he is emotional and can be violent and aggressive. She indicated that L.O. creates problems and often places the blame on others. Ms. Howard said that on one occasion after January 7, 1994, she heard L.O. say to a group of students that he would try to get Mr. Smith fired. She also heard J.P. say that the respondent threw him over some chairs.

Francis J. Katusa, Jr., teaches video production at the school. He testified that sometime in January 1994 J.P. bragged that he and others "got Mr. Smith fired." When Mr. Katusa asked J.P. to explain, he said that the respondent threw him over chairs, punched him, kicked him and beat him up. Mr. Katusa replied that J.P. did not seem to be injured, and when J.P. was asked to explain that, he just hung his head.

Furnishing more details about the conversation, Mr. Katusa said that J.P. told him that Mr. Smith threw him over a couple of desks, kicked him in the ribs, kicked him in the side, and punched him in the face (not in the chest, as stated in the charges and in J.P.'s testimony). Mr. Katusa testified that he was incredulous and found the story hard to believe, because the conversation took place only a couple of days after the alleged incident. He did not think that J.P. was telling the truth, particularly after hearing J.P. brag that he and others were getting the respondent fired.

Mr. Katusa also testified about events involving F.R., which need not be discussed because the charges involving F.R. were withdrawn.

Wilfred Moyler, a teacher's aide who worked with Mr. Smith in the welding shop in 1989-90, testified that the respondent was even-tempered, and he never heard him use any profanity during the year they shared a classroom. Mr. Moyler also spent a period of time in the gym class with Mr. Smith.

The respondent, Elbert Smith, testified in his own behalf. He said that he had been teaching at the same school since 1980, approximately fourteen years prior to the events in question, and that his evaluations had always been satisfactory or exemplary. The respondent is a teacher of welding and industrial arts, and in 1993-94 he was assigned to teach predominately classified, neurologically impaired, perceptually impaired and emotionally disturbed students. At that time his assignments included teaching graphic arts, video production and gym.

The respondent testified at length about the January 7, 1994 incident with L.O. and the football he took away from him. Soon after class began that day, the respondent saw L.O. throwing the ball around with friends, and at one point L.O. threw it hard against the door. As a result, the respondent took the ball away and put it into his closet, or anteroom. When classes ended that day, L.O. returned with J.P. to retrieve the ball. Mr. Smith was anxious to avoid damage, and he wanted to return the ball to L.O. himself. However, J.P. took the ball without asking and gave it to L.O., who put it behind his back and leaned back against the wall, with his hands free. When the respondent asked for the ball, L.O. said that he didn't have it, and he showed his empty hands.

Mr. Smith said that he then went behind L.O. to get the ball, and in doing so he made physical contact with him. L.O. lunged away and the ball fell; Mr. Smith picked the ball up, carried it to his office and closed the door behind him, with his back to L.O. He knew that L.O. had tried to prevent him from getting the ball, at which point the student could have ended up on the floor. However, Mr. Smith denied having put him there. He testified that when he turned around he saw L.O. on the floor and was baffled by his position. L.O. was cursing at him, and he was trying to discover why he seemed to be stuck there. Mr. Smith then saw that the hood of L.O.'s jacket had

become wedged under the door, and he saw L.O. wiggle out of his jacket. The respondent wrote a disciplinary report and gave it to his superiors. L.O. was suspended thereafter. When asked to compare his version of the event with that related by L.O., Mr. Smith said that the student's account was not the truth and was not accurate.

When asked about the students' testimony that he often used profane language, Mr. Smith acknowledged that he sometimes did curse when students were disruptive, but he insisted that the worst words he used were "damn," "hell" and "shit." He said that despite the students' testimony to the contrary, he never used curse words beginning with "F." The respondent admitted that, on occasion, he has become angry enough to shout at the students.

Mr. Smith also spoke about the incident that occurred with J.P., who he said seemed to want to be disruptive. According to the respondent, J.P. entered class one day and sat on top of a desk, along with three or four other students who were all sitting on top of their desks. L.O. and J.P.-2 were two of the other students. When he asked them to sit down, L.O. and J.P.-2 obeyed, but J.P. refused and remained sitting on the desk. The respondent said that when J.P. did not respond to further requests, he touched him gently, not aggressively, on his upper arms or shoulders with both hands. He was surprised to then see J.P. lean far back on the desk, sink down and fall down on the floor. Because the floor was slippery, some chairs and desks behind J.P. slid along the floor. Mr. Smith said that he helped J.P. up, but he never struck him. He opined that J.P. did not seem particularly bothered by the incident at the time, and said that the class was not disrupted.

The respondent testified further about the incident related by B.G., who is not included in the charges, but who testified as a separate witness. He said that B.G. jumped up on an empty hand truck that had been used to move chairs. B.G. was using the hand truck as a sort of skateboard. Mr. Smith repeatedly asked B.G. to stop and get off, but he did not. The respondent then approached B.G., put his arm across B.G.'s shoulder, and said "stop." B.G. stopped and got off. Respondent said that he

did not grab him in a choke hold, but he came up behind him, put his right arm around him and grasped the top of his shoulder, not aggressively. His goal was to stop the motion of the truck, with B.G. on it. He said that the witness, J.G., who testified about what she saw, might have misperceived the encounter.

The next student incident that Mr. Smith testified about was the one involving H.P., who kept running in the gym on a slippery floor, after repeated requests to stop. The respondent said that H.P. fell over his own feet, and that he went over to him and pulled him up. In fact, respondent said that he was thirty or forty feet away when he saw H.P. fall. He denied having cursed at the student, and he had no idea why H.P. would say that Mr. Smith tripped him.

The respondent then testified about the difficult relationship he had with his principal, Ms. Mendolla. In previous years, both of them had sought appointments to the same positions, acting vice principal, assistant principal and principal. Ms. Mendolla received all of the appointments, and he was awarded none of them. As a result, Mr. Smith felt that he was being discriminated against, and he made his dissatisfaction known. He did not hide his feelings and he was assertive. The respondent filed two complaints with the Equal Employment Opportunity Commission. Both complaints were investigated and subsequently dismissed. Nevertheless, Mr. Smith felt that he was more than qualified for the positions.

After Ms. Mendolla became his principal, several attempts by him to speak to her were rebuffed. She told him that that there was an in-house policy that required an appointment, scheduled three weeks in advance, to see the principal. Exhibit R-12 was introduced to confirm the policy regarding the need for such appointments. In addition, Ms. Mendolla chastised the respondent for communicating directly with parents about students' behavior. The respondent referred to a discipline policy (R-3) that specifically states that a teacher may contact a parent or guardian of a student. Nevertheless, Ms. Mendolla sent him stern memos on the subject, and he answered with his own memoranda. Eight of these memos (R-4 through R-11) were marked in evidence. The respondent said that he tried to stay away from Ms. Mendolla because he regarded her

as an administrative pariah, and he felt that the competition between them was unhealthy.

The respondent testified about another student complainant, K.C., who claimed that Mr. Smith hit him in the chest at least twenty times. Mr. Smith denied the incident, and he asserted that K.C. was a discipline problem in class. He recalled one occasion when he asked K.C. to sit down and to stop being disruptive. The student descended to the floor on his own, without being touched. Nevertheless, respondent opined that K.C. was articulate, personable and had academic potential.

When asked directly about the accusations made by each of the complaining students, Mr. Smith denied all of them except for the accounts he gave. He specifically denied the charges leveled by J.P., M.C., H.P., L.O. and K.C. He also denied the accounts of his severe cursing, except as he related above.

The respondent was cross-examined extensively. First, he furnished more details about the incident with L.O. on January 7, 1994. He said that his account was not much different from that of L.O., except that the student said Mr. Smith grabbed him and threw him down. The respondent disagreed, saying he reached behind L.O. to get the ball and L.O. lunged away, enabling him to pick up the ball and take it into his office. The respondent said that L.O. must have fallen onto the floor at that point, when he had his back to him and was closing the door. Mr. Smith insisted that his back was turned and he was surprised that the student ended up on the floor. He said that he never saw the descent onto the floor happen because he was proceeding directly into his office with the ball. He had no idea how the jacket became caught in the door that he had partially closed behind him. Mr. Smith said that he just leaned into his office, put the ball in, turned and came back out into the classroom. He then saw that L.O.'s hood was caught in the hinge side of the door frame. He first saw and heard L.O. curse when he turned around.

The respondent said that L.O. then asked for a pass to see the school nurse, and he wrote it for him. According to Mr. Smith, L.O. left, came back quickly and then

resumed cursing and spitting at him. In the midst of writing his report at the end of the day, the respondent brought the ball to Ms. Mendolla's office and gave it to her. That evidently occurred after L.O. had already conferred with Ms. Mendolla about the incident.

Mr. Smith said that he did not recall telling Ms. Mendolla that he might have pushed L.O. too hard. He only remembers that he used his hands trying to get the ball from the student. He did not think that he pushed him while doing so. Respondent acknowledged that he became angry with L.O. because of his resistance in giving up the ball, and because of his spitting and cursing.

When asked again about the incident involving B.G. and the hand truck, Mr. Smith said that some students would periodically crash the cart into walls, seemingly on purpose. He said that he had repeatedly asked B.G. to stop skating with the cart, but he did not. At the time he touched the student, the cart had momentarily stopped moving, but B.G. was trying to get it moving again by using his legs and body. He did not think that B.G. believed he was trying to hurt him or choke him when he put his arm around his upper chest and onto his shoulder.

Repeating his denial of involvement when H.P. fell while running in the gym, Mr. Smith again affirmed that he was thirty-five to forty feet away from H.P. at the time, and that he had nothing to do with the fall.

Discussing, on cross-examination, his difficulties with Ms. Mendolla, Mr. Smith said that he began applying for administrative positions in 1985, after he received his master's degree, but he was never offered those positions. The respondent said that although he applied over and over, others with less qualifications, skills and credentials succeeded, while he did not.

The respondent said that he when called Ms. Mendolla a pariah, he meant that she was someone to stay away from. When asked about their respective abilities, Mr. Smith said that he thought that Ms. Mendolla's administrative talents were inferior, and

that he could do better. In Exhibit R-4, Mr. Smith directly accused Ms. Mendolla of having occluded vision. He acknowledged that this might have been unwise, tactless and very confrontational. He also accused her of abusing authority and sending inappropriate signals. In fact, he even had five students sign his memorandum severely criticizing the principal.

Asked again about his use of profanity, Mr. Smith repeated that he had, on occasion, used the words "hell," "damn" and "shit" in the classroom. He also said that he could recall telling a student to stop "acting like a jackass," but he denies ever having called anyone a "jackass" directly. As a final statement, Mr. Smith repeated that, in the fourteen years of his teaching career at the Hudson County Area Vocational-Technical School, he incurred no disciplinary actions of any kind and no complaints were filed against him, until the 1993-94 events involving the subject group of ninth-grade students.

The principal, Barbara Mendolla, was recalled as a rebuttal witness. She related more facts concerning the L.O. incident, and she confirmed that Mr. Smith had said "Perhaps I pushed him too hard," which she wrote on the bottom of the report. When asked about her investigation of the incident, Ms. Mendolla said that she spoke to L.O. first, and then asked someone to have Mr. Smith report to her.

J.P. was also recalled as a rebuttal witness. He indicated that he never said that Mr. Smith kicked him or hit him in the chest or face, only that he poked him and threw him over some chairs. In addition, J.P. denied bragging that he would get the respondent fired. It is noted that J.P. was obviously much bigger and much heavier than Mr. Smith.

A student, G.G., also called as a rebuttal witness, testified that he saw the incident involving J.P. He said that Mr. Smith told J.P. to sit down and J.P. refused. According to G.G., the respondent then poked at J.P., picked him up and threw him over a group of desks.

When cross-examined, G.G. acknowledged that he is a friend of J.P.'s and that the only people present at the time of the J.P. incident were Mr. Smith, J.P. and himself. G.G. acknowledged that J.P. is much bigger and heavier than Mr. Smith, but he said that even so, the respondent picked J.P. up and threw him over three desks.

FINDINGS OF FACT

The uncontested facts related in the foregoing discussion, such as the respondent's teaching position, class assignments and length of service, are incorporated herein by reference without the need for repetition.

There are six specific student charges (a seventh - F.R. - was withdrawn during the hearing), each of which emanates from a group of ninth-grade students in the respondent's class during the 1993-94 school year, up to the end of January 1994. The six charges are identified by the names (initials) of the students. Another charge involves verbal abuse - cursing at students.

Re J.P.: This charge alleges that respondent punched J.P. in the chest on two occasions. The testimony in support of these charges was that Mr. Smith wanted J.P. to sit down, which he refused to do, and that the respondent then poked him in the chest and threw him over three chairs or desks, after punching him, kicking him and beating him up.

It is found to be **FACT** that the above account was grossly exaggerated and unlikely. The respondent did touch or push J.P. on the shoulders with both hands, trying to get him down from a desk he was sitting on. J.P. leaned back and slid onto the floor, dislodging some nearby chairs. That fall onto the floor was J.P.'s own doing, and he was not propelled there by Mr. Smith. It is also found as fact that J.P. is much bigger and heavier than the respondent, and it is highly unlikely that Mr. Smith could pick him up, let alone throw him.

Re E.J.: This charge alleges that in October 1993 the respondent struck E.J. in the chest and cursed at him.

At the hearing E.J. did not testify, and the only evidence adduced regarding this charge was hearsay from Mr. Pecklers. See Conclusions, *infra*, where this charge will be dismissed for lack of proof.

Re M.C.: This charge alleges that in September 1993 M.C. was physically assaulted by Mr. Smith.

At the hearing M.C. did not testify, and no direct evidence of the charge was adduced, except for the hearsay testimony of Mr. Pecklers. See Conclusions, *infra*, where this charge will be dismissed for lack of proof.

Re H.P.: This charge alleges that H.P. was physically assaulted by Mr. Smith in October 1993.

The evidence indicates and it is found to be **FACT** that H.P. tripped and fell while running in the gym, after ignoring Mr. Smith's orders to stop. H.P. alleged that the respondent tripped him and held him down by placing his knee on his chest. Respondent testified that H.P. tripped over his own feet when he and H.P. were thirty to forty feet apart, and that he helped H.P. up. No report was made of the incident, and there was no corroborating testimony, even though the incident occurred in a gym class full of students.

Based on the above, it will be concluded, *infra*, that the petitioner did not carry its burden of proof by a preponderance of the evidence as to this charge.

Re L.O.: This is the most extensive charge, and the incident on January 7, 1994, was more than adequately discussed above. L.O. claims that he was physically assaulted by the respondent.

The **FACTS** are: Mr. Smith took a football away from L.O. early in the day and held it in his anteroom. At the end of the day, L.O. took the ball away from respondent's custody without asking and then taunted the respondent by putting it behind his back and pretending he did not have it. Mr. Smith went behind L.O. to get the ball back from him. L.O. resisted, there was a struggle for the ball, and L.O. ended up on the floor. The respondent put the ball in the ante-room and closed the door behind him without looking back, and L.O.'s hood became caught under the door. L.O. was not injured, and his trip to the nurse was a mere distraction. No report was received from the nurse or from anyone else, including L.O., regarding an injury. L.O. kicked the door, threw an eraser, and cursed and spit at Mr. Smith after the incident.

L.O. was often disruptive, unduly aggressive, highly emotional and given to the free use of obscene language. He was a difficult student to deal with.

Several days after he testified at the hearing, but before the hearing ended, L.O. said that he and other students were "trying to get Smith out."

Re K.C.: This charge alleges that K.C. was physically assaulted by Mr. Smith on three occasions during the school year.

It is found to be **FACT** that K.C.'s testimony was that on one occasion the respondent hit him in the chest twenty times or more while in the entrance to the gym locker room. The respondent denies touching K.C., but recalls one incident when K.C. was disruptive and slithered to the floor on his own after being asked to sit down. No one else testified about the alleged incident, and no report was made to anyone by K.C. at or about the time of the occurrence. The evidence on this charge is in equipoise.

Respondent indicated that K.C. was a disciplinary problem, but also said that he was articulate, personable and had academic potential.

Re one additional charge not involving a particular student, but related to all or many of respondent's students: This charge alleges that Mr. Smith regularly engaged in a pattern of verbal abuse, including cursing at his students.

It is found to be **FACT** that Mr. Smith did, on occasions when he had difficulty controlling students and was provoked and defied by them, utter improper and unseemly words and remarks. He admitted to the use of such words, but, based on all the evidence, he did not use the extreme profanity attributed to him by some of the students. He did use some curses in relation to his principal, Ms. Mendolla, but that behavior is not included in the charges.

It is also found to be **FACT** that several of the involved students bragged, individually and as part of the group, that they were going to see to it that Mr. Smith lost his job. Some of these comments were made during and after the students testified at the hearing, as well as soon after the reported incidents. This is accepted as fact because it was heard and testified to by more than one witness, including a student.

The evidence relating to a student who is not involved in the charges, B.G., dealing with one occasion when the respondent allegedly stopped him forcibly from "skateboarding" on a hand cart, is not considered herein because the charges do not include that alleged incident.

It is further found to be an uncontested **FACT** that prior to the approximate five-month period involved in the charges, the respondent served in his position at the same school for approximately fourteen years with no disciplinary actions or complaints against him, and no evidence was submitted that indicates that his evaluations were anything but satisfactory or better.

LEGAL DISCUSSION

In any case involving tenure charges, a board of education has the burden of proving the truth of the charge or charges by a preponderance of the competent and credible evidence. *In re Tenure Hearing of Dusel, Sayreville Sch. Dist.*, 1978 *S.L.D.* 526; *In re Tenure Hearing of Ribacka, Sussex-Wantage Regional Sch. Dist.*, 1978 *S.L.D.* 929; *In re Tenure Hearing of Brown, Bayonne Sch. Dist.*, 1970 *S.L.D.* 239.

N.J.S.A. 18A:28-5, dealing with the tenure of teaching staff members, provides:

> The services of all teaching staff members including all teachers . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming a teaching staff member or other just cause . . . .
>
> [*See also N.J.S.A.* 18A:6-10 to -29.]

If it is determined that the charges or any of them are true, it then becomes necessary to address the question of the appropriate penalty. The statute, *N.J.S.A.* 18A:28-5, speaks of dismissal or reduction in compensation. Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students, and the likelihood of such behavior recurring. *In re Tenure Hearing of Ostergren, Franklin Township Sch. Dist.*, 1966 *S.L.D.* 185, 187; *In re Tenure Hearing of Kittell, Little Silver Sch. Dist.*, 1972 *S.L.D.* 535, 541; *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967).

Also, in determining the respondent's fitness to continue in the position, the pronouncement in *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E. & A. 1944), serves as a concise guideline:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.
>
> [130 *N.J.L.* at 371.]

The subject of corporal punishment is embodied in the following statute:

> No person, employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;
>
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
>
> (3) for the purpose of self-defense; and
>
> (4) for the protection of persons or property;
>
> and such acts, or any of them, shall not be construed to constitute corporal punishment . . . .
>
> [*N.J.S.A.* 18A:6-1.]

A statement by the Commissioner of Education in *In re Tenure Hearing of Lomakin*, 1971 *S.L.D.* 331, 334, is instructive:

> In the Matter of the Tenure Hearing of Thomas Appleby, decided by the Commissioner of Education November 25, 1969, the Commissioner said:
>
> > "'***While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing

> with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner defines in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185, 186***.'"

and:

> "'***that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions.***'" *Ostergren, supra*

and, also:

> "Thus, when teachers resort 'to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty.'" *Ostergren, supra.*'"

[*See also In re Tenure Hearing of Sammons,* 1972 *S.L.D.* 302, 321.]

A review of the evidence in this matter indicates that the only direct evidence in support of the charges came from the students themselves, most of whom were in their early or mid teens. In assessing the testimony of young students, great caution must be exercised. In drawing conclusions under such circumstances, the hearer is particularly mindful of his responsibility to assure that the conclusions and resulting decisions are supported by a preponderance of the credible evidence.

As stated by the State Board of Education in *In re Tenure Hearing of Deetz, Ridgewood School District*, 1984 *S.L.D.* 1923, 1926, *aff'd*, No. A-1264-84T5 (App. Div. May 10, 1985), *certif. denied,* 101 *N.J.* 321 (1985):

> Although we recognize that corroboration of student testimony is not required, it has long been established that student testimony must be examined with great caution. *See, e.g. In the Matter of the Tenure Hearing of Portia Williams*, decided by the Commissioner August 27, 1981, *aff'd* State Board March 24, 1982, *aff'd* Docket. No. A-4036-81T3 (App. Div. Dec. 15, 1982).

CONCLUSIONS

Based on all the foregoing, it is **CONCLUDED** that, as to J.P., the respondent did make physical contact, with his hands, on the young man's shoulders after he refused to get down from a desk that he was sitting on. That was the extent of the physical contact. However, J.P. then leaned back and slipped onto the floor, dislodging some other chairs. The fall most likely resulted from the student's own action, and he was not pushed over by Mr. Smith. The testimony indicating that the respondent threw J.P. over chairs or desks is not believable, particularly in view of the fact that J.P. is much bigger and heavier than Mr. Smith. The actual physical contact was not intended to harm the student, but rather to maintain order in the classroom.

As to E.J., it is **CONCLUDED** that the charge has not been proved by a preponderance of the credible evidence, and should be **DISMISSED**.

As to M.C., it is **CONCLUDED** that the charge has not been proved by a preponderance of the credible evidence, and should be **DISMISSED**.

As to H.P., it is **CONCLUDED** that the charge has not been proved by a preponderance of the credible evidence, and should be **DISMISSED**.

As to L.O., it is **CONCLUDED** that the respondent did use physical force to get the football away from him, which might have contributed to the student's fall onto the floor. Mr. Smith should have avoided the degree of physical contact that he engaged in with this student, even though L.O.'s conduct and physical disobedience deliberately provoked him. However, it is also **CONCLUDED** that Mr. Smith's action toward L.O. was not designed to harm him, but more to maintain order in the face of physical disobedience. Nevertheless, to the extent that the respondent's use of force was excessive, it was unbecoming conduct.

As to K.C., it is **CONCLUDED** that the charge has not been proved by a preponderance of the credible evidence, and should be **DISMISSED**.

The particular students involved in this matter were, for the most part, disorderly and difficult to control. Furthermore, their disobedience transcended mere refusal to obey and obscene argument. They often acted physically, such as throwing a football in class and striking the door. Some point was reached, on occasion, when it may have been necessary for the teacher to react physically, but not to initiate it, in order to maintain order and safety and to protect other students from harm, but only with enough restraint so that the degree of force used was not excessive.

Over the course of five days of hearing and observation, it was noted that Mr. Smith is a slight man, who uses pretentious language. Most of the involved students are larger and heavier. The evidence indicated that they taunted and provoked him with their behavior. The fact that he sometimes needed to react physically to the students' physical challenges does not excuse any excessive use of force, but the line is a fine one. The comment he made to his principal, "Perhaps I pushed him too hard," evidences the respondent's own understanding that he might have overreacted on that single occasion.

It is not necessarily concluded that the bragging of some of the students that they would "get Mr. Smith out" proved the existence of a well-knit conspiracy to fabricate testimony in order to cause the respondent's dismissal. However, a collective state of mind existed among the students which contributed to and encouraged Mr. Smith's behavior toward them, and illustrated their delight at the prospect of his removal as a teacher. These comments depreciated the quality of their testimony. In addition, there were often disquieting feelings during the students' testimony that their descriptions of incidents were too pat and seemingly rehearsed.

It became obvious that Mr. Smith's need to control difficult and unruly students must have often tried his patience, since he does not appear to be a "rough and ready" type of man. His rather diminutive stature and his tendency to speak precisely and with an air of intellectual pomposity would have exacerbated the contemptuous manner in which the students treated him and afforded them some delight at the prospect of "getting him out."

Nevertheless, Mr. Smith should have exercised more restraint, and he should have avoided physical contact in those instances related above, even though he was deliberately provoked and challenged. Unfortunately, he did not do so, and those intemperate instances constituted unbecoming conduct.

As for the profanity sometimes used by the respondent, which included unseemly remarks about his principal, again, Mr. Smith should have exercised greater restraint. His use of such language was unbecoming conduct.

Mr. Smith's relations with his principal, who continually bested him in securing promotions, were extremely unpolitic and harsh, almost self-destructive, considering the employment relationship. However, these difficulties were unrelated to the issues contained in the charges.

PENALTY

As indicated above, the applicable tenure laws, *N.J.S.A.* 18A:6-10 to -29, do not necessarily require dismissal upon proof of unbecoming conduct, but allow a reduction in compensation as a lesser penalty. While the events related above have led to a conclusion that the respondent was guilty of unbecoming conduct, mitigating circumstances also exist. Mr. Smith enjoyed an unblemished record for fourteen years, prior to the five months involved in the charges. His students during those five months were obviously more than just difficult, and he had to deal with them alone, without a teacher's aide, and with no training in special education.

On the other hand, there is no question that a teacher's conduct must be held to very high standards. *See In re Tenure Hearing of Talley*, 94 *N.J.A.R.*2d (EDU) 395, where it was held that teachers, as role models, are expected to exercise exemplary restraint and mature self-control. Nevertheless, there have been many instances when unbecoming conduct by a teacher, which includes inappropriate physical contact between a teacher and a student, has resulted in a lesser penalty than termination. *See New Brunswick Bd. of Educ. v. Murphy*, 92 *N.J.A.R.*2d (EDU) 527; *Randolph Township Bd. of Educ. v. DiPillo*, 93 *N.J.A.R.*2d (EDU) 13; *In re Tenure Hearing of Boyd*, 93 *N.J.A.R.*2d (EDU) 445; *In re Fulcomer, supra,* 93 *N.J. Super.* 404.

In *In re Fulcomer*, a teacher laid hands on and restrained a student. When the boy ran toward the door to leave the classroom, the teacher pursued him and again restrained him physically, causing both of them to fall to the floor. In its decision, the court noted the teacher's age, the relatively short time he had left until retirement, and the fact that he enjoyed a long record of unblemished teaching experience. While finding the teacher's conduct to be hasty and misguided, the court found termination to be unduly harsh under the circumstances.

In the instant matter, it is ultimately **CONCLUDED** that, while the respondent's conduct in the instances related above was inappropriate and unbecoming a teaching staff member, termination is too severe a penalty. Instead, a reduction in salary is more appropriate.

ORDER

It is therefore **ORDERED** that the respondent should be reinstated to his position at the same annual salary that he was paid at the time of his suspension, without benefit of any employment and adjustment increments that he might have been entitled to during the intervening period of time. Respondent shall also forfeit the 120 days' pay withheld during his suspension. In addition, respondent shall not be credited with any sick leave, personal leave or other benefits that might have ordinarily accrued during the period of his suspension, up to the time of reinstatement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 6, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

Michael Pecklers

K.C., student

L.O., student

H.P., student

J.P., student

B.G., student

J.G., student

Barbara Mendolla

Irvin B. Herrick

Doreen Bryant

Lynn Fedele

Ronald Courts

S.C., student

J.P.-2, student

Norma Howard

Francis J. Katusa, Jr.

Wilfred Moyler

Elbert Smith, respondent

G.G., student

Exhibits:

The Exhibits, left in the possession of respondent's attorney at the end of the hearing, have not been returned, nor have communications asking for the exhibits been answered. This decision was written without the benefit of a review of the exhibits. Nevertheless, a description of the documents marked in evidence follows, to the extent possible.

R-1 Grade sheet - Gym and Graphic Arts Video Production
R-2 Disciplinary report, January 7, 1994
R-3 Discipline policy
R-4 Memo from Smith to Mendolla, December 2, 1993
R-5 Memo from Mendolla to Smith, December 14, 1993
R-6 Memo from Smith to Mendolla, December 14, 1993
R-7 Memo from Mendolla to Smith, December 14, 1993
R-8 Memo from Mendolla to Smith, December 14, 1993
R-9 Memo from Smith to Mendolla, December 14, 1993
R-10 Memo from Smith to Mendolla, December 14, 1993
R-11 Memo from Smith to Mendolla, December 14, 1993
R-12 Policy regarding appointments

OAL DKT. NO. EDU 4736-94

IN THE MATTER OF THE TENURE	:	
HEARING OF ELBERT SMITH,	:	
SCHOOL DISTRICT OF THE HUDSON	:	COMMISSIONER OF EDUCATION
COUNTY AREA VOCATIONAL-TECHNICAL	:	DECISION
SCHOOLS, HUDSON COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board has not met its burden of proof with regard to the charges relating to the incidents involving E.J., M.C., H.P., or K.C. Although this matter turns to a great extent on the credibility of witnesses and the weighing of evidence, the Commissioner is satisfied, based upon his review of the record, that the ALJ considered all testimony and weighted it according to the credibility of the witnesses and the plausibility of its content. The Commissioner finds no basis in the record for overturning the credibility assessments of the ALJ who had the benefit of observing the witnesses firsthand.

The Commissioner also agrees with the ALJ's assessment concerning respondent's physical contact with L.O. and J.P., in those respective incidents, "***Mr. Smith should have exercised more restraint, and he should have avoided physical contact in those

instances related above, even though he was deliberately provoked and challenged. Unfortunately, he did not do so, and those intemperate instances constituted unbecoming conduct." (Initial Decision at p. 30) Likewise, the ALJ correctly observed "As for the profanity sometimes used by the respondent, which included unseemly remarks about his principal, again, Mr. Smith should have exercised greater restraint. His use of such language was unbecoming conduct." (*Id.*) In reaching his determinations herein, the Commissioner was particularly cognizant that it has long been recognized that there is a unique degree of self discipline demanded of a teaching staff member, notwithstanding deliberate provocation on the part of recalcitrant students

> ***While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control. (1962 *S.L.D.* at 162)
>
> *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D.* 160, 162, remanded by the State Board of Education 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 225, reversed and remanded 93 *N.J. Super.* 404 (App. Div. 1967), decided by the Commissioner 1967 *S.L.D.* 215.

With regard to the evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner is mindful that he is required to consider respondent's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967). Having considered the proven charges and all of the remaining factors, the

Commissioner concludes, as did the ALJ, that respondent's conduct, although serious and unprofessional, does not warrant his dismissal from his tenured position. Notwithstanding, he finds that it is necessary to impress upon respondent and others the seriousness of the conduct at issue herein and he, therefore, concurs with the ALJ's recommendation that respondent should suffer the loss of his employment and adjustment increments* and the loss of the 120 days' salary withheld pursuant to *N.J.S.A.* 18A:6-14 following certification of tenure charges.

Accordingly, the initial decision of the OAL is affirmed, as modified herein, for the reasons expressed therein. The Commissioner hereby directs that respondent forfeit the 120 days' salary withheld following certification of the instant tenure charges, as well as benefits accrued during the period of his suspension, and that he be denied his salary and adjustment increments for the 1996-97 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is, however, noted that as respondent had no entitlement to receive a salary amount that included an award of increments during his suspension following the Board's certification of tenure charges, (see *In the Matter of the Tenure Hearing* of *Anthony Castaldo*, decided by the State Board, 1986 *S.L.D.* 3026) such employment and adjustment increment loss must be prospectively applied.

JULY 26, 1996

DATE OF MAILING JULY 26, 1996

329-96

329-96

TOWNSHIP COUNCIL OF THE TOWNSHIP OF EWING,

MOVANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JULY 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING APPLICATION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 4829-96

AGENCY DKT. NO. 207-6/96

TOWNSHIP COUNCIL OF THE TOWNSHIP OF EWING,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

Charles P. Allen, Jr., Esq., for petitioner

John G. Dyer, III, Esq., for respondent

This matter commenced on June 10, 1996, when the Township Council of the Township of Ewing (hereinafter petitioner) filed a petition with the Commissioner of Education alleging, inter alia, that the Ewing Township Board of Education (hereinafter respondent) immediately upon learning of petitioner's resolution of May 13, 1996, reducing the amount to be raised by taxation pursuant to N.J.S.A. 18A:22-37, "intentionally, and in bad faith, embarked on a spending plan which deviates significantly from that which it had proposed and published in an overt attempt to spend down the free balance so as to defeat" respondent's May 13, 1996 resolution.

Together with the petition, petitioner filed a notice of motion for emergent relief seeking an order enjoining respondent from entering into a contract for roof repairs to the Antheil School in the amount of $479,000 together with engineering costs, and from committing funds and or expending any funds beyond those already budgeted for necessary normal daily operations, etc. Petitioner also filed on June 10, 1996, a letter memorandum in support of the motion for an injunction. On June 14, 1996, the Commissioner transmitted the matter to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14-1 to -13. The file was transmitted without an answer or papers responding to the motion because unexpected hospitalization of respondent's attorney had prevented the filing of a response by that date. On June 19, 1996, respondent filed an answer to the petition, certifications of Leonard P. Kelpsh, Dennis Nettleton, Thomas N. Saltzgueber and Board Counsel, John G. Dyer, III. Also filed on that date was a letter memorandum opposing the motion for emergent relief. Oral argument on the motion for emergent relief was scheduled for June 20, 1996 at 1:30 p.m. At that time petitioner filed a certification of Charles P. Allen, Jr., Township attorney, in response to respondent's papers, together with a reply memorandum, dated June 20, 1996. Oral argument was conducted as scheduled. Petitioner's continued objections to the untimely submissions by respondent, even after it became aware of the medical conditions preventing respondent's attorney from filing earlier, were noted and overruled. Likewise overruled was petitioner's objection to the viewing of a video tape prepared by Roof Spec/Design, Inc., architects and roofing consultants employed by respondent to demonstrate the current condition of the roof at Antheil School. The video tape was viewed by all present and has been marked R-1 in evidence.

Based upon my review of the pleadings and papers on file, the responses of both counsel during oral argument and my review of the video tape, I **CONCLUDE** that petitioner has not established that it is entitled to the relief which it seeks. Although petitioner alleges, in rather strong and sharp terms, that respondent has embarked on a plan to spend down the free balance in disregard of the jurisdiction of petitioner, when confronted with a direct question from the undersigned during oral argument, petitioner was forced to acknowledge that the "plan" consisted only of respondent's intention to proceed with performance of a contract for $479,000, plus $28,000 engineering costs, to repair the roof at Antheil School, with work commencing on June

24, 1996. There is absolutely no evidence to support petitioner's allegations of bad faith by respondent. The history of this contract as it appears from the documents on file is as follows: In November 1995, respondent received a report concerning the condition of the roofs on buildings in the district. After reviewing this report, respondent developed a five-year roof replacement/repair program. During one of the severe snow storms which occurred during the winter of 1995-1996, on February 25, 1996, the roof on the Ryan Administration Building literally blew off in large chunks; water had seeped between the roof and the roof deck making the roof susceptible to peeling during high winds. As a result of this dramatic incident, all the roofs were reinspected. An independent roofing consultant hired by respondent, Roof Spec/Design, Inc., advised respondent following this reinspection that the roof on Antheil School was as bad as the roof on the Ryan Administration Building. Thomas N. Saltzgueber, Executive Vice President of Roof Spec/Design, Inc., advised respondent that to avoid another potential catastrophic failure of the roofing system, such as the incident at the Ryan Administration Building, and to avoid potentially serious health concerns to the students in the building caused by the growth of mildew and other moisture-related bacteria between the water-saturated layers of the roof, that the Antheil roof should be replaced immediately rather than waiting for several years as previously planned. Thereafter, bid specifications for the Antheil roof were prepared and were received in the district on March 12, 1996. Respondent determined that the funds to pay for this project would be obtained from the expected proceeds from the sale of a building it no longer used or needed, Lanning School. An auction sale of the Lanning School occurred on the morning of March 29, 1996, and at that time the only bid, one for $525,000, was accepted. The Antheil roof project was advertised for bid the very next day, March 30, 1996. Bids were opened on April 10, 1996. All of the foregoing occurred before the Ewing Township Board of Education budget for 1996-97 was defeated at the annual school election on April 16, 1996. On May 6, 1996, respondent's superintendent, Leonard P. Kelpsh, specifically advised petitioner that the Antheil roof repairs were going to be made immediately rather than later and that the proceeds of the sale of Lanning School would be used to pay for the project.

On May 13, 1996, petitioner passed a resolution pursuant to N.J.S.A. 18A:22-37 reducing the amount to be raised by taxation by one million dollars. The reduction consisted of

two items, first, reduction in line item expenditures for instructional salaries of $100,000 based upon savings to be realized by teacher attrition due to retirement and other personnel actions and, second, a reduction of $900,000 in the amount raised by taxation based upon petitioner's estimate of respondent's free balance available in June 1996. Petitioner apparently also calculated that the $525,000 from the sale of Lanning School would be available as part of the free balance in June 1996, notwithstanding that it had been advised of respondent's plans to use the proceeds to fund the Antheil roof. Respondent awarded the bid for the roof project on May 14, 1996. The work is scheduled to commence on Monday, June 24, 1996. The closing on the contract of sale for the Lanning School is also scheduled to take place on June 24, 1996.

Preliminarily, it should be noted that although petitioner is asking the Commissioner to enjoin the performance of the contract for roof repairs, it has not named or served the moving papers upon the contractor to whom the bid was awarded on May 14, 1996. Certainly the contractor has an interest in the subject of this action, and were the imposition of an injunction prohibiting performance of the contract to be seriously entertained, he would be required to have notice and an opportunity to be heard. The injunction can not issue, however, because there is no basis in fact or in law to support it.

Pursuant to *N.J.A.C.* 6:24-1.5(b) and Crowe v. DeGioia, 90 *N.J.* 126 (1982) petitioner must show a substantial likelihood of success on the merits, likely irreparable harm in the absence of the relief requested and a balancing of the equities in its favor in terms of relative hardship to the parties in granting or denying relief. Petitioner cites Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super, 540 (App. Div. 1983), cert. den. 97 N.J. 506 (1983) and Board of Education of the Borough of Carteret, Middlesex County v. Mayor and Council of the Borough of Carteret, Middlesex County, 94 N.J.A.R. 2d (EDU) 126 (1993) as the legal basis for its asserted right to prevent respondent from incurring contractual obligations and expending monies during the current budget year, a budget not subject to review by the council. In Branchburg, supra., the court found too restrictive the rulings of the Commissioner and State Board that actions of a township committee in reviewing a proposed budget pursuant to N.J.S.A. 18A:22-37 are limited to a consideration of the line items contained in the current expense budget which was rejected by

the voters and that an increase in anticipated income or reduction in surplus by the township committee was outside the authority conferred by the statute. The court held that such a review must also involve a consideration of funds available from other sources to defray the necessary costs, including items of anticipated income and unappropriated free balance.* The fact that a township council may recalculate a board's anticipated income or surplus where the facts so warrant is not synonymous with the power to void contracts lawfully bid and awarded during a current school year. The facts as they appear in this matter do not support an inference that respondent entered into this contract after petitioner cut one million dollars from the school budget in an effort to make petitioner look bad. While in fact the bid was awarded the day after the council meeting; the award was simply the culmination of months of planning to address a problem which respondent had in good faith concluded was much more immediate than it had previously thought in November of 1995. The severe winter storms during the winter of 1995-96, the recommendations of an independent roofing expert, and the video tape of the deplorable, water-soaked conditions of the roof of the Antheil School prepared by the consultant, all support that good faith conclusion. In balancing the equities in this matter, they clearly preponderate in respondent's favor; there is not one shred of evidence that respondent acted in bad faith in awarding this contract. There is not an iota of proof that respondent exercised its authority in an arbitrary, capricious or unreasonable manner. The roof contract appears to be a valid legal obligation for the current budget year 1995-96. An injunction or a voiding of the contract by the Commissioner would undoubtedly result in (justifiable) litigation by the contractor who has relied upon respondent's actions in preparing for performance commencing Monday, June 24, 1996. There is no hardship to petitioner. The budget appeal which has been filed by respondent with the Commissioner of Education will go forward; the school district audit will be completed, and a final budget will be determined in due course. The process should take place as intended by statute and all of the other issues raised in the within matter by petitioner will be addressed during the regular course of the budget appeal, with the exception of petitioner's request that respondent be required to provide courtesy bussing. Respondent moved for summary disposition of that

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* The Carteret case was just a budget appeal where the borough council was found to have cut the surplus based upon mistaken assumptions. What it has to do with the present application for emergent relief enjoining the performance of a contract is not apparent.

issue at the oral argument in the within matter. Petitioner requested an opportunity to submit a legal memorandum before that motion is determined. Petitioner should have whatever it wishes to be considered on the issue filed with the undersigned no later than July 12, 1996. Petitioner's application for emergent relief is otherwise **DENIED** in its entirety.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 21, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

/cc

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Videotape of Antheil School's Roof

OAL DKT NO EDU 4829-96

TOWNSHIP COUNCIL OF THE TOWNSHIP OF EWING,	:	
MOVANT,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this matter, the audiotape of the hearing, and the initial decision of the Office of Administrative Law have been reviewed. Movant's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. No reply was filed by respondent.

Movant's exceptions primarily recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that the respondent's commencement of roof repair at the Antheil School was in bad faith in that there was no immediate need to spend the entire fund balance that would arise from the sale of the Lanning School on this project. (Movant's Exceptions at pp. 1-2) Movant again avers that the Board contended the Antheil roof was to be repaired as part of a five-year plan, that there were other school roofs in the District more urgently in need of repair than the Antheil roof, and that the project at issue was at no time submitted to the voters for approval. *(Id.* at p. 2) In that these arguments were reviewed and addressed before the ALJ, they are not further summarized herein.

Movant also avers the ALJ incorrectly construed case law in denying Council the authority to effect spending in the 1995/96 fiscal year. It argues that the cases entitled,

Branchburg Board of Education, supra, and *Carteret Borough Board of Education, supra*, require the Council to look to all sources of revenue and monies on hand which will impact the budget being reviewed. Thus, movant avers, the revenues from the sale of the school must necessarily be under the jurisdiction of the Council if the Board attempts to spend them subsequent to the Council's action. (Movant's Exceptions at pp. 2, 3) Lastly, movant argues that the contractor is not a necessary party to the question and is not entitled to participate in this matter as the dispute is between the public bodies concerning the use of proceeds from the sale of the Lanning School. Alternatively, it seeks that the contractor be joined and afforded "an opportunity to be heard as to whether injunction should issue as to the entire project and/or only as to a portion of the project, reducing its scope." (*Id.* at p. 3) A motion to effectuate such joining was subsequently filed with the Commissioner on June 26, 1996.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ denying emergent relief, as movant has failed on the record of the hearing to meet the standards for granting of such relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

It is well established that the granting of emergent relief is an extraordinary remedy which can only be awarded when the party seeking such relief demonstrates the existence of each of four separate conditions: 1) that in the absence of such emergent relief, the movant will suffer irreparable harm; 2) that there is a clear probability that the movant will prevail on the merits of the underlying controversy; 3) that the probability of harm to other persons will not be greater than the harm the movant will suffer in the absence of such stay; and 4) that the public interest will not be adversely affected by such a stay. *Crowe, supra.* The Commissioner finds that movant has failed to satisfy its burden in proving these elements.

While there is certainly merit to movant's claim of irreparable harm, in that permitting the Board to expend monies on which the Council relied as a revenue source in making its reductions pursuant to *N.J.S.A.* 18A:22-37 would effectively thwart the impact of Council's actions even if it prevailed before the Commissioner on the pending budget appeal, movant has failed in the record before the ALJ to substantiate its claims of bad faith with sufficient supporting evidence to demonstrate a reasonable likelihood of success on the merits. To the contrary, the record before the ALJ fully supports the findings and conclusions upon

which she based her decision to deny emergent relief. In so holding, the Commissioner notes that movant appended unsworn documentation to its exceptions in support of its contention that the Board represented to Council, even as late as May 6, 1996, that the roof repair at issue was to be phased-in over a three-year period. However, this submission was not placed on record before the ALJ, so that the Commissioner may not consider it herein pursuant to *N.J.A.C.* 1:1-18.4(c), which expressly precludes evidence not presented at hearing from being submitted in conjunction with exceptions.

Lastly, with regard to the weighing of interests, while the Council certainly has a legitimate interest in protecting its actions with respect to budget reductions made on behalf of the electorate which defeated the school budget, the Commissioner cannot ignore the competing interests of the Board, which must act to ensure provision of the safe school environment to which the students and employees of the District are entitled. In this context, the Commissioner notes that the Council in its moving papers made no allegation that the roof repair at issue was unnecessary for T&E and, accordingly, although this issue was alluded to during emergent proceedings herein, it was not squarely addressed.

With respect to this issue, the Commissioner concurs with the ALJ that the question of T&E necessity is a matter properly addressed on its merits within the context of the budget appeal presently pending before the Commissioner. In so holding, the Commissioner denies the Council's Motion to join G&M Eastern, Inc., as a respondent in further proceedings, as, given the denial of emergent relief herein, the roofing contractor would be neither a necessary nor an appropriate party to budget appeal proceedings.

Finally, with regard to a board's ability to spend money during the current budget year subsequent to municipal action to reduce the subsequent year's budget pursuant to *N.J.S.A.* 18A:22-37, the Commissioner expressly rejects any contention that a municipality has "jurisdiction" over school district funds, that is, the independent authority to direct a board to spend funds in a particular way, or prevent their expenditure. He affirms, however, that a municipality may certainly apply to the Commissioner for an injunction, as the Council has done herein, if it believes that the board is deliberately spending down relied-upon surpluses and revenues or otherwise attempting to thwart municipal budget cuts prior to the Commissioner's determination on appeal.

Accordingly, the Commissioner affirms the ALJ's initial decision on motion for emergent relief as further explicated herein, denying extraordinary restraints and providing for no further proceedings at OAL on those counts of the emergent application regarding the disputed roof repair; he further denies as unnecessary the Council's motion to join the district's roofing contractor as a party to further proceedings. This matter shall now duly proceed at OAL on the courtesy busing issue in accordance with the ALJ's recommendation, and further argument on the merits of the parties' claims regarding use of the proceeds from the sale of Lanning School shall be made and addressed within the context of the budget appeal presently pending before the Commissioner pursuant to *N.J.A.C.* 6:24-7.1 *et seq.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 26, 1996

DATE OF MAILING JULY 26, 1996

330-96

M.D., on behalf of minor nephew, S.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,

RESPONDENT.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,

COUNTERCLAIMANT,

V.

M.D. AND M.S,

COUNTERCLAIM RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning aunt alleged that her nephew, S.S., was wrongfully denied access to school due to residency dispute.

Since petitioner did not file an answer to respondent's counterclaim, did not appear for the prehearing conference, and did not respond to the motion to enter default, each count in the counterclaim was deemed to be admitted and the matter was decided by way of summary judgment. Thus, the ALJ found that M.D. failed to satisfy the statutory criteria for affidavit pupil admission as set forth in *N.J.S.A.* 18A:38-1. ALJ concluded that M.D. had to be assessed tuition for the period of S.S.'s ineligible attendance in respondent's schools.

Commissioner adopted findings and determination in initial decision as his own and ordered M.D. to pay the District the tuition owed. Petition filed by M.D. was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11616-95
AGENCY DKT. NO. 364-9/95

M.D., ON BEHALF OF MINOR NEPHEW, S.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD,
Respondent.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD,
Counterclaimant,
v.
M.D. AND M.S.,
Counterclaim Respondents.

No appearance by or for M.D.

No appearance by or for M.S.

Joanne L. Butler, Esq., for respondent
(Young, Dimiero & Sayovitz, attorneys)

Record Closed: June 6, 1996 Decided: June 7, 1996

BEFORE **RICHARD McGILL,** ALJ:

This matter involves a petition by M.D. (petitioner) seeking relief from a determination of the Board of Education of the School District of South Orange and Maplewood (respondent) that her nephew, S.S., does not meet the requirements as set forth in *N.J.S.A.* 18A:38-1(b) for a free public education in respondent's schools. Respondent continues to deny that S.S. is eligible for a free public education and counterclaims against M.D. and against S.S.'s mother, M.S., for payment of tuition during the period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed an amended petition with the Commissioner of Education on September 25, 1995 pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an amended answer and counterclaim on October 13, 1995, naming M.D. and M.S. as counterclaim respondents. The matter was transmitted to the Office of Administrative Law on October 18, 1995 for determination as a contested case.

An in-person prehearing conference was scheduled for February 22, 1996 at the Office of Administrative Law in Newark, New Jersey. Prior to the prehearing conference, respondent filed a notice of motion to enter default against M.S. for failure to answer the amended counterclaim.

M.D. and M.S. did not appear for the prehearing conference on February 22, 1996. It may be noted that M.S. was not listed as a party on the transmittal sheet from the Department of Education and was not sent notice thereof. During a brief conversation, the undersigned advised counsel for respondent that the notice of motion to enter default pertained only to M.S. and did not mention M.D. On February 26, 1996, respondent filed a notice of motion to enter default against M.D. for failure to answer the amended counterclaim. M.S. and M.D. did not respond to respondent's motions.

From a review of the file, it was not apparent to the undersigned that M.S., who is a resident of Bermuda, is properly a party to this proceeding. As a result, the undersigned directed respondent to set forth the legal basis for the counterclaim against M.S. Respondent responded by letter dated May 16, 1996, requesting leave to amend the pleadings to include a third-party petition naming M.S. as a respondent or to file a separate petition, naming M.S. as respondent, to be consolidated with this matter. The record closed on June 6, 1996, when respondent was advised that its request to amend the pleadings in this matter was denied.

ANALYSIS

Respondent's amended counterclaim and motion to enter default against M.S. raise the question whether she is properly a party to this proceeding. For the following reasons, I conclude that M.S. is not properly a party to this proceeding.

Respondent's characterization of the claim against M.S. as a counterclaim is not accurate. In accordance with *R.* 4:7-1, a counterclaim is a claim against an opposing party. Here, M.S. is not an opposing party. Rather, the action against M.S. is a form of third party practice which is permitted in the courts pursuant to *R.* 4:8-1 to -2. However, third party practice is not permitted under the New Jersey Uniform Administrative Procedure Rules, unless there is a specific statutory authorization. *N.J.A.C.* 1:1-1.3(a). The pertinent statute, *N.J.S.A.* 18A:38-1, does not expressly permit third party practice in administrative hearings. It follows that M.S. is not properly a party to this proceeding.

Additionally, a petition must be adequately served upon a respondent. *N.J.A.C.* 6:24-1.2, and the petitioner must provide proof of service. *N.J.A.C.* 6:24-1.2(b). In accordance with *N.J.A.C.* 6:24-1.2(b)4, a receipt for certified mailing constitutes proof of service. Here, respondent sent the amended counterclaim and the motion to enter default to M.S. by certified mail. However, M.S. lives in Bermuda, which is a foreign country. In order to achieve service of process on a resident of a foreign country, a party must comply with international

conventions. *See, Gapanovich v. Komori Corp.*, 255 *N.J.Super.* 607 (App. Div. 1992). Here, respondent has not demonstrated that it has complied with international conventions with respect to the service of process upon M.S.

Based upon the above, I **CONCLUDE** that M.S. is not properly a party to this proceeding. Therefore, the motion to enter default must be denied, and the amended counterclaim against M.S. must be dismissed.

M.D. did not file an answer to respondent's counterclaim, did not appear for the prehearing conference on February 22, 1996, and did not respond to the motion to enter default. Where a party fails to file an answer to a petition, each count therein is deemed to be admitted, and the matter is decided by way of summary judgment. *N.J.A.C.* 6:24-1.4(e). Here, M.D.'s petition and respondent's counterclaim, each count of which is deemed to be admitted, clearly indicate that S.S.'s mother is a resident of Bermuda, that M.D. is a resident within respondent's school district, that M.D. entered S.S. in respondent's schools, that S.S. attends school in respondent's district and that M.D. failed to satisfy the statutory criteria for affidavit pupil admission as set forth in *N.J.S.A.* 18A:38-1. Where a resident enrolls a child who is ineligible as an affidavit student, the resident shall be assessed tuition for that student prorated to the time of the student's ineligible attendance. *N.J.S.A.* 18A:38-1(b)1. Therefore, I **CONCLUDE** that M.D. must be assessed tuition for the period of S.S.'s ineligible attendance in respondent's schools.

Where a party fails to appear at any proceeding, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. *N.J.A.C.* 1:1-14.4(a). Here, M.D. failed to appear for the prehearing conference on February 22, 1996. Under the circumstances, I **CONCLUDE** that M.D.'s petition should be returned to the transmitting agency for appropriate disposition.

Accordingly, it is **ORDERED** that:

1. Respondent's motion to enter default against M.S. is denied, and the amended counterclaim against M.S. is dismissed.

2. M.D. shall pay to respondent the amount of tuition for the period of S.S.'s ineligible attendance in respondent's schools.

3. M.D.'s petition in this matter will be returned to the Department of Education for appropriate disposition.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jun. 7, 1996
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

6/12/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

am

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 Washington Street
Newark, New Jersey 07102
(201) 648-6066
Fax (201) 648-6124

Richard McGill
Administrative Law Judge

June 6, 1996

Joanne L. Butler, Esq.
Young, Dimiero & Sayovitz
Skyline Plaza
414 Eagle Rock Avenue
West Orange, New Jersey 07052

Re: Myrtle Denson v. South Orange-Maplewood Board of Education
OAL Dkt. No. EDU 11616-95
Agency Dkt. No. 364-9/95

Dear Counselor Butler:

I am in receipt of your letter dated May 15, 1996, in which you request leave to amend the pleadings in the above-mentioned matter to include a third-party petition naming Maxine Simmons as respondent, or alternatively, to file a separate petition naming Maxine Simmons as respondent to be consolidated with this matter. Please be advised that I am denying your request for the following reasons.

First, third-party practice is generally not permitted in administrative hearings. *N.J.A.C.* 1:1-1.3(a). Therefore, leave will not be granted to file a third-party petition against Maxine Simmons. Second, while you may file a petition against Maxine Simmons with the Commissioner of Education, consolidation with the pending matter would not be advisable, considering that Ms. Denson has already failed to answer the counterclaim, failed to appear for

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the prehearing conference and failed to respond to the motion to enter default. Accordingly, your request is denied.

Very truly yours,

Richard McGill
Administrative Law Judge

RMcG:am
cc: Myrtle Denson
Maxine Simmons

M.D., on behalf of minor nephew, S.S.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	
RESPONDENT.	:	
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	COMMISSIONER OF EDUCATION
COUNTERCLAIMANT,	:	DECISION
V.	:	
M.D. AND M.S,	:	
COUNTERCLAIM RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Administrative Law Judge's (ALJ) advisement of M.S.'s failure to appear was transmitted to the Commissioner by the OAL pursuant to *N.J.A.C.* 1:1-14.4, along with the record which supports the ALJ's finding that improper service was effectuated upon M.S. Accordingly, upon careful and independent review, the Commissioner concurs that the amended counterclaim against M.S. must be hereby dismissed with prejudice.

Additionally, in that M.D. did not answer respondent's counterclaim, appear for the prehearing conference on February 22, 1996, or respond to the motion to enter default, in

contravention of the directives of the ALJ, the Commissioner concurs that the entrance of a default judgment against M.D. is appropriate in the instant case.

Accordingly, pursuant to *N.J.A.C.* 6:24-1.4(e), each count of the Board's counterclaim charges against M.D. is deemed to be admitted and M.D. is hereby ordered to pay to the District tuition for the period of minor child S.S.'s illegal attendance in the public schools of the South Orange and Maplewood School District. The petition filed by M.D. is dismissed with prejudice due to her failure to appear or otherwise comply with the directives of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 29, 1996

DATE OF MAILING JULY 29, 1996

331-96

331-96

IN THE MATTER OF THE TENURE HEARING	:	
OF HOWARD MASSEY, SCHOOL DISTRICT	:	
OF THE BOROUGH OF PAULSBORO,	:	
GLOUCESTER COUNTY.	:	
AND	:	
HOWARD MASSEY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	
	:	

JULY 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4319-95 and
EDU 6666-95 (CONSOLIDATED)
AGENCY DKT. NO. 60-3/95 and
179-5/95

IN THE MATTER OF THE TENURE HEARING OF HOWARD MASSEY, BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,
AND

HOWARD MASSEY,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO,
Respondent.

Eugene P. Chell, Esq., for Board of Education of the Borough of Paulsboro, (Chell & Chell, attorneys)

Michael C. Damm, Esq., for Howard Massey, (Selikoff & Cohen, attorneys)

Record Closed: June 5, 1996 Decided: June 6, 1996

BEFORE **LILLARD E. LAW**, ALJ:

This matter was transmitted to the Office of Administrative Law on for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION,** which by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

6 June 1996
DATE

Lillard E Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

6/12/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 14 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ai

IN THE MATTER OF THE TENURE HEARING OF HOWARD MASSEY, BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY

AND

HOWARD MASSEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

OAL DOCKET NOS. EDU 4319-95 AND EDU 6666-95
AGENCY DKT. NOS. 60-3/95 AND 179-5/95
(Consolidated)

STIPULATION DISMISSING CHARGES AND DISMISSING APPEAL FROM INCREMENT WITHHOLDING

THIS STIPULATION OF DISMISSAL is entered into by and between the Board of Education of the Borough of Paulsboro (hereinafter "Board") and its tenured employee Howard Massey (hereinafter "Massey"); and,

WHEREAS, Massey has been continuously employed by the Board as a teaching staff member since September, 1966; and,

WHEREAS, on March 14, 1995, the Board certified to the Commissioner of Education charges against Massey which it felt under the circumstances, if true, were sufficient to warrant a reduction in salary, captioned In the Matter of the Tenure Hearing of Howard Massey, Board of Education, Borough of Paulsboro, Gloucester County, OAL Docket No. EDUTH 04319-95S, Agency Ref. No.

60-3/95; and,

WHEREAS, Massey on April 6, 1995, filed an Answer to the charges denying the allegations as stated; and,

WHEREAS, on April 11, 1995, the Board acted to withhold Massey's salary adjustment for the 1995-96 year; and,

WHEREAS, on May 24, 1995, Massey filed a Petition of Appeal, alleging that the Board arbitrarily withheld his salary adjustment in violation of N.J.S.A. 18A:29-14, captioned Howard Massey v. Board of Education for the Borough of Paulsboro, Gloucester County, OAL Docket No. EDUOR 06-666-95S, Agency Ref. No. 179-5-95; and,

WHEREAS, on June 5, 1995, the Board filed its Answer to the Petition of Appeal denying the allegations; and,

WHEREAS, on January 23, 1996, the Honorable Lillard E. Law, A.L.J. entered an Order consolidating the Board's action seeking to reduce Massey's salary and the Petition of Appeal filed by Massey from the Board's action withholding his salary adjustment; and,

WHEREAS, the Board having instituted the charges based upon initial information received from others concerning Massey's interaction with students, having determined that if in the event the allegations were true that Massey's salary should be reduced; and subsequent to the placing of this matter into litigation, during the "discovery" phase and in preparation for hearing, having conducted a more detailed and full independent investigation into the allegations, having obtained all relevant information and documentation; and the Board's representatives having communicated with students and parents of students as to the alleged

occurrences; and recognizing the fact that Massey's job of computer keyboarding instructor by its very nature involved close contact with students and at times individualized instruction; and having reached a determination that in light of this subsequent and full investigation that the allegations against Massey of improper contact as originally stated were not sustainable, but that as admitted by Massey on isolated occasion he would in a non-injurious, non-threatening, playful and friendly manner pat or tap a student on the head area to establish a mutual camaraderie with the student; and Massey recognizing that such contact would not continue or ever re-occur; and,

WHEREAS this full investigation of all the evidence that might be presented during the tenure hearing having provided the Board with the opportunity to explore a means of resolving this dispute in a manner consonant with the public interest; and in light of the commendable employment record of Massey and his long-standing tenure of some 29 years; his dedication and contributions to the youth of the Paulsboro community in the form of scholarships and activities in organizations promoting the betterment of youth; and the fact that no further incident has occurred subsequent to the initiation of charges during which time Massey has continued to teach; and the Board having concluded that it was in the best interest of the public, including students and the Paulsboro community that Massey continue in his long standing position as a teaching staff member for the Paulsboro School District uninterrupted; and being satisfied that no further incident would

occur; and,

WHEREAS, the Board having determined that Massey's conduct did not warrant termination or permanent salary adjustment withholding, but rather that Massey's salary adjustment be withheld in the amount of $641.00 for the 1995-1996 year only, the remainder of his increment at his request to be deposited into the Massey Scholarship Fund established by Massey in or about 1977, currently funded by monies he has allotted from his salary, and which he awards to needy and deserving student(s) each year; and,

WHEREAS Massey and the Board have entered into this stipulation with a full understanding of their rights, recognizing that this stipulation and their agreement is subject to the review and approval of the Commissioner of Education, and with Massey's further understanding that pursuant to N.J.A.C. 6:11-3.6(a)1 any determination made by the Commissioner of Education resulting in a loss of tenure or dismissal may be referred to the State Board of Examiners for determination of possible revocation or suspension of teaching certificate;

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. Massey's salary adjustment in the amount of $641.00 for the 1995-1996 year only shall be withheld, the remainder of his increment for that year to be placed into the Massey Scholarship Fund;

2. The Board hereby withdraws the charge that it has filed against Massey seeking that his salary be reduced under OAL Docket No. EDUTH 04319-95S, Agency Ref. No. 60-3/95, with prejudice;

3. Massey hereby withdraws his Petition of Appeal that the Board arbitrarily withheld his salary adjustment in violation of N.J.S.A. 18A:29-14, under OAL Docket No. EDUOR 06-666-95S, Agency Ref. No. 179-5-95 with prejudice;

4. The Board's actions based upon the foregoing are in the best interests of the public including the citizens of Paulsboro and the students of the Paulsboro School District.

FOR THE PAULSBORO BOARD OF EDUCATION

DATED: 5/14/1996 By: _____
EUGENE P. CHELL, ESQUIRE

SELIKOFF & COHEN, P.A.
Attorneys for Howard Massey

DATED: 5/13/96 By: _____
MICHAEL C. DAMM, ESQUIRE

DATED: 5/13/96 By: _____
HOWARD MASSEY

F:\WPDOCS\PUBLIC\MIKE\NEA-G\MASSEY\SET\STIP.DIS

IN THE MATTER OF THE TENURE HEARING	:	
OF HOWARD MASSEY, SCHOOL DISTRICT	:	
OF THE BOROUGH OF PAULSBORO,	:	
GLOUCESTER COUNTY.	:	
AND	:	
HOWARD MASSEY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

Noting that the Board, after a thorough investigation, determined that charges of improper conduct against Howard Massey were not sustainable, the Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. This consolidated matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 29, 1996
DATE OF MAILING JULY 29, 1996

332-96

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THERESA PICARD,	:	DECISION
RESPONDENT.	:	
	:	

JULY 29, 1996

OAL DKT. NO. EDU 6663-95

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THERESA PICARD,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 29, 1996

DATE OF MAILING JULY 29, 1996

333-96

JERSEY CITY EDUCATION ASSOCIATION,: on behalf of itself and its members, *ET AL.*,

:

PETITIONERS,

:

V. : COMMISSIONER OF EDUCATION

:

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, : DECISION

:

RESPONDENT. :

:

JULY 31, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4587-89

AGENCY. NO.: 163-5/89

JERSEY CITY EDUCATION ASSOCIATION, INC.
on behalf of itself and its members, et al.,

Petitioners,

v.

BOARD OF EDUCATION OF JERSEY CITY,
NEW JERSEY,

Respondent.

Philip Feintuch, Esq., for petitioners
(Feintuch, Porwich & Feintuch, attorneys)

Karen A. Murray, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: June 5, 1996 Decided: June 13, 1996

BEFORE: **THOMAS E. CLANCY**, ALJ

This matter was transmitted to the Office of Administrative Law (OAL) on June 22, 1989, for determination as a contested case, pursuant to *N.J.S.A. 52:14B et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached documents (totalling 41 pages).

Having reviewed the contents of the attached documents (totalling 41 pages), I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C. 1:1-19.*1 and I hereby approve same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

6-13-96
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

6/17/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 17 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, N.J. 07739
(908) 747-2300
Attorneys for Respondent State-Operated School District

IN THE MATTER OF:	:	
	:	OAL DOCKET NO. EDU-4587-89
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY AND JERSEY CITY EDUCATION ASSOCIATION (TITLE I)	:	Civil Action
	:	SETTLEMENT AGREEMENT AND STIPULATION OF DISMISSAL

Petitioner, THE JERSEY CITY EDUCATION ASSOCIATION and Respondent, THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY hereby agree to settlement and Stipulation of Dismissal of the above-captioned matter as follows:

1. With Regard to Issue #1 (Recipients of the Arbitration Award)

The parties hereby agree that Petitioners ELISA EISENMAN, MATTIE JOHNSON-LONG, MARCELLA BAKER, DELORES MCLEMORE, and ANITA YANOVER shall execute Release forms in the following amounts:

(a) ELISA EISENMAN: $812.64;

(b) ANITA YANOVER: $2,196.04;

(c) DELORES MCLEMORE: $2,196.04

(d) MATTIE JOHNSON-LONG: $2,196.04

(e) MARCELLA BAKER: $2,196.04.

The Release forms shall be prepared in accordance with the formula heretofore utilized by the parties in this action.

2. With regard to Issue #2

The parties accept Judge Clancy's interlocutory order as the final order. (See attached) fee

3. With Regard to Issue #3 (Petitioners Whose Entitlements Were in Factual Dispute)

(a) The parties hereby agree that Petitioners JEANNETTE AYALA, MAUREEN MCQUADE, GLENNA RASKIN and LORRAINE MOORE shall execute Release forms in the following amounts:

(a) JEANNETTE AYALA: $28,561;

(b) MAUREEN MCQUADE: $24,513;

(c) GLENNA RASKIN: $5,090;

(d) LORRAINE MOORE: $25,088.

The Release forms shall be prepared in accordance with the formula heretofore utilized by the parties in this action.

(b) Petitioners MEGALY PACHELO and MICHELLE MOORE hereby agree to release all their claims against the District arising from this action.

4. The undersigned representatives have full authorization and power to bind their respective clients to the terms of this Agreement.

5. This action, and all issues relating thereto, shall be dismissed with prejudice, upon execution of all the individual agreements.

Dated: 5/21/96

Philip Feintuch, Esq.
Attorney for Petitioner
Jersey City Education Association

Dated: 5/23/96

Karen A. Murray, Esq.
Attorney for Respondent State-Operated
School District of Jersey City

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER

OAL DKT. NO.: EDU 4587-89

Agency Ref. No. 163-5/89

JERSEY CITY EDUCATION ASSOCIATION, INC., on behalf of itself and its members, et al.,

Petitioners,

v.

BOARD OF EDUCATION OF JERSEY CITY, NEW JERSEY,

Respondent.

Philip Feintuch, Esq., represented petitioners

Karen A. Murray, Esq., represented respondent
(Murray, Murray & Corrigan, attorneys)

PROCEDURAL BACKGROUND

In 1982, 14 individually named, bilingual, Title I teachers filed a petition with the Commissioner of Education seeking pay and emolument parity with other teachers employed by the respondent. During the pendency of that case at the Office of Administrative Law, the following dialogue took place:

MR. FEINTUCH - I should like to say one thing further, your Honor, and the Board has agreed to be bound by the determinations made in this case as they may apply to others in the same or similar circumstances.

We are aware of the fact, that the Association is aware of the fact, that there may be a greater number of people who are in the same or similar circumstances as these fourteen, who have not yet made claim for any

benefits . . . at least formally . . . through the Commissioner's office, but the Board has agreed to be bound by the determinations made in this case as those determinations would relate to these others who have not yet made claim. Is that correct, Mr. Massa*.

MR. MASSA - That is so, your Honor. We would afford the same benefits or whatever. The ruling is applied to all others similarly situated. We would not want to be discriminatory.

JUDGE SPRINGER -That is the ruling as it is ultimately reached by the highest authority? In other words, if it goes up to the Commissioner?

MR. MASSA - Right. The ultimate adjudication of the matter. Whatever that may be, we would apply the same ruling to others.

JUDGE SPRINGER -And similar circumstances?

MR. MASSA - Yes.

JUDGE SPRINGER -So, in other future cases that may come up, or if there is a dispute as to whether the circumstances are similar or not?

MR. MASSA - Right.

JUDGE SPRINGER - If they are similar, those cases would be disposed of by the parties in the same manner as this one?

MR. MASSA - I might add that our reason for doing that is not only out of a sense of faimess, but also, we would like to terminate all this litigation once and for all.

Notwithstanding the foregoing however, when the State Board of Education issued its Final Decision on April 3, 1987, it granted parity only to the 14 individually named petitioners. No appeal was filed by the Jersey City Education Association from this determination.

---

* Mr. Massa was the attorney for the Jersey City Board of Education at the time of this dialogue.

Then, in 1989, the JCEA filed another petition on behalf of approximately 140 to 150 other teachers, who in its view were similarly situated. This petition sought compliance with the State Board's Final Decision of April 3, 1987 vis-a-vis salary entitlements, back pay and other emoluments for the 140 to 150 or so new individuals named in the Petition.

After referral to the Office of Administrative Law, on August 22, 1989, Administrative Law Judge Ward R. Young issued a Prehearing Order which required petitioners' counsel to amend this petition "to incorporate individually named petitioners, including sworn verifications by individual petitioners, and to file same . . . no later than September 30, 1989."

This was not done, but the petitioners' attorney wrote two letters to Judge Young requesting extensions of the filing deadline. In his letter of September 21, 1989, petitioners' attorney acknowledged that he would "have to have all the petitioners sign appropriate Certifications", while in a letter dated November 8, 1989, he indicated that the "Petition runs some 240 pages without the Certifications", that "the document is presently at the printer," and that "I will need time to have the approximate 140 petitioners sign the appropriate Certification[s]". In a letter dated November 9, 1989, Judge Young responded as follows: "The amended petition with executed certifications shall be due no later than December 15, 1989. The Board's answer shall be due no later than January 4, 1990. You are advised that no further extensions will be granted to petitioners, since 11 weeks [have] already been added to a generous 6 weeks provided at the August 18, 1989 prehearing".

The amended Petition was then filed at OAL on December 5, 1989. However, petitioners' attorney now seeks to have 11 more names added to the Petition. He relies heavily on the dialogue involving Judge Springer back in 1982.

DISCUSSION

Having carefully considered the contents of the briefs submitted by counsel and the exhibits attached thereto, the undersigned is convinced that the amendment should not be permitted. There are a number of reasons which lead to this result:

1. JCEA never appealed from the Final Decision of the State Board of Education dated April 3, 1987;

2. Only the State Board - - and not the local Jersey City Board of Education - - had the authority to provide relief to "other petitioners in the same or similar circumstances" . . . but the State Board granted parity only to individually named petitioners and not to any others;

3. JCEA knew back in 1982 (13 years ago) that there were other teachers similarly situated to the original 14 petitioners, but apparently never identified them with any certainty until just recently;

4. When petitioners' attorney participated in the dialogue with Judge Springer in 1982, he acknowledged that "similarly situated" teachers had to formalize their claims . . . but the 11 teachers now seeking to join this 61/2 year old lawsuit have still not complied with N.J.A.C 6:24-1.3, which requires them to verify their allegations under oath;

5. Even if these 11 individuals were to presently comply with N.J.A.C. 6:24-1.3, their claims should be barred by application of the doctrine of laches;

6. JCEA had more than sufficient time (7 years between 1982 and 1989) and opportunity to identify said 11 individuals, prior to filing the 1989 Petition, but did not do so.

7. When the parties appeared before Judge Young in 1982, JCEA was given 17 weeks to perfect the amendment of its Petition - - but did not do so; and

8. There is imputed to the law a need for finality and repose, prevention of needless litigation, avoidance of duplication and the reduction of unnecessary burdens of time and expenses (*see City of Hackensack v. Winer, 82 N.J. 1 at page 32 (1980)*; otherwise, this litigation would be never-ending.

On the strength of the foregoing, I ORDER that petitioners' application for the addition of 11 more individuals to the Petition filed with Judge Young on December 5, 1989, **BE** (and is hereby) **DENIED.**

This Order may be reviewed by the **COMMISSIONER OF EDUCATION** either upon interlocutory review, pursuant to *N.J.A.C. 1:1-14.10*, or at the end of the contested case, pursuant to *N.J.A.C. 1:1-18.6*.

12/28/95
Date

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

/g

2/14-15/96

MURRAY, MURRAY & CORRIGAN
COUNSELLORS AT LAW
25 SYCAMORE AVENUE
LITTLE SILVER, N.J. 07739
(908) 747-2300

FAX NO. (908) 758-8095

ROBERT EMMET MURRAY*
KAREN A. MURRAY**
DAVID F. CORRIGAN

LINDA SABAT*
DAVID A. RAPUANO^
SAMUEL M. FIRST^
VALERIE J. DION^
DONNA A. RAMSAY-WILCOX
YVONNE D. CATLEY

CAMDEN COUNTY OFFICE
WILSON BUILDING, OFFICE 1107
130 NORTH BROADWAY
CAMDEN, N.J. 08102

*MEMBER OF N.Y. BAR
**MEMBER D.C. & N.Y. BARS
^MEMBER OF PA. BAR

October 13, 1995

By Facsimile and Regular Mail

Hon. Thomas Clancy, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: State Operated School District of Jersey City
and Jersey City Education Association
Docket No. EDU 4587-89 (Title I)
Our File No. 99,022A

Dear Judge Clancy:

This letter shall confirm the results of a conference with yourself, Philip Feintuch and the undersigned relative to outstanding issues in this case. The parties agreed with the following procedures for resolving this case.

Issue #1: **Impact of the "arbitration award" (5 Petitioners)**

The State Operated School District is to prepare a data sheet showing the salary adjustment awarded to those Petitioners covered under the 1982 arbitration and the date such award was implemented for each Petitioner. Further, for each Petitioner, the District is to compare the monies paid under the arbitration award with the monies to which each Petitioner might be entitled if they are to be considered in the instant case.

This data, in conjunction with the District's legal argument on the issue of whether the Petitioners, who were grievants in the 1982 arbitration, should be considered active Petitioners in the instant case, is due to be filed by October 20, 1995. Petitioners are to submit their reply brief by November 9, 1995.[1]

[1] The brief was originally due on October 10, 1995. However, the District requested an extension and was granted one to October 20th. All other due dates were extended by a like time period.

Issue #2: **Petitioners who did not sign the Petition (11 Petitioners)**

Petitioners and the District are to submit briefs, simultaneously, on the issue of whether Petitioners who did not sign the Petition are to be active Petitioners and thus included in the settlement terms of the case. The parties' briefs are due to be filed by November 30, 1995, with any responsive briefs due by December 20, 1995.

Issue #3: **Petitioners with factual disputes (6 Petitioners)**

The District is to submit, by January 29, 1996, all factual and legal positions on the six (6) Petitioners whom they claim are not entitled to any adjustment by reason of the relevant facts. Petitioners' reply to the District's brief shall be due by February 12, 1996.

The parties will proceed to a hearing in the event the relevant facts regarding any Petitioner addressed in any of the three (3) above-noted groups remain in dispute and cannot be stipulated to by the parties. Presently, the hearing is scheduled for February 14 & 15, 1996.

I trust that the above accurately reflects the parties' briefing schedule, as modified by the extension. Should you have any questions, please contact me. This letter is being faxed and mailed, this date, to Petitioners' attorney, Mr. Feintuch.

Very truly yours,

MURRAY, MURRAY & CORRIGAN

Karen A. Murray /pcr

KAREN A. MURRAY

cc: Ms. Judi Granick, State Exec. Asst.
Charlotte Kitler, Esq.
Philip Feintuch, Esq. (facsimile + regular mail)

KAM/pcr

MURRAY, MURRAY & CORRIGAN
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• MEMBER OF N.Y. BAR
•• MEMBER D.C. & N.Y. BARS
△ MEMBER OF PA. BAR

May 23, 1996

Charlotte Kitler, Esq., General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, NJ 07305

Re: State Operated School District of Jersey City
and Jersey City Education Association, Title I
OAL Docket No. EDU-4587-89
Our File No. 99,022R

Dear Ms. Kitler:

Enclosed please find originally signed releases for the following individuals:

Jeannette Ayala; Marcella Baker; Elisa Eisenman; Mattie Johnson-Long; Delores McLemore; Maureen McQuade; and Lorraine Moore.

We are still waiting for releases from Glenna Raskin and Anita Yanover.

Very truly yours,

MURRAY, MURRAY & CORRIGAN

KAREN A. MURRAY

KAM/gmc
Enclosures (originals)

cc: Hon. Thomas E. Clancy, ALJ (w/o encls.)
Judi Granick, State Exec. Asst. (w/o encls.)
Philip Feintuch, Esq. (w/o encls.)

5/29 not yet received by me

6/4 - Eisenman rec'd

McQuade rec'd

Yanover rec'd

(fax) Raskin rec'd

28

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 04587-89 RELEASE

This Release, dated _____, 1996, is given by the Releasor

Jeannette Ayala, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $28,561 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

the State District and the JCEA, including but not limited to any and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment,

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9 day of May, 1996.

WITNESSED OR ATTESTED BY:

/ Joseen Ayala Jeannette Ayala
Jeannette Ayala, Petitioner

State of New Jersey }
} ss.:
County of Monmouth }

I certify that on May 9, 1996, Jeannette Ayala personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

/ Carol Quinn

CAROL QUINN
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES 12/09/96

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 04587-89 **RELEASE**

This Release, dated _____, 1996, is given by the Releasor

Marcella Baker
_____, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $2,196.04 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

the State District and the JCEA, including but not limited to al and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment,

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of May, 1996.

WITNESSED OR ATTESTED BY:

Otto R. Moss
Marcella Baker Jr.

Marcella Baker
Marcella Baker, Petitioner

State of New Jersey }
} ss.:
County of Hudson }

I certify that on May 9th, 1996, _____ Marcella Baker personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

Otto R. Moss
OTTO R. MOSS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 5, 1998

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 04587-89 **RELEASE**

This Release, dated May 13, 1996, is given by the Releasor

Mattie Johnson-Long, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $2,196.04 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

the State District and the JCEA, including but not limited to any and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment,

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13th day of May, 1996.

WITNESSED OR ATTESTED BY:

Gary W. Nelson

Mattie Johnson Long
Mattie Johnson-Long Petitioner

State of New Jersey }
} ss.:
County of }

I certify that on May 13 1996, 1996, Mattie Johnson-Long personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

~~Mattie Johnson Long~~

Gary W. Nelson
My Commission Expires
6-30-99

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 04587-89 **RELEASE**

This Release, dated _____, 1996, is given by the Releasor

Delores McLemore
_____, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $ 2,196.04 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

2t

the State District and the JCEA, including but not limited to any and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment,

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of May, 1996.

WITNESSED OR ATTESTED BY:

Robert F. Gawroniak

Delores McLemore

Delores McLemore, Petitioner

State of New Jersey }
} ss.:
County of Middlesex }

I certify that on May 9th, 1996, Delores McLemore personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

Robert F. Gawroniak

ROBERT F. GAWRONIAK
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 12/6/96

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 04587-89 RELEASE

This Release, dated May 7, 1996, 1996, is given by the Releasor

Lorraine Moore, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $25,088 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

the State District and the JCEA, including but not limited to any and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment,

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of May, 1996.

WITNESSED OR ATTESTED BY:

Linda M Burzynski
LINDA M. BURZYNSKI

Lorraine F Moore
Lorraine Moore, Petitioner

State of New Jersey }
} ss.:
County of Hudson }

I certify that on May 7, 1996, Lorraine Moore personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

Linda M Burzynski

LINDA M. BURZYNSKI
Notary Public of New Jersey
I.D. #2021737
My commission expires
August 28, 2000

lrj

FEINTUCH, PORWICH & FEINTUCH
ATTORNEYS AT LAW

PHILIP FEINTUCH
ALAN S. PORWICH
HOWARD S. FEINTUCH

26 JOURNAL SQUARE
SUITE 1003
JERSEY CITY, NEW JERSEY 07306
PHONE: (201) 656-8600
FAX: (201) 656-7125

VIA FACSIMILE AND REGULAR MAIL

June 5, 1996

Hon. Thomas E. Clancy, ALJ
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: State-Operated School District of Jersey City
and Jersey City Education Association, Title I
OAL Docket No. EDU-4587-89

Dear Judge Clancy:

Enclosed herewith please find a copy of Release from Anita Yanover.

This is the final Release. Thank you for all your help in this matter.

Respectfully yours,

PHILIP FEINTUCH

PF/jvc
Encl.

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners,	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
v.	OAL DOCKET NO. EDU 04587-89
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	**RELEASE**

This Release, dated June 1st, 1996, is given by the Releasor

Anita Yanover, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $2,196.04 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

the State District and the JCEA, including but not limited to any and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment,

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of June, 1996.

WITNESSED OR ATTESTED BY:

/ Wanda M. Hasselbach

Anita Yanover

Anita Yanover, Petitioner

State of ~~New Jersey~~ FLORIDA }
} ss.:
County of Collier }

I certify that on _____, 1996, _____ Anita Yanover personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

✓ Anita Yanover

Wanda M. Hasselbach

NOTARY PUBLIC STATE OF FLORIDA
WANDA M HASSELBACH
My Commission CC471494
Expires Jun. 13, 1999
Bonded by ANB
800-852-5878

cc

FEINTUCH, PORWICH & FEINTUCH
ATTORNEYS AT LAW

PHILIP FEINTUCH
ALAN S. PORWICH
HOWARD S. FEINTUCH

26 JOURNAL SQUARE
SUITE 1003
JERSEY CITY, NEW JERSEY 07306
PHONE: (201) 656-8600
FAX: (201) 656-7125

VIA FACSIMILE AND REGULAR MAIL

June 3, 1996

Karen Murray, Esq.
Murray, Murray & Corrigan
25 Sycamore Avenue
Little Silver, NJ 07739

Re: Title I

Dear Ms. Murray:

Enclosed herewith please find original copy of the fully executed Release from Glenna Raskin.

I am also faxing to you a copy of Anita Yanover's Release. Once I get the original copy of Ms. Yanover's Release, I will forward same to you as quickly as possible.

Very truly yours,

Philip Feintuch/jvc

PHILIP FEINTUCH

PF/jvc
Encls.

add

FEINTUCH, PORWICH & FEINTUCH
ATTORNEYS AT LAW

PHILIP FEINTUCH
ALAN S. PORWICH
HOWARD S. FEINTUCH

26 JOURNAL SQUARE
SUITE 1003
JERSEY CITY, NEW JERSEY 07306
PHONE: (201) 656-8600
FAX: (201) 656-7125

VIA FACSIMILE

May 30, 1996

Hon. Thomas E. Clancy, ALJ
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: State-Operated School District of Jersey City
and Jersey City Education Association, Title I
OAL Docket No. EDU-4587-89

Dear Judge Clancy:

As per our conversation of today, enclosed please find copies of fully executed Releases from ELISA EISENMAN, MAUREEN MC QUADE and ANITA YANOVER.

As soon as we get the original signed copies from the claimants, we will forward same to your Honor.

Very truly yours,

PHILIP FEINTUCH

PF/jvc
Encl.

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 04587-89 **RELEASE**

This Release, dated May 20, 1996, is given by the Releasor

Elisa Eisenman, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $812.64 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

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the State District and the JCEA, including but not limited to any and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment,

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 20th day of May, 1996.

WITNESSED OR ATTESTED BY:

Linda M Burzynski

Elisa Eisenman, Petitioner

State of New Jersey }
} ss.:
County of HUDSON }

I certify that on May 20, 1996, 1996, Elisa Eisenman personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

Linda M Burzynski

LINDA M. BURZYNSKI
Notary Public of New Jersey
I.D. #2021737
My commission expires
August 28, 2000

ehh

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 04587-89 **RELEASE**

This Release, dated May 21, 1996, is given by the Releasor

Maureen McQuade, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $ 24,513 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

the State District and the JCEA, including but not limited to any and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment.

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 21st day of May, 1996.

WITNESSED OR ATTESTED BY:

Linda M Burzynski

Maureen McQuade

Maureen McQuade, Petitioner

State of New Jersey }
} ss.:
County of HUDSON }

I certify that on May 21, 1996, Maureen McQuade personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

Linda M Burzynski

LINDA M. BURZYNSKI
Notary Public of New Jersey
I.D. #2021737
My commission expires
August 28, 2000

lkk

FEINTUCH, PORWICH & FEINTUCH
ATTORNEYS AT LAW

PHILIP FEINTUCH
ALAN S. PORWICH
HOWARD S. FEINTUCH

26 JOURNAL SQUARE
SUITE 1003
JERSEY CITY, NEW JERSEY 07306
PHONE: (201) 656-8600
FAX: (201) 656-7125

VIA FACSIMILE AND REGULAR MAIL

June 3, 1996

Hon. Thomas E. Clancy, ALJ
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: State-Operated School District of Jersey City
and Jersey City Education Association, Title I
OAL Docket No. EDU-4587-89

Dear Judge Clancy:

Enclosed herewith please find a copy of Release from Glenna Raskin.

I am still awaiting the original signed copy of the Release from Anita Yanover. We will forward the Release to your Honor as soon as we receive same.

Respectfully yours,

Philip Feintuch /jvc

PHILIP FEINTUCH

PF/jvc
Encl.

cc

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, NJ 07739
(908) 747-2300
Attorneys for Respondent

JERSEY EDUCATION ASSOCIATION, INC., a non-profit corporation of the State of New Jersey, on behalf of itself and all of its members, et al., Petitioners, v. BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body politic, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDU 04587-89 RELEASE

This Release, dated _____, 1996, is given by the Releasor

Glenna Raskin, (referred to as "I").

TO: The Jersey City Board of Education, n/k/a The State-Operated School District of the City of Jersey City (referred to as the "State District")

-and-

The Jersey City Education Association (referred to as "JCEA")

1. In consideration of the gross amount of $5,090 in exchange for this release, I hereby release, give up and waive any and all claims and rights which I have or may have against

the State District and the JCEA, including but not limited to any and all salary, any type of leave time and/or benefits claims which arose or may have arisen from my date of hire up to and including September 30, 1992. This releases any and all claims against the State District and/or JCEA relating to and/or arising out of this action, including those claims of which I am not aware and/or those not mentioned in this Release.

2. I agree that the amount set forth in ¶1 above shall be paid in one single payment,

, and shall be subject to the usual and ordinary deductions.

3. My salary and step placement after September 1, 1996 shall be subject to collective negotiations between the State District and JCEA.

4. This Release binds me and anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate. This Release is made for the benefit of the State District and the JCEA and all who succeed to their rights and responsibilities.

5. I understand and agree to the terms of this Release, and have executed same willingly and without coercion.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 1996.

WITNESSED OR ATTESTED BY:

✓ _____ Glenna Raskin
Glenna Raskin, Petitioner

State of ~~New Jersey~~ New York }
} ss.:
County of Nassau }

I certify that on May 22, 1996, _____ Glenna Raskin personally came before me and acknowledged under oath, to my satisfaction, that this person (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document and his/her act or deed.

✓ ~~Glenna Raskin~~
Adrienne F. Stern

ADRIENNE F. STERN
NOTARY PUBLIC, State of New York
No. 4719199
Qualified in Nassau County
Commission Expires August 31, 1996

250

OAL DKT. NO. EDU 4587-89

JERSEY CITY EDUCATION ASSOCIATION,: on behalf of itself and its members, *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 31, 1996
DATE OF MAILING JULY 31, 1996

334-96

C.N., SR. AND M.N., on behalf of their minor grandchild, C.N.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning grandparents alleged that their grandchild, C.N., was wrongfully denied access to school due to residency dispute.

ALJ found that C.N. was not residing with her grandparents in order to receive a free education in New Jersey; instead, petitioners, who have cared for C.N. from age 20 months, were attempting to provide C.N. with a positive family setting since her parents were not capable of doing it themselves. ALJ concluded the statutory purpose of *N.J.S.A.* 18A:38-1a and b were being effectuated. Petitioners' motion for summary decision was granted. ALJ ordered that C.N. was entitled to a free public education in the District.

Commissioner concurred with the ALJ that petitioners met their burden under *N.J.S.A.* 18A:38-1b(1) and that C.N. was entitled to a free public education in the District. Commissioner rejected as inapplicable that portion of the initial decision which analyzed the facts of the matter under the domicile provision of *N.J.S.A.* 18A:38-1a.

JULY 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6588-95
AGENCY DKT. NO. 170-5/95

C.N., Sr. and M.N., on behalf of their minor grandchild, C.N.,
Petitioners,
v.
SOUTH ORANGE and MAPLEWOOD BOARD OF EDUCATION,
Respondent.

David G. Sciarra, Esq., for petitioners

Joanne L. Butler, Esq., for respondent,

Record Closed: June 3, 1996 Decided: June 11, 1996

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE: **ELINOR R. REINER**, ALJ:

PROCEDURAL HISTORY

Petitioners, C.N., Sr. and M.N.,[1] filed a petition for declaratory judgment on behalf of their minor grandchild C.N. on May 22, 1995. Petitioners asserted that C.N. is domiciled in South Orange as defined in *N.J.S.A.* 18A:1-1 and as such is entitled to a free public education in the South Orange-Maplewood school district (respondent). Petitioners alleged that the board of education's decision was not in accordance with *N.J.S.A.* 18A:38-1. Further, petitioners asserted that the exclusion of their granddaughter, C.N., from Marshall Elementary School constitutes an unconstitutional application of *N.J.S.A.* 18A:38-1b.

By letter dated May 22, 1995, the Commissioner of Education determined to entertain the petition for declaratory judgment as a petition of appeal under *N.J.A.C.* 6:24-1 *et seq.* On June 2, 1995, respondents filed an answer requesting that the petition be dismissed. In addition, respondents filed a counterclaim, alleging that petitioners are responsible pursuant to *N.J.S.A.* 18A:38-1 for the tuition cost of the period of ineligible attendance of the pupil, C.N. On June 21, 1995, petitioners filed an answer to the counterclaim contending that it failed to state a claim upon which relief could be granted. On June 23, 1995, this matter was transmitted to the Office of Administrative Law pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on August 9, 1995, and a prehearing conference scheduled for October 25, 1995. On October 11, 1995, petitioners moved for summary decision as to all the issues raised herein, dismissing the counterclaim and ordering respondent to provide an education for C.N. At the prehearing conference held on October 25, 1995, the issues were isolated, and a hearing scheduled for June 3 and 7, 1996. Dates were also set for respondent's response to the motion and petitioners' reply thereto. It was also determined that a

[1] I have designated C.N.'s grandfather as C.N., Sr. and C.N.'s father as C.N., Jr. for purposes of this initial decision.

joint stipulation of facts would be filed with the undersigned on or before December 29, 1995.

On November 22, 1995, respondents filed a brief in opposition to petitioners' motion for summary decision, and petitioners filed a reply on December 12, 1995. An extension of time in which to file the joint stipulation of facts was granted until January 22, 1996, and the parties were advised that a determination on the motion would await that filing. On February 5, 1996, the parties filed a joint stipulation of facts, indicating however that there were additional facts which the parties could not stipulate to and which petitioners believed were necessary for a full factual record. As a result, and in order to determine the import of this on the motion for summary decision, a conference call was held with counsel; the parties were advised that oral argument on the motion would be held on March 19, 1996 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. Oral argument was held on that date, and it was determined that petitioners would amend their motion to allege that they are entitled to summary decision pursuant to *N.J.S.A.* 18A:38-1b.

Petitioners supplemented their motion for summary decision by letter brief and certification of M.N., dated April 17, 1996, and on May 9, 1996, respondent filed its brief in opposition to petitioners' supplemental motion and in support of its cross motion for summary decision, seeking a determination that C.N. is not entitled to a free public education in the district's school as petitioners had failed to satisfy *N.J.S.A.* 18A:38-1b. Respondent relied on the certification of Dr. Jacqueline L. Cusack, assistant superintendent.

FACTUAL BACKGROUND

The facts necessary to a determination on the issues here are essentially undisputed. The joint stipulations filed by petitioners are incorporated herein. Of import the facts may be summarized as follows:

C.N. is a seven year old female student who has been living with her grandparents (petitioners), since she was twenty months old. Her father currently resides in New Hampshire, and the whereabouts of her mother are unknown. Currently, C.N. is enrolled in the second grade at the Marshall School, which is part of the School District of South Orange and Maplewood (respondent). She has attended schools in the respondent's district since kindergarten.

In March of 1995, respondent challenged C.N.'s right to continue attending her local school because her father resided outside of the school district. At issue was whether the petitioner was entitled to receive a free public education as an individual who is "domiciled in the school district," pursuant to *N.J.S.A.* 18A:38-1a. Respondent eventually decided that C.N. was not eligible to attend school in the district without paying tuition.

Prior to the respondent's decision to remove C.N. from school, a hearing was conducted on March 14, 1995 in order to afford petitioners an opportunity to establish that the child was entitled to a free public education in respondent's schools. Affidavits were submitted in January, 1995 by petitioners which asserted that the child's father, C.N., Jr., works long hours, cannot supervise C.N., and cannot obtain adequate, affordable child care. (*See,* Affidavit of Petitioners, at Exh. A. of Respondent's Brief). In addition, following the March 14, 1995 hearing, a notarized statement was received from C.N.'s father indicating that the child cannot live with him because he does not have a bedroom for her, that he has very little income, that he is out of the home frequently due to work, and that he cannot adequately care for her.[2] (*See,* Affidavit of Child's Father dated April 3, 1995, at Exh. B of Respondent's Brief). Finally, C.N.'s father maintains contact with her and generally attempts to visit her at Christmas and during other family celebrations. Moreover, he apparently visits C.N. each year on her birthday and she visited with him for two weeks each summer in 1993 and 1994. (Petitioners' Answers to Interrogatories, at p. 6, attached to Petitioners' Initial Brief.)

[2] The father resides with a woman and their toddler son.

Petitioner M.N. filed a certification dated April 4, 1996 as an update on her son's circumstances since April 4, 1995. She certified as follows:

> "My son C., his companion J.G. and their son have moved to a smaller, one-bedroom apartment located at -W. Street, Concord, New Hampshire. My son resides with Ms. G. and their son on weekends only. During the work week, he now lives in a rented room located at -B. Street, #2, Lowell, Massachusetts. Upon information and belief, my son made this move for business and personal reasons. He rented the room in Lowell to eliminate the daily hour and a half car ride to Boston, where his work is located. Upon renting the room, he and Ms. G. could no longer afford the two-bedroom apartment they were renting, and had to find a smaller less expensive apartment."[3]

DISCUSSION

Summary Decision Standard

In considering petitioners' motion for summary decision, this tribunal must determine whether the pleadings, answers to interrogatories, admissions, and affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to an order as a matter of law. *N.J.A.C.* 1:1-12.5(b); *R.* 4:46-2. Additionally, "[i]t is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954). However, in order for the non-movant to prevail, a responding affidavit must be offered setting forth specific facts which indicate that there is a genuine issue that can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b). Therefore, if the non-moving party fails to respond, an absence of material factual dispute may be presumed and the movant will prevail if the law supports the movant's position. 37 *New Jersey Practice*, *Administrative Law and Practice* § 194, at 202 (Steven L. Lefelt) (1988).

[3] Initials have been utilized in the affidavit in place of identifying names.

Recently, our Supreme Court modified the analysis required when considering a motion for summary decision/judgment. In *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520 (1995), the Court adopted the summary judgment standard currently utilized by the federal courts. In particular, the Court stated the following:

> Under this new standard, a determination whether there exists a `genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The `judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' [*Anderson v.*] *Liberty Lobby* 477 *U.S.* [242, 249], 106 *S.Ct.* [2505, 2511], 91 *L.Ed.*2d [202, 212 (1986)]. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a `genuine' issue of material fact for purposes of *Rule* 4:46-2. *Liberty Lobby, supra,* 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed.*2d at 213. The import of our holding is that when the evidence `is so one-sided that one party must prevail as a matter of law,' *Liberty Lobby, supra,* 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed.*2d at 214, the trial court should not hesitate to grant summary judgment.
>
> [*Id.* at 540].

Thus, the non-movant essentially must raise a factual issue which is sufficient to lead a rational factfinder to rule in the non-movant's favor if a trial were held. Otherwise, summary judgment/decision is appropriate.

Analysis

Petitioners claim that C.N. is entitled to a free public education because she is domiciled in the respondent's school district. As such, petitioners assert that summary decision is appropriate by relying upon *N.J.S.A.* 18A:38-1a, which provides that public schools shall be free to those persons over five and under twenty years of age who are "domiciled within the school district."

Respondents counter by asserting that the instant controversy should not be determined pursuant to *N.J.S.A.* 18A:38-1a, *i.e.* "the domicile provision," but instead must be analyzed according to the affidavit pupils provision, *N.J.S.A.* 18A:38-1b. That statute provides in relevant part:

> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, . . . and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the Board and only to the extent that it directly pertains to the support or nonsupport of the child.
>
> . . .

Thus, respondents aver that the threshold criteria set forth in *N.J.S.A.* 18A:38-1b must be satisfied before C.N. is entitled to a free education in its schools.

In order for a pupil to be entitled to a free education in New Jersey, the student must be a local domicile of the particular school district where admission is sought. *See, V.R. on Behalf of A.R. v. Hamburg Bd. of Ed.,* 2 *N.J.A.R.,* 283, 287 (Educ. 1980), *aff'd,* State Bd., 1981 *S.L.D.* 1553, *rev'd on other grounds*, *Rabinowitz v. N.J. State Bd. of Ed.*, 550 *F.Supp.* 481 (D. N.J. 1982) (indicating that New Jersey requires a local domiciliary, as opposed to mere residence, to receive a free education). As such, at issue in this matter is whether C.N. is entitled to a free education under *N.J.S.A.* 18A:38-1 as a local domiciliary within respondents' school district. In other words, a

determination of the child's domicile is necessary in order to resolve the instant dispute. In addition, at issue is whether the criteria set forth in *N.J.S.A.* 18A:38-1b have been satisfied.

(a) *N.J.S.A.* 18A:38-1a.

N.J.S.A. 18A:38-1a provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled in the school district." Petitioners claim that C.N. is domiciled within respondents' school district thus requiring this tribunal's grant of summary decision.[4] Respondent counters by arguing that C.N.'s domicile tracks her father's, i.e., New Hampshire, thereby precluding the child from receiving a free education in the State of New Jersey. Instead, as respondent asserts, the child must comply with the "affidavit student" law, *i.e., N.J.S.A.* 18A:38-1b, in order to receive a free education within the district.

In the current matter, the question under *N.J.S.A.* 18A:38-1a involves the domicile of a minor child who does not live with either of her parents. As a result, a determination of the child's domicile is not entirely straightforward. Generally speaking, domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercandante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd,* 58 *N.J.* 112 (1971). A person may have multiple residences, but may have only one domicile at a time; as such, the

[4] As a preliminary matter, petitioners assert that they are entitled to summary decision as a matter of law because the respondent initially stated in its answers to interrogatories that the child was domiciled within the school district. (See, petitioners' Initial Brief, at p.3). However, respondent contends that its answer was nonresponsive to the question asked and therefore submitted amended answers to petitioners' interrogatories which aver that the child is domiciled in New Hampshire. (*See*, Amended Answers to Interrogatories, at Exh. C of Respondent's Brief.) Since this tribunal is to consider the pleadings, answers to interrogatories, admissions, and affidavits when deciding a motion for summary decision, summary disposition on the ground that the respondent initially indicated that the child is domiciled in New Jersey is not a sufficient basis for granting petitioners' motion.

residence may coincide with domicile, but does not alone determine domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955).

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." *Matter of Unanue* 255 *N.J. Super.* 362, 374 (1991) (citing *Kurilla v. Roth,* 132 *N.J.L.* 213, 215 (Sup. Ct. 1944)). *See also, Mercandante*, 111 *N.J. Super.* at 39. Thus, domicile is what is regarded as an individual's true and permanent home. *In re Jaffe,* 74 *N.J.* 86, 90-91 (1977). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. *Benny,* 20 *N.J.* at 251.

The question of domicile is one of fact and must be determined on a case by case basis. *Lea v. Lea*, 18 *N.J.* 1, 7 (1955). Thus, "the concept of 'domicile' may have different content and shades of meaning depending upon the context in which is used." *In re estate of Gillmore*, 101 *N.J. Super.* 77, 86-87 (App. Div.), *certif. den.*, 52 *N.J.* 175 (1968). Nonetheless, "[e]very person has a domicile at all times, and no person has more than one domicile at any one time." *Id.* at 87 (citation omitted). There are three possible ways by which an individual may acquire a domicile: (1) by birth or place of origin; (2) through the choice of a person legally capable of choosing his or her domicile; or (3) by operation of law in the case of a person who lacks capacity to acquire a new domicile by choice. *Ibid.*

Since the instant case involves a child who lacks the capacity to choose her own domicile, this tribunal must look to the operation of law. Traditionally speaking, the domicile of a child for school purposes under Title 18A is that of the natural father. *Bd. of Ed. Little Egg Harbor v. Bds. of Ed., etc.*, 145 *N.J. Super.* 1, 12 (App. Div. 1975) (Morgan, J.A.D., dissenting), *rev'd per curium*, based on dissent below, 71 *N.J.* 537 (1976) (citing *Mansfield Tp. Bd. of Ed. v. State Bd. of Ed.,* 101 *N.J.L.* 474 (Sup. Ct. 1925)); *V.R. on Behalf of A.R. v. Hamburg Bd. of Ed.*, 2 *N.J.A.R.* 283, 286 (Educ. 1980), *aff'd, State Bd.,* 1981 *S.L.D.* 1553, *rev'd sub nom on other grounds*, *Rabinowitz*

v. N.J. State Bd. of Ed., 550 *F.Supp.* 481 (D.N.J. 1982). The policy underlying the "traditional domicile concept" was discussed by Administrative Law Judge Lefelt in *V.R., supra*. In that case, petitioner *V.R.* was a New York resident who alleged that the board of education of Hamburg improperly denied his nine year old handicapped daughter, A.R., admission as a student in the respondent's school district. Prior to the litigation, which occurred in 1980, A.R. had neither attended nor been enrolled in any educational program. A.R. had lived in the respondent's school district since 1975 with an unrelated resident who was paid by the child's father for looking after A.R.

In concluding that the child's domicile was that of her father's, namely New York, thereby precluding the child from receiving a free education under *N.J.S.A.* 18A:38-1a, Judge Lefelt discussed the traditional domicile rule:

> The law establishing an infant's domicile seems based on the rationale that an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location. Changing times should, therefore, affect the domicile law only when the factual situation presented undercuts this rationale.
> [*Id.* at 286].

Thus, Judge Lefelt acknowledged that the traditional rule was not absolute. Nevertheless, he chose not to depart from the principle due to the special facts presented in the case:

> The fact that a third person provides the day-to-day care and control of A.R. at the request of A.R.'s parents seems insufficient to overturn normal domicile principles. Thus, in the absence of a legal termination of parental responsibility, a finding that A.R.'s domicile is in New York would not be mechanical, but rather would be a reasonable application of the general rule. Wherever A.R. is placed by her parents, until emancipation, her domicile must remain in New York, as long as her parents live there. Control, in a legal sense, over A.R.'s life clearly rests with her parents. *Mansfield Twp. and C. v. State Bd. of Education*, 101 *N.J.L.* 474, 480 (Sup. Ct. 1925).
>
> [*Id.* at 287].

The current dispute is readily distinguishable from the facts presented in *V.R.*, thereby warranting a departure from the traditional domicile rule that an unemancipated infant cannot acquire a new domicile other than its father's, which is obtained at birth. In *V.R.*, it was clear that the parents were still exercising control over the child's life. Here, there is no such evidence. Not only has C.N. been living with the petitioners since she was twenty months of age, but the record is also devoid of any evidence which indicates that her father provides any support or maintenance whatsoever. In short, the child has been separated from her natural parents for over six years. The only contention that the respondent makes in an attempt to refute the conclusion that the child has been detached to such an extent so as to require an application of the traditional domicile rule is that the father visits the child periodically. Under the circumstances presented here, however, such visits are hardly sufficient to raise a genuine issue of material fact regarding the child's domicile for the purposes of the public school law.[5]

Judge Lefelt chose to follow the traditional rule because the facts in *V.R.* clearly indicated that the child received support and maintenance from the father, even though he was physically located in New York. In the instant matter, however, the record is clear that the child's support and maintenance are entirely derived from her grandparents, who themselves are domiciled within respondent's school district. Indeed, although parental responsibility has not been terminated legally, the child in this case is separated from her father to such an extent that this tribunal may conclude that her domicile rests in New Jersey.

"The concept of domicile is not constant. It is designed to assure fairness to the individual or the State or both in a given setting. Its ingredients therefore will vary, depending upon what is just and useful in a given context." *Worden, et al. v. Mercer*

[5] The fact that the child periodically visits, and is visited by, her father in New Hampshire, if anything, may tend to support the notion that her "true and permanent establishment" is in New Jersey as she continues to return to live in her grandparents' home.

County Board of Elections, 61 *N.J.* 325, 349 (1972) (Weintraub, C.J., concurring). Fairness to the individual in this case requires a departure from the original rule which states that a child's domicile tracks the father's. The concept of the traditional rule is grounded upon the rationale that an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location. Such a blanket presumption, however, is no longer applicable in today's society.[6] Under the facts of this case, it is apparent that C.N. has been in the *de facto* care and custody of her grandparents for virtually her entire life, and, as such, she should be considered as domiciled in New Jersey for the purpose of receiving a free public education. *See generally, Donlon v. Miller*, 355 *N.E.*2d 195 (Ill. App. 3d 1976)(child deemed to have acquired domicile of non-parent petitioner who had "*de facto* custody" since the child was in the *de facto* care of the petitioner for approximately the first six years of the child's life).

In this matter, a finding that C.N.'s domicile is in New Hampshire would be an unreasonable application of the traditional presumption, since such an approach would endorse a mechanical rather than a substantive application. The interrogatories and affidavits submitted by both parties support a finding that the child's domicile is in New Jersey. First, petitioners have indicated that they have acted as the child's parent since she was twenty months old. Second, as petitioners submit via interrogatories, they are responsible for all of C.N.'s expenses and needs. Third, information submitted by respondent fails to refute the petitioners' contentions; in fact, sworn affidavits from the petitioners and the child's father, which were submitted by the respondent, support the proposition that for all intents and purposes, petitioners are and have been functioning in a parental capacity.

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[6] Indeed, our Supreme Court has recognized that changing times have necessitated the abrogation of so-called "traditional" presumptions in other related areas of the law. *E.g., Gubernat v. Deremer*, 140 *N.J.* 120, 139 (1995) (noting that sex based presumptions in the area of family law which had survived as a matter of custom for decades, have been replaced by an inquiry focused on the happiness and welfare of the child).

The purpose underlying the law which requires domicile, as opposed to residence, for free education is to prevent pupils from living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. *See, Sponsor's Statement,* Senate Education Committee Statement and Governor's Conditional Veto Message to Senate Bill No. 1447 of 1993, enacted as C. 380. Respondent claims, however, that a finding of New Jersey domicile in this matter would have grave consequences on local school boards.

> . . . This [tribunal's] finding of domicile with the grandparents, however, would create a dangerous precedent which must be overcome by each and every school district in this State. It is well established that, in recent months, many New Jersey school districts have taken action to combat the ever increasing attendance at district schools of children who are not eligible for same pursuant to law. This necessarily includes circumstances in which children are placed with relatives for extended periods of time. Sanctioning such placement, by bestowing upon such individuals the benefits of domicile, will send a powerful message to parents that they can and should leave their children in the care of relatives and reap the benefits of an education in the relatives' district of residence. This, unfortunately, places an excruciating burden on school district taxpayers, striving year after year to provide qualify education in the face of fiscal limitations. . .
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> [Respondent's Brief, at 9].

Although the concerns raised by the respondents are valid, they are nonetheless inapplicable in the instant matter. This is not a case which involves parents placing a child with relatives for an extended period of time in order to reap the educational benefits provided by a particular school district. The child in this case is separated from her father and natural mother by a long distance, and to merely conclude that such a separation has manifested for the sole purpose of bestowing upon the child a free education from the respondent school district simply is not believable, as the child began living with the petitioners long before attaining the requisite age for attending school.

The papers presented make clear that the petitioners, who are residents of the school district, are the sole caretakers and supporters of the child. Furthermore, the respondent board has failed to show otherwise, or even present information which raises a genuine issue of material fact with respect to that issue. To prevent C.N. from receiving a free education in the respondent school district simply because her biological father lives in New Hampshire would harm a party the Legislature never intended to penalize by unreasonably placing form over substance and effectively subverting the substantial State interest in ensuring the education of all its children. *Sabella v. Lacey Tp.*, 204 *N.J. Super.* 55, 60 (App. Div. 1985); *Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co.,* 52 *N.J.* 73, 77 (1968). Certainly, a finding that the child's domicile is that of her grandparents is in line with this paramount state interest, and in no way does it create a precedent which encourages parents to leave their children in the care of relatives in order to obtain the benefits of an education in the relatives' district of residence. C.N. is not residing with her grandparents in order to receive a free education in New Jersey. Instead, the petitioners are attempting to provide a positive family setting to a child who has already confronted difficult obstacles in her young life.[7]

Once again, the question of domicile is one of fact and must be determined on a case by case basis. *Lea v. Lea*, 18 *N.J.* 1, 7 (1955). The concept of domicile is not rigid, but instead it is designed to assure fairness to the individual or the State or both in any setting. *Worden,* 61 *N.J.* at 349. As such, a finding of New Jersey domicile here is limited to the facts presented and in no way establishes precedent which will place an unreasonable burden on local school districts. Cases involving domicile must still be scrutinized carefully according to the spirit and letter of the public school law.

[7] In fact, the petitioners' sworn affidavit reveals that they have provided the child with nursery school and other prekindergarten training, as well as affording the child opportunities to engage in swimming and tennis classes, ballet lessons and religious education. (See, Affidavit of Petitioners, question D5, at Exh. A. of Respondent's Brief).

(b) *N.J.S.A.* 18A:38-1b.

Respondent asserts that the instant controversy cannot be determined pursuant to the domicile provision listed in *N.J.S.A.* 18A:38-1a, but instead must be decided pursuant to the "affidavit student" law set forth at *N.J.S.A.* 18A:38-1b. That provision authorizes boards of education to challenge the validity of affidavits submitted by parents and relatives or friends to determine if the pupil is entitled to a free education in the particular school district. The statute was amended in 1977 to prevent the problem described as follows:

> Parents sometimes attempt to send their children to schools in districts other than their own without actually changing their residences. It is a very simple matter for a parent to request a relative or friend who resides within the district to provide the child with an official address within the district for purposes of school attendance. Further, if the friend or relative agrees to sign an affidavit, the school district must accept the child as a student within the system.
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> [*Statement to Senate Bill* No. 1464-L.1977 c.373.]

Nonetheless, the current dispute does not present the type of situation the Legislature intended to prevent by enacting the "affidavit student" law. However, an analysis of the facts presented pursuant to the relevant statute is helpful in resolving the instant dispute.

Essentially, the proofs required to satisfy the "affidavit student" law must demonstrate that (1) petitioners are domiciled within respondent's school district, (2) petitioners are supporting C.N. gratis, (3) C.N.'s father is not capable of supporting or providing care for her due to family or economic hardship, and (4) C.N. is not residing with her grandparents solely for the purpose of receiving a free public education in respondent's school district. The burden of proof is on the petitioners to demonstrate each and every element. *N.J.S.A.* 18A:38-1b.

The first requirement is not at issue in this dispute, as the record is clear that petitioners reside within respondent's school district. Therefore, an analysis of the remaining proofs is necessary. When interpreting a statute, this tribunal looks to the fundamental purpose for which the legislation was enacted, and where a literal reading of the law will not accord with that underlying purpose, the spirit of the law will control over its letter. *N.J. Builders, Owners & Managers Association v. Blair*, 60 *N.J.* 330, 333 (1972). Furthermore, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy. *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969); *San-Lan Builders, Inc. v. Baxendale*, 28 *N.J.* 148, 155 (1958).

The requirements set forth at *N.J.S.A.* 18A:38-1b are not inflexible concrete standards. Instead, the proofs required by that statute are simply a means permitted by *N.J.S.A.* 18A:38-1 to aid local boards of education in accomplishing the statute's goal of preventing pupils from reaping the educational benefits from schools in districts other than their own without actually changing their residences. *Gunderson v. City of Brigantine Board of Education*, 95 *N.J.A.R.*2d (EDU) 39, 42, *aff'd* State Bd. of Ed., 95 *N.J.A.R.* 2d (EDU) 132. As a result, this tribunal is empowered to "look to other indicia to see that the statutory purpose is being effectuated and accept such indicia in lieu of [information] required by the Board." *Ibid.*

In *Gunderson,* the Commissioner of Education upheld an ALJ's decision which allowed a student to enter a school district, even though the pupil could not completely comply with the "affidavit student" law because his out-of-state mentally incompetent father refused to sign the required affidavit indicating that custody of the child had been relinquished. In so holding, the Commissioner indicated:

> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the non-parent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, do [sic] to particular

> circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its children. *Sabella v. Lacey Tp.*, 204 *N.J. Super.* 55, 60 (App. Div. 1985); *Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co.*, 52 *N.J.* 73, 77 (1968).
>
> [*Gunderson*, 95 *N.J.A.R.*2d at 42].

Here, the record not only makes clear that petitioners are for "all intents and purposes the sole caretakers and supporters of the child," but also provides evidence that the underlying requirements of the "affidavit student" law are being met. First, the record shows that petitioners are domiciled within respondent's school district. Second, the petitioners and the child's father have submitted answers to interrogatories, along with sworn affidavits, which demonstrate that the petitioners are supporting C.N. gratis.[8] Third, the record contains an affidavit from C.N.' s father indicating that he is unable to care for the child due to financial and personal hardships. (*See*, Exh. B of Respondent's Brief). Although such a bare assertion is not by itself dispositive of the statutory requirement regarding family or economic hardship, the fact that the father's adjusted gross income for 1994 was only $7,496.00[9] is sufficient to corroborate the sworn affidavit claiming financial hardship on behalf of the child's father. Additionally, the natural father has not declared the pupil as a dependent for federal income tax purposes, and has indicated that he will not declare the child as a dependent during the time she resides with her grandparents. (*See,* Affidavit of Child's Father, question G., at Exh. A. of Respondent's Brief).

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[8] For instance, the petitioners state that they are, and have been, responsible for the child's maintenance, emotional support, and well-being since she was twenty months old. (*See*, Affidavit of Petitioners, question D5, at Exh. A. of Respondent's Brief). In addition, there are affidavits present from the child's father which indicate that he does not provide maintenance for the child. (See, Affidavit of child's Father, question D-2, at Exh. A. of Respondent's Brief; *see also*, Affidavit of Child's Father dated April 3, 1995, at Exh. B of Respondent's Brief).

[9] *See,* Father's Federal Income Tax Return (1994), at Exh. D. of Respondent's Brief.

In addition, and of import, (this is from petitioners' brief) the affidavits establish that at the time respondent decided to deny admission to C.N., C.N., Jr. was living with his girlfriend and their toddler son in a two-bedroom apartment. His income was extremely limited, and while his name was on a waiting list for a larger, federally subsidized apartment, he anticipated that it would be years before he would be given such an apartment. Given his limited income, small living quarters, long work hours and inability to obtain adequate child care, C.N., Jr. attested to respondent that he was incapable of supporting or providing care for C.N. due to family and economic hardship. As is set forth in the certification of M.N. (Exh. A), C.N., Jr.'s situation has changed somewhat since he last submitted an affidavit to respondent in that he now lives in a rented room during the work week in order to be close to his work, and he and his partner and son have moved to a one-bedroom apartment.

Other than to assert that it "lacks the ability to specifically confirm the veracity of [statements made by petitioners] or to predict what will happen in the future," respondent does not dispute the underlying facts offered by petitioners and C.N., Jr. Rather, respondent argues that C.N., Jr. cannot establish that he is incapable of supporting or providing care for his daughter because he lives with a woman on weekends only, who is apparently caring for their toddler son. Implicit in respondent's argument is the assumption that C.N., Jr.'s girlfriend is willing and able to act as a parent to C.N., C.N., Jr.'s seven-year-old daughter from another relationship, on weekends. Respondent offers no facts to support this assumption. Because it is well settled that a party resisting summary judgment must respond with specific facts demonstrating a genuine factual dispute for trial and can not merely rely on conclusionary allegations and speculations. *see, e.g., Robbins v. J.C.*, 23 *N.J.* 229, 241 (1957); *James Talcott, Inc. v. Schulman*, 82 *N.J. Super.*, 438 (App. Div. 1964), this tribunal must conclude that there are no genuine issues or material fact, and must consider the issue of C.N.'s entitlement to admission to school under *N.J.S.A.* 18A:38-1b ripe for disposition on legal grounds. Fourth, there is not one scintilla of evidence present in the record which may plausibly lead this tribunal to conclude that C.N. was brought into New Jersey to obtain a free education. Indeed, the record is devoid of any proof whatsoever which intimates in any form that possible special or attractive features

of the schools in respondent's district have caused this child to be separated from her natural father for virtually her entire life.

The purpose of the "affidavit student" law is to prevent individuals from abusing the entitlement of free public education by attending schools in districts where the pupils do not belong. As to the Commissioner in *Gunderson* observed, the intent of the law is not to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme. In this case, it is evident that the child's home is, and has been, that of her grandparents. The child has continually lived with her grandparents since the age of twenty months, and the petitioners indicated that they "have in the past and will continue in the future to provide a decent home and environment for [their] granddaughter."[10] (See, affidavit of petitioners, question D5 at Exh. A of Respondent's Brief.) In addition, the petitioners "have made it a priority to provide [their] granddaughter with a normal enriching life, since her parents are not capable of doing it themselves." *Ibid.*

C.N. is not residing with her grandparents in order to receive a free education in New Jersey. Instead, the petitioners are attempting to provide a positive family setting to a child who has already confronted difficult obstacles in her young life, and I have already cited the sworn affidavit as to what they have been providing for C.N. To deny this child a free education in the respondent's school district would harm a party the Legislature never meant to penalize by unreasonably placing form over substance and evading our substantial State interest in ensuring the education of this child.

[10] Respondent asserts that summary decision is not appropriate because it "lacks the ability to specifically confirm the veracity of these statements or to predict what will happen in the future." (See, Respondent's Brief at 9.) Such a contention, however, is not a valid basis for denying summary disposition of this matter, as respondents have failed to come forward with any information that rebuts or at least raises a genuine issue of material fact in regard to the contentions put forth by the petitioners.

CONCLUSION

This matter is ripe for summary decision, as the record presents sufficient indicia to conclude that the statutory purpose of *N.J.S.A.* 18A:38-1a. and b. are being effectuated. As a result, I **CONCLUDE** that C.N. is entitled to a free public education in the school district of South Orange and Maplewood.

ORDER

It is hereby **ORDERED** that petitioners' motion for summary decision is granted and C.N. is entitled to a free public education in the South Orange and Maplewood school district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended oral decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

I, Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision as edited by the ALJ for form but not substance, rendered in the above matter on June 3, 1996.

DATED June 11, 1996

Anna M. Leggett
ANNA M. LEGGETT, SECRETARY

DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

6/13/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 13 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 6588-95

C.N., SR. AND M.N., on behalf of their minor grandchild, C.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

The Board initially objects to the ALJ's conclusion that "***[t]he facts necessary to a determination on the issues here are essentially undisputed.***" (Board's Exceptions at p. 1, citing Initial Decision at p. 3) Rather, the Board underscores that not all relevant facts have been stipulated; in particular, the Board asserts that it did not stipulate to the contents or the veracity of the April 4, 1996 certification filed by Petitioner M.N. (Board's Exceptions at p. 2) The Board continues,

> ***Regarding the remaining facts to which the Board could not stipulate, the Board merely acknowledged a willingness to assume the veracity of certain facts for the purpose of the analysis under the affidavit pupils statute, *N.J.S.A.* 18A:38-1b.

> Throughout her Initial Decision, Judge Reiner has repeatedly asserted that the Board of Education did not meet its burden in presenting to the Court any genuine issues of material fact which preclude summary decision in favor of Petitioners. The Board respectfully submits that said conclusion is erroneous. The Board further submits that, in her analysis, Judge Reiner has ignored the Board's willingness to accept all facts as true for the purposes of the affidavit pupils analysis, in order to establish that summary decision is appropriate in favor of the Respondent Board ***."
>
> (*Id.*)

While the Board asserts that the ALJ incorrectly concluded that C.N.'s domicile lies with her grandparents (*id.* at p. 3), it further contends that the within matter is not one of domicile, but should be analyzed pursuant to *N.J.S.A.* 18A:38-1b, the "affidavit student" provision. (*Id.* at p. 4) Here, the Board again indicates its willingness to "***assume the veracity of the facts as alleged by Petitioners, for the purposes of the summary decision motion.***" (*Id.*) Nevertheless, the Board maintains that these facts are insufficient to establish C.N.'s entitlement to a free public education in its school system as an affidavit pupil. The Board argues,

> ***In her decision, Judge Reiner ignored the very real existence of choices made by Mr. [N.] which Petitioners assert have created a sufficient family or economic hardship which establishes compliance with the affidavit pupils requirements. Mr. [N.] has a legal and moral obligation to care [for] and support his child. At no time has the Board attempted to transfer this obligation to Mr. [N's] partner. Mr. [N.], as all parents, must make decisions which necessarily impact upon his children. Those choices, including remaining in New Hampshire with his partner and their child, raising that child, maintaining a primary residence more than 1 and 1/2 hours from his workplace, and paying for a secondary residence to avoid weekday commuting, cannot be deemed sufficient to require taxpayer responsibility for his child's education in another State.***
>
> (*Id.* at pp. 5, 6)

Accordingly, the Board reasons that summary decision must be issued in its favor. (*Id.* at p. 4)

Upon careful and independent review, the Commissioner determines to affirm, in part, the initial decision of the ALJ. Initially, the Commissioner agrees with the Board that the within matter is controlled by *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision. The statute requires that the student be kept in the home of another person who is domiciled within the district, and that the child be supported gratis by such domiciliary, as if the child were his/her own. If so required by the board, the resident must provide a sworn statement that he/she is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements, and that he/she intends to keep and support the child gratuitously for a longer time than merely through the school term. *N.J.S.A* 18A:38-1b(1). Additionally, the child's parent or guardian must provide a sworn statement that he/she is not capable of supporting or providing care for the child due to family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education in the district. This sworn statement shall be accompanied by confirming documentation, to the extent such documentation pertains to the support or nonsupport of the child. *N.J.S.A.* 18A:38-1b(1)[1]. As the Board properly indicates, it is petitioners' burden to establish that they meet the requirements set forth in the statute.

Inasmuch as the initial decision does not set forth the stipulated facts, and the Board has raised an objection as to the appropriateness of issuing a summary decision in favor of petitioners in this matter, the Commissioner herein restates the facts which have been jointly stipulated:

> 1. [C.N., Sr. and M.N.] reside at *** South Orange, Essex County, New Jersey. The [N's] own the home in which they live and have resided there for the past fifteen years.

[1] The statutory requirements as to residents who lease property are omitted as they are inapplicable here.

2. The [N's] granddaughter, C.N., is eight years old.

3. Since 1989, [C.N.] stays in close contact with his daughter by telephones and he visits her on her birthday, holidays and other family occasions.

4. On September 12, 1993, the [N's] including [C.N.], completed an affidavit for admission to the South Orange/Maplewood School District (School District). The [N's] were permitted to register C.N. at the Marshall Elementary School to attend kindergarten. *** C.N. attended kindergarten at the Marshall School during the 1993-94 school year.

5. In May 1994, the [N's], including [C.N.], filled out and filed another affidavit for admission so that C.N. could attend first grade at the Marshall School. This affidavit was accepted by the School District and on or about September 1, 1994, C.N. began attending first grade at the Marshall School.

6. In December 1994, while C.N. was attending the Marshall School in the first grade, the School District requested that the [N's] complete another application for admission of C.N. The [N's] completed their affidavit, attesting to their residency and responsibility for C.N., and submitted it to the School District on or about December 7, 1994.

7. An affidavit from [father, C.N.], dated February 9, 1995, was submitted to the School District on or about February 12, 1995 on C.N.'s behalf.

8. On or about March 10, 1995, the [N's] received a letter dated March 9, 1995 from Jacqueline L. Cusack, Assistant Superintendent, informing the [N's] that the Superintendent of the School District would seek removal of C.N. from the Marshall School under N.J.S.A. 18A:38-1 and that a hearing on removal of C.N. would take place before the Board of Education of the School District on March 15, 1995.

9. A hearing before the School Board was held on March 15, 1995. At this hearing the board requested additional documentation from the [N's].

10. On or about April 7, 1995, [C.N.], who at the time resided at *** Concord, New Hampshire, submitted to the School District, through his parents, an affidavit, a power of attorney, a statement

> regarding support and a copy of his 1993 Income Tax return. In addition, Mr. [N.] included an eligibility letter from the New Hampshire Housing Authority.
>
> 11. At the request of the School District, the [N's] also provided written permission from the School District to obtain their tax records from the Internal Revenue Service.
>
> 12. In a letter dated May 2, 1995, the Superintendent of the School District Ralph Lieber informed the [N's] that the School District had determined to exclude C.N. from receiving a free public education in the School District. (Joint Stipulation of Facts, February 2, 1996)

Recognizing the Board's willingness "***to accept all facts as true for the purposes of the affidavit pupils analysis ***" (Board's Exceptions at p. 2), the Commissioner finds the following: (1) C.N. has been living with her grandparents, C.N., Sr. and M.N. since she was 20 months old. (Affidavit of Petitioners, question D1, Exhibit A, Respondent's Brief) (2) C.N.'s mother has had no responsibility for C.N. and has provided no care for C.N. since she was 18 months old, and C.N.'s father is unable to care for his daughter. Regarding his son, C.N., Sr., states, "He delt [sic] with late hours weekend work and constant trave[l] thru [sic] out New England. He could not afford to pay for child care on his income even if he were able to locate safe, capable care at odd hours, which he was not." (*Id.*, question D5) (3) Petitioners have financially supported C.N. and have guided her participation in athletic activities, ballet lessons and religious education. They have volunteered for PTA-sponsored events, attended educational meetings and school conferences. (*Id.*) (4) C.N. is not residing with her grandparents for the purpose of obtaining a free education in the District. (*Id.* at question D6) (5) Petitioners have declared, and will declare, C.N. as a dependent for income tax purposes. (*Id.* at question H) (6) C.N.'s father attests that C.N. cannot live with him due to financial and personal hardships.

Neither his living arrangements, nor his work schedule currently permit him to provide for C.N. (Affidavit of C.N., Exhibit B, Respondent's Brief) (7) C.N.'s father substantiates an adjusted gross income of $7,496 for 1994. (Exhibit D, Respondent's Brief)

Based on the facts as jointly stipulated, together with the factual findings as stated, *supra,* the Commissioner finds that summary judgment in favor of petitioners is appropriate, in that petitioners have met the statutory requirements set forth under *N.J.S.A.* 18A:38-1b(1), notwithstanding the Board's objections as to the "choices" C.N.'s father has made in this matter. As the ALJ aptly noted, "***there is not one scintilla of evidence present in the record which may plausibly lead this tribunal to conclude that C.N. was brought into New Jersey to obtain a free education.***" (Initial Decision at p. 18)

Accordingly, the initial decision of the ALJ is affirmed to the extent necessary to find petitioners have met their burden under *N.J.S.A.* 18A:38-1b(1).[2] The Board is hereby ordered to admit C.N. into its public school system, free of charge, so long as there is no change in petitioners' circumstances that would alter C.N.'s entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] The Commissioner herein notes that he rejects as inapplicable that portion of the initial decision which analyzes the facts of this matter under the domicile provision of *N.J.S.A.* 18A:38-1a.

JULY 29, 1996
DATE OF MAILING JULY 30, 1996

335-96

MYRON PLOTKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning principal claimed tenure status and contended that Board's actions not renewing his employment were arbitrary, capricious and *ultra vires*.

ALJ concluded petitioner did not acquire a tenure status as principal in that petitioner did not serve the full two-year probationary period under *N.J.S.A.* 18A:28-6 to acquire tenure as a principal. Nor did the Board grant him early tenure. Moreover, the Board's action to remove petitioner from the principal's position was not arbitrary, capricious or in violation of his constitutionally protected rights. The Board evaluated petitioner's performance and determined not to grant him tenure on reasonable grounds. (*Donaldson*) Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

AUGUST 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6075-94

AGENCY DKT. NO. 166-5/94

MYRON PLOTKIN,

Petitioner,

v.

BOARD OF EDUCATION
OF THE CITY OF BRIGANTINE,
ATLANTIC COUNTY.

Respondent.

Steven R. Cohen, Esq., for petitioner (Selikoff & Cohen, attorneys)

Richard M. Salsberg, Esq., for respondent (Stanton, Hughes, Diana & Zucker, attorneys)

Record Closed: May 26, 1995 Decided: April 29, 1996

BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Myron Plotkin, claims a tenure status as principal in the employ of the Brigantine City Board of Education (Board). Petitioner contends that the Board's actions were arbitrary, capricious and ultra vires when it failed to renew his contract.

This matter was transmitted to the Office of Administrative law (OAL) for determination as a contested case pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15, and the act creating the OAL, N.J.S.A. 52:14F-1 to -13. The hearing was held on October 16 and 17, 1995, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties requested, and were granted leave, to submit post hearing briefs and memoranda. The last submission was received by the undersigned on March 27, 1996, which closed the hearing record.

STIPULATION OF FACTS

The parties stipulate to the following facts:

1. Petitioner has been continuously employed by respondent in various professional capacities since September 1, 1972. [Source: Petitioner of Appeal ¶1 and Respondent's Answer]

2. Respondent is the body corporate and politic of the State of New Jersey charged with the supervision and administration of the City of Brigantine Public School District. {Source: Petitioner of Appeal ¶2 and Respondent's Answer]

3. Petitioner has held and continues to hold appropriate and valid certifications issued by the New Jersey Department of Education, State Board of Examiners as follows:

Teacher of Music, K-12; Principal/Supervisor; and School Administrator. [Source: Petitioner of Appeal ¶3 and Respondent's Answer]

4. Respondent employed petitioner as a teacher of music from September 1, 1972 until June 30, 1988. As such, petitioner acquired tenure as a teaching staff member pursuant to N.J.S.A. 18A:28-5. [Source: Petitioner of Appeal ¶4 and Respondent's Answer]

5. Respondent employed petitioner as coordinator of school operations from July 1, 1988 through June 30, 1989.

6. Respondent employed petitioner as an assistant principal from July 1, 1989 through June 30, 1982. As such, petitioner acquired tenure as an assistant principal pursuant to N.J.S.A. 18A28-6. [Source: Petition of Appeal ¶5 and Respondent's Answer and Respondent's Supplemental Responses to Petitioner's Interrogatories 1-3]

7. At its special meeting of May 26, 1992, respondent, by recorded roll call vote, unanimously appointed petitioner as Principal of Brigantine North Middle School effective July 1, 1992. [Source: Petition of Appeal ¶6 and Respondent's Answer]

8. At no time has respondent issued a written employment contract to petitioner in his capacity as Principal of Brigantine North Middle School. [Source: First sentence of Petition of Appeal ¶7 and Respondent's Answer]

9. Respondent never passed a resolution formally reserving the right to revoke petitioner's appointment as Principal of Brigantine North Middle School, but contends it need not have done so. [Source: Petitioner of Appeal ¶11 and Respondent's Answer as to factual allegation]

10. By letter dated March 2, 1994, respondent advised petitioner that at its March 1, 1994 meeting, it had voted "not to renew [his] employment contract as Principal of the North Middle School for the 1994-95 school year." [Source 4: Petitioner of Appeal ¶9 and Respondent's Answer]

11. By letter dated March 17, 1994, respondent, through Board Secretary/Business Administrator Charles D. Brewin, Jr., advised petitioner of the reasons for its action of March 1, 1994. [Source: Petition of Appeal ¶14 and Respondent's Answer]

12. Respondent was served with petitioner's Petition of Appeal on May 23, 1994. [Source: Amended Petition of Appeal ¶18 and Respondent's Answer to Amended Petition]

13. On May 26, 1994, respondent passed a resolution pertaining to petitioner's employment status, which states in pertinent part:

> NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City of Brigantine that Myron Plotkin's employment contract with the Board, if any, and his appointment as Principal of the Brigantine North Middle School be and hereby are terminated effective at 12:01 a.m. on June 26, 1994.

14. Respondent had a written policy number 4138 concerning non-school employment during school hours, a copy of which it produced as document 0280, a written policy number 3514 concerning personal use of school equipment, a copy of which it produced as document 000343, and a written policy number 6145 concerning extracurricular activities, a copy of which petitioner produced as document 000025, which was amended effective January 9, 1994 to modify the definition of good academic standing. [Source: Petitioner's Production Requests 10 and 15 and Respondent's Supplemental Response thereto]

15. Respondent did not have any unwritten policy or guideline which defines the condition under which a District employee may or may not engage in outside employment. [Source: Petitioner's Interrogatory 4 and Respondent's supplemental Response thereto]

16. Respondent did not have any unwritten policy or guideline which defines the conditions under which a District employee may or may not receive personal calls at work. [Source: Petitioner's Interrogatory 13 and Respondent's Supplemental Response thereto]

17. Respondent is unaware of any District employee who at any time since February 1990 requested permission to use district property or facilities in connection with their outside employment. [Source: Petitioner's Interrogatory 6 and Respondent's Supplemental Response thereto]

18. Respondent is unaware of any District employee who at any time since February 1990 was reprimanded or disciplined for receiving personal calls at work. [Source: Petitioner's Interrogatory 14 and Respondent's Supplemental Response thereto]

19. Petitioner's last day of employment as principal of the North Middle School was June 26, 1994.

20. Petitioner acted as a consultant to the New Jersey Education Association, and included on his business letterhead his in school telephone number in the past.

21. On May 16, 1994, petitioner was afforded an informal appearance before the Board, at which time the Board resolved not to reconsider its decision of March 1, 1994 regarding petitioner's employment as principal of the North Middle School.

SUMMARY OF THE TESTIMONY

Nancy Rhodes, David Cunningham and William Schoppy, retired or present teaching staff members in the Board's employ, testified on behalf of petitioner. Each of the witnesses testified that there was always a regular, non-pay telephone available for teaching staff members located in the school's copy room and teachers room. The telephones were available to receive calls from outside of the school and also for teachers to make calls to the outside. Many teachers were engaged in businesses outside of school houses and during the summer months. The telephones were used by the teaching staff members for the conduct of their respective outside businesses. None of the three witnesses were aware of any teacher or other employee being disciplined for using the telephones for outside calls or for the conduct of their outside businesses.

Ms. Rhodes testified she was a teaching staff member under petitioner's supervision when petitioner served as assistant principal and principal. She had served under six or seven administrators, other that petitioner. She opined that petitioner was an outstanding administrator.

Ms. Rhodes served as a member of the Board of Education of the City of Absecon for one and one-half years. She also served as president of the local teacher's union when employed by the Brigantine Board. She also served on the teacher's union negotiating team and was instrumental in negotiating the first contract between the union and the Board in 1968, under P.L. 303. She asserted that petitioner facilitated the union in its negotiations with the Board.

Ms. Rhodes admitted that as president of the teacher's union, she was provided with a copy of the Board's policy manual. She further admitted that the union reviewed every single item in the Board's policy manual with the Board and reached agreement on every issue in the policy manual. Ms. Rhodes recalls reviewing Policy No. 6145, dealing with pupil extracurricular activities. She asserted there was a great deal of discussion

concerning Policy No. 6145, because certain people wanted the pupils to participate in extracurricular activities and objected to the grading standards which had to be met under the policy.

David Cunningham testified, among other things, that Board employees would receive telephone messages in their mailboxes, with a request to return the call. These calls were for Board employees who had outside businesses as well as other personal calls.

Mr. Cunningham, who served as President of the Brigantine Education Association (BEA) would receive incoming telephone calls at school from the New Jersey Education Association (NJEA). He asserted that the school secretary would receive the telephone calls at North School and leave a message for Cunningham. He also testified that he used the School's telephone number on his NJEA business card as the daytime number where he could be reached. He admitted he did not seek permission from anyone in the Board's employ to use the school telephone number on his business card.

William Schoppy was employed by the Board for 27 years as a health & physical education teacher and also served as basketball coach. He retired in June 1994. During the 27 years Mr. Schoppy was employed by the Board, he also owned and maintained a twelve month business outside of school known as the William Schoppy Trophy Company. During the school day, he would contact the business more that once per day. He also observed other teaching staff members use the telephones for personal business and to make personal calls. One teacher used the telephones to call his stockbroker on a regular basis.

As a basketball coach, Mr. Schoppy understood that a Board policy was adopted in or about 1983 or 1984, dealing with pupil eligibility for extracurricular activities. It was his understanding that the policy was adopted by the Board without any input from the teachers or school principals. He recalled approaching Mrs. Raye, the principal at the time because Schoppy was involved in intramural basketball to inquire about the policy. He

recalled that Mrs. Raye observed that it was near the end of the intramural basketball season, therefore, there was no need to deal with the issue at that time. Schoppy was a teacher concerned with pupil discipline and concerned with following the rules. He asserted that the issue was never brought up again, either by petitioner, who served as Schoppy's principal, or any Superintendent of Schools.

Petitioner testified on his own behalf asserting, among other things, that he had been employed by the Board since September 1972 and had acquired a tenure status as a teaching staff member and as an assistant principal, as stipulated by the parties. Prior to acquiring tenure, petitioner was issued a series of contracts of appointments with the Board. After he had acquired tenure, he was issued a form letter from the Board giving him notice of his salary for the subsequent school year. Petitioner asserted he never received any individual employment contracts from the Board after he had acquired tenure in a position.

Petitioner testified that effective July 1, 1992, his appointment as principal of Brigantine North Middle School, grades five through eight, began. He testified that prior to his appointment as principal, there was one school serving grades kindergarten (K) through eight. Upon principal Raye's retirement, the Board restructured the school district and moved from one single school to two separate schools; i.e., an elementary school and a middle school. The Board also restructured its administrative staff, moving from one principal and two vice-principals to two principals with no vice-principals. Mr. Marrindino served as the elementary school principal while petitioner served as the Board's Middle School principal.

Petitioner asserts that between May 26, 1992 to immediately prior to the Board's action to remove him from the position of principal, no one from the Board or its administration ever advised him that his appointment as principal was for a fixed term. Petitioner's initial appointment was for the 1992-93 school year.

Petitioner was appointed again for the 1993-94 school year. However, he testified, no employment contract was issued to him by the Board. Rather, he received the normal form letter which was issued to the staff members advising him of his reappointment and his salary for the coming year. Petitioner believed he was under tenure as principal because he had not been issued an individual employment contract with an ending date. And, he believed, he had been appointed principal without a fixed term.

Petitioner testified that while he served as the Board's principal of its Middle School, he was also employed by the NJEA as a negotiations consultant assigned to the Hammonton office which served Atlantic County and Gloucester County. He represented the various bargaining units in the local school districts with regard to their respective local boards of education. He assisted the local unions in processing grievances, processing unfair labor practices before the Public Employees Relations Commission (PERC), among other things, against the local boards of education. He is also a partner in the firm of Schaffer, Plotkin and Waldman, a labor relations consulting firm which represents only public employees; i.e., police officers, corrections officers, Sheriff's departments, firefighter employees, social service workers, among others. The partnership represents the public employees in labor relations matters with various municipalities and county governments. His duties with the partnership is comparable with those duties petitioner performs for the NJEA as a consultant.

On March 21, 1994, Superintendent Daniel G. Loggi sent a letter to petitioner which stated as follows:

> As you know, the Board was quite dismayed when it was informed that you were utilizing the school phone number on the letterhead of your non-school employment.
>
> You are to stop this practice immediately; I would appreciate your advising me exactly what steps you will take to do so. (P-12)

On April 19, 1994, petitioner answered Superintendent Loggi, as follows:

> As per your letter of March 21, 1994, this is to formally advise you that immediately upon being advised of the concern of the Board regarding the use of the work phone number on my letterhead, new stationary and business cards were ordered and any letters that went out subsequent to that during the tendency that the stationary was being printed had the school member blacked out.
>
> For clarification purposes, I want you to know that the stationary in question has been in use by me since 1977 when I was appointed as a part time consultant to the New Jersey Education Association. This letterhead had been utilized with all school districts within Atlantic County, but most importantly had been used with the Brigantine Board of Education. On numerous occasions letters were sent to the Superintendent of Schools of Brigantine with copies to the Board or directly to the Board of Education with that number on the top of the stationary. At no time in seventeen (17) years has anybody ever requested that the number be removed from my stationary. Had that request been made, it would have been done immediately. Utilizing the school phone number on my letterhead was not an attempt to run a business out of the school but was more of a convenience for people to call and leave messages if needed at which I would return their phone calls during my free time. I hope this answers the concern of the Board and clarifies the use of the phone number. Again I am only sorry that the Board instead of having the courtesy to advise me of their concern and allowing me the opportunity to remove the phone number, decided to utilize this as a reason for my non re-employment. (P-13)

Petitioner produced several documents to demonstrate he had used the school's telephone number on his letterhead for outside employment for a number of years. Some of the letters had been addressed to former superintendents in the Board's employ.

Exhibit P-11 in evidence, a letter to petitioner from the Board Secretary, dated March 17, 1994, sets forth the Board's reasons for its nonrenewal of petitioner's position of principal as follows:

> 1. Your failure to follow Board Policy No. 6145 regarding Extracurricular Activities, and your failure to advise your staff of the policy;
>
> 2. Your lack of judgment in designating the school telephone number on your non-school business letterhead;
>
> 3. Your violation of Board Policy No. 4138 regarding Non-school Employment, in that you have taken telephone calls at school pertaining to your outside employment, and have thus engaged in outside activities and/or performed services other that those assigned by the district during the hours of the prescribed school day;
>
> 4. Your violation of Board Policy No. 3514, in that you have utilized district equipment and personnel for personal use. (P-11)

Petitioner repeated that he was not aware there was a problem with the use of the school's telephone number on his outside employment (NJEA) letterhead until he was advised by the Superintendent's letter dated March 21, 1994. Nor was he advised that his receipt of outside business calls at the school interfered with his school duties. He asserted he would return telephone calls if he had a break in the school day. Otherwise, he would return the calls when he arrived home at the end of the school day.

Petitioner observed several staff members use the school telephone for personal and outside business purposes. Teachers who used the telephones were engaged in businesses which included; roofing, antiques, artificial flowers, crafts, child care, Avon products, Christmas trees, men's clothing, summer classes at home, jewelry, among others. Some of the products and services were offered for sale to teaching staff members on school time. Petitioner testified that Superintendent Loggi received telephone calls at school regarding Loggi's tutorial program for students preparing to take the SAT's. The telephones were used for a wide variety of activities which were not for school business or for school purposes.

Petitioner testified that there were many telephones available to teachers throughout the building including the one located in the teacher's room. The other telephones available for teachers use were located in the main office, the nurses' office and the Child Study Team (CST) office.

Petitioner testified that in 1986 or 1987, the Board attempted to remove the regular free telephone from the teachers room and install a pay telephone. The BEA reminded the Board of the "past practices" provision in the collective bargaining agreement between the BEA and the Board which included, among other things, continued benefits. The Board did not install pay telephones in the teachers room.

Petitioner testified that no member of the Board or its administration ever advised him that he was in violation of Board Policy 4138 or 3514. He asserted that no one had ever explained the policies to him. Nor, prior to March 17, 1994, had anyone ever indicated to petitioner that there was anything wrong or that Policy 4138 and 3514 included the use of the school telephone as he had used it. Subsequent to his receipt of Superintendent Loggi's letter dated March 17, 1994, petitioner ceased making telephone calls related to NJEA and his private consulting business. He admitted, however, that it was difficult to control calls coming into the school for these purposes.

Prior to petitioner's appointment as principal, Mr. Marrandino was principal of the entire K-8 school and responsible for enforcing all Board policies including the policy related to extracurricular activities. Petitioner served as assistant principal under Marrandino's supervision at the time. When petitioner became principal of the Middle School it was his understanding that when a teacher complained about the eligibility of a pupil participating on the school's basketball team where grades were low, tutoring could be afforded the pupil by one of the two basketball coaches in order that the pupil remain eligible for the sport. He asserted the extracurricular activity eligibility practice was informal. Petitioner was never advised that policy had changed. Nor was he advised by the Board or its administration as to how the policy was to be applied and enforced.

Petitioner testified the extracurricular controversy arose at a meeting of the Board on October 28, 1993. Prior to the October 28, 1993, Board meeting, the BEA and the Board had been engaged in collective bargaining, therefore, there was no agreement between the parties. Consequently, the Board had not officially approved any of the 20 or so extracurricular activities usually offered to the pupils. Parents made comments concerning pupil discipline at the October 28, 1993, Board meeting. Petitioner testified that Board member Carol J. Callowhill responded to the parents concerns by asserting that the Board had a very strict policy whereby a pupil who received one or more grades of "D" in subject matter courses was ineligible to participate in school extracurricular activities. Petitioner asserted that the extracurricular policy announced in public by Ms. Callowhill was not the policy followed by the school district's administration.

Subsequent to the October 28, 1993, Board meeting, the petitioner and Marrandino located the policy Ms. Callowhill had made reference to at the Board meeting. Petitioner prepared a memorandum and the two administrators then met with Superintendent Loggi to review and discuss Board Policy 6145. Petitioner's memorandum, dated October 29, 1993, in reference to extracurricular activities states as follows:

> As you recall, last night comment was made by Mrs. Callowhill regarding the Board policy of not allowing students to participate in extracurricular activities if they have more than one (1) "D" in a subject. This policy is indeed the actual policy in the Board Policy Book. I had attached a copy of this for your review. My question is do we in fact enforce this policy to the letter as this will preclude any student who has received more than 1 "D" or any "F's" for participation in not only sports activities but also any extra-curricular activities including band, choir, newspaper, student council, etc.
>
> We must have a decision on this as soon as possible as Mr. Morey had come to me and has asked about the basketball team which is to begin practicing next week as well as all of the other activities that are currently in progress... (P-23)

Petitioner asserted he advised all of the staff members of Board Policy 6145 and implement it immediately. Subsequently, on November 2, 1993, Superintendent Loggi sent Board President Steve Van Note and Ms. Callowhill the list of pupils ineligible to participate in extracurricular activities at the end of the school's first marking period, November 1, 1993. Grade four excluded ten pupils while the remaining exclusions were enforced: Grade five - 40 pupils; Grade six - 18; Grade seven - 34; and Grade eight - 38; for a total of 140 pupils.

Thereafter, an Extracurricular Committee was formed and recommended that rather than the "D" grade criteria for ineligibility, a Good Academic Standing of a grade average of 3.0 on a 5.0 scale be implemented. A grade of "A" would equal 1 point while a grade of "F" would equal 5 points. Pupils found to be ineligible at the conclusion of one marking period would not be permitted to participate in the subsequent marking period or until they achieved a grade point average of 3.0.

On November 18, 1993, the Board took formal action to temporarily rescind Policy 6145, in favor of the recommended good academic standing criteria. The staff members were advised of the Board's action on November 23, 1993, in petitioner's absence. On December 9, 1993, the Board rescinded its Policy No. 6145, which effectively changed the one "D" ineligibility to the grade point average (GPA) of 3.0.

Petitioner admitted, on cross-examination, that he had never received a letter from Superintendent Loggi or the Board advising him he had acquired tenure in the position of principal. He further admitted that the contract between him and the Board for the 1993-94 school year specifically set forth a term of one year. Petitioner never saw a resolution which granted tenure to a class of employees. Nor did he see a resolution adopted by the Board granting petitioner tenure. Petitioner testified that he believed his appointment without a term granted him tenure. However, he had no knowledge of any employee having been granted tenure upon the employee's original employment. Petitioner did not discuss nor put in writing his belief that he had acquired tenure with the Board. It was only after the Board took official action not to reemploy petitioner as principal that he discussed his belief with Superintendent Loggi. Petitioner subsequently contacted the NJEA regional office for advise and then asked the Board for a statement of reasons for his nonremployment in writing. Petitioner appeared before the Board on May 16, 1994. Although petitioner asked that his nonreemployment be kept confidential, he went public following his private appearance before the Board on May 16, 1994.

Petitioner admitted that when he served as coordinator of School Operations he reviewed the Board's then existing policies and directed a memorandum to the then Superintendent of Schools (R-10). In his memorandum (R-10) petitioner specifically refers to Board Policy No. 6145 and opines that the policy needs more review, among other things. Therefore, petitioner was aware of the existence of Policy 6145, when he assumed the position of principal.

Petitioner asserted that several petitions in support for his reemployment as principal were presented to the Board at its regular monthly meeting held on May 16, 1994. Petitioner admitted that he actually crafted the petitions signed by 75 of the approximately 100 teachers on staff at the time.

Superintendent Loggi testified, among other things, that the present Board Secretary, Charles Brewin, commenced his duties in June 1992, replacing the Board Secretary who was not reemployed by the Board. Mr. Brewin was not fully certificated when he began in the position as Board Secretary and had never occupied a similar position prior to his employment with the Board. Mr. Brewin began in his position at about the same time as petitioner began as principal of the middle school. It was the Board's practice to have the Board Secretary assist in the preparation of personnel contracts and salary notice letters.

Superintendent Loggi recommended a restructuring of the school organization to the Board which, among other things, recommended petitioner's appointment as principal of the newly established middle school. The Board accepted Loggi's recommendations and, among other things, appointed petitioner to the principal's position. After the Board meeting at which the Board appointed petitioner, and which petitioner attended, Loggi wrote petitioner a letter. The Superintendent did not, however, set forth a term of petitioner's appointment nor did he include a contract for petitioner to execute.

In April 1993, the Board executed a second appointment for petitioner in the principal's position with a specific term for the 1993-94 school year. Superintendent Loggi advised petitioner of his second appointment by letter. Petitioner raised no objection to the letter or the terms set forth therein. Loggi asserted that there was no contract issued to petitioner for the 1993-94 term. The Superintendent did not know why there was no contract issued to petitioner. However, he recalled that there was no discussion of petitioner having acquired tenure by the Board at its meeting where petitioner was reappointed.

Superintendent Loggi testified extensively about the extracurricular activity incident raised by Board member Callowhill at the October 1993, Board meeting. Loggi asserted that the school principal was responsible for the day-to-day operation of the school. And, as a consequence of their failure to carry out the Board's policies, in particular Policy 6145 dealing with pupil grades and participation in school extracurricular activities, the Board voted to withhold the salary increments for Marrandino and petitioner.

The Superintendent testified, among other things, that he was aware petitioner had outside businesses when Loggi became Superintendent of the Brigantine Schools. Loggi first became aware that petitioner used the school telephone numbers on his outside business letterhead at a meeting of the Board in January 1993. Loggi did not recognize the school telephone number on petitioner's letterhead when he had occasion to receive letters from petitioner. When he did become aware that petitioner was using the school telephone number on his outside business letterhead, Loggi requested petitioner to cease the practice.

Superintendent Loggi testified that the Board's use of school equipment for outside activities was not strictly enforced. He recalled that Mr. Marrandino wrote a sports column for a local weekly newspaper and used the schools facsimile (fax) machine to transmit his stories to the newspaper. Loggi was advised of Marrandino's practice by Board member Callowhill and directed Marrandino to stop the practice.

Superintendent Loggi opined that the school principal should be held to a higher standard of conduct that the standard for teachers. He asserted that the principal should serve as a role model for those he supervises and, therefore, a higher standard of conduct is expected.

Superintendent Loggi, recommended petitioner for a third year contract, which would have granted petitioner tenure. Loggi made the recommendation to the Board notwithstanding Loggi's knowledge that petitioner had used the school telephone number on his outside business letterhead and, that petitioner had not enforced the Board's extracurricular activities policy. Loggi had the opportunity to observe and evaluate petitioner's performance and believed petitioner had done a good job. Loggi recommended petitioner's appointment at the Board meeting held in March 1993, where he attempted to convince the Board to adopt his recommendation.

A subsequent Board meeting was held in May 16, 1993. Superintendent Loggi was unable to attend the Board meeting due to back surgery he had undergone on May 12, 1993. However, Loggi wrote two letters in support of his recommendation to reappoint petitioner. One letter to Mrs. Callowhill and the other letter, through the Board Secretary, to be read in the open public session of the Board. The Board rejected Superintendent Loggi's recommendation.

The Superintendent admitted he prepared pupils for the SAT examination. He conducts two tutorial programs per year; one in the spring and one in the fall. He does not advertise nor does he use the school's telephone number on personal letterhead or business cards. Because he maintains an unlisted home telephone number, he receives telephone calls at the school concerning the SAT tutorial program. He also provides Brigantine pupils with the SAT tutorial program, at school, without pay.

When it came to Loggi's attention that Avon products and other items were offered for sale at school during school hours, he ordered Marrandino and petitioner to immediately stop the practice.

The Superintendent asserted that certain Board policies are viewed differently by different people. Although he believed the extracurricular policy was restrictive, Loggi believed that petitioner was implementing the policy. Loggi was embarrassed when he learned at the October 1993 public meeting of the Board that petitioner was not following the policy. Loggi asserted that the principal may not ignore a policy adopted by the Board.

Board member Carol Callowhill testified, among other things, concerning Superintendent Loggi's proposal to reorganize the school into an elementary unit and Middle School unit, together with Loggi's recommendation to appoint petitioner principal of the Middle School. She asserted that the proposal was discussed at the May 1992 Board meeting and petitioner was appointed principal, effective July 1, 1992. She asserted the Board did not discuss tenure for petitioner, and petitioner's appointment to the administrative position was for one year.

Ms. Callowhill stated that petitioner had applied for the Board Secretary position. She was certain that the Board did not discuss early tenure for petitioner because the subject of early tenure for Superintendent Loggi had been discussed and rejected by the Board just one year prior to petitioner's appointment as principal. She asserted she is opposed to tenure in any form and voted for petitioner's reappointment for one year.

Ms. Callowhill was appointed to the Board by Mayor J. Edward Kline in August 1988. During the 1988-89 school year, all of the Board's policies were reviewed. The extracurricular policy was reviewed and made stricter than the former policy by excluding pupil participation in extracurricular activities where the pupil received one "F" or failing grade, or one "D" grade for a marking period. Despite Mr. Schoppy's testimony that he did not know of the extracurricular policy, Ms. Callowhill asserted that he was very vocal and opposed to its adoption. The issue of the policy was again raised at a Board meeting in October 1993, where pupil test scores were discussed and a parent inquired as to why pupils were allowed to participate in basketball and other sports when the pupils were receiving failing grades. Ms. Callowhill brought to the Board's attention the existence of the extracurricular activity policy and that the former Boards had placed pupil academics first, before extracurricular activities. Ms. Callowhill was under the impression the policy was being implemented and enforced.

A member of the public advised the Board that the policy was not enforced because certain pupils that had failed subject matter courses were participating in athletic events. Ms. Callowhill and other Board members were embarrassed by this revelation. Superintendent Loggi was directed by the Board to investigate the matter and return to the Board with his findings and recommendations.

Loggi subsequently reported to the Board that the policy had not been enforced. Loggi also reported that if the policy were enforced, almost one-half of the pupil population would be ineligible to participate in extracurricular activities. This report was most disturbing to Ms. Callowhill, and also annoying, because her telephone was constantly busy with calls from parents complaining about the policy, asserting that they were unaware of the policy and that it was unfair to their children. The Board subsequently rescinded the extracurricular activity policy and adopted a new policy which has been discussed hereinbefore.

Ms. Callowhill testified that in or about January 1994, she became aware that petitioner's NJEA letterhead contained the school telephone number. Ms. Callowhill received petitioner's NJEA letterhead from a Board member who had received it from a member of the Absecon City Board of Education. The Brigantine Board member was quite embarrassed to see the school telephone number on petitioner's NJEA letterhead.

Ms. Callowhill was Vice President of the Board in January 1994, and served on a number of the Board's standing committees; the Personnel Committee among them. The Personnel Committee invited Superintendent Loggi to attend a meeting subsequent to Ms. Callowhill's learning of petitioner's use of the school telephone number on his NJEA letterhead. Loggi was not aware petitioner was using the school telephone number on the NJEA letterhead and recommended that petitioner's salary increment be withheld. The Personnel Committee also discussed the extracurricular policy at its meeting. Petitioner's employment was also discussed. Ms. Callowhill was not aware that petitioner would acquire tenure as principal if the Board employed him for the third year. She was under the impression that petitioner would have to serve three, rather than two, years in position to acquire tenure. The Personnel Committee recommended that petitioner's salary increment be withheld and that he not be granted tenure. At the March 1994 Board meeting, it adopted the Personnel Committee's recommendation that petitioner had used extremely poor judgment in his job performance by placing the school telephone number on his outside employment letterhead and, further, he failed to enforce an existing (extracurricular) policy of the Board.

SUMMARY OF THE LEGAL ARGUMENTS

PETITIONER'S POSITION

Petitioner argues, among other things, that although the resolution appointing petitioner principal of the Brigantine North Middle School designated July 1, 1992, as his commencement date, the Board placed no limitation on the term of petitioner's appointment. See Exhibit P-5 (Certified minutes of special Board meeting of 5/26/92). Neither did the Superintendent's letter confirming petitioner's appointment. Ex. P-6; see TR I-75 line 20 to -76 line 13. The Board produced no evidence that any other educational staff member who did not have tenure was ever appointed for an unfixed term. Indeed, Board Policy 4112.1 required that all non-tenured staff, including administrators, be given written contracts in a form prescribed by the state, including a fixed term and termination's on 60 days notice. Ex. P-1, Board Policy 4112.1.

Although the Board's resolution appointing petitioner principal without a fixed term did not specifically grant tenure to principals as a class, Don Marrandino, the only other principal in the district, already had tenure. TR II-8 line 23 to -9 line 1; TR ii-46 line 19 to -47 line 5. Petitioner contends that his unrestricted appointment together with the Board's consistent subsequent treatment of him as tenured establish that the Board provided him early tenure as a principal in the reorganized district.

Petitioner further argues that the Board considered him to be a tenured principal and was consistent with its intent to confer early tenure upon him pursuant to N.J.S.A. 18A:28-6 (a), which provides that:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1992, shall not obtain tenure in the new position until after:

> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

The subject of early tenure under N.J.S.A. 18A:28-6 or 18A:28-5, the analogous provision applicable to initial employment rather that promotion, has been considered by the Commissioner and the courts. See e.g. Rall v. Board of Education v. Bayonne, 104 373 (1969); Contardo v. Board of Education of the City of Trenton, 78 S.L.D. 633, 637 (Comm. Ed. 7/18/78), aff'd, Dkt. No. 161-78 (St. Bd. 4/5/79); Spadoro v. Coyle, 1965 S.L.D. 134 (Comm. Ed. 9/29/65). None of the impediments to early tenure discussed in these cases is present here.

For example, Rall and Spadoro hold that if a board grants early tenure to one member of a class, it must do so for all members of the class, and any attempt to limit tenure to one individual is void ab initio. Pickering v. Board of Education of the Borough of North Plainfield, 88 S.L.D. 65, 69 (Comm. Ed. 6/1/88) aff'd Dkt. No. 10-88 (St. Bd. 6/3/88); aff'd Dkt No. A-5087-87T2 (App. Div. 5/8/89). There is no evidence here that respondent intended that early tenure benefit petitioner alone. Because the district's only other principal, Donald Marrandino, already had tenure, allowing petitioner early tenure does not establish any intent to limit its effect to him. In the absence of any evidence that the Board acted irregularly, its decision concerning early tenure as evidenced by its treatment of petitioner should be presumed correct.

In the alternative, petitioner argues that the Board's action to remove him from the principal's position was arbitrary, capricious and for reasons which the Board has not yet identified truthfully, all in violation of constitutionally protected rights. Petitioner asserts that the Board's discretionary authority not to renew the employment of a nontenured staff member is not unlimited. Its action can be set aside if it is "arbitrary, unreasonable, capricious, or arbitrary considerations which have no relationship to the purpose to be served." Donaldson v. Board of Education of North Wildwood, 65 N.J. 236, 247 (1974); quoting Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, 68 S.L.D. 7, 10 (Comm. Ed. 1968). The retaliatory nonrenewal of a public employee for engaging in constitutionally protected expression or petitions to the government for redress of grievances is an arbitrary and capricious act which violates constitutional protections. "While a board has broad discretion with respect to the appointment, transfer, dismissal or nonrenewal of these employees, its actions are limited by First and Fourteenth Amendment protections." Parente v. Board of Education of the Borough of Metuchen, 94 N.J.A.R. 2d 352, 355 (Comm. Ed. 3/17/94), aff'd 94 N.J.A.R. 2d 500 (St. Bd. 7/6/94) (Board's reprimand and nonrenewal of nontenured lunch aid for exercise of permissible free speech declared null and void); see Winston v. Board of Education of South Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd 64 N.J. 582 (1974).

Petitioner's criticism of the Board's extracurricular policy and his recommendations for change were constitutionally protected expressions similar to those considered by the Third Circuit in Zamboni v. Stamler, 847 F. 2d 73 (3d. Cir. 1988), cert. denied 488 U.S. 899 (1988). There an employee of Union County, New Jersey alleged that he was subject to arbitrary disciplinary actions in reprisal against his criticism of a departmental reorganization, all in violation of the First and Fourteenth Amendments to the United States Constitution, Article 1, ¶¶6, 18. The Third Circuit held that the state could not condition public employment on a basis which infringed upon an employee's constitutionally protected interest in free expression on matters of public concern, at least where that expression did not interface with the efficiency of the public services performed through its employees. Id. 857 F. 2d at 76, citing Pickering v. Board of Education, 391 U.S. 563, 568 (1968) ("the free speech rights of public employees may be limited only where absolutely required by the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"). It therefore reversed the district court's order granting summary judgment to the public employer, and remanded the case for trial on the factual issues, including the causal connection between the plaintiff's protest and the alleged reprisal. It must be concluded that the Board's extracurricular policy and its academic standards were matters of public concern, and that petitioners engaged in protective speech concerning these issues.

Petitioner finally argues, alternatively, that the Board's reasons for removing him from the principal's position were so arbitrary and capricious that they must be removed from his personnel record. The requirement that even a nontenured staff member be given the reasons for nonrenewal of employment "may serve as a significant discipline on the board itself against arbitrary or abusive exercise of discretionary powers" by the Board. Donaldson supra, 65 N.J. at 245. Where the reason given for a nonrenewal is arbitrary and without a sufficient basis in fact to be considered a reason for nonrenewal, the liberty interest in future professional employment is compromised.

Petitioner argues that because there is no reasonable basis for holding petitioner responsible for the non-enforcement of an extracurricular policy which was unworkable and modified by the Board to encompass the very changes suggested by the petitioner and other district administrators, the Commissioner should require that of the extracurricular policy be removed from his personnel file as a reason for his nonrenewal.

The evidence similarly demonstrates that there was no written policy specifically prohibiting the use of school telephones for non-school business, and no established practice of applying to school telephones the general prohibition on using school equipment for non-school purposes. Moreover, there was absolutely no evidence that Mr. Plotkin's telephone calls or out-of-school activities interfered in any way with his performance as principal. In fact, the Superintendent had only praise for petitioner's performance and recommended to the Board that he be retained as principal. Under these circumstances it can only be concluded that petitioner's use of school telephones and publication of his school telephone number was not a sufficient justification for nonrenewal. These reasons should also be deleted from his personnel file.

THE BOARD'S POSITION

The Board argues, among other things, that petitioner did not acquire a tenure status as principal, therefore, it was not in violation of the Tenure Act, N.J.S.A. 18A:28-1 to -18 (Act). The Board recognizes that petitioner had acquired a tenure status in its employ as a teacher and as an assistant principal. However, it is axiomatic that the right of tenure, and with it the consequent security of permanent employment, does not exist "until the precise condition[s] laid down in the statute ha[ve] been met." Zimmerman v. Newark Board of Ed., 38 N.J. 65, 75 (1962), cert. Denied, 371 U.S. 956 (1963). See also Ahrensfield v. State Board of Educ., 126 N.J.L. 543 (E. & A. 19941); In the Matter of the Tenure Hearing of Carmine Pellechio, 83 S.L.D. 1616, 1622 (St. Bd. 5/4/83), aff'd, 84 S.L.D. 2003 (App. Div. 2/28/84) ("courts have consistently held that tenure accrues to teaching staff members who meet the precise conditions of the tenure statute"). Here, such precise conditions require, at a minimum, two successful calendar or school years of employment in the position for which petitioner is claiming tenure. Petitioner's employment with the Board in the principal's position does not meet that basic requirement.

The Board observes that N.J.S.A. 18A:28-6 allows an employing Board to fix a shortened tenure period. However, such action can only be taken by means of a resolution which is formally adopted by the board and which shows unequivocally the board's intent to fix a shortened tenure period for an entire class of employees. See, e.g., Procopio v. Wildwood Bd. Of Educ., 75 S.L.D. 807, 813 (Com. Ed. 12/15/75) (Absent evidence that

policy was established by the Board to shorten tenure requirements generally for superintendents in the district, and absent specific language in the Boards' minutes showing the clear intent of the Board to grant early tenure to petitioner..., petitioner's claim to early tenure must fall.") (emphasis added); Knipple v. Egg Harbor Bd. Of Educ., 71 S.L.D. 210, 213 ("Absent any specific provision made by the Board to deliberately shorten the time to be served by [the employee] before the acquisition of tenure, the governing statute is ... N.J.S.A. 18A:28-5).

Petitioner does not even allege, must less had he proven, that the Board formally adopted a resolution which "unequivocally" evidences its intent to grant a shortened tenure period to all principals in the district.

Significantly, only where a grant of early tenure had been adopted pursuant to a formal resolution of the Board which indicates a clear intent to grant early tenure to a class of employees has it been upheld. See, in Rall v. Board of Educ. Of the City of Bayonne, 54 N.J. 373, 375 (1969). On the other hand, where a Board resolution had not been clear and unequivocal, employees' claim to early tenure have consistently been denied. See, in King v. Atlantic County Vocational Bd. Of Educ., 75 S.L.D. 547 (Comm. Ed. 8/5/75).

In sum, the Board argues, there are only two ways that petitioner could have earned tenure as a principal: (1) by serving the requisite statutory probationary period (which it is undisputed he did not); or (2) if the board fixed a shorter probationary period for all principals in the district. Petitioner has not cited any statutory or decisional authority to support his position that a Board's inadvertent failure to confer a certain type of contract upon a single non-tenured employee evidences a "clear intent" by the Board to shorten the tenure period for the entire class of employees. The reason for petitioner's failure to cite any authority for this proposition is obvious: there is none.

The Board further argues that its decision not to reappoint petitioner as principal was justified and should not be disturbed. The Board grounded its decision not to reemploy petitioner for: (1) his failure to enforce Board Policy 6145; (2) utilizing a non-school business letterhead in conjunction with his NJEA consulting business on which he listed his school telephone number; (3 and 4) receiving and returning non-school business telephone calls on school time. The Board contends that in light of the uncontroverted and overwhelming evidence of petitioner's misconduct, it is clear that the Board's decision not to reemploy him was justified. Indeed, reasons far less credible than those cited by the Board for its decision here have been upheld. See, e.g., Goldstein v. Board of Educ. Of the Tp. of Wyckoff, 82 S.L.D. 837 (Comm. Ed. 9/2/82). Hanson v. Red Bank Borough Bd. Of Educ., 85 S.L.D. 513 (Comm. Ed. 4/26/85) aff'd 85 S.L.D. 523 (St. Bd. 8/7/85).

In sum, there simply is no evidence to sustain a finding that the Board abused its discretion when it chose not to reemploy Plotkin. It has been held that "school administrators and the Board have the right to make subjective judgments so long as they do so in good faith." Bringhurst v. Board of Educ. of the City of Cape May, 81 S.L.D. 564, 565 (St. Bd. 10/7/81). Because there is no indication here that the Board acted other than in good faith, its decision must not be disturbed.

In addition, to his contention that the Board's decision not to reappoint him was arbitrary, petitioner also claims that the Board's decision violated his First Amendment rights. More specifically, petitioner argues that the Board's decision not to reemploy him was motivated, in part, by his criticism of the Board's extracurricular policy in October of 1993, which petitioner claims was constitutionally protected activity. Petitioner has failed to produce any evidence to sustain this claim. Even if petitioner's suggestions or criticism concerning Board Policy 6145 constitutes constitutionally protected expression, he has failed to produce any evidence which would establish that his criticism was a 'substantial motivating factor" in the Board's decision not to reemploy him as principal. Zamboni v. Stamler, 847 F. 2d 73, 79 n.b. (3rd Cir. 1988).

Finally, the Board argues that because its decision not to reappoint petitioner as principal was not arbitrary or capricious, there is no need to remove the reasons for the decision from petitioner's personnel record. It contends, among other things, that its action constituted sufficient justification for petitioner's removal and, therefore, his request that the Board's reasons be expunged from his personnel record must be denied.

CONCLUSIONS

I **FIND** and **CONCLUDE** that petitioner did not acquire a tenure status as principal with the Board. The uncontroverted facts clearly demonstrate that petitioner did not serve the full two year probationary period under N.J.S.A. 18A:28-6 to acquire tenure as a principal. Nor is there any showing by petitioner that the Board intended or did, in fact, grant him early tenure. Petitioner is unable to show, in any fashion, that the Board took any affirmative action to grant him tenure as a principal at any time. As the Board appropriately observes, "it is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met," our Supreme Court in Zimmerman, supra. at 38 N.J. 75, quoting with approval from Ahrensfield, supra. 126 N.J.L. at 544. Thus, the precise statutory conditions having not been met by petitioner preclude him from a tenure status as principal in the Board's employ.

Nor were the Board's action to remove petitioner from the principal's position arbitrary and/or capricious, or in violation of his constitutionally protected rights. Rather, the Board evaluated petitioner's performance and determined not to grant him tenure upon reasonable and justicable grounds. First, the Board determined that petitioner lacked good judgment when he had his school telephone number imprinted on his out of school business letterhead. The Board was paying petitioner's substantial salary to administer its school, not to use school time and equipment to engage in outside business activities. He was being compensated by the board to attend to school problems and issues rather than use the school to enhance his outside compensation. Such grounds for not renewing his contract, and thus not granting him tenure, was sufficient under the law. Donaldson, supra.

Petitioner's argument that the Board violated his constitutionally protected rights for criticizing the Board's extracurricular activities policy is without merit. Petitioner was not disciplined for criticizing Policy 6145. Rather, he was not reemployed as principal for not enforcing the policy. Petitioner admits, that as an administrator in the board's employ, he is responsible for knowing the Board's policies. In fact, petitioner had engaged in an exhaustive review of the policies and made specific comments concerning Policy 6145. He cannot claim ignorance of the policy. To the contrary, petitioner was negligent in carrying out a known and understood policy of the Board; sufficient grounds not to renew his appointment and grant him tenure.

I **CONCLUDE**, therefore, that the action by the Board to deny petitioner tenure under the facts and circumstances of this matter was appropriate and in accordance with the law.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

29 April 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5-2-96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 6 1996
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

FOR PETITIONER:

NANCY GILBERT RHODES
DAVID CUNNINGHAM
WILLIAM SCHOPPY
MYRON PLOTKIN

FOR RESPONDENT:

DANIEL G. LOGGI
CAROL J. CALLOWHILL

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 CONTRACT BOARD POLICY 4112.1
P-2 EMPLOYMENT CONTRACT (12 PAGES) WILLIAM RAYE
P-3 EMPLOYMENT CONTRACT (11 PAGES) DONALD MARRANDINO
P-4 EMPLOYMENT CONTRACT (3 PAGES) PAUL SAXTON
P-5 BOARD OF EDUCATION MINUTES, 5/26/92
P-6 MEMO FROM LOGGI TO PLOTKIN, 5/27/92
P-7 LETTER TO PLOTKIN FROM NEY, 6/1/92
P-8 LETTER TO PLOTKIN FROM LOGGI, 7/20/90
P-9 LETTER TO PLOTKIN FROM LOGGI, 4/23/93
P-10 BOARD OF EDUCATION MINUTES, 5/26/94
P-11 LETTER, 3/17/94 TO PLOTKIN FROM BREWIN, JR.
P-12 LETTER, 3/21/94 TO PLOTKIN FROM LOGGI
P-13 MEMO, 4/19/94 TO LOGGI FROM PLOTKIN
P-14 MYRON PLOTKIN, NJEA NEGOTIATION CONSULTANT
P-15 LETTER, 1/21/95 TO RALPH LEVIN FROM PLOTKIN
P-16 MEMO TO FARRAH FROM PLOTKIN, 9/22/87
P-17 MEMO TO FARRAH FROM PLOTKIN, 12/26/87
P-18 MEMO TO CURT WARY FROM PLOTKIN, 6/3/88
P-19 EQUIPMENT, BOARD POLICY NO. 3514
P-20 NONSCHOOL EMPLOYMENT, BOARD POLICY NO.4138
P-21 EXTRACURRICULAR ACTIVITIES, BOARD POLICY NO. 6145
P-22 FROM PLOTKIN LOGGI, 10/1/93
P-23 MEMO FROM PLOTKIN TO LOGGI, 10/29/93
P-24 MEMO FROM PLOTKIN TO ALL STAFF MEMBERS, 10/19/93
P-25 MEMO FROM PLOTKIN TO LOGGI, 11/1/93
P-26 MEMO FORM LOGGI TO STEVE VONNOTE & CAROL CALLOWHILL, 11/2/93
P-27 MEMO TO BOE HELD ON 11/18/93
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P-36 MEMO FROM SUPERINTENDENT'S OFFICE, 5/16/94 TO MRS. CALLOWHILL
P-37 MEMO TO BOE MEMBERS FROM LOGGI, 5/16/94
P-38 LETTER (HAND DELIVERED) TO PLOTKIN FROM BREWIN, 5/18/94
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R-1 SPECIAL BOE MEETING, 5/1/94
R-2 MINUTES OF BOE MEETING, 5/16/94
R-3 AGREEMENT BETWEEN BRIGANTINE PRINCIPAL'S ASSOC. & BOE, 7/1/91 THRU 6/30/92
R-4 LETTER, 3/2/94, TO PLOTKIN FROM BREWIN
R-5 LETTER, 3/4/94, TO BREWIN FROM PLOTKIN
R-6 LETTER, 3/24/94 TO BREWIN FROM PLOTKIN
R-7 WAIVER, 4/22/94, SIGNED BY PLOTKIN
R-8 LETTER, 4/30/87, TO PLOTKIN FROM LEVIN
R-9 PRINCIPAL RESPONDS: LETTER TO THE EDITOR
R-10 REVIEW OF PROPOSED BOARD POLICY FILE CODES-5000-9430
R-11 MINUTES OF BOE MEETING, 6/29/89, WITH ATTACHMENTS, PRINCIPAL JOB DESCRIPTIONS

OAL DKT. NO. EDU 6075-94

MYRON PLOTKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE THE CITY OF BRIGANTINE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.*

Upon careful and independent review of the record in this matter, the Commissioner adopts the initial decision of the Administrative Law Judge (ALJ) for the reasons expressed therein. The Commissioner concurs with the ALJ's conclusion that petitioner's claim to the position in question fails pursuant to *N.J.S.A.* 18A:28-6.

Accordingly, the Commissioner affirms the initial decision of the ALJ and dismisses the Petition of Appeal in this matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

* By letter dated May 21, 1996, the parties were notified that the Superior Court of New Jersey, Appellate Division, had reversed the holding in *G. Michael Nelson v. Board of Education of the Township of Old Bridge*, 95 *N.J.A.R.* 2d (EDU) 257, thereby abandoning the long-standing administrative practice of recognizing the positions specifically enumerated in *N.J.S.A.*18A:28-5 as "separately tenurable." See *Nelson*, decided by the Superior Court of New Jersey, Appellate Division, April 29, 1996, A-6441-94T5. The parties were therein provided five days from receipt of said notice to submit arguments to the Commissioner as to the relevancy of the *Nelson* holding on the instant matter. Upon request, the parties received extensions to file these arguments, and petitioner and the Board filed timely arguments. These submissions were carefully reviewed. Subsequently, however, on June 10, 1996, Bill A-2153 was introduced to the Legislature, amending *N.J.S.A.* 18A:28-5, to clarify that tenure in the enumerated positions shall accrue only by employment in the particular position, effectively negating the Court's ruling in *Nelson*. The Bill was signed into law by Governor Whitman on June 28, 1996. (*P.L.* 1996, *c.* 58)

AUGUST 1, 1996
DATE OF MAILING AUGUST 1, 1996

336-96

ARTHUR KRUPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, a certified teaching staff member in the District, alleged he should have been given preference over the person appointed to the position of head coach of girls' basketball at one of the District's high schools for the 1990-91 school year.

ALJ determined that petitioner failed to demonstrate by a preponderance of credible evidence that the Board's decision to reject his application to be the head girls' basketball coach was arbitrary, capricious, unreasonable, taken in bad faith or otherwise legally tainted. Thus, the ALJ concluded that the petition to set that decision aside and for an award of back pay must be rejected.

Commissioner concurred with findings and determination in initial decision. Petition was dismissed.

AUGUST 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6595-95

AGENCY DKT. NO. 45-2/91

ON REMAND (EDU 9182-91)

ARTHUR KRUPP,

Petitioner,

v.

BOARD OF EDUCATION
OF THE UNION COUNTY REGIONAL HIGH SCHOOL
DISTRICT #1, UNION COUNTY,

Respondent.

Brian M. Adams, Esq., for petitioner
(Dwyer & Canellis, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: May 6, 1996 Decided: June 14, 1996

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter is on remand from the June 7, 1995 decision by the State Board of Education which followed a reversal by the New Jersey Superior Court, Appellate Division, on December 6, 1994, of State Board and Commissioner affirmances of an initial decision which I rendered in 1993. *See* 95 *N.J.A.R.*2d (EDU) 446, *rev'd*, 278 *N.J. Super.* 31 (App. Div. 1994), *certif. denied*, 140 *N.J.* 277 (1995). In its decision the Appellate Division held that the administrative determinations failed to properly apply the amended provisions of *N.J.A.C.* 6:29-3.3(a) and (b) respecting the appointment of coaches not already employed in the school district. In particular, the court interpreted the cited regulation to impose no obligation on local boards of education, when hiring candidates for coaching positions, to give any preference to qualified, certified teaching staff members already employed within the school district itself. My initial decision, later affirmed both by the Commissioner and the State Board of Education, was based in large part upon my finding that since Krupp was a certified teacher already employed by the respondent regional school district, he should have been given preference over the person who was appointed in his stead - Walter Hennessey - to the position of head coach of girls' basketball at one of the district's high schools for the 1990-91 school year. The Appellate Division, as noted, disagreed with that decision, but determined, nevertheless, to remand the case to the agency in order to permit it to explore whether, in any event, the respondent's determination to deny Krupp the appointment reflected an exercise of sound educational judgment since the record did not adequately reveal whether there was a proper basis for the determination to reject Krupp in favor Hennessey, a non-Board employee. Following the remand, the State Board itself remanded the matter to the Commissioner in order to provide respondent the opportunity to argue that its decision constituted a valid exercise of sound educational judgment.

The Commissioner then transmitted the case to the Office of Administrative Law, the matter was assigned to the undersigned administrative law judge, and a plenary hearing was conducted on April 1, 1996. Post-hearing briefs were submitted, and the record closed on May 6, 1996.

TESTIMONY

For the Board:

The Board's sole additional witness at the April 1, 1996 hearing was its superintendent of schools, Donald Merachnik, who has served in that capacity for about twenty-five years. The regional district, he explained, operated three separate high schools (grades 9-12) with an enrollment of approximately 2,174 students. There are also 450 staffpersons, about half of whom are teachers. The students are from the following six municipalities: Berkeley Heights, Clark, Garwood, Kenilworth, Mountainside and Springfield.*

In response to Krupp's claim that the Board unlawfully rejected his application to be appointed head girls' basketball coach at Arthur L. Johnson High School (hereinafter "Johnson") for 1990-91, Merachnik amplified upon testimony which had been offered at the original hearing by Charles Bauman, assistant superintendent of schools, Peter Falzarano, director of athletics, and David Carl, principal of Johnson. The testimony of those individuals is contained in the transcript of the March 2, 1993 proceedings, which is a part of the record in this case and which I will mark as "Court Exhibit 1."

Merachnik explained that following receipt of Krupp's application to coach girls' basketball at Johnson for 1990-91 he spoke to Bauman and Falzarano regarding the application and explored its propriety in light of district policy. Although, according to the witness, he was not "involved directly" in the selection process, as superintendent it was his task ultimately to make recommendations to the Board for all coaching appointments and it therefore was necessary for him to be kept informed of the rationale for his senior administrative staff's recommendations. Accordingly, Merachnik explained that Bauman and Falzarano were strongly of the opinion that Krupp's

*At the time of the original hearing in 1993, there were four high schools. Since then, one of the constituent municipalities withdrew from the regional high school district. Indeed, in a special school election held on May 14, 1996, a majority of the voters in four of the six towns determined to dissolve the regional high school district itself.

application to coach at Johnson in 1990-91 was inappropriate for the following reasons: (1) an individual seeking appointment to a coaching position ought to be a teacher in the same high school where he or she would be coaching in light of the need for an ongoing relationship with students; (2) coaches also should be assigned to the same high school where they already teach since there is a "coaching collegiality" to be fostered and it is desirable to have "an athletic family" of coach-teachers, particularly in view of the fact that some students participate in more than one sport; (3) in order to maintain "consistency" it is important for coaches to have the opportunity to build a program within a high school, and this takes time to achieve; and (4) each of the district's three high schools receives pupils from only one or two of the constituent communities, and a person who teaches in the same school where he or she also coaches can form a more lasting relationship with parents, local "boosters" and community leagues from which the student athletic population is derived. Thus, since Krupp was a teacher at Jonathan Dayton High School, and had coached there for several years, appointing him to coach at Johnson met none of those objectives.

Although implementation of the above factors was described by Merachnik to represent the "ideal" situation, he candidly conceded that given the practical realities of the coaching assignment situation many coaches, by necessity, although certified teachers, regrettably are not also employed in the school district itself. Although Krupp, of course, was a long time employee of the district, his determination to resign his coaching position at Dayton, where he taught and where he had coached girls' basketball for ten years, just to seek a similar coaching position at another school (Johnson), was seriously at odds with the spirit of those salutary policy considerations. Thus, to have appointed Krupp to coach at Johnson potentially would have created a bad precedent for the system at large and might also have served as a poor role model for other coaches who, although also employed within the district, might be prompted, as well, to move to another school either to improve their win-loss records or for some other unsound reason.

For Petitioner:

Krupp, who also had testified at the original hearing in March 1993, insisted that his application to coach girls' basketball at Johnson for 1990-91 should not have been considered "unusual," since the municipality feeding pupils into Johnson, Clark, was the town where he had been raised, and Johnson was the high school from which he had graduated. Thus, he would be returning to coach at his "alma mater." Indeed, even while at college Krupp worked for the Clark Recreation Department and officiated at league games there. In short, as he put it, he had strong ties both to the municipality (Clark) and to the high school (Johnson), and the appointment of Hennessey, who didn't even teach in the district or live in Clark, made no sense at all.

Also, with respect to Merachnik's claim that interaction with other coaches is important, Krupp observed that he often sought the assistance and advice of other coaches within the district, and all willingly shared their experiences and their expertise regardless of the particular school in which they taught.

DISCUSSION

The issue, as noted in the Procedural History section of this initial decision, is to determine whether Krupp has shown by a preponderance of the credible evidence that the Board's action in rejecting his application to coach girls' basketball at Johnson for 1990-91, and its appointment of Hennessey, instead, represented the improper exercise of educational judgment and was arbitrary, capricious or unreasonable. Having heard Merachnik reiterate the criteria which he and his senior staff felt to be important with respect to coaching assignments, I am convinced, measured by that standard, that the respondent's determination to reject Krupp's application and appoint Hennessey must be upheld, even though some of the factors mentioned by the superintendent arguably could be cited to support Krupp's own entitlement to the position.

As the respondent correctly notes in its post-hearing submissions, the settled case law establishes that decisions by boards of education in matters committed by law to their discretion must be upheld unless they are so arbitrary, capricious or unreasonable to fall, as a matter of law, into some prohibited category. To put it another way, boards even are free to make "poor" decisions, and to exercise "poor" judgment. In such instances, however, that conduct alone does not make their decisions subject to reversal by an administrative law judge or by the reviewing agencies, as the proper remedy for the exercise of poor judgment in respect to an area committed by law to the discretion of a board rests with the electorate. Thus, the proofs reveal that Merachnik and his senior administrative staff legitimately were concerned that adverse consequences might flow if Krupp were allowed to "desert" Dayton in order to coach at Johnson. While I, personally, might disagree with some of the reasons advanced by the Board's witnesses in this regard, it is not legally within my purview to reject their judgment solely on the basis of my own predilections concerning the persuasiveness of their rationale. The upshot, of course, of the Board's decision to appoint Hennessey and to reject Krupp was that neither of the head girls' basketball coaches at Dayton or Johnson were teaching staff members employed by the Board. Obviously, the Board was aware of that consequence, but did not believe it militated against the action it took.

As the Board noted in its initial brief, a decision is arbitrary or capricious only if it is exercised in "bad faith" or without any conceivable regard to reason. Accordingly, even if I disagree with the decision and believe that the determination was erroneous, that view, standing alone, is not legally adequate to permit me to substitute my judgment for that of the board. Our case law is replete with authority for that settled proposition. *See, e.g., Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960). The Board, through its senior administrative staff, sincerely was convinced that permitting Krupp to give up his coaching position at Dayton, where he had taught and coached for years, and then to apply for a like coaching position at Johnson, might result in potentially serious adverse effects upon Dayton's athletic program and upon the sensibilities of its student population, especially its girls' basketball team members. While I personally question whether any adverse effects would have occurred (as I

mentioned in the 1993 initial decision), I cannot say it was unfair or unreasonable for the Board to take that view. True, the Board seems to have assumed that Krupp "belonged" to Dayton and that his precipitous departure was "disloyal" and perhaps predicated upon his desire to "jump ship" in order to coach a different team, which he felt had a "better" chance of winning. Again, while that belief may be subject to criticism, and may in fact have been quite wrong, that does not make it subject to reversal by me. Although, as noted, the determination to reject Krupp's application to coach at Johnson resulted in a situation where neither of the head girls' basketball coaches at Dayton or Johnson in 1990-91 were employed within the school district, and therefore neither had the attributes of continuity, collegiality and/or coordination with staff and pupils that the Board desired, that is not the legal test. While I do not believe the Board could have forced Krupp, over his objection, to coach at Dayton in 1990-91 if he no longer wished to do so, by the same token it was under no obligation to appoint him to the Johnson position, since Hennessey too was a qualified certified teacher. The respondent had the discretion to conclude that permitting Krupp to take the Johnson position potentially would have interfered, if only theoretically, with the Board's goals of continuity, collegiality and rapport with students at a particular school. Although, in hindsight, the upshot of its determination might have been that those considerations were not advanced, that merely goes to the "quality" of the judgment, not its legal validity.

Finally, I agree with the Board that there is no proof in the record that its decision was the product of "bad faith." Indeed, as the Board has not let me forget, its determination to appoint Hennessey over Krupp does have some "intrinsic merit," and the fact that the eventual coaching assignments did not turn out the way the Board had hoped does not make its decision susceptible to reversal.

Accordingly, for the reasons set forth above I have determined that the petitioner has failed to demonstrate by a preponderance of the credible evidence that the Board's decision to reject his application to be the head girls' basketball coach at Johnson for 1990-91 was arbitrary, capricious, unreasonable, taken in bad faith or otherwise legally

tainted. Thus, I **CONCLUDE** that his petition to set that decision aside and for an award of back pay must be rejected.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 1996
DATE

Stephen Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

6/17/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

\mh

APPENDIX

Witness List:

For Petitioner:

Arthur Krupp

For Respondent:

Donald Merachnik

Exhibit List:

Court Ex. 1 - Transcript of March 2, 1993 hearing

OAL DKT. NO. EDU 6595-95 (EDU 9182-91 ON REMAND)

ARTHUR KRUPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record of this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) conclusion that the Board's decision not to appoint petitioner to the sought-after coaching position did not constitute an abuse of discretion, as the Board's actions were not arbitrary, capricious and unreasonable, or otherwise taken in bad faith.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein and the within petition is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 1, 1996

DATE OF MAILING AUGUST 1, 1996

337-96

337-96B

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF GLEN GARDNER,	:	DECISION
HUNTERDON COUNTY.	:	
	:	

SYNOPSIS

Board appealed General Fund cap waiver in the amount of $43,589 rejected by voters on April 16, 1996. Appeal was uncontested by the governing body.

Upon review of the record, Commissioner determined to order the increase of $43,589 in cap waiver monies for a total General Fund tax levy of $1,208,475 for 1996-97 school year.

AUGUST 1, 1996

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF GLEN GARDNER,	:	DECISION
HUNTERDON COUNTY.	:	
	:	

For the Board of Education, Michael K. Ligorano, Esq.
(Ligorano & Sozansky)

For the Borough of Glen Gardner, J. Peter Jost, Esq.

This matter was opened before the Commissioner of Education on June 5, 1996, through the filing of a Petition of Appeal by the Glen Gardner Board of Education (Board), seeking to appeal the defeat of the Board's cap waiver proposal at the annual school election.

PROCEDURAL HISTORY

In March 1996, the Board advised the County Superintendent that the Board would need a "voter cap waiver" pursuant to *N.J.S.A.* 18A:7D-28f in order to be able to provide for a thorough and efficient system of education (T & E) in the District. The County Superintendent ultimately determined, by way of communication dated April 3, 1996, that all of the Board's proposed $43,589 voter cap waiver was necessary for T & E, and, therefore, appealable in the event of voter defeat.

At the annual school election on April 16, 1996, the Board submitted a proposed general fund tax levy question of $1,164,886, as well as its proposed cap waiver question of

$43,589, to the voters of Glen Gardner; both questions were defeated by the voters. Pursuant to *N.J.S.A.* 18A:22-37, the Mayor and Council reviewed the defeated budget, but determined to certify the full amount of tax levy proposed by the Board. In addition, the governing body certified the entire amount of the cap waiver, notwithstanding that it did not have the authority to do so. Accordingly, there being no governing body reductions at issue so as to necessitate a budget appeal and in that only the Commissioner can restore monies in a cap waiver rejected by the voters, the Board filed the within appeal of the voters' action on its cap waiver question on June 5, 1996.

On June 7, 1996, the County Superintendent submitted his affidavit and supporting documents attesting to the process that led to his conclusion, and that of the Department of Education's Cap Waiver Review Panel, that the cap waiver funds approved were both necessary for T & E and unable to be reallocated from within the base budget. No replies to this filing were made by the parties.

The appeal was deemed uncontested with the receipt of a letter from the Borough on June 10, 1996, stating that the governing body of the Borough is in favor of this appeal, at which time the record was closed pending receipt of the June 30 report below.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated March 13, 1996, and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1996-97 budget the amount of anticipated undesignated surplus.

The amounts in dispute in this appeal are as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Township	
General Fund	$1,164,886	General Fund	$ 1,164,886
		Cap Waiver	$ 43,589

Amount of Reduction by Township		Amount of Reduction in Dispute	
General Fund	$ -0-	General Fund	$ - 0-

Amount of Cap Waiver Approved as T & E and Appealed Herein	
	$ 43,589
TOTAL AMOUNT ON APPEAL	$ 43,589

The cap waiver requested by the Board was composed of only one line item, which was determined by the County Superintendent to be necessary for T & E as set forth below:

Necessary for T & E

Account Title	Account Number	Dollar Amount
Tuition to Other LEAs - Regular	11-000-100-561	$ 43,589
TOTAL WAIVER REQUEST		$ 43,589

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for T & E. The Legislature by way of statutory scheme has delegated the responsibility for providing such T & E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township*, 116 *N.J.* 305 (1989). With respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and unable to be derived from further reallocation within the base budget. *Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County*, State Board decision July 7, 1993; *Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County*, State Board Decision July 6, 1994.

Mindful, then, of the standards to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

The Commissioner notes that the Board's appeal papers state that the Glen Gardner School District is a nonoperating district, which sends most students, including those with special education needs, to the Town of Clinton school. The entire amount of cap waiver funds herein, $43,589, is dedicated for tuition which is contractually owed to the Town of Clinton school.

Upon review of the record, the Commissioner approves this amount as necessary for T & E.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board appropriated $132,284 of a projected fund balance of $183,619 as revenue, leaving $51,335 as undesignated unreserved surplus which is less than 3% of its proposed 1996-97 budget. The Board's annual financial report filed pursuant to *N.J.S.A.* 18A:17-10 (June 30 Board Secretary's report) reveals that this projection was essentially accurate.

Based on the above, subject to verification through the Board's 1995-96 annual year-end audit report, the Commissioner determines that no allocation from surplus is possible to fund the line-item appropriation approved herein as necessary for T & E.

SUMMARY

In summary, the Commissioner finds that the $43,589 appealed by the Board herein is necessary for provision of a thorough and efficient system of education in the District and, further, that the monies in question cannot be derived from reallocation within the general fund budget. The Commissioner additionally notes that the line-item waiver to expenditure

limitations granted herein, and outlined below, represents a restricted appropriation in accordance with *N.J.A.C.* 6:20-2A.11(b)3.

Account Title	Account Number	Amount Necessary	Not Necessary
Tuition to Other LEAs - Regular	11-000-100-561	$43,589	$ -0-
Total Line-Item Determinations		$43,589	$ -0-

Tax Levy Certified by Governing Body	$ 1,208,475
Line Items Approved for Cap Waiver	43,589
Amount of Cap Waiver to be Funded by Surplus	(-0-)
Cap Waiver Amount Already Certified by Governing Body	(43,589)
Total Tax Levy for 1996-97	$ 1,208,475

Accordingly, the tax levy certified by the Council of the Borough of Glen Gardner, which already included the amount herein appealed as indicated above, shall stand as certified.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 1, 1996

DATE OF MAILING AUGUST 1, 1996

338-96

C #338-96L
SB # 60-96

LINDA PETERS, PETITIONER-APPELLANT, V. BOARD OF EDUCATION OF THE PINE-LANDS REGIONAL SCHOOL DISTRICT, OCEAN COUNTY, RESPONDENT-RESPONDENT, AND LEO F. KLAGHOLZ, COMMISSIONER OF EDUCATION, RESPONDENT-RESPONDENT.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, August 1, 1996

Reconsidered by the Commissioner of Education, September 20, 1996

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Aileen M. O'Driscoll, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Pinelands Regional School District, Murray & Carr (Paul J. Carr, Esq., of Counsel)

For the Respondent-Respondent Leo F. Klagholz, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

The genesis of this appeal lies in two letter decisions issued by the Commissioner of Education which, together, resulted in the complete dismissal of a two-count petition filed by a tenured speech correctionist (hereinafter "petitioner")

April 1, 1998

pursuant to N.J.A.C. 6:24-1 et seq. By this petition, petitioner essentially sought to challenge the action taken by the Board of Education of the Pinelands Regional School District (hereinafter "Board") to reduce her full-time position to part-time, twenty hours per week, pursuant to N.J.S.A. 18A:28-9.

In Count One of her petition, petitioner claimed that the reduction of her position on April 24, 1996 was in violation of her tenure and seniority rights. Petitioner alleged that the Board's action was based on an invalid waiver granted by the Commissioner pursuant to N.J.A.C. 6:3A-1.1 et seq. of the requirements of the administrative code pertaining to the provision of special education.[1] Petitioner also alleged in Count One that the Board had acted improperly in requesting that waiver and that the Commissioner had improperly granted it. Petitioner sought relief in the form of reinstatement to a full-time position with back pay and emoluments from the date of the reduction in her employment.

Count Two of the petition focused on the underlying waiver granted to the Board by the Commissioner. Petitioner alleged in Count Two that the Board had not requested the waiver for the purposes authorized by N.J.A.C. 6:3A-1.1 et seq. and, further, that the Commissioner did not grant the waiver for any of these purposes. Petitioner therefore sought, in addition to reinstatement to a full-time position, a declaration from the Commissioner that the waiver was null and void.

---

[1] On November 1, 1995, the Board applied to the Commissioner for a waiver pursuant to N.J.A.C. 6:3A-1.5 of the program criteria set forth in N.J.A.C. 6:28-4.3 et seq. That regulation requires that speech language services for classified pupils must be provided either individually or in groups not exceeding three, N.J.A.C. 6:28-4.3(a)(1), and that supplementary instruction may not be provided in groups exceeding five pupils. N.J.A.C. 6:28-4.3(a)(2). That waiver request was approved by the Commissioner on March 4, 1996.

By letter decision dated August 1, 1996, the Commissioner determined that Count Two constituted an appeal from a final determination of the Commissioner which should have been made to the State Board pursuant to N.J.A.C. 6:2-1 et seq. rather than to the Commissioner under N.J.A.C. 6:24-1 et seq. He therefore dismissed Count Two. In addition, while he found that Count One of the petition was "inextricably linked to Count Two," the Commissioner asked petitioner to advise the Bureau of Controversies and Disputes whether she wished to proceed with Count One.

In response to this decision, petitioner advised the Commissioner that she wished to proceed with Count One, and also requested reconsideration of his dismissal of Count Two.

By letter dated September 20, 1996, the Commissioner reaffirmed his prior determination to dismiss Count Two. In addition, the Commissioner dismissed Count One, finding that because Count One was contingent on a ruling on Count Two, Count One was not yet "ripe for adjudication."

Petitioner appealed to the State Board, seeking reversal of the Commissioner's dismissal of her petition and a remand of the matter for a determination of the merits of her claim. Petitioner argued that dismissal of her petition was contrary to the applicable regulations and, further, that approval of the waiver in question constituted an administrative decision reviewable by the Commissioner.

In response to petitioner's appeal, a Deputy Attorney General representing the Commissioner filed a brief on his behalf urging affirmance of the Commissioner's determination. In her letter brief, the Deputy argued that waiver determinations made under N.J.A.C. 6:3A-1.1 et seq. are "final determinations" which are appealable to the

State Board pursuant to N.J.A.C. 6:2-1.1(a)(1). In support of her position, the Deputy relied on comments and responses made concerning N.J.A.C. 6:3A-1.1 et seq. during the regulation adoption process. Relying on the same responses, she further argued that the Commissioner's original determination to hold Count One in abeyance until an adjudication by the State Board of Count Two was reasonable, and hence, that his subsequent decision to dismiss Count One without prejudice was appropriate.

Counsel for the Board then filed a letter response on behalf of the school district indicating that it supported the position taken by the Commissioner.[2]

In her reply brief, petitioner once more argued that her claim centered on alleged violations of her tenure and seniority rights and that the regulations governing appeals to the State Board are controlling of her right to appeal such tenure violations. Petitioner points out that, under the State Board's rules, such tenure and seniority claims must first be litigated before the Commissioner as provided by N.J.A.C. 6:24-1 et seq. before being appealed to the State Board, notwithstanding the fact that underlying claims might concern, as in this case, the application of other regulations.

Petitioner subsequently requested to supplement the record with a Complaint Investigation Report issued by the Department of Education's Office of Special Education Programs concerning the Board's use of the waiver underlying this litigation.

The Deputy Attorney General representing the Commissioner opposed supplementation, arguing that only the dismissal of petitioner's claim is before the State Board and that the Complaint Investigation Report is immaterial to this issue. In this respect, she argued that the lawfulness of the waiver was not before the State Board

[2] The Board also stressed that because petitioner's appeal was directed at action taken by the Commissioner sua sponte, it had not had the opportunity to establish a record below on Count One.

because "pertinent facts and allegations have not been pled or briefed." She further asserted that petitioner in any event "appears to be out of time to appeal the Commissioner's waiver grant."[3]

On May 19, 1997, petitioner formalized her request to supplement the record on appeal by filing a motion pursuant to N.J.A.C. 6:2-1.9. In her motion, petitioner additionally sought to supplement the record with correspondence dated April 28, 1997 from Dr. Richard A. DiPatri, who was then Deputy Commissioner of Education.

As follows, we reverse the Commissioner's determination to dismiss the petition in this case. We also grant petitioner's motion to supplement the record and remand this matter to the Commissioner with direction that it be transmitted to the Office of Administrative Law for initial determination of petitioner's claims.

Based on our review of the record developed thus far, it is clear that petitioner's claim that her tenure and seniority rights were violated when the Board reduced her position to part-time presents a controversy arising under the school laws over which the Commissioner has primary jurisdiction pursuant to N.J.S.A. 18A:6-9. Accordingly, before the State Board of Education can properly consider the substance of petitioner's claim pursuant to N.J.S.A. 18A:6-28, it must first be decided by the Commissioner.

Our jurisdiction over this matter emanates from N.J.S.A. 18A:6-27, which provides that any party aggrieved by any determination of the Commissioner can appeal to the State Board. N.J.S.A. 18A:6-28 provides that such appeal must be taken within thirty days in the "manner prescribed by the rules of the board." The rules

[3] From this perspective, petitioner's cause of action arose on March 4, 1996, the date on which the waiver was approved, rather than April 24, 1996, the date on which the Board acted to reduce her employment.

implementing this statutory right of appeal are codified at N.J.A.C. 6:2-1 et seq. As petitioner correctly points out, those rules are controlling of appeals to the State Board.

Petitioner in this instance was not aggrieved by the Commissioner's approval of the waiver involved in this case, but rather by the Board's subsequent action in reducing her position. There is no question that such actions must be challenged by a petition of appeal to the Commissioner and litigated as provided by N.J.A.C. 6:24-1 et seq.[4] before the matter may be brought to the State Board through an appeal made pursuant to N.J.A.C. 6:2-1 et seq. It is equally clear that the Commissioner may not dispose of such petitions without deciding the matter merely because the claim involves the application of a regulation, even when the regulation, as here, provides authority to a district board to seek a waiver of another regulation and to the Commissioner to grant such a request.

Such a construction of N.J.A.C. 6:3A-1.1 et seq. would permit a district board in cases like this to avoid administrative and judicial scrutiny of the legal propriety of actions it has taken under the authority conferred by N.J.S.A. 18A:28-9 to abolish or reduce positions held by tenured teaching staff members. Whatever discussion occurred while we were in the process of adopting N.J.A.C. 6:3A-1.1 et seq., the State Board never intended this result.

In addition, as this case well illustrates, such a result would circumvent our ability to review the exercise by the Department of Education of the authority which we have delegated to the Commissioner as administrative officer of the Department, see N.J.S.A. 18A:4-22, to grant administrative waivers pursuant to N.J.A.C. 6:3A-1.1 and

[4] We note that N.J.A.C. 6:24-1.2(d) provides that a petition of appeal may name the Department of Education or its agents as parties to disputes falling within the jurisdiction of our agency.

N.J.A.C. 6:3A-1.5. In this respect, we recognize that the waiver process set forth in N.J.A.C. 6:3A-1.5 does not and cannot guarantee that the effect of individual waivers will be readily ascertainable in all cases from the documentation generated by the waiver application process. See N.J.A.C. 6:3A-1.5(a)(1) through N.J.A.C. 6:3A-1.5(a)(4).

Further, although N.J.A.C. 6:3A-1.5(a)(4) requires that an application for a waiver "demonstrate that the school district's educational community, including the district board of education, parents, administration and staff, have been informed of the proposed waiver to the specific rule through public comment and input," we would not impose a general bar to substantive challenges to the application of the education laws on the basis of such a general notice provision. Rather, as head of the Department of Education, N.J.S.A. 18A:4-1, and given our responsibility for the general supervision of public education in New Jersey, N.J.S.A. 18A:4-10, as well as our obligation to insure that our procedures operate fairly and in conformity with the requirements of due process principles, e.g., In re Masiello, 25 N.J. 590, 601 (1958); Laba v. Board of Education of Newark, 23 N.J. 364, 382 (1957), we must judge the propriety of each substantive appeal under the particular circumstances presented to us in that case.

Again, the appeal in this case is based on the substantive claim that petitioner's statutory rights were violated when the Board reduced her full-time position to part-time. This agency would be abrogating its responsibility were we to avoid hearing this claim on the grounds that such alleged violation of petitioner's statutory rights was based on the application of a rule adopted by the State Board to implement the education laws.

Our responsibility in this context is to assure that petitioner's claims are properly considered. To accomplish this, we remand this matter to the Commissioner with the direction that he transmit it to the Office of Administrative Law for initial determination of both Count One and Count Two of the petition.[5] Finally, as previously stated, we grant petitioner's motion to supplement the record with documents relating to the underlying waiver so that they will be considered in the proceedings in the Office of Administrative Law. We have not, however, considered the substance of those documents in arriving at our determination herein.

Attorney exceptions are noted.

April 1, 1998

Date of mailing APR 03 1998

[5] We note that while the Rules Governing Appellate Practice provide for an appeal as of right to the Appellate Division to review the validity of any rule promulgated by an administrative agency where there is no right of review available before any administrative agency, R. 2:2-3(a)(2), there is no similar provision in the State Board's rules relating to any actions by the Commissioner. See N.J.A.C. 6:2-1 et seq. In any event, while petitioner's claim implicates the validity of the underlying waiver, it arises from the application of N.J.A.C. 6:3A-1.1 et seq. and does not appear to be a challenge to the facial validity of that regulation.

340-96

340-96

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLOTTE GALLA,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause against respondent English as a second language teacher due to her alleged inappropriate, nonprofessional and personal relationship with a male student.

Citing *Redcay*, *In re Tyler* and *In re Tordo*, the ALJ determined that the Board demonstrated that the acts charged against respondent were examples of unbecoming conduct. ALJ concluded that respondent engaged in a pattern of improper interaction and sexual contact over several years with a minor student whose interest she was mandated to safeguard. ALJ concluded respondent should be dismissed from her tenured position and her certifications revoked.

Commissioner adopted findings and determination in initial decision as his own. Commissioner ordered respondent dismissed from her position as of the date of this decision and, noting that certification revocation is within the jurisdictional purview of the State Board of Examiners, rather than that of the Commissioner, he directed matter be transmitted to that body for action as it deems appropriate with respect to respondent's certifications.

AUGUST 5, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE

INITIAL DECISION

OAL DKT NO EDU 6581-95

AGENCY DKT NO. 178-5/95

IN THE MATTER OF THE TENURE HEARING OF CHARLOTTE GALLA, BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY

Nicholas Celso, III, Esq. and **Joseph R. Morano**, Esq., for petitioner
(Schwartz Simon Edelstein Celso & Kessler, attorneys)

James Weinberg, Esq., for respondent
(Weinberg and Weinberg, attorneys)

Record Closed: May 3, 1996 Decided: June 14, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Board of Education of the Township of Irvington ("Board"), certified tenure charges of conduct unbecoming a teacher and other just cause against respondent, Charlotte Galla, a tenured teacher. The Board submits that Galla's conduct warrants her dismissal from employment. Respondent denies any charges of wrongdoing.

The Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) on June 23, 1995 for a determination as a contested case pursuant to *N.J.S.A.* 52:14b-1 to-15 and *N.J.S.A.* 52:14f-1 to-13. Hearings were held on September 25, 26, 1995; January 16, 25, and February 1, 1996. On or about October 11, 1995, respondent's counsel, Harold N. Springstead, Esq., informed the Board that respondent had terminated his services. On November 29, 1995, James M. Weinberg, Esq., filed a substitution of attorney for respondent. The parties filed posthearing briefs and the records closed on May 3, 1996.

SUMMARY OF THE CHARGES

The Board filed six charges of unbecoming conduct and insubordination against Galla. The charges are summarized as follows:

CHARGE ONE:

> During the spring of the 1992-93 school year, continuing with the summer of 1993, Charlotte Galla initiated and cultivated an inappropriate, nonprofessional and personal relationship with R.D., a male student, approximately 15 years of age at the time, who was assigned to Ms. Galla's English as a Second Language Class (ESL) at the Florence Avenue School. This relationship was conducted inside and outside the confines of the school, and included the purchasing of gifts for the minor student, as well as driving the minor student around in Galla's automobile. Ms. Galla's actions in engaging in such an inappropriate, nonprofessional and personal relationship with a minor student under her supervision, as set forth above, constitutes conduct unbecoming of a teaching staff member.

CHARGE TWO:

> During the 1993-94 school year, Charlotte Galla continued to cultivate in an inappropriate, nonprofessional and personal relationship with the aforesaid R.D. This relationship included the purchasing of gifts for the student as well as driving the student around in Galla's automobile. The continuance of such an inappropriate, nonprofessional and personal relationship with a

minor student, as set forth above, constitutes conduct unbecoming of a teaching staff member.

CHARGE THREE:

During the 1993-94 school year, Charlotte Galla knowingly permitted, caused and/or attempted to permit the aforesaid R.D. to attend at least one school designated field trip, including a trip to Liberty Science Center, without notifying or seeking approval of the School Building Principal, although R.D. was no longer a student in the school. Moreover, as a result of Ms. Galla's actions on the Liberty Science Center trip, R.D. was involved in a verbal and physical altercation with other minor students in Galla's class who were under her supervision. The foregoing conduct of Ms. Galla constitutes conduct unbecoming of a teaching staff member and insubordination.

CHARGE FOUR:

During the aforesaid Liberty Science Center field trip cited in Charge Three herein, Ms. Galla physically and verbally assaulted, in a sexually derisive manner, E.M., V.A. and A.Z., minor female students under her supervision, as a result of their involvement in an altercation with R.D. Specifically, Galla angrily stated to the above students, with specific reference to R.D., that they should "go ahead and be together," "do you want him," and "the only thing we (girls) want is sex, sex, sex." These actions by Ms. Galla constitute conduct unbecoming of a teaching staff member.

CHARGE FIVE:

During the 1994-95 school year, Charlotte Galla, continued to cultivate an inappropriate, nonprofessional, and personal relationship with the aforesaid R.D. This relationship was conducted inside and outside the confines of the Florence Avenue School, and included the purchasing of gifts for the minor student as well as driving him around in Galla's automobile. These actions by Ms. Galla constitute conduct unbecoming a teaching staff member.

CHARGE SIX:

On or about February 11, 1995, respondent Charlotte Galla engaged in sexual intimate acts with the aforesaid R.D. in a small and darkened classroom at the Florence Avenue School during which she kissed and/or intimately touched R.D. while he was

partially undressed (pants around his ankles). These actions by Ms. Galla constitute conduct unbecoming a teaching staff member.

STIPULATED FACTS

The following stipulation of relevant facts are adopted as **FACT**:

1. The Irvington Board of Education ("Board") is a body politic and corporate organized and existing and by virtue of the laws in the State of New Jersey, *N.J.S.A.* 18A:11-1, and entrusted with maintaining and conducting the schools of the Irvington School District.
2. On or about September 1, 1974, Charlotte Galla, was employed by the Board as an elementary school teacher.
3. Galla is certified as a Teacher of English as a Second Language ("ESL"), Teacher of Spanish, and as a Principal/Supervisor.
4. Galla has been employed as a tenured ESL teacher at the Florence Avenue School since the 1983-84 school year.
5. R.D. was a student in Galla's 8th grade ESL class at the Florence Avenue School during the 1993-94 school year at the time that he was a student in Galla's class.
6. On or about February 25, 1995, Galla was administratively suspended with pay pending further investigation of an incident which allegedly occurred at the Florence Avenue School with R.D. on February 11, 1995.
7. Also, as a result of the February 11, 1995 incident, the Division of Youth and Family Services ("DYFS") Institutional Investigation Unit was called to investigate the matter.
8. On or about April 26, 1995, then Superintendent of Schools Dr. Rodgers M. Lewis filed sworn tenure charges of unbecoming conduct, insubordination, and other just cause together with a sworn statement of evidence in support of the charges against Galla with Victor Demming,

Board Secretary of the Irvington Board of Education. A copy of the charges were also served upon Galla.

9. On or about May 17, 1995, after consideration of charges and evidence against Galla, together with her attorney's written submissions, the Board determined to proceed to certify the charges to the Commissioner for a hearing pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

10 Further, at that meeting, the Board determined to suspend Galla with pay pursuant to *N.J.S.A.* 18A:6-14.

11. Thereafter, on May 18, 1994, the above charges, together with the sworn statement of evidence and a certificate of determination, were filed by the Board with the Commissioner.

12. On or about June 6, 1995, an answer was filed on behalf of Galla.

13. The matter was thereafter transmitted to the Office of Administrative Law, where it was assigned to Administrative Law Judge Mumtaz Bari-Brown. The matter was set for hearing on September 25 and 26, 1995.

14. On or about June 20, 1995, the Board moved before the Hon. Phillip Freedman, J.S.C., for an Order permitting for hearing: 1) the release of the Division of Youth and Family Services investigative file concerning the February 11, 1995 incident as well as; 2) permission for all DYFS employees who conducted the investigation to testify.

FINDINGS OF FACTS

Based on the evidence, I **FIND** the following as **FACT**:

1. R.D. was born on May 19, 1977. In September 1972, R.D. moved from Brazil to Irvington, New Jersey, to live with his father, stepmother and brothers.

2. During school year 1992, Charlotte Galla was employed as a certified English as a Second Language teacher ("ESL") at the Florence Avenue School.

3. In September 1992, R.D. Jr., 15 years old, was enrolled in the Florence Avenue School in the Irvington School District and was placed into Galla's 8th grade ESL class.

4. In the school year 1992-93, R.D.'s father, R.D., Sr., observed Galla driving his son to and from school. R.D. brought home gifts of clothing, toys, small television and radios from school.

5. R.D., Sr., asked his son where the gifts came from and was told that Galla had given them to him.

6. R.D., Sr., went to the Florence Avenue School and told Galla to stop giving his son gifts.

7. During the school year 1993-94 and 1994-95, Galla continued to send gifts to R.D. including magazines, sweat pants, shoes, checkers, playing cards, toy cars, a watch, hockey items and air hockey games.

8. Galla purchased these gifts with her money.

9. R.D. graduated from the Florence Avenue School in June 1993 and with assistance from Galla secured a position as a summer employee in the Irvington Job Program.

10. During the summer of 1993, Vincent Mays, Assistant Principal of Chancellor Avenue School, was informed that Galla allowed R.D. to work as an aide in her basic skills summer class although he was assigned to assist the custodial crew.

11. Galla informed Mays that she needed R.D. to "do translations" for her and that he also served as a role model her other students in the classroom. Galla also explained that she wanted to keep R.D. close to her because she believed that he was being abused at home.

12. Mays advised Galla that she should report any alleged child abuse to DYFS.

13. Mays informed Rev. James Deas, a certified school guidance counselor for the Irvington High School At Risk Program and an ordained minister, that Galla was concerned that R.D. was a victim of abuse.

14. Rev. Deas, interviewed R.D. and Galla to determine if R.D. Jr., was a victim of abuse. R.D. talked about his relationship with his father and stated that he loved his father, and that his father did not hit him.

15. Rev. Deas then spoke with Galla about the reasons she believed that R.D. Jr., was abused by his father. Galla responded that during the past several months R.D. Jr., did not respond to her as he once did and that he appeared to be withdrawn. She also believed that R.D. Sr., was against her although she had "moved mountains" for R.D. Jr.. For example, she got R.D. Jr., a job a the summer program and now he was not responding to her; she felt as if she was being used by R.D. Jr.

16. Rev. Deas concluded that R.D. was not a victim of abuse by his father. Rather, he believed that there was an inappropriate teacher/student relationship between R.D. and Galla. Moreover, Galla appeared to be concerned about R.D.'s response to her, not whether he was being abused at home.

17. R.D. left the summer job program in August after Mays and Alfred Cummings, the school principal, discussed the issue with him and Galla.

18. In September 1993, with Galla's assistance, R.D. enrolled in Essex County Vocational Technical School (Vo-Tech).

19. During the school year, the Vo-Tech guidance counselor, Ms. Claire Major, contacted R.D., Sr., and informed him that Galla would frequently appear at Vo-Tech and attempt to switch R.D.'s teachers.

20. On December 23, 1993, Galla permitted R.D. to attend a school trip to the Liberty Science Center with the seventh and eighth grade students who attended Florence Avenue School although R.D. was not enrolled in the school.

21. An incident occurred during the trip involving Galla and three female students, A.Z., E.Z. and Y.A. A.Z. alleged that Galla pushed her into R.D. and stated, "Do you want him? Do you want her? The only thing that you want is sex, sex, sex, sex."

22. The three students reported the incident to Mays. Cummings and Mays separated the students and listened to their stories.

23. Cummings discussed the matter with Galla. He determined that Galla had no authority to invite R.D. on a trip because he was not a student at the school and issued a letter of reprimand.

24. Cummings also determined that Galla inappropriately used physical contact to handle the incident involving the three female students

25. Between October 1994 to February 1995, Galla purchased a cellular telephone for R.D.'s use. He used the telephone to contact Galla at her

residence and also called her and requested that she pick him up and drop him off at his school.

26. In February 1995, Samuel Corollo, Vo-Tech principal, informed Cummings that he had taken the cellular telephone from R.D. who revealed that he had received the phone from Galla.

27. Galla also gave R.D. access to her MCI long distance calling card number and permitted him to make international telephone calls to his mother, aunt and other relatives in Brazil. Galla paid the telephone bills.

28. In spring 1994, Galla invited R.D. Jr. on another school sponsored trip to Sandy Hook. The security monitor at Florence Avenue School, Betty Hunter, saw him boarding the bus and notified Principal Cummings. After Cummings discussed the matter with Galla Hunter saw Galla board the bus, escort R.D. Jr. off of the bus, and then put her arms around him as she spoke to him.

29. Joanne Giunta also attended the field trip with her third grade class. Giunta observed Galla exit the school building and kiss R.D. Jr., on the cheek while he stood in front of the school.

30. In August 1994, R.D. joined the "Soccer in the Streets" program, an out of school soccer program which was started by Galla at the urging of R.D.

31. Galla was granted permission to use the Florence Avenue School gymnasium for practice during inclement weather during the 1994-95 school year. Soccer practices were held almost daily and games were played on Sunday.

32. On several occasions Galla drove R.D. to soccer practice and to the games.

33. Also on many occasions, Galla drove R.D. to and from the Essex Vo-Tech school.

34. During the 1993-94 school year on approximately three or four Saturdays, Ms. Hunter, the security guard at Florence Avenue School, observed R.D. and Galla sitting in Galla's car.

35. On Saturday, February 11, 1995, an incident occurred involving Galla and R.D. Galla scheduled a soccer practice at the Florence Avenue School. She entered the school and requested the keys to her second floor from a custodian, Paul Gaynor. Approximately 15 minutes after Gaynor gave Galla the keys to her classroom, he observed several students outside of the building waiting for her and banging on the door to get in. Gaynor told

the students to wait while he went to find Galla. Galla was not in the gym. Gaynor then proceeded to Galla's classroom. The lights in the hallway were on but he did not hear any sounds as he approached the classroom. He called Galla's name but she did not respond. Gaynor entered the darkened classroom and he observed Galla lying on the floor on her back with her head on the floor and her feet up on the table. Galla was clothed and her legs were spread wide open. Gaynor also saw R.D. who had his pants down around his ankles. He also observed a bulge in R.D.'s white boxer shorts. When Gaynor entered into the room, R.D. immediately jumped up and down as he in an effort to pull up his pants. R.D. then walked out of the room. Gaynor told Galla that her students were waiting for her downstairs. Galla responded that she would be right down.

36. The following Monday morning, Gaynor informed the school principal what he had observed on Saturday in Galla's classroom. The matter was referred to DYFS. Tracy Wilson, Family Service Specialist/Investigator, was assigned to investigate the matter.

37. Wilson reported the incident to Detective Gene Nigro from the Irvington Police Department. Wilson and Nigro frequently work together on sexual abuse assignments. They investigated the matter for their respective offices.

38. Wilson and Nigro interviewed R.D., Sr., R.D., and Galla.

39. R.D., Sr., told Nigro about the gifts that Galla had given to his son.

40. R.D. initially denied that he was with Galla in the classroom on February 11, and was uncooperative and refused to talk.

41. At a second meeting with R.D., Sr. and Dr. Lewis, the superintendent of school present, R.D. admitted that an incident had occurred between him and Galla at the Florence Avenue School.

42. R.D. told Detective Nigro that Galla had given him gifts and that she had taken him to the classroom on February 11, 1996 during soccer practice. R.D. also admitted that he was lying on the floor and was kissed on the mouth by Galla when Gaynor entered the room.

43. R.D. then gave a written statement to Detective Nigro. When asked whether he had any sexual contact with Galla, R.D. responded, "no, just once by accident." (P-8).

44. Nigro and Wilson then interviewed Galla on February 22, 1996.. She stated that she gave R.D. the gifts which he asked for but believed that she did nothing wrong.

45. Galla also stated that on Valentine's Day, February 14, 1995, she told R.D. that she no longer wanted to see him.

DISCUSSION AND CONCLUSIONS

I

THE CHARGES:

Tenured employees are protected "in their employment when they are subject to unfair and improper attacks, when they are unable to perform efficiently because of conditions not of their own making or beyond their control." *In re Tenure Hearing of Joseph A Maraeta, Township of Riverside*, 1966 *S.L.D.* 77, *aff'd* State Board of Education 1966 *S.L.D.* 106. *N.J.S.A.* 18A:6-10 further provides that no tenured teacher shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing are required under the law to protect tenured teachers from arbitrary dismissal or "unfounded or flimsy reasons." *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63, 73 (1968). Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in any events leading up to the allegations made against the employee which may help to explain the situation. *In re Tenure Hearing of Romaroli, School District of Willingborough*, 1975 *S.L.D.* 352.

Petitioner has the burden of proof to establish claims against the tenured teacher by a fair preponderance of the evidence. *In Re Polk License Revocation*, 90 *N.J.* 550, 560 (1982). The term "burden of proof" refers to the "burden of persuasion". The burden of persuasion entails more than merely producing evidence to establish a state of equilibrium with respect to whether a certain fact exists. This tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." *Jackson v D.L. & W.R.R.,* 111

N.J.L. 487, 490 (E. & A. 1933). Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis,* 67 *N.J.* 47 (1975). The evidence must be such as to lead a reasonable cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div 1959).

One factor to consider to determine which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v Salimone,* 19 *N.J. Super.* 600, 608 (App. Div. 1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." *Congleton v Pura-Tex Stone Corp.,* 53 *N.J. Super.* 282, 287 (App. Div. 1958).

With regard to charges one, two and five, Galla conceded that she gave R.D. and his family numerous gifts and drove R.D. around in her car. She believed that there was nothing improper about her conduct. I disagree. The act of gift giving has inherent connotations. For example, teachers give token gifts to reward students for good behavior or academic achievement. Thus, it was not inappropriate for Galla to give a nominal gift to a student who showed progress or needed encouragement. Indeed, she gave trophies valued at $2.95 to the Soccer in the Streets students for their perfect attendance. On the other hand, clothing, watches, televisions and radios, the personal use of a cellular phone and a long distance telephone credit card are inappropriate gifts to students. Implicit in these gifts is an intent to be more than a teacher in a student's life.

The cumulative evidence also supports charges three and four that Galla knowingly permitted R. D. to attend a field trip without authority and then verbally abused three female students on the trip whom she believed was interested in R.D. Mr. Cummings, school principal, testified about the incident according to discussions with the students. He sent Galla a memorandum recounting the facts he learned and issued a reprimand for inappropriate unprofessional behavior. (P-32). Hearsay evidence regarding the incident at Liberty Science Center support a finding of conduct unbecoming and need not be ignored under the residuum rule. *Matter of Tenure Hearing of Cowan,* 224 *N.J. Super* 737 (App. Div. 1988).

I also reject Galla's version of the incident which occurred in her classroom on February 11, 1995, charge six. Statements in the police report, P-8 and the DYFS report, P-16, differ from the testimony. Her prior statements were that R.D. asked for his trophy. She testified, however, that another student, B., asked about receiving a trophy for attendance. She also provided several explanations as to why she was on the floor when Gaynor walked into the room. Galla told the DYFS investigator that she fell over a chair and landed on her knees. P-16. She testified that she was wearing high heel shoes, tripped, hit her shoulder and landed on her side/back. After this incident, Galla told R.D. on Valentine's Day that she did not want to see him any more.

Proof of the charges filed against Galla depend largely on the credibility of the witnesses. In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Tp. v Murdoch,* 73 *N.J. Super.* 511 (App. Div. 1962). Moreover, the trier of fact is not bound to believe the testimony of any witness and may accept or reject, in whole or in part, the testimony. *Application of Howard Sav. Bank,* 143 *N.J. Super.* 1 (App. Div. 1976). The existence of some inconsistencies in a witness's testimony does not warrant an automatic discounting of that testimony as incredible. However:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as a

> common experience and observation of mankind can approve as probable under the circumstances.
>
> *Spagnuolo v. Bonnet*, 16 *N.J.* 546, 554-55 (1954); *In re Perone*, 5 *N.J.* 514, 522 (1950).

Galla's demeanor under cross-examination about the classroom incident which occurred on February 11, 1996, rendered her testimony unworthy of belief. She had difficulty answering questions and spoke in a fast pace, rambling manner. She was directed to answer the questions in a coherent manner.

I am persuaded, however, by the straightforward and detailed account by Gaynor that he saw Galla lying on the floor on her back with her head on the floor and her legs spread wide open and her feet up on the table. Gaynor also observed R.D. with his pants down around his ankles and a "bulge" similar to an erection beneath his boxer shorts.

Based on the preponderance of the credible evidence, I **CONCLUDE** that the Board has demonstrated that acts charged against respondent were examples of unbecoming conduct.

II

THE PENALTY:

Unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but it is best evidenced by a series of incidents. *See Redclay v. State Board of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326 (E. & A. 1944) I have carefully considered Galla's testimony regarding the charges and observed her demeanor. Galla has been employed by the Irvington School District since 1974. She earned her BA degree from Newark State College and her Masters Degree from Seton Hall University. She is certified to teach elementary grades K through Eight and also holds a certificate for Principal/Supervisor. She has taught ESL for many years and was responsive to the diversity of her students. She was involved in various civic

activities and urged her students to become involved in community programs. Except for the pending charges, Galla's record is unblemished. Indeed, various commendations, evaluations and letters of recognition acknowledge Galla as a dedicated and attentive teacher who genuinely cared about her students. For example, she organized an out of school soccer program for students who were not eligible to play for the high school soccer program. When R.D. expressed that he did not like school and exhibited low self-esteem because he was older than the other students in the class, Galla encouraged him to stay in school. She also encouraged him to enroll in Vo-Tech to learn a trade and supported his interest in sports by coaching the Soccer In The Streets program.

These mitigating factors do not negate conduct which is improper or might be viewed improper by the ordinary person. Galla exercised poor judgment by driving R.D. in her car and giving him gifts such as her cellar phone, access to her MCI calling card, magazines subscriptions, and a watch. Galla also gave birthday gifts of fruit baskets to R.D.'s parents and toys to the other family members. The gifts to R.D. and his family were neither *de minimis* or inconsequential. She ignored the parent's request that she stop giving gifts to R.D. and instead sent him gifts through the mail. Moreover, Galla's voluntary contact with Vo-Tech about R.D.'s class assignments was inappropriate and she had to be told to stop interfering in his life. Galla's affection toward R.D. was open and observed by the Board personnel on several occasions. For instance, during the Sandy Hook field trip incident, the school security guard watched Galla and R.D. walk from the bus side by side and touching at the hip with her arm around him. Another teacher saw Galla give R.D. a short kiss on the cheek. R.D. was also seen sitting with Galla in her car on several occasions.

I have also considered the results of the DYFS investigation. *In re the Tenure Hearing of Tyler,* 236 *N.J. Super.* 478 (App. Div. 1989). DYFS concluded that sexual abuse was substantiated and also determined that Galla's interaction and behavior was unjustified, inappropriate and placed R.D. at risk. The police and DYFS investigation disclosed that R.D. admitted having a sexual encounter with Galla and that she kissed

him when they were in her classroom on February 11, 1995. Galla's feelings toward R.D. must be viewed as more than a teacher who was merely interested in the welfare of her student; Galla had become enamored with her student.

I also have considered, carefully, the important role served by members of the teaching profession. Teachers hold a sacred position in our society. They are entrusted with the care and custody of school children and thus, they play important roles in the community. They have daily contact with their students, molding habits and nurturing young minds. Thus, teachers must be held to a high standard of conduct. Parents, law enforcement officials and the general public expect teachers not only to provide students with book learning, but also to impart social and moral values appropriate to the setting. Clearly, teachers play a direct role in influencing the opinions of their pupils and, indeed, teachers are role models. Also, teachers encourage students to set goals and then help to steer the path students take to achieve those goals. *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County,* 1974 *S.L..D.* 97, 98, the Commissioner recognized that:

> Teachers . . . are public employees to who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinion of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

Thus, it is essential that teachers avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated. Teachers are expected to exercise exemplary restraint and mature self-control. Consequently, it is appropriate to sanction teachers who behave with impropriety or the appearance of impropriety. Indeed, the Commissioner has not hesitated to dismiss an employee whose behavior involved sexually intimate contact with a student. See Petitioner's Brief at 14-15. The Board's request that the Commissioner order similar relief in this matter is justified.

Based on the whole of the record, I **CONCLUDE** that Galla, a tenured teacher with many years of experience, engaged in a pattern of improper interaction and sexual contact over several years with a minor student whose interest she is mandated to safeguard. I further **CONCLUDE** that Galla violated the public and private trust. I also **CONCLUDE** that there are no mitigating factors to support continued employment with the Irvington Public Schools. Consequently, I **CONCLUDE** that respondent should be dismissed from her position as a teaching staff member in the Irvington Public Schools and that her certifications be revoked.

ORDER

It is **ORDERED** that respondent be dismissed from her position as a teaching staff member in the Irvington Public Schools

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 19, 1996
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

6/21/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 24 1996
DATE

Barbara A. Kermel
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:
Vincent Mays
R.D., Sr.
Betty Hunter
Jo-Ann Giunta
James Deas, Sr.
Paul Gaynor
Alfred Cummings
Gene Nigro
Tracey Wilson
Kelli Kapri-Tate
Mary Hughes

For Respondent:
Charlotte Galla

Exhibits:

P-1 Memorandum from Vincent Mays, Assistant Principal of Florence Avenue School to Alfred Cummings, Principal, dated July 26, 1993.

P-2 Memorandum from Rev. James E. Deas, Counselor Summer Programs, to Vincent Mays, dated July 28, 1993.

P-3 Memorandum from Vincent Mays, Assistant Principal of Florence Avenue School to Alfred Cummings, Principal, dated December 23, 1993.

P-4 Memorandum from Jody McClymont dated December 23, 1993.

P-5 Signed Statement of Paul Gaynor, Custodian, Florence Avenue School, dated February 22, 1993. (2 pages)

P-6 Letter from Paul Gaynor to Alfred Cummings dated February 15, 1995.

P-7 Police Report and attached Statements dated February 17, 1995.

P-8 Signed Statement of R.D. dated February 21, 1995. (2 pages)

P-9 Signed Statement of Charlotte Galla dated February 22, 1995. (2 pages)

P-10 Photos of Charlotte Galla's classroom as founded on February 22, 1995.

P-11 Photos of Charlotte Galla's classroom with furniture rearranged according to Paul Gaynor dated February 22, 1995.

P-12 Referral Response Report dated February 15, 1995. (3 pages)

P-13 Updated Referral Response Report dated February 15, 1995. (4 pages)

P-14a Handwritten Statement of Dr. Rodgers Lewis.

P-14b Typewritten Statement of Dr. Rodgers Lewis.

P-15a Typewritten Statement of Tracy Wilson.

P-15b Handwritten Statement of Tracy Wilson.

P-16a Typewritten Statement of Charlotte Galla.

P-16b Handwritten Statement of Charlotte Galla.

P-17a Typewritten Statement of Paul Gaynor.

P-17b Handwritten Statement of Paul Gaynor.

P-18a Typewritten Statement of Claire Majors.

P-18b Handwritten Statement of Claire Majors.

P-19a Typewritten Statement of Samuel Corollo.

P-19b Handwritten Statement of Samuel Corollo.

P-20a Typewritten Statement of M.D.

P-20b Handwritten Statement of M.D.

P-21a Typewritten Statement of R.D., Sr.

P-21b Handwritten Statement of R.D., Sr.

P-22a Typewritten Statement of Alfred Cummings.

P-22b Handwritten Statement of Alfred Cummings.

P-23 Institutional Abuse and Neglect Report. (4 pages)

P-24 Photocopies of Charlotte Galla's.

P-25 Correspondence from Susan Manion, DYFS to Dr. Rodgers M. Lewis, Superintendent, Charlotte Galla and R.D. (5 pages)

P-26 Letter of Findings to Charlotte Galla.

P-27 Letter of Findings to R.D., Sr.

P-28 Letters from Anne Creter, DYFS Corrective Action Coordinator dated June 9, 1995 and July 7, 1995. (2 pages)

P-29 Letter from Anne Creter dated July 7, 1995. (2 pages)

P-30 Charlotte Galla's MCI Bills.

P-31 Charlotte Galla's AT&T Bills.

P-32 Letter of Reprimand from Alfred Cummings to Charlotte Galla, dated January 5, 1994.

P-33 Memorandum from Alfred Cummings to Dr. Rodgers Lewis, dated August 26, 1994.

P-34 Charlotte Galla's Schedule 1994-95.

P-35 Charlotte Galla's Attendance Record 1994-95.

R-1 Letter from Assistant Superintendent Silva to Charlotte Galla dated March 10, 1992.

R-2 Letter from Dr. Rodgers M. Lewis to Charlotte Galla dated September 15, 1992.

R-3 Letter from Commissioner Fitzgerald to Charlotte Galla dated April 30, 1993.

R-4 Teacher Volunteer Recognition Award to Charlotte Galla dated June 10, 1993.

R-5 Letter from Secretary of the Interior to Charlotte Galla dated June 29, 1993.

R-6 Letter from Assembly man Oros to Charlotte Galla dated July 26, 1994.

R-7 Charlotte Galla's Professional Evaluation Report 1993-94.

R-8 Charlotte Galla's Professional Evaluation Report (summer) 1994.

R-9 Letter from Lebby P. Jones to Charlotte Galla dated February 5, 1995.

OAL DKT. NO. EDU 6581-95

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLOTTE GALLA,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter,[1] the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that the Board has sustained its burden of proof with respect to its tenure charges of unbecoming conduct against respondent. The Commissioner further agrees that the appropriate penalty in this matter is respondent's dismissal from her tenured teaching position.[2]

[1] It is noted that the record contains correspondence, dated June 19, 1996, from counsel for respondent to the ALJ in this matter, apparently in response to the ALJ's request to resubmit certain trial exhibits entered during the course of this matter on behalf of respondent. Such letter states that, as a result of a recent relocation of his offices, counsel was having difficulty locating the file in this matter and he requests additional time to comply with the ALJ's request. The record also contains a responding letter from the ALJ, dated June 20, 1996, advising counsel that the initial decision in this matter was issued on June 17, 1996 and that, although the record transmitted to the Commissioner does not contain respondent exhibits R-1 through R-9, such exhibits, along with all transcripts and notes, were "thoroughly reviewed and considered in preparing the initial decision." The ALJ's June 20 letter further directs counsel to submit the requested exhibits to the Commissioner upon their location. The Commissioner observes that during the course of his review of this matter no submission or communication of any kind was received from respondent's counsel.

[2] The ALJ's decision additionally recommended revocation of respondent's certifications as part of the penalty herein. In that such determination is within the jurisdictional purview of the State Board of Examiners rather than that of the Commissioner, this matter will be forwarded to that body for its consideration.

Accordingly, the initial decision of the OAL is affirmed for the reasons well expressed therein. Respondent is hereby dismissed from her teaching position in the Irvington public school district as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6, for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 5, 1996

DATE OF MAILING AUGUST 5, 1996

340-96

EDU #6581-95
C # 340-96
SB # 65-96

IN THE MATTER OF THE TENURE :
HEARING OF CHARLOTTE GALLA, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF IRVINGTON, ESSEX COUNTY. :

Decided by the Commissioner of Education, August 5, 1996

For the Petitioner-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nicolas Celso, III, Esq. and Joseph R. Morano, Esq., of Counsel)

For the Respondent-Appellant, Charlotte Galla, pro se

The decision of the Commissioner of Education dismissing respondent from her tenured employment for unbecoming conduct is affirmed for the reasons expressed therein. In so doing, we deny the motion filed by the Board of Education of the Township of Irvington to dismiss respondent's appeal on procedural grounds.

March 4, 1998

Date of mailing MAR 06 1998

341-96

341-96

PAUL MADEIROS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE - OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON ORDER
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured high school teacher, appealed withholding of his increment and charging of sick days for allegedly work-related injury. Petitioner also sought continuation of his salary subsequent to January 2, 1995. District contended he had not filed a new leave request.

Citing the State Board's decision in *Verneret*, the ALJ determined that a petitioner is not to be excused from complying with the 90-day rule, even in those instances where the Commissioner chooses to defer exercising his jurisdiction to hear the claim until the issue of the work-related nature of any injury has been decided by the Division of Workers' Compensation. ALJ found that petitioner filed his petition well beyond District's notification of denial of his claim for reinstatement of sick days and continuation of salary. ALJ granted District's motion for partial summary decision. Petitioner's claims pursuant to *N.J.S.A.* 18A:30-2.1 were dismissed as untimely and ALJ found no cause to relax the 90-day rule pursuant to *N.J.A.C.* 6:24-1.15.

Commissioner adopted findings and determination in initial decision as his own and directed matter to go forward to OAL on the remaining issue of the withholding of petitioner's 1995-96 increment.

AUGUST 5, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 7611-95
AGENCY DKT. NO. 223-6/95

PAUL MEDEIROS,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Dennis L. McGill, Esq., for petitioner

Charlotte A. Kitler, General Counsel, The Jersey City Public Schools, for respondent

BEFORE **STEPHEN G. WEISS**, ALJ

PROCEDURAL HISTORY

This contested case was transmitted by the Department of Education to the Office of Administrative Law on July 21, 1995, a telephone prehearing conference was conducted by the undersigned on November 21, 1995, and plenary hearings were scheduled for May 20, 1996, through May 22, 1996. A number of issues were identified in the prehearing order, including whether petitioner Medeiros's claims (other than his challenge to a proposed withholding of his 1995-96 increment) should be barred as untimely pursuant to the provisions of *N.J.A.C.* 6:24-1.2(c). Thus, paragraph thirteen of the prehearing order provided that respondent State Operated School District of Jersey City (the Board) could move prior to February 1, 1996, for partial summary decision on the timeliness issue. Thereafter, a motion for partial summary decision on that ground was made by respondent, supported by a brief and several exhibits. Supplemental and reply memoranda then were filed, oral argument was conducted on May 20, 1996, and the matter is now ready for determination.

STATEMENT OF THE CASE

The material facts essential to a determination of the Board's motion are not in dispute and substantially are set forth in the certification (with attached exhibits) of Judith N. Granick, the Board's executive assistant in charge of human resources, which was filed in support of the motion.

On June 19, 1995, Paul Medeiros, a tenured employee of the Board, filed a petition of appeal seeking, *inter alia*, reinstatement of sick days charged against his accumulated sick time for his absences from work from May 18, 1994, through June 30, 1995. All of the absences were alleged to be the product of a "work-related injury" which petitioner received as a result of an incident occurring at Ferris High School on May 18, 1994.

Although not cited in his petition, Medeiros's claims for reinstatement of his sick days and for the continuation of his salary since January 2, 1995,[1] are made pursuant to *N.J.S.A.* 18A:30-2.1. That statute provides that a school district shall pay full salary for up to one calendar year to an employee who is absent from duty as a result of an injury caused by an accident arising out of and in the course of his employment, and that such absence shall not be charged to accumulated sick leave. It is the Board's position that Medeiros's claim for reinstatement of his sick days from May 19, 1994, regardless of its "merits," should be dismissed for his failure to file his petition within the 90-day time period prescribed by *N.J.A.C.* 6:24-1.2(c). Further, to the extent that Medeiros also seeks to confirm the propriety of the Board's allegedly mistaken continuation of his salary from January 3, 1995, to March 15, 1995, that claim, too, is alleged by the Board to be out of time.

In his petition Medeiros alleged that on May 18, 1994, he was teaching a class at Ferris and was injured when a student threw a pencil at him. Medeiros was treated that day at a medical facility in Jersey City by a Dr. R. I. Shah, who reported that although petitioner had a "small abrasion mid forehead between eyebrows," he was cleared to return to work the following day. However, Medeiros remained out of work and applied for a leave of absence, which was approved for the period May 19, 1994, to June 21, 1994.

Beginning in September 1994, Medeiros stayed out of work and filed another application for a leave of absence. This request was approved for the period September 6, 1994, to January 2, 1995. However, the last section of his application bore the following handwritten notation by the school district's medical director: "Approved as Personal Illness not Job-related."

In a letter dated October 19, 1994, Dennis L. McGill, Esq., wrote to advise Granick that he was the attorney for Medeiros in connection with an assault committed

[1] The claim with respect to the period of time since January 2, 1995, relates to a situation whereby even though he was absent the Board paid Medeiros his full salary for the period between January 3, 1995, and March 15, 1995. The Board demanded reimbursement of $17,004 and Medeiros failed to comply. As a result, the Board informed him that beginning in the 1995-96 school year it would make deductions from his pay in order to reimburse itself for that amount for the period in question.

by a student at Ferris the previous May. McGill maintained that since his client's absences were due to a work-related incident, and were not personal sick leave, there should be no reduction in his client's accumulated sick days.

In a letter dated November 7, 1994, Granick responded that since Medeiros had been medically cleared to return to work on May 19, 1994, all of his subsequent days of absence were considered by the Board to be related to personal illness only. In addition, the Ferris High School principal, Terence Matthews, also sent a letter to McGill drawing counsel's attention to the "personal illness" notation contained at the bottom of the leave of absence form submitted in September.

In March 1995 Matthews wrote to advise Medeiros that since the school district had never received any request for an extension of approved leave beyond January 2, 1995, and Medeiros had remained absent from his employment, he would be considered "absent without leave" after that date. Matthews directed the petitioner to forward a new leave request immediately. In May 1995, Granick wrote to advise Medeiros that despite Matthews's letter, by error he had been paid full salary between January 3, 1995, and March 15, 1995, even though during that time he was neither at work nor absent on an approved leave. Granick calculated the overpayment to amount to slightly more than $17,000 and requested that Medeiros make necessary arrangements for its repayment. She further indicated that when petitioner returned to work the Board would hold his salary at the 1994-95 level until the "overpayment" issue had been resolved. Thereafter, in response to a letter from McGill disputing the alleged "overpayment," Granick reiterated that since Medeiros had never filed any request for an extension of his leave beyond January 2, 1995, the Board had no option other than to consider him to be "absent without leave" since then.

In September 1995 Medeiros returned to work, but the Board began to withhold his salary increment because of his absences since May 18, 1994. In his petition of appeal (filed June 19, 1995) Medeiros had challenged that anticipated withholding

action. Thus, as noted above, this count is not subject to the Board's motion to dismiss since it was timely filed.[2]

DISCUSSION

This case revisits a subject which has been addressed by the Commissioner, the State Board and the courts on previous occasions, namely, the inter-relationship between work-related injury claims under *N.J.S.A.* 18A:30-2.1 and the workers' compensation laws, and the timing of those claims *vis-à-vis* the 90-day rule contained in *N.J.A.C.* 6:24-1.2(c). Thus, in its decision in *Verneret v. Board of Education of Elizabeth*, 92 *N.J.A.R.*2d (EDU) 191, *modified and aff'd*, 95 *N.J.A.R.*2d (EDU) 134, the State Board "clarified" what it believed to have been some existing confusion in this area by holding that even if an alleged work-related injury also is the subject of a workers' compensation petition, a school law claim under *N.J.S.A.* 18A:30-2.1 still must be filed within 90 days under *N.J.A.C.* 6:24-1.2(c). Previous Commissioner and State Board decisions apparently were not clear in that respect and were construed by some to mean that a school law claim need not be filed until after the workers' compensation case was decided. *See, e.g., Tompkins v. Hamilton Bd. of Educ.,* 11 *N.J.A.R.* 520 (1986). The *Verneret* decision flatly rejected that view and held that although the school law claim could be deferred pending the outcome of the workers' compensation case, the petition of appeal still had to be timely filed in accordance with the education regulations. *See also Sweet v. Jackson Bd. of Educ.*, Comm'r. of Educ. (May 26, 1995), aff'd and modified, State Bd. of Educ. (Nov. 1, 1995).

In the instant case, Medeiros's petition of appeal was filed with the Commissioner on June 19, 1995, which was 223 days after he was notified of the Board's denial of his claim and 164 days after the State Board's decision in the *Verneret* case. Thus, the two questions originally before me as a result of the Board's motion were as follows: (1) Does the ruling in *Verneret* apply prospectively as of the date of its decision (1/4/95) to Medeiros; and (2) If so, should the filing of Medeiros's

[2] Since the improper-withholding-of-increment claim made by Medeiros is to be tried, the instant motion is for partial summary decision only. Both counsel agree that the hearing should await the outcome of the Commissioner's decision on the motion.

petition on June 19, 1995 (164 days after 1/4/95) be excused by the Commissioner pursuant to *N.J.A.C.* 6:24-1.15?

Before I address these two issues it is necessary for me first to discuss a third issue which I raised, *sua sponte*, after the Board's motion for partial summary decision was filed, to wit, whether the State Board decision in *Verneret* constituted adjudicative "rulemaking" in violation of the requirements of the Administrative Procedure Act (APA) and the principles set forth by the New Jersey Supreme Court in *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313 (1984). In other words, did the State Board fail to comply with the public notice, comment and other salutary provisions of the APA? I will address this issue first.

Pursuant to *N.J.S.A.* 52:14B-1 to -15, prior to the adoption of a rule an agency first must provide public notice of its intent to issue the rule and afford interested parties a reasonable opportunity to submit data, views or arguments respecting the proposal. *See N.J.S.A.* 52:14B-4. Although administrative rules are defined as agency statements of general applicability and continuing effect that implement or interpret law or policy (see *N.J.S.A.* 52:14B-2(e)), as a general proposition agency decisions in contested cases flowing from the quasi-judicial exercise of administrative agency authority specifically are excluded from the definition. *See N.J.S.A.* 52:14B-2(e)(3). Since the State Board decision in *Verneret* falls into that excluded category, conceivably there is no further need to address this issue. However, our courts have held that <u>in some cases</u> agency decisions are so closely related to rulemaking that if the agency fails to acknowledge the rulemaking aspect of the case by seeking to apply its decision and findings beyond the parties to the litigation itself, the agency's action may have to be evaluated under the principles laid down in the *Metromedia* case. *See* 37 *New Jersey Practice, Administrative Law and Practice*, §§ 34, 80 and 81 (Steven L. LeFelt) (1995 Supplement). That is the issue which I asked the parties to address in supplemental briefs.

In *Metromedia* the Supreme Court prescribed six factors to be applied when determining whether agency action constitutes rulemaking which must conform to the requirements of the APA. These factors are whether the agency action:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [97 *N.J.* at 331-32.]

These six factors are implicated whenever an agency's authority to act without conforming to the formal rulemaking requirements is questioned. *See John Doe v. Poritz*, 142 *N.J.* 1, 97 (1995) (citing *Woodland Private Study Group v. Department of Envtl. Protection,* 109 *N.J.* 62, 67 (1987)). Although not all of the *Metromedia* factors need be present to characterize agency action as rulemaking, the factors should not merely be tabulated, but weighed. *See In re Solid Waste Util. Customer Lists,* 106 *N.J.* 508, 518 (1987). In addition, "[t]hese relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making . . . ." *Metromedia, supra,* 97 *N.J.* at 332.

In this matter, it is evident that the State Board's holding in *Verneret*, which requires any petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 to file a petition with the Commissioner within 90 days of the district board's action denying such benefits, is intended: (1) to have wide coverage; (2) to be applied uniformly; and (3) to operate prospectively. However, the remaining *Metromedia* factors seem to weigh in favor of the view that *Verneret* does not constitute adjudicative rulemaking.

The fourth *Metromedia* factor is whether *Verneret* "prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization." *Metromedia*, *supra*, 97 *N.J.* at 331. The ruling announced in *Verneret* regarding the 90-day rule is explicitly contained at *N.J.A.C.* 6:24-1.2(c). Since the Commissioner and the State Board were empowered by the Legislature to adopt a regulation establishing a 90-day limitation period for school personnel to file disputes under the school laws, the holding of *Verneret* cannot be regarded as outside the scope of the State Board's power. *See Kaprow v. Berkeley Bd. of Educ.*, 131 *N.J.* 572, 582 (1993) ("The Legislature's broad delegation of power to the Commissioner and the State Board, particularly *N.J.S.A.* 18A:6-26, encompasses the authority to establish a time limitation for the resolution of disputes under the school laws"). In addition, *Verneret* does not deviate from the explicit language of the regulation itself; instead, it merely represents a restatement of the limitations period contained at *N.J.A.C.* 6:24-1.2(c). Therefore, the fourth *Metromedia* factor is not satisfied.

The fifth factor requires consideration as to whether *Verneret* "reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter . . . ." *Metromedia, supra*, 97 *N.J.* at 331. The holding in *Verneret* fails to satisfy either of these two component factors.

First, *Verneret* arguably reflects a policy that <u>was</u> clearly expressed in an official and explicit manner for many years, as evidenced by the language contained in *N.J.A.C.* 6:24-1.2(c), *i.e.*, that a petition must be filed within 90 days of the district board's action denying benefits.[3] Second, the case law relied upon by the petitioner did not adequately represent a clear and definitive past agency position on the subject of filing requirements for a claim pursuant to *N.J.S.A.* 18A:30-2.1.

[3] Indeed, Judge Ospenson, the administrative law judge who heard *Verneret* in 1991, presciently decided that the 90-day rule did apply and perceived no reason to excuse the late filing there. Apparently, he was not at all "confused" by the prior decisions.

Nevertheless, Medeiros contends that *Verneret* does represent a material and significant change from a clear, past agency view of the identical subject matter and relies upon *Tompkins, supra*, for the proposition that the Commissioner generally would refrain from ruling on a claim filed pursuant to *N.J.S.A.* 18A:30-2.1 until a determination was rendered by the Division of Workers' Compensation. As a result, Medeiros claims that the prior case law did not require him to file a claim until the Division rendered its decision. However, as noted, *Tompkins* was not clear on the issue of filing requirements for petitions claiming benefits under *N.J.S.A.* 18A:30-2.1. Indeed, *Tompkins* only added to the alleged confusion surrounding filing requirements for claims under *N.J.S.A.* 18A:30-2.1. *See Verneret, supra*, 95 *N.J.A.R.*2d (EDU) at 135.

Nor did *Tompkins* directly address the filing requirements of *N.J.A.C.* 6:24-1.2(c). Instead it dealt with a jurisdictional question regarding the Commissioner's role in determining the validity of a claim under *N.J.S.A.* 18A:30-2.1. The 90-day rule was not directly at issue in that case. Thus, even though *Tompkins*, along with other cases, can be read to imply that a petition need not be filed until after the Division rendered a decision, the filing requirements pertaining to a claim for benefits under *N.J.S.A.* 18A:30-2.1 were not definitively settled until *Verneret* was decided. *See also Airwork Serv. Div. v. Director, Div. of Taxation*, 97 *N.J.* 290, 301 (1984).

Finally, the sixth *Metromedia* factor is inapplicable because *Verneret* does not "reflect a decision on administrative regulatory policy in the nature of the interpretation of law or general policy." *Metromedia, supra*, 97 *N.J.* at 331-32. *Verneret* is not an administrative policy on how best to apply a broad statutory grant of authority. In addition, the State Board's decision clearly was not an announcement of a policy that was adopted without statutory authorization. Instead, *Verneret* may be characterized essentially as a reaffirmation of the regulatory requirements already in an existing regulation, as well as an expression of intent on the part of the State Board fully to comply with the plain meaning contained in that provision. *See, e.g., Radiological Soc. v. N.J. State Dep't of Health*, 208 *N.J. Super.* 548, 559 (App. Div. 1986) (indicating that a policy statement by the Department of Health was not rulemaking, but instead, "was

simply a re-affirmation of the certificate of need requirements already enunciated in existing regulations . . . , and an announcement giving notice and fair warning that the [Hospital Rate Setting] Commission intended to fully enforce the law"). In sum, *Verneret* represents a clarification and reiteration of the plain meaning of *N.J.A.C.* 6:24-1.2(c), and therefore its holding is not an administrative rule that must conform to the requirements of the APA.

THE 90-DAY RULE ISSUES

Medeiros's petition seeks reinstatement of his accumulated sick days for absences from work beginning May 19, 1994, together with continuation of his salary subsequent to January 2, 1995. As noted, the Board contends that his claims for reinstatement and continuation of his salary should be dismissed as untimely pursuant to *N.J.A.C.* 6:24-1.2(c) and that no compelling circumstances exist pursuant to *N.J.A.C.* 6:24-1.15 to relax the rule.

I believe for the reasons which follow that the filing of the petition of appeal in this case on June 19, 1995, was untimely under *N.J.A.C.* 6:24-1.2(c), even though I agree with petitioner that at the time he was injured at work in May 1994 the existing case law seemed to indicate that in situations where entitlement to relief under *N.J.S.A.* 18A:30-2.1 might exist, the Commissioner should defer exercising his school law jurisdiction pending a determination of the work-related nature of the injury by the Division of Workers' Compensation. Thus, Medeiros is entitled to claim that until the State Board's modification in *Verneret* he reasonably could rely upon the prior case law to support his belief that no claim had to be filed until after the Division of Workers' Compensation acted.

However, *Verneret* was decided by the State Board of Education on January 4, 1995, and squarely held that a petitioner is not to be excused from complying with the 90-day rule, even in those instances where the Commissioner chooses to defer exercising his jurisdiction to hear the claim until the issue of the work-related nature of any injury has been decided by the Division of Workers' Compensation. Indeed, in the

Verneret decision itself, the State Board directed the Commissioner to apply the decision on a prospective basis only to the litigants.

Unfortunately, the State Board did not elaborate further on what it meant by directing application of its holding on a "prospective" basis. Thus, *Verneret* arguably can be read to apply to all causes of action which like Medeiros's claim arose before the date of the decision. In other words, although Medeiros's cause of action arose on November 7, 1994, when he was informed of the Board's rejection of his position, since *Verneret* was not decided until January 4, 1995, and 90 days had not yet elapsed, arguably one view could be that he still had almost one month, until February 5, 1995, to file his claim. On the other hand, if *Verneret* does not apply to injuries which arose before the date of the decision, any petition filed within 90 days of the decision (April 2, 1995) could be deemed to be timely. Of course, even if this approach were taken in this case, unless the 90-day rule is relaxed the claim still would be barred since the petition was not filed until June 19, 1995, which was well beyond the expiration of the 90-day period.

Generally, the New Jersey Supreme Court has followed the traditional rule that the overruling of past precedent is retrospective in nature. *See Fischer v. Canario*, 143 *N.J.* 235, 243 (1996); *Darrow v. Hanover Tp.*, 58 *N.J.* 410, 412-13 (1971). Whether a decision applies retroactively requires a consideration of three questions: (a) does the decision constitute a new principle of law; (b) what is the purpose of the newly announced rule and would retroactive application further that purpose; and (c) would retroactive application be unfair to those who reasonably relied upon the old rule? *See, e.g., Frazier v. New Jersey Mfrs. Ins. Co.*, 142 *N.J.* 590, 606 (1995); *Rutherford Educ. Ass'n v. Rutherford Bd. of Educ.*, 99 *N.J.* 8, 23 (1985). The controlling factor in determining whether *Verneret* should be applied prospectively to Medeiros is whether reasonable reliance had been placed upon the past precedent. *See, e.g., Manturi v. V. J. V., Inc.*, 179 *N.J. Super.* 300 (App. Div. 1981).

A particularly instructive case regarding prospective application of a judicial decision because of reasonable reliance involved the impact of the decision upon a

statute of limitations. *See Chevron Oil Co. v. Huson*, 404 *U.S.* 97, 92 *S. Ct.* 349, 30 *L. Ed.* 2d 296 (1971). In that case a new interpretation of a period of limitations was restricted to a prospective application because a long line of precedents supported a prior view of the law. The plaintiff filed an action in 1968 for personal injuries he sustained about two years earlier on the defendant's off-shore oil rig. While his case was pending, the United States Supreme Court ruled that state law remedies, rather than admiralty law, were to be applied to such actions. *See Rodrigue v. Aetna Casualty & Surety Co.*, 395 *U.S.* 352, 89 *S. Ct.* 1835, 23 *L. Ed.* 2d 360 (1969). As such, the limitations period was changed from the admiralty law principle of laches to any specific period defined by applicable state law. Thus, in the *Huson* case, the change effectuated by the decision in *Rodrigue* resulted in the application of a one-year statute of limitations and plaintiff was determined by the lower courts to have filed out of time. However, on appeal, the U.S. Supreme Court determined that the one-year statute should not be applied retroactively because *Rodrigue* overruled a long line of precedent, and at the time plaintiff was injured and for the next two years until he filed his lawsuit, not to mention the ensuing year of pretrial proceedings, prior judicial decisions continued to represent the law governing the case. Thus, the Supreme Court reasoned that it could not be assured that the plaintiff could foresee that the consistent interpretations which held that the laches doctrine governed would be overturned. In addition, the Supreme Court observed that termination of the cause of action on the basis of the one-year statute of limitations, if applied retroactively, would frustrate the salutary purposes of the federal law governing compensation for injury suffered on off-shore oil rigs.

Similarly, in the instant case, *Verneret* may be applied prospectively to Medeiros since, at the time he received a denial of his claim (November 7, 1994), the decision in *Tompkins* and other cases arguably represented the law governing matters of this sort. Although the Board argues that Medeiros should have recognized that the prior law dealt with petitions filed in timely fashion, I have determined to give petitioner the benefit of the doubt in this respect and use the date of January 4, 1995, as the "trigger" for the 90-day rule.

Nevertheless, while I somewhat reluctantly agree that Medeiros was entitled to interpret prior case law to the effect that he did not have to file his claim until after the Division of Workers' Compensation made a determination, once the State Board decided *Verneret* the basis for that reliance entirely disappeared. *See, e.g., Manturi, supra*, 179 *N.J. Super.* at 306. Thus, unless the 90-day rule is waived or relaxed, the filing by Medeiros of his petition on June 19, 1995, was substantially out of time.

Medeiros claims that even if I determine, as I have, that he should have filed with the Commissioner in early April 1995, pursuant to *N.J.A.C.* 6:24-1.15 the rule should be relaxed because of the particular circumstances that exist here. In particular, his counsel argues that distribution of the State Board decision, insofar as availability to the general bar is concerned, did not occur until "late March 1995" and it is not until then that the 90 days should begin.[4]

Medeiros's insistence that the rule should be relaxed because of the delayed timing of the publication of the State Board decision must be rejected. First, where the courts have given a prior decision prospective effect, the relevant date for beginning to apply the decision invariably has been the date it was rendered - not the date it was published. *See, e.g., Coons v. American Honda Motor Co., Inc.*, 96 *N.J.* 419 (1984), *cert. denied*, 469 *U.S.* 1123, 105 *S. Ct.* 808, 83 *L. Ed.* 2d 800 (1985); *DiFalco v. Subaru of America, Inc.*, 244 *N.J. Super.* 530 (App. Div. 1990), *appeal dismissed*, 130 *N.J.* 585 (1992). So, too, in *Smith v. New Brunswick Board of Education*, 1978 *S.L.D.* 214, the Commissioner held that the operative date of a regulation was the date it was promulgated and filed, not the date it was published.

Secondly, case law has established that application of the relaxation rule is very sparingly granted and occurs only where compelling circumstances to do so exist. *See, e.g., Boles v. Bergen County Vocational Sch. Bd.*, 92 *N.J.A.R.*2d (EDU) 554, 556. In my view the facts of the instant case do not qualify for the exceptional application of the relaxation rule. For example, as noted by the administrative law judge (ALJ) in

[4] No specific identification was made by counsel with respect to when, in fact, the *Verneret* decision actually became available during March. Indeed, since the petition was not filed until June 19, 1995, public distribution and availability of the decision prior to March 19, 1995, would have required a filing before June 19, 1995.

Raymond v. River Edge Board of Education, 94 *N.J.A.R.*2d (EDU) 203, at 206-07, *aff'd*, 94 *N.J.A.R.*2d (EDU) 431, "Clearly, the Commissioner can relax *N.J.A.C.* 6:24-1.2 if a strict application of the rule is inappropriate, unnecessary, or causes injustice, and has done so in the past. However, the Commissioner has found such 'unusual and compelling circumstances to warrant such relief' in only a limited number of cases" (citations omitted).

Similarly, in his decision in *Portee v. Newark Board of Education*, 94 *N.J.A.R.*2d (EDU) 381, at 383-84, the ALJ noted that the 90-day requirement "has been strictly construed by the Commissioner of Education, the State Board of Education and the Courts. . . . This [relaxation] rule gives the Commissioner broad discretion. Even so, since the holding in *Riely* [v. Board of Education of Hunterdon County Regional School District, 173 *N.J. Super.* 109 (App. Div. 1980)], the Commissioner, the State Board of Education, and the courts have read *N.J.A.C.* 6:24-1.2 very strictly and have applied it almost without exception. The Commissioner has indicated that the relaxation authorized in *N.J.A.C.* 6:24-1.15 is reserved for limited situations wherein a compelling reason can be demonstrated for expanding the limitation period."

The ALJ in *Portee* went on to observe that in *Dreher v. Jersey City Board of Education,* OAL Dkt. No. EDU 2777-87 (Dec. 18, 1987), *aff'd*, Comm'r of Educ. (Feb. 2), *aff'd*, State Board of Educ. (July 8, 1988), the filing of a petition just two days after the time expired was determined to be out of time and relaxation was not necessary. *See also Bogart v. East Orange Board of Educ.*, OAL Dkt. No. EDU 6245-82 (Jan. 26), *aff'd*, Comm'r of Educ. (March 14, 1983); *Weir v. Board of Educ. of Northern Valley Reg. High Sch. Dist.*, OAL Dkt. No. EDU 8609-83 (June 7), *aff'd*, Comm'r of Educ. (July 20, 1984), *aff'd*, State Board of Educ. (March 6, 1985), *aff'd*, No. A-3520-84T6 (App. Div. April 9, 1986).

As noted in cases like *Dreher, Bogart* and *Weir*, the instances wherein the Commissioner has relaxed the rule have been limited strictly to situations where a particularly compelling reason is advanced for expansion of the time limit, such as the existence of a genuine constitutional issue or the presence of a matter of significant

public interest beyond that of only the parties themselves. No such reasons exist in this case. Thus, even if I give petitioner the benefit of several doubts (which I have), since the 90-day time period arose on January 4, 1995, I see no basis to validate the filing of a petition of appeal on June 19, 1995, 164 days later.

CONCLUSION AND ORDER

Accordingly, there being no reason for me to recommend to the Commissioner that the requirements of the 90-day rule be relaxed pursuant to *N.J.A.C.* 6:24-1.15, the Board's motion for partial summary decision as to the two claims subject to the provisions of *N.J.A.C.* 6:24-1.2(c) is **GRANTED**.

In light of my determination, and subject to the Commissioner's review, I shortly will be in touch with counsel in order to schedule potential hearing dates for the remaining issue in the case, the withholding of Medeiros's 1995-96 increment.

This order granting partial summary decision is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who, by law, is authorized to make the final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days and unless such time is otherwise extended, this recommended order shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 18 1996
DATE

Stephen Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

6/21/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 24 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mh

OAL DKT. NO. EDU 7611-95

PAUL MADEIROS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE - OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON ORDER
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner's claims pursuant to *N.J.S.A.* 18A:30-2.1 are properly dismissed as untimely, and that petitioner provides no cause to relax the 90-day rule pursuant to *N.J.A.C.* 6:24-1.15.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and partial summary judgment is granted to the District as to the two claims subject to the provisions of *N.J.S.A.* 18A:30-2.1. This matter will go forward at the OAL on the remaining issue of the withholding of petitioner's 1995-96 increment.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 5, 1996

DATE OF MAILING AUGUST 5, 1996

341-96

EDU #7611-95
C # 341-96
SB # 62-96

PAUL MEDEIROS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 5, 1996

For the Petitioner-Appellant, Dennis L. McGill, Esq.

For the Respondent-Respondent, Charlotte A. Kitler, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

342-96

342-96

ANGELA ROTELLA-SUAREZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured teaching staff member, alleged Board was wrongfully deducting her time absent from employment from her accumulated sick leave, contrary to *N.J.S.A.* 18A:30-2.1. Petitioner contended she was absent due to the allegedly unsafe environment caused by the installation of a heating, ventilation and air conditioning system at the school at which she was assigned. Board contended petitioner failed to comply with Judge's orders to submit to medical examination.

ALJ determined that petitioner willfully and deliberately disregarded discovery orders. ALJ noted *N.J.S.A.* 18A:16-2 clearly states that a board may require an employee to submit to a medical examination and that such examination may include flouroscopic or x-ray procedures. Petitioner disregarded two orders for examination. Thus, ALJ granted Board's motion to dismiss. ALJ denied motion for the imposition of costs on petitioner. ALJ dismissed petition with prejudice.

Commissioner determined that petitioner did not meet her burden of proof with regard to the claims she brought against the Board and consistently failed to follow reasonable and necessary discovery orders. Commissioner adopted initial decision as his own. Petition was dismissed.

AUGUST 5, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4233-95
AGENCY DKT. NO. 73-4/95

ANGELA ROTELLA-SUAREZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, P.A., attorneys)

Frank A. Blandino, Esq., for respondent,
(Scarinci & Hollenbeck, attorneys)

Record Closed: May 6, 1996 Decided: June 19, 1996

BEFORE: **DIANA C. SUKOVICH**, ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

On April 3, 1995, Angela Rotella-Suarez (Suarez or petitioner) filed a petition with the Department of Education (DOE). Suarez, a tenured teaching staff member employed by the Board of Education of the Town of West New York (Board or respondent), alleged that, commencing October 1994, she began experiencing ill health resulting from the installation of a heating, ventilation, and air conditioning system at the school at which she was assigned, School No. 5. Petitioner also alleged

that the situation worsened until on or about January 4, 1995 and that she was unable to report to work due to her argued medical conditions, which, she claimed, included breathing difficulties, headaches, nausea, laryngitis, dizziness, difficulty swallowing, sinus pain, and a dry skin rash. Finally, Suarez claimed that respondent had been deducting her time absent from employment from her accumulated sick leave, contrary to *N.J.S.A.* 18A:30-2.1. Petitioner requested that the Commissioner of the DOE (Commissioner) order that respondent provide Suarez with her full salary for one year or until such time as she was medically able to return to work, restore to her accumulated leave sick time that time deducted therefrom by the Board on account of the alleged illness, and transfer petitioner ". . . to a school that will provide her with a safe environment." (Petition, page 2). The Board filed an answer on October 31, 1995, essentially denying that petitioner was absent as a result of a personal injury caused by an accident arising out of and in the course of her employment.

On April 26, 1995, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. It was subsequently assigned to the Honorable Ken R. Springer.

On September 18, 1995, the Board filed a motion to compel petitioner to submit to a medical examination. Conferences were conducted before Judge Springer in September 1995, and he issued a prehearing order on September 28, 1995, referencing, in part, respondent's September 18, 1995 motion.

Petitioner filed an amended complaint with the Commissioner on September 28, 1995. She included a second count, alleging that her argued condition constituted a handicap pursuant to the New Jersey Law against discrimination, *N.J.S.A.* 10:5-1 *et seq.*, and that she requested, but was denied, a reasonable accommodation due to the argued handicap. Respondent filed an answer to the amended complaint on October 31, 1995, denying Suarez's allegations.

On September 29, 1995, Judge Springer issued an order granting respondent's motion for a medical examination of petitioner. Judge Springer ordered that Suarez appear for an independent medical examination (IME) before a physician selected by respondent, within thirty days from the date of his order, and that upon a failure by petitioner to comply with the order, respondent could move for appropriate sanctions pursuant to *N.J.A.C.* 1:1-10.5 and 14.14.

Petitioner did not appear for an IME before a physician selected by respondent within thirty days of Judge Springer's order, and the Board filed a motion for sanctions on November 8, 1995. The Board sought dismissal of the petition or, alternatively, an order suppressing petitioner's claims, excluding evidence of her alleged medical conditions, and awarding costs. Petitioner filed a reply on November 15, 1995.

Judge Springer subsequently notified the parties of his recusal, on November 13, 1995, and the case was thereafter reassigned to this judge in December 1995. I requested that the parties clarify certain portions of their briefs. Respondent did so on January 5 and 26, 1996.

I issued an order on respondent's motion on March 18, 1996, directing that petitioner appear for a medical examination with Dr. Leonard-Hudgins (Leonard-Hudgins), or another physician selected by respondent, no later than April 22, 1996, that upon a failure by petitioner to comply with the order, her petition would be dismissed with prejudice, and scheduling hearings for September 24 and 25, 1996.

On April 18, 1996, the Board filed a motion for dismissal of Suarez's petition and the imposition of costs on her. Petitioner filed a reply to the motion on May 1, 1996; and the Board, a response thereto, on May 6, 1996, on which date the record was closed.

FINDINGS OF FACT

My March 18, 1996 order set forth findings of fact, based upon a review of the documents which had been filed in reference to the Board's November 8, 1995 motion. Those findings are incorporated herein and will be restated in this decision. I also make findings based upon the documents filed pertinent to the Board's April 18, 1996 motion.

Based upon a review of the entire record, I **FIND** the following to be facts.

An appointment was scheduled for petitioner to be examined by Leonard-Hudgins at 9:00 a.m. on October 26, 1995. On October 23, 1995, Frank A. Blandino (Blandino), counsel for the Board, spoke by telephone with Sanford Oxfeld (Oxfeld), petitioner's counsel, to confirm that Suarez would submit to the medical examination ordered by Judge Springer. During this conversation, Blandino learned that petitioner, against Oxfeld's direction, was intending to cancel the scheduled examination with Leonard-Hudgins. Blandino spoke with individuals in the physician's office on October 25, 1995, ascertaining that petitioner had, in fact, canceled the appointment which had been scheduled for October 26, 1995. On the latter date, Blandino again spoke with an individual in Leonard-Hudgins's office and reconfirmed that petitioner had canceled the appointment and did not reschedule another one.

By letter dated October 20, 1995, to Oxfeld, regarding the October 26, 1995 scheduled appointment, petitioner stated reasons why she opposed any examination and, specifically, one by Leonard-Hudgins. Petitioner stated that she believed an examination was unnecessary and redundant, questioning the purpose of the examination, in light of the fact that she was previously absent from her employment with respondent from approximately late December 1994. Petitioner also noted that she was "briefly examined" by Leonard-Hudgins in January 1995, asserting concerns regarding the fact that he apparently is the worker's compensation attorney for

respondent. (Petitioner's letter, page 1). Petitioner also raised argued concerns regarding Leonard-Hudgins's competency, allegedly based on Suarez's experience with the physician on January 19, 1995, and petitioner's argued strained relationship with the physician and his office staff. Petitioner also stated that she canceled a scheduled October 20, 1995 examination because she was 'advised by my attorney to cancel until the attorneys could work things out." (*Id.* at p. 2). Petitioner concluded: "I have not changed my mind about taking that test, so lets not waste anyone's time. She got all the information in January.' (*Id.* at p. 3).

On March 28, 1996, Blandino scheduled an appointment for Suarez with Leonard-Hudgins for Monday, April 8, 1996, at 9:00 a.m. Blandino confirmed the appointment with Oxfeld by telephone conference and correspondence that same day.

On April 8, 1996, Blandino spoke by telephone with personnel in the office of Leonard-Hudgins, learning that Suarez had appeared for the scheduled IME but refused to undergo certain testing. Specifically, Blandino was informed by an employee of Leonard-Hudgins, referred to as "Nancy," that as Nancy brought petitioner in for testing, she (Nancy) informed Suarez that petitioner would first undergo what was referred to as pulmonary testing and, then, a chest X-ray. Suarez was advised that the pulmonary test would involve petitioner inhaling and blowing out into a tube and mouthpiece and that the mouthpiece would be changed. Suarez refused to do so and left the physician's office. Suarez refused to take the pulmonary test, viewing it as being "intrusive," and refused to take the X-ray because she felt it would subject her to unnecessary radiation.

On April 8, 1996, Blandino left a telephone message with Oxfeld's office regarding petitioner's failure to undergo a medical examination. On April 10, 1996, Blandino, by facsimile transmission, requested of Oxfeld that petitioner withdraw her petition. Blandino spoke by telephone with Oxfeld on April 11, 1996 regarding the matter and a request by Oxfeld to have petitioner provide an affidavit. Blandino agreed to not file a motion seeking relief for one week. Blandino received an affidavit executed by petitioner on April 17, 1996.

DISCUSSION

A board of education is mandated to require all of its employees to undergo a physical examination at least annually and may require psychiatric or physical examinations of any employee whenever, in the judgment of the board of education, an employee shows evidence of deviation from normal physical or mental health. Any examination may, if the board approves, include laboratory tests or fluroscopic or X-ray procedures. *N.J.S.A.* 18A:16-2.

The purpose of discovery is to facilitate the disposition of cases. Regulations applicable to discovery in administrative proceedings are designed to achieve such purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary. *N.J.A.C.* 1:1-10.1(a).

The presiding judge may impose sanctions for a failure to comply with requirements regarding discovery. *Id.* at §10.5. In general, for an unreasonable failure to comply with any order of a judge, the judge may dismiss or grant a motion or application, suppress a defense or claim, exclude evidence, order costs or reasonable expenses, or take other appropriate case-related action. *Id.* at §14.14. Dismissal is an extreme sanction which should be imposed when discovery misconduct is deliberate and contumacious, evidencing a willful, deliberate disregard of discovery orders. *Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc.*, 139 *N.J.* 499 (1995) (*Abtrax*). An order or ruling of a presiding judge may generally be reviewed interlocutorily by the agency head at the request of a party. *N.J.A.C.* 1:1-14.10.

As discussed in my order of March 18, 1996, petitioner's October 20, 1995 letter contained bald assertions which were not supported by certifications. In addition, petitioner raised no issues which should not have been known by her as of September 1995, when respondent filed its initial motion to compel a medical examination. Such arguments should have been raised before Judge Springer. Petitioner did not

thereafter seek relief from Judge Springer's order of September 29, 1995 by requesting interlocutory review thereof. Suarez was therefore bound by the terms of that order. Petitioner's action at that time indicated a willful disregard of Judge Springer's discovery order.

The Board has the statutory authority, whether or not a contested case was initiated by either party, and irrespective of pertinent discovery regulations, to require petitioner to undergo a physical examination in this instance, pursuant to *N.J.S.A.* 18A:16-2. In addition, a physical examination, on its face, is a reasonable means of discovery in the current matter in light of the nature of Suarez's claims. In light of those claims, a pulmonary test and chest X-ray are reasonable, on their face. Petitioner's characterization of the pulmonary test as "intrusive" is not supported by her certification. In any event, respondent has the authority to require such testing, pursuant to *N.J.S.A.* 18A:16-2. Suarez's certification to the effect that she complied with this judge's order to submit to a medical examination, but not to any specific tests, is without merit. An examination includes tests deemed to be necessary by the physician in question.

Petitioner's counsel again advances on her behalf arguments regarding the necessity of any examination whatsoever. That issue was previously addressed by Judge Springer and by me and for the reasons indicated, I am persuaded that such is reasonable. Suarez's actions subsequent to the issuance of Judge Springer's order evidence a willful, deliberate disregard of discovery orders, thereby justifying the extreme penalty of dismissal of her claims. *Abtrax, supra.* The discovery sought by the Board is resonable and would, on its face, facilitate the disposition of the current matter.

I am persuaded, for the foregoing reasons, that the Board's motion to dismiss should be granted. However, after considering the matter, I am also persuaded that costs should not be imposed. Dismissal of the petition, with prejudice, provides a sufficient remedy to the Board.

CONCLUSIONS

I **CONCLUDE** that petitioner has evidenced a willful, deliberate disregard of discovery orders, that her petition, filed with the DOE on April 3, 1995, should be dismissed with prejudice, that the Board's motion to dismiss the petition should be granted, and that respondent's motion for the imposition of costs on petitioner should be denied.

ORDERS

It is hereby **ORDERED** that the Board's motion for dismissal be and is hereby **GRANTED**, that respondent's motion for the imposition of costs on petitioner be and is hereby **DENIED**, and that the petition filed by Suarez with the DOE on April 3, 1995 be and is here hereby **DISMISSED WITH PREJUDICE**. Finally, it is hereby **ORDERED** that the hearings previously scheduled for September 24 and 25, 1996 be and are hereby adjourned.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

6/21/96

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 24 1996

DATE

Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

al

ANGELA ROTELLA-SUAREZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. Petitioner then filed supplemental exceptions on July 12, 1996. In that these were filed outside of the above-cited regulatory time frame, they are not considered herein. Reply exceptions were timely filed by the Board. *

Petitioner's exceptions state that petitioner did not willfully disregard discovery orders and, therefore, the Administrative Law Judge (ALJ) erred in dismissing the within case. Petitioner avers that

> ***pursuant to the ALJ's Order [she] did see Dr. Hudgins. Quite to the contrary to Petitioner's expectations, Petitioner never in fact met with Dr. Hudgins on the date in question. Rather, she was informed that she would have to take a pulmonary test and have a chest x-ray. As the [ALJ's] prior Order did not direct that Petitioner have what Petitioner considered to be intrusive tests,

* Although the Board's reply exceptions were received by the Commissioner on July 23, 1996, the Commissioner has accepted them as timely filed, pursuant to *N.J.A.C.* 1:1-18.4(d), based upon the Board attorney's certification submitted therewith which contends that petitioner's exceptions were received by him on July 18, 1996. The certification explains that his receipt was delayed after exceptions were forwarded to him following a substitution of attorney.

Petitioner declined to participate in these tests.*** (Petitioner's Exceptions at p. 2)

Further, petitioner avers that the ALJ did not direct petitioner to undergo flouroscopic or x-ray procedures although *N.J.S.A.* 18A:16-2 authorizes a board of education to include such tests in medical examinations. Had the Judge's Order so required, she avers, "then Petitioner would have been aware that her refusal to undergo the requested procedures could have dire consequences." (Petitioner's Exceptions at p. 3)

Lastly, petitioner excepts that because an Order of Dismissal is "the most severe sanction that can be imposed, ***it is irregular at the very best for Petitioner's case to be dismissed when Petitioner did not violate or refuse to follow the ALJ's Order*** and, further, that the ALJ "has not been sympathetic to Petitioner's position from the very outset." (*Id.* at p. 4) Thus, petitioner contends that the Board should be given an opportunity to have the court sign an order directing petitioner to undertake the specific procedures in question, reserving dismissal for the juncture when and if petitioner refuses the procedures after being ordered to take them. (*Id.* at p. 5)

In reply, the Board avers that the ALJ was correct when she determined this matter was ripe for dismissal in that, "***Petitioner flagrantly disobeyed not one judge's order, but two such orders" and "Petitioner's actions are at the least deliberate***." (Reply Exceptions at p. 3) The Board also discounts petitioner's argument that a medical evaluation would be fruitless because the exam results would fail to show petitioner's condition when she first instituted this action as "clearly without merit" (*Id.* at p. 4) The Board avers that had petitioner submitted to one of the *three* examinations requested by the Board as ordered in September 1995, petitioner's condition certainly would have been ascertained. (emphasis in text) (*Id.*) The Board further avers that petitioner's supplemental exceptions should not be admitted into this record as regulation does not provide for the admission of evidence outside of the 13-day deadline. (*Id.*)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the within petition must be dismissed. *N.J.S.A.* 18A:16-2 clearly states that a board may require an employee to submit to a medical examination and that such examination may include fluoroscopic or x-ray procedures. The Commissioner agrees with the ALJ, for the reasons stated, that petitioner's claim of compliance

with the Judge's Order to submit to a medical examination, but not to any specific tests, is without merit.

Accordingly, in accepting the factual findings of the ALJ, the Commissioner determines that petitioner did not meet her burden of proof with regard to the claims she brought against the Board and consistently failed to follow reasonable and necessary discovery orders. As such, the Commissioner finds dismissal is fully warranted in the instant matter.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL dismissing the within Petition of Appeal with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 5, 1996

DATE OF MAILING AUGUST 6, 1996

342-96

EDU #4233-95
C # 342-96
SB # 57-96

ANGELA ROTELLA-SUAREZ,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 5, 1996

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Allan C. Roth, Esq.

In April 1995, Angela Rotella-Suarez (hereinafter "petitioner"), a teaching staff member, filed a petition with the Commissioner of Education alleging that the Board of Education of the Town of West New York (hereinafter "Board") had failed to provide her with sick leave benefits under N.J.S.A. 18A:30-2.1 for a medical condition which she claimed was caused by a new heating, ventilation and air conditioning system at the school to which she had been assigned.[1] Petitioner claimed that her symptoms

[1] N.J.S.A. 18A:30-2.1, "Payment of sick leave for service connected disability," provides, in pertinent part:

> A. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such

12/3/97

included breathing difficulties, headaches, nausea, laryngitis, dizziness, difficulty swallowing, sinus pains and a dry rash, and that she was unable to report to work as a result of such condition. Petitioner subsequently filed an amended petition in which she also alleged that her condition constituted a handicap under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and that the Board had failed to provide her with a reasonable accommodation by transferring her to another school.

On September 29, 1995, an Administrative Law Judge ("ALJ") issued an order granting the Board's motion for a medical examination of petitioner. The ALJ directed petitioner to appear for an independent examination by a physician selected by the Board within 30 days of his order. The Board thereafter arranged for petitioner to be examined by Dr. Joan Leonard-Hudgins on October 26, 1995. Petitioner, however, did not appear for that examination, indicating in a letter to her attorney dated October 20 that she had previously been examined by Dr. Leonard-Hudgins as part of her workers' compensation claim and that she had been unwilling to submit to a pulmonary test. Petitioner expressed concern about the safety of such a procedure.

As a result of petitioner's failure to appear for the medical examination, the Board filed a motion for sanctions, seeking dismissal of the petition or, in the alternative, an order suppressing petitioner's claims and excluding evidence of her alleged medical condition. On March 18, 1996, a second ALJ assigned to the case after the first judge recused himself denied the Board's request to dismiss the petition,

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absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

stating that she was not persuaded that the petitioner had demonstrated a willful, deliberate disregard of discovery orders. However, the ALJ did issue an order directing petitioner to appear for a medical examination with Dr. Leonard-Hudgins or another physician selected by the Board by April 22, 1996. The ALJ indicated that the petition would be dismissed with prejudice if petitioner failed to comply with that order.

Petitioner thereafter submitted an affidavit in which she related that she had appeared at Dr. Leonard-Hudgins' office on April 8 for an examination as scheduled by the Board, but that she had been unwilling to submit to the pulmonary test or to be exposed to the "unnecessary radiation" of a chest x-ray. She indicated that her avoidance of such procedures was at the recommendation of her chiropractor. She also questioned the necessity for such "intrusive" procedures when she had not been exposed to the conditions which allegedly had caused her medical problems for over a year. As a result of petitioner's refusal to submit to medical tests, the Board filed a motion to dismiss the petition.

On June 19, 1996, the ALJ recommended granting the Board's motion, finding that petitioner had evidenced a willful, deliberate disregard of the discovery orders. The ALJ indicated that a physical examination was a reasonable means of discovery in light of the nature of petitioner's claims, and that a pulmonary test and chest x-ray were also reasonable procedures. She observed that the discovery sought by the Board would facilitate the disposition of this matter.

On August 5, 1996, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition.

Petitioner filed the instant appeal to the State Board.

After a careful review of the record, we dismiss the appeal for the reasons stated herein.

The threshold question under N.J.S.A. 18A:30-2.1 is whether a claimant's injury arose "out of and in the course of his employment." As we explained in Verneret v. Board of Education of the City of Elizabeth, decided by the State Board of Education, 95 N.J.A.R.2d (EDU) 134, 134-35, that question:

> ...is controlled by the standards established under the Workers' Compensation Act. See Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982). In those instances where entitlement to relief under N.J.S.A. 18A:30-2.1 is dependent upon whether the injury arose out of and in the course of employment within the meaning of N.J.S.A. 34:15-7 of that Act, the State Board has held that the Commissioner of Education should refrain from exercising his jurisdiction pending a determination of that issue by the Division of Workers' Compensation. Amos v. Board of Education of the Borough of Red Bank, decided by the State Board of Education, February 3, 1988; Tomkins v. Board of Education of the Township of Hamilton, decided by the State Board of Education, December 2, 1987. See City of Hackensack v. Winner, 82 N.J. 1 (1980); Forgash v. Lower Camden County School, 208 N.J. Super. 461 (App. Div. 1985).

Thus, although the Commissioner has jurisdiction over all disputes arising under the school laws, the exercise of his jurisdiction over claims arising under N.J.S.A. 18A:30-2.1 should be deferred pending a determination by the Division of Workers' Compensation of whether the claimant's injury was work-related. In this case, there is nothing in the record to confirm that the Division of Workers' Compensation has rendered such a determination.

The record indicates that petitioner had requested the ALJ to place her claim for benefits under N.J.S.A. 18A:30-2.1 in abeyance pending a determination by the

Division of Workers' Compensation. As related by the counsel for the West New York Board in a letter dated December 4, 1995 to the Office of Administrative Law, the ALJ had indicated in a telephone conference on September 20, 1995 that the case would be placed on inactive status pending the outcome of petitioner's workers' compensation claim but that he would grant the Board's motion to compel petitioner to submit to a medical examination. That order was subsequently issued by the ALJ on September 29, 1995. In its answer brief, the Board states that petitioner's workers' compensation claim was denied "[b]ased upon her refusal to attend the medical examination." Answer brief, at 2.

While we would be hesitant to dismiss the appeal on the basis of this statement alone,[2] petitioner does not dispute the Board's contention or offer any indication that the Division of Workers' Compensation rendered a determination that her injury was work-related. Under these circumstances, the appropriate course for this agency is to refrain from exercising its jurisdiction over petitioner's claim, including any discovery matters, and to dismiss the instant appeal.

Our determination is not altered by the fact that petitioner also raised a claim under the New Jersey Law Against Discrimination. The Commissioner has "jurisdiction to hear and determine...all controversies and disputes arising under the school laws...." N.J.S.A. 18A:6-9. "Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel." Board of Ed., E. Brunswick Tp. v. Township Council, E. Brunswick, 48 N.J. 94, 102 (1966). Thus, petitioner's Law Against Discrimination claim, which does not

[2] We note that the Board has provided no corroboration for its assertion that petitioner's workers' compensation claim was denied.

arise under the school laws, does not alone provide this agency with jurisdiction over this matter.

We therefore dismiss the appeal in this matter for the reasons stated herein.

December 3, 1997

Date of mailing DEC 05 1997

343-96

C #343-96L
SB # 61-96

TEJINDER S. SACHDEVA,

PETITIONER-APPELLANT,

V. : STATE BOARD OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND NEW JERSEY STATE BOARD OF EXAMINERS, : DECISION

RESPONDENTS-RESPONDENTS.

Decided by the Commissioner of Education, August 8, 1996

For the Petitioner-Appellant, Tejinder S. Sachdeva, pro se

For the Respondent-Respondent State-operated School District of the City of Newark, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Louis R. Franzese, Esq., of Counsel)

For the Respondent-Respondent New Jersey State Board of Examiners, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

December 4, 1996

Date of mailing DEC 06 1996

344-96

344-96E

M.R., on behalf of minor, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

August 9, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 6250-96
AGENCY DKT. NO. 258-7/96

M. R. ON BEHALF
OF MINOR S. R.,
Petitioner,
v.
BOARD OF EDUCATION
OF THE FREEHOLD
REGIONAL SCHOOL DISTRICT,
Respondent.

Arsen Zartarian, Esq., for petitioner (McOmber & McOmber, attorneys)

James E. Collins, Esq., for respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

BEFORE **BRUCE R. CAMPBELL**, ALJ:

On motion for emergent relief, a parent challenges expulsion of a minor pupil and seeks an order directing that the pupil be placed in a summer academic program pending decision on the expulsion challenge.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13. Oral argument on the motion for emergent relief was held on July 16, 1996, at the Office of Administrative Law, Trenton.

The factual background is uncontested. S.R. telephoned a bomb threat to Freehold Township High School on March 12, 1996. On March 13, 1996 the school principal spoke with S.R. and S.R. admitted making the threat. Following a conference with the principal and a Freehold Township police detective, S.R. was suspended by the principal, N.J.S.A. 18A:37-2.1. At some point before the hearing, Mrs. R. and the principal spoke. Among other things, the principal stated that, in the past, parents facing similar situations had withdrawn their children from the public school and placed them elsewhere. Mrs. R. withdrew S.R. on March 25, 1996 and the scheduled hearing was canceled. Mrs. R. tried for some time, without success, to gain admission of S.R. to another school. She declined the offer of a child study team evaluation and attendance in the accredited evening high school program. An assistant superintendent spoke with Mr. and Mrs. R. and offered to assist them in obtaining alternate placements, including but not limited to the Monmouth County Vocational system. Assistance was refused.

Mr. and Mrs. R. retained counsel in late April. The parents' and the Board's attorneys worked out an arrangement under which S.R. was allowed to reenroll and was placed on home instruction. His expulsion hearing was reset for May 20, 1996.

On May 20, following the regularly scheduled Board meeting, the board conducted the expulsion hearing. Counsel stipulated the facts and S.R. apologized. S.R. submitted the assessment of a psychologist. The Board resolved to expel S.R. permanently from the regular high school program, to offer placement in the evening high school program, to discontinue home instruction and to ban S.R. from attendance at any school functions related to the regular high school program. The Board also resolved to have its staff cooperate and coordinate with the Monmouth County Vocational School in any way to facilitate S.R.'s enrollment there.

It became apparent at hearing that placement in the summer school, even if ordered, is impracticable. The session had been under way since July 8. It is concededly a concentrated

experience. The program runs for six weeks. Instruction is so concentrated that pupils with two or more unexcused absences are not permitted to continue. The instruction is so intense and the time so limited that attendance is an absolute requirement. For S.R. to attempt to catch up at this late date would be foolhardy and could not produce a positive educational result.

The petitioner's arguments are that the incident was an isolated lapse of judgment, expulsion is too extreme as a remedy, expulsion was undertaken without the benefit of competent advice, the pupil's interests cannot be met through the evening or vocational programs, the pupil will suffer immediate and irreparable damage to his academic and social maturation and that no harm would accrue to the Board if S.R. were admitted to the summer program immediately.

The Board asserts there is no immediate and irreparable harm at least until September, summer school is a privilege and not a right, the parents' rejection of all alternative placements is unreasonable, an incident of the magnitude of a bomb threat cannot be ignored, the principal had a duty to act when the threat occurred, the principal acted appropriately, the Board carefully reviewed and carefully reacted to the threat, the Board has a duty to protect the pupils in its charge and, here, the Board offered sound alternative school placements.

Both parties have referred to Scher v. Board of Education of West Orange, 1968 S.L.D. 92 and H.A. v. Board of Education of Warren Hills Regional School District, 1976 S.L.D. 336. Scher does, as petitioner points out, refer to expulsion as "a drastic and desperate remedy" and it does say the board's decision should be based on competent advice, while suggesting a variety of sources of the advice. 1968 S.L.D. at 96. The usual source has been the Child Study Team. In the present case, Mrs. R. expressly refused a child study team evaluation. As counsel are aware, N.J.A.C. 6:28-2.8(g) formerly required a child study team evaluation before a noneducationally handicapped pupil could be considered for expulsion. That rule has been repealed. 22 N.J.R. 2683(b). In this regard, the Board seems to have elevated concern for the pupil over simple reliance on the administrative code and offered the evaluation. The petitioner may not now argue that the Board lacked competent advice when it expelled S.R. for two reasons. First, the Board had and used the advice of its staff. These persons know the day-to-day operation of the school and they know S.R. Second, the traditional source of competent advice, a child study team workup, was offered even though the Board was not required to offer it and was refused.

H.A. rejected arguments based on standard of proof and alleged procedural deficiencies. More importantly, it found that H.A. was subjected to a long-term suspension, not expulsion. It ordered "an offer of an alternate form of education to petitioner . . . ." 1976 S.L.D. at 341-342.

Expulsion is an extreme remedy. It is so extreme that a body of law has created a panoply of safeguards for the pupil. The procedural due process rights guaranteed by the Fourteenth Amendment attach. A preliminary hearing, however informal, must be provided. This provides an opportunity for the pupil to learn the precise infractions alleged and an opportunity to present her or his side. A hearing before the board must be provided. It is often referred to as a full hearing and may approach trial-like formality. All of these things inure to the pupil's benefit. None of them takes expulsion out of the authority of a district board of education. Where, as here, the procedural safeguards have been provided, it remains within the discretion of a board of education to invoke expulsion.

Potential damage to the pupil's academic and social maturation appear to have been included in the Board's considerations, but not in the pupil's. That S.R.'s interests cannot be met in evening high school or vocational school programs is not inconsequential, but neither is it controlling. And the fact that the vocational school does not offer a horticultural program - - in which S.R. apparently is interested - - would be a fact if S.R. had not been expelled.

Applying the traditional criteria to a motion for emergent relief, I **FIND** that some immediate harm will befall S.R. if an educational placement is not decided upon by the start of the 1996-97 school year. I have not been given enough in this brief record to find that the harm is yet irreparable. Balancing the hardships that would be visited on the parties by the grant, or not, of the requested relief, they seem to fall more heavily, but not exclusively, on the pupil.

Most tellingly, I **FIND** that the petitioner's likelihood of prevailing on the merits is slight. I **CONCLUDE**, therefore, that an order directing emergent relief may not issue at this time. Accordingly, the motion is **DENIED**. It is so **ORDERED**. It is further **ORDERED** that this matter proceed to plenary hearing as soon as practicable.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review, pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

23 JULY 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

cad

OAL DKT. NO. EDU 6250-96

M.R., on behalf of minor, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this matter, audiotape of the proceedings, and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) denying emergent relief as petitioner failed to meet the standards for such relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the Motion for Emergent Relief is denied for the reasons expressed by the ALJ and this matter shall duly proceed on its merits in accordance with the ALJ's instructions.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

August 9, 1996
Date of Mailing, August 12, 1996

345-96

KAREN HOFFMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning tenured teaching staff member alleged the Board unilaterally and wrongfully deducted monies from her salary and sought reimbursement. Board contended petitioner's request to be laterally moved to the doctor's column of the 1995-96 salary guide was denied because the institution petitioner attended was not recognized by the State of New Jersey. Salary reduction was to correct the erroneous salary increase.

ALJ concluded petition was time-barred. (Petitioner filed her petition before the Commissioner following arbitrator's decision against her in a contractual grievance procedure.) ALJ determined it was not necessary to address the remaining points argued by the parties. Moreover, the ALJ pointed out that since the Commissioner may not tread in matters concerning labor contracts, the arbitrator's award stood as the final judgment in this case. ALJ found that petitioner should be precluded from relitigating the issues addressed at the arbitration hearing under the entire controversy doctrine, which provides that the adjudication of a legal controversy should occur in one litigation in only one court. Petition was dismissed.

Commissioner concurred with the findings and conclusions of the ALJ with modification. Commissioner concurred with the ALJ that the petition was filed untimely and concurred that no relaxation of the 90-day rule was warranted. Petitioner should have filed her two claims simultaneously. Commissioner modified the initial decision to note that while the Commissioner does not tread in labor contract matters, petitioner was not precluded from filing this appeal before the Commissioner under the entire controversy doctrine in that the issue raised by petitioner, *i.e.*, improper reduction of a tenured staff person's salary pursuant to *N.J.S.A.* 18A:28-5, is separate from the contractual issues previously considered in arbitration. Commissioner concurred that a board may not act to unilaterally recoup monies erroneously paid to a tenured teaching staff member. Petition was dismissed as untimely.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 678-96

AGENCY DKT. NO. 22-1/96

KAREN HOFFMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH,

Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: May 16, 1996 Decided: June 24, 1996

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Karen Hoffman, petitioner, alleges that the Hillsborough Township Board of Education (Board or respondent) unilaterally and wrongfully deducted monies from her salary and seeks reimbursement.

The matter was opened and joined before the Commissioner of Education. The matter was transmitted to the Office of Administrative Law for determination as a contested case

pursuant to *N.J.S.A.* 52:14F-1 through -13. The Board's answer set forth an affirmative defense contending that the case should be dismissed based on sound precedent. The Board so moved before the judge then assigned. The petitioner timely filed responsive papers. All issues in the case being addressed by the moving and responsive papers, the matter proceeds to summary disposition.

Certain facts are not disputed and outline the case. In November 1994, the petitioner requested approval to take a six-credit graduate course offered by LaSalle University located in Mandeville, Louisiana. On or about November 22, 1994, the Superintendent of Schools approved the course for tuition reimbursement. LaSalle conferred the Doctor of Education degree on the petitioner shortly thereafter. During the summer of 1995, the petitioner submitted for Board review the diploma issued by LaSalle. She requested that the Board advance her on the 1995-96 salary guide from step 12 on the master's plus fifteen credits column ($48,187) to step 12 on the doctor's column ($53,978).

The Board was to review and approve all applications for salary advancement for the 1995-96 school year at its regular meeting of September 18, 1995. Upon reviewing the petitioner's transcript, the assistant superintendent noticed that nine of the thirty-six credits required by LaSalle for the doctoral degree had been taken at or through LaSalle. A total of 150 credits was given for prior educational credits earned, including graduate and continuing education unit credits, and for work and life experience. The assistant superintendent noted, for the first time, that LaSalle was located in Mandeville, Louisiana, not in Philadelphia. She discussed the matter with the Superintendent and then called the New Jersey Commission on Higher Education. The Commission advised her that LaSalle of Louisiana was not accredited by the Southern Association of Colleges and Schools, was not a candidate for accreditation and, therefore, was not recognized by the State of New Jersey as an authorized institution of higher education.

The superintendent directed the assistant superintendent to strike the petitioner's name from the board's list to be reviewed at the September 18 meeting. By memorandum dated September 27, 1995, the superintendent advised the petitioner that her request to be laterally

moved to the doctor's column of the 1995-96 salary guide was denied because the institution was not recognized by the State of New Jersey.

The practice of the Board has been to pay teachers their new salaries prior to the first Board meeting in September. Based on this practice, the petitioner already had been paid for her anticipated lateral movement to the doctor's column, although her request for advancement was later denied. To correct the overpayment, the petitioner requested that her salary be reduced evenly over the remainder of the school year. On or about October 6, 1995, the Hillsborough Education Association filed a grievance alleging that the Board's refusal to recognize the petitioner's degree from LaSalle and its subsequent denial of her request for salary advancement violated the negotiated labor agreement between the Association and the Board. The Board denied the grievance. The association filed a request for arbitration before the American Arbitration Association on or about November 28, 1995. The petitioner also filed the present petition of appeal with the Commissioner of Education on January 19, 1996. The Board filed its answer on February 6, 1996. On February 15, 1996, an arbitration hearing was held. On April 15, 1996, the arbitrator denied the grievance.

THE ARGUMENTS

The Board

The Board argues that the petitioner's claim for salary guide advancement rests on the interpretation of the Collective Bargaining Agreement and examination of the parties' past practice. Therefore, the Commissioner has no jurisdiction over the subject matter of this action. Further, the petitioner is barred from bringing this action for failure to file a timely petition in accordance with *N.J.A.C.* 6:21-1.2(c), the 90-day rule.

In addition, because the contractual issues alleged in the petition have already been addressed by the arbitrator, the fundamental principle of the entire controversy doctrine acts as a bar. The petitioner may not seek a determination by the Commissioner.

The Petitioner

The petitioner asserts that the controversy here is within the Commissioner's jurisdiction. The Commissioner has heard controversies of this type and has held that, even where a tenured employee's annual salary is erroneously inflated or mistakenly scheduled, it cannot peremptorily be corrected. Here, the petitioner is contesting the unilateral reduction of her salary and the position taken by the Board that her doctoral degree is not to be recognized for salary purposes. The Board's own affidavits establish that the assistant superintendent initially approved the petitioner's courses for tuition reimbursement and the Board had begun payment to petitioner on the doctoral degree level for the 1995-96 school year. These facts mandate the petitioner's continuation, at the least, upon her step of the doctoral guide for the 1995-96 school year.

The petitioner maintains she informed the assistant superintendent well in advance of the program, the institution offering it and her involvement in it.

DETERMINATION

Certain facts are not in dispute. In November 1994, the petitioner sought and received approval for tuition assistance to take a six-credit graduate course. In the following summer, the petitioner submitted a diploma conferring the doctor of education degree upon her from LaSalle University in Mandeville, Louisiana. She asked for advancement on the salary guide from step 12 on the master's plus fifteen credits scale to the same step on the doctoral scale. That salary was put into effect beginning September 1, 1995, although official Board action was scheduled to be taken on September 18, 1995. At some point in the interim, an assistant superintendent noted that the petitioner had completed only nine credits of course work at or through LaSalle University. LaSalle granted one hundred fifty credits for prior education, graduate education and work and life experience. The assistant superintendent also noticed, apparently for the first time, that LaSalle was located in Louisiana, not in Philadelphia. The assistant superintendent spoke with the superintendent and this led to a contact with the New Jersey Commission on Higher Education. The Commission reported that LaSalle was not recognized by New Jersey as a institution of higher education and that it was neither accredited nor a candidate for accreditation by a recognized agency.

The superintendent then directed that the petitioner's name be stricken from the list of persons whose salaries were to be acted upon on September 18. On or about September 27, the superintendent sent a memorandum to the petitioner informing her that the move on the salary guide was denied because LaSalle was not an institution recognized by the State of New Jersey.

The petitioner had already received at least one paycheck reflecting the higher rate of pay. When she became aware that a correction might be made, she asked for even deductions over the balance of 1995-96 school year. In early October, the local education association filed a grievance on her behalf stating that the refusal to recognize the degree followed by denial of the higher salary constituted a contract violation.

This decision was grieved. A petition was filed before the Commissioner of Education on January 19, 1996 and answered by the Board on February 6, 1996. Later that month, the arbitration hearing was held and on April 15, 1996, the arbitrator denied the education association grievance. I adopt the foregoing as **FINDINGS OF FACT** in this matter.

The petitioner knew on or about September 27, 1995, that her request for salary adjustment was denied based on the fact that LaSalle was not a New Jersey recognized institution of higher education. She filed the present appeal on January 19, 1996, 124 days after receiving the superintendent's memorandum. In mitigation of this circumstance, the petitioner argues that where there have been discussions for the purpose of reasoning out a problem, the 90-day rule should be relaxed. However, the education association filed a grievance on the petitioner's behalf on October 6, 1995. If it is argued that this was done simply to protect her right to invoke the arbitration clause in her union contract, then it must equally be true that she could have and should have filed a petition before the Commissioner of Education to keep that right alive. *Riely v. Hunterdon Central High School Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980).

In *Riely*, an untenured teacher whose contract was not renewed filed a petition of appeal before the Commissioner to obtain reinstatement and back pay. The board of education moved to dismiss the petition as untimely and as barred by reason of an adverse decision in an arbitration proceeding. The Commissioner denied the motion to dismiss. The Board of Education appealed

to the State Board of Education and that appeal was dismissed. However, the Appellate Division of Superior Court held that the petition was filed out of time and should have been dismissed.

In *Riely,* as in this case, the petitioner availed herself of a contractual grievance procedure. Binding arbitration was invoked and considerable time elapsed before the arbitrator decided against the petitioner. She then filed her petition before the Commissioner. Although the petitioner in this case was not as lax as Riely, she nevertheless waited too long. Even if this tribunal accepts October 6, 1995, the date the grievance was filed, as the date upon which the parties stopped "reasoning together," the petitioner still is out of time by at least six days. And, as in *Riely*, although the issue was properly within the scope of mandatory arbitration under the petitioner's collective bargaining agreement, those issues were properly raised before the Public Employment Relations Commission, not the Commissioner. Further, the arbitrator's award was final as to the matters within the scope of the issues framed by the parties for arbitration. They may not be relitigated before the Commissioner. *Riely* at 113.

If the petitioner now argues that her appeal before the Commissioner involves matters that were not or could not have been submitted for arbitration, she comes too late. There was no reason to withhold the appeal to the commissioner of any issue or issues not included in the arbitration under the contract. The petitioner had ample time to file her petition of appeal. She did not and, thus, is time-barred. There is no reason why she could not have timely filed a petition of appeal with the Commissioner of Education even while pursuing other avenues. There is nothing in the record that calls for equitable relief of the 90-day rule. The petitioner could have and should have filed sooner, but did not. I **CONCLUDE**, for the reasons stated, that the present petition is time-barred and, therefore, must be **DISMISSED**. It is so **ORDERED**.

It is not necessary to address the remaining points argued by the parties. Nevertheless, it must be pointed out that the Commissioner may not tread in matters concerning labor contracts. Thus, the arbitrator's award, over which this tribunal has no jurisdiction whatsoever, stands as the final judgment in the case.

Finally, although the Board has prevailed, it is clear that the Commissioner, the State Board and the courts have taken a dim view of unilateral salary reduction action taken during the

school year, even where error is present. In those cases, corrective formal action of the Board upon notice to the employee is required. *Stockton v. Bd. of Educ. of Trenton,* 1987 S.L.D. 512, 518.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

24 JUNE 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

June 26, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

KAREN HOFFMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions contend that the determination of the Administrative Law Judge (ALJ) should be overturned for three reasons. Initially, petitioner cites *Stockton, supra,* for the proposition that the proper date for the running of the 90-day rule is November 13, 1995, in that "the parties in an erroneous salary case should be given ample time for a discussion 'in order to reason together' in order to attempt to arrive at a solution without litigation.***" (Petitioner's Exceptions at pp. 1-2) Petitioner next excepts that assuming the ALJ's selection of October 6, 1995 is deemed the cut-off date for the 90-day limitation period, "certainly six days is not of such moment, in the context of this case, so as to preclude equity from providing a six day extension of time for the filing of a petition.***" (*Id.* at p. 1)

Petitioner also states that the ALJ recognized that the Commissioner, State Board and the Courts have consistently rejected the preemptory correction of an erroneous salary increase and incorporates by reference her May 15, 1996 letter brief which cites case law to support this proposition. (*Id.* at p. 2)

In summation, petitioner characterizes the ALJ's application of the 90-day rule in this matter as a "hyper-technical approach" which "frustrates the purpose for the petitioner's controversy, i.e., to interpret the school laws when a dispute arises.***" (*Id.*)

In reply, the Board reiterates its arguments that petitioner filed her appeal beyond the 90-day limitation period. The Board avers that the ALJ correctly determined that petitioner received notice via memorandum that her request for salary guide advancement was denied on September 27, 1995, triggering the 90-day limitation period. It further argues that petitioner acknowledged that she had notice in the filing of her grievance wherein she claimed the alleged violation occurred on September 18, 1995, when the superintendent advised her in person that her request was denied. (Board's Exceptions at pp. 1-2) "Thus, petitioner is estopped by her own actions from asserting that November 13, 1995 was the operative date which triggered the 90-day period." (*Id.* at p. 3) The Board next argues that contrary to petitioner's assertions, no negotiations took place in an effort to reason things out in accordance with *Stockton*, *supra*. The Board next rejects as without merit petitioner's argument that she should have been granted a six-day extension of time in which to file her petition in that she has not advanced any compelling reason to excuse her failure to file her appeal within the 90-day limitation period. (Board's Exceptions at pp. 4-5)

The Board avers that although the ALJ's decision ultimately rested on the timeliness issue, the ALJ correctly found that petitioner should be precluded from relitigating the issues addressed at the February 15, 1996 arbitration hearing under the entire controversy doctrine, which provides that the adjudication of a legal controversy should occur in one litigation in only one court. *Cogdell v. Hospital Center*, 116 *N.J.* 7, 15 (1989). In support of its contention, the Board cites *Board of Education of the River Dell Regional School District v. Canal*, 93 *N.J.A.R.* 2d (EDU) 784 (Comm. Ed. September 24, 1993, aff'd 94 *N.J.A.R.* 2d (EDU) 327 (St. Bd. May 4, 1994) wherein the Board's action was unrelated to a teacher's job performance and the Commissioner held that the matter did not implicate genuine questions of school law or educational policy and should have been determined by general contract principles. Further, the Commissioner determined such issues are "beyond the scope of his jurisdiction and, thus, were better left to 'the dispute resolution mechanism set forth in the parties' negotiated agreement.'" (Board's Exceptions at pp. 5-6) The Board avers petitioner is seeking an identical

remedy to that previously sought before the arbitrator and this must be regarded as nothing more than an attempt to obtain a second opportunity to seek a favorable determination in this matter. Therefore, it avers, "should the Commissioner find petitioner's appeal to have been timely filed or compelling reasons to relax the limitations period, the Commissioner should accept [the ALJ's] position in this regard and dismiss petitioner's appeal under the entire controversy doctrine." (Id. at p. 7)

To the extent that the ALJ implied that petitioner's salary was improperly reduced, the Board disagrees and excepts that the ALJ's reliance on *Stockton*, *supra*, was misplaced. The Board avers its corrective action plan with respect to the erroneous salary payment was proper and cites in its support *Sklute v. Board of Education of the City of Trenton*, 96 *N.J.A.R.* 2d (EDU) 264, 266 (Comm. Ed. December 1, 1995) and *Trenton Education Association v. Board of Education of the City of Trenton,* 1986 *S.L.D.* 2434 (Comm. Ed. October 6, 1986) as the monies paid,

> were public monies to which petitioner had no lawful claim as the Board never formally advanced petitioner to the Ph.D. column of the salary guide. The Board therefore, had not only the right but the responsibility to correct the error made by payroll personnel and recoup the monies.*** (Board's Exceptions at p. 8)

The Board then avers *Trenton*, *supra,* carved an exception to permit a Board of Education to correct a salary overpayment and to recoup overpaid monies under certain specified conditions with which, the Board avers, it acted consistently. (Board's Exceptions at pp. 8-9)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ as modified herein. The Commissioner affirms the ALJ's finding that petitioner's appeal was untimely filed and adds that the language of *N.J.A.C.* 6:24-1.2(c) requires that actions brought before the Commissioner of Education be filed "no later than the 90th day from the day of receipt of the notice of a final order, ruling or other action by the district board of education, individual party ***which is the subject of the requested contested case hearing." This rule, which was promulgated by the State Board of Education, "represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws.***" *Kaprow v. Board of Education of Berkeley Township,*

131 *N.J.* 572, 582 (1993). "In addition, the ninety-day limitation period represents a *reasonable* procedural requirement.***" (emphasis in text) (*Kaprow* at *583)*

The ALJ finds that petitioner should have filed her claim for reimbursement within 90 days of notice of the Board's intentions to reduce her salary, which notice she clearly possessed on September 27, 1995, when she received a letter from the superintendent to this effect. Moreover, even accepting October 6, 1995, as the date the parties stopped "reasoning together" as per *Stockton*, s*upra,* and petitioner filed her grievance, the ALJ finds the petition would still be six days out of time. (Initial Decision at p. 6)

Moreover, the Commissioner concurs that no relaxation of the 90-day rule is warranted in this instance. As noted by the Board, case law suggests that the applicable regulation must be construed strictly. See, *e.g. North Plainfield Education Association v. Board of Education*, 96 *N.J.* 587 (1984) and *J.R. Transportation Company, Inc. and A & A Charter Service, Inc. v. Board of Education of the State-operated School District of Jersey City, Hudson County*, decided by the Commissioner March 8, 1996. The Commissioner has held that, "[e]xceptions to the 90-day rule should*** be granted sparingly, and only where there exists compelling circumstances to justify enlargement or relaxation of the time limit.***" *Morris-Union Jointure Commission v. Board of Education of the Borough of South River*, 92 *N.J.A.R.* 2d (EDU) 453, 455, quoting *Riely, supra.* The Commissioner has described these circumstances as follows:

> Where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination, and where a matter of significant public interest is involved. ****Miller v. Morris School District.**** (February 25, 1980) (at 455)

This present case involves a monetary dispute with facts decidedly not compelling enough to warrant the relaxation of this rule. Moreover, in order to preserve her right to file before the Commissioner in a timely manner pursuant to *Riely, supra,* there was nothing to prevent petitioner from filing her two claims simultaneously.

The Commissioner further modifies the initial decision to note that while the Commissioner does not "tread in matters concerning labor contracts," petitioner was not precluded from filing this appeal before the Commissioner under the entire controversy doctrine

in that the issue raised by petitioner, *i.e.,* improper reduction of a tenured staff person's salary pursuant to *N.J.S.A.* 18A:28-5, is separate from the contractual issues previously considered in arbitration.

Lastly, the Commissioner concurs that a board may not act to unilaterally recoup monies erroneously paid to a tenured teaching staff member as numerous Commissioner and State Board of Education decisions so aptly point out and, thus, dismisses the Board's exceptions in this regard as without merit. See *Trenton, supra; Stockton, supra; Rivers v. Board of Education of the Mercer County Area Vocational-Technical Schools, Mercer County*, 1984 *S.L.D.* 102*; and Tripp v. Board of Education of the South Orange-Maplewood School District, Essex County,* decided by the Commissioner, February 6, 1984.

Accordingly, the Commissioner concurs with the ALJ for the reasons expressed therein, as modified, and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 9, 1996
Date of Mailing, August 12, 1996

346-96

346-96

IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH DENNIS,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

August 9, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9260-95

AGENCY DKT. NO. 288-7/95

IN THE MATTER OF THE TENURE HEARING OF RALPH DENNIS, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

Gregory G. Johnson, Esq., attorney for petitioner

Louis P. Bucceri, Esq., attorney for respondent (Bucceri & Pincus, Esqs., attorneys)

Record Closed: June 14, 1996 Decided: June 19, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

Petitioner sought to dismiss respondent from his position as a tenured custodian on charges of neglect of duty, excessive absenteeism and insubordination.

The Department of Education transferred this matter to the Office of Administrative Law (the OAL) on August 15, 1995. The OAL scheduled a hearing for June 17, 1996.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On June 14, 1996, they submitted the attached Stipulation of Settlement which sets forth the terms of the settlement.

I have reviewed the record and settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 19, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

6/28/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

STATE ... OFFICE ...
JUN 14 11 29 AM '96

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE HEARING OF RALPH DENNIS,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON.	:	AGENCY REF. NO. 288-7/95 O.A.L. DOCKET NO. EDU 9260-95N **STIPULATION OF SETTLEMENT**

The petitioner, State-Operated School District of the City of Paterson (hereinafter the "District"), and the respondent, Ralph Dennis, residing at 150 Harrison Street, Passaic, New Jersey 07055, hereby stipulate and agree as follows:

WHEREAS tenure charges are pending against Mr. Dennis seeking his termination from employment as a custodian due to allegations of neglect of assignments, absenteeism and insubordination; and

WHEREAS Mr. Dennis has denied said charges; and

WHEREAS on or about May 14, 1996, the State Superintendent of Schools of Paterson determined to subcontract the District's custodial services and abolish all custodial positions in the District, effective June 30, 1996; and

WHEREAS respondent's position was among those abolished; and

WHEREAS said decision to subcontract was made for reasons unrelated to this proceeding, but results in there being no position for respondent to return to if he were to prevail in this case; and

WHEREAS said decision, therefore, renders this proceeding moot except for the issue of back salary related to respondent's 120 day suspension without pay;

It is on this 31ST day of MAY, 1996, agreed that:

1. The District shall and hereby does withdraw and dismiss its tenure charges against Mr. Dennis because they are now moot.

2. The District will include Mr. Dennis and his position in, and as part of, its reduction in force, effective June 30, 1996, thereby terminating Mr. Dennis' employment in the same manner as that of all other custodians, except as otherwise provided herein.

3. The District will continue Mr. Dennis' salary, health insurance benefits and pension contributions through August 31, 1996 in compromise of Mr. Dennis' claim regarding his 120 days suspension without pay. Mr. Dennis agrees not to apply

for work with the Paterson School District or any contractor providing custodial services to the District.

4. No further salary, benefits or any other contractual term or condition of employment shall be due or owing to Mr. Dennis beyond the entitlements specified herein.

5. Mr. Dennis hereby permanently waives and releases any and all claims to back salary and/or any other payment, in return for the District's compliance with this Agreement. Mr. Dennis retains the right to enforce the terms of this Agreement.

6. This Agreement is in the public interest since it achieves a reduction in the costs of litigation which would be an unnecessary expenditure under these circumstances.

7. Mr. Dennis acknowledges that he has hereby been advised in writing that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

8. The undersigned representatives of the District hereby acknowledge that they have been duly authorized by the District to sign this Agreement and bind the District to its terms.

3C

9. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

10. In the event that the District is prevented from, unable, or unwilling to fulfill the terms of this Agreement, for any reasons, the rights of the parties shall return to the status quo prevailing prior to the signing of this Agreement.

11. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Mr. Dennis.

12. The parties acknowledge that this Agreement must be approved by the Administrative Law Judge and the Commissioner of Education before it becomes effective. This Agreement shall be null and void if not so approved.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Louis P. Bucceri, Esq.

Dated: 5/24/96

Ralph Dennis

Ralph Dennis

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON

By:

Gregory G. Johnson, Esq.

Dated: May 31, 1996

OAL DKT. NO. EDU 9260-95

IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH DENNIS,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

August 9, 1996
Date of Mailing, August 12, 1996

345-96

EDU #678-96
C #345-96
SB # 64-96

KAREN HOFFMAN, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF HILLSBOROUGH, SOMERSET COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, August 9, 1996

For the Petitioner-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Fogarty & Hara (Stephen R. Fogarty, Esq., of Counsel)

The decision of the Commissioner of Education dismissing the petition in this matter as untimely pursuant to N.J.A.C. 6:24-1.2(c) is affirmed substantially for the reasons expressed therein. Given such determination, we need not pass upon the merits of petitioner's claim that the Board had improperly reduced her salary.

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

347-96

347-96

IN THE MATTER OF THE TENURE	:	
HEARING OF PASQUALE LAPADURA,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

August 9, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9279-95

AGENCY DKT. NO. 283-7/95

IN THE MATTER OF THE TENURE HEARING OF PASQUALE LAPADURA, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

Gregory G. Johnson, Esq., attorney for petitioner

Louis P. Bucceri, Esq., attorney for respondent (Bucceri & Pincus, Esqs., attorneys)

Record Closed: June 14, 1996 Decided: June 19, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

Petitioner sought to dismiss respondent from his position as a tenured custodian on charges of neglect of duty, excessive absenteeism, leaving the school building during work hours without authorization and insubordination.

The Department of Education transferred this matter to the Office of Administrative Law (the OAL) on August 16, 1995. The OAL scheduled a hearing for June 24, 1996.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On June 14, 1996, they submitted the attached Stipulation of Settlement which sets forth the terms of the settlement.

I have reviewed the record and settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 19, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

6/28/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

STATE
JUN 14 11 30 AM '96

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE HEARING OF PASQUALE LAPADURA,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
STATE-OPERATED SCHOOL DISTRICT OF THE CITY	:	AGENCY REF. NO. 283-7/95 O.A.L. DOCKET NO. EDU 9279-95N
OF PATERSON.	:	**STIPULATION OF SETTLEMENT**

The petitioner, State-Operated School District of the City of Paterson (hereinafter the "District"), and the respondent, Pasquale Lapadura, residing at 370 Union Avenue, Paterson, New Jersey 07502, hereby stipulate and agree as follows:

WHEREAS tenure charges are pending against Mr. Lapadura seeking his termination from employment as a custodian due to allegations of neglect of assignments, absenteeism and insubordination; and

WHEREAS Mr. Lapadura has denied said charges; and

WHEREAS on or about May 14, 1996, the State Superintendent of Schools of Paterson determined to subcontract the District's custodial services and abolish all custodial positions in the District, effective June 30, 1996; and

WHEREAS respondent's position was among those abolished; and

WHEREAS said decision to subcontract was made for reasons unrelated to this proceeding, but results in there being no position for respondent to return to if he were to prevail in this case; and

WHEREAS said decision, therefore, renders this proceeding moot except for the issue of back salary related to respondent's 120 day suspension without pay;

It is on this 4TH day of JUNE, 1996, agreed that:

1. The District shall and hereby does withdraw and dismiss its tenure charges against Mr. Lapadura because they are now moot.

2. The District will include Mr. Lapadura and his position in, and as part of, its reduction in force, effective June 30, 1996, thereby terminating Mr. Lapadura's employment in the same manner as that of all other custodians, except as otherwise provided herein.

3. The District will continue Mr. Lapadura's salary, health insurance benefits and pension contributions through August 31, 1996 in compromise of Mr. Lapadura's claim regarding his 120 days suspension without pay. Mr. Lapadura agrees not to apply for work with the Paterson School District or any contractor providing custodial services to the District.

4. No further salary, benefits or any other contractual term or condition of employment shall be due or owing to Mr. Lapadura beyond the entitlements specified herein.

5. Mr. Lapadura hereby permanently waives and releases any and all claims to back salary and/or any other payment, in return for the District's compliance with this Agreement. Mr. Lapadura retains the right to enforce the terms of this Agreement.

6. This Agreement is in the public interest since it achieves a reduction in the costs of litigation which would be an unnecessary expenditure under these circumstances.

7. Mr. Lapadura acknowledges that he has hereby been advised in writing that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

8. The undersigned representatives of the District hereby acknowledge that they have been duly authorized by the District to sign this Agreement and bind the District to its terms.

9. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

10. In the event that the District is prevented from, unable, or unwilling to fulfill the terms of this Agreement, for any reasons, the rights of the parties shall return to the status quo prevailing prior to the signing of this Agreement.

11. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, now or in the future, other than Mr. Lapadura.

12. The parties acknowledge that this Agreement must be approved by the Administrative Law Judge and the Commissioner of Education before it becomes effective. This Agreement shall be null and void if not so approved.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Louis P. Bucceri, Esq.

Dated: 5/29/96

Pasquale Lapadura

Pasquale Lapadura

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON

Gregory G. Johnson, Esq.

Dated: June 4, 1996

By:

OAL DKT. NO. EDU 9279-95

IN THE MATTER OF THE TENURE	:	
HEARING OF PASQUALE LAPADURA,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

August 9, 1996
Date of Mailing, August 12, 1996

348-96

348-96

DARREN RESSLER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, tenured physical education teacher who was riffed and awarded compensation by the Commissioner in June 1994 when it was found that he was entitled to 1992-93 employment, claimed entitlement to 1993-94 employment based on endorsement as an elementary school teacher acquired in June 1992, after the date of the RIF. Petitioner contended that if the Board had properly employed him for 1992-93, he would have been protected by his elementary endorsement issued prior to the commencement of that academic year. Respondent Board sought motion seeking dismissal on two grounds: that the petition was untimely pursuant to *N.J.A.C.* 6:24-1.2(c) and that any tenure rights were fixed as of the date when the Board abolished his position on April 4, 1992.

ALJ concluded that petitioner's tenure rights were fixed as of the date of the reduction in force and, therefore, his elementary endorsement acquired after that date did not expand his tenure rights. (*Francey*) As to the issue of untimeliness, the ALJ found that the existing record was inadequate to make a determination. ALJ granted Board's motion to dismiss the petition.

Commissioner adopted findings and determination in initial decision as his own.

August 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10156-94

AGENCY DKT. NO. 368-9/94

DARREN RESSLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK,

Respondent.

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Anthony N. Gallina, Esq., for respondent

Record Closed: October 30, 1995 Decided: June 24, 1996

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is the third in a series of related appeals by a physical education teacher challenging various employment actions taken by the Saddle Brook Board of Education ("Board"). Petitioner Darren Ressler ("Ressler") alleges that he has tenure as an elementary teacher by virtue of an endorsement acquired in June 1992 and that the

Board violated his tenure rights by employing nontenured teachers in a position for which he was qualified in 1993-94. As a result of the prior litigation, the Commissioner of Education ("Commissioner") determined that the Board had violated Ressler's seniority rights by failing to offer him part-time employment in 1992-93. Basically, Ressler argues that if the Board had properly employed him for 1992-93, he would have been protected by his elementary endorsement issued prior to the commencement of that academic year.

Respondent Board brings a motion seeking dismissal of the petition on two separate grounds: (1) that the petition is untimely under the 90-day rule, *N.J.A.C.* 6:24-1.2(c); and (2) that any tenure rights were fixed as of the date when the Board abolished his position on April 4, 1992. For the reasons which follow, the motion must be granted.

Procedural History

Two prior adjudications set the backdrop for the present proceeding. On January 16, 1992, Ressler brought his first appeal, OAL Docket No. EDU 0705-92, contending that the Board had violated his seniority rights by reducing his employment from full to part-time during the 1991-92 academic year. Shortly thereafter, on June 10, 1992, Ressler filed a second appeal, OAL Docket No. EDU 5018-92, contending that the Board had violated his seniority rights by abolishing his position for the 1992-93 academic year. The two earlier cases were consolidated for disposition. On June 27, 1994, the Commissioner of Education ("Commissioner") rendered a final decision sustaining Ressler's seniority claim for both years and awarding him back pay for classes taught by teachers with less seniority.

After issuance of the Commissioner's decision, Ressler filed this third appeal on September 9, 1994, claiming that his tenure rights had been violated in 1993-94. The Board filed its answer on October 14, 1994. Subsequently, on October 19, 1994, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for

hearing as a contested case. Meanwhile, on October 14, 1994, the Board filed a notice of motion to dismiss, together with supporting affidavits and legal brief. Ressler filed an opposing certification and legal brief on November 9, 1994. The Board filed a reply brief on November 22, 1994. Both parties agree that all facts necessary to resolve the Board's motion are undisputed, although Ressler reserves the right to develop a more complete record in the event that this motion is denied.[1] The motion was submitted for disposition on the papers.

Findings of Fact

All of the material facts are stipulated.[2] For purposes of this motion, the parties have entered into the following stipulation:

> At the beginning of the 1991-92 school year, Ressler initially had a full-time teaching assignment of students in grades four to ten. On December 11, 1991, the Board adopted a formal resolution reducing Ressler's employment to a .6 position effective February 12, 1992. On April 4, 1992, the Board abolished Ressler's position pursuant to a reduction in force and placed him on a preferred eligibility list "for recall in the event a vacancy develops."
>
> At the time of the reduction in force on April 4, 1992, Ressler held an instructional certificate with endorsements as teacher of health and physical education. Ressler obtained an endorsement as an elementary school teacher . . . in or about June of 1992.

---

[1] Specifically, the parties are unable to stipulate the full circumstances concerning the Board's employment of nontenured elementary-level teachers in 1993-94.

[2] In addition to the facts highlighted by the parties, this decision incorporates by reference the detailed factual findings set forth in the administrative decision entitled *Ressler v. Saddle Brook Bd. of Educ.*, OAL Dkt. No. EDU 0705-92 & EDU 5018-92, slip op. at 4 to 8 (Comm'r June 28, 1994), *appeal docketed*, No. 35-94 (State Bd. July 27, 1994).

The Petitioner's appeal in this matter was filed with the Commissioner of Education on [September 9, 1994] and received by Respondent on September 12, 1994.[3]

Petitioner was not employed by Respondent for the 1993-94 school year.

There was no correspondence between Respondent and Petitioner with regard to his employment for the 1993-94 school year.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Ressler's tenure rights were fixed as of the date of the reduction in force and, therefore, that his after-acquired elementary endorsement does not expand his tenure rights.

Before addressing the timeliness issue, the underlying merits of petitioner's complaint will be considered. Tenure is a statutory status accrued by service for the requisite number of years in a position requiring an appropriate teaching certificate. *N.J.S.A.* 18A:28-5. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73-74 (1982). Generally, an educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate. *Dennery v. Passaic Cty. Reg. High Sch. Dist.*, 131 *N.J.* 626, 634 (1993). In the prior litigation between the same parties, the Commissioner held that the elementary endorsement which Ressler acquired after the abolition of his position on April 4, 1992 did not confer additional tenure rights for the 1992-93 academic year. Instead, "teachers have tenure entitlement only to those positions for which they were properly certified on the date of the reduction in force." *Ressler v. Saddle Brook Bd. of Educ.*, OAL Dkt. No. EDU 0705-92 & EDU 5018-92, slip op. at 4 to 8 (Comm'r June 28, 1994), *appeal docketed*, No. 35-94, (State Bd. July 27, 1994).

[3] Although the parties stipulated that the date of filing was September 8, 1994, the original petition is date-stamped as having been received by the Division of Controversies and Disputes on September 9, 1994.

Support for this result came from *Francey v. Salem Bd. of Educ.* 92 *N.J.A.R.* 2d (EDU) 449 (Comm'r July 22, 1992), *aff'd* ___ *N.J.A.R.* 2d __ (St. Bd. Aug. 3, 1994), where the Commissioner expressed concern that the administrative burden of requiring local school districts to look beyond existing endorsements "would likely lead to amassing of endorsements following [a reduction in force], reduce to chaos any attempt by a district to ascertain its legal responsibilities upon the arising of a vacancy, and unduly restrict boards in their efforts to provide a thorough and efficient education by choosing the most qualified staff for open positions. 92 *N.J.A.R.* 2d at 452. In *Francey*, the Commissioner ruled that a home economics teacher was not entitled to preferred reemployment rights arising from an elementary endorsement obtained after the date of her layoff. *See also, Johnstone v. Cinnaminson Bd. of Educ.,* 92 *N.J.A.R.* 2d (EDU) 506 (Comm'r Aug. 12, 1992). Recently, the Appellate Division upheld the Commissioner's ruling in *Francey* and declared that the determination is "plainly a matter of [educational] policy" within the Commissioner's acknowledged area of expertise. *Francey v. Salem Bd. of Educ.*, 286 *N.J. Super.* 354 (App. Div. 1996).

Notwithstanding denial of his tenure claim for 1992-93, Ressler still seeks tenure under his elementary endorsement for 1993-94 on the theory that the Commissioner has since awarded monetary damages for wrongful termination of his employment and that, *if he had been employed during 1992-93*, he would have possessed an elementary endorsement prior to the 1993-94 academic year. Ressler cites no legal authority for his novel argument that a "*de facto*" reduction occurred in 1993-94 while he was no longer employed in the district. If there exist "cogent educational policy considerations" for denying tenure to an elementary position in the year following a teacher's termination (see *Francey*, 286 *N.J. Super.* at 357), those same considerations apply with equal or greater force to succeeding years. What petitioner may have done after the reduction took place should not give him any greater rights than he had on the initial date of the Board's wrongful action. When drawing a bright line in the *Francey* case, the Appellate Division sought to foster clarity and certainty in school employment relationships. Unless clearly required by statute, it would be unwise to muddy the waters by inventing a different rule for cases involving ongoing litigation.

Alternately, the Board contends that the petition was untimely under *N.J.A.C.* 6:24-1.2(c), which requires that an appeal be filed "no later than the 90th day from the date of receipt of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." Petitioner maintains that his cause of action did not arise until June 27, 1994, the date on which the Commissioner rendered his decision on Ressler's seniority rights for 1991-92 and 1992-93. The Board maintains that petitioner's cause of action arose on the date that the district appointed the last nontenured elementary-level teacher for 1993-94.[4]

Ressler confuses the ultimate adjudication of his prior claim with the possession of sufficient underlying facts to put him on adequate notice of his potential rights. Courts sometimes apply a "discovery rule," which tolls the statute of limitations until an injured party knows, or should have known by reasonable diligence, that he may have a basis for an actionable claim. But the discovery rule is pertinent only in those circumstances in which a plaintiff was not, and could not be, aware of the underlying factual basis for a cause of action. *Tevis v. Tevis*, 79 *N.J.* 422, 432 (1979). Injured parties are not justified in delaying suit until they are ready to prove every aspect of their claim. Cf. *Brizak v. Needle*, 239 *N.J. Super.* 415, 427 (App. Div. 1990), *certif. den.* 122 *N.J.* 164 (1990). An injured party does not need "impeccable" knowledge or definitive evidence establishing the exact cause of the injury before the statute of limitations starts to run against him. It is enough that the fact of the injury and the identity of the party causing the injury be known. *Torcon, Inc. v. Alexian Bros. Hosp.*, 205 *N.J. Super.* 428, 435 (Ch. Div. 1985), *aff'd* 209 *N.J. Super.* 239 (App. Div. 1986), *certif. den.* 104 *N.J.* 440 (1986). Here Ressler knew that his teaching position had been abolished and that the Board refused to recognize any tenure entitlement based

[4] In her original affidavit, the Saddle Brook superintendent of schools averred that the last nontenured elementary teacher was hired on January 1, 1994. Later, she filed a second affidavit correcting retracting that particular date. Ressler takes the position that he needs discovery to ascertain relevant information, including the dates of hire of the district's nontenured elementary-level teachers.

on his elementary endorsement. He did not need to wait for the Commissioner's seniority determination.

On the other hand, the Board also focuses on the wrong date. Pursuant to *N.J.A.C.* 6:24-1.2(c), the limitations-period for filing an appeal with the Commissioner commences when the person whose rights are affected receives "adequate notice" of the school district's action. Accordingly, the limitation period is not triggered "until tenured teachers have been alerted to the existence of facts that may equate in law with a post-RIF cause of action." *Kaprow v. Berkeley Twp. Bd. of Educ.*, 131 *N.J.* 572, 586-589 (1993). For example, in *Kaprow*, the ninety-days did not begin to run until Kaprow had learned from the local board "that it had created and filled two positions in which he claimed tenure rights." *Kaprow*, at 588. Applied to our case, the crucial date is when Ressler first learned that nontenured teachers were performing duties for which he has a tenure claim, not when the Board happened to have filled those positions. Insofar as the record reflects, "[t]here was no correspondence between Respondent and Petitioner with regard to his employment for the 1993-94 school year." Likewise, the affidavits filed in connection with this motion are silent with respect to when Ressler became aware that nontenured teachers in the district held elementary positions. Consequently, the existing record is inadequate to determine whether or not Ressler's petition is untimely.

Order

It is **ORDERED** that the Board's motion to dismiss the petition on its merits is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 24, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

June 26, 1996
DATE

DN Costanzo
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 10156-94

DARREN RESSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by both parties.

Petitioner's exceptions reiterate his argument that, had the prior decision rendered in the matter of *Ressler v. Saddle Brook Board of Education*, *supra*, ("*Ressler I*") been issued in time to reinstate petitioner for the 1992-93 school year, "then the Board would have been forced to vote to rif him to prevent his hiring in 1993-94. That rif would have been after his June, 1992 K-8 endorsement [was] issued." (Petitioner's Exceptions at p. 2) Petitioner reasons that, since the decision followed the 1992-93 school year, no reduction in force (RIF) was needed. However, as argued before the Administrative Law Judge (ALJ), petitioner contends a *de facto* RIF took place, and his retroactive reinstatement for the 1992-93 school year created a right to assert a claim for 1993-94 based on his previously acquired endorsement. *(Id.)*

Additionally, petitioner recasts his argument as to the timeliness of the Petition of Appeal filed in this matter. As argued before the ALJ, petitioner maintains that his cause of

action in this matter did not arise until June 27, 1994, the date the Commissioner issued his decision in *Ressler I.* Prior to this date, petitioner reasons that he had no legal right to assert a claim for the 1993-94 school year. *(Id.)* Petitioner contends that the cases cited in the initial decision "relate to the discovery of the fact of an injury." Whereas, petitioner argues, "[t]his case deals *** with the inability to claim *fault* on the part of the Board until the Commissioner ruled. Until the legal issue of fault could be determined, the limitation period of *N.J.A.C.* 6:24-1.2(c) did not begin to run.***" (emphasis in text) (*Id.* at p. 3) Thus, petitioner asserts that the initial decision should be reversed.

The Board takes exception to the ALJ's factual finding on page six, footnote four, of the initial decision stating that it is petitioner's position that he needs discovery to ascertain relevant information, including the dates of hire of the District's nontenured elementary school teachers. (Board's Exceptions at p. 1) The Board counters that "[p]etitioner conceded that for purposes of the Board's motion, there [were] sufficient undisputed facts." *(Id.)*

The Board further excepts to the ALJ's conclusion that the current record is inadequate to support a determination as to the timeliness of petitioner's Petition of Appeal. *(Id.)* Here, the Board asserts,

> Petitioner does not [argue] that he was unaware or lacked notice that non-tenured teachers were appointed by the Respondent for the 1993-1994 school year. Petitioner simply argues that until the Commissioner ruled on the 1992-1993 claim, there was no "fault" attributable to the Board.***
>
> Petitioner further admits that at the beginning of the 1993-94 school year, he learned that the tenured physical education teachers who were assigned to elementary physical education for the 1993-94 [school year] were all individuals with more elementary physical education seniority [than] himself. ***

> Accordingly, Petitioner acknowledges he was aware of the employment status of the tenured physical education teachers at the beginning of the 1993-1994 school year and does not deny that he was [aware] of the appointment of non-tenured teachers which is done at a public meeting of the Board. (*Id.* at p. 2, citations omitted)

Thus, the Board urges the Commissioner to recognize that "the record in this matter is adequate and complete" with respect to the issue of the timeliness of the Petition of Appeal. The Board further urges the Commissioner to dismiss the petition, pursuant to *N.J.A.C.* 6:24-1.2(c) for untimeliness. *(Id.)*

Upon careful and independent review of the record, the Commissioner determines to affirm the initial decision of the ALJ, as he concurs with the ALJ that petitioner's claim herein is properly dismissed on its merits. The Commissioner agrees that petitioner's tenure rights were fixed as of the date of the Board's RIF on April 4, 1992, and, as his decision in *Ressler I* established, the acquisition of petitioner's elementary endorsement in June of 1992 did not confer upon him additional tenure rights for the 1992-93 school year. (Initial Decision at p. 4) As the Commissioner further determined in *Ressler I,* after the April 4, 1992 RIF, petitioner was entitled to be offered the opportunity to teach the elementary level *physical education* classes assigned, for the 1992-93 school year, to physical education teachers with less seniority in the elementary category.

Notwithstanding this determination, petitioner now contends that the Board violated his tenure rights by employing nontenured elementary teachers in positions for which he was qualified for the 1993-94 school year. However, the Commissioner is not persuaded by petitioner's "novel argument" (Initial Decision at p. 5) that a *de facto* RIF occurred for the

1993-94 school year which permits him to assert a claim to any or all of the elementary teaching positions filled that year by virtue of his newly acquired elementary endorsement.

Further, the Commissioner concurs with the ALJ that petitioner knew, or should have known, of his current cause of action prior to the issuance of the Commissioner's decision of June 27, 1994, and that petitioner is confusing "the ultimate adjudication of his prior claim with the possession of sufficient underlying facts to put him on adequate notice of his potential rights," as is necessary to file a petition pursuant to *N.J.A.C.* 6:24-1.2(c). (Initial Decision at pp. 6, 7) However, like the ALJ, the Commissioner finds insufficient support in the record to conclude that petitioner's claim herein is untimely, pursuant to *N.J.A.C.* 6:24-1.2(c).

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein and the within matter is dismissed on its merits.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

August 12, 1996, Date of Mailing, August 12, 1996

348-96

EDU #10156-94
C # 348-96
SB # 66-96

DARREN RESSLER, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF SADDLEBROOK, BERGEN :
COUNTY, :

RESPONDENT-CROSS/APPELLANT.: :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 12, 1996

For the Petitioner-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Cross/Appellant, Anthony N. Gallina, Esq.

Darren Ressler (hereinafter "petitioner"), a tenured teaching staff member, alleged that the Board of Education of the Township of Saddle Brook (hereinafter "Board") had violated his tenure and seniority rights when it reduced his employment to part-time during the 1991-92 school year. Petitioner further alleged that the Board had violated his tenure and seniority rights when it thereafter abolished his position in April 1992, effective June 30, 1992, and failed to reemploy him within the scope of his certificate in 1992-93. ("Ressler I.")

Petitioner subsequently filed another petition in September 1994, alleging that his tenure rights had been violated when the Board failed to reemploy him within the scope

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of his certificate in the 1993-94 school year. ("Ressler II.") It is this petition that forms the basis for the instant appeal.[1]

On June 27, 1994, the Commissioner of Education rendered his determination in Ressler I. The Commissioner rejected petitioner's contention that the Board had violated his tenure rights when it reduced him to part-time status during the 1991-92 school year. However, the Commissioner concluded that the Board had violated petitioner's seniority rights when it failed to reemploy him as an elementary physical education teacher in 1992-93 after his position was abolished at the end of the 1991-92 school year. The Commissioner rejected petitioner's claim to reinstatement as an elementary school teacher in 1992-93 on the basis of an elementary education endorsement he had received subsequent to the Board's action abolishing his position.

On August 12, 1996, the Commissioner granted the Board's motion to dismiss the petition filed in Ressler II.

Petitioner filed an appeal to the State Board from the decisions of the Commissioner in both Ressler I and Ressler II. We placed petitioner's appeal in Ressler II in abeyance pending our determination of his appeal in Ressler I.

On October 1, 1997, we rendered our decision in Ressler I, concluding that the Board had violated petitioner's tenure rights when it reduced him to part-time status during the 1991-92 school year. We further found that, by virtue of his superior seniority, petitioner had been entitled to an assignment teaching elementary physical education in 1992-93 following the abolishment of his position at the end of the 1991-92 school year. However, we rejected petitioner's contention that he had been entitled to reinstatement in

[1] We note that the Board reemployed petitioner as a full-time physical education teacher in the 1994-95 school year. Petitioner's Certification, at 3. Thus, his claim in this case is limited to 1993-94.

1992-93 as an elementary school teacher. We stressed that the scope of petitioner's tenured position was determined in April 1992 when the Board acted under N.J.S.A. 18A:28-9 to reduce its staff, thereby triggering petitioner's rights, and that his subsequent acquisition of an elementary education endorsement in June 1992 did not operate to enlarge the tenure rights he had achieved during and as a result of his employment in the district. Francey v. Board of Education of the City of Salem, decided by the State Board, August 3, 1994, aff'd, Docket #A-0625-94T2 (App. Div. 1996).

In the instant appeal, petitioner claims that as a result of the decision in Ressler I, he was entitled to reemployment within the scope of his elementary education endorsement in 1993-94 as against non-tenured teachers.

After a careful review of the record, we reverse the decision of the Commissioner dismissing the petition in Ressler II and remand this matter to him for further proceedings in accordance with our decision herein.

In Ressler I, we determined that petitioner had been entitled to reemployment as a physical education teacher in 1992-93. Had petitioner been so employed, the tenure rights ensuing from such employment would have encompassed the elementary education certification he had obtained in June 1992. Thus, while petitioner's receipt of an elementary education endorsement in June 1992 did not alter the tenure rights which were triggered when the Board abolished his position in April 1992–prior to his receipt of such certification–the scope of his tenure protection in any subsequent reduction in force would encompass elementary education.[2]

[2] Indeed, we note that if petitioner had properly been reemployed as a physical education teacher in 1992-93, the Board could have reassigned him without his consent to any assignment within the scope of his elementary education certification. See Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner of Education, 1982 S.L.D. 1328, aff'd by the State Board of Education, 1983 S.L.D. 1554.

In the matter now before us, in which petitioner claims entitlement to any assignments within the scope of his elementary education certification held by non-tenured individuals in 1993-94, petitioner represents without contradiction that all teachers assigned to teach elementary physical education in 1993-94 had more seniority than he in the applicable category. Petitioner's Certification, at 2. Thus, if petitioner had properly been reemployed as an elementary physical education teacher in 1992-93, he apparently would not have been retained in such capacity in 1993-94, and his tenure rights would once again have been implicated. Since petitioner's tenure rights in 1992-93 encompassed elementary education, his entitlement to reemployment in 1993-94 would have included any assignment within the scope of his elementary education certification held by a non-tenured teacher. See Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988).

Consequently, we reverse the decision of the Commissioner to dismiss the petition in this matter. However, since the parties were "unable to stipulate the full circumstances concerning the Board's employment of nontenured elementary-level teachers in 1993-94," initial decision, slip. op. at 3, n.1, we remand this matter to the Commissioner for further proceedings in order to determine whether the Board had employed any non-tenured individuals within the scope of petitioner's elementary education certification in the 1993-94 school year and for a resultant determination of petitioner's claim in accordance with the terms of our decision herein.

In so doing, we reject the Board's contention that petitioner failed to file the instant petition in a timely manner. N.J.A.C. 6:24-1.2(c). Until it was determined in Ressler I that petitioner had been entitled to reemployment in 1992-93, he had no claim to

employment in 1993-94 on the basis of an endorsement he had received subsequent to the Board's action in April 1992 reducing its staff.

February 4, 1998

Date of mailing FEB 06 1998

349-96

E.W. AND B.W., on behalf of their minor child, P.W.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF BERGENFIELD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents alleged various violations of due process when their daughter, P.W., was suspended for one day for writing stories on the computer that ridiculed her mathematics teacher. P.W. was not allowed back into the classroom for a time; she was taught on a one-to-one basis from February 9 through March 13, 1995. Petitioners sought expungement of the record.

ALJ found that there was no relief to be granted to petitioners. ALJ concluded that issues raised in this matter were moot and petitioners failed to state claims upon which relief might be granted. Board's motion to dismiss the petition was granted.

Commissioner adopted findings and determination in initial decision as his own.

August 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11878-95
AGENCY DKT. NO. 183-5/95

E.W. AND B.W. ON BEHALF
OF THEIR MINOR CHILD, P.W.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY
OF BERGENFIELD, BERGEN COUNTY,
Respondent.

E.W., Esq., petitioner, *pro se*

Joanne L. Butler, Esq., for respondent (Young, Dimiero & Sayovitz, attorneys)

Record Closed: June 12, 1996 Decided: June 24, 1996

BEFORE **EDITH KLINGER**, ALJ:

Petitioners, E.W. and B.W., attempted to file a petition in this matter in April 1995. The petition was rejected by the Department of Education because it failed to conform to the requirements of the regulations for the filing of petitions. *N.J.A.C.* 6:24-1.3. No copy of that petition was served upon the respondent Board. On September 5,

1995, the Department accepted a subsequent petition for filing which it designated as an "amended petition." Because the petitioners were appearing *pro se*, the petition was accepted in spite of the fact that it was seriously deficient in certain respects. This amended petition was served upon the respondent, which filed its answer with the Department on October 4, 1995. The most striking deficiency in the petition is that the petitioners do not state the relief which they are seeking.

On November 1, 1995, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A plenary hearing was scheduled for June 12, 1996.

The Board moved for summary decision to dismiss the petition. A hearing on the motion was held on the day scheduled for the plenary hearing, and the record closed at that time.

The motion for summary decision was brought on the grounds that the petition was not filed in a timely manner; that petitioners failed to comply with the regulations with respect to the service of petitions; that the petition is moot; and that there is no relief to which the petitioners are entitled.

The motion to dismiss on the grounds of petitioners' untimely filing was not considered. *N.J.A.C.* 6:24-1.2(c) requires that the petition had to be filed no later than the 90th day after notice of the Board's action was received. The action which is the subject of the petition occurred in February 1995, and petitioners' first attempt to file was made in April 1995. Even though no adequate petition was filed until September 1995, not within 90 days of the Board's action, the one finally accepted was designated an amendment to the earlier one rejected by the Department and arguably relates back to it. No determination as to whether or not it should be allowed to relate back will be made here.

The motion to dismiss the petition or petitions because E.W. and B.W. failed to serve them as required by the regulations is **DENIED**. *See N.J.A.C.* 6:24-1.2(a). The "amended" petition as finally accepted in September 1995 was served by petitioners within a reasonable time. From documents in the record and statements of counsel, it appears that respondent was aware in the spring of 1995 that a petition was in the process of being filed, and the Board would have been in no better position had it received earlier versions of the petition. Therefore, the effect upon respondent of petitioners' failure to comply was minimal.

Not all of the facts in this matter are agreed to by the parties. I **FIND**, however, that there is no dispute as to those facts necessary to decide the motion to dismiss for failure to state a claim upon which relief can be granted or the motion to dismiss the matter as moot. The version of the facts recited below is taken from a written chronology of events prepared and submitted by E.W. and B.W and from the two stories written by their daughter, P.W., which were provided by the Board and not disputed by the petitioners. Some additional facts come from a certification submitted by the superintendent of the school district, Dr. John Galish, in support of the motions. These statements were not relied upon where they are inconsistent with the facts as stated by petitioners, and the inconsistencies are noted in the recitation below.

On February 7, 1995, P.W., then an eighth-grade student at the Roy W. Brown Middle School in Bergenfield, was in her computer class practicing her use of the keyboard. When the teacher stepped out of the room for a moment, he asked another teacher, Mrs. Brendel, to supervise the class. Brendel noticed that P.W. did not have the same information on her computer screen as the rest of the class did. She went over to look at it and printed it out. The document turned out to be a story, written by P.W., with sexual overtones which ridiculed P.W.'s mathematics teacher, Sigrid Phelan, who is legally blind. Another story of the same type was discovered in the computer's memory and also printed out. Brendel took the two stories to Phelan.

E.W. and B.W. claim that their daughter's right to privacy was invaded by Brendel when she printed out P.W.'s stories from the school computer. There is no merit to this argument since it was the school's computer that P.W. was misusing during class time.

E.W. and B.W. also claim that their rights were violated because Brendel took P.W.'s stories directly to Phelan without going through "proper channels" in the school. There is no merit to this claim because it appears that P.W.'s infractions were made known to the principal's office within a short time, and there is no reason why they should not have been made known to Phelan also.

P.W. was sent to the principal's office. The principal, Rita Eberhard, called E.W., and P.W. was directed to tell her father what she had done. No one in the principal's office spoke to E.W. at that time.

P.W. received a one-day, in-school suspension on February 8, 1995. Her parents deny that they were informed of this suspension. The parents further claim that they did not learn that P.W. was being kept out of her regular mathematics classroom until February 18, 1995. The certification from Galish states that they were notified on the telephone by the assistant principal, Robert Cancro, on February 8 and in writing shortly thereafter.

From February 9 through March 13, 1995, P.W. was not allowed back into Phelan's class. E.W. and B.W. characterize this as harassment. Galish states that P.W. was taught on a one-to-one basis by Mrs. Stein, a certified mathematics teacher, during this period based upon lesson plans provided by Phelan. P.W.'s parents deny that this happened.

E.W. and B.W. claim that their rights were violated because they tried to apologize to Phelan and she would not speak to them. Phelan ultimately allowed the child back into her classroom, but apparently she did not accept the apology quickly

enough for petitioners, who feel that this also amounted to harassment. There is no merit to this contention either.

P.W. was allowed to return to the computer class on March 1, 1995. When she was allowed to return to Phelan's class on March 13, 1995, she discovered that there was an additional "teacher" in the room. Her parents claim that it was announced by someone, they did not know whom, that the second "teacher" was to act as a bodyguard for Phelan to protect her from P.W. They believed that the additional "teacher" was not present unless their daughter was in the classroom. Galish states that the other person in the classroom was an instructional aide placed there to assist the handicapped Phelan, not to protect her from P.W.

In any event, P.W. passed her Early Warning Test in mathematics, passed the course and successfully completed the school year. She transitioned to Bergenfield High School for the 1995-96 school year. When her parents moved from Bergenfield in the middle of the year, she was allowed to finish the ninth grade at Bergenfield High School. She will transfer to Northern Valley High School for the 1996-97 school year, but her records relating to this incident will not follow her there.

At the hearing, E.W. and B.W., who did not submit papers responding to the Board's motions until that morning, were asked to explain how they were injured by the actions of the Board and what relief they expected to obtain through their appeal. They stated that their rights and their daughter's rights were violated because they were not told she was suspended. They were angry that they did not receive the prompt responses they expected from the school administration and the Board. They were offended that the injured teacher refused to allow their daughter back in the math class and refused to discuss the matter with them, even though they tried to apologize to her.

E.W. and B.W. claim that their daughter was humiliated by the presence of the aide in Phelan's classroom because it implied that she was a dangerous person. They

said that she has been having emotional problems since the incident and her self-esteem has been severely affected.

P.W. has apparently had emotional problems since before she entered the district in 1992. Her parents stated that she had been seeing a psychologist for therapy at that time. According to them, they have been trying to have their child evaluated for special education since 1992, but the school has refused to do it. They have never tried to appeal the refusal, and now raise it as a defense to their daughter's actions.

As their remedy for these perceived wrongs, E.W. and B.W. are demanding a written apology from the Board. The transmittal from the Department also indicates that they seek an expungement of this incident from their daughter's school record, although they did not request this at the time of the hearing.

Taking the version of the facts most favorable to the petitioners, I **FIND** that under no circumstances are they or P.W. entitled to a written apology from the Board or any of its employees. P.W. committed a hurtful act toward a teacher and suffered the consequences.

Whether or not her parents received notice of her one-day suspension, P.W. suffered no injury which can be remedied at this time. Likewise, there is no presently available remedy for her being taught, or not taught, on a one-to-one basis outside of her regular mathematics classroom between February 8, 1995, and March 13, 1995. She passed the course and the required tests.

The Board did not retaliate against P.W. in any way following the incident and the record of the incident will not follow her to her new school. She is not, however, entitled to have the matter expunged from her record. Petitioners could request that the school permit them to add their version of the events to P.W.'s file, but they apparently have not done so.

Based upon the facts as presented by petitioners, I **FIND** that there is no relief to which they are entitled. I **CONCLUDE** that the issues raised in this matter are moot. I further **CONCLUDE** that petitioners have failed to state claims upon which relief may be granted.

I **FIND** that the issues of fact raised by petitioners, considered in their most favorable light, are not sufficient to lead a rational fact finder to rule in the petitioners' favor if a plenary hearing were held. Therefore, I **CONCLUDE** that summary decision for the Board is appropriate. *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520 (1995).

In *J.B. and P.B. v. Board of Education of Asbury Park*, 1988 *S.L.D.* 2303, and *Weehawken Education Association v. Board of Education of Weehawken*, 1978 *S.L.D.* 924, the Commissioner of Education approved the dismissal of appeals where no effective relief could be granted even if the petitioners prevailed upon the merits. Consequently, I **CONCLUDE** that the motion of the Board to dismiss this matter as moot should be **GRANTED**. I **CONCLUDE** that the petitioners have failed to state any claims upon which relief may be granted and, therefore, respondent's motion to dismiss the petition on this ground should be **GRANTED** also.

Accordingly, it is **ORDERED** that the petition of E.W. and B.W. is hereby **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 24, 1996
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

June 26, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 28 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 11878-95

E.W. AND B.W., on behalf of their minor child, P.W.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the ALJ's findings and conclusions in this matter. Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein and this matter is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 12, 1996, Date of Mailing, August 12, 1996

350-96

PAUL B. MC VEIGH,

PETITIONER,

V.

BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

Petitioning citizen sought to set aside results of a bond referendum conducted by the Board on December 19, 1995. Initially, the Commissioner dismissed the petition as untimely in that it was filed beyond the required 20 days set forth in statute, *N.J.S.A.* 18A:24-65. State Board remanded matter to Commissioner, noting that in light of major snowstorm and failure of mail delivery at that time, petition should have been considered timely.

On remand, ALJ addressed three issues. First, since petitioner actually voted in the December 19, 1995 school bond referendum, did he have any standing to challenge the conduct or the results of that election?; Second, was petitioner's petition invalid by virtue of its failure to contain the signatures of ten qualified voters as required by the statute?; and Third, did petitioner establish by a preponderance of the credible evidence that by virtue of inclement weather conditions on December 19, the free will of the electorate was thwarted thereby warranting the setting aside of the election? ALJ found that petitioner did not lack standing to challenge the results of the referendum by virtue of the fact that he voted in said election. ALJ found failure to meet the ten qualified voter signatures required by *N.J.S.A.* 18A:14-63.12 was fatal to petitioner's viability. Finally, ALJ determined petitioner failed to establish that a decision by school election officials to conduct an election despite a snowstorm thwarted the free will of the electorate.

Commissioner adopted findings and determination in initial decision with modification. Commissioner concurred with the conclusion of the ALJ that petitioner's failure to submit the required signatures with his petition challenging the election warranted dismissal of his appeal. Commissioner further concurred with the ALJ that petitioner had not met his burden of establishing that the Board's decision to hold the bond referendum during inclement weather constituted an irregularity of election procedures, thwarted the free will of the electorate, or changed the outcome of the election. In light of the applicable education statutes in place at the time petition was initiated, Commissioner found it unnecessary to consider the question of petitioner's standing by virtue of his having voted in the December 19, 1995 election. Petition was dismissed.

August 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

OAL DKT. NO.EDU 5172-96

AGENCY DKT. NO. 6-1/96

PAUL B. MCVEIGH,

Petitioner,

v.

BOARD OF EDUCATION

OF THE WESTWOOD REGIONAL SCHOOL DISTRICT,

Respondent.

Paul B. McVeigh, *pro se*

Rodney T. Hara, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: June 17, 1996 Decided: June 17, 1996

BEFORE **STEPHEN G. WEISS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2 on June 17, 1996.

This matter was transmitted to the Office of Administrative Law (OAL) by the Department of Education on May 9, 1996 as a result of a decision rendered on May 1, 1996 by the State Board of Education which remanded to the Commissioner the instant case for further proceedings. Following that remand the case was transmitted by the Commissioner to the OAL and an expedited hearing was scheduled for, and was conducted today, June 17, 1996. The following constitutes my oral initial decision in the case.

With respect to the underlying circumstances I first would note that in its May 1, 1996 decision the State Board determined that a challenge lodged by the petitioner, Mr. McVeigh, in January 1996 to a special school bond referendum held on December 19, 1995 in the respondent school district should have been heard by the Commissioner since although the filing was beyond the twenty days set forth in the applicable statute, *N.J.S.A.* 18A:24-65, as amended, the actual date of the filing was excusable because a major winter snowstorm occurred over the weekend of January 6-7, 1996 and the State offices were closed on Monday, January 8, 1996 which was the twentieth day. Beyond that, there was not even any regular mail delivery the following day, January 9, 1996. Therefore, the State Board took the view that in light of the inability to have mail delivered the receipt of the petition by the Commissioner on January 10, 1996 should be considered timely despite the statutory provision. The Commissioner earlier had determined that the twenty day time period applied and therefore he did not entertain Mr. McVeigh's petition in January.

The State Board also noted in its May 1, 1996 decision that even though the Commissioner had referred to the fact that the petition also failed to contain the signatures of ten qualified voters contrary to *N.J.S.A.* 18A:14-63.12, the Commissioner had based his decision to reject the petition only upon the alleged failure to meet the twenty day time limit. The remand, therefore, deliberately left open that issue for further determination by the Commissioner. By the way, I would note at this juncture

that the vast majority of the provisions of the school elections laws have now been repealed, effective as of March 15, 1996, and that challenges to school election matters generally now would have to be lodged in the Superior Court. I would refer you to the provisions of Laws 1995, Chapter 278, generally. In any event, as a result of the May 1, 1996 remand by the State Board to the Commissioner, and the Commissioner's transmittal to the Office of Administrative Law, I conducted a hearing today at which time testimony was received from the petitioner on his own behalf and from witnesses on behalf of the Board of Education; Mr. Angelo Raimondi, the school district's Business Administrator - Board Secretary and Dr. Joseph Fisler, the Superintendent of Schools.

Previously, I had conducted a telephone conference with Mr. McVeigh and Mr. Hara, Board counsel, earlier this month at which time it was agreed that three issues would be addressed by me following the hearing. First, since petitioner actually voted in the December 19, 1995 school bond referendum did he have any standing to challenge the conduct or the results of that school election?; Second, even assuming petitioner had the standing to file his challenge; nevertheless, was his petition invalid by virtue of its failure to obtain the signatures of ten qualified voters as required by the statute; and, third, even assuming petitioner has the standing to challenge the outcome of the referendum and is not disqualified by virtue of the failure to obtain ten signatures on his petition, should it be dismissed because of his failure to establish by a preponderance of the credible evidence that by virtue of inclement weather conditions on December 19, 1995 the free will of the electorate was thwarted in that persons wishing to get to the polls could not do so in a safe fashion on account of the weather? It is my intention to deal with and dispose of all three of those issues today.

TESTIMONY

Testimony, as I indicated, was received from three witness and I will briefly try and summarize what each had to say. First to testify, since the burden of proof is upon him, was Mr. McVeigh who with respect to the standing issue stated that was never raised as an issue as far as he knew either before the Commissioner or the State Board and that the Board of Education should not be permitted to raise it now. Beyond that, he had been in communication with the Office of the Bergen County Superintendent of Schools and had never been informed concerning that issue either.

With respect to the absence of ten signatures; again, even though he had received information from the County Superintendent's Office, none of it alerted him, nor was he told, that his petition had to be accompanied by the signatures of ten qualified voters. In fact, he pointed out that what he did receive were the regulations concerning petitions generally, *N.J.A.C.* 6:24-1.2 *et seq.*, and a petition with respect to the bond referendum is not even particularly covered by that provision since that deals generally with the filing of a school law controversy petition. He claims, therefore, that he had the right to rely upon the information received and not having been informed of the special requirement of the statute, and not being attorney, in all fairness he should not be held to it. Beyond that, he points out that since it was brought to his attention as a defect before the Commissioner, and the Commissioner made reference to it in his January 17, 1996 determination, before the State Board of Education that defect was cured since essentially he refiled the petition with the requisite number of signatures.

With respect to the third issue, the merits of the case so to speak, the snow storm, it was Mr. McVeigh's testimony that the nature of the inclement weather on the 19th of December, 1995 was of such a serious nature as to preclude many voters from getting to the polls and casting their ballots. To that end, he noted that on the morning of the 19th of December the snow started about 9:00 a.m. and essentially became

heavier and heavier as the day went on. In fact, at approximately 11:00 a.m. that morning his wife received a telephone call from a class mother informing her that indeed the school system was going to close early that day at 12:45. According to Mr. McVeigh, he drove to school to pick up his daughters at the early closing and snow was falling heavily at that time. He did go out at about 2:00 p.m. or so when he said there was a slight break in the snow to go to the bank. When he got to the branch drive-up there was a note there, he said, indicating that the bank had closed. Normally, the drive-up would have been open at that point.

Mr. McVeigh indicated that at about 6:30 or so he went to vote at his designated polling place and that to get there he had to traverse local streets which as far as he could determine had not been plowed and seemed to him to contain anywhere from 6" to 8" of snow. He described the driving conditions as "semi-treacherous". In fact, when he informed his wife that he was going to go to the polls she absolutely refused to accompany him because of what she indicated to him was the dangerous situation of the driving conditions. Mr. McVeigh did go to the polls, did vote and returned home. The snow, he said, was sufficient enough so that between around 7:30 and 8:00 he went out and did some cross-country skiing on his local street. He continued to indicate that snow was falling heavily. It was his judgment that by about 7:30 or 8:00 there was perhaps 7 to 8" of snow on the ground and it was still snowing heavily at that point. The polls by the way were open that day from 2:00 p.m. to 9:00 p.m. At about 10:00 p.m. that evening he received a telephone call indicating that the school system had determined not to open the following day and that classes were canceled - that would be December 20. He concluded his observations regarding the weather by indicating that as far as he was concerned the conditions of travel obviously were extremely dangerous and they were particularly intimidating to elderly potential voters and because of that situation it was inappropriate, unfair and improper for the Board to have gone forward with its bond referendum that day. He also indicated that he had

polled some of his neighbors who indicated they did not go to the polls because of the weather conditions.

The Board's testimony, as I indicated, consisted of testimony from Mr. Raimondi and from the superintendent, Dr. Fisler. Basically, with regard to the weather, which was what concerned me the most as far as testimony was concerned, Mr. Raimondi indicated that he was responsible for the building and grounds and also to see to it that the polling places were kept as reasonably clear from snow as possible on the day in question. In fact, there was a special effort made to keep the walkways and the parking lots open in that regard. He personally visited each of the polling places twice on the day in question. First, at about 2:00 - 3:30 p.m. and then about 6:00 - 7:30 p.m. He noted what he characterized as a heavy turn-out of senior citizens on the earlier occasions between 2:00 and 3:30 p.m. and at that point he estimated there was only about 1" of snow on the ground. The second time he visited the polls was about 6:00 or 6:30 - 7:30 p.m. and he agreed there was more snow, about 3" the way he put it, and that the voting seemed to him to be rather light at that time which was typical since it was the supper hour. He insisted that the Board made every reasonable effort and did successfully keep open its own roadways and sidewalks and parking lots and he had no trouble getting to and from the various polling places at the schools. He also opined that as far as he could see the local streets had been plowed. He remained at one of the schools, which I think was Brookside, until the polls closed and the tallies were received and by about 10:30 p.m. in his estimation, while the snow had been heavier, nevertheless it was not so bad that the ability of persons to get to and from the polls was substantially impaired.

He also identified various excerpts from the minutes of several Board meetings dealing with the proposal on the bond issue, about a $6.9 million bond issue, and also excerpts of minutes reflecting the results of previous school elections over the past twelve years or so regarding the numbers of persons who had voted and the

percentage of those persons voting favorably on the budgets. The school bond referendum held on December 19, 1995 was the first one in many, many years in the district so there was no comparative statistics with regard to school bond referenda as such. By the way, it was stipulated that at the April 19, 1996 school election there was a total of, I think, approximately 1860 votes cast, whereas at the December school bond referendum in issue the total number of votes cast was 1249; 793 in favor and 456 in opposition. Generally then, Mr. Raimondi's testimony with regard to the travel conditions on the day in question was that although it was snowing all day, it was not so bad as to justify not having the election held. He also indicated that he would not have had the authority, nor as far as he knew would anybody have the authority, to cancel the bond referendum.

The last witness was Dr. Fisler, Superintendent of Schools, who first testified regarding the planning for the bond proposal. He noted that the Board had not had a school bond referendum in many years. In fact, it has no bonded indebtedness and because of the nature of school budgeting in recent years there was a growing need for the repair of various and sundry facilities. As a result, the Board authorized the issuance of school bonds in the total amount of about $6.9 million and the proposal and the specifics were set forth in the October 30, 1995 and also the December 4, 1995 minutes of the Board meeting - the breakdown of the expenditures. He noted that the Board had considered holding the bond referendum on dates other than December 19, particularly waiting until April 1996, but it was felt that because of the need to do the work, particularly during the summer months when students were not in the schools, to wait until April and then have to go through the bid award and contract negotiation process and so forth would perhaps not have left enough time for the Board to move forward with these needed projects.

With regard to the specifics of the day in question, he agreed that in fact school was dismissed early that day - 12:45 p.m. for the elementary schools and 1:15 p.m. for

the high school. Normally, the elementary schools closed at 3:15 p.m. and the high school at 2:58 p.m. The decision to close early that day concededly was made because of the impending weather problems and it was made, he said, in collaboration with other neighboring school districts with whom he often conferred in matters of that sort. Also, the decision had to be made by 10:30 or 10:45 a.m. in order to make sure that the school bus people had transportation available to pick up the students at the early closing time. So, logistics drove the timing of the decisions. He also noted that closing early that probably interfered with the ability of some people to actually vote on the referendum since had there been no particular weather problem that day parents coming to pick up their children at the normal closing hours could essentially have "killed two birds with one stone" and voted while they were at the school. Having to pick their children up before the polls opened would therefore require them to return a second time and he speculated that perhaps some people were unable or unwilling to do so because of the nature of the snow conditions.

Dr. Fisler personally visited three of the schools on the day in question - the George School around 2:30 or 3:00 p.m., the Berkeley School at about 4:00 to 4:30 p.m., and Brookside School at about 8:30 p.m. When he went to the George School at about 2:30 - 3:00 p.m., he indicated that there was only a "dusting" up to perhaps an inch of snow on the ground and access was relatively easy. It was his recollection that the storm came later than had been predicted. The sidewalks and the parking lots were clear and the roads, as he put it, "were not very bad" because there was no significant accumulation. He also noted the presence at that early time of a number of senior citizens. At the 4:30 time when he was at the Berkeley School he said there were "a couple of inches" on the ground; nevertheless, the lots were clear and he saw quite a few people at the school voting. The roads were all passable and as far as he could tell had been plowed. He went home to Oradell thereafter and then returned to the district to go the to Brookside School at about 8:30 p.m. At that time, he said, there were about 6" to 7" of snow and it was coming down heavily. The roads he conceded

now were more dangerous than they had been during the earlier hours and snow plows were busily at work to try and keep the roads clear as possible. It was his conclusion, overall, that despite the fact that it certainly did snow, that it was not a state of emergency or any such problem requiring him (even if he had the authority to do so which he did not think he did) to cancel the school bond referendum. He explained that he did decide to close schools early because that was his judgment based upon what he considered at the time. In his judgment the conditions warranted closing down the schools and he made that decision.

In light of my consideration of the testimony I would now recite the following findings of fact. In my view, the material facts necessary to a decision in this case are not essentially in dispute and may be set forth as follows:

STATEMENT OF FACTS

1. Petitioner, Paul B. McVeigh, is a resident of Washington Township and a qualified voter in the Westwood Regional School District, Bergen County, New Jersey, which is operated by the respondent Board of Education.

2. The regional school district is comprised of schools grades K through 6 in the Borough of Westwood and Township of Washington and grades 7 through 12 in a junior-senior high school shared by both municipalities.

3. At a meeting of December 4, 1995 the respondent adopted a resolution calling for a special school election to be held on December 19, 1995 with respect to a proposal that the voters approve the issuance of school district bonds in the total amount of $6.9 million.

4. On Tuesday, December 19, 1995, the school bond referendum was conducted in the regional school district and a total of 1249 votes were cast on that date. Of that total, 793 voted in favor of the proposed bond issue and 456 in opposition to it.

5. Petitioner, Paul B. McVeigh, was one of the qualified voters who cast their votes at the election on that date.

6. On December 19, 1995, a winter storm struck the northern New Jersey area and a total of at least 6" to 8" of snow fell during that day. As a result of the snowfall, travel by the voting public to and from the polls was affected. In some respects the travel was hampered.

7. Because of the storm the Superintendent of Schools, Dr. Fisler, determined to close the schools early on December 19, 1995, namely, at 12:45 p.m. for the elementary schools and at 1:15 p.m. for the high schools which was approximately one and a half hours, at least, earlier than normal. This was done in light of the fact that there had been a predicted snow storm and even though it was not snowing heavily at all during the early morning hours, logistical steps had to be taken to arrange for school bus transportation for students and enough advance notice given to parents and others that the students would be coming home early that day.

8. During the twelve year period between 1984 and 1995 the average annual voter turnout at the April school elections in the school district was 1573 persons. The average approval rate for

the school budgets at those elections was approximately 55.1%. By comparison, the percentage of voters voting to approve the proposed school bonds on December 19, 1995 was approximately 63.5%.

9. Although the precise amount of snow that fell during the hours between approximately 9:00 a.m. and 9:00 p.m. on December 19, 1996 was not firmly fixed, by virtue of the testimony and documentary evidence in this case there were at least 6" to 8" of snowfall total during the day, and perhaps more.

10. On January 10, 1996 petitioner filed a challenge to the results of the school bond referendum with the Commissioner of Education. Contrary to the provisions of *N.J.S.A.* 18A:14-63.12 his petition was neither signed by nor or accompanied by the signatures of ten qualified voters of the school district. Indeed, the only signature appearing on the petition was that of Mr. McVeigh himself.

11. In his petition to the Commissioner filed on January 10, 1996, Mr. McVeigh challenged the results of the bond referendum on the basis that a number of citizens qualified to vote in the school district, especially senior citizens, were denied equal access to the polling places in light of the inclement weather conditions on that date and this was particularly evidenced by the fact that the school system was shut down at 12:45 p.m. and students and staff were permitted to leave to go home at that time rather than at the normal closing hours about one and one half hours later.

12. In a letter dated January 17, 1996 to the petitioner, Commissioner Leo Klagholtz acknowledged receipt of the petition but determined to reject the challenge on the basis that it was filed beyond the twenty day time limit set forth in *N.J.S.A. 18A:*24-65. In that same rejection letter the Commissioner also noted that pursuant to *N.J.S.A.* 18A:14-63.12 all inquiries with respect to the conduct of a school election had to be filed (a) no later than five calendar days following the announcement of the election results and, (b) in the case of public questions, had to be accompanied by the signatures of ten qualified voters.

13. In light of the Commissioner's rejection of the petition under the twenty day provision of the statute, McVeigh appealed to the State Board of Education. In a decision dated May 1, 1996, the State Board reversed Commissioner Klagholtz and remanded the matter for further proceedings. The State Board determined that the filing of the petition on January 10, 1996, which was on the twenty second day following the December 19, 1995 bond referendum, was excusable since a major blizzard had occurred in New Jersey over the weekend of January 6-7, 1996, and on Monday, January 8, the Governor had declared a Statewide snow emergency. Beyond that, there was no regular mail delivery to the Department of Education on January 9, 1996 so that the earliest possible time for delivery of the petition to the Department was not until Wednesday, January 10, 1996 and under those circumstances, according to the State Board of Education, in all fairness, the petition should be deemed to have been filed in a timely fashion.

14. In a footnote to its decision the State Board acknowledged that the Commissioner had referred in his January 17, 1996 letter to the alleged violation of the signature requirement of the statute and went on to note that since the Commissioner did not dismiss the petition on that ground, it, the State Board, would not pass upon the applicability of the provision to the matter or to the possible effect of that failure on the consideration of the case.

That concludes my statement as to the findings with respect to the factual issues in the case. As I noted, most of the facts essentially are not in dispute. The only real dispute stems really about the number of inches of snow which fell, when it fell and how severely it may have impacted upon the ability of voters to get to the polls which I will address shortly.

DISCUSSION

Based upon my review and consideration of the testimony and the other evidence, the following is my discussion of the issues. As I noted, three issues have been identified by the parties. The first is McVeigh's very standing even to challenge the results of the December 19, 1995 referendum in light of the fact that despite his complaint concerning the impact of inclement weather on the electorate he, himself, managed to get to the polls on that date and actually cast his ballot. The Board argues that because he engaged in that conduct, and cites some cases in support, he cannot challenge the election. I think this issue can be disposed of favorably to Mr. McVeigh. First, there is no provision in the school laws setting forth any specific requirement that in order to challenge the results of an election because of inclement weather or other such reason, a party must demonstrate that he or she was unable to get to the polling place because of that fact. Second, I take from the State Board decision in this case a "message", so to speak, that militates against my finding in the

Board's favor on this issue for the following reason. The remand by the State Board, despite the clear violation of the twenty day rule, seems to have been predicated on "fairness" considerations and the Board did not raise the standing issue, as far as I know, before the State Board, as Mr. McVeigh pointed out. To now preclude him from pursuing his claim because of his alleged lack of standing, having cast a ballot himself, cannot be reconciled with the way the State Board has approached this case. This is not to say that there is always some sort of overriding fairness doctrine which would permit potentially viable standing claims to be ignored under all circumstances. I am merely determining that based upon the particular and unique circumstances of this case only, I do not believe it would be appropriate for me to reject the petition on the standing ground raised by the Board. So, I am going to hold in Mr. McVeigh's favor and proceed to the other issues. I would finally note, by the way, that I did read the cases cited by the Board - *In re D'Amore* which was attached to Mr. Hara's affidavit, and the *Brown* case, the 1903 decision [69 *N.J.L.* 45 (Sup. Ct. 1903), aff'd 70 *N.J.L.* 762 (E&A 1904)] and in my view the circumstances in those cases are distinguishable from the instant situation and therefore do not require me to dismiss the petition.

The second issue, the ten signature issue, raises a much more serious problem for Mr. McVeigh. The statute, now repealed, but in existence at the time of this school bond referendum, clearly and unequivocally required that a petition challenging a school election because of alleged violations had to have ten qualified voter signatures and that did not take place here. As Board counsel observes, that requirement is obviously designed to discourage frivolous challenges and is reasonably calculated toward that end. He cites, appropriately so, the decision in the case of *In re Annual School Election of the School District of Lacey Tp*, 91 *N.J.A.R.* 2d, p3 (EDU) (Sept. 12, 1991), where, similar to this case, a petition failed to meet the ten signature requirement and the Commissioner rejected an effort by the petitioner to amend the appeal to comply with the requirement.

In this case, as I previously indicated, Mr. McVeigh attempted to cure the defect at the State Board level and under the *Lacey Tp.* decision, to be consistent, I would have to hold that came too late. Simply put, in my view, a condition precedent to filing a challenge capable of being heard by the Commissioner pursuant to the statute is that ten signatures be contained on the petition. Unfortunately, although the Commissioner did refer to this defect in his letter decision of January 17, 1996, he did not clearly indicate that that was a separate basis for rejecting the challenge and in light of that uncertainty the State Board, quite properly, simply made note that the issue had been raised but did not decide it. However, that issue was squarely and appropriately placed before me and in light of the *Lacey Tp.* decision and in light of the wisdom of the legislative requirement in the first place, I frankly do not perceive any basis that would allow me to waive, relax or otherwise ignore the statutory provisions, even if I had the authority to do so. While this, too, may be and, in fact, has been claimed by Mr. McVeigh to be somewhat "unfair" there is a point at which statutory requirements have to be honored and claims of unfairness rejected. That point, in my view, was reached here. While I appreciate that the petitioner was acting *pro se* on his own behalf, and purportedly relied upon information given to him by the county superintendent, that does not and should not be allowed to override the clear, unambiguous statutory language. Ten qualified voters' names did not appear on the petition he filed on January 10, 1996 challenging the election. That made the petition defective and I do not believe the Commissioner should have considered it. While some procedural irregularities in elections may be waived, and there is case law to that effect, this is not usually done unless a failure to do so unfairly would disenfranchise voters. This is not the case here. In fact, if I did not do this and permitted the petition, and then went on the "merits" to find favorably for Mr. McVeigh, assuming I rejected the Board's ten signature argument, that would result in disenfranchisement, just the opposite of what the cases indicate would form an appropriate basis to overlook arguably technical irregularities. I am not saying that this is a technical irregularity, I think it is a substantial, well-reasoned requirement and while I appreciate, as I said, that Mr.

McVeigh may not have been expected to know of its existence and arguably may have been misled by not getting the specific statute from the county superintendent, that is not reason enough to ignore what the legislature has clearly required in matters of this sort. So, I will dismiss the petition on that basis alone.

Since it is possible that my determination with respect to the ten signature violation could be rejected by the Commissioner of Education, it is incumbent upon me to address the third issue - the "merits" of the case, *i.e.*, that in light of the nature of the inclement weather on the date of the school bond referendum and its potential impact, if not actual impact on the ability of persons safely to travel to and from the polls, the free will of the electorate was so severely curtailed as to require that the election be set aside. My review of the facts in this case, together with the case law, leads me to conclude that this argument, too, must be rejected. Decisions both by the Commissioner and by the courts are replete with cases establishing the very clear principle that elections are to be given effect wherever possible, even where gross irregularities are to be found. In this regard I would cite to two decisions which pop up all the time in matters of this sort: *Wene v. Meyner*, 13 *N.J.* 185, 197-198 (1953); and *Sharrock v. Keansburg*, 15 *N.J. Super.* 11, 19-20 (App. Div. 1951). See also, *In re Livingston*, 83 *N.J. Super.* 98, 107 (App. Div. 1964). Furthermore, the burden of proof to demonstrate that the free will of the people has been thwarted rests upon the person challenging the outcome and it is not enough merely to speculate had the challenged state of facts not occurred the result would have been different. Authority for that proposition may be found in two decisions by the Commissioner which the Board cited, namely, *In the Matter of the Annual School Board Election in* Newark, 93 *N.J.A.R.* 2d (EDU) 645 and *In the Matter of the Annual School Election in* Matawan-Aberdeen Regional School District, 1987 *S.L.D* 1140, aff'd State Board of Education 1987 *S.L.D.* 1146.

It is equally clear to me in this case that there was neither fraud nor the kind of overriding irregularity which reasonably can be said to have interfered with the ability of the electorate freely to express their will. Cases which have determined the existence of such misconduct include obstruction of voters, improper campaign practices, improper use of or tampering with voting machines, directly assisting voters inside polling places, and so forth. In my view, a decision by school election officials to conduct an election despite a snowstorm does not constitute fraud or the kind of irregularity warranting the setting aside of the election at all. While there may have been a snowstorm, and there clearly was a rather substantial one on December 19, 1995, which involved eventually the deposit of perhaps 6", 8" or 10" of snow, it did not lead (as did occur the following month) to a declaration by the Governor of a state of emergency so severe as to close down all State functions, nor the cessation of mail delivery the following day. I think it would be a dangerous precedent to set aside an election based upon a storm without any substantial guidelines as to what standards one follows. How many inches? Was it icy? Were there "blizzard" conditions which I think technically requires certain winds of 50 miles per hour and so forth. It would be much too difficult in my view to set aside elections on that kind of ground merely speculating that persons could not get to the polls. In fact, as noted in the statement of facts, a fairly large number of persons did vote that day on the school bond referendum and to set aside the election based upon the speculation advanced by Mr. McVeigh to me would be an intolerable interference with their activities on that date. I would also quote from the legal treatise, *Corpus Juris Secundum,* Vol. 29, Elections, ¶213, where the editors note as follows. ". . .

> Where the general public knows or should know that an election is taking place for a particular purpose, such election will be held valid even though only a small minority of the voters cast their ballots in such election. So where an election has been held despite interference by the elements, the vote may be reduced thereby, or the outcome changed, but qualified voters who fail to go to the polls to vote under the circumstances will be bound by the express will of those who do.

Cited in that regard is a decision by a court in Minnesota, *State ex rel. School Dist. No. 56 v. Schmeising,* 66 *N.W.* 2d. p. 20.

Furthermore, as observed by Board counsel in his prehearing memoranda, there are least two Commissioner decisions which tend to support this view. See, *In re Annual School Election held in Cherry Hill*, 1978 *S.L.D.* 377 (dec. by Comm'n April 14, 1978); and *In re Annual School Election held in East Amwell*, 1976 *S.L.D.* 460 (dec. by Comm'n. April 29, 1976). I do not exactly recall the facts in the *Cherry Hill* case but I think *East Amwell* directly involved the claim that a certain number of voters on a certain street could not get to the polls because of snow and while that issue perhaps got lost in the shuffle a little bit with other claims, clearly the Commissioner rejected that as a basis for setting aside an election.

Thus, I cannot nor will I engage in the sort of conjecture and speculation that I would have to do if I bought into Mr. McVeigh's argument with regard to his claim that many potential voters may have been, or were in fact, frustrated by the weather to such an extent that they determined not to exercise their voting privileges. It may very well be, and the statistics I cited do, in fact, tend to support the view, that although a number of persons did turn out it was less than maybe two-thirds of the amount of persons who have been casting their votes, at least most recently, in the April regular school elections. However, it is difficult to make such comparisons because of issues as to candidate personalities, and the annual school election is also a budget election which has different aspects and attributes than a school bond referendum. I cited the statistics provided by the Board in my findings of fact only to demonstrate that this <u>was not</u> a situation where hardly anybody managed to get to the polls. A goodly number of people did get to the polls and to that extent the statistical data was helpful. At bottom, the burden of proof in this sort of case rests upon the petitioner and more than mere speculation is required. This Mr. McVeigh failed to do.

Therefore, in light of the findings of fact, I **CONCLUDE** and hereby **ORDER** for the reasons set forth in this oral initial decision, that the petition of appeal should be **DISMISSED.**

This concludes my oral decision. There is a tape which will be available within a day or two for whoever wants to order it. In addition, even though it is an oral decision, under our regulations I must have it transcribed and there will be a written transcription of my oral decision prepared by my secretary and will be mailed to the parties within, I think I have two weeks under the regulations but I will try and do it more quickly than that. So that concludes my determination and let me again express my appreciation to both Mr. Hara and also Mr. McVeigh in bringing this matter in an expeditious fashion for a hearing.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

OAL DKT. NO. EDU 5172-96

I, Marie V. Hackett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Stephen G. Weiss' oral decision rendered in the above matter on June 17, 1996.

June 25, 1996
DATE

MARIE V. HACKETT

June 25, 1996
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

6/25/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mh

PAUL B. MC VEIGH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Primary exceptions of the Board and those of petitioner were timely filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, as were reply exceptions of the Board.

The Board excepts to the Administrative Law Judge's (ALJ) conclusion with respect to the first issue in this matter, *i.e.*, the question of whether petitioner had standing to challenge the December 19, 1995 school bond referendum in that he actually voted in that election. It avers that in finding in favor of petitioner on this issue, the ALJ ignored the principles of standing established by the Supreme Court. The Board argues that it is well-settled that to have standing to assert a claim an individual "***must have a sufficient stake and real adverseness with respect to the subject matter of the litigation. *New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 82 *N.J.* 57, 67 (1980)."

(Board's Exceptions at p. 2) The Board asserts that to satisfy this standard "***a petitioner must show that there is a substantial likelihood of some harm to be visited upon him in the event of an unfavorable decision" *(id.),* and it argues that because the within petitioner voted at the election he neither suffered harm nor did he have a stake in the outcome of this matter. The Board further advances that the ALJ erred in discounting the applicability of *In re D'Amore*, Docket No. SOM-L-729-96 (Law Div. May 29, 1996), and *Brown v. Street Lighting Dist. Number One of the Township of Woodbridge*, 69 *N.J.L.* 485 (Sup. Ct. 1903), aff'd 70 *N.J.L.* 762 (E. & A. 1904), discussed at length in its pre-hearing brief, to this matter. It maintains that these decisions are directly on point and serve to establish that petitioner's appeal should have been dismissed for lack of standing.

The Board further urges that, notwithstanding clear case law, the ALJ mistakenly reasoned that the State Board's remand of this matter was predicated on a finding that "fairness considerations" and the Board's failure to raise the standing issue before the Commissioner dictated such remand and, as such, the State Board was sending "a 'message' to the Office of Administrative Law that the matter should, in fairness, proceed on the underlying merits of the appeal, regardless of whether petitioner has standing.***" (Board's Exceptions at p. 4) In this regard, the Board asserts that the State Board's remand sent no such "message". Rather, it contends

> ***The State Board simply held that, in fairness, petitioner's appeal should be deemed timely filed due to the inclement weather. Principles of fairness, however, play no part in the determination of a petitioner's standing to pursue a claim. This is a legal issue which should be decided on the basis of existing legal precedent. As such, the administrative law judge should have independently addressed this issue, by applying the principles set forth in *New Jersey Chamber of Commerce, supra, D'Amore, supra,* and *Brown, supra,* to the instant situation, without looking for guidance from

the State Board which remanded the matter on an entirely different issue. (Board's Exceptions at p. 4)

The Board further argues that the fact that it had not previously raised the issue of petitioner's standing has no bearing on its ability to do so herein. In this regard, the Board observes that the dismissal of petitioner's appeal by the Commissioner was based solely on the determination that such appeal was untimely filed and, as such, "***the Board was precluded from raising any other issues, including that of petitioner's standing, before the State Board." (*Id.* at p. 3)

With respect to the standing issue, petitioner's exceptions urge that, as correctly noted by the ALJ in his decision, "there is no provision in the school laws setting forth any specific requirement that in order to challenge the results of an election because of inclement weather or other such reason, a party must demonstrate that he or she was unable to get to the polling place because of that fact." (Petitioner's Exceptions at p. 1)

With regard to the second issue, that of the missing ten signatures, petitioner argues that the particular statute imposing such a requirement, intended to discourage frivolous challenges to an election, has now been repealed. Petitioner proffers that "***[w]hile my violation was previous to its repeal the workings toward that end certainly occurred many months before the actual repeal." (*Id.* at p. 2) He urges that the Commissioner relax this particular requirement to prevent an injustice from occurring, arguing in that his petition is neither frivolous nor capricious, and that he acted in good faith relying on the completeness of information provided to him on how to bring his petition, "[i]t would be entirely fair not to hold me to [a] statute which has now become extinct.***" (*Id.*)

In response, the Board contends that relaxation of the ten signature requirement set forth in *N.J.S.A.* 18A:14-63.12 is entirely inconsistent with the intent of the Legislature and that of the Commissioner to require strict enforcement of this requirement as evidenced in *In re Annual School Election of the School District of Lacey Township,* 91 *N.J.A.R.* 2d (EDU) 3. Further, it posits that the fact that the statutory provision at issue was subsequently repealed has no bearing on its applicability to this matter arguing

> ***The bond referendum was held and the petition was filed prior to March 15, 1995--the effective date for when the conduct of school elections became subject to Title 19 of the Revised Statutes. L.1995, c.278. Therefore, this lawsuit is governed by the school election statutes set forth at *N.J.S.A.* 18A:14-1 *et seq.* and is subject to the jurisdiction of the State Department of Education. Petitioner's failure to comply with the strict requirements of *N.J.S.A.* 18A:14-63.12 is in no way lessened by the statute's subsequent repeal.*** (Board's Reply Exceptions at p. 3)

The Board further contends that notwithstanding that the within petitioner is representing himself in this matter and claims reliance on information provided to him on how to file an appeal, the procedural deficiencies of his petition cannot be excused nor does such situation justify the relaxation of the signature requirement. The Board cites *Tuckey v. Harleysville Ins. Co.*, 236 *N.J. Super.* 221, 224 (App. Div. 1989) for the proposition that "pro se litigants are presumed to know, and are required to follow, state statutes." *(Id.)*

Lastly, with regard to the third issue in this matter, whether the inclement weather on December 19, 1995 was severe enough that voters were prevented from getting to the polls, thereby thwarting the will of the electorate, petitioner's exceptions argue that, as reported by various media sources, there was a significant snowfall on December 19, 1995. He asserts that although the Board cites cases where elections were upheld despite snowstorms,

> ***This snow was such as to close the schools early on that day and then order the schools closed the following day December 20, 1995 because of the heavy accumulation. While logistics played a role in the closing the primary reason was the snow. The news reports had predict[ed] up to two feet of snow would fall on December 19, 1995. The sirens sounded signaling the closings in the two towns and the entire school system was shut down.
>
> (Petitioner's Exceptions at pp. 2-3)

Petitioner argues that the severity of this situation distinguishes this matter from those cases cited by the Board in that here "***the host system sen[t] everyone home because of the hazardous conditions and impending doom and then expect[ed] the electorate whe[n] the conditions are far worse to risk their lives." (*Id.* at p. 3) Petitioner further maintains that the voter numbers for the last twelve years presented by the Board are misleading. He states that, instead, the focus should be on voter numbers for the last five to seven years, which evidenced a much more active participation in the election process, and present a much more accurate picture. Petitioner argues

> ***Totaling the votes cast from the years 1990 through 1996 budget votes we get an average annual turnout of 1961 voters. The turnout on the day of the referendum was 1249. A difference of 712 votes on the average which is more than twice the votes needed to defeat the measure which won by 337 votes. It can now be clearly seen there were a significant number of voters who did not cast their ballots. The snowfall on this day did in fact significantly interfer (sic) with the ability of the electorate to get to the polls not because they did not want to but because it was dangerous and hazardous to human life.
>
> (Petitioner's Exceptions at p. 3)

In response, the Board avers that the Commissioner has consistently held that the conducting of a school election in a snowstorm "does not constitute an irregularity of school election laws warranting the voiding of the election," again citing *In re Annual School Election Held in the School District of the Township of Cherry Hill*, 1978 *S.L.D.* 377, 378 and *In re Annual School Election Held in the School District of East Amwell*, 1976 *S.L.D.* 460, 462 as its

support for this proposition. (Board's Reply Exception at p. 4) As such, it argues that petitioner's attempt to distinguish these cases based upon the severity of those storms vis-à-vis the one involved here, is of no consequence. It maintains that, as indicated by the ALJ, until standards or guidelines are established which definitively address the circumstances under which an election must be canceled, such as a specific amount of snow accumulation, "the severity of inclement weather plays no part in the determination of the propriety of a board's decision to hold an election during a snowstorm.***" (*Id.* at p. 5)

With regard to petitioner's challenge of its statistical data concerning prior voter turnout which was presented at the hearing, the Board advances that such challenge is without merit in that petitioner ignores the fact that the data submitted by the Board "represents the voter turnout at annual school elections, which historically receive greater voter turnouts than special elections." (*Id.*) It argues that even if the ALJ considered only the voter turnout at the annual school elections for the last seven years, "the statistics clearly demonstrate that the electorate was adequately represented at the referendum." (*Id.*) The Board further proffers that, in any event, petitioner has not satisfied his burden of establishing that "the free will of the people was thwarted. *In re Annual School Board Election in Newark*, 93 *N.J.A.R.* 2d (EDU) 645, 648***" arguing that mere speculation that the snowstorm impacted the outcome of the bond referendum is insufficient to satisfy such burden of proof. (*Id.*)

Upon a careful and independent review of the record in this matter, including the exception arguments advanced by the parties, the Commissioner agrees with the conclusion of the ALJ that petitioner's failure to submit the required signatures with his petition challenging the election warrants dismissal of his appeal. (*In re Annual School Election of the School*

District of Lacey Township, supra. As correctly noted by the ALJ, "a condition precedent to filing a challenge capable of being heard by the Commissioner pursuant to the statute [*N.J.S.A* 18A:14-63.12] is that ten signatures be contained on the petition." (Initial Decision at p. 15) The Commissioner further concurs with the ALJ, for the reasons articulated in his decision, that petitioner has not met his burden of establishing that the Board's decision to hold the bond referendum at issue in this matter during inclement weather constituted an irregularity of election procedures, thwarted the free will of the electorate, or changed the outcome of the election. *In the Matter of the Annual School Board Election in Newark, supra; In the Matter of the Annual School Election in Matawan-Aberdeen Regional School District, supra.*

With respect to the standing issue raised herein, as was mentioned in the initial decision and the exception submissions of the parties, Chapter 278 of the Public Laws of 1995 repealed *N.J.S.A.* 18A:14-1 through 104 inclusive, and amended Title 19 of the Revised Statutes and *N.J.S.A* 18A:6-9, effective March 14, 1996, thereby placing all school elections under the provisions of Title 19 (*N.J.S.A.* 19:60-1 *et seq.*). However, the bond referendum in this matter was held and the subsequent petition was filed prior to the effective date of the new legislation. Therefore, this matter is governed by the school election statutes set forth at *N.J.S.A.* 18A:14-1 *et eq.* and is subject to the jurisdiction of the Commissioner of Education. Those controlling education statutes impose no requirement that to challenge an election on a public question, an individual have a stake and real adverseness to the subject matter at issue, nor do they require that he must show the existence of a substantial likelihood of some harm to be visited upon him in the event of an unfavorable decision in order to petition for an inquiry into a school election

before the Commissioner of Education.* Thus, the Commissioner finds it unnecessary to address petitioner's standing in terms of his having voted in the December 19, 1995 election.

Accordingly, the Commissioner accepts the recommendation of the OAL, as modified herein, dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons clearly articulated in the initial decision.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

August 12, 1996
Date of Mailing, August 12, 1996

* As such, the Commissioner concurs with the ALJ that the cases cited by the Board with respect to standing are distinguishable from the instant matter and do not require the dismissal of the within petition.

351-96

351-96

WILLIAM ALAN FILLEBROWN *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
CHERYL LAUER, BARBARA LENTINE, MARTHA ORLANDO, ROBERT ZEKTICK, GWENDOLYN MILLER, FRANKLYN KENNEDY, AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY.	:	DECISION
RESPONDENTS.	:	

August 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 1905-94
AGENCY DKT. NO. 341-9/93 and
OAL DKT. NO. EDU 541-95
AGENCY DKT. NO. 475-11/94
CONSOLIDATED

WILLIAM ALAN FILLEBROWN, et als.,
Petitioners,
v.
CHERYL LAUER, BARBARA LENTINE, MARTHA ORLANDO, ROBERT ZEKTICK, GWENDOLYN MILLER, FRANKLYN KENNEDY, and THE BOARD OF EDUCATION OF TOWNSHIP OF CLINTON,
Respondents.

Douglas W. Hansen, Esq., for petitioners, (Breuninger, Hansen & Fellman, attorneys)

Robert A. McLarty, Jr., Esq., for respondent, Clinton Township Board of Education (Carson & Astorino, attorneys)

Robert Tosti, Esq., for respondents Cheryl Lauer, Barbara Lentine, Martha Orlando, Robert Zektick, Gwendolyn Miller, and Franklyn Kennedy, (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: May 17, 1996 Decided: June 25, 1996

BEFORE **ROBERT S. MILLER**, ALJ:

These matters were transmitted to the Office of Administrative Law on February 28, 1994, and January 17, 1995, for a hearing pursuant to N.J.S.A. 52:14F-1 to -13. They were consolidated with OAL docket number EDU 1906-94. However, for the purpose of this decision I hereby **ORDER** these matters severed.

The parties now seek to have the matters withdrawn and dismissed without prejudice (see attached Stipulation of Dismissal without Prejudice). Based on this representation, I **CONCLUDE** that these matter are no longer contested cases before the Office of Administrative Law and they are **DISMISSED without PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 1996
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

July 1, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 3 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

FILED
STATE OF N.J.
OFFICE OF ADMIN LAW

MAY 17 11 41 AM '96

BREUNINGER, HANSEN AND FELLMAN
P.O. Box 485
313 SOUTH AVENUE
FANWOOD, NEW JERSEY 07023
(908) 889-8900
ATTORNEY FOR PETITIONERSFILLEBROWN AND THE COALITION

WILLIAM ALAN FILLEBROWN, and THE CLINTON TOWNSHIP COALITION FOR EXCELLENCE IN EDUCATION (CONCERNED TAXPAYERS)	STATE OF NEW JERSEY
Petitioners	OFFICE OF ADMINISTRATIVE LAW
VS.	
CHERYL LAUER, BARBARA LENTINI, MARTHA ORLANDO, ROBERT ZETTICK GWENDOLYN MILLER, FRANKLYN KENNEDY, AND THE BOARD OF EDUCATION OF CLINTON TOWNSHIP	OAL DOCKET NUMBER: ~~EDU 1904-94~~ EDU 1905-94 ~~EDU 1906-94~~ EDU 541-95
Defendants	Civil Action STIPULATION OF DISMISSAL WITHOUT PREJUDICE

With respect to the above matters in difference in the above entitled actions between the parties, it is hereby stipulated and agreed by the Petitioners, William A. Fillebrown and the "Coalition" only that the same be and it is hereby dismissed without prejudice. This does not effect any actions by Petitioners Cahill, Williams, and Ferguson which are still pending.

BREUNINGER, HANSEN AND FELLMAN
Attorneys Petitioners Fillebrown
and Coalition

By: _____
DOUGLAS W. HANSEN, ESQ.

Dated: May 14, 1996

WILLIAM ALAN FILLEBROWN *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
CHERYL LAUER, BARBARA LENTINE, MARTHA ORLANDO, ROBERT ZEKTICK, GWENDOLYN MILLER, FRANKLYN KENNEDY, AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY.	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) recommending dismissal based on petitioners' withdrawal of this matter, transmitted to the Commissioner pursuant to *N.J.A.C.* 1:1-19.2, have been reviewed. Respondents' exceptions and petitioners' reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondents filed an exception in this matter solely on the issue that the dismissal in this case should be "with prejudice" rather than without prejudice as determined by the ALJ. In support of this position, respondents argue "[a]fter almost three years of litigation, the respondents should be entitled to a definitive repose on these claims.***" (Respondents' Exceptions at p. 1)

In response, petitioners assert that it is not their desire to reopen this case for any reason but, to protect themselves from possible retributive actions by respondents, they "wish to reserve the right to reopen in that event." (Petitioners' Reply Exceptions at p. 2)

The Commissioner initially notes that the issue raised in respondents' exceptions was presented to the ALJ shortly before his decision in this matter was issued. By letter dated June 25, 1996, the ALJ denied respondents' request for a dismissal with prejudice stating that it was his opinion that "[petitioner] has the right, even at this stage of the litigation, to withdraw both of his petitions ***without prejudice," noting that under *New Jersey Court Rules*, R.4:37-1, "dismissals are generally *without* prejudice unless otherwise specified." (emphasis in text) (ALJ's June 25, 1996 Letter, at p. 1) The ALJ further opined "***I remind counsel of the strong public policy encouraging settlements and dismissals so as to avoid the continuation of unnecessary litigation. In this regard, I venture the opinion that any attempts to reinstitute these petitions in the future would be unlikely to succeed because of the pecuniary prejudice to respondents and the application of the doctrine of laches and mootness, among other possible defenses." (*Id.* at p. 2)

After his review, the Commissioner concurs with the ALJ's analysis with respect to this issue, particularly in light of the fact that respondents have neither advanced any persuasive basis for overruling this determination nor made any showing that they will, under the circumstances existing here, be unduly disadvantaged by a dismissal without prejudice.

The Commissioner approves the dismissal of this matter, based on the petitioners' withdrawal pursuant to *N.J.A.C.* 1:1-19.2 and, accordingly, such matter is hereby dismissed without prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

August 12, 1996, Date of Mailing, August 12, 1996

354-96

354-96

DAVID L. CAHALL, JUDITH KAGLE, FERGUSON AND CYNTHIA WILLIAMS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY, ET AL.,	:	DECISION
RESPONDENTS.	:	

August 14, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 1906-94
AGENCY DKT. NO. 343-9/93

DAVID L. CAHALL, JUDITH KAGLE FERGUSON and CYNTHIA WILLIAMS,
Petitioners,
v.
THE BOARD OF EDUCATION OF TOWNSHIP OF CLINTON, et als.,
Respondents.

David L. Cahall, Judith Kagle Ferguson and Cynthia R. Williams, petitioners, *pro se*

Robert A. McLarty, Jr., Esq., for respondent, Clinton Township Board of Education (Carson & Astorino, attorneys)

Robert Tosti, Esq., for respondents Cheryl Lauer, Franklyn Kennedy, Barbara Lentine, Martha Orlando, Gwendolyn Miller and Robert Zektick (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: June 25, 1996 Decided: June 25, 1996

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 28, 1994, for a hearing pursuant to N.J.S.A. 52:14F-1 to -13. It was consolidated with OAL docket numbers EDU 1905-94 and EDU 541-95. However, for the purpose of this decision I hereby **ORDER** this matter severed.

The parties now seek to have the matter withdrawn and dismissed with prejudice (see attached Stipulation of Dismissal with Prejudice). Based on this representation, I **CONCLUDE**

that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED with PREJUDICE.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 1996
DATE

ROBERT S. MILLER, ALJ

July 1, 1996
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JUL 3 1996
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

tmp

Cahall, Ferguson and Williams
Pro Se Plaintiffs
One Stonegate Lane
Annandale, NJ 08801
Telephone: (908)730-8112
Fax:(908)730-7889

DAVID L. CAHALL, JUDITH KAGLE FERGUSON and CYNTHIA WILLIAMS,

Petitioners,

vs.

CHERYL LAUER, FRANKLYN KENNEDY, BARBARA LENTINE, MARTHA ORLANDO, GWENDOLYN MILLER, ROBER ZEKTICK and CLINTON TOWNSHIP BOARD OF EDUCATION,

Respondents

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: EDU-1906-94

STIPULATION OF DISMISSAL WITH PREJUDICE

The issues in dispute in the above-referenced matter having been amicably adjusted by and between the parties, it is hereby stipulated that this matter be and hereby is dismissed with prejudice and without costs to any party.

DATED:

DAVID L. CAHALL

ROBERT A. McLARTY, JR., ESQ.

JUDITH KAGLE FERGUSON

ROBERT TOSTI, ESQ.

CYNTHIA R. WILLIAMS

June 25, 1996

OAL DKT. NO. EDU 1906-94

DAVID L. CAHALL, JUDITH KAGLE, FERGUSON AND CYNTHIA WILLIAMS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY, ET AL.,	:	DECISION
RESPONDENTS	:	

The record of this matter and the initial decision of the Office of Administrative Law, incorporating a stipulation of dismissal based on petitioners' withdrawal of this matter pursuant to *N.J.A.C.* 1:1-19.2, have been reviewed. The Commissioner approves the withdrawal. Consequently, this matter is no longer deemed to be a dispute before him and is hereby dismissed with prejudice.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

August 14, 1996
Date of Mailing, August 15, 1996

355-96

JOSEPH MONTESANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

August 14, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3302-96
Agency Ref. No. 53-2/96

JOSEPH MONTESANO,

Petitioner,

v.

BOARD OF EDUCATION of the CITY OF BAYONNE,

Respondent.

Joseph Montesano, *pro se*, petitioner

Kenneth R. Hampton, Esq., represented respondent (Board Counsel)

Record Closed: June 26, 1996 Decided: June 28, 1996

BEFORE **JEFFREY A. GERSON**, ALJ

In this matter, petitioner appealed to the Commissioner of Education challenging the Board of Education of the City of Bayonne's residency determination.

This matter was transmitted to the Office of Administrative Law (OAL) on March 18, 1996, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the petitioner withdrew from the Bayonne school system (see attached documents).

Having reviewed the contents of the attached documents, I **FIND** petitioner withdrew his application for a hearing.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that these proceedings be (and are hereby) **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

6/28/96
DATE

JEFFREY A. GERSON,
Administrative Law Judge

July 2, 1996
DATE

Receipt Acknowledged:
D. N. Castamates Jr.
DEPARTMENT OF EDUCATION

JUL 3 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

BOARD OF EDUCATION
LAW DEPARTMENT
29th STREET AND AVENUE A
BAYONNE, N.J. 07002

KENNETH R. HAMPTON
COUNSEL

TEL. 858-5841

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
JUN 26 11 23 AM '96

June 25, 1996

Hon. Jeffrey Gerson, Judge
Office of Administrative Law
185 Washington Street
Newark, N. J. 07102

Dear Judge Gerson:

Re: Joseph Montesano
vs. Board of Education of the City of Bayonne
OAL Docket No. EDUOS 03302-9GN
Agency Reference No. 53-2/96

As I advised you on Wednesday, June 19, 1996, the Petitioner withdrew from Bayonne High School on April 25, 1996. When we attempted to contact him before the hearing, we were told by the owner of the property at 56 Avenue B, Bayonne, New Jersey that Mr. Montesano had moved out of Bayonne. A copy of that withdrawal slip is enclosed.

I respectfully request that the dismissal of the matter be done in such a way so as not to preclude the Bayonne Board of Education filing a Petition for tuition in the future, and of course Mr. Montesano being allowed to defend on the basis of his allegation that he was a resident from September 1, 1995 through January 26, 1996.

Respectfully submitted,

Kenneth R. Hampton
Board Counsel

KRH/jj

Enc.

Faxed to (201) 648-6124
Hard Copy Mailed

4/25/96

T. Mo. McFadden

I, Joseph Montesano am leaving school. If there is anything else that is needed you can mail me a letter at my Bayonne house.

Joseph Montesano

OAL DKT. NO. EDU 3302-96

JOSEPH MONTESANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed. This decision does not affect any future claim for tuition which may be brought by the Board pursuant to *N.J.A.C.* 6:24-1 *et seq.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 14, 1996
Date of Mailing, August 15, 1996

356-96

356-96

MYRNA YABLONSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 14, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6664-95
AGENCY DKT. NO. 202-6/95

MYRNA YABLONSKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent.

Richard J. Kaplow, Esq., for Petitioner

Victor E.D. King, Esq., for respondent
(King, King and Goldsack, attorneys)

Record Closed: June 19, 1996 Decided: June 28, 1996

BEFORE **ARNOLD SAMUELS**, ALJ:

The Petitioner, Myrna Yablonsky, filed a verified petition with the Commissioner of Education, alleging that the respondent acted arbitrarily and capriciously in refusing to accept the recession of her letter of resignation. The petitioner sought reinstatement.

On June 26, 1995, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13. A prehearing conference was held on November 16, 1995, and a Prehearing Order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing, which was scheduled to be held in May, 1996.

The parties conferred for purposes of settlement prior to the hearing dates, and an agreement was reached. The terms of the settlement were placed on the record by counsel, in the presence of the petitioner and an authorized representative of respondent on June 19, 1996. The petitioner acknowledged, on the record and under oath, that she fully understood and agreed to each term and condition of the settlement, and that her agreement was voluntary. The substantive terms of the settlement consisted of a withdrawal of all claims and withdrawal of the petition by the petitioner, in exchange for a payment to her by the respondent of $5,000. A stipulation of dismissal with prejudice, was signed by the petitioner and by counsel for both parties, and petitioner executed a conforming release.

Copies of the foregoing documents are attached hereto and made a part hereof.

Having reviewed and considered the issues involved in this dispute, it is **CONCLUDED** that the parties have voluntarily and knowingly agreed to the settlement, as evidenced by the attached documents. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy.

It is therefore **ORDERED** that the settlement be approved and that this matter **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 28, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

July 2, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 3 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

Law Offices of
KING, KING AND GOLDSACK
450 Somerset Street
P.O. Box 1106
North Plainfield, New Jersey 07061-1106
(908) 756-7804 Fax (908) 756-2184
Attorneys for Respondent

Petitioner, MYRNA YABLONSKY, v. Respondent, PLAINFIELD BOARD OF EDUCATION	BEFORE THE STATE OF NEW JERSEY COMMISSIONER OF EDUCATION OAL DOCKET NO. EDUOR 06664-95N AGENCY REF. NO. 202-6/95 Civil Action STIPULATION OF DISMISSAL WITH PREJUDICE

It is stipulated and agreed by the attorneys for the respective parties that the above action be dismissed with prejudice and without costs to either of the parties.

Dated: June 19, 1996

Victor E.D. King
Attorney for the Respondent

Dated: June 19, 1996

Richard J. Kaplow
Attorney for Petitioner

Dated: June 19, 1996

Myrna B. Yablonsky
Petitioner

RELEASE

This Release, dated , 1996 , is given

BY the Releasor(s)

MYRNA B. YABLONSKY
19 Remington Drive, Edison, New Jersey 08820

referred to as "I".

TO BOARD OF EDUCATION OF THE CITY OF PLAINFIELD
IN THE COUNTY OF UNION, A TYPE II SCHOOL DISTRICT
with offices at 504 Madison Avenue, Plainfield, New Jersey

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

All claims now and in the future, known and unknown, related to the employment of Myrna B. Yablonsky by the Board of Education of the City of Plainfield from the date of her initial hiring to the present, including all claims arising out of the employment relationship, under the negotiated agreement with the Plainfield Education Association as well as all state and federal regulations and laws pertaining to their relationship.

2. **Payment.** I have been paid a total of $ 5,000.00 , in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

RICHARD J. KAPLOW

Myrna B. Yablonsky (Seal)
MYRNA B. YABLONSKY

(Seal)

STATE OF NEW JERSEY, COUNTY OF SS.:
I CERTIFY that on , 19 96 ,

MYRNA B. YABLONSKY personally came before me
and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):
(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

Prepared by: (Print signer's name below signature)
VICTOR E. D. KING, ESQ.

(Print name and title below signature)
Richard J. Kaplow
Attorney at Law of New Jersey

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One Commerce Drive, Cranford, N.J. 07016

OAL DKT. NO. EDU 6664-95

MYRNA YABLONSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 14, 1996
Date of Mailing, August 15, 1996

357-96

357-96

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY CATLIN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
JERSEY CITY, HUDSON COUNTY.	:	
_____	:	

August 14, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9499-95
AGENCY DKT. NO. 203-6/95

IN THE MATTER OF THE TENURE HEARING OF MARY CATLIN, STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY

Phllip Feintuch, Esq.,
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent
(The Jersey City Public Schools)

Record Closed: June 13, 1996 Decided: June 28, 1996

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 23, 1995 determination as a contested case, pursuant to *N.J.S.A.* 5214B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

6/28/96
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

July 3, 1996
DATE

D. N. Gustanatis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 3 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

OAL Docket No
EDU TH 09499-

IN THE MATTER OF
THE TENURE HEARING
OF MARY CATLIN

Agency Ref. No.
203-6/95

This matter has been amicably resolved by:

1. Ms. Catlin submits her resignation, effective June 30, 1996, from employment with the Jersey City School District.

2. The District withdraws the tenure charges, based on Ms. Catlin's resignation, which the District has accepted.

Charlotte Kitler 6/13/96

for Jersey City School District

Charlotte Kitler, Atty

Mary J. Catlin 6/13/96

Mary Catlin

6/13/96

Philip Feinstein, Esq.

Attorney for Ms. Catlin

June 13, 1996

I hereby resign from the Jersey City School District, effective June 30, 1996.

Mary J. Catlin

Witness:

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY CATLIN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
JERSEY CITY, HUDSON COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

Although the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the school and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

It is well established that, having once taken up the burden of tenure charges, a board may not lay it down without spreading forth on the record a reasonably specific

explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification by the State Board of Education November 2, 1983, affirmed Superior Court, Appellate Division, January 30, 1986. The present record contains no such explanation.

Additionally, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations to the State Board of Examiners for review and possible revocation of certificate.

It further appears that the terms of the settlement have already been effectuated through respondent's resignation. The parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for revision of settlement terms consistent with the concerns herein expressed. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing on the merits.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

August 14, 1996
Date of Mailing, August 14, 1996

358-96

358-96R

ULYSSES GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

August 14, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13140-95

AGENCY DKT. NO. 412-12/93
(Remand of OAL Dkt. No. EDU 1644-94)

ULYSSES GREEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION,

Respondent.

Donald D. Vanarelli, Esq., for petitioner

Steven F. Dorry, Esq., for respondent
(Hurley & Vasios, attorneys)

E. Robert Levy, Esq., for respondent
(Levy, Lybeck, Bertele & Jaworski, attorneys)

Record Closed: June 12, 1996 Decided: June 28, 1996

BEFORE **RICHARD McGILL,** ALJ:

This matter was remanded to the Office of Administrative Law by the Commissioner of Education for revision of the terms of a settlement. The difficulty with the settlement was that

the language on its face did not appear to contemplate that the settlement document would become a matter of public record as normally occurs in contested cases.

The underlying dispute involves a petition by Ulysses Green, alleging violations of various provisions of the education laws by the Board of Education of the Township of Union (respondent) and requesting relief which included reinstatement to the position of JROTC instructor, back pay, emoluments, attorney's fees and damages. A portion of the petition is based upon a request for reimbursement of attorney's fees and other costs and expenses related to the defense of criminal charges pursuant to *N.J.S.A.* 18A:16-6.1.

Ulysses Green and Elnora Green filed a related complaint and an amended complaint in the Superior Court of New Jersey, Law Division, Union County, bearing Civil Action No. UNN-L-007448-93 (the "lawsuit"). The lawsuit makes claims against various defendants including the respondent in this proceeding.

Prior to hearing, the parties agreed to a settlement, which was intended to resolve both this proceeding and the lawsuit in Superior Court. The parties submitted settlement papers which included a stipulation of dismissal with prejudice, correspondence dated September 3, 1995 from petitioner's attorney, a release and a confidential settlement agreement. The settlement agreement contains provisions related to confidentiality as to the terms thereof. These provisions led to the remand for the reason stated above.

Subsequent to transmittal of the remand to the Office of Administrative Law, the parties submitted an Addendum to Release and Confidential Settlement Agreement (Addendum). The Addendum provides that the confidentiality provisions of the confidential settlement agreement are only binding on Ulysses and Elnora Green, that the confidentiality provisions of the confidential settlement agreement are not binding on respondent or any of its officials, officers or employees, and that the release and confidential settlement agreement is a

public record available to the public in accordance with the requirements of federal and state laws and regulations. Thus, it is clear that the release and confidential settlement agreement will become a matter of public record.

Having reviewed the record and the settlement terms in their entirety, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time

limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Jan 29, 1996
DATE

RICHARD McGILL, ALJ

July 3, 1996
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 3 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am

DONALD D. VANARELLI
ATTORNEY AT LAW
211 NORTH AVENUE EAST
WESTFIELD, NEW JERSEY 07090-1444

ADMITTED TO PRACTICE LAW
IN NEW JERSEY & NEW YORK

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SOMERSET COUNTY OFFICE
COURTYARDS AT PLUCKEMIN
318 RT 206 N. SUITE A-2A
P.O. BOX 181
PLUCKEMIN, NJ 07978
(908) 658-5511

RECEIVED
STATE OF NEW JERSEY
OFFICE OF LAW
JUN 12 11 45 AM '96

June 10, 1996

The Honorable Richard McGill, A.L.J.
The Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **Ulysses Green vs. Farnoli**
Case No.: 412-12/93

Dear Judge McGill:

As you may recall, the undersigned represents petitioners in the above matter.

Enclosed please find an Addendum to Release and Confidential Settlement Agreement which has been executed by the parties and their counsel. We believe that the Addendum will meet the objections which the Commission of Education had to the prior settlement documents. Please forward the enclosed addendum to the appropriate party for review.

Thank you for your assistance in this case.

Respectfully yours,

Donald D. Vanarelli

Donald D. Vanarelli

Enclosure
cc: Mr. Steven S. Dorry (w/o encl.)
Mr. & Mrs. Ulysses Green (w/o/ encl.)

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 3, 1996
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

7/15/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 16 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

ej

SHORE & ZAHN, ESQS.
P. O. BOX 755
EAST BRUNSWICK, NJ 08816
(908) 254-5500
Attorney for Respondent

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

JEAN KLINE FEIGENBAUM, Petitioner,	:	AGENCY DOCKET NO. 284-7/95
-vs-	:	OAL DOCKET NO. EDU 4549-96 (REMAND OF EDU ~~8015-95~~ 8105-95)
CRANBURY TOWNSHIP BOARD OF EDUCATION, Respondent.	:	AMENDED SETTLEMENT AGREEMENT

BEFORE KATHRYN A. CLARK, A.L.J.:

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the Petitioner and Respondent:

1. Petitioner withdraws, with prejudice, her appeal and request for a hearing.

2. Respondent and Petitioner agree to have monthly informal meetings as long as deemed necessary. Such meetings shall be for the purpose of reviewing and discussing Petitioner's teaching performance.

3. The parties agree that there shall be no restriction on the use of this Settlement Agreement, including its terms and purposes in any future proceedings in which the parties may become involved.

4. The Petitioner waives all claims against the Respondent with regard to this matter, including any award of back pay or counsel fees.

5. Both parties agree to waive the right to file exceptions and cross exceptions.

DATED: 6-27-94

MICHAEL T. BARRETT
Attorney for Petitioner,
Jean Kline Feigenbaum

DATED: 6-26-94

PHILIP H. SHORE
Attorney for Respondent,
Cranbury Board of Education

C:\WP51\feigenbaum.agr

JEAN KLINE FEIGENBAUM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

August 21, 1996
Date of Mailing, August 21, 1996

364-96

364-96

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MIGDALIA ROMAN,	:	DECISION
RESPONDENT.	:	

AUGUST 28, 1996

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MIGDALIA ROMAN,	:	DECISION
RESPONDENT.	:	

For the Board, Kenneth J. Lindenfelser, Esq.

For Respondent, Migdalia Roman, *Pro Se*

This matter having been opened before the Commissioner of Education on April 11, 1996, by way of a Petition of Appeal alleging respondent failed to pay the district outstanding tuition for her minor child's illegal attendance at petitioning school district; and

The Commissioner having directed respondent on April 16, 1996, May 29, 1996, and, again, by letter sent by both regular and certified mail on June 24, 1996, which was returned unclaimed, to file an answer to the aforesaid petition in 10 days; and

Respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against her is deemed to be admitted pursuant to *N.J.A.C.* 6:24-1.4; now therefore

IT IS ORDERED this 28th day of August 1996 that summary judgment shall be granted to the Board, and Migdalia Roman is hereby assessed tuition in the amount of $1,223.04 covering the period of her child's illegal attendance in the public schools of the Town of Kearny.

COMMISSIONER OF EDUCATION

AUGUST 28, 1996

DATE OF MAILING AUGUST 28, 1996

365-96

365-96E

DEAN EQUIPMENT & FURNITURE CO., INC.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY, AND PATOCK CONSTRUCTION COMPANY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

AUGUST 28, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 6688-96
AGENCY DKT. NO. #318-8/96

DEAN EQUIPMENT & FURNITURE CO., INC.,
Petitioner,
v.
OCEAN TOWNSHIP SCHOOL DISTRICT and PATOCK CONSTRUCTION COMPANY,
Respondents.

James J. Ross, Esq., for petitioner (Wolff & Samson, attorneys)

Honora O'Brien Kilgallen, Esq., for respondent Ocean Township School (Kramer, Kramer & Kilgallen, attorneys)

Leonard Needle, Esq., for respondent Patock Construction Company

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Respondent Ocean Township Board of Education (BOE) decided to undertake construction on several of its schools and Thomas Associates Architects + Engineers, P.C., (Thomas) prepared bidding documents, including specifications and drawings, so that the BOE could advertise for bids. N.J.S.A. 18:18A-21 et seq. The specifications provided for separate bids for prime contracts, including "Bid Package G," for "Casework and Equipment," which related to the BOE's high school construction project. P-2D, RP-1D. The specifications referred to drawings for "Bid Package G" and, among the items to be provided by the bidder, the drawings included numbered symbols and the drawings referred to "Equipment Schedules." On the "Equipment Schedules," the "Casework & Equipment Schedule" listed "Tack" and "Chalk" "Board[s]," with identification numbers that coordinated with the drawings' numbered symbols. P-2E, P-2F, RBOE-1C.

Petitioner Dean Equipment and Furniture Company, Inc., (Dean) submitted a bid for "Bid Package G;" however, Dean excluded "Tack" and "Chalk" "Board[s]" from its bid. Respondent Patock Construction Company (Patock) also submitted a bid for "Bid Package G;" and Patock included "Tack" and "Chalk" "Board[s]" in its bid. Dean was the lowest bidder; however, the BOE determined that Dean was "non-responsive," the BOE determined that Patock was the "lowest responsible bidder" and the BOE entered into a contract with Patock. N.J.S.A. 18A:18A-37. Dean contends that the bidding documents did not include "Tack" and "Chalk" "Board[s]" among the items to be provided as part of the "Bid Package G" "Casework & Equipment." Consequently, Dean contends that it is the "lowest responsible bidder," the contract with Patock should be rescinded and the BOE should be ordered to enter into a contract with it (Dean) for "Bid Package G."

PROCEDURAL HISTORY

On August 2, 1996, Dean's verified petition with exhibits, notice of motion for temporary restraints, affidavit of Aaron Kemble, etc., were filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL)

where, on August 6, 1996, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On August 7, 1996, the BOE's answer to the petition and defenses, letter memorandum and exhibit were filed with the OAL. On August 8, 1996, additional exhibits were filed on behalf of Dean, the BOE and Patock and the motion was heard in the OAL in Trenton (Hamilton Township).

FINDINGS OF FACT

The BOE, which operates the Ocean Township (Monmouth County) school district, determined that it should engage in construction, including construction of new science rooms in its Ocean Township High School.

Consistent with the BOE's determination, Thomas prepared bidding documents, including technical specifications and drawings, so that the BOE could advertise for bids. N.J.S.A. 18:18A-21 et seq. Bidding was for "Prime Contracts," each of which had a "Bid Package." P-2D.

The specifications entitled "**Section 01010 - Summary of Project**" list the "Prime Contracts" and "Bid Package[s]" and, relative to "Bid Package G," stated:

> **G. Bid Package G - Ocean Township High School (3838.2):**
> The Work included I Bid Package G shall be done under the following separate Prime Contracts as indicated in the Contract Documents.
>
> 1. **Prime Contract GEQ - Equipment Work:** Includes (but not limited to) casework and equipment in new Science Rooms at Ocean Township High School. Refer to Drawings A51 & A52.
>
> [P-2D]

"Drawing A51," entitled "Laboratory Plans & Details, Physics, Biology, Gen. Science Rms.," showed two room floorplans with detailed drawings of, e.g., benches, tables and sinks with features noted by way of symbols, including numerous squares containing the number "46" and numerous squares containing the number "50." P-2E. "Drawing A52," entitled "Laboratory Plans & Details, Chemistry Rooms," showed one room floorplan with detailed drawings of, e.g.,

"Prep Room[s]" and "Storage," with features also noted by way of symbols, including numerous squares containing the number "46" and numerous squares containing the number "50." P-2F. "Drawing A51" and "Drawing A52" both included "General Notes, Laboratory Casework," wherein the potential bidder was directed to "See schedule on sheet 55." P-2E, P-2F. Sheet "55," entitled "Science & Library Equipment Schedules," included a "Chalk and Tack Board Schedule" and "Casework & Equipment Schedule" and listed "Tack" and "Chalk" "Board[s]," with identification numbers that coordinated with the drawings. That is to say, e.g., on "Drawing 52," above the drawing of a "demonstration table," was drawing of a rectangular area with the word "Tack" written on it and a square containing the number "50" from which an arrow points to the rectangular area and, on sheet 55, under "Chalk and Tack Board Schedule," "number" "50" is described as a marker/tack board. Similarly, "number" "46" is described as a "Tackboard." P-2E, P-2F, RBOE-1C.

Dean did not understand the above-described bidding materials to require that a "Bid Package G" bidder was required to provide, among the equipment, the "Tack" and "Chalk" "Board[s]" and it excluded them from its $555,330.00 base bid. P-2, P-3. Dean then inquired of Scott J. Duell, Thomas' project manager, as to whether the "Tack" and "Chalk" "Board[s]" were required; however, Dean did not change its bid. RBOE-4. See also in this regard RBOE-1. (During argument of the motion, Dean alleged that, because Thomas was slow in reacting to its inquiry, it was unable to change its bid and include the "Tack" and "Chalk" "Board[s.]") Patock understood the above-described bidding materials to require that a "Bid Package G" bidder was required to provide the "Tack" and "Chalk" "Board[s]" and included them in its $567,720.00. RP-1A.

The BOE opened the bids and, during its July 16, 1996 meeting, determined that, relative to "Bid Package G," Dean's (the lowest) bid was non-responsive and Patock's (the next lowest) bid was the "lowest responsible bidder" and the BOE determined that the contract should be awarded to Patock. P-2C, N.J.S.A. 18A:18A-37.

On July 16, 1996, the BOE and Patock entered into a written agreement relative to "Bid Package G." RP-1E. During the argument of the motion, Patock alleged that it was well underway with performance pursuant to the agreement and that it needed to continue its

performance uninterrupted by, e.g., the orders sought here by Dean, in order to enclose the building before the winter, so that construction progress could continue uninterrupted by the cold weather.

CONCLUSIONS OF LAW

The Public School Contracts Law governs the BOE's bidding and contract award processes. N.J.S.A. 18A:18A-1 et seq. Public contracts laws are intended to encourage competition and to guard against favoritism, improvidence, extravagance or corruption, i.e., to benefit the taxpayer. Pied Piper Ice Cream v. Essex Cty. Park Comm., 132 N.J.Super. 480 (App. Div. 1975).

Generally, public entities, such as the BOE, are presumed to have acted lawfully and in good faith. Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958); Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966). Consequently, that the petitioner bears the burden of proof that the BOE acted unlawfully and/or that its award of the contract was arbitrary, capricious and unreasonable.

Standards for the granting of a motion for emergent relief are well-established. See N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-134 (1982).

Given the above-described bidding materials, it cannot be said that Dean will probably prevail in its contention that the "Tack" and "Chalk" "Board[s]" were excluded from the work to be performed consistent with "Bid Package G." To the contrary, given the specifications and drawings, especially the "Casework & Equipment Schedule," specifically listing "Tack" and "Chalk" "Board[s]," among equipment to be provided, Dean faces a genuine issue of material fact or an improbability of prevailing. That is to say, Dean fails to satisfy the above-cited standards. N.J.A.C. 1:1-12.6(f)3.

ORDER

Consistent with the above, **I DENY** the motion for emergent relief.

I **ORDER** the following: (1) By August 30, 1996, the parties may serve discovery requests. (2) By October 31, 1996, the parties will serve answers to the discovery requests. (3) A telephone conference to discuss the progress of the case and hearing dates will be set.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

August 8, 1996
DATE

JOHN R. TASSINI, ALJ

EXHIBITS

Petitioner's Exhibits:

P-1 Petition and William Dean's verification, dated July 30, 1996

P1A Dean's bid documents (attached to Petition and verification): "Bid Form, . . . Bid Package G" completed and submitted by Dean

P-1B Portion of respondent BOE's minutes of public meeting of July 16, 1996

P-2 Affidavit of Aaron Kemble

P-2A "Bid Form," completed by Dean, dated January 29, 1996, etc.

P-2B "Bid Tabulations," date of bid July 9, 1996

P-2C Portion of respondent BOE's minutes of public meeting of July 16, 1996

P-2D Bid specifications: "Section 01010 - Summary of Project"

P-2E "Laboratory Plans & Details, Physics, Biology, Gen. Science Rms.," Drawing A51, dated January 29, 1996

P-2F "Laboratory Plans & Details, Chemistry Rooms," Drawing A52, dated January 29, 1996

P-2G Bid specifications: "Section 12304 - Plastic Laminate Faced Casework"

P-2H Bid specifications: "Section 11600 - Laboratory Equipment"

P-2I Bid specifications: "Section 10100 - Chalkboard and Tackboards

P-3 Affidavit of Joan M. Murdock

Respondent Board of Education's Exhibits:

RBOE-1 Certification of Scott J. Duell

RBOE-1A Page 4 of Bid specifications: "Section 01010 - Summary of Project"

RBOE-1B "Laboratory Plans & Details, Physics, Biology, Gen. Science Rms.," Drawing A51, dated January 29, 1996 and "Laboratory Plans & Details, Chemistry Rooms," Drawing A52, dated January 29, 1996

RBOE-1C "Science & Library Equipment Schedules," Drawing A55

RBOE-2 Thomas Associates' letter, dated July 11, 1996

RBOE-3 Dean's "Bid Form," with note: "Does Not Include Chalk & Tack Boards."

Respondent Patock's Exhibits:

RP-1	Certification of Joseph Barrett
RP-1A	"Bid Form, . . . Bid Package G," etc., completed and submitted by Patock
RP-1B	"Instructions to Bidders"
RP-1C	Patock letter, dated July 10, 1996
RP-1D	"Casework & Equipment Schedule" from "Science & Library Equipment Schedules," drawing A55
RP-1E	"Standard Form of Agreement Between Owner and Contractor," BOE and Patock, made July 16, 1996

OAL DKT. NO. EDU 6688-96

DEAN EQUIPMENT & FURNITURE CO., INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY, AND PATOCK CONSTRUCTION COMPANY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter and the Order of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful review of the record in this matter, including the audiocassette tape of the hearing conducted on August 7, 1996, and in consideration of the standard for granting emergent relief as established by *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), the Commissioner determines to affirm the ALJ's Order denying petitioner's request for emergent relief in this matter, in that petitioner has failed to demonstrate a reasonable probability of ultimate success on the merits, given the genuine issue of material fact which is in dispute. *Crowe* at 133.

Accordingly, petitioner's Motion for Emergent Relief is denied for the reasons expressed in the recommended Order, and the matter on the merits will proceed at the OAL, consistent with the recommendation of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 28, 1996

DATE OF MAILING AUGUST 28, 1996

365-96

(365-96E)

63-97

DEAN EQUIPMENT AND FURNITURE COMPANY, INC.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY AND PATOCK CONSTRUCTION COMPANY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 11, 1997

OAL DKT. NO. EDU 6688-96
AGENCY DKT. NO. 318-8/96

DEAN EQUIPMENT AND FURNITURE COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY AND PATOCK CONSTRUCTION COMPANY,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 11, 1997
DATE OF MAILING FEBRUARY 11, 1997

366-96

366-96

WILLIAM SALVATORI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning senior high school student, who had been twice retained in elementary school and turned 19 years of age prior to September 1, 1996, sought reversal of NJSIAA's decision precluding petitioner from participating as a member of the Ridgefield Park High School football team during the 1996-97 school year and further sought a declaration that he was eligible to so participate. Petitioner's request for a waiver of the age rule was denied on February 14, 1996 by the NJSIAA's Eligibility Committee and on March 22, 1996 by the Eligibility Appeals Committee. Petitioner contended his learning disabilities were organically based and, thus, his retentions were not his fault.

Commissioner may not overturn an action by NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. Commissioner concluded that petitioner failed to demonstrate that the NJSIAA's decision was arbitrary, capricious and unreasonable. Commissioner may not substitute his judgment for that of the NJSIAA, even when he might judge otherwise in a *de novo* review. Commissioner was satisfied that the NJSIAA fairly examined the purpose of the age requirement and the result of waiving that requirement. (*Johnson*) NJSIAA had health and safety concerns inasmuch as football is a contact sport and petitioner's size was much larger than the average student his age. Commissioner adopted findings and conclusions of the NJSIAA as his own and dismissed the petition.

August 28, 1996

WILLIAM SALVATORI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner: Robert F. Binetti, Esq.

For Respondent: Michael J. Herbert, Esq. (Picco, Herbert, Kennedy)

This matter has come before the Commissioner of Education by way of a Petition of Appeal filed on June 7, 1996 seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) to preclude petitioner from participating as a member of the Ridgefield Park High School football team during the 1996-97 school year and further seeking a declaration that petitioner is eligible to so participate. Respondent's Answer was filed on June 14, 1996, together with a complete record of the proceedings before the NJSIAA Eligibility Appeals Committee (EAC). A briefing schedule was established and both parties filed timely briefs, as well as reply briefs.

Petitioner William Salvatori will be a senior in the 1996-97 school year. On January 4, 1996, Ridgefield Park Jr.-Sr. High School requested that the NJSIAA review the

ADDENDUM TO RELEASE AND CONFIDENTIAL SETTLEMENT AGREEMENT

WHEREAS, the plaintiffs, Ulysses Green and Elnora Green, and the defendant, Union Township Board of Education, and all officials, officers and employees of the Union Township Board of Education in their capacities as public officials, public servants, and individually, have executed a release and confidential settlement agreement.

WHEREAS, the executed release and confidential settlement agreement, a stipulation of dismissal with prejudice as to petition of appeal on case #412-12/93 and correspondence dated September 3, 1995 from plaintiff's counsel redacting paragraphs 22 and 23 in the confidential settlement agreement were forwarded and received by the Office of Administrative Law on or about September 19, 1995.

WHEREAS, the Hon. Richard McGill, A.L.J., issued his decision on December 19, 1995, recommending settlement to the Commissioner of the Department of Education and filing said decision with the Commissioner of the Department of Education;

WHEREAS, the Commissioner of Education remanded the matter to the Office of Administrative Law for revision of the settlement terms as set forth in his by decision dated November 6, 1995.

WHEREAS, the parties seek to clarify and modify the terms of the confidential settlement agreement in accordance with the decision of the Commissioner of Education dated November 6, 1995, the parties hereby agree to the following terms as clarification and modifications to the confidential settlement agreement:

1. The confidentiality provisions of the confidential settlement agreement are only binding upon plaintiffs Ulysses and Elnora Green;

2. The confidentiality provisions of the confidential settlement agreement is not binding upon the defendants, Union Township Board of Education or any of its officials, officers, or employees in their capacities as public officials, public servants or individually.

3. The release and confidential settlement agreement is a public record available to the public in accordance with the requirements of federal and state laws and regulations.

4. All other terms and conditions of the confidential settlement agreement remain in full force and effect.

IN WITNESS WHEREOF, the parties intending to be legally bound hereby, have entered into this amendment to the release and confidential settlement agreement.

WITNESS:

DATED: March , 1996

MAY 28TH, 1996

Ulysses Green

Elnora Green

Donald Vanarelli, Esq.
Attorney for plaintiffs

James J. Damato, Esq.
Union Township Board of Education

HURLEY & TASIOS
Attorneys for defendants

STEVEN F. DORRY, ESQ.

OAL DKT. NO. EDU 13140-95 (OAL DKT. NO. EDU 1644-94 ON REMAND)

ULYSSES GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision in the form of a jointly executed addendum to the prior stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

Upon review, the Commissioner concurs with the initial decision of the Administrative Law Judge for the reasons expressed therein. In so ruling, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

August 14, 1996
Date of Mailing, August 14, 1996

359-96

359-96E

THOMAS BRUGGER T/A C & A WINDOW SERVICE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

August 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
OAL DKT. NO. EDU 7679-96
AGENCY DKT. NO. 265-7/96

THOMAS BRUGGER T/A
C & A WINDOW SERVICE,
Petitioner,

v.

STATE-OPERATED SCHOOL
DISTRICT OF NEWARK,
Respondent.

Thomas Brugger, *pro se*

Gregory G. Johnson, Esq., for respondent

BEFORE **RICHARD McGILL,** ALJ:

Thomas Brugger t/a C & A Window Service (petitioner) submitted the low bid for window repairs at the Oliver Street School in Newark. After the State-Operated School District of the City of Newark (respondent) advised petitioner that all bids for the project would be rejected, petitioner filed the petition in this matter seeking to overturn respondent's determination. Petitioner now seeks emergent relief to prevent respondent from rebidding the project.

Petitioner filed the petition with the Commissioner of Education on July 9, 1996 pursuant to the Commissioner's authority to hear and determine controversies under the school laws pursuant to *N.J.S.A.* 18A:6-9. By letter received on July 15, 1996, petitioner made the request for emergent relief. Respondent filed an answer on July 25, 1996, and the matter was transmitted to the Office of Administrative Law on July 30, 1996 for determination as a contested case. An oral argument in regard to the motion for emergent relief was held on August 5, 1996 at the Office of Administrative Law in Newark, New Jersey.

Thomas Brugger testified that C & A Window Service is a sole proprietorship. Petitioner submitted a bid for window repairs at Oliver Street School in Newark on April 30, 1996 and was the low bidder. Brugger spoke with respondent's employee, Mr. Burroughs, and was told that everything was in order. In mid-June, Burroughs advised Brugger that another bidder had protested the bid because he misunderstood a section pertaining to a contingency factor. Brugger states that the bid papers contain a section requiring a prospective bidder to request an explanation or interpretation prior to the date scheduled for opening the bids. Brugger also spoke with another employee, Linda Armenio, who is Burrough's supervisor. Burroughs and Armenio confirmed that papers were being processed in regard to his bid. Finally, Brugger spoke with Robert Hardy, who is head of petitioner's purchasing department. Hardy informed Brugger that petitioner would reject all bids on the project. Brugger acknowledges that the bid papers contain a provision, Paragraph D3.3, in which respondent reserves the right to reject all proposals.

Brugger had already ordered parts for the project. The parts were delivered with a cost of approximately $4,000. Additionally, if the project is rebid, other bidders will know his prior bid, thereby forcing him to make a lower bid.

Brugger states that rejection of all bids is normally done in situations where all bids exceed the budget or none of the bidders is qualified. Brugger maintains that the bids were rejected in this instance because petitioner received a protest. However, Brugger could not

cite any legal authority for the proposition that petitioner could not reject all bids under these circumstances.

Brugger acknowledged that he received a letter dated July 1, 1996 from Robert Harding. According to the letter, the District rejected all bids because it realized that "it will be more cost effective to bid all its window repair requirements at one time rather than to bid each school individually."

Petitioner seeks emergent relief equivalent to a preliminary injunction. In order to prevail on such a motion, a party must show that: (1) emergent relief is necessary to prevent irreparable harm, (2) the claim is based upon settled law, (3) the material facts are uncontroverted, and (4) the relative hardship to the parties favors granting emergent relief to the applicant. *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1982).

The first factor to consider is irreparable harm. Harm is considered to be irreparable if it cannot be redressed adequately by monetary damages. *Id.* at 132-133. Here, petitioner has not shown that any harm that he may suffer cannot be redressed by monetary damages. It follows that petitioner has not shown that he will suffer irreparable harm if emergent relief is denied.

The second requirement is that the pertinent law must be settled. *Id.* at 133. Here, the law is settled, but it does not support petitioner's position. Paragraph D3.3 of the bid papers expressly provides that respondent reserves the right to reject any and all proposals. This reservation of rights evidently is based upon *N.J.S.A.* 18A:18A-22, which expressly provides that the school district has the right to reject all bids. Therefore, the settled law does not support petitioner's position.

The third requirement is that the material facts are uncontroverted. *Crowe v. DeGioia*, 90 *N.J.* at 133. Here, petitioner maintains that respondent rejected all bids solely because it received a protest from another bidder. In contrast, respondent asserts that it rejected all bids

because it would be more cost effective to bid all its window repair requirements at one time. A material fact is one that may affect the outcome of the case. Putting aside the possibility that petitioner may not prevail on either version of the facts, it is evident that respondent controverts petitioner's version of the facts. It follows that petitioner has not established that his version of the facts are uncontroverted.

The last factor to consider is the relative hardship to the parties. *Id.* at 334. Here, it is fair to say that the expenditures to date would be a greater burden to petitioner than to respondent, but petitioner has not established that he will experience any real hardship. In any event, considering all the factors, I **CONCLUDE** that petitioner has failed to demonstrate that emergent relief is warranted under the circumstances of this case.

Accordingly, it is **ORDERED** that the motion for emergency relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision on this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

RICHARD McGILL, ALJ

OAL DKT. NO. EDU 7679-96

THOMAS BRUGGER T/A C & A WINDOW SERVICE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

The audiotape of emergent proceedings by the Administrative Law Judge (ALJ), and the initial decision on Motion for Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ denying emergent relief as petitioner failed to meet the standards for such relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 1:1-12.6.

Accordingly, the Motion for Emergent Relief is denied for the reasons expressed by the ALJ and this matter shall duly proceed to the OAL for further proceedings as deemed necessary to bring this matter to conclusion.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

August 15, 1996
Date of Mailing, August 15, 1996

362-96

EDWARD CARPENITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured middle school teacher, alleged his seniority and tenure rights were violated when his position as social studies teacher was abolished and the Board failed to establish a preferred eligibility list. Subsequently, the Board created a new 7th grade social studies position and employed a nontenured staff member to fill it.

ALJ concluded that Board's action abolishing petitioner's position of 7th grade social studies teacher effectively constituted a RIF pursuant to *N.J.S.A.* 18A:28-9 and the Board failed to execute and comply with a preferred eligibility list and establish petitioner's seniority status pursuant to *N.J.S.A.* 18A:28-12. Board was ordered to reinstate petitioner and assign him to the position of 7th grade social studies teacher.

Commissioner reversed the initial decision. Commissioner determined that since petitioner was not terminated from employment with the District, did not suffer a reduction in salary, and was transferred to a teaching position for which he was properly certificated, he was not subject to a RIF. Thus, the Board acted pursuant to its managerial prerogative to transfer teaching staff members. Because seniority regulations were not implicated in this matter, the Commissioner did not reach to petitioner's allegations that his seniority rights were violated during the 1994-95 and 1995-96 school years. Petition was dismissed.

August 21, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8576-95

AGENCY DKT. NO. 326-8/95

EDWARD CARPENITO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY.

Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Rosen, Cavanagh & Uliano, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: April 12, 1996 Decided: April 19, 1996

BEFORE **LILLARD E. LAW**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Edward Carpenito, alleges that his seniority and/or tenure rights were violated when the Board of Education of the Borough of Rumson (Board) abolished his teaching position and failed to assign him to a newly created position.

This matter was transmitted to the Office of Administrative law (OAL) for determination as a contested case pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15, and the act creating the OAL, N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on December 13, 1995, at which, among other things, the parties agreed upon the issues to be resolved by this tribunal and the parties were granted leave to file cross-motions for summary decision pursuant to N.J.A.C. 1:1-12.5.

ISSUE

The sole issue for determination, as agreed upon by the parties, is this:

> Whether the Board violated petitioner's tenure and/or seniority rights when it failed to establish a preferred eligible list, subsequent to its action to abolish petitioner's social studies teaching position and, thereafter, created the position of 7th grade social studies and employed a non-tenure staff member to fill the new position?

The parties submitted their respective motions and briefs in support and opposition to petitioner's application for summary disposition. In evaluating whether a matter is ripe for summary decision, we must first turn to New Jersey Court Rule 4:46, which sets forth the procedures for bringing a motion for summary judgment. The rule allows "[a] party seeking any affirmative relief, ... [to] move for a summary judgment or order in his favor upon all or any part thereof or as to any defense."

This procedure, which is incorporated into N.J.A.C. 1:1-12.5, is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause, which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly show not to present any genuine issues of material fact requiring disposition at trial. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). The standard applied in determining whether a summary judgment should be granted was set forth by Justice Brennan in Judson, at 74:

> The standard of decision governing the grant or denial of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of genuine issues of material fact. At the same time, the standards are to be applied with a discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one.

Having carefully considered and evaluated the record before me, I **CONCLUDE**, pursuant to the Judson, supra. criteria, that the instant matter is ripe for summary disposition.

STIPULATION OF FACTS

I. PETITIONER'S EMPLOYMENT HISTORY

DATE OF EMPLOYMENT: January 22, 1974

CERTIFICATION AND ENDORSEMENTS:
Principal, Regular
K-12 Teacher of English, Permanent
K-12 Teacher of Social Studies, Permanent
K-12 Teacher of Science, Permanent

POSITIONS HELD:

1995-96 Computers, Gr. 4,5,6,7,8, Basic Skills[1]

1994-95 Computers, Gr. 4, 5, 6, 7, 8, Basic Skills[2]

1993-94 Health, Gr. 7, 8[3], Computers, Gr. 7, 8, Basic Skills[4]

1992-93 Social Studies, Gr. 7; Health

1991-92 Social Studies, Gr. 7[5]

1990-91 Social Studies, Gr. 7[6]

1989-90 Social Studies, Gr. 7; English[7]

1988-89 Social Studies, Gr. 7[8]

1987-88 Social Studies, Gr. 6, 7

1986-87 Social Studies, Gr. 6, 7

1985-86 Computers, Gr.7, Social Studies, Gr. 6

1984-85 Social Studies, Gr. 6; Computers, Gr. 7

1983-84 Computers, Gr. 7, 8; Social Studies, Gr. 6

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[1] Part of the Basic assignment to Mr. Carpentio included the teaching of Basic Skills Math for 2 out of 30 periods, but the 2 periods were eliminated in the early fall of 1995. As a result, Mr. Carpenito taught no Basic Skills Math for the majority of this school year.

[2] Part of the Basic Skills assignment to Mr. Carpenito included the teaching of Basic Skills Math for 3 out of 30 period.

[3] The school district's records show that Mr. Carpentio taught Health to Grade 8 as well as Grade 7. Mr. Carpenito believes he taught 7th graders only.

[4] Part of the Basic Skills assignment to Mr. Carpenito included the teaching of Basic Skills Math for 8 out of 30 periods.

[5] Mr. Carpenito believes he taught Health to Grade 7. The school district has no record that he taught Health for that school year.

[6] Mr. Carpenito believes he taught Health to Grade 7. The school district has no record that he taught Health for that school year.

[7] The school district's records show that Mr. Carpenito taught English. Mr. Carpenito describes his assignment as teaching "Skills."

[8] Mr. Carpenito believes he taught Literature to Grade 7, but the school district has no record of Mr. Carpentio teaching anything other than social studies to Grade 7.

1982-83 Social Studies, Gr. 6; Study Skills, Gr. 7; Computers, Gr. 8

1981-82 Social Studies/Study Skills, Gr. 6[9], 7, 8

II. ADDITIONAL FACTS

1. Prior to the commencement of the 1993-94 academic year, the petitioner's 7th grade social studies position was abolished due to declining enrollment. As a result of the abolishment of that position, the petitioner was assigned to full time employment teaching computer applications to 7th and 8th grade students, as well as Health and Basic Skills courses during 1993 and 1994.

2. During the 1994-95 and the 1995-96 school years, the petitioner was assigned to teach computer applications to grades 5 through 8, as well as a Basic Skills course.

3. Grades 7 and 8 in the respondent district are departmentalized, where as grades 4, 5, and 6 are not.

4. In or about April of 1995, the respondent school district posted a number of positions, the same designation previously taught by the petitioner. The petitioner submitted an application for this position and during May of 1995, a non-tenured teacher from outside the Rumson School District was appointed to the 7th grade social studies position, despite the application of the petitioner. (A copy of the Posting is attached hereto as Exhibit A.)

Respondent does not object to the Stipulation of Facts as set forth above. However, it is respondent's position that certain facts need elaboration based upon information supplied to the Board's counsel. First, the social studies position formerly held by petitioner was abolished, however, the Board's counsel had no information to

[9] Mr. Carpenito and the school district's records differ as to whether Mr. Carpenito taught study skills to Grade 6 for that school year.

suggest that the reason given was because of "declining enrollment." Second, counsel has been advised that grades 7 and 8 are not departmentalized in the conventional sense, rather, the Board uses the "middle school concept."

PETITIONER'S ARGUMENT

Initially, it is the position of the petitioner that the 7th grade social studies position which he had established seniority and which was abolished prior to the 1992-93 school year, was a position which he was entitled to reclaim, when same was reestablished in the District last spring. The Board's apparent defense to this initial argument would appear to be that a reduction in force did not take place due to the reassignment of the petitioner to another full time position. Therefore, any seniority or other rights he may have acquired in the position would not be manifest when the position was re-established several years later. In order for the Administrative Law Judge to accept that defense, two essential facts must be established in relation thereto.

The Board must demonstrate that the absence of a classic reduction in force regarding the petitioner obviates his rights in connection therewith. While the petitioner concedes that he was not severed from the school district, he strenuously contends that the abolishment of the position acted in a similar fashion to a reduction in force and triggered the same type of responsibility on behalf of the Board. See, for example, Fallis v. Plainfield Bd. of Ed., 1985 S.L.D. 264. Certainly, N.J.A.C. 6:3-5.1 establishes his rights when a position is either abolished or a teacher is riffed. When a vacancy occurs in the same category, the teacher is entitled to claim it. See N.J.A.C. 6:3-5.1(I).

In addition to the abstract evaluation of the argument set forth above, the Administrative Law Judge is presented with a second problem in considering the Board's defense that the reassignment prevents activation of the rights set forth above. Although the petitioner was originally assigned to teach computer applications in the 7th and 8th grade departmentalized areas, beginning in 1994, he was reassigned to a similar computer

teaching position involving grades 4 through 8, and that assignment persists up to the present. Teachers acquire seniority either in elementary, secondary or district wide categories. Since grades 4, 5, and 6 are apparently self contained, they fall under the elementary category. In light of the Commissioner's decision in Taxman v. Bd. of Ed. of Piscataway Twp., 92 N.J.A.R. 2d (Edu) 189, aff'd. State Bd. of Ed. (Sept. 1, 1993), teachers with any relevant endorsement can be assigned to teach computer related courses in they are not particularly sophisticated courses. Therefore, it can be reasonably argued that the initial reassignment probably did not violate Mr. Carpenito's seniority rights.

However, the current assignment involves teaching 4th, 5th and 6th grade computer applications, thereby involving the elementary area where he is not certified. The sum and substance of this concept is quite straight forward. The abolishment of his position has now resulted in his assignment to an elementary category, and he appears to have a clear entitlement to assert his right to the social studies position, as a result of his current assignment. Clearly, that argument is in line with the intent and motivation of the seniority regulations.

While it is conceded that there is no specific requirement that a particularized endorsement is necessary to instruct in computer applications, it is obvious that such an assignment cannot be utilized to frustrate tenure rights or seniority rights which arise as a result of a reduction in force or the abolishment of a position. See, for example, L.C. Morgan v. Bd. of Ed. of the Twp. of Wayne, 1991 S.L.D. 2578, State Bd. of Ed. Dec. (Nov. 6, 1991). While the original assignment may have survived scrutiny under this type of application, the current assignment clearly does not. The petitioner was entitled to claim the vacancy which existed last spring and this entitlement cannot be avoided by the Board by placing him in an elementary designation which is not in accordance with the endorsements that he holds.

THE BOARD'S POSITION

SUMMARY OF PETITIONER'S ARGUMENT

Petitioner, a tenured teacher teaching computer and basic skills, claims an entitlement to a 7th grade social studies position presently occupied by a non-tenured employee.

Petitioner argues a three-step analysis. First, petitioner argues that he does not have the proper endorsements to his teaching certificate to teach computer applications to elementary school children even though petitioner is also teaching computer applications to 7th and 8th grades and English in a basic skills format. Secondly, petitioner argues that such an assignment translates into a *de facto* reduction in force, entitling him to be placed on a preferred eligibility list for the social studies position. Lastly, since the position is occupied by a non-tenured teaching staff member, petitioner, as a tenured teaching staff member, claims an entitlement to the "vacant" position since it is currently occupied by the non-tenured staff member. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987) and Capodilupo v. West Orange Bd Ed., 218 N.J. Super. 510 (App. Div. 1987).

SUMMARY OF RESPONDENT'S ARGUMENT

In essence, petitioner attempts to dictate his position of employment in spite of N.J.S.A. 18A:25-1, which permits a board of education to transfer teaching staff members. Admittedly, a teaching staff member may only be transferred to appropriate assignments, that is, where the position's description matches the teaching staff member's certification and endorsements, but even where such assignments may be inappropriate, the teaching staff member may not dictate his position of employment to a board of education.

LEGAL ARGUMENT

POINT I

THE PETITIONER'S PRESENT POSITION TEACHING COMPUTER SKILLS TO FOURTH, FIFTH, SIXTH, SEVENTH AND EIGHTH GRADERS, AS WELL AS TEACHING THE ENGLISH PORTION OF BASIC SKILLS, ARE APPROPRIATE ASSIGNMENTS, GIVEN PETITIONER'S CERTIFICATIONS AND ENDORSEMENTS.

Presently, petitioner holds an instructional certificate with endorsements to teach English, social studies and science to K-12 students and teaches computer skills to 4th, 5th, 6th, 7th, and 8th graders. As petitioner concedes in its moving brief, the instruction of computer applications does not require a particular endorsement to the teaching certificate, citing, Taxman v. Bd. of Ed. of Piscataway Twp., 93 N.J.A.R. 2d (Edu) 189, 191, but petitioner then asserts that his teaching an elementary school class[10] even though he is not teaching the subjects of reading, writing arithmetic and spelling.

Petitioner's argument stems from his instructional certificate. As a general rule, all instructional endorsements are valid at every grade level and as the Stipulation of Facts disclose, petitioner holds a K-12 certificate. Of the three exceptions to the general rule only one exception may have some application here, which is that elementary endorsements are valid only for teaching nursery through 8th grade students. N.J.A.C. 6:11-6.1. The converse of the exception, which is petitioner's argument, is not the standard. Teachers with any endorsement to the teaching certificate may teach specific areas, such as computer applications, to elementary students. In Morgan v. Bd. of Ed. of

[10] Because of their departmentaliztion, teaching the computer skills to 7th and 8th graders may not be consturcted as teaching in the elementary category.

the Township of Wayne, 91 N.J.A.R. 2d (Edu) 122, the State Board of Education, in remanding there, distinguished a decision relied upon by the Commissioner of Education, writing:

> Petitioners in *South River*, dismissed teachers on a preferred eligibility list, challenged the district board's requirement that individual teaching a K-5 computer literacy course hold an elementary certification and *also* possess nine academic credits in computer science. The Appellate Division affirmed the State Board's determination that the district board did not have the prerogative to impose such an additional requirement so as to preclude claims to the assignment based on seniority. In annalyzing the appropriate certification for the specific assignment at issue therein, the State Board concurred with the Administrative Law Judge's finding that the certification regulations contained no endorsement specifically authorizing the teaching of computer literacy in the elementary schools. (Emphasis Added)

Thus, petitioner's argument here has been addressed and rejected. The South River Board of Education was not permitted to impose upon teaching candidates the requirement of an elementary endorsement to teach computer literacy to elementary students because no endorsement, such as an elementary endorsement, is specifically required to teach computer literacy to elementary school students. If it was clear such an elementary endorsement was necessary to teach computer literacy to elementary school students, the South River Board's requirement would have upheld.

Since no particular endorsement is required for the teaching of computer related courses, then any endorsement to the instructional certificate may serve as a basis for teaching computer applications to all students. To argue that petitioner's teaching of computer skills cannot be provided to elementary school children, unless he holds an elementary endorsement, is directly counter to his K-12 endorsements and the general principal espoused in Taxman. Moreover, it had been rejected. Morgan, 91 N.J.A.R. 2d 122. Lastly, no policy, practice or logic supports insisting that a teacher, teaching specific computer skills to elementary school children, hold an elementary endorsement because

the elementary subjects of reading, writing, arithmetic and spelling are not being taught or are relevant to computer skills.

POINT II

ASSUMING, ARGUENDO, PETITIONER'S ENDORSEMENT ARGUMENT, PETITIONER IS NOT ENTITLED TO DICTATE POSITION TO RESPONDENT

Petitioner is tenured in the district and in the specific position of teacher. N.J.S.A. 18A:28-5 and 6. Being tenured as a teacher, the teaching staff member can neither be dismissed nor reduced in compensation without recourse to the Tenure Employees Hearing Act at N.J.S.A. 18A:6-10, et. seq. Since petitioner is a tenured teacher in the district, petitioner is entitled to such protections against losing his position to a non-tenured employee. See, Grosso v. New Providence Bd. of Ed., St. Bd. of Ed. 90 S.L.D. 1750.

SUBPOINT A.

THE BOARD MAY TRANSFER TEACHERS TO TEACHING POSITIONS

Yet, the Board of Education may transfer teaching staff members. N.J.S.A. 18A:25-1. Here, petitioner was transferred within his tenure position of teacher. Although petitioner probably did not consent to the transfer, tenure does not accord him any protection if the transfer is within his tenure position, which in this case, is teacher. See, Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980), cert. denied, 87 N.J. 300 (1981). In a reduction of force, a tenured employee's seniority may act to prevent a transfer from his or her tenure positions unless consent is given. See, Mustil v. North Bergen Bd. of Ed., 94 N.J.A.R. 2d (Edu) 167, Farley v. North Bergen Twp. of Ed., 705 F. Supp. 223 (D.N.J. 1989) and Ayoub v. South Plainfield Bd. of Ed., 88 S.L.D. 941.

In this case, no reduction in force took place and petitioner was transferred from one teaching position to another teaching position, the same tenure position.

SUBPOINT B.

TENURED TEACHERS WHO CONTINUE IN THEIR TENURE POSITIONS HAVE NO TENURE ENTITLEMENTS OR SENIORITY RIGHTS OVER OTHER TEACHERS

Since the petitioner has never lost his teaching position, he has no tenure entitlement to a particular assignment over a non-tenured teacher. See Bednar, supra and Capodilupo, supra. In addition, petitioner has no seniority entitlement to any particular assignment over fellow tenured teachers unless there has been a reduction in force, causing the abolishment of his position. N.J.A.C. 6:3-5.1. Without a reduction in force, tenure and seniority entitlements are inapplicable because seniority governs the relationship between tenured persons and tenure protects a teacher's position. Grosso v. New Providence Bd. of Ed., 90 S.L.D. 1750.

DISCUSSION AND CONCLUSIONS

The facts of this matter clearly demonstrates tht the 7th grade social studies position held by petitioner was abolished by Board action prior to the 1992-93 school year. The Board's position that it is not certian that the abolitiion of the position was due to a decrease in pupil enrollment, as alleged by petitioner, is of no moment. The fact remains that the position held by petitioner and to which he had acquired a tenure status was abolished by Board action, giving the effect of a reduction in force (R.F) pursuant to N.J.S.A. 18A:28-12. The Board's subsequent action to transfer and assign petitioner to another employment position under N.J.S.A. 18A:25-1, was clearly within the authority and discretion of the Board. Fallis, supra. 1985 S.L.D. at 272-273. Given the facts in this matter, however, the Board's transfer of petitioner to another position acted as an

accomendation to a tenured teaching staff member, for the advantage of the Board, to fill an available postition.

The facts further demonstrate that in or about April 1995, the Board acted to reinstate the 7th grade social studies position for the 1995096 school year, the position from which petitioner had effectively been the subject of a RIF prior to the 1992-93 school year. Although petitioner was not dismissed from the Board's employ, he was dismissed from a position to which he had acquired a tenure status and transferred to another position. The Board elected not to place respondent in the reinstated position even after he requested that it do so. Rather, the Board placed a non-tenured teaching staff member in the position formerly held by petitioner. There has been no showing that petitioner has in any manner, attempted to dictate to the Board his employment position as alleged by the Board. Rather, he merely attempts to assert his tenure/seniority rights.

The Court, in Bednar, supra. summarizes the tenure and seniority statutes and the rights attendant thereto as follows:

> The tenure statute authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF. N.J.S.A. 18A:28-13. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 n. 4 (1983); Capodilupo v. West Orange Tp. Ed. Bd., 218 N.J. Super. 510, 514 (App. Div. 1987). The statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers. Under current regulations, seniority is measured by years of employment in specific job categories which are normally narrower than the subject fields which are endorsed on teachers' certificates. See N.J.S.A. 18A:28-5; N.J.A.C. 6:3-1.10(b).
>
> Seniority is a statutory concept created by Chapter 28 of Title 18A, a chapter which deals only with the various aspects of tenure. Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n., 98 N.J. 523, 531 (1985). It does not purport to create employment rights for non-tenured employees. This court has thus held that non-tenured teachers whose contracts are not renewed by reason of a RIF are not entitled to the reemployment rights conferred by Chapter 28. Union City Bd. of Ed. v. Union

> City Teach. Assn., 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977). Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. Capodilupo v. West Orange Tp. Ed., Bd. supra. 221 N.J. Super. at 242.

I **CONCLUDE**, therefore, that the Board's action to abolish petitioner's position of 7th grade social studies teacher acted as a RIF, pursuant to N.J.S.A. 18A:28-9. I **CONCLUDE** that the Board failed to execute and comply with a preferred eligible list and establish petitioner's seniority status pursuant to N.J.S.A. 18A:28-12.

I **FIND** and **CONCLUDE** that petitioner is entitled to claim the 7th grade social studies teaching position which he held and for which he was certified prior to the RIF. I **CONCLUDE**, therefore, that petitioner should be returned to the position he formerly held before the Board acted to abolish it.

ORDER

Accordingly, it is **ORDERED** that the Board of Education at the Borough of Rumson, reinstate petitioner and assign him to the position of 7th grade social studies teacher.

Summary decision is, therefore, entered on behalf of petitioner, Edward E. Carpenito, and the Board's motion in opposition is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

19 April 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

May 1, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 3 1996
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

ai

OAL DKT. NO. EDU 8576-95

EDWARD CARPENITO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the initial decision was mailed to the parties on May 3, 1993 and the exceptions were filed on May 17, 1996. Accordingly, neither the exceptions nor the reply thereto is considered herein.

Upon careful and independent review of the record in this matter, the Commissioner determines to reverse the initial decision of the Administrative Law Judge (ALJ), for the reasons set forth below, inasmuch as he is not persuaded that the circumstances herein support the conclusion that petitioner was subject to a reduction in force (RIF), pursuant to *N.J.S.A.* 18A:28-9.

Initially, the Commissioner observes that *N.J.S.A.* 18A:28-9 provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to *reduce the number of teaching staff members, employed in the district*

> whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article. (emphasis added)

The Commissioner is further mindful that the meaning of a statute is first derived by looking at its plain language. *Chase Manhattan Bank v. Josephson*, 135 *N.J.* 209 (1994). Where that language is clear and unambiguous, "it will be given effect 'absent any *specific* indication of legislative intent to the contrary.'" (emphasis in text) *Chase Manhattan Bank* at 225. Clearly, the above statute, as well as *N.J.S.A.* 18A:28-10 and 28-11, contemplates a reduction in the number of staff employed in the district.

In the instant matter, although the record supports the conclusion that petitioner's social studies position was "abolished" prior to the commencement of the 1993-94 school year, the reason for such elimination is not clear. Petitioner's employment with the District was not terminated. Indeed, there is no indication that any staff member's employment was terminated. Nor does petitioner allege that he suffered a reduction in salary as a result of his transfer to the position of teacher of computer applications so as to implicate his tenure rights pursuant to *N.J.S.A.* 18A:6-10 *et seq.* Essentially, there was no consequence for petitioner which flowed from the transfer, other than his claim that he now occupies a different seniority category, since he teaches computer applications to the elementary grades and his position as a social studies teacher was, for seniority purposes, in a secondary category.

Moreover, the Commissioner is not persuaded that the circumstances in *Fallis*, *supra*, lend support to petitioner's claim that he was subjected to a RIF. In *Fallis*, that the ALJ and the Commissioner concluded petitioner was subjected to a reduction in force was *based on*

the unanticipated budget constraints and administrative reorganization which accompanied the abolishment of Fallis' position. *Fallis, supra,* at 275. By contrast, in the instant matter, there is no evidence that the elimination of petitioner's position was driven by anything other than the Board's decision to exercise its managerial prerogative to determine appropriate staff assignments for its school system. In any event, to the extent the holding in *Fallis, supra,* is inconsistent with the Commissioner's holding in the instant matter, *Fallis* is rejected as determinative case law under these circumstances.

Where there is no reduction in force or loss of employment and where tenure rights have not been impacted by a transfer, as the Commissioner so finds, the seniority regulations which were established to effectuate *N.J.S.A* 18A:28-9 *et seq.* do not attach:[1]

> ***It is basic education law that seniority is a concept which applies to certain rights of tenured personnel and the concept only has meaning where a reduction in force is necessary in the judgment of the Board under its authority at *N.J.S.A.* 18A:28-9 and then when the Board takes action to reduce the number of teaching staff members employed in the district.***
>
> ***The language of *N.J.S.A.* 18A:28-9, from which the seniority rights conferred by *N.J.S.A.* 18A:28-11 explicitly flow, plainly speaks to "the number of teaching staff members employed in the district" and, thus, has no applicability to a situation where the total number of teachers was not reduced. *Guy Ciarcia v. Bd. of Education of the City of Trenton*, 1991 *S.L.D.* 1422, 1425, 1426, 1429.

Notwithstanding that the Board does not dispute that petitioner's social studies position was "abolished," under the particular circumstances in this matter, to accept petitioner's argument that such elimination, absent attendant tenure violation(s), *supra*, nevertheless compels

[1] While the language of the regulations governing seniority found at *N.J.A.C.* 6:3-5.1 *et seq.* appears to be quite broad, such regulations were promulgated pursuant to *N.J.S.A.* 18A:28-9 *et seq.*, and must be read consistent with that statute.

the application of the seniority regulations, would constitute a capitulation to semantics at the expense of sound educational policy. To so permit would unnecessarily restrict the Board in the exercise of its broad powers to govern and manage its schools, including the power to transfer teachers to alternative teaching assignments, either voluntarily or involuntarily, within the scope of their certificates, thereby establishing an optimal staffing configuration. The Commissioner recognizes that "[a] tenured teacher may be 'transferred' or reassigned within the scope of the endorsements on his or her Instructional Certificate *** but may not be transferred involuntarily from one position to another." *Howley v. Ewing Township Board of Education*, 1982 *S.L.D.* 1328, at 1340, aff'd State Board June 1, 1983. Here, petitioner was not transferred to a different position, in that he remained a teacher. As the Board correctly notes, petitioner's argument that he is not properly certified to teach the fourth, fifth and sixth grades must also fail in light of *Taxman, supra*, which established that a teacher of computers need only possess an instructional certificate; there is no requirement for a specific endorsement. *Taxman, supra,* at 191.

Inasmuch as petitioner was not terminated from employment with the District, did not suffer a reduction in salary, and was transferred from one teaching position to another teaching position for which he is properly certificated, the Commissioner must reject petitioner's contention that the abolishment of his social studies position "***acted in a similar fashion to a reduction in force and triggered the same type of responsibility on behalf of the Board." (Initial Decision at p. 6) Instead, the Commissioner finds that the Board acted pursuant to its managerial prerogative to transfer teaching staff members, and that petitioner has failed to establish that said transfer was improper. Since seniority regulations are not implicated in this

matter, the Commissioner does not reach to petitioner's allegations that his seniority rights were violated during the 1994-95 and 1995-96 school years.

Accordingly, the initial decision of the ALJ is reversed, as set forth herein, and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 21, 1996
Date of Mailing, August 21, 1996

362-96

EDU #8576-95
C # 362-96
SB # 63-96

EDWARD CARPENITO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 21, 1996

For the Petitioner-Appellant, Chamlin, Rosen, Cavanagh & Uliano (Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent-Respondent, McOmber & McOmber (J. Peter Sokol, Esq., of Counsel)

Edward Carpenito (hereinafter "petitioner"), a tenured teaching staff member, had been employed by the Board of Education of the Borough of Rumson (hereinafter "Board") as a teacher of seventh-grade social studies when the Board acted pursuant to its authority under N.J.S.A. 18A:28-9 to reduce the number of teachers in the district by eliminating one social studies position prior to the commencement of the 1993-94 school year.[1] Petitioner was serving in the position so abolished. The Board thereupon

[1] N.J.S.A. 18A:28-9 provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of

FEB. 4, 1998

employed petitioner on a full-time basis as a teacher of health, basic skills and computer applications. In May 1995, the Board appointed a non-tenured individual to a newly-established position teaching seventh-grade social studies.

Petitioner filed the instant petition of appeal with the Commissioner of Education alleging that the Board had violated his tenure and seniority rights in failing to reinstate him to that newly-created position. Petitioner also claimed that the Board had violated his rights in assigning a non-tenured teacher to teach eighth-grade social studies in 1994-95.[2] During proceedings in the Office of Administrative Law, the parties filed cross-motions for summary decision.

On April 19, 1996, an Administrative Law Judge ("ALJ") recommended granting petitioner's motion for summary decision. The ALJ concluded that the Board's action in abolishing petitioner's position had acted as a reduction in force ("RIF"). He found that "[t]he Board's subsequent action to transfer and assign petitioner to another employment position...was clearly within the authority and discretion of the Board. [Citation omitted.] Given the facts in this matter, however, the transfer of petitioner to another position acted as an accommendation [sic] to a tenured staff member, for the advantage of the Board, to fill an available position." Initial Decision, slip op. at 12-13. The ALJ noted that although petitioner had not been dismissed from the Board's employ, he had been "dismissed from a position to which he had acquired a tenure status and transferred to another position." Id. at 13. Consequently, the ALJ concluded

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pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

[2] We note that petitioner did not pursue his claim to the eighth-grade social studies assignment.

that petitioner was entitled to the newly-created position teaching seventh-grade social studies as against a non-tenured teacher.

On August 21, 1996, the Commissioner rejected the ALJ's recommendation and dismissed the petition. The Commissioner was not persuaded that petitioner had been subject to a RIF, noting that although the record supported the conclusion that petitioner's position had been abolished, there had been no consequences to petitioner of such action since his employment had not been terminated and he had not suffered a reduction in his salary. Instead, the Commissioner found that the Board had acted pursuant to its managerial prerogative to transfer teaching staff members, and that petitioner had failed to establish that such transfer was improper.

Petitioner filed the instant appeal to the State Board.

On October 15, 1997, our Legal Committee issued its initial report in this matter, in which it recommended reversing the Commissioner's determination that petitioner had not been subject to a reduction in force but affirming his ultimate determination to dismiss the petition. Upon further reflection in light of exceptions filed to that report by the parties, the Legal Committee found it necessary to issue a revised report on December 17, 1997. After a careful review of the record, including the exceptions filed in response to the revised report of the Legal Committee, we reverse the decision of the Commissioner.

Initially, we find that, as the ALJ correctly determined, petitioner was affected by a reduction in force when the Board acted to abolish his position teaching seventh-grade social studies prior to the 1993-94 school year. This is not a case in which the Board, as it now urges, simply "transferred [petitioner] from one teaching

position to another teaching position." Answer brief, at 4. Rather, the Board acted to eliminate one social studies teacher pursuant to the authority granted it by N.J.S.A. 18A:28-9 prior to the commencement of that school year. The fact that petitioner's employment was ultimately continued in another full-time assignment without any reduction in his compensation does not nullify such action, although it may affect the relief to which he is entitled. Sheffield v. New Jersey State Department of Human Services, decided by the State Board of Education, November 2, 1994; Parker and Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board of Education, May 2, 1990.[3]

We note, moreover, that although the specific reason for the elimination of petitioner's position is not established in the record, petitioner has not challenged its validity. In addition, we agree with petitioner that this case is analogous to Fallis v. Board of Education of the Borough of Plainfield, decided by the Commissioner, 1985 S.L.D. 264, aff'd by the State Board, 1985 S.L.D. 281, in which a tenured assistant principal serving at the high school level was reassigned to a middle school assistant principalship with no reduction in compensation after his high school position was abolished. The Commissioner stressed in that case that the assistant principal's seniority rights were triggered "irrespective of the fact he was neither dismissed nor reduced in salary." Fallis, supra, at 279. Thus, notwithstanding the Commissioner's

[3] We clarify the Commissioner's characterization of the Board's action after the abolishment of petitioner's position as constituting a "transfer from one teaching position to another...." Commissioner's Decision, slip op. at 19. Tenure is achieved in a "position," and "teacher" is a separately tenurable "position" under N.J.S.A. 18A:28-5. Nelson v. Board of Educ. of Old Bridge, 148 N.J. 358 (1997); Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987). Hence, a teacher who has achieved tenure status may be reassigned to another assignment within the scope of his instructional certificate, but may not be transferred to another separately tenurable "position" without his consent.

concern that recognizing petitioner's tenure and seniority rights in this case would "unnecessarily restrict the Board in the exercise of its broad powers to govern and manage its schools," Commissioner's decision, slip op. at 19, the law is clear that petitioner was subject to a reduction in force when the Board eliminated his social studies position prior to the 1993-94 school year.

We turn, therefore, to consideration of petitioner's claim that, as a result of such RIF, he was entitled by virtue of his tenure status to the seventh-grade social studies position when it was reestablished by the Board in 1995. N.J.S.A. 18A:28-12 requires that a tenured teaching staff member affected by a reduction in force "shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs...." N.J.A.C. 6:3-5.1(i) provides that:

> (i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

Moreover, it is now well established that a staff member dismissed as the result of a reduction in force has tenure protection in all assignments within the scope of his certificate as against a non-tenured individual. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988).

In this instance, petitioner, who had achieved tenure under his instructional certificate, was employed in another full-time teaching assignment with no reduction in compensation after his position teaching social studies was abolished prior to the 1993-94 school year. Thereafter, in May 1995, the Board appointed a non-tenured individual to a vacancy in a newly-established position teaching seventh-grade social studies. The Board could not appoint a tenured teacher to that position who had less seniority than petitioner in the applicable category. Fallis, supra. Nor could the Board dilute petitioner's tenure rights by affording a non-tenured teacher "seniority" in that position. Bednar, supra. Consequently, we conclude that petitioner was entitled to the newly-created seventh-grade social studies position as against a non-tenured individual.

We therefore reverse the decision of the Commissioner and direct the Board to reassign petitioner to the position teaching seventh-grade social studies.[4]

Attorney exceptions are noted.

February 4, 1998

Date of mailing FEB 06 1998

[4] We note that our decision herein does not alter the ability of a district board to exercise its prerogative to reassign its teaching staff members within the scope of their instructional certificates. See supra note 3. We note, in addition, that the transfer of employees between work sites is not mandatorily negotiable and that "no employer shall transfer an employee for disciplinary reasons." N.J.S.A. 34:13A-25. See Ridgefield Park Ed. Assn. V. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978).

363-96

363-96R

JEAN KLINE FEIGENBAUM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

August 21, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4549-96

(REMAND OF EDU 8105-95)

AGENCY DKT. NO. 284-7/95

JEAN KLINE FEIGENBAUM,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Philip H. Shore, Esq., for respondent (Shore & Zahn, attorneys)

Record Closed: July 2, 1996 Decided: July 3, 1996

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 28, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 3, 1996
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

7/15/96
DATE

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DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 16 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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SHORE & ZAHN, ESQS.
P. O. BOX 755
EAST BRUNSWICK, NJ 08816
(908) 254-5500
Attorney for Respondent

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

JEAN KLINE FEIGENBAUM, Petitioner,	:	AGENCY DOCKET NO. 284-7/95
-vs-	:	OAL DOCKET NO. EDU 4549-96 (REMAND OF EDU ~~8015-95~~ 8105-95)
CRANBURY TOWNSHIP BOARD OF EDUCATION, Respondent.	:	AMENDED SETTLEMENT AGREEMENT

BEFORE KATHRYN A. CLARK, A.L.J.:

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement which fully disposes of all issues in controversy between the Petitioner and Respondent:

1. Petitioner withdraws, with prejudice, her appeal and request for a hearing.

2. Respondent and Petitioner agree to have monthly informal meetings as long as deemed necessary. Such meetings shall be for the purpose of reviewing and discussing Petitioner's teaching performance.

3. The parties agree that there shall be no restriction on the use of this Settlement Agreement, including its terms and purposes in any future proceedings in which the parties may become involved.

4. The Petitioner waives all claims against the Respondent with regard to this matter, including any award of back pay or counsel fees.

5. Both parties agree to waive the right to file exceptions and cross exceptions.

DATED: 6-27-94

MICHAEL T. BARRETT
Attorney for Petitioner,
Jean Kline Feigenbaum

DATED: 6-26-94

PHILIP H. SHORE
Attorney for Respondent,
Cranbury Board of Education

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OAL DKT. NO. EDU 4549-96 (EDU 8105-95 ON REMAND)

JEAN KLINE FEIGENBAUM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

August 21, 1996
Date of Mailing, August 21, 1996

363-96R

JEAN KLINE FEIGENBAUM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

August 21, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4549-96

(REMAND OF EDU 8105-95)

AGENCY DKT. NO. 284-7/95

JEAN KLINE FEIGENBAUM,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Philip H. Shore, Esq., for respondent (Shore & Zahn, attorneys)

Record Closed: July 2, 1996 Decided: July 3, 1996

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 28, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an agreement indicating the terms thereof, which is attached and fully incorporated herein.

eligibility of petitioner, who turned 19 years of age prior to September 1, 1996, and would, therefore, be ineligible to participate in sports for the 1996-97 school year pursuant to Article V, Section 4C of the NJSIAA Bylaws (*NJSIAA Handbook*, 1995-96, at 37). On February 14, 1996, petitioner's request for a waiver of the age requirement was considered by the Association's Eligibility Committee, which denied the request by a vote of 5-0. On March 13, 1996, an appeal hearing was conducted by NJSIAA's EAC. After considering the evidence, the EAC, by a vote of 3-2, denied petitioner's request to obtain a waiver of the age rule so that he could participate on the football team. However, a waiver was granted to permit petitioner to permit him to participate in track and other non-contact sports. The EAC issued a written decision on March 22, 1996.

The undisputed facts are as follows: William Salvatori turned 19 on August 24, 1996, seven days prior to the September 1, 1996 eligibility cutoff date imposed by NJSIAA's rules. He attended public schools in the Secaucus School District through seventh grade. William was retained in fourth grade and again in seventh grade due to learning disabilities. Since 1991, he has been classified as perceptually impaired. After his family moved, William completed the eighth grade in the Little Ferry School District, and, in 1993, entered Ridgefield Park High School, a receiving district to Little Ferry, as a ninth grader. William played football in high school during his freshman, sophomore and junior years.

PETITIONER'S POSITION

Petitioner argues that his learning disabilities are organically based and his retentions in elementary school were not, therefore, his fault.[1] Had he not been left back on two

[1] In his reply brief, petitioner strongly objects to NJSIAA's statement, *infra*, that "the record in this case demonstrates that the Petitioner was actually capable of performing academically at a much higher level than his peers." (Petitioner's Reply Brief at p. 13) Petitioner views this statement as an effort to cast blame on him for being a learning disabled student. He maintains that the testimony established that, notwithstanding that a student

occasions, he would have completed his senior year prior to his 19th birthday and would have been eligible to participate in interscholastic sports for four years. (Petition of Appeal, Exhibit B at p. 2) Petitioner further asserts that the Child Study Team recognizes that his participation in interscholastic sports, particularly football, has been a significant motivation to assist him in overcoming his disability. He contends, that, as result of such participation, his grades and attitude in school have improved. (*Id.*)

Petitioner argues that the NJSIAA's failure to permit a waiver of the eligibility rule constitutes a violation of Title II of the Americans with Disabilities Act (ADA), 42 *U.S.C.* Section 12132, Section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.* Section 794, and 42 *U.S.C.* Section 1983. (Petition of Appeal at p. 3; Exhibit B at p. 3)

Asserting that the NJSIAA is an "instrumentality of a State or Local Government and is thus a 'public entity' subject to the provisions of ADA," (*Id.* at p. 3) petitioner, observes that the ADA provides that

> ***no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity. (42 *U.S.C.* Section 12132)

The ADA defines a "qualified individual with a disability" as

> an individual with a disability who, with or without reasonable modifications to rules, policies or practices *** meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. (42 *U.S.C.* 12131 (2))

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may, in an aptitude test, demonstrate an aptitude above grade level in certain subject areas, the results are not necessarily significant where the student, because of his learning disabilities, is unable to reach that level of ability in a classroom. (*Id.*)

Petitioner affirms that he is a "qualified individual with a disability," as defined by the ADA, and as such, the NJSIAA is required to make "reasonable modifications" and to waive the eligibility requirements. (Petition of Appeal, Exhibit B at p. 4) He contends that, but for the age requirement, he meets all of the NJSIAA's eligibility requirements. That NJSIAA should modify the age standard would not, according to petitioner, "fundamentally alter the nature of NJSIAA's services, programs or activities. ***" (*Id.* at p. 5) Thus, petitioner concludes, modifying the age requirement would be a "reasonable accommodation" compelled by the ADA.

Further, petitioner argues that Section 504 of the Rehabilitation Act of 1973 supports his right to participate in interscholastic sports. That is, the Act provides

> ***No otherwise qualified individual with handicaps *** shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ***. (29 *U.S.C.* Section 794 (a))

Again claiming that the NJSIAA is subject to the rules and provisions of the Act as a federally assisted program[2], petitioner maintains that he is an individual with a handicap who is "otherwise qualified," and has been excluded from participation in a federally assisted program "solely" because of his handicap. (Petition of Appeal, Exhibit B at p. 6) Petitioner contends that the issue is not whether he meets all the eligibility criteria, but to what extent the NJSIAA is required to make reasonable accommodations to meet his disabilities. (*Id.*)

Petitioner further argues that if there is wrongful discrimination under the Rehabilitation Act or the ADA, such discrimination would also be wrongful under 42 *U.S.C.* Section 1983, which "**provides that any person who, under color of State law, subjects any citizen of the United States to deprivation of any rights secured by the Constitution or laws of the

[2] Petitioner states, "***Although not a direct recipient of federal funding, NJSIAA receives funding from its member schools, most of which are direct recipients of federal funding.***" (Petition of Appeal, Exhibit B at p. 5)

United States, shall be liable to the party injured in an action at law or equity.***" (*Id.* at p. 7) Petitioner argues that to preclude him from participating in interscholastic sports would cause him irreparable harm and "would cause a regression or perhaps retrogression of [his] improved performance academically, emotionally and socially***." (*Id.* at p. 8)

Petitioner finds support for his position in, *inter alia*, *Johnson v. Florida High School Activities Association, Inc.*, 899 *F. Supp.* 579 (M.D. Fla. 1995). There, a handicapped student brought action against a state high school activities association for enforcing its age requirement, thus prohibiting the student's participation in high school sports. Here, the Court examined the purposes of the age requirement (i.e., safety and fairness) and found that these purposes were not undermined by the plaintiff's participation in interscholastic activities.[3] (*Id.* at 585) Similarly, petitioner argues that although he is larger than the average football player, he is not larger than the average nose guard. (Petitioner's Reply Brief at p. 10) Moreover, petitioner strongly objects to NJSIAA's "efforts ***to try to state that [he] was being 'red-shirted' for an additional year***." (*Id.* at p. 11)

Additionally, petitioner cites to *Dennin v. Connecticut Interscholastic Athletic Conference*, 913 *F. Supp.* 663 (D. Conn. 1996), where the Court ordered the Athletic Conference to waive its eligibility rule and permit a student who turned 19 prior to September 1 to participate on the high school's swim team. (Petitioner's Supplemental Brief at p. 5) Petitioner states

> As in the present case, the Connecticut student's participation in athletics increased his self esteem and social skills and was considered sufficiently important to his development. The Court

[3] The *Johnson* Court emphasized "that while the Plaintiff is large, he is not the largest football player playing his position. There are individuals larger than him on the playing field. Thus, accepting the fact that football is a contact sport in which injuries do occasionally occur, the Court finds that allowing this individual to play does not facilitate or exacerbate the potential for injury.***" *Johnson, supra*, at 585.

held that waiving the age eligibility rule was a "reasonable accommodation" and should be granted. (*Id.* at pp. 5, 6)

Petitioner further argues that the *Dennin* Court fairly addresses many of the arguments raised by respondent, *infra*, particularly with respect to respondent's concerns about the potential for abuses of the rules, were a waiver to be granted. (Petitioner's Reply Brief at p. 7) Petitioner underscores that *Dennin* does not require NJSIAA to grant waivers to all individuals who fail to meet the age eligibility requirement but, rather, to those who are disabled individuals, under the Rehabilitation Act. *(Id.)*

Additionally, petitioner asserts that the age rule considered by the Court in *University Interscholastic League v. Buchanan*, 848 *S.W.*2d 298 (Tex. App. Austin 1993) was essentially the same as that in the NJSIAA rules. (Petitioner's Reply Brief at p. 4) Notwithstanding respondent's attempts to distinguish this case, petitioner argues that the Texas case "closely parallels" the instant matter. There, the Court found that the trial court did not err in enjoining the enforcement of the over-19 rule imposed by the University Interscholastic League against learning disabled high school athletes. *University Interscholastic League v. Buchanan, supra,* at 303.

Acknowledging that there is contrary case law, petitioner points out that there are no Third Circuit cases involving the issues in this matter. Therefore, there is no precedent by which New Jersey must be bound, and the reasoning and holdings of other District Courts may be "equitably applied in other judicial circuits.***" (Petitioner's Reply Brief at p. 6)

Petitioner reviews the testimony presented at the hearing before the EAC which, he argues, established that his improvements in school occurred as a direct result of his participation in high school football. (Petitioner's Supplemental Brief at p. 6)

Finally, petitioner argues that the NJSIAA's claim that he should have participated as an eighth grader is without merit and not applicable in this case. (*Id.* at p. 13) Petitioner argues

> Respondent has stated that the By-laws of the NJSIAA permit a student to play four years, by participating as an eighth grader if he would not be eligible to participate as a twelfth grader. They have taken the position that the Ridgefield Park Athletic Department should have notified all seventh grade students in Little Ferry of this rule ***.
> ***There does not appear to be anything in the Respondent's By-Laws or regulations that would compel a school district, such as Ridgefield Park, to be obligated to go to another school district because of a sending-receiving relationship and inform their seventh grade students of this right to play high school athletics in the eighth grade ***.
> ***Even if Ridgefield Park spoke to each and every seventh grader who attended school in Little Ferry prior to the end of the seventh grade, *** [petitioner] would never have been notified, as he did not attend seventh grade in Little Ferry. He attended seventh grade in Secaucus." (*Id.* at pp. 13, 14)

Moreover, petitioner argues that the NJSIAA's Bylaws with respect to eighth grade student players, *infra*, are inapplicable in the present matter since petitioner, as an eighth grader, was not enrolled in a member school. (Petitioner's Reply Brief at p. 12) Thus, under these circumstances, petitioner maintains that it would be "patently unfair" to penalize him.

RESPONDENT'S POSITION

Respondent NJSIAA underscores that the purpose of the age rule is to help "reduce the competitive advantage flowing to teams using older athletes and discourages student-athletes from delaying their education to gain athletic maturity.***" (Respondent's Letter Brief at p. 4) Respondent further cites to the NJSIAA's Bylaws which allow a student who may become 19 years old prior to September 1 to play four years of high school sports by requesting a waiver of the Bylaws, Article V, Section 4.I while in either sixth, seventh or eighth grade at a

member school. (*Id.* at pp. 4, 5) NJSIAA claims that petitioner could have played on the Ridgefield Park team in the eighth grade. However, he was never advised by the school district that he had this option. (*Id.* at p. 9)

Respondent argues that it is uncontraverted that petitioner is an outstanding football player on an excellent team. He is 5 feet, 8 inches tall, weighs 250 pounds, and has played varsity football for three years. (*Id.* at pp. 5, 6) Respondent notes petitioner's achievements and honors as a football player, track athlete and wrestler. Further, NJSIAA asserts that petitioner "***is much larger than the average high school football player. He aspires to be a professional athlete.***" (*Id.* at p. 23) The Association notes that "[f]ootball is a contact sport and [petitioner's] substantial size clearly implicates the health and safety concerns behind the rule.***" (*Id.*)

Respondent reviews petitioner's academic strengths and weaknesses, as contained in his Individual Education Plan (IEP), the results of petitioner's 1991 Learning Evaluation, 1993 Educational Evaluation, 1993 Psychological Evaluation, and 1993 Social History. (Respondent's Letter Brief at pp. 6-8) The NJSIAA concludes that "***the record in this case demonstrates that the petitioner was actually capable of performing academically at a much higher level than his peers. His reading and comprehension skills were 2 or 3 years ahead of his classmates.***" (*Id.* at p. 23)

NJSIAA maintains that the 19-year-old rule does not violate Section 504 of the Rehabilitation Act or the ADA.[4] Noting that the Commissioner has consistently upheld the rule, NJSIAA cites *Pottgen v. Missouri State High School Activities Association*, 40 *F.*2d 926 (8th Circuit 1994) wherein the Court determined that the handicapped student barred from eligibility

[4] It is herein noted that the NJSIAA does not dispute that it is a "public entity" or a recipient of federal funding.

by the 19-year-old rule was *not* an "'otherwise qualified' individual" entitling him to relief under Section 504. "***In so holding, the Circuit Court found the reasons for the age rule to be of 'immense importance in any interscholastic program.'" (*Id.* at p. 12, citing *Pottgen, supra,* at 929) Citing the Court's rationale for the age rule, respondent continues

> The rationale supporting the age rule is virtually identical to the reasons set forth by the NJSIAA in maintaining a similar eligibility provision. That rationale, which was sustained by the Commissioner in both *Marco Leyton [v. NJSIAA* and *Carteret Board of Education, Middlesex County*, 84 *S.L.D.* 90] and *Benny Mars [v. NJSIAA*, decided February 9, 1995], is set forth in the NJSIAA Handbook [at] page 61***.[5] (Respondent's Letter Brief at pp. 12-13)

The *Pottgen* Court further found that, even if the student could not meet the essential eligibility requirement, he would be "otherwise qualified" if the Association could make reasonable accommodations to enable him to meet the age limit. (Respondent's Letter Brief at pp. 13, 14) However, NJSIAA continues,

> ***The *Pottgen* Court then held that reasonable accommodations did not require an Association to "lower or to effect substantial modifications of standards to accommodate a handicapped person" ***. The Circuit Court then went on to observe that accommodations are not reasonable if they impose "undue financial and administrative burdens" or if they require a "fundamental alteration in the nature of (the) program" ***. (*Id.* at p. 14)

Thus, NJSIAA observes, the *Pottgen* Court concluded that the only possible accommodation the Association could make was a waiver of its age limit, which was not, the Court held, a reasonable accommodation. Rather, the Court maintained that waiving an essential eligibility standard

[5] The rule states, in pertinent part: "This rule is not only aimed at preventing 'red-shirting' but is also aimed at encouraging students to satisfactorily complete their academic studies starting with the elementary school level. It is also a safety measure to assure that 13- and 14-year-old students are not expected to compete against adults who are six or more years older, with substantially greater physical size, strength and skills. In view of this paramount safety factor, waivers of this rule will be granted by the NJSIAA in only *truly extraordinary circumstances.*" (emphasis added) *(NJSIAA Handbook*, Article V, Section 4.C, Interpretive Guidelines at 61)

constituted a fundamental alteration in the nature of the baseball program. (*Id.* at p. 14) Thus, since Pottgen could not meet the essential eligibility requirement (of age), he was not an "'otherwise qualified' individual." (*Id.*) Under a similar analysis, the 8th Circuit rejected Pottgen's ADA claim.

NJSIAA further finds support for its position in *Sandison v. Michigan High School Athletic Association*, 64 *F.*3d 1026 (6th Cir. 1995), wherein the 6th Circuit reversed a District Court's grant of preliminary injunction allowing two 19-year-old students to participate in track and cross country. The *Sandison* Court similarly found that the "students were not 'otherwise qualified' to participate and that a waiver would constitute an unreasonable modification of an essential rule of the Association." (*Id.* at p. 15) Again, the *Sandison* Court, like the *Pottgen* Court, found that the 19-year-old rule did not violate the ADA. (*Id.* at p. 16) The Court reasoned "the basis for the exclusion was not because of any disability, but by the application of a neutrally applied age restriction." (*Id.*, citing *Sandison* at 1036)

Respondent underscores that its age rule is also a neutral one. "***Students who are not able to play are not precluded because of a disability, but because of their age.***" (*Id.* at p. 17) Moreover, granting waivers "would fundamentally alter the nature of this competitive activity," the Association argues. (*Id.*) Here, NJSIAA cites statistics showing that 14.9% of all students attending public schools in New Jersey are classified in various educational disability categories, resulting in almost 50,000 public high school students classified as disabled in 1994.[6]

> ***To accept the petitioner's argument, each one of these students would be exempted from the NJSIAA eligibility rules, even when these classifications had nothing to do with their retention. Taken to the logical extreme, the petitioner's position would immunize approximately 15% of the student/athletes in New Jersey from the application of the NJSIAA eligibility rule. Such a wholesale exception would encourage the very abuses the rules intended to

[6] This figure assumes that the students are in the 14 to 17 age bracket.

> prevent, namely, zealous parents and coaches seeking an advantage by encouraging school districts to classify promising athletes so they could be red-shirted. (*Id.* at p. 18)

Distinguishing the facts in the *Johnson* case, *supra,* from those in the within matter, the NJSIAA observes that in *Johnson*, the student was totally deaf. (NJSIAA's Reply Brief at p. 5) In that case, "[h]is disability reached the point where he was provided with an interpreter, note-taker and itinerant teacher. *** Here the petitioner has no physical disabilities whatsoever and, in fact, has an intellectual ability two or three years higher than his classmates.***" (*Id.*) Moreover, NJSIAA observes that the *Johnson* Court relied heavily upon the later-reversed District Court decision in *Sandison, supra.* (*Id.*) NJSIAA also asserts that the facts in *Dennin* are distinguishable, in that Dennin was a student with Down's Syndrome seeking a waiver so that he could participate in swimming, a non-contact sport, whereas, petitioner herein, although classified as "perceptually impaired," is "***a bright young man whose intellectual ability is considerably above those of his classmates" seeking a waiver "***to permit a superior athlete to compete in a contact sport where injuries are more likely to occur as a result of disproportionate size and strength of competitors, which in turn, is correlated to age." (*Id.* at pp. 6, 8)

The NJSIAA points to its policy of granting waivers to classified students in the case of academic credit requirements, of permitting seventh and eighth grade students to participate in interscholastic sports, *supra*[7], of permitting 19-year-old students to play non-contact sports, under certain circumstances, and of providing for due process hearings which allow the

[7] The NJSIAA argues that its guidelines provide that the failure of the school's staff to advise a student-athlete of the rule will not be considered grounds for a waiver of the eligibility regulations. (NJSIAA's Reply Brief at p. 12) Moreover, NJSIAA contends that "***the fact that the petitioner attended a school in the 7th grade, which is not a sending district ***, is frankly, irrelevant. As a member of the NJSIAA, Secaucus High School could have advised the student in the 7th grade, just as the personnel from Ridgefield Park could have done so prior to the 8th grade." (*Id.*)

opportunity to demonstrate grounds for an eligibility waiver. (NJSIAA's Letter Brief at pp. 18, 19) In the instant matter, the NJSIAA granted petitioner a waiver to participate in track or other non-contact sports. The Association argues that its decision preserves the "essential health and safety purposes underlying the age rule.***" (*Id.* at p. 24)

DISCUSSION AND CONCLUSION

Initially, it is noted that, pursuant to *N.J.S.A.* 18A:4-33, the Deputy Commissioner has been delegated to hear and decide this matter.

The NJSIAA is a voluntary association. The Commissioner's scope of review in NJSIAA determinations is an appellate one. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 183. The Commissioner may not overturn an action by NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious and unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Further, the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J.Super.* 288, 297 (App. Div. 1960). In such cases, the Commissioner may not substitute his judgment for that of the NJSIAA, even when he might judge otherwise in a *de novo* review. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Having carefully reviewed the record of proceedings before the NJSIAA[8], as well as the legal arguments presented by the parties, the Deputy Commissioner concludes that, notwithstanding that NJSIAA's written decision of March 22, 1996 fails to explicate its reasons for rejecting petitioner's claims pursuant to Section 504 of the Rehabilitation Act and the ADA, which claims were before the EAC, there is sufficient legal support for the NJSIAA's decision to

[8] The record includes a transcript of the hearing before the EAC.

apply the age rule to petitioner in the instant matter, and there is no indication that the NJSIAA's action was in any way arbitrary, capricious or unreasonable. The Deputy Commissioner is satisfied that the NJSIAA has fairly examined the purpose of the age requirement and whether that purpose would be undermined if it were to be waived for this particular petitioner. *Johnson, supra,* at 585. In determining that the age requirement could not be waived, the NJSIAA notes, *inter alia*, that petitioner "*** is much larger than the average student his age." (EAC Decision, March 22, 1996 at p. 5) Inasmuch as football is a contact sport, petitioner's size and superior ability, according to the NJSIAA, "***clearly implicate the health and safety concerns behind the age rule." (*Id.*)

Accordingly, the Deputy Commissioner concludes that petitioner has failed to demonstrate that the determination by the NJSIAA was arbitrary, capricious and unreasonable. Thus, the Deputy Commissioner adopts as his own the findings and conclusions of the NJSIAA and dismisses this Petition of Appeal.

DEPUTY COMMISSIONER

August 28, 1996
Date of Mailing, August 29, 1996

367-96

367-96

BOARD OF EDUCATION OF THE TOWNSHIP OF BELVIDERE, WARREN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BUREAU OF FISCAL POLICY AND AUDIT, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND THE BOARDS OF EDUCATION OF THE TOWNSHIPS OF HOPE, HARMONY AND WHITE, WARREN COUNTY,	:	DECISION
RESPONDENTS.	:	

AUGUST 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11557-94
AGENCY DKT. NO. 347-8/94

BOARD OF EDUCATION OF THE TOWNSHIP OF BELVIDERE,
Petitioner,
v.
BUREAU OF FISCAL POLICY AND AUDIT, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND THE BOARDS OF EDUCATION OF THE TOWNSHIPS OF HOPE, HARMONY AND WHITE,
Respondents.

Stephen J. Edelstein, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

John K. Worthington, Deputy Attorney General, for respondent Department of Education (Peter Verniero, Attorney General of New Jersey, attorney)

Craig U. Dana, Esq., for respondent Hope Township Board of Education
(Morris, Downing & Sherred, attorneys)

William J. Gold, Esq., for respondents
Harmony Township and White Township Boards of Education

Record Closed: July 10, 1996 Decided: July 10, 1996

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of Facts

This matter was transmitted to the Office of Administrative Law on November 30, 1994 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15. and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 10, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

7/15/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 16 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
JUL 10 10 20 AM '96

MORRIS, DOWNING & SHERRED
P. O. Box 67 (One Main Street)
Newton, NJ 07860 201-383-2700
Attorneys for Respondents,
Board of Education of the
Township of Hope

BOARD OF EDUCATION OF THE TOWNSHIP OF BELVIDERE, Petitioner,	:	OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 11557-94 AGENCY DKT. NO. 347-8/94
v.	:	STIPULATION OF SETTLEMENT
BUREAU OF FISCAL POLICY AND AND AUDIT, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND THE BOARDS OF EDUCATION OF THE TOWNSHIPS OF HOPE, HARMONY AND WHITE, Respondents.	:	

WHEREAS, the Board of Education of the Town of Belvidere (hereinafter Belvidere or Petitioner) has engaged in a long standing sending-receiving relationship with the Boards of Education of the Township of Hope, Harmony and White (hereinafter Respondent Boards) for the students in Grades 9 through 12 including special education students; and

WHEREAS, pursuant to N.J.S.A. 18A:38-19 and N.J.A.C. 6:20-3.1 the Bureau of Fiscal Policy and Audit of New Jersey State Department of Education (now known as the Bureau of School Finance, hereinafter the Bureau) has the responsibility to certify the Petitioner's per pupil costs; and

WHEREAS, as the result of a dispute as to the per pupil costs for the years 1991-92 through 1993-94 school years the subject Petition was filed by the Petitioner alleging that the certified costs per student were erroneous; and

WHEREAS, the Respondent Boards of Education did file a Cross-Petition which alleges that the Petitioner had overcharged the Respondents for all the school years prior and subsequent to the 1991-92 school year; and

WHEREAS, the parties hereto have had an opportunity to conduct such due diligence as they deemed necessary and have entered into extensive negotiations through their respective counsel; and

WHEREAS, the parties have agreed to resolve all of the matters contained in the Petition and the Cross-Petition, including, but not limited to the amounts that are due for the school years 1988-89 through 1993-94 inclusive; and

WHEREAS, the parties have agreed upon the amount of liability that the Petitioner has to the Respondent sending Boards of Education for the years 1988-89 through 1993-94 inclusive; and

WHEREAS, the parties have agreed as to the manner in which the Petitioner's monetary obligations for overcharges for tuition to the Respondent Boards of Education shall be repaid.

NOW THEREFORE, in consideration of $1.00 and Other Good and Valuable Consideration the parties hereto do hereby agree as follows:

1. The balance due by Petitioner to the Respondent Boards for the school years 1988-89 through 1993-94, both inclusive, is $1,587,536.00 as more particularly set forth on Exhibits A and B. Of the said $1,587,536.00, the Respondents' respective interests

therein is:

a. Due to Harmony Township Board of Education $538,067.00

b. Due to White Township Board of Education $766,622.00

c. Due to Hope Township Board of Education $282,847.00

2. In addition, the parties do hereby stipulate and agree for the purposes of this agreement and for the years at issue in the Petition and Cross-Petition that the Bureau's methods of calculating the actual costs per student are accurate.

3. The payments due hereunder shall be funded through tuition credits; that is to say, as credits against future tuition payments that the Respondent Sending Districts owe to the Petitioner as a receiving district, as set forth in paragraph 5 below. In the event that the sending-receiving relationship is terminated with any or all of the Respondents, the balance of any funds to be repaid to that Respondent(s) shall be repaid in accordance with a schedule approved by the Commissioner of Education.

4. The parties do hereby anticipate that the amount that the Petitioner owes to the Respondents and which have as of this date not yet been certified by the Bureau for the school years 1994-95 and 1995-96 will be in the approximate total additional amount of $680,000.00 of this amount the Respondents' respective interests therein is:

a. Due to Harmony $260,000.00

b. Due to White $170,000.00

c. Due to Hope $250,000.00

The parties acknowledge that exact amount cannot be accurately determined as of this date, but the parties hereto do hereby agree that upon receipt of the certified amounts from the Bureau that the total amount due by the Petitioner, the Belvidere Board of Education to the Respondent Boards of Education will be adjusted pursuant to paragraph 5 b.

5. It is further understood and agreed that the total amount due to the Respondent Boards of Education from 1988-89 through 1995-96 shall be paid by the Petitioner with an 11 year pay out, as follows:

a. During the first year (1996-97 School Year) the sum of $88,000.00 which shall be paid as follows:

(1) to Harmony Township Board of Education $36,000.00

(2) to White Township Board of Education $32.000.00

(3) to Hope Township Board of Education $20,000.00

b. During the years two (1997-98) through 11 (2006-07) inclusive, the balance, including the estimated amount for the 1994-95 and 1995-96 school years set forth in paragraph 4 above, shall be amortized in ten equal payments which remaining amortized balance is to be amended and modified based upon the certified amounts for the 1994-95 and 1995-96 school years when the same are determined by the Bureau. Upon receipt of the said certified amounts for 1994-95 and 1995-96 the <u>then</u> balance will be recomputed and shall be amortized over the remaining number of years within the aforesaid remaining period.

As a guide to the parties, it is calculated that the tuition

credits due to the sending districts (with the estimated certified amounts for 1994-95 and 1995-96 being included) are as follows:

Year	Harmony	Hope	White
1996-97	$36,000.00	$20,000.00	$32,000.00
1997-98 through 2006-2007 per year	$76,207.00	$51,285.00	$90,462.00

Once the 1994-95 tuition figures are certified the business administrator and/or chief school administrator shall promptly meet and mutually agree upon the exact amount of the tuition credit due the sending districts. The remaining balance shall be calculated accordingly and amortized over the remaining portion of the ten year period.

Once the 1995-96 tuition figures are certified, the parties shall follow the procedure as set forth above.

The parties expressly agree that the above adjustments are not necessarily exclusive, as there could be other adjustments to the tuition figures in the normal course of business.

6. All pre and post judgment interest claims are specifically waived by the Respondent Boards of Education.

7. The parties agree that the funding for this settlement must come strictly from the taxpayers of Belvidere and that the taxpayers of the Respondent Sending Districts shall not be directly or indirectly responsible to pay the same.

8. The Petitioner, Belvidere Board of Education, agrees to annually make a full and complete disclosure of all financial

reports and records to the Respondents. The Respondents shall have the right to have reasonable and continuous access to pertinent financial records; and an independent audit of the Belvidere system conducted at the sole cost and expense of the Respondent Boards of Education.

9. It is expressly understood and agreed that it is in the best interests of both the Petitioner and the Respondents and of the students who attend Belvidere High School that the programs offered by Belvidere High School not be reduced as a result of this settlement unless required by law or sound educational policy.

10. Petitioner, Belvidere Board of Education, during the terms of this agreement, shall not take nor permit any of its officers, agents or employees to take or fail to take any action with respect to the agreement which would cause the agreement to be unfunded or under-funded. Belvidere shall take all actions necessary to insure that this agreement is continued until all payments due to the Respondent Boards of Education are paid in full.

11. The Parties agree that should any dispute arise as to the interpretation and/or implementation of this Agreement that the parties shall first use their best efforts to resolve the same by and between themselves, and if such efforts are not successful then the Commissioner of Education shall have jurisdiction to resolve any issue after first submitting the disputes to the County Superintendent.

12. This Agreement shall be binding upon the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the parties hereto set their hands and seals this 21ST day of JUNE 1996.

ATTEST:

Ronald L Rush
Secretary

Town of Belvidere Board of Education

Clifford R Ghetti
President

Lisa Ayars
Lisa Ayars, Secretary

Hope Township Board of Education

Thomas Dilts, President

Secretary

Harmony Township Board of Education

President

Joyce A. Gibbs
Secretary

White Township Board of Education

President

State Department of Education
Bureau of Fiscal Policy (now known as the Bureau of School Finance)

Director

William J. Gold, Attorney for Harmony and White Townships Boards of Education

Stephen J. Edelstein, Attorney for Town of Belvidere Board of Education

Craig U. Dana, Attorney for Hope Township Board of Education

John K. Worthington
Deputy Attorney General
Bureau of Fiscal Policy and Audit
(now known as the Bureau of School Finance)

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OAL DKT. NO. EDU 11557-94

BOARD OF EDUCATION OF THE TOWNSHIP OF BELVIDERE, WARREN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BUREAU OF FISCAL POLICY AND AUDIT, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND THE BOARDS OF EDUCATION OF THE TOWNSHIPS OF HOPE, HARMONY AND WHITE, WARREN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 29, 1996
DATE OF MAILING AUGUST 29 , 1996

368-96

368-96

H.V., on behalf of his minor child, E.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01222-96

AGENCY DKT. NO. 461-11/95

H.V. ON BEHALF OF HIS MINOR CHILD,

E.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,

ESSEX COUNTY,

Respondent.

H.V., *pro se*

Stepehn J. Christiano, Esq., for respondent

Record Closed: June 26, 1996 Decided: July 1, 1996

BEFORE **LINDA BAER**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 18, 1996, for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was scheduled for June 13, 1996. As part of the prehearing conference the parties discussed the possibility of settling this matter.

The parties agreed to settle this matter and have prepared a settlement agreement indicating the terms thereof, which is attached hereto and fully incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by their signatures and their on the record representations.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby **CONCLUDED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 1, 1996
DATE

Linda Baer
LINDA BAER, ALJ

Receipt Acknowledged:

7/15/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 16 1996
DATE

Barbara A Harmer
OFFICE OF ADMINISTRATIVE LAW

\mh

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT
OAL DKT. EDU 1222-96

H.V.. ON BEHALF OF HIS MINOR CHILD
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE , ESSEX COUNTY
Respondent.

SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and have prepared this settlement agreement which fully disposes of all issues in controversy between the Petitioner and the Respondent.

1. Petitioner withdraws his appeal and request for a hearing.

2. It is agreed that Petitioner does not owe any tuition to the Board for his daughter for the 1995-1996 school year.

3. This agreement does not prevent H.V. from applying for admission to the West Orange public schools for his daughter and independently establishing residency for the 1996- 1997 school year.

4. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other pupils.

5. Both parties waive the right to file exceptions and cross exceptions.

6. This agreement will only become effective when it is approved by the **BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE , ESSEX COUNTY AND THE COMMISSIONER OF EDUCATION**. Any disapproval by the Board or the Commissioner shall not interfere with the rights of either party to pursue the matter further.

June 13, 1996

H. Vastey

Hans Vastey

June 13, 1996

Stephen J. Christiano

Stephen J. Christiano,
Attorney

OAL DKT. NO. EDU 1222-96

H.V., on behalf of his minor child, E.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 29, 1996

DATE OF MAILING AUGUST 29, 1996

369-96

JASON BRADY,

PETITIONER,

V.

NEW JERSEY INTERSCHOLASTIC ATHLETIC ASSOCIATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning senior high student, who repeated ninth grade and who has a pending complaint before the United States District Court, sought emergent relief enjoining NJSIAA from not allowing him to play football during his senior year at New Milford High School. He contended NJSIAA violated his rights under the Americans with Disabilities Act (ADA) and other federal and state law by refusing to grant a waiver of the eight semester rule. District Court denied petitioner's request for preliminary injunction, finding that petitioner's request was not ripe until the Commissioner of Education had had an opportunity to address the issue of whether NJSIAA should have granted petitioner a waiver in an application for emergent relief.

Upon review of the papers, Commissioner determined to rule directly on the merits rather than address the application for emergent relief and the case in chief in two separate rulings. Commissioner may not overturn an action by NJSIAA absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. Commissioner concluded that petitioner herein failed to demonstrate that the NJSIAA's decision was arbitrary, capricious or unreasonable when it concluded, on the basis of the record before it, that petitioner's retention in ninth grade and early departure from the sports program in 1993-94 were not due to circumstances beyond his control or to handicap but, rather, were the result of his own voluntary actions, thus, rendering him ineligible for a waiver of the eight semester rule. Having found that NJSIAA's action was reasonable and that petitioner was not prevented from participation in sports by his handicapping condition so as to violate ADA or other cited law, Commissioner upheld findings and conclusions of the NJSIAA and dismissed the petition.

AUGUST 30, 1996

JASON BRADY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

:

V. DECISION

:

NEW JERSEY INTERSCHOLASTIC ATHLETIC ASSOCIATION, :

RESPONDENT. :

This matter has come before the Commissioner of Education by way of a Petition of Appeal and Motion for Emergent Relief filed by petitioner on August 13, 1996, seeking a stay of the determination of the New Jersey State Interscholastic Athletic Association (NJSIAA) that petitioner is ineligible to participate in interscholastic athletic contests by application of Article V, Section 4J of the NJSIAA Bylaws, the eight semester rule which precludes eligibility of a student for high school athletics after the expiration of eight consecutive semesters following his entrance into ninth grade. (*NJSIAA Handbook* at pp. 43-44)

Respondent NJSIAA submitted its Answer and Reply Brief on August 19, 1996, together with the record of proceedings before NJSIAA.

The Commissioner has designated the Deputy Commissioner to decide this matter pursuant to *N.J.S.A.* 18A:4-33 which authorizes the Commissioner of Education to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate.***" Such authority expressly includes assignment by the Commissioner of "[t]he hearing and determination of controversies and disputes which may arise under the school laws***." (*N.J.S.A.* 18A:4-34)

Petitioner Jason Brady will be entering his fifth year of high school at New Milford High School as he was held back in the ninth grade. Petitioner is a running back on the football team and has been characterized as "an exceptionally outstanding player." (NJSIAA's Brief Opposing Emergent Relief at p. 1) Petitioner was eligible to participate in football for his first two years of high school (while in ninth grade) through special accommodations for classified students at Lodi High School. He played football in his first ninth grade year (1992-93). During the 1993-94

season, his second ninth grade year, he participated in four to five preseason practice sessions. He then played football in his sophomore and junior years and now seeks to play football in his upcoming senior year. Petitioner was advised by school officials in New Milford that he could not play football in September 1996 unless NJSIAA granted him a waiver from its eight semester rule.

NJSIAA denied New Milford's request for a waiver of the eight semester rule following a hearing on June 5, 1996 before the Eligibility Appeals Committee (EAC) under the provisions set forth in the *NJSIAA Handbook.* In its determination letter of June 11, 1996, NJSIAA denied the waiver finding that petitioner had participated for four years, including 1993, by attending several practice sessions and then leaving the team because of an injury to his knee.

Procedurally, this matter commenced before the Deputy Commissioner after petitioner filed an application for preliminary injunction with the United States District Court, which was denied without prejudice in that it was not ripe until the Commissioner of Education had had an opportunity to address the issue of emergent relief.

Upon review, the Deputy Commissioner finds that the record herein is sufficient to establish, independent of the issue of emergent relief, that the NJSIAA's determination was not arbitrary, capricious or unreasonable. Therefore, the Deputy Commissioner has determined to decide this matter on its merits and uphold the June 11, 1996 decision of the NJSIAA.

In his moving papers, petitioner seeks emergent relief to allow him to participate in interscholastic athletic competition, a reversal of the NJSIAA's June 11, 1996 decision and an order which would allow petitioner to participate in competitive sports in his senior year. Petitioner claims that NJSIAA's denial of waiver has violated his rights under the Rehabilitation Act of 1973, 29 *U.S.C.* Section 701 *et seq.,* the Americans with Disabilities Act ("ADA"), 42 *U.S.C.* Section 12101 *et seq.*, the Individuals with Disabilities Education Act, 20 *U.S.C.* Section 1400 *et seq.* ("IDEA") and its equivalent State Statute, the Civil Rights Act of 1871, 42 *U.S.C.* Section 1983 and New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*

Petitioner affirms that he is a "qualified individual with a disability" as defined by the ADA in that he has been diagnosed with Attention Deficit Disorder (ADD), a learning disability, and during the 1992-94 school years was diagnosed as emotionally disturbed (Petition at p. 6), which classification was changed at New Milford to perceptually impaired (*Id.* at p. 7).

Petitioner receives special education pursuant to the IDEA. As such, he contends NJSIAA must waive its eligibility requirements. Petitioner claims that under Section 504 of the Rehabilitation Act of 1973, he is an individual with a handicap who is otherwise qualified and has been excluded from participation in athletics.

Petitioner further contends that there is wrongful discrimination under the Rehabilitation Act and the ADA and such discrimination would also be wrongful under 42 *U.S.C.* Section 1983. Petitioner cites several cases in support of his position.

Petitioner further asserts that his participation in interscholastic sports, particularly football, has significantly contributed to his progress in overcoming his disabilities. He contends that as a result of such participation, his grades and attitude have improved.

Additionally, petitioner contends that the NJSIAA's finding that he has already participated in football for four years is without merit. Petitioner avers that his attendance at four to five preseason practice sessions and his attendance record of only 50 days during the 1993-94 school year were "due to his disabilities, including the emotional problems he was experiencing as well as his ADD." (Petition at p. 6) By refusing to allow petitioner to play sports during his senior year, he avers, the NJSIAA has acted contrary to its own Interpretive Guidelines which provide that waivers may be granted for circumstances beyond the student's control. Petitioner continues stating, "***the uncontroverted evidence, in particular the opinion of Dr. Fidel, was that [petitioner's] need for a waiver was due to his disabilities which are clearly circumstances ``beyond his control." (Petition at p. 11)

In its response papers, the NJSIAA explains the eight semester rule is aimed at prohibiting "redshirting," a practice of holding a student back to allow him an extra year to mature or to save a talented athlete for another season, and at preventing students who are not meeting academic standards from replacing students who are maintaining their academic standards. "Waivers of the eight semester rule are only granted when a student has had to continue schooling beyond the eighth semester because of circumstances beyond his or her control. Waivers are never granted to allow an athlete more than four years of participation in any single sport." (NJSIAA's Brief at p. 3, quoting *Handbook* at p. 69)

NJSIAA states that petitioner played football for four years, as NJSIAA rules state that participation in a sport begins with the very first day of practice and, therefore, petitioner

participated in football during the 1993-94 season, even though he did not complete the season. Like all other students, it affirms, petitioner has had the opportunity to participate in four full years of football: two at Lodi and two at New Milford.

Further, it argues that, in 1993, petitioner was out over 50 days of school *of his own accord,* pointing to his annual review which notes that, "unfortunately, [petitioner] chose not to attend for over one-third of the school year, disallowing the formal therapeutic interaction." (NJSIAA's Brief at p. 5, quoting Exhibit B-21) NJSIAA further objects to the notion that petitioner quit the football team as a result of a handicap, averring that the evidence before the NJSIAA showed that he quit the team because he "lost interest." (NJSIAA's Answer at p. 4, quoting Transcript at pp. 62-63) It further states "[t]here was never any sworn testimony presented to the Committee that petitioner's 50 days of truancy from school, [which resulted in his retention] *** was even remotely related to any learning disability." (NJSIAA's Brief at pp. 5-6)

In this regard, the NJSIAA contends that petitioner is attempting to bring material before the Commissioner which contradicts evidence presented at the hearing that petitioner had been classified as emotionally disturbed before entering high school. The NJSIAA denies that the Certification of Dr. Bernard Fidel and the Certification of Jason Brady, both relied upon for facts alleged in paragraph 16 of the petition, are part of the record. It contends, without dispute, that each was prepared after the NJSIAA issued its decision. (NJSIAA's Answer at pp. 3-4)

The NJSIAA argues that the school was advised prior to hearing that it may invite any and all parties to the hearing, including counsel, and that it may submit any additional materials. It argues,

> Now, after hearing of, and disagreeing with, the EAC's decision, petitioner has attempted to supplement and change the record with a series of *ex post facto* affidavits and certifications, in an effort to create a different and more favorable record.*** These submissions were not presented to the NJSIAA, are not part of the record, and should not be considered by the Commissioner. (NJSIAA's Brief at pp. 10-11)

In support of its contention that the Commissioner must base his opinion on the record before him, NJSIAA cites case law to emphasize that "[e]xclusiveness of the record is a bedrock

principle" and cites *Mazza v. Cavichia* for the proposition that

> where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing. 15 *N.J.* 498, 514 (1954) (NJSIAA's Brief at p. 11)

In its Brief, NJSIAA explains that Dr. Fidel's certification was presented five weeks after the EAC hearing; however, NJSIAA did have before it a letter from Dr. Fidel opining that petitioner had been unable to attend school on a regular basis during 1992-93 due to his handicap. NJSIAA avers it discounted petitioner's expert opinion relating to his handicap because it had been rendered three years after the event in question and because it contradicted a child study team report written at the time of the event -- which contemporaneous report noted that petitioner failed ninth grade and did not receive attendant therapy because he chose not to attend for over one third of the school year. (*Id.* at p. 14)

In response to petitioner's claims of discrimination, NJSIAA asserts in its Brief that petitioner is not likely to succeed on his claims under Section 504 of the Rehabilitation Act and the ADA in that he

> cannot prove that he has been prevented from playing football solely by reason of his handicap because ***he is responsible for the fact that he is a fifth year senior in high school. Petitioner rejected the special school which his Child-Study Team advised that he attend (and which Lodi High School paid for), and he quit the football team the following year because he lost interest.***
>
> (NJSIAA's Brief at pp. 26-27)

Additionally, NJSIAA avers that petitioner cannot prove under these statutes that he is "otherwise qualified" to participate in NJSIAA programs because "he cannot comply with the eight-semester rule and there is no reasonable accommodation which would allow him to meet it.***" (*Id.* at p.27) NJSIAA continues emphasizing that, "[t]he only accommodation petitioner

seeks -- an extra year of participation -- would fundamentally alter the rules of athletic competition and give him an advantage no other student, [able] or disabled has ever received." (*Id.* at p. 28) In further arguing inapplicability of these statutes to the present matter, NJSIAA avers that the ADA and Rehabilitation Act provide for equality of opportunity but do not guarantee equality of results. See e.g. *ADA Title II Technical Assistance Manual* Section 11-3.3000, USDOJ and *D'Amico v. New York State Board of Law Examiners*, 813 *F.Supp.* 217, 221 (W.D.N.Y. 1993). The statutes require evenhandedness, but neither the language, purpose or history of Section 504 reveals an intent to impose an affirmative-action obligation on service providers. *Southeastern Community College v. Davis*, 442 *U.S.* 398, 410-411 (1979). NJSIAA asserts that petitioner has been afforded the same opportunity to play football that his peers have been provided. He has had the opportunity to play football in each of the four years he has been a high school student. He now seeks, contends NJSIAA, an additional benefit -- a fifth year of football. (NJSIAA's Brief at p. 31) NJSIAA explains that while it is aware that handicapped students must be provided with reasonable accommodation, it does make special allowances for classified students to play and that petitioner has benefited from such accommodation. NJSIAA avers, however, that allowing for a fifth year of participation is not a reasonable accommodation. (*Id.* at pp. 32-34)

NJSIAA addressees petitioner's IDEA claim which requires a school district to provide a student with a free appropriate education and related services. It reviews petitioner's Individual Education Plan (IEP) and writes that petitioner is unlikely to succeed on his IDEA claim because there is no evidence that participation on the New Milford Football Team is mandated by petitioner's IEP. Moreover, football cannot be considered a "related service" which the school district must provide. (*Id.* at p. 34)

FINDINGS AND CONCLUSIONS

The NJSIAA is a voluntary association. The Commissioner's scope of review in NJSIAA determinations is an appellate one. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. The Commissioner may not overturn an action by the NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Reg. School District,,* 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Further, the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Educ.,* 60 *N.J. Super.* 288, 297 (App. Div. 1960). In such cases, the Commissioner may not substitute his judgment for that of the Association, even when he might judge otherwise in a *de novo* review. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

In the instant matter, the Deputy Commissioner is satisfied that NJSIAA did not act arbitrarily or unreasonably when it concluded, on the basis of the record before it, that petitioner's retention in ninth grade and early departure from the sports program in 1993-94 were not due to circumstances beyond his control or to handicap but, rather, were the result of his own voluntary actions, thus, rendering him ineligible for a waiver of the eight semester rule.* The Deputy Commissioner further finds that, inasmuch as petitioner's having been prevented from participating in an additional year of sports is in no way related to his handicapping position, the NJSIAA did not rule in a manner which violates the federal law cited by petitioner. Finally, while not unmindful of the value of athletic participation to petitioner, the Deputy Commissioner recognizes the legitimate interest of the NJSIAA in upholding its regulations designed to prevent athletic advantage for older, larger students and displacement of otherwise eligible students by those who have already had a full opportunity to participate in interscholastic athletics.

Accordingly, petitioner not having met his burden of establishing that in denying its request for waiver the NJSIAA acted arbitrarily, unreasonably, in bad faith or contrary to law, the Deputy Commissioner upholds the NJSIAA's decision and dismisses the Petition of Appeal.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

* In so holding, the Deputy Commissioner notes that, notwithstanding that NJSIAA did not then have Dr. Fidel's certification, it did have his opinion which it duly weighed against other evidence and concluded was less credible.

AUGUST 30, 1996
DATE OF MAILING AUGUST 30, 1996

370-96

370-96

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY, AND BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board Ho-Ho-Kus sought termination of its current sending-receiving relationship with Respondent Board Midland Park pursuant to *N.J.S.A.* 18A:38-13 and sought authorization to enter into a new sending-receiving relationship with Respondent Board Northern Highlands Regional High School District (NHRHS). NHRHS did not oppose petitioner.

Following nine days of hearing, the ALJ found that Ho-Ho-Kus had cogent reasons for wanting to terminate its sending-receiving relationship with Midland Park and would derive benefits from entering into a relationship with NHRHS. ALJ concluded that the termination would not result in any substantial negative racial, educational, or financial impact on any of the three districts and, therefore, severance must be granted pursuant to *N.J.S.A.* 18A:38-13. (*Boonton Twp. v. Boonton*; *Washington Township v. Upper Freehold Regional*; *Englewood Cliffs v. Englewood*; *Merchantville v. Pennsauken*) ALJ ordered that Ho-Ho-Kus be authorized to terminate its sending-receiving relationship with Midland Park and enter into a new sending-receiving relationship with NHRHS subject to the following conditions: 1) Ho-Ho-Kus must enter into a contract for a new sending-receiving relationship with NHRHS for a minimum of five years; and 2) Withdrawal shall be phased out over a four-year period, starting with the incoming 9th grade class in September 1996.

Commissioner after a full examination of the record concurred with the ALJ's determination that no substantial racial, educational or financial negative impact would inure to any of the Districts if severance of the Ho-Ho-Kus/Midland Park sending-receiving relationship were to be granted. Absent such a showing of substantial racial, educational or financial negative impact, pursuant to *N.J.S.A.* 18A:38-13, the Commissioner was required to grant the requested severance.

AUGUST 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4243-95

AGENCY DKT. NO. 51-3/95

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY and BOARD OF EDUCATION OF NORTHERN HIGHLANDS SCHOOL DISTRICT, BERGEN COUNTY,

Respondents.

Fredric J. Sirota, Esq., attorney for petitioner (Wiley, Malehorn and Sirota, attorneys)

Robert M. Jacobs, Esq., attorney for respondent Board of Education of the Borough of Midland Park (Winne, Banta, Rizzi, Hetherington & Basralian, P.C., attorneys)

James L. Plosia, Jr., Esq., attorney for respondent Board of Education of Northern Highlands School District (Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys)

Record Closed: May 10, 1996 Decided: June 5, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioner, Board of Education of the Borough of Ho-Ho-Kus, Bergen County (Ho-Ho-Kus), seeks a judgment from the Commissioner of Education (the Commissioner) permitting it to terminate its sending-receiving relationship with respondent, Board of Education of the Borough of Midland Park, Bergen County (Midland Park), pursuant to *N.J.S.A.* 18A:38-13. Ho-Ho-Kus also seeks authorization to enter into a new sending-receiving relationship with respondent, Board of Education of Northern Highlands School District, Bergen County (Northern Highlands), and the Commissioner's approval of a contract between Ho-Ho-Kus and Northern Highlands.

PROCEDURAL HISTORY

On March 9, 1995, Ho-Ho-Kus filed a Petition with the Commissioner. On March 29, 1995, Northern Highlands filed an Answer and on April 12, 1995, Midland Park filed an Answer. On April 26, 1995, the Department of Education transferred this matter to the Office of Administrative Law for a hearing.

On July 12, 1995, the parties appeared at a Prehearing Conference. A Prehearing Order was entered on July 14, 1995. On July 26, 1995, Ho-Ho-Kus filed a Notice of Motion to Amend Petition. On September 7, 1995, an Order was entered granting that motion. On January 19, 1996, Ho-Ho-Kus filed a motion for an Order permitting it to depose certain witnesses. An Order was entered on January 30, 1996, granting that motion.

The hearing was held on February 16 and 20, 1996, and March 20, 21, 22, 25, 26, 27 and 28, 1996. The record closed on May 10, 1996, after the submission of all post-hearing Briefs.

DISCUSSION OF TESTIMONY AND EVIDENCE

A. Background

Located in northwest Bergen County, Ho-Ho-Kus and Midland Park are small, residential professional, suburban communities with a small percentage of minority residents. Ho-Ho-Kus is 1.8 square miles in area and has a population of 3,935 reported in the 1990 Census. Ho-Ho-Kus operates a K-8 elementary school of approximately 381 students. Midland Park is 1.7 miles in area and has a population of 7,047 reported in a 1990 Census. Midland Park operates two elementary schools: a Kindergarten to 2nd grade elementary school and a 3rd to 6th grade elementary school. Midland Park also operates Midland Park High School (MPHS) which serves 7th to 12th grade students from Midland Park and 9th to 12th grade students from Ho-Ho-Kus. MPHS also rents space to the Bergen County Special Services School District which conducts a Secondary Hearing Impaired Program (SHIP) for 7th to 12th grade hearing-impaired students who reside in other counties.

During the 1995-96 school year, 348 students in the 9th to 12th grades attended MPHS. This figure does not include the 7th and 8th grade Midland Park students who also are enrolled at MPHS. Class size was between 22 and 24 students. Of the 348 students in the 9th to 12th grades, 78 were from Ho-Ho-Kus and 270 were from Midland Park. MPHS also housed 46 SHIP students in the 9th to 12th grades and 17 in the 7th and 8th grades.

MPHS is a 136,000 square foot facility located on a 23 acre campus. The building was built in 1957. Additions and modifications were made in 1975. MPHS is a comprehensive high school with provisions for students to study part-time at Bergen County Vocational-Technical High School. The outdoor facility consists of a football field, 4 baseball fields, 4 soccer fields, 4 tennis courts, a track and field site and 2 general practice fields. The indoor facility consists of a gymnasium, a weight training room, 5 science labs, 2 art studios, an auditorium, a 15,000 volume library, a media center, 33 classrooms, a cafeteria, a senior lounge, a cable TV studio, 4 computer labs, a band room and a portable computer laboratory. One-half of the building also is wired for

computer networking and using external network services. MPHS is implementing a 5 year expansion of their computer program which will provide 2 new IBM 486 labs.

MPHS has a Principal, an Assistant Principal, a Director of Curriculum and Instruction, a Director of Athletics, 49 full-time and part-time teachers, a district-wide Child Study Team, 3 full-time guidance counselors and a nurse. There also are 20 staff members who work solely with SHIP and are employed and paid by the Bergen County Special Services School District.

MPHS offers primarily a college preparatory curriculum of 109 courses, excluding Special Programs and Additional Special Education. It offers Basis and Honors courses in English, Mathematics, Science, Social Studies, Spanish and French and Advanced Placement courses in English, Computer Science, Calculus, U.S. History, Government and Politics, Spanish and French. MPHS also offers its students independent study and vocational training at the Central Bergen Technical Center and it offers to its seniors externships in community service, college courses or a practical experience outside the school setting.

MPHS offers 39 co-curricular activities for 9th to 12th grade students consisting of 7 Academic Teams, 24 Clubs, 3 Publications, 2 Drama Activities, 2 Musical Activities and Student Government. MPHS also offers athletics consisting of Football, Volleyball, Wrestling, Bowling, Fall and Winter Cheerleading, Golf, Baseball, Softball and Boys and Girls Basketball, Soccer, Winter and Spring Track, Girls Cross Country, Winter Track and Tennis. MPHS has a no-cut policy for participation in co-curricular activities and athletics.

Northern Highlands Regional High School (NHRHS) is a 230,000 square foot facility located in northwest Bergen County on a 5.5 acre campus. The building was built in 1964 with a major addition made in 1971. The outdoor facility consists of a football field, 2 baseball fields, 3 soccer fields, a softball field, a field hockey field and 4 tennis courts. The indoor facility consists of a 20,000 volume library, a planetarium, a TV production studio, a performing arts theater, a computer assisted drawing room, a child care learning lab, student learning labs for reading, writing, language and mathematics, a science lecture hall, a weight and exercise room, a fitness lab, a gymnasium, a wrestling gymnasium, a back gymnasium, a cafeteria, a teacher's cafeteria, a senior's cafeteria, a band cafeteria, a band room, a choral room, a trainer's room, a store, a senior

courtyard, an audio-visual room and about seventy classrooms. NHRHS also houses the District Office of the Region I's Special Education Group's administrative office and "Project Impact," New Jersey's oldest presenter of visual and performing arts education programs.

NHRHS serves the communities of Allendale and Upper Saddle River. Although NHRHS can accomodate 1923 students, only 754 students in the 9th to 12th grades attended NHRHS during the 1995-96 school year. The average class size is about 18.5 students. NHRHS has a Principal, a Director of Educational Services, a Director of Pupil Personnel Services, a Dean of Student Affairs, 4 part-time content area supervisors, a part-time content area coordinator, 68.5 full-time teachers, a librarian, a nurse, 2 full-time and 2 part-time guidance counselors, a part-time G&T facilitator, a Child Study team and an athletic trainer.

NHRHS also offers primarily a college preparatory curriculum of 134 courses. It offers Basis and Honors courses and Advanced Placement courses in English, American History, Calculus (BC), Physics, Chemistry, Biology, French, Spanish and Economics. NHRHS also offers its students a non-credit independent study, college level courses and early graduation.

NHRHS offers 29 co-curricular activities consisting of a Student Government, 4 Class Organizations, 3 Publications, 6 Music and Theater and 15 other Clubs and Activities. NHRHS also offers athletics consisting of Fall and Winter Cheerleading, Field Hockey, Football, Volleyball, Winter Track, Wrestling, Baseball and Softball and consisting of Boys and Girls Cross Country, Track, Soccer, Tennis, Basketball and Swimming. NHRHS has a cut policy for its athletics.

B. History of the Sending-Receiving Relationship

Prior to September 1973, 9th to 12th grade students from Ho-Ho-Kus attended Ridgewood High School pursuant to a sending-receiving relationship with the Ridgewood School District. In 1972, the Ridgewood Board of Education sought to terminate that relationship and the State Board of Education permitted the termination. Although Ho-Ho-Kus had wanted to enter into a new sending-receiving relationship with Northern Highlands at that time, the State

Board of Education mandated that Ho-Ho-Kus enter into a sending-receiving relationship with Midland Park.

On June 8, 1973, Ho-Ho-Kus and Midland Park entered into a sending-receiving Agreement which commenced in September 1973. On September 30, 1975, Ho-Ho-Kus and Midland park entered into another Agreement which extended the first Agreement. Thereafter, the sending-receiving relationship between the parties continued without written agreements. In accordance with the Agreements, from September 1973 to the present, Ho-Ho-Kus has been sending its 9th to12th grade students to MPHS and has been paying an annual tuition per student. Midland Park sets the base amount of the tuition annually. The base tuition for the 1995-96 school year was $9,300 per student and it will increase to $9,800 for the 1996-97 school year. MPHS also may add additional tuition charges which Ho-Ho-Kus must pay.

C. Reasons for Terminating the Existing Sending-Receiving Relationship

Ho-Ho-Kus has become dissatisfied with its relationship with Midland Park for a number of reasons. According to Ho-Ho-Kus, parents of its students are concerned about MPHS not providing the best educational fit for their children. Fewer Ho-Ho-Kus students have chosen to go to MPHS and it is estimated that only 14 of 33 Ho-Ho-Kus's 8th grade students will attend MPHS in the 1996-97 school year. Some Ho-Ho-Kus parents send their children to private or other high schools at their own cost while other families have moved from Ho-Ho-Kus to avoid sending their children to MPHS. Parents desire to change to a high school that offers their children a broader curriculum and has a record of higher achievement.

According to Ho-Ho-Kus, there also is a lack of input into the decision-making process at MPHS. Of primary concern to Ho-Ho-Kus is that there is a lack of effective articulation between it and Midland Park with respect to some areas of the curriculum and to coordination of staff development. There are incongruent philosophies regarding special education and there are concerns about the special education program at MPHS. There also are concerns about the college selection process of the MPHS Guidance Department and the lack of input of Ho-Ho-Kus in that process.

Ho-Ho-Kus also is dissatisfied with the tuition charged by Midland Park. Midland Park charges Ho-Ho-Kus a base tuition which is set at the maximum rate permitted by the State. Midland Park later makes adjustments to the base tuition to reflect the actual per pupil cost and Ho-Ho-Kus must pay the difference. On many occasions, Midland Park has miscalculated the tuition rate and has overcharged Ho-Ho-Kus. Ho-Ho-Kus has requested that Midland Park fix the tuition rate at the minimum permitted by the State, but Midland Park has refused. In addition, Midland Park is a Kindergaten to12th grade district and has one budget. Ho-Ho-Kus wants only to be charged for the costs of the 9th to12th grades at MPHS.

As a result of its dissatisfaction, in the fall of 1993, Ho-Ho-Kus, along with Northern Highlands and the Boards of Education of Allendale, Saddle River and Upper Saddle River, engaged Guidelines, Inc. to conduct an informal feasibility study on regionalization. In addition to this informal study, Ho-Ho-Kus appointed an ad hoc Citizens Committee on the High School to gather information concerning MPHS's facility, faculty, curriculum, guidance department and other components. The Committee also gathered information on student performance statistics at MPHS, at NHRHS and at 4 other local high schools. In May 1994, the Committee issued a report entitled, "Report to the Ho-Ho-Kus Board of Education." The Committee found that NHRHS had substantially better college acceptance figures than MPHS, that NHRHS students were accepted into more competitive colleges than MPHS students, that NHRHS students scored significantly higher than MPHS students on the SAT and Achievement Test, that NHRHS offered a broader range of Advanced Placement courses than MPHS and that NHRHS had extraordinary facilities.

In January 1994, Ho-Ho-Kus engaged Educate America, Inc. to conduct a pre-feasibility study on terminating the sending-receiving relationship with Midland Park. In September 1995, Educate America, Inc. issued a report entitled, "Pre-Feasibility Impact Study on Terminating a Sending-Receiving Relationship between HoHoKus and Midland Park School Districts. In that report, although Educate America, Inc. identified some adverse educational impacts on Midland Park if Ho-Ho-Kus terminated their sending-receiving relationship, it recommended that Ho-Ho-Kus consider proceeding with a formal feasibility study.

In July 1994, Ho-Ho-Kus engaged Patricia M. Horton, Ph.D. (Dr. Horton) of the Educational Information and Resource Center (EIRC) to conduct a formal feasibility study in accordance with *N.J.S.A.* 18A:38-13. In that study, Dr. Horton investigated the educational, financial and racial impact of severing the sending-receiving relationship with Midland Park and of entering into a new sending-receiving relationship with another School District. In December 1994, Dr. Horton issued a report entitled, "A Feasibility Study to Determine the Impact of Severing the Sending-Receiving Relationship Between Ho-Ho-Kus and Midland Park School Districts, December 1994." Dr. Horton concluded that there would be no educational, financial or racial impact on any of the Districts involved in this litigation. Based upon Dr. Horton's conclusion, Ho-Ho-Kus decided to file a Petition to sever its sending-receiving relationship with Midland Park and to enter into a new sending-receiving relationship with Northern Highlands.

Based upon the foregoing, I **FIND** that Ho-Ho-Kus has cogent reasons for wanting to terminate its sending-receiving relationship with Midland Park.

D. Reasons for Entering Into a New Relationship with Northern Highlands

Ho-Ho-Kus does not claim that MPHS provides an inadequate education for its students. Rather, Ho-Ho-Kus prefers to send its students to NHRHS for many reasons. NHRHS is an exceptional school and Ho-Ho-Kus believes that the package it offers exceeds that offered at MPHS. According to Ho-Ho-Kus, NHRHS will provide a better education for Ho-Ho-Kus students, NHRHS has a more diversified educational offering, the facilities are more updated and provide a superior variety of educational opportunities and tuition will be fixed for the 1996-97 school year at $8,000 per student with no additional charges. This is a minimum savings of $1,800 per student. Ho-Ho-Kus also presently is sending some of its special education students to NHRHS because MPHS does not have an appropriate program for those students. NHRHS could educate more of Ho-Ho-Kus's special education students because it has a broader, in-house special education program.

Ho-Ho-Kus also was impressed with the student performance at NHRHS. While many of the performance statistics of MPHS students exceeded State averages to some degree, the

performance statistics for NHRHS students were exceptional. For example, in May 1995, NHRHS students took 148 advanced placement tests in about 18 subjects and 88% of those students scored three or above. About 99% of all NHRHS students pass the High School Proficiency Test and they regularly score higher than the national average. About 90% of NHRHS 1995 graduates went to a four year college and 8% went to a two year college. Only 62% percent of MPHS 1995 graduates went to a four year college and 25% went to a two year college. With respect to students not going to college, NHRHS offers several vocational courses which are not offered at MPHS.

As of a January 1996 survey, 81% of NHRHS students participate in co-curricular and athletic activities. NHRHS also offers many unique facilities and programs such as an Early Learning Center and it is developing a Business Resources in Today's Education (BRITE) Alliance. It also offers several unique Advanced Placement courses not offered at MPHS. NHRHS also has been described as one of the best overall high schools in the State by *New Jersey Monthly* magazine.

There are many more aspects of the program and facilities at NHRHS which make it an exceptional high school. While all of these factors are important to Ho-Ho-Kus, of significant importance is the fact that there will be a detailed Articulation Agreement between Ho-Ho-Kus and Northern Highlands. This Articulation Agreement contains 21 provisions which give Ho-Ho-Kus substantial input into the decision making process at NHRHS, something it lacks at MPHS. In addition, Northern Highlands will keep Ho-Ho-Kus's Superintendent informed of studies and special committees which may be established concerning NHRHS and the Ho-Ho-Kus Board can designate a Ho-Ho-Kus Board member as a liaison representative thereto. The Ho-Ho-Kus Board also will be involved in the activities of the Northern Highlands Board to the extent provided by statute, the Ho-Ho-Kus Superintendent will participate in selecting a new Principal for NHRHS if a vacancy occurs and a representative of the Ho-Ho-Kus Board will be involved in the interview process for a new Principal, and the Ho-Ho-Kus Superintendent will be informed of any proposed administrative changes at NHRHS. Northern Highlands also will provide various pupil progress reports on a monthly, quarterly and/or annual basis and information on school programs.

Based upon the foregoing, I **FIND** that Ho-Ho-Kus would derive many benefits from entering into a sending-receiving relationship with Northern Highlands.

E. Projections of Future Enrollment

Daniel R. Mastrobuono, D.Ed. (Dr. Mastrobuono) testified as Ho-Ho-Kus's expert in demographics and student enrollment projections. He has prepared numerous enrollment projections throughout his career and has used a 7 year Cohort Survival Rate in those projections. He uses a 7 year Cohort Survival Rate because it provides longer periods of enrollment history that takes into account the most happenings that would impact enrollment. He also uses a 7 year Cohort survival rate because it provides a stable and more accurate and valid base for projecting future enrollment.

To allow for a more accurate picture of the impact of the withdrawal of Ho-Ho-Kus students from MPHS, Dr. Mastrobuono also did not include students in the special education program in his study because none of these students are from Ho-Ho-Kus. He also did not include the SHIP students because those are students of the Bergen County Special Services School District and they reside in counties other than Bergen County.

The withdrawal of the Ho-Ho-Kus students would take place over a 4 year period beginning with the September 1996 9th grade class. Using the 7 year Cohort Survival Rate, Dr. Mastrobuono concluded that the following would be the number of Ho-Ho-Kus students lost to MPHS beginning in 1996 with projected loss of 9th grade students:

Year	MPHS Enrollment Minus Ho-Ho-Kus Students	Students Remaining
1996	339 minus 16 projected Ho-Ho-Kus students	323
1997	336 minus 34 projected Ho-Ho-Kus students	302
1998	331 minus 56 projected Ho-Ho-Kus students	275
1999	315 minus 76 projected Ho-Ho-Kus students	239
2000	344 minus 83 projected Ho-Ho-Kus students	261
2001	368 minus 88 projected Ho-Ho-Kus students	280
2002	379 minus 88 projected Ho-Ho-Kus students	291

Dr. Mastrobuono also stated that since 1983, the percentage of Ho-Ho-Kus's 8th grade students attending MPHS has decreased from 56.4% to 49.2% and that it is likely that this consistent deterioration will continue. Dr. Mastrobuono opined that this decrease shows that the potential loss of Ho-Ho-Kus students is projected to be less that half of the Ho-Ho-Kus students who would be eligible to attend MPHS in the years ahead. Dr. Mastrobuono also stated that enrollment at MPHS will rise in the years 2001 and 2002 due to a projected increase of Midland Park students and special education students. This will ameliorate the loss of the Ho-Ho-Kus students.

Emanuel Averbach, Ph.D. (Dr. Averbach) qualified to testified as Midland Park's expert in demographics analysis and planning. Dr. Averbach found that Ho-Ho-Kus's Kindergarten to 8th grade enrollment has been rising while Midland Park's has been flat. He also found that Ho-Ho-Kus's enrollment for the 9th to 12th grades has been declining while Midland Park's has been rising slowly.

Dr. Averbach used a 2 year Cohort Survival Rate because he found it to provide the best estimates of future enrollment at MPHS. He used the 2 year period despite the fact that he acknowledged in his report that the standard procedures for preparing cohort survival enrollment projections rely on 5 or 6 years of recent enrollment history in order to provide a stable platform of conditions for projecting future enrollment. He did so because, in his opinion, the last 5 or 6 years of enrollment at MPHS did not provide a stable platform for such projections.

Using the 2 year Cohort Survival Rate, Dr. Averbach concluded that the following would be the number of Ho-Ho-Kus students lost to MPHS beginning in 1996:

Year	MPHS Enrollment Minus Ho-Ho-Kus Students	Total Enrollment
1996	389 minus 19 projected Ho-Ho-Kus students	370
1997	392 minus 38 projected Ho-Ho-Kus students	354
1998	379 minus 64 projected Ho-Ho-Kus students	315
1999	363 minus 86 projected Ho-Ho-Kus students	277
2000	390 minus 94 projected Ho-Ho-Kus students	296
2001	403 minus 99 projected Ho-Ho-Kus students	304
2002	413 minus 101 projected Ho-Ho-Kus students	312

Dr. Averbach's total enrollment numbers are higher than Dr. Mastrobuono's because Dr. Averbach used the SHIP students in his calculations, whereas Dr. Mastrobuono used only Midland Park and Ho-Ho-Kus students. The SHIP students are students of the Bergen County Special Services School District. They are not residents of Bergen County and they are not included in any of Midland Park's student statistics. The SHIP staff is employed and paid by the Bergen County Special Services School District. SHIP is separate and distinct from the rest of MPHS and the majority of SHIP students are not in any mainstream classes. SHIP is essentially a school within a school. Based upon the foregoing, I **FIND** that the SHIP students should not be included in the calculation of projected future enrollment.

Even if the SHIP students are included, Dr. Mastrobuono's and Dr. Averbach's enrollment projections are substantially similar. They both show that MPHS will reach its lowest enrollment in 1999 and that enrollment at MPHS will begin to increase in 2000. Using Dr. Averbach's projections, MPHS will still have 277 students in the 9th to 12th grades in 1999. This figure does not include Midland Park's 7th and 8th grade students, nor does it take into consideration the fact that both Dr. Averbach and Dr. Mastrobuono agree that there will be an increase in the enrollment in Midland Park's 7th and 8th grades in the future.

In addition, the use of a 2 year Cohort Survival Rate does not give an accurate projection of future enrollment because it relies on the limited information provided by only 3 years of enrollment history. Overall trends over a longer period of time provide a better view of projected enrollment. Based upon the foregoing, I **FIND** that Dr. Mastrobuono's approach of using the 7

year Cohort Survival Rates most accurately projects future enrollment, that by 1999, MPHS will lose 76 Ho-Ho-Kus students over a 4 year period as a result of the termination of the sending-receiving relationship and that MPHS will still have a 9th to 12th grade population of at least 239 students, plus Midland Park's 7th and 8th grade students.

F. Substantial Negative Impacts

(1) Impact on Racial Composition:

It was clear from the testimony and evidence presented at the hearing that race is not a factor in this matter. Midland Park did not even address this issue in its post-hearing Brief. This probably is because its own expert on this issue, Adam F. Scrupski, Ed.D. (Dr. Scrupski), admitted that there would be no substantial negative impact on the racial composition at MPHS from the termination of the sending-receiving relationship.

In addition to Dr. Scrupski's admission, other evidence shows that during the 1993-94 school year, Midland Park was made up of 92% white students, 1% African-American students and 7% of another national origin. If the sending-receiving relationship is terminated, MPHS will be made up of 93% white students, 1% African-American students and 6% of another national origin. The statistics are essentially the same.

By reason of the foregoing, I **FIND** that race is not a factor in whether or not to allow the termination of the sending-receiving relationship between Ho-Ho-Kus and Midland Park. I further **FIND** that there would be no substantial negative impact on the racial composition at MPHS if the termination of that relationship is permitted.

(2) Impact on Financial Conditions:

Midland Park's Business Administrator, Louis Roer (Mr. Roer), and William S. Barnett, Ph.D. (Dr. Barnett), who qualified as an expert in educational economics and finance, testified with respect to the negative financial impact Midland Park will suffer as a result of the termination of the sending-receiving relationship. Mr. Roer testified that Midland Park's revenue comes from

five sources: tuition income, State aid, local taxes, miscellaneous income (i.e. tuition for SHIP students and Adult School fees) and free balance income.

Mr. Roer estimated that 15 Ho-Ho-Kus 9th grade students would not attend MPHS in the 1996-97 school year. Mr. Roer calculated that at $9,800 per student, there would be a 1996-97 tuition income loss of $147,000. This figure is inflated for two reasons: less than 15 Ho-Ho-Kus students are projected to attend MPHS that year and the per pupil tuition figure of $9,800 is higher than that quoted to Ho-Ho-Kus. In addition, Mr. Roer admitted that if the 15 Ho-Ho-Kus students did not attend MPHS, Midland Park would raise the tuition for the remaining Ho-Ho-Kus students. He also admitted that the figure of $147,000 will be affected if more Midland Park students go to MPHS. Both Dr. Averbach and Dr. Mastrobuono agreed that Midland Park will have more 7th and 8th grade students in the future. Thus, the actual loss of tuition income cannot be calculated.

With respect to State aid, in 1995-96, Midland Park received $722,485. Mr. Roer testified that Midland Park will receive $88,168 less ($634,317) for 1996-97. He admitted, however, that $30,000 of this loss comes from a reward that Midland Park received from the State in 1995-96 and would not receive in the future. The $30,000 has nothing to do with the termination of the sending-receiving relationship. Since Midland Park knew that it would not receive this reward beyond 1995-96, it should have anticipated this loss and planned for replacement of those funds from other sources.

The State requires Midland Park to keep a balance of 3% of its budget in a free balance. Midland Park has an annual budget of $11 million. The money from the free balance is to be used as a contingency fund to offset shortfalls in the budget. For the 1994-95 school year, Midland Park had $150,000 left over from its budget. Midland Park placed that money into the free balance. As of July 1, 1995, Midland Park had $522,888 in its free balance. It has budgeted $100,000 of the free balance for the 1996-97 school year. Thus, as of June 30, 1996, Midland Park's free balance will be $422,888. This balance may be higher because, as Mr. Roer admitted, Midland Park expects to add unexpended funds from the 1995-96 budget to the free balance. Even without the addition of these unexpended funds, Midland Park will have about $422,888 in its free balance and this amount exceeds the 3% required by the State.

Mr. Roer also testified that the State imposes a CAP on the amount of taxes Midland Park can raise for the school budget. As long as Midland Park's free balance is at 3%, it could ask the State for a CAP waiver to raise additional taxes to offset any shortfall in its revenues. It also could cut certain expenditures without affecting educational services. For example, Mr. Roer testified that Midland Park is considering changing to a less expensive health benefits plan and that it could negotiate employee contributions to the health benefits plan. All of these measures would also help offset any shortfall in revenues resulting from the termination of the sending-receiving relationship.

Dr. Barnett concluded that the following substantial negative financial impacts will result from the termination of the sending-receiving relationship:

1. Cost per pupil for high school education in Midland Park will increase, and this will result in increased property taxes in Midland Park;

2. Capitalization of tax increases and damage to the reputation of the Midland Park schools will decrease property values in Midland Park; and

3. Property taxes in Ho-Ho-Kus will increase.

In coming to his conclusion, Dr. Barnett assumed that the decline in enrollment at MPHS would be that projected by Dr. Averbach. Based on Dr. Averbach's projections, Dr. Barnett projected a rise in per pupil costs even if MPHS cuts expenditures. Dr. Barnett also assumed inflation-adjusted increases in the costs per pupil at the rate of 5% per year. He then determined the effects of the termination of the sending-receiving realtionship on the costs to Midland Park residents over the 9 year period for which Dr. Averbach had prepared enrollment projections. From those costs, Dr. Barnett determined that by 2005, property taxes in Midland Park would increase by $544.02 in 1995 dollars.

Dr. Barnett described the effect of the rise in property taxes on property values, known in ecomonic terminology as "capitalization." Dr. Barnett concluded that the value of a median home

in Midland Park would decline by about $6,500 in 1995 dollars. Dr. Barnett also stated, however, that the average value of a home in Midland Park is $214,500 as of the 1990 Census. If the value of a Midland Park home did decrease by $6,500 by 2005, as against today's present value, this would only be a 3% decline in a home valued at $214,500.

Vincent Calabrese (Mr. Calabrese) testified on behalf of Ho-Ho-Kus and qualified as an expert in school finance. Mr. Calabrese examined 2 scenarios to determine the financial impact on Midland Park: Ho-Ho-Kus students withdraw over a 4 year period, and Ho-Ho-Kus students do not withdraw. In both of these scenarios, Mr. Calabrese assumed that Midland Park's budget was at a projected 3.75% CAP limit. Mr. Calabrese examined a third scenario to determine the financial impact on Ho-Ho-Kus: he compared tuition costs at MPHS and NHRHS. He also examined a fourth scenario to determine the financial impact on Northern Highlands: Ho-Ho-Kus students transfer to NHRHS over 4 years. In this scenario, Mr. Calabrese assumed that Northern Highlands would use 50% of the tuition from the Ho-Ho-Kus students for tax relief.

Mr. Calabrese concluded that, during the transition period of the 4-year phased withdrawal, the increased tuition rate that Ho-Ho-Kus will pay for the students still at MPHS will mitigate the financial impact on Midland Park. This is consistent with Mr. Roer's testimony that Midland Park will raise the tuition for the remaining Ho-Ho-Kus students. In addition, other testimony indicated that the tuition for the SHIP students is tied to the same average cost per pupil and would adjust to the per pupil increase as a result of the withdrawal of the Ho-Ho-Kus students. Thus, tuition for the SHIP students also will increase and this would further mitigate the financial impact on Midland Park.

Mr. Calabrese also concluded that, after the transition years in 2000-2001, Midland Park's cost per pupil will be $14,270. In his opinion, this is not a significant increase given the history of the cost per pupil and the historical percentage increase from year to year. This increase will cause a tax increase of about 4.4% or $613 over a 5 year period for a house assessed at $188,000. Mr. Calabrese viewed this as a modest increase that would not constitute a substantial negative financial impact on Midland Park. In addition, this increase could be mitigated by having to spend less for supplies for the 76 less Ho-Ho-Kus students that will attend MPHS, by an increase in 7th

and 8th grade Midland Park students, by increasing the tutition for the SHIP students and by the other cost-saving mechanisms mentioned by Mr. Roer.

With respect to Ho-Ho-Kus and Northern Highlands, Mr. Calabrese concluded that both will experience a positive financial impact. For example, NHRHS is highly under-utilized. It could add students without adding funds to cover the costs for those students. While Northern Highlands will use some of the Ho-Ho-Kus tuition income to cover new costs incurred to educate those new students, Mr. Calabrese determined that it will use most of the tuition income for tax relief. In additon, since Northern Highlands is able to charge a below cost tuition to Ho-Ho-Kus, Ho-Ho-Kus taxes will decrease an average of $209 on a home assessed at $350,000 over the period covered by his analysis.

Based upon the foregoing, I **FIND** that there will be no substantial negative financial impact on any of the Districts. There will be a tax increase in Midland Park as a result of the termination of the sending-receiving relationship, but that tax increase will not be substanital. In addition, the per pupil tuition for Ho-Ho-Kus students will be less at NHRHS and Ho-Ho-Kus will receive more value for each educational dollar spent to send its students to NHRHS.

(3) Impact on Quality of Education:

Ronald T. Hyman Ed.D. (Dr. Hyman), who qualified as a expert in educational curriculum and administration, and August C. DePreker (Mr. DePreker), Midland Park's Superintendent, testified for Midland Park. Midland Park also offered the testimony of the Principal of MPHS, a teacher who teaches Advanced Placement Calculus, Alegbra II, Math 7 Honors and Honors Pre-Calculus, an Art and English teacher, a teacher of elective courses in the Art and English Departments, the Director of Athletics and the Director of Special Services. These witnesses testified about the effects of the termination of the sending-receiving realtionship on the quality of education at MPHS.

Midland Park views quality of education as more than a quantification or listing of courses and activities offered, student performance on standardized tests, graduation rates or college acceptance rates. To Midland Park, quality of education includes and stems from the "silent

curriculum." The "silent curriculum" is what MPHS teaches its students by the way it is organized and operated. It is the character, ethos, spirit or feel of the school and it involves an understanding of how and what a school provides to meet the needs of its students, including social interaction and behavior, pupil environment and relationships between students and staff. Midland Park claims that the termination of the sending-receiving relationship would change the "silent curriculum" and that this, in turn, would upset the delicate balance in MPHS among the 3 main groups of students (Midland Park students, Ho-Ho-Kus students and SHIP students). The termination also would negatively affect the character of MPHS and it would negatively impact individual students.

Midland Park also claims that Midland Park and SHIP students rely on Ho-Ho-Kus students for their contribution to leadership and for their prospective on school achievement, future goals, and participation in school athletics and co-curricular activities. According to Dr. Hyman's data, however, out of all of the co-curricular activities offered at MPHS during the 1994-95 school year, Ho-Ho-Kus students only participated in 19 clubs, 6 academic teams, 5 music activities, 2 theater productions and 3 publication activities. Ho-Ho-Kus students comprised at least 50% of the students participating in only 6 clubs and 3 academic teams. Out of 55 participants in student government, only 11 were from Ho-Ho-Kus.

With respect to leadership, Midland Park students led 9 clubs, Ho-Ho-Kus students led 2 clubs, Midland Park and Ho-Ho-Kus students jointly led 3 clubs, no Ho-Ho-Kus student led an academic team and only 14 out of 36 captains of athletic teams were Ho-Ho-Kus students. Only 4 out of 42 students participating in the Fall Drama were Ho-Ho-Ku students and only 12 out of 57 students participating in the Spring Musical were Ho-Ho-Kus students. In addition, out of 20 students who won Awards for General School Activities and Clubs in 1994, only 8 were from Ho-Ho-Kus.

Midland Park further claims that its athletic programs will be negatively affected. According to Dr. Hyman, student participation in athletics in 1994-95 was as follows:

Team	Ho-Ho-Kus	Midland Park	SHIP	Total
Football	2	37	3	42
Boys Soccer	8	30	1	39
Boys Cross Country	1	4	0	5
Girls Soccer	10	22	0	32
Girls Cross Country	3	4	0	7
Girls Tennis	6	8	0	14
Girls Volleyball	7	28	0	35
Co-ed Cheerleading, Fall	1	10	2	13
Boys Basketball	5	17	5	27
Boys Wrestling	4	14	0	18
Boys Track	0	8	0	8
Girls Basketball	5	14	0	19
Girls Track	3	9	0	12
Co-ed Bowling	3	13	0	16
Co-ed Cheerleading, Winter	6	12	1	19
Baseball	2	19	2	23
Boys Track	5	16	0	21
Boys Tennis	2	9	0	11
Softball	5	22	5	32
Girls Track	10	13	4	27
Co-ed Golf	1	8	0	9

Based upon the above, Ho-Ho-Kus students comprise about 50% of the students participating in only 4 athletic activities, Girls Cross Country, Girls Tennis, Winter Co-ed Cheerleading and Girls Spring Track. Midland Park argues that the loss of the Ho-Ho-Kus students would devastate the Girls Basketball and Tennis teams and would affect the SHIP students. Out of the 7 starting players on the Girls Basketball team, 4 were Ho-Ho-Kus students. The majority of thoses students, however, are seniors who will graduate in June 1995. The same is true for the Girls Tennis team, which has 6 Ho-Ho-Kus students, the majority of which are seniors. In addition, the SHIP students participate primarily in Football and Basketball. According to Dr. Hyman's data, only 2 out of 42 football players and only 5 out of 27 basketball players were Ho-Ho-Kus students.

Although Midland Park has claimed that the number of Ho-Ho-Kus students was often essential for the viability of a club, activity or athletic or team, Midland Park produced no evidence that a club, activity or athletic team actually would be eliminated as a result of the termination of the sending-receiving relationship. It must be remembered that MPHS would lose the Ho-Ho-Kus 12th grade students to graduation anyway and the Ho-Ho-Kus 9th, 10th and 11th grade students will remain to continue participating in clubs, activities and athletic teams. MPHS will only lose the incoming Ho-Ho-Kus students and there is no evidence whatsoever that any of these students would participate in any clubs, activities or athletic teams at MPHS.

Although Midland Park also claims that the termination of the sending-receiving relationship will negatively impact the academic curriculum at MPHS, it focused primarily on the effect of the termination on the Advanced Placement (AP) and Honors courses offered at MPHS. MPHS offers AP courses in Calculus, Computer Programming, English, French, Music Theory, Spanish and U.S. History. According to Dr. Hyman, student participation in these AP courses in 1994-95 was as follows:

AP Course	Ho-Ho-Kus	Midland Park	SHIP
Calculus	5	5	0
Computer Programming	1	11	0
English	6	8	0
French	3	0	0
Music Theory	3	17	0
Spanish	0	1	0
U.S. History	10	16	0

According to Dr. Hyman, student participation in Honors courses in 1994-95 was as follows:

Honors Course	Ho-Ho-Kus	Midland Park	SHIP
Advanced Computer Programming	2	10	1
Alegbra II	9	25	0
Biology	10	23	0
Calculus	4	10	0
Chemistry	10	19	0
English (10th grade)	5	4	0
English (11th grade)	9	15	0
French IV	6	6	0
Geometry	10	14	0
Physical Science	5	20	0
Physics	5	6	0
Pre-Calculus	13	20	0
Spanish IV	3	6	0
U.S. History	7	12	0

The testimony of Midland Park's witnesses shows that only 3 courses at MPHS that would be negatively affected by the termination of the sending-receiving realtionship. These are AP Calculus, AP French and Honors Biology. Dr. Hyman's data shows that in 1994-95, no SHIP students participated in any of these courses and no Midland Park students participated in AP French. Even assuming that those courses would be cancelled as a result of the termination of the sending-receiving relationship, there will be no impact on the SHIP students because they did not participate in any of those courses. Assuming that the AP French course would be cancelled, there would be no impact on Midland Park students because they did not participate in that course.

With respect to AP Calculus, Midland Park has set a limit of 10 students for that course. Midland Park has the discretion to permit more than 10 students to participate in that course. Midland Park could use that discretion to permit less than 10 students to participate in that course. In addition, testimony showed that Midland Park can utilize the Waldwick Consortium for those students who are interested in AP Calculus, it can offer those students an independent study or it can combine AP Calculus with Honors Calculus. Alternatives are, therefore, available for students interested in AP Calculus in the event that the course is cancelled as a result of the termination of the sending-receiving relationship.

With respect to Honors Biology, Dr. Hyman's data shows that 33 students participated in that course in 1994-95, 10 of which were Ho-Ho-Kus students. Even if all of Ho-Ho-Kus's students left MPHS in 1996-97, which is not the case, MPHS still would have more than the requisite 10 students to continue offering this course. Again, Midland Park has produced no evidence that Honors Biology or any other AP, Honors or regular course actually will be cancelled if the sending-receiving relationship is terminated. Even Dr. Hyman could not name any course that actually would be cancelled. It also must be remembered that 9th to 11th grade Ho-Ho-Kus students will remain at MPHS after the termination. If any of those students participate in AP or Honors courses, they will continue to do so until they graduate.

Midland Park also claims that the curriculum of the SHIP students would be negatively affected by the termination because some SHIP students are mainstreamed. According to Dr. Hyman, of the 63 SHIP students at MPHS in 1994-95, some were mainstreamed as follows:

Course	Number of SHIP Students
Accounting	3
Art	9
Computer Programming	8
Electives (Music, Art, Computers)	11
English	5
Graphic Arts	3
Health (First Aid, Driver Education CPR)	25
Independent Living	1
Journalism I	1
Marketing I	1
Mathematics	1
Physical Education	63
Science	8
Social Studies	4

This data shows that only a small number of SHIP students are mainstreamed in classes other than Health and Physical Education. With such a small number, there cannot be a substantial negative educational impact on SHIP students.

Dr. Hyman testified that MPHS will have difficulty functioning because it will be a smaller school (about 320 students) after the 4 year withdrawal period. His testimony contradicts the expert opinion he gave for the Mountain Lakes School District in *Board of Education of the Township of Boonton v. Board of Education of the Town of Boonton,* 92 *N.J.A.R.* 2d (EDU) 235. In that case, Dr. Hyman concluded that despite its size (314 students), Mountain Lakes High School was an excellent High School. He stated that "students like and prefer the atmosphere of the small school" and the "staff attributed Mountain Lakes's success to the committment to excellence and to the insistence on providing a rich program despite the size of the student body." Dr. Hyman also concluded that Mountain Lakes High School could accomodate its students' course selections despite limited enrollment and that Mountain Lakes was willing to find alternative avenues.

Midland Park has not investigated alternative avenues to lessen the impact of the termination of the sending-receiving relationship. It also rejected, without valid reasoning, some of the alternatives suggested by Ho-Ho-Kus's experts. Many of these alternatives have been implemented in smaller schools such as Mountain Lakes High School and Glen Ridge High School, which has 290 students in the 9th to 12th grades. Both Mountain Lakes High School and Glen Ridge High School are excellent schools and have been ranked as one of the top 10 schools in New Jersey by *New Jersey Monthly.*

Based upon the foregoing, I **FIND** that there will be no substantial negative educational impact on any of the Districts as a result of the termination of the sending-receiving realtionship.

LEGAL ANALYSIS AND CONCLUSION

"Absent unusual circumstances or overriding social policy, it is preferable in a democratic society to let local people decide for themselves how their children should be educated and how their tax money should be spent." *Board of Education of the Township of Boonton v. Board of Education of the Town of Boonton,* 92 *N.J.A.R. 2d* (EDU) 235, 244. The State Board of Education "is obligated to effectuate the desire of a sending district to educate its students in another district so long as its preference is educationally based and the termination of an existing

agreement does not create unwarranted instability." *Washington Township Board of Education v. Upper Freehold Regional Board of Education, S.L.D.* 89:2010, 2017; *aff'd, S.L.D.* 89:2038.

The Legislature recognized that a district can best decide how and where its students should be educated and it gave districts the power to make that decision. Once a sending district makes the decision to educate its students in another district, it must make an application to and receive the approval of the Commissioner to terminate or change an existing sending-receiving relationship. The Commissioner shall grant the change or termination if there is no substantial negative educational or financial impact or no substantial negative impact on the racial composition of the pupil population of the districts involved. *N.J.S.A.* 18A: 38-13. *Englewood Cliffs v. Englewood,* 257 *N. J. Super.* 413 (App. Div. 1992).

As a prerequisite to applying for termination, *N.J.S.A.* 18A:38-13 requires a petitioning district to prepare and submit a feasibility study addressing all of the areas specifically set forth in the statute. The petitioning district also must establish the factual basis underlying the study so as to withstand a challenge by a district contesting termination. Once the petitioning district does so, the burden shifts to the contesting district to produce evidence that termination will result in a substantial negative financial, racial or educational impact. *Board of Education of the Borough of Merchantville v. Board of Education of the Township of Pennsauken,* (State Board) 9/5/90), slip op. at 3.

It is acknowledged that any termination of a sending-receiving relationship will have some negative impact. Any receiving district losing students from a sending district will suffer some negative financial and/or educational impact. Although not an issue in this case, a receiving district also may suffer some negative racial impact. The question is whether or not the negative impact is "substantial" in that it will fundamentally affect the receiving high school and nearly destroy it.

In this case, Ho-Ho-Kus has made the decision to educate its students at NHRHS. Its decision clearly was educationally based. Ho-Ho-Kus then conducted the required feasibility study and applied to the Commissioner for approval of the termination of the existing sending-receiving relationship with Midland Park. At the hearing, Ho-Ho-Kus established the factual basis

underlying the feasibility study. It, therefore, became Midland Park's burden to produce evidence that the termination will result in a substanial negative, financial, racial or educational impact.

Although Midland Park showed some negative financial and educational impact, those impacts are not substantial. MPHS is losing only 76 Ho-Ho-Kus students over a 4 year period. After that 4 year period, MPHS will have a minimum enrollment of 239 students, not including the 7th and 8th grade and SHIP students. Midland Park produced no evidence that it would not be able to continue operating MPHS with this number of students and continue offering its students the quality of education they currently are receiving. Midland Park only was able to speculate that it might have to cancel some courses or eliminate some clubs, activities or athletic teams. This does not constitute a substantial negative educational impact.

With respect to financial impact, Midland Park is concerned about potential tax increases resulting from the termination. Although there may be some tax increase in Midland Park, that increase will not be substantial. Furthermore, *N.J.S.A.* 18A:38-13 "was never intended to create a revenue source for receiving districts or protect them from tax increases." *Boonton, S.L.D.* 89 at 2036.

The situation in this case is not like that in *Bloomingdale Borough Board of Education v. Butler Borough Board of Education,* 94 *N.J.A.R. 2d* (EDU) 553; *aff'd,* St. Bd. 95 *N.J.A.R. 2d* (EDU) 151. In *Butler*, the withdrawal of the students from the sending district would have reduced the enrollment at Butler High School (BHS) by 50%. This would have distorted and shrunk the range of courses offered and would have severly impacted the extracurricular program at BHS. In order for the district to continue operating BHS, a complete and unlikely overhaul of the school system would have to occur. Thus, it was concluded in *Butler* that a termination of the sending-receiving relationship with Bloomingdale would result in a substantial negative impact on BHS because the district could no longer provide its students with adequate courses and activities unless the district conducted a complete overhaul.

The termination of the sending-receiving relationship between Ho-Ho-Kus and Midland Park will not cause a substantial negative educational impact on MPHS. MPHS may be a somewhat different and smaller high school, but it will still exist after all of the Ho-Ho-Kus

students have withdrawn and it still will be able to provide an appropriate education to its students.

ORDER

It, therefore, is **ORDERED** that Ho-Ho-Kus be and hereby is authorized to terminate its existing sending-receiving relationship with Midland Park and to enter into a new sending-receiving realtionship with Northern Highlands, subject to the following conditions:

1. Ho-Ho-Kus must enter into a contract for a new sending-receiving relationship with Northern Highlands for a minimum duration of 5 years; and

2. Withdrawal shall be phased-out over a 4 year period, starting with the incoming 9th grade class in September 1996, the 10th grade class in September 1997, the 11th grade class in September 1998, and the 12th grade class in September 1999.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 5, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

6/13/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 13 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses:

For Ho-Ho-Kus:

Jacqueline Ancess, Expert Witness

Vincent B. Calabrese, Sr., Expert Witness

Steven Cea, School Business Administrator/ Board Secretary

John H. Haldeman, Jr., Member of Ho-Ho-Kus Board of Education

Patricia M. Horton, Ph.D., Expert Witness

Debra Jackson, Ed.D., Superintendent

Daniel Mastrobuono, D.Ed., Expert Witness

For Midland Park:

Emanuel Averbach, Ph.D., Expert Witness

William S. Barnett, Ph.D., Expert Witness

August C. DePreker, Superintendent of Schools

Patricia Dunn, Director of Curriculum and Instruction

Alexis Eckert, Assistant to the Principal at Goodwin Elementary School

Jack Ferriday, Art/English Teacher

William G. Freeman, Jr., Principal of Midland Park High School

Ronald Hyman, Ed.D, Expert Witness

James Newman, Director of Special Services

Nancy Peet, President of Board of Education

Louis Roer, School Business Administrator/Board Secretary

Charles Ryan, Esq., Parent

Edward Salvi, Director of Athletics

Adam F. Scrupski, Ed.D., Expert Witness

Leon Varjian, Math Teacher

Esther Vierheilig, Mayor of Midland Park

Teresa Wecht, Art/English Teacher

For Northern Highlands:

Herbert Cohen, Dean of Student Activities

Gary Scott Lane, School Business Administrator/Board Secretary

Ralph Musco, Ph.D., Principal of Northern Highlands High School

Exhibits:

HHK-1	First Amended Petition
HHK-2	Ho-Ho-Kus Eighth Grade Placement List
HHK-3	Ho-Ho-Kus Citizens Committee Report
HHK-4	Ho-Ho-Kus Feasibility Study
HHK-7	Ho-Ho-Kus Pre-Feasibility Impact Study
HHK-8	Letter, dated May 5, 1994, from Gary T. Reece to Dr. Debra Jackson
HHK-9	Resume of Jacqueline Ancess
HHK-10	Ancess Expert Report
HHK-11	Resume of Vincent B. Calabrese, Sr.
HHK-12	Calabrese Expert Report
HHK-13	Resume of Daniel R. Mastrobuono, Ed.D.
HHK-14	Mastrobuono Expert Report
HHK-15	Resume of Patricia M. Horton, Ph.D.
HHK-16	Horton Expert Report
HHK-17	Resume of Dr. Debra Jackson
HHK-18	Letter, dated May 19, 1995, from David C. Ostman to Ruth Friedkin
HHK-19	Ho-Ho-Kus K-12 Mathematics Program Assessment
HHK-20	Memorandum, dated January 23, 1996, from Patricia A. Dunn to Caren Pollack
HHK-21	Midland Park High School New Jersey School Report Card for 1994-95
HHK-22	Northern Highlands High School New Jersey Report Card for 1994-95
HHK-23	Agreement between Northern Highlands and Ho-Ho-Kus
HHK-24	Social Factors Report
HHK-25	Ho-Ho-Kus Feasibility Study for Mountain Lakes High School
HHK-26	Ho-Ho-Kus 1994-95 Application for State School Aid

MP-1	Discussion Points Meeting with Northern Highlands
MP-2	Ho-Ho-Kus Board of Education Minutes
MP-3	Memorandum of Record Dated: May 1995
MP-4	Memorandum, dated June 12, 1995, from James R. Newman to Barbara Sugarman
MP-5	Agreement between Midland Park and Ho-Ho-Kus, dated June 8, 1973
MP-6	Agreement between Midland Park and Ho-Ho-Kus, dated September 3, 1975
MP-7	Resume of August C. DePreker
MP-8	Midland Park 1996-97 Enrollment Information
MP-9	Midland Park Fall 1995 Enrollment Report
MP-10	Midland Park Program of Studies Booklet
MP-11	Midland Park Class Size Policy Statement
MP-12	Midland Park List of Independent Study Courses
MP-13	New Jersey Coalition of Essential Schools Development Project Request for Proposals
MP-14	Final Report on Coalition of Essential Schools Exploratory Phase Involvement
MP-15	A Study of Potential Impacts of the Severance of the Sending-Receiving Relationship Beteen Midland Park and Ho-Ho-Kus
MP-16	New Jersey Mathematics Curriculum Framework Application
MP-17	English Identification Process and Selection Criteria of Exceptional Students
MP-18	Resume of William Freeman, Jr.
MP-19	Midland Park List of College Selection and Attendance of Students
MP-20	Midland Park List of Participation in Athletics
MP-22	Resume of Ronald T. Hyman
MP-23	Resume of Averbach & Associates
MP-24	Replacements to Pages 170, 171 and 172 in MP-15
MP-25	Supplementary Report of Averbach & Associates
MP-26	Resume of Louis D. Roer
MP-27	Tuition Contract Agreement, dated March 31, 1994
MP-28	Tuition Contract Agreement, dated June 6, 1995
MP-29	Midland Park State Aid Report for 1995-96
MP-30	Midland Park State Aid Report for 1996-97

MP-31	Midland Park Five Year Facility Plan
MP-32	Resume of Adam F. Scrupski
MP-33	Resume of William Steven Barnett
NH-1	Resume of Herbert Allen Cohen
NH-2	Northern Highlands 1995 Student Activities Guide
NH-3	Northern Highlands List of Students Enrolled in Extracurricular Activities
NH-4	Northern Highlands Fine and Performing Arts Department
NH-5	Memorandum, dated October 19, 1995, from Herb Cohen to Ed Westervelt
NH-6	Northern Highlands Championships
NH-7	Fine & Practical Arts Festival
NH-8	Science Awards 1993 - Present
NH-9	Varsity and J.V. Debate Awards, 1993-94, 1994-95, 1995-96 To Date
NH-10	State DECA Award Winners - 1995
NH-11	National DECA Career Development Conference Report
NH-12	Regional DECA Conference Winners - 1996
NH-13	Press Release
NH-14	Civitas Participants and Awards
NH-15	Brite Alliance
NH-16	Resume of Dr. Ralph S. Musco
NH-17	Northern Highlands Curriculum Guide, 1995-96
NH-18	Northern Highlands Early Learning Center
NH-19	Northern Highlands Curriculum Guide, 1996-97
NH-20	Top 50 Schools Applied, Class 1995
NH-21	Class of 1995 - Early Decision Candidates
NH-22	Advanced Placement Scores - Six Year Summary
NH-23	Verbal and Math Test Scores
NH-24	Summary Statistics on NMSQT Scores for Classes 1987 - 1996
NH-25	Students Honored at Monthly Board of Education Meeting
NH-26	Common Staff Development Program
NH-27	Notice of Orientation
NH-28	The Town Journal Newspaper Article, December 14, 1995

NH-29	New Jersey Monthly Magazine Article, September 1994
NH-30	New Jersey Monthly Magazine Article, September 1995
NH-31	Northern Highlands 1995-96 Profile
NH-32	Northern Highlands Brochure
NH-33	Sample of Volunteer Activities at Northern Highlands
NH-34	Resume of Gary S. Lane
NH-35	Drawing of Northern Highlands Athletic Fields
NH-36	Drawing of Floor 1 and 2 at Northern Highlands
NH-37	Map of Bergen and Passaic Counties
NH-38	Excerpts from New Jersey Municipal Data book
NH-39	Project Impact Brochure
NH-40	Bond Issue
NH-41	Northern Highlands Five Year Long Range Facility Plan, 1995 - 2000
NH-42	Northern Highlands Support Personnel

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY, AND BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board of Education of the Borough of Midland Park (hereinafter Midland) filed timely exceptions pursuant to the applicable provisions of *N.J.A.C.* 1:1-18.4. The Borough of Ho-Ho-Kus (hereinafter Ho-Ho-Kus) and Northern Highlands Regional High School Board of Education (hereinafter NHRHS) filed timely reply exceptions.

Midland's submission cites five exceptions to the initial decision summarized in pertinent part below. Its first exception contends that the Administrative Law Judge (ALJ) erred in concluding that a substantial negative financial and educational impact as result of severance has not been established. It avers that in so finding, the ALJ chose to arbitrarily measure such impact only as of the commencement of the phase-out process which would follow severance, or, at most, one year, rather than measuring impact when severance is complete and total, *i.e.*, at the

end of the phase-out period and thereafter as required by the applicable statute and existing case law. Midland avers that the ALJ simply assumed the loss of 9th graders in the 1996-97 school year and judged the resultant negative impact solely on this factor. As substantiation of this assertion, it posits that in her discussion of educational impacts the ALJ

> discounts and ultimately rejects all of the evidence which was presented by Midland Park with respect to both course offerings (particularly with respect to AP and Honors courses) and the effects upon clubs, activities and athletic teams by suggesting that "[I]t also must be remembered that 9th to 11th grade HoHoKus students will remain at [Midland Park High School] MPHS after the termination" (Initial Decision at page 22), and that "[I]t must be remembered that MPHS would lose the HoHoKus 12th grade students to graduation anyway and the HoHoKus 9th, 10th and 11th grade students will remain to continue participating in clubs, activities and athletic teams." (Initial Decision at page 20). It is clear from such statements, and from the conclusions reached by Administrative Law Judge Simonelli based upon such statements, that the Court failed or refused to consider the effects and impacts beyond the 1996-1997 school year (the first year of the phase-out recommended in the Initial Decision) since, had the Court properly focused upon effects and impacts at the end of the phase-out period, when severance and termination was full and complete, the Court would have, of necessity, acknowledged the loss of a substantially greater number of additional students who would no longer remain to continue to participate in such activities and to enroll in such courses.*** (Midland's Exceptions at pp. 3-4)

Midland further proffers that compounding this narrow view of the effects of severance, the ALJ proceeded to impose an impossible standard of proof upon it when she stated, with respect to the loss of incoming Ho-Ho-Kus 9th grade students, "that there is 'no evidence whatsoever that any of these students would participate in clubs, activities or athletic teams at MPHS.'" (Midland's Exceptions at p. 4, quoting Initial Decision at p. 20) Midland asserts that there is no conceivable way it, or any other receiving district facing the prospect of the termination of a sending-receiving relationship, could present testimony which would establish,

with any degree of certainty, that specific incoming students would participate in identified clubs, activities, athletic teams or educational offerings during the course of their four-year high school experience sufficient enough to establish, with an absolute certainty, which activities would be terminated or eliminated as a result of severance.

Next, Midland asserts that the Court imposes an arbitrary requirement that negative impact can be established only by viewing those activities in which Ho-Ho-Kus students currently comprise not less than 50% of total participation in a particular activity. It posits that this invalid analytical approach is evidenced by the ALJ's conclusion that "there was no evidence that any club, activity or athletic team *actually* would be eliminated as a result of the termination of the sending-receiving relationship" (emphasis in text) (Midland's Exceptions at p. 5), which, it contends, was predicated on the ALJ's finding that "HoHoKus students comprise about 50% of the students participating in only 4 athletic activities, Girl's Cross-Country, Girl's Tennis, Winter Co-Ed Cheerleading and Girl's Spring Track." (*Id.*, quoting Initial Decision at p. 19) Midland avers that in utilizing such arbitrary 50% participation cutoff point, the ALJ fully ignored the testimony offered by Midland's athletic director which concluded, based on sound, accurate data, such as past student participation trends, and guidelines and requirements as to the minimum number of students necessary to field specific teams, that a significant deterioration in Midland's athletic programs would ensue from severance.

Additionally, with respect to the effects on Midland's academic curriculum, in concluding that only three courses (AP Calculus, AP French and Honors Biology) would be negatively impacted by severance, Midland contends that the ALJ totally ignored extensive testimony of its high school principal with regard "to the likely impacts, not only upon specific course offerings which encompassed courses far beyond the three which [the ALJ] indicated

would be at risk, but also upon the already difficult course scheduling process and its effect upon the district's staffing needs and decisions." (*Id.* at p. 7) Again, Midland asserts that the ALJ found that there was no negative educational impact based upon "the inappropriate utilization of an overly constricted relevant time period for measuring such impact and without *any* consideration whatsoever of future impacts, either during the balance of, or following, the completion of the phase-out period." (emphasis in text) (*Id.)*

Midland contends that the ALJ similarly erred in measuring the financial impact of severance during only the first year of the proposed phase-out rather than at the point where severance was complete. In this connection, Midland cites what it avers were a number of erroneous and inappropriate conclusions reached by the ALJ. Initially, it asserts that its business administrator offered unrefuted testimony that the total tuition loss from the initial phase-out would be approximately $147,000 (15 prospective students @ $9,800 each). The ALJ concluded that such figure was "inflated," a conclusion which Midland posits is "both unfounded and not supported by the record." (Midland's Exceptions at p. 10) Further, because the ALJ concluded that Midland might have an increased enrollment of 7th and 8th graders in the future, she determined that "actual" tuition loss cannot be calculated with mathematical certainty and, as such, no further consideration need be given to tuition loss as an element of negative financial impact, a conclusion Midland contends is without foundation or legal precedent. Midland observes that "[w]hile acknowledging that the State requires [all districts] to keep a minimum of three percent of its overall budget in free balance for its contingency needs ***, the ALJ inappropriately chooses to arbitrarily terminate her analysis and consideration of the impact of the loss of tuition income from HoHoKus upon the State's free balance requirement *as of June 30, 1996*," because she determined that, at that point in time, Midland would have a free

balance of $422,888 which exceeds the 3% required by the State. (emphasis in text) (*Id.* at p. 11) Midland argues that in so determining, the ALJ again confined her impact analysis to an overly constricted period of time. It contends that the ALJ arbitrarily refused to recognize the testimony of its business administrator stating that the loss of $147,000 in the first year of the phase-out would necessitate an appropriation from this free balance, causing Midland to fall well below the State requirement, and further refused to allow him to testify as to the continuing impacts and consequences of the tuition loss of Midland's ability to comply with the State's free balance requirement in subsequent years.

In response, Ho-Ho-Kus asserts that Midland's claim that the ALJ erred by measuring the effects of severance only as of the commencement of phase-out, which, it posits, was totally based on one comment made by the ALJ, is clearly illogical. It maintains that the initial decision is replete with statements substantiating that the ALJ viewed impact based on the completion of severance. As examples, it advances "***The ALJ specifically stated that, 'MPHS is losing only 76 Ho-Ho-Kus students over a *4 year period*...Midland Park produced no evidence that it would not be able to continue operating MPHS with this number of students and continue offering the students the quality of education they currently are receiving." (emphasis in text) (Ho-Ho-Kus' Reply Exceptions at p. 23, quoting Initial Decision at p. 25) "Furthermore, the ALJ makes several references to the enrollment figures after the phase-out (Initial Decision at 12); she also discusses the ability of MPHS to properly educate its students after the phase-out as compared to other public high school[s] with small enrollment figures (Initial Decision at 23); and she discusses the financial impact of severance to the year 2001. (Initial Decision at 16-17)." (Ho-Ho-Kus' Reply Exceptions at p. 23)

Ho-Ho-Kus further maintains that Midland's contention with respect to an "unreasonable standard" being imposed in connection with establishing impact on extracurricular activities in that the ALJ imposed a floor of a 50% participation rate by Ho-Ho-Kus students, is similarly meritless as it is clearly evident from the full context of the initial decision that the ALJ imposed no such arbitrary requirements, but rather just expressed her determination "that loss of Ho-Ho-Kus students would not have a negative impact on MPHS extracurricular activities by pointing out that the Ho-Ho-Kus participation rate in most sports is relatively low.***" (*Id.* at p. 25)

Likewise, Ho-Ho-Kus advances that Midland's assertion regarding the ALJ's use of an inappropriately short period of time within which financial impact on the District was measured, is totally without support. It contends that in her initial decision at pages 15-17, the ALJ clearly addressed the financial projections of Dr. Barnett, which extended until the year 2005, and those proffered by Mr. Calabrese which spanned until the year 2001. (Ho-Ho-Kus' Reply Exceptions at p. 38) Further, the ALJ's determination that the $147,000 tuition loss for the 1996-97 school year was an inflated figure is fully supported in light of testimony offered by Mr. Haldeman and Dr. Jackson that only 14 Ho-Ho-Kus 9th grade students were expected to attend Midland at a rate which had not yet been agreed upon but which would probably be between $9,200 and $9,300. (*Id.* at p. 44) Ho-Ho-Kus additionally posits that in arriving at the $147,000 figure, Mr. Roer neglected to consider cost savings which would result from withdrawal and the portion of this small revenue reduction which would be picked up by Ho-Ho-Kus and Bergen County Special Services District through increased tuition costs for remaining students. (*Id.*) Moreover, it argues, that even if the $147,000 figure truly approximated Midland's first-

year tuition loss, this amount represents but a fraction of its overall budget of $11 million. (*Id.* at p. 46)

In its second exception, Midland asserts that the ALJ erroneously concluded that the use of a seven-year cohort rate most accurately projects future enrollment at Midland "because it provides longer periods of enrollment history that [take] into account most happenings that would impact enrollment." (Midland's Exceptions at p. 14, quoting Initial Decision at p. 10) Midlands contends that "***this approach is, in fact, nothing but the utilization of arbitrarily chosen assumptions motivated by the blind acceptance of the notion that longer periods of enrollment history provide a more stable base for projections.***" *(Id.)* Rather, Midland asserts that the choice of the enrollment period history to be utilized must be made on a case-by-case basis to most accurately reflect and gauge the relevant data, such as housing patterns and other vital statistics, along with their changes over time, for the particular community(ies) involved. Midland asserts that the "'longer is always better' approach" (*Id.* at p. 16) utilized by the ALJ was specifically rejected by the Commissioner in *Boonton Township Board of Education v. Boonton Town Board of Education*, 92 *N.J.A.R.* 2d EDU 235, 249 (1992), and maintains that the two-year trend utilized by Dr. Averback was superior to Dr. Mastrobuono's "longer is always better" approach *in this particular case* and should have been accepted by the ALJ. Further, Midland contends that Dr. Mastrobuono's exclusion of Secondary Hearing Impaired Program (SHIP) students from his calculations "totally distorts the analysis of the impact of such withdrawal" (Midland's Exceptions at p. 18) as the testimony of Midland's Superintendent of Schools clearly established that "there are a considerable number of HoHoKus special education students attending Midland Park High School, including eleven students in the Resource Center and one

HoHoKus student attending the neurologically impaired program at Midland Park High School.***" (*Id.* at pp. 17-18)

In response, Ho-Ho-Kus asserts that, although Midland vigorously opposes the ALJ's adoption of the seven-year cohort survival rate of Dr. Mastrobuono as opposed to the two-year rate utilized by Dr. Averback, as the ALJ and both experts have recognized

> the variance between the use of a two year cohort and a seven year cohort is very slight. In other words, despite the fact that the Ho-Ho-Kus and the Midland Park demographic experts used different cohort survivals, they produced similar projections. Thus, either projection supports the decision in this matter -- the numbers are essentially the same. (Ho-Ho-Kus' Reply Exceptions at p. 18)

It argues that Midland's claim that Dr. Mastrobuono's projections were "self-serving statistical conclusions" (*id.* at p. 19), is unsupportable in that, as indicated in his report, if Dr. Mastrobuono wished to use the cohort which would produce the highest enrollment figures, he would have chosen the five-year cohort survival. Rather, Ho-Ho-Kus posits that his demographical experience "has found that the use of a longer cohort rate proves to more accurately project future enrollment.***" (*Id.*)

Ho-Ho-Kus further advances that Midland's argument with respect to the exclusion of special education students, pointing to 11 such Ho-Ho-Kus students currently attending Midland, is misguided in that

> ***While eleven Ho-Ho-Kus students do participate in the Resource Center, those children are counted as mainstream pupils as a matter of law and regulation in the ASSA reports from which Dr. Mastrobuono obtained his enrollment figures. In other words, those eleven children were included in Dr. Mastrobuono's report because, for purposes of the ASSA reports, those students are considered mainstream students, not Special Education students.
>
> (*Id.* at p. 20)

Ho-Ho-Kus points out that, notwithstanding which cohort the ALJ chose to adopt, both experts' reports demonstrate an ascension in Midland enrollment in the year 2000 and, even if Dr. Averbach's projections were utilized, these conclude that Midland "will reach its lowest level in 1999 and will still have 277 pupils enrolled; a population [which Ho-Ho-Kus contends is] comparable to some of the best high schools in New Jersey.***" (*Id.* at pp. 21-22)

Midland's third exception maintains that in concluding that severance would impose no substantial negative financial impact on Midland, the ALJ specifically rejected the testimony and evidence presented by William S. Barnet, Ph.D., an expert in Educational Economics and Finance which

> established that by the year 2004-05, there would be an increase in the *annual average* tax payment by the typical Midland Park homeowner of $544.02 *in 1995 dollars*, over the annual amount which would have been paid had HoHoKus not withdrawn. This amount is not a cumulative amount, as would appear to be the inference of [the ALJ's] statement that "Dr. Barnett determined that by 2005, property taxes in Midland Park would increase by $544.02 in 1995 dollars" (Initial Decision at page 15), but rather only one year's increase, with increases in each year between 1996-97 and 2004-2005 and, of course, in each year thereafter, in perpetuity. (See MP-25 in evidence, Table 45, page 127.) (emphasis in text)(Midland's Exceptions at p. 21)

Midland further asserts that the ALJ, likewise, failed to give credence to Dr. Barnett's testimony with respect to the full extent and significance of the capitalization "(i.e. the decrease in property values based upon increases in property taxes and potential buyers' evaluations of the taxes and services offered by a locality)" impact of the property tax increase. (*Id.* at p. 22) Midland argues that inherent in this examination is a recognition, posited by Dr. Barnett, that given most homeowners have borrowed the majority of the money for purchasing their homes, their actual equity is far lower than the value of their home. Consequently, homeowners bear all of the risk of a decline in their home's value, resulting, even with a most conservative estimate of the effects of

the capitalization effect of projected property tax increases, in such increases representing a substantial percentage of their actual equity, which equates to a serious economic loss. Midland contends that the ALJ ignored using this sound measure of economic impact and, instead, "inaccurately and incorrectly determined to measure the impact of the capitalization of the property tax increases against either the average value of a home in Midland Park, or the average assessment of such a home, rather than against the property owner's much smaller equity interest therein." (*Id.*) As such, Midland posits that the ALJ's reasoning and resultant conclusions with respect to the negative effects on home values as a result of the capitalization of tax increases necessitated by severance and the negative financial impacts on Midland as a consequence, are fundamentally flawed and should be rejected.

In reply, Ho-Ho-Kus advances that Midland's assertions with regard to the potential tax impacts of severance and, thus, resultant home values, for Midland homeowners is clearly incorrect. Rather, it offers, "***As Mr. Calabrese testified and as his report indicates (HHK12, Scenario 1, Table 4), Midland Park will only experience an average yearly tax increase of $122.58 which is equivalent to $613 over 5 years.***" (Ho-Ho-Kus' Reply Exceptions at p. 39) Also, as testified to by Mr. Calabrese, home values are influenced by a myriad of factors, local taxes are but one of these factors. (*Id.* at p. 42) Further, it posits that Midland's statements with regard to the average homeowner's equity are merely assumptions rather than being rationally based on an examination of actual equity maintained by Midland homeowners. It reasons, such an assumption, likewise, presupposes that an "[individual's] wealth is automatically linked exclusively to and limited by the equity in one's home" (*id.* at p. 43), a presumption which fails to adequately recognize that "homeowners' net worth may also be tied to their securities, personal property, retirement plans and other assets.***" (*Id.*)

In its fourth exception, Midland avers that the ALJ erred in finding that Ho-Ho-Kus has cogent reasons for wanting to terminate its sending-receiving relationship with Midland. In this regard, it contends that the ALJ simply accepted at face value those reasons offered by Ho-Ho-Kus without considering the perspectives and responses offered by Midland in its reply post-hearing brief at pages 2-7. As such, Midland maintains that the ALJ's consideration of the withdrawal rationales was fundamentally arbitrary, capricious and unreasonable and should be discounted by the Commissioner, citing *Washington Township Board of Education v. Upper Freehold Regional Board of Education et al.*, Commissioner of Education decision dated June 27, 1989, 1989 *S.L.D.* 2010, in support of this assertion. (Midland's Exceptions at pp. 25-26)

In response, Ho-Ho-Kus argues that Midland's only support for its claim that the ALJ's finding of cogent reasons for withdrawal was arbitrary and unreasonable "is the fact that the ALJ accepted Ho-Ho-Kus' rationale rather than theirs.***" (Ho-Ho-Kus' Reply Exceptions at p. 9) It alleges that the ALJ is charged with making credibility and judgment decisions in her evaluation of the parties respective arguments and such decisions cannot be termed arbitrary and capricious simply because they did not comport with the position advanced by Midland. Ho-Ho-Kus maintains that the record is replete with examples that lack of effective articulation with Midland is a primary Ho-Ho-Kus concern with respect to its severance application, pointing to testimony advanced by the President of Ho-Ho-Kus' Board of Education and its Superintendent of Schools which detailed specific problem areas in this regard. It also advances differences in philosophies with respect to special education students as another area of dissatisfaction along with the desire for a fixed rate of tuition charged "in order to avoid miscalculations and unpredictable adjustments [as in] the present situation in which tuition is

determined on a year to year basis." (*Id.* at p. 11) Ho-Ho Kus additionally asserts that its parents and community members are also dissatisfied with the current relationship and many are choosing to either move or send their children to private schools. (*Id.* at p. 12) Ho-Ho-Kus argues that these established concerns will be eliminated if it is permitted to have NHRHS as its receiving District, in that the proposed arrangement involves a specific articulation agreement, an identifiable under-cost per pupil tuition for ten years, and attendance for Ho-Ho-Kus children at an institution which is recognized as offering an exceptional educational package. It contends that "***[f]or these reasons alone, the ALJ's findings that Ho-Ho-Kus' reasons for wanting to alter its sending-receiving situation are educationally based, and cannot be considered 'arbitrary and unreasonable.'" (*Id.* at p.17)

Lastly, Midland's fifth exception urges that if termination of the sending-receiving relationship should be ordered by the Commissioner, that "the implementation of any withdrawal which may ultimately be ordered should commence, *at the earliest*, with the HoHoKus ninth grade class which would otherwise enter Midland Park High School in September, 1997." (emphasis in text) (Midland's Exceptions at p. 27) It avers that the Board's budget for the 1996-97 school year, which included anticipated tuition income from Ho-Ho-Kus as one of its five sources of income, integral to the establishment of a balanced budget, has been prepared, submitted and approved in accordance with Department of Education timeline mandates and cannot, as a matter of law, be altered at this time. It argues that

> "***[W]hile Administrative Law Judge Simonelli has concluded that Midland Park would have available to it a free balance as of June 30, 1996 of $422,888.00, the Court's conclusion that this amount would exceed the 3% required by the State is inaccurate, since the Court's reasoning stopped short of even acknowledging the consequences of the appropriation from free balance of the amount necessary to make up for the loss of tuition which would result from the first step of phase-out, namely, that Midland's free

> balance will immediately fall below the State required 3%. There simply are no other sources of revenue, or mechanisms for increasing the amounts available from the existing sources of revenue, which are available to the Midland Park District to enable the Midland Park School District to immediately and adequately compensate for the tuition income losses were phase-out to commence as of September, 1996.*** (*Id.* at p. 29)

Further, Midland contends that the suggestions offered by the ALJ, *i.e.*, to immediately request a cap waiver from the State or to cut certain expenditures which wouldn't impact educational services, are, as a legal and practical matter, options which are unavailable to it at this late date to mitigate the effects of the immediate loss of tuition for the 1996-97 school year. (*Id.* at p. 30)

In response, Ho-Ho-Kus posits that Midland has been aware of Ho-Ho-Kus' desire to terminate their sending-receiving relationship beginning with the 1996-97 school year since early 1994 "and has been repeatedly reminded of this during the 1995-96 school year, including as part of the budget procedure for the 1996-97 budget***." (Ho-Ho-Kus' Reply Exceptions at p. 51) It asserts that, notwithstanding the long-term clear notice, Midland has been unwilling to make any type of contingent plans to mitigate the minimal loss which may result from the loss of 14 Ho-Ho-Kus students in the 1996-97 school year. Ho-Ho-Kus advances that its 8th graders at issue have been fully prepared to enter NHRHS in September and should not be deprived of their expectations merely because Midland has not prepared for a potential situation of which it has been fully aware for some time.

With respect to Midland's free balance argument, Ho-Ho-Kus points out that a 3% level is merely *recommended,* not required, by the State. Notwithstanding this, it posits that even if use of Midland's free balance is necessary to compensate for the loss of tuition of 14 Ho-Ho-Kus students in 1996-97, the facts that surplus funds from 1995-96 will be added to Midland's free balance in June 1996 (as confirmed by the testimony of Midland's business

manager), fewer supplies will be required as a result of decreased enrollment, and the proportionate increase in tuition for remaining 10th, 11th and 12th grade Ho-Ho-Kus students and SHIP students, will render the "lost" money truly irrelevant. (*Id.* at p. 52)

Upon a careful and independent review of the record, including the exception submissions of the parties, the Commissioner concurs with the conclusion of the ALJ that the termination of the sending-receiving relationship between Ho-Ho-Kus and Midland Park will not result in any substantial negative racial,* educational, or financial impact and, therefore, severance must be granted pursuant to *N.J.S.A.* 18A:38-13. His examination of the within matter leads the Commissioner to concur with the ALJ's assessment that no substantial educational or financial impact will inure to Midland as a result of the severance. With regard to educational impacts, notwithstanding Midland's arguments to the contrary, the Commissioner finds that the ALJ correctly observes that Midland has established that three courses would be negatively impacted by severance. (Initial Decision at p. 21) He is, likewise, persuaded that Midland's arguments regarding the impact of severance on other course offerings is purely speculative. Considering financial impact, the Commissioner recognizes that any termination of a sending-receiving relationship will result in some financial impact, but such impact must be significant in order to be categorized as "substantial[ly] negative." See *Board of Education of the Borough of Englewood Cliffs, Bergen County v. Board of Education of the City of Englewood, Bergen County v. Board of Education of the Borough of Tenafly, Bergen County*, 1988 *S.L.D.* 1501, 1546, aff'd State Board 1990 *S.L.D.* 1720, aff'd 257 *N.J. Super.* 413 (App. Div. 1992), aff'd 132 *N.J.* 327 (1993). The Commissioner's review leads him to conclude that severance will not result in substantial negative financial impacts to any of the three Districts involved herein. Although Midland Park

* As observed by the ALJ, it is not argued by the parties that any negative racial impact will ensue from the proposed severance.

will be denied revenue and incur tax increases as a consequence of severance, the Commissioner concurs with the ALJ's assessment that such outcomes have not been established to be "substantial" while, at the same time, the record demonstrates that positive financial benefits will inure to NHRHS and Ho-Ho-Kus as a result of severance.

The Commissioner finds that Midland's exceptions, in large measure, refashion and restate arguments advanced in its post-hearing submissions which the Commissioner determines were considered and addressed by the ALJ in the initial decision, or that such exceptions attempt to draw assumptions and conclusions from the initial decision which are clearly belied by a "reasoned reading" of such decision. Particularly unpersuasive are its assertions that the ALJ's educational and financial impact assessments were predicated only on an examination of such impacts at commencement of, or shortly after, severance. Rather, as argued in Ho-Ho-Kus' reply exceptions, the Commissioner concludes that a comprehensive reading of the initial decision establishes that the ALJ's evaluation spanned the entire period of the contemplated withdrawal. Likewise unpersuasive are Midland's assertions that the two-year cohort rate of Dr. Averbach should have been utilized to project future enrollment rather than the seven-year cohort rate adopted by the ALJ. For the reasons outlined by the ALJ on pages 10-13 of the initial decision, the Commissioner concurs with her determination that the utilization of the seven-year cohort rate was most appropriate *in this particular matter*. Further, as correctly asserted by both the ALJ and the petitioner, notwithstanding which rate is utilized, the resultant projections are similar and establish that the resultant impact of severance is not substantial.

It is noted that Midland raises extensive exceptions regarding disputed and undisputed facts determined by the ALJ based on testimony of its witnesses and the credence and weight ascribed to such testimony by the ALJ. However, the record before the Commissioner

does not include transcripts of the nine days of OAL hearings in this matter. Challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party to supply the agency head with the relevant and necessary portion of the transcript. See *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). Thus, without pertinent transcript citations from which to draw his own conclusions, the Commissioner defers to those credibility determinations reached by the ALJ who was in a position to hear and adjudge the credibility of witnesses. See *Parker v. Dornbierer*, 140 *N.J. Super.* 185, 188 (App. Div. 1976). Further, the Commissioner determines that such findings and conclusions of the ALJ are well grounded in the record before him, and such record, additionally, does not provide any cause to challenge the weight ascribed to evidence or credibility assessments made by her. Consequently, Midland's exceptions challenging the ALJ's credibility determinations and the factual findings predicated thereon, are hereby rejected as being without merit.

The Commissioner further opines that, although the applicable statute, *N.J.S.A.* 18A:38-13, does not require Ho-Ho-Kus to demonstrate good and sufficient justifications for wanting to terminate its sending-receiving relationship, Midland correctly notes in its exception arguments that such justifications are subject to challenge as arbitrary, capricious or unreasonable. See *Washington Township Board of Education v. Upper Freehold Regional Board of Education et al.*, 1989 *S.L.D.* 2010. In this regard, the Commissioner finds that the ALJ's consideration of the rationales which compelled Ho-Ho-Kus to seek withdrawal was entirely reasonable and justified as the record fully substantiates the existence of such reasons, including poor communication, financial disagreements, and educational quality. Further, the Commissioner finds that both Ho-Ho-Kus and NHRHS would derive many genuine benefits, both academic and fiscal, from their proposed relationship.

Finally, the Commissioner concludes that, as noted by the ALJ, there are mitigating strategies available to Midland to alleviate any impact which may be experienced. As found by the State Board in *Board of Education of the Township of Cranbury, Middlesex County v. Board of Education of the Township of Lawrence, Mercer County,*

> ***approval for withdrawal will be granted unless the receiving district can show that withdrawal will result in negative impact beyond the fact of the loss of tuition. We further conclude,***that such impact must be definite and tangible. Specifically, we will not find negative impact based on speculation regarding the future of the receiving district's programs where the future direction of such programs will be determined by decisions, both financial and educational, made by that district and the continued ability to achieve its educational goals is within the control of the receiving district. (1987 *S.L.D.* 2580, 2587)

As such, absent a showing of substantial racial, educational or financial negative impact herein, pursuant to *N.J.S.A.* 18A:38-13, the Commissioner is required to grant the requested severance. Further, he is persuaded that no undue hardship for Midland would result from such severance commencing with the 1996-97 school year, in that Midland had ample prior notice of the possibility of impending severance during this time period, and he concludes that impacts occasioned by such commencement will be minimized by Midland's addition of surplus from 1995-96 to its free balance and the proportionate increases in tuition it will receive for SHIP and remaining Ho-Ho-Kus students.

Accordingly, the initial decision is adopted as the final decision in this matter, for the reasons expressed therein. Ho-Ho-Kus' application for severance from its sending-receiving relationship with Midland is hereby granted, subject to its entering into a new sending-receiving relationship with NHRHS for a minimum duration of five years, and that withdrawal shall be phased out over a four-year period, beginning with the incoming 9th grade class in September 1996.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 30, 1996

DATE OF MAILING AUGUST 30, 1996

371-96

371-96

IN THE MATTER OF THE TENURE	:	
HEARING OF NICHOLAS CIUFI,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent assistant principal for incident of alleged sexual touching. Respondent was suspended with pay.

In light of testimony of witnesses and evidence in the record, the ALJ determined that respondent did engage in unbecoming conduct and that the egregious nature of his conduct showed that a single instance of misconduct can be sufficient to remove him. ALJ ordered respondent removed from his tenured position.

The Commissioner concurred with the ALJ's credibility determinations and resultant conclusion that respondent engaged in unbecoming conduct. Citing *Redcay, In re Campbell* and *In re Sammons*, the Commissioner found that dismissal was warranted. (Even a single act of misconduct may be sufficient to terminate a tenured teacher.) Commissioner ordered respondent dismissed from his position as an assistant school principal and matter was forwarded to the State Board of Examiners for review.

September 3, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6022-94
AGENCY REF. NO. 165-5/94

IN THE MATTER OF THE TENURE HEARING OF NICHOLAS CIUFI, BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Nicholas Celso, III, Esq. and **Joseph R. Morano,** Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Wayne Oppito, Esq. for respondent

Record Closed: June 3, 1996 Decided: July 18, 1996

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter concerns the tenure charges brought against respondent, Nicholas Ciufi, which were certified by Rodgers M. Lewis, superintendent of schools on April 29, 1994 and served upon respondent. On May 24,1994 the charges were transmitted to the Department of Education an answer was filed on June 7, 1994.

On June 21, 1994 the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

An in-person prehearing was held on October 26, 1994 and hearing dates were assigned in December 1994. Those hearing dates were adjourned due to discovery problems and new hearing dates were set beginning October 10, 1995. On that date testimony was taken and the matter continued on October 11, 1995, October 13, 1995 as well as October 18, 1995 and December 13, 1995. At the conclusion of testimony in this matter the hearing record remained open until June 3, 1996 to allow the parties to obtain transcripts of the matter and file posthearing submissions.

It should be noted that during the course of this hearing a **protective order** for a closed hearing was signed at the request of both parties so that the identity of individuals who were minors at the time of the December 2, 1992 incident would be protected by the use of their initials or similar designation and as such initials will be used throughout this initial decision.

JOINT STIPULATION OF FACTS

The parties in this matter by way of stipulation of facts agree that the following facts are in evidence (J-1):

1. The Irvington Board of Education (Board) is a body politic and corporate, organized and existing under and by virtue of the laws of the State of New Jersey, *N.J.S.A.* 18A:11-1, which is entrusted with maintaining and conducting the schools of the Irvington school district.

2. Or on about January 21, 1996, Nicholas Ciufi, was employed by the Board as an interim class supervisor at the Frank Morell (Irvington) High School.

3. Mr. Ciufi is certified as a principal/supervisor.

4. At all times relevant to the charges herein, Mr. Ciufi had been employed as a tenured assistant principal at Irvington High School since the 1982-83 school year. A copy of the job description of the position principal is attached to J-1 as Exhibit A.

5. During the 1992-93 school year, N.M. was a student at Irvington High School, date of birth February 13, 1976.

6. On or about April 29, 1994 Mr. Ciufi was administratively suspended with pay, pending further investigation of an incident which allegedly occurred at the high school with N.M. on December 2, 1992. (Exhibit B- of J-1).

7. Also, as a result of the December 2, 1992 incident, the Division of Youth and Family Services (DYFS) institutional investigation unit was called to investigate the matter.

8. On or about April 29, 1994, then Superintendent of Schools Dr. Rodgers M. Lewis filed sworn tenure charges of unbecoming conduct, and other just cause together with a sworn statement of evidence in support of the charges against Mr. Ciufi, with John D'Angelo, then the Board secretary of the Irvington Board of Education. A copy of the charges were also served upon Mr. Ciufi (Exhibit C of J-1).

9. On or about May 18, 1994, after consideration of the charges and evidence against Mr. Ciufi, together with the attorney's written submissions, the Board determined to proceed to certify the charges to the Commissioner of Education for a hearing pursuant to *N.J.S.A.* 18A:6-10 *et seq.* (Exhibit E of J-1).

10. Further, at that meeting, the Board determined to suspend Mr. Ciufi with pay pursuant to *N.J.S.A.* 18A:6-14.

11. Thereafter on May 20, 1994, the above charges, together with the sworn statement of evidence, and a certificate of determination were filed by the Board with the Commissioner of Education and served upon Mr. Ciufi in accordance with *N.J.A.C.* 6:24-5.1.

12. On or about June 3, 1994, an answer was filed on behalf of Mr. Ciufi. (Exhibit E of J-1).

13. The matter was thereafter transmitted by the Commissioner to the Office of Administrative Law, where it was assigned to administrative law judge Marylouise Lucchi-McCloud.

14. Finally, on or about December 19, 1994 the Board moved before the Honorable Philip Freedman, J.S.C., for an order permitting for a hearing;

    1) The release of the Division of Youth and Family Services (DYFS) investigative file concerning the December 2, 1992 incident, as well as;

    2) permission for all DYFS employees who conducted the investigation to testify. A copy of Judge Freedman's order releasing the file is provided herein. (Exhibit F of J-1).

15. Also, on or about September 9, 1994, the Board moved before the Honorable Donald S. Coburn, J.S.C. for an order releasing the prosecutor's file in the above matter. A copy of Judge Coburn's order releasing the prosecutor's file is provided herein. (Exhibit G).

As these facts are stipulated to by the parties I **FIND** them to form operational facts in this case.

TESTIMONY

This case deals with charges against Nicholas Ciufi regarding a student in the school in which he taught named N.M. who was a minor at the time. N.M. testified during the hearing that she had gone to the high school although changed schools before graduating.

On December 2, 1992 she stated that the bell had rung and she and R.M. went to get a pass from respondent Ciufi. At that time he was dealing with five or six other people. She stated that they went to a holding room and he told her to wait. He then gave R.M. a pass while she was writing a letter. He then looked over and stated to her that he gets jealous. She testified that he began rubbing her hand and that he then took her hand and made her touch his penis.

N.M. stated that right after that she left and told R.M. When she left Ciufi's office she did remain in school for the remainder of the day. That evening she went to an ROTC program as she was a participant and they were to escort parents around the building. Among those chosen for this detail were R.M.; C.B. and C.J. The witness stated that R.M. had told C.B. what had happened. N.M. also spoke with C.B. and asked him to stay with her during that evening detail because Ciufi was there in the school. She stated that when she saw Ciufi he merely smiled and laughed.

The witness stated that her sister told her not to tell her mother and that on the following day she spoke with Sergeant Zeigler who was her ROTC teacher. Sergeant Zeigler then went to see Mr. Joy and came back and told her that Mr. Joy could not do anything without a written statement. She then wrote a statement (P-1) for Mr. Joy. A meeting took place between herself, Zeigler, Joy, and Mr. Pilone. Her mother was then called and she said she had to be picked up. She was questioned by Mr. Joy and Mr. Pilone before her mother came. Sergeant Zeigler was present with her during this.

N.M. states that Mr. Pilone who was the principal and Mr. Joy who was the vice principal kept asking her if she was telling the truth.

Additionally the witness testified that she had been asked on the day of the incident to purchase a videotape for Ciufi. He had given her ten dollars and that on the day after the incident she was asked where the money was. She gave the change to her mother and her mother gave the money to the police. The amount was seven dollars. N.M. also indicated that she was interviewed by Ms. Williamson from DYFS and gave a statement. She also gave a statement to the police which she signed.

N.M. testified that she had no prior dealings with Ciufi although he had told her that she was pretty several times in his office. She stated that C.A. was present. The witness testified that she felt that this was said in a joking way and she never thought anything of it.

The witness testified that during the incident in which Ciufi had her hand and was trying to place it on his penis she was trying to open the door and he kept shutting it. He also kissed her and she just froze. She stated that he put his tongue in her mouth and it was after that he took her hand and put it on his penis forcing her to feel his penis. She stated that she was crying afterward.

The witness testified that after the incident some people started to say that she was lying and teachers started to treat her differently. As a result she left the district because of the treatment she received. She stated that she had nothing personal against the respondent in this case.

The witness acknowledged that prior to the December 2, 1992 incident she knew Ciufi only since the tenth grade and that he was never her class administrator. She knew him through M.H. whom she used to date. M.H. was two grades ahead of her. It was for him that Ciufi was obtaining the videotape to tape one of his games as he was now in college.

The witness testified that she had a somewhat strained relationship with her mother and would not confide everything to her mother. She was however close to her grandmother. She would also tell things to her friend, C.A. who was her best friend. R.M. was one year behind her and C.A. was in the same grade.

The witness acknowledged that sometimes she would also speak with the guidance counselor she had from ninth grade on named Janet West. She also indicated she felt comfortable with Michelle Evelyn who also was a counselor with the school.

N.M. admitted that she never bought the tape for which she was given the ten dollars and was told to keep the change. Instead she used three dollars to buy something to eat and gave her mother back seven dollars which was ultimately turned over to the police. When she saw Ciufi at "back to school night" he never asked if she had purchased the tape or not. He also never asked for change.

The witness stated that she spoke with school officials, with the Irvington Police Department, with the Division of Youth and Family Services as well as the prosecutor's office.

The witness also acknowledged having filled out a victim impact statement in which most of the answers had been hers although she said that her mother supplied the answers to number six and number eight which indicated the amount and type of restitution the defendant should be ordered to pay as no less than $100,000 as well as a recommendation to the court regarding any sentence to be imposed on the defendant which was listed as no less than twenty years. (R-1). She also acknowledged that prior to December 2, 1994 Ciufi never made any comments to her of a sexual nature other than comments that she was pretty. She stated that he was friendly to students and he did ask how they were doing.

The witness stated that she did not tell her mother or her grandmother what had happened initially because she was afraid as well as scared and she wanted to forget what had occurred. According to her it was R.M.'s idea to speak with Sergeant Zeigler.

Testimony was also taken from Ethel Davion who, at the time of the hearing was employed as acting principal in Irvington. Prior to that she had spent three years as a vice principal.

Davion testified that Mr. Pilone was the principal and Mr. Joy was the vice principal in 1992. She came on as acting vice principal. There were four assistant principals, Ciufi; Smith; Crespo and Grant. The witness testified that in the 1992-93 school year Ciufi was the assistant principal for the ninth grade. The assistant principals were responsible for discipline in the school. The assistant principals then reported to the vice principals and the vice principals then reported to the principals. Guidance counselors were also assigned to a grade group that followed them through their school years. Assistant principals also moved with the class.

The witness recalled the December 2, 1992 incident involving N.M. She stated that she walked into the building and was immediately called into Mr. Joy's office and was told there was a problem. He stated that N.M. reported an incident. Mr. Zeigler and Mr. Joy were present. N.M. then came in with a statement in her hand. The witness also spoke with Ms. West who was the guidance counselor.

This witness called N.M.'s mother who seemed annoyed at receiving the phone call. She acknowledged that the mother was not told any of the specifics of why she was being called to the school. The mother arrived later.

In Mr. Joy's office was Sergeant Zeigler, herself and the student N.M. seemed to be "distant." When Davion was first called in she was informed as to why she was there. Then she spoke with N.M. in her office and Ms. West came in with a folder. She

was asked for all of the information on N.M. She was not asked for any information about Ciufi.

The witness stated that N.M. told her that she was in Ciufi's office and he gave her ten dollars and also put her hand on his penis. It took approximately one and one-half hours for N.M.'s mother to arrive. At some point Ms. Evelyn also arrived and spoke with N.M.

Mary Williamson of the Division of Youth and Family Services also came to Davion's office but was not present during this interview. The witness had known Ciufi when she was first the supervisor. She did not know N.M. until the meeting that occurred on December 3, 1992, the day after the incident. She stated that her demeanor at that time was distant and seemingly aloof. According to the witness something had happened but it was not apparent immediately what it was. N.M. was not crying.

The witness stated that doors to assistant principal's offices were ordinarily left open however sometimes they were closed. She also indicated that there was some question regarding N.M.'s residency status and her attending the school and that had been brought to the attention of the school one or two weeks before the events happened.

Michelle Evelyn also testified that she is a student assistance counselor and was summoned by Ms. West to the location where N.M. and Sergeant Zeigler were located. She observed Sergeant Zeigler consoling N.M. and overheard him say, "You didn't do anything wrong." She observed N.M. crying, hunched over and shaking. This was in Mr. Joy's office. She stated that N.M. was sitting while all of the adults in the room which she approximated to be fifteen to sixteen feet long and approximately ten feet wide were standing.

Ms. Evelyn took N.M. back to her office and she asked N.M. to tell her what had happened. At that time she was told that N.M. was in Ciufi's office and that others had left. He asked to buy a tape for him and would not let her leave. She told Evelyn that he took her hand and had her touch him on his "private parts." The witness stated that she just listened and employed a technique she referred to as "active listening." She stated that she observed N.M.'s eyes as being still teary, red-rimmed and she was shaking during this conversation. After speaking with N.M. she sought out the principal, Mr. Pilone and was aware of the mandate to report the matter to the Division of Youth and Family Services. Joyce Witney was her immediate supervisor and had trained her. Information was given to the building supervisor who would then make the call. She told Pilon what had happened who designated her to make the call. She made the call at approximately 11:00 a.m. on December 3, 1992 and told DYFS the information that she had received. They then screened the information and told her that a worker would be sent out. That worker was Mary Williamson.

At some point the mother came to the principal's office and was upset because her daughter had been spoken to without her being present.

The witness acknowledged that she had known N.M. prior to December 3, 1992 and had been a counselor of hers. She also acknowledged that N.M. did not speak with her on December 2, 1992 although she was in her office.

The testimony of Sergeant Anthony Zeigler was given by way of videotape deposition due to the fact that he had been a resident of Georgia for the past year. He had been in the Army for twenty years and then subsequently became involved with the ROTC program. He then also became involved in the junior ROTC program.

Zeigler stated that he was familiar with N.M. because she was involved in his program. According to him she was an excellent student and was both reserved and self-assured. She acted as a squad leader.

The witness testified that R.M. came to his office and stated that N.M. had experienced a problem. He informed her that she should bring N.M. in. She did in fact come in and inform him that she had been sexually touched in Mr. Ciufi's office. She also told him that she had been given ten dollars to purchase a cassette. R.M. was then told to leave and she stated that Ciufi had her hand and would not let N.M. leave. He then went to the principal's office and he was not in but he subsequently found Mr. Joy. At this point N.M. was still crying and sobbing. She relayed the same story that he received. Mr. Pilone passed by and Mr. Joy then excused himself and went and spoke with Mr. Pilone. He was then asked to go back to Pilone's office with N.M. and Ethel Davion was also present. N.M. was then asked to explain what had happened. She was also asked if she understood the seriousness of this matter. According to Sergeant Zeigler she was still crying at this time. Sergeant Zeigler testified that he had found N.M. to be a very truthful individual and described her demeanor as sobbing during the encounter.

Zeigler stated that someone from the Division of Youth and Family Services came and asked for a statement. He did recall that Mr. Joy also asked for a statement from him. He went down and wrote the statement on that same day. He stated that he was not present when N.M. wrote any statement.

C.B. testified that at the time of the hearing he was working and about to go into the Army full time. He had graduated through summer school in 1995. He was acquainted with N.M. and the night of the parent escorts by the junior ROTC he was also a member. Four individuals were stationed on the second floor and they consisted of himself, N.M.; R.M. and another individual. They would escort someone and come back. According to him N.M. was upset that night. She spoke with him and said that a teacher tried to "take her hand and make her touch him." This was in response to him asking what was the matter with her because she had started to cry. Earlier she had been "sort of cheery" and all four were upstairs. When he came back she was upset

and started crying. He stated that's when he became concerned and asked him what the problem was. She told him only that a teacher had tried to make her touch him and he said that she should report it to somebody. According to him she was "sort of scared because she wasn't sure how she was going to come out and tell somebody like that."

Mary Williamson from the Division of Youth and Family Services testified that she was called in as an investigator regarding this incident. After giving her credentials and explaining the positions that she has held she stated that in the early 1990s she went to the institutional abuse unit as an investigator and then in 1993 became a senior investigator. She stated that she has been involved in more than 250 cases which she has investigated.

On December 3, 1992 she received information from Irvington High School by way of a referral (P-3). A screener took the information and it was encoded for immediate response because it involved sexual abuse as well as institutional abuse in cases where children could be in imminent danger.

On December 3, 1992 she went to the school and spoke with a Mr. "Pallante." (Both sides stipulated during the course of the hearing that this reference was to Anthony Pilone.)

The witness also propounded a report. (P-10).

On December 3, 1993 she spoke with Mr. Joy in his office and he indicated that he had been informed by Sergeant Zeigler that Mr. Ciufi had kissed N.M. and had cause her to touch his private parts. He said that he had written statements. He also said that he heard that Ciufi gave students money for lunch occasionally and also helped with money for prom dresses. He had counseled Ciufi several times about being too friendly with students. He recounted that he once gave twenty dollars to a

student for a sub sandwich. Mr. Joy told her that he had warned him about lending money and that it could be misinterpreted. He stated to Ms. Williamson that this was a prime example.

N.M. on December 2, 1993 had a free period and she and R.M. were in Ciufi's office. R.M. left and the witness stated that N.M. recounted that Ciufi said he was jealous. She had been writing a letter and he kissed her and took her hand and had her touch his private parts. He then gave her ten dollars for a tape. She indicated that the mouth was open when he kissed her. Williamson described N.M. as visibly upset and crying but that she spoke with great confidence.

The witness was qualified as an expert on investigations regarding sexual cases involving adults and minors as well as child abuse cases. As a result she determined in her investigation that the allegations should be at least substantiated to the point that her investigation took them.

The witness acknowledged that she is not written for publication nor has she done research or surveys but has had ongoing training in the area. She has more than 50 hours of in-service training since she has been with institutional abuse.

The witness stated that N.M. presented with nervous behavior and was sometimes a bit out of control and sometimes in control. Her mother was present along with Detective Dougherty from the Irvington Police Department as well as a counselor, Michelle Evelyn. According to her, the mother was visibly and very supportive of her daughter. The mother was also very angry at times. N.M. said that she did not immediately tell anyone. Interviews were then conducted with administrators such as vice principal Joy and principal Pilone.

The witness indicated that this situation was unusual because the school had essentially done an internal investigation first and had N.M. write out a statement and

had asked her whether she was telling the truth before ever reporting this either to the Division of Youth and Family Services or the police department. The witness expressed concern to Mr. Pilone about Mr. Joy doing an investigation and having the victim do a report before this matter was reported to the institutional abuse unit. She stated that N.M. said that she felt Mr. Joy did not believe her and that her mother was very concerned that she was questioned without the mother's presence.

The witness also requested a statement (P-6) from Ciufi. An attorney called her and both Ciufi and the attorney, Sanford Amdur came to see her. Ciufi denied that anything had occurred and the interview took approximately thirty minutes.

The witness was asked about her report dated May 1993 when the incident had occurred in December 1992. In that interim period she stated that she had investigated at least 35 other cases. She stated absolutely and credibly that she was not confusing this case with any other incident at that school or any other school.

The witness described what N.M. had told her which was that this had occurred after an assembly and that she asked N.M. what had happened. N.M. also indicated that she had told R.M. as well as C.B. The witness stated that she interviewed C.B. on December 4, 1992.

Testimony was also taken from Detective Gene Nigro a detective with the Irvington Police Department who had been with the department for just under twenty years. He stated that he worked on cases involving child abuse and neglect and worked on a team concept with the State institutional abuse unit. He recalled the incident of December 1992 and was advised that the allegation regarding a sexual contact between Ciufi and N.M. He filed an initial report (P-11) and a follow-up report. He also executed a Miranda warning statement (P-12) and Ciufi gave a statement while there was no attorney with him and did so voluntarily. (P-14).

Detective Nigro described Mrs. M.'s demeanor as both concerned and angry.

The defendant called Albert Joy to the stand who was a vice principal from 1991 until the time of the hearing. He testified that he had met Ciufi in 1981.

In December 1992 the witness received information regarding allegations from N.M. around 7:40 a.m. or 7:45 a.m. on either December 3 or 4, 1992. Sergeant Zeigler told him that he had a young lady downstairs who alleged a touching by a teacher. When asked if it was sexual Sergeant Zeigler responded that it was. He asked if this was in writing and was told that it was not and therefore Mr. Joy asked for it in writing and also, after receiving the statement asked N.M. if it was true. He also called for Michelle Evelyn as a counselor. After this he went to Mr. Pilone and stated that he told him to call the Division of Youth and Family Services.

The witness was not acquainted with N.M. and found out her name while learning about the incident.

Mr. Joy was also interviewed either on December 3 or 4, 1992 by Ms. Williamson from DYFS. He was asked questions about the length of time that he had known Ciufi, Ciufi's character and whether or not he believed the incident had occurred.

According to the witness Williamson asked if Ciufi was "a generous-type person" and he told her that he was and that Ciufi had "loaned" money as did Mr. Joy. She asked if Joy had ever warned him about doing such a thing. He replied that he did tell him that at some point it could come back to haunt him. He does not recall telling Williamson about giving twenty dollars and saying to keep the change. He does recall discussing loaning money for the prom.

The witness stated that all assemblies occur between 9:45 and 10:45 in the morning and that there are three lunches consisting of five (a); five (b) and five (c). All periods are 42 minutes including fifth and sixth period in which students receive one period free and the other period of instruction. He did acknowledge telling Williamson that he had overheard Ciufi saying at one point in the school "Hey baby you're looking fine." According to him the witness' style was more dry and Ciufi was more animated. He indicated that he had a second conversation with Williamson two or three months later.

The witness acknowledged that he had known Ciufi for 14 or 15 years and they worked closely. He stated that he has not seen much of him since the incident. Before that he saw him several times a week. He worked with him and saw him daily. He never saw him outside of the school however and never went to his home other than one occasion for dinner. When Sergeant Zeigler met with the witness he stated that he told Zeigler to go back and get statements from the individuals involved. According to this witness standard operating procedure was to do this. He stated that this was based upon DYFS training sessions. He also confirmed that Pilone instructed him to contact DYFS and that he made the original call between 8:10 a.m. and 8:15 a.m. on the day after the incident. He called and advised DYFS that there were allegations of a sexual contact although he did not specifically ask anyone to investigate N.M.

Janice West also testified that she was a counselor at Frank H. Morell High School. She stated that she became aware of a situation involving N.M. in December 1992 and was met by Ms. Evelyn who asked for her file on N.M. Upon accompanying Ms. Evelyn she found N.M.; Mr. Joy, Mr. Pilone and Sergeant Zeigler. Upon arrival she was told that she was not needed. Later she stated that N.M.'s mother called the witness and asked if it was worthwhile taking time off from work or if this was just some of "N.'s, mess." She stated that N.M. and her mother had "personal issues." She stated that she never met with N.M. on December 2, 1992 or December 3, 1992. The witness stated that she did not have any part in the incident and that she met Ms.

Williamson from DYFS for about five minutes. She never spoke with N.M.'s mother after the incident and N.M. never indicated directly to her that Ciufi had made any inappropriate comments to her nor did she discuss the alleged incident. The witness stated that she was in her office on December 2, 1992. She did not recall if N.M. or her friend C.A. cut class on December 2, 1992. The witness stated that she was contacted by the Irvington Police Department as well as the Essex County prosecutor's office.

The witness confirmed that she was present in the group when Mr. Joy asked N.M. to give a statement in writing to Sergeant Zeigler. According to the witness N.M. appeared very muted and very confused as well as withdrawn. It was not until approximately two hours later that she was informed about the alleged incident by Mr. Pilone who said it was being handled and that they were contacting DYFS.

The witness confirmed that when she spoke with the mother she was working for a major pharmaceutical company. The mother was mad and upset. The witness confirmed however that she did not tell the mother what the allegations were or the nature of the allegations. As a result the mother had no knowledge as to why she was being asked to come all the way to the school and the witness stated that she could not tell her.

Anthony Pilone who was the principal at the high school in 1992 testified that Albert Joy informed him that N.M. had lodged a complaint against Ciufi that he had kissed her and that he had caused her to put her hand on his private parts. He was advised of this one morning between 7:45 and 8:15 a.m. He told Mr. Joy to bring the young lady in and give a statement. He then asked that the mother be called and she indicated she was on a job assignment and therefore sent the grandmother. He also spoke with the young lady who stated that it happened on Wednesday, the day before, between 12:30 and 12:55 p.m. When asked where she had belonged she indicated that she had a study hall with Ms. Schilling. The witness testified that this could not be.

Mr. Joy and he left the room so that Ms. Evelyn and N.M. could speak together. Later the mother came in and was upset that the school had talked to her daughter without her bring present. He also confirmed being interviewed by Ms. Williamson The witness stated that he recalled clearly that on December 2, 1992 there was an assembly and that Joe Clark a former school principal of renown was the speaker. This occurred between period two and period four although he does not recall the exact time. He stated that on that day the sophomore class would have actually gone to the assembly and that N.M. who was an eleventh grader would have seen it on TV at another location. She would not have been out of the classroom for the assembly.

The witness acknowledges initially doing an investigation but after that Friday, two days after the incident, he was told not to do any further investigation.

This witness had no firsthand knowledge as to whether or not Mr. Ciufi had been at his designated lunch duty on the day in question. The witness also stated that Ciufi presented him with a handwritten statement although he does not recall asking for it. According to him the statement was turned over to Ms. Williamson the next day. he agreed that it was a very important statement. This statement was not given to Dr. Lewis.

At the time this witness was under redirect examination a statement was produced in Court by Ciufi which was a photocopy of a statement purportedly by him, although this had never been seen by either side's attorneys nor did either side have a copy. The statement was produced in the midst of the hearing (R-7). The witness identified the statement but did not recall whether he first saw it on Thursday or Friday of the week during which the incident took place.

The witness stated that he has never been informed of a Board policy regarding lending money to students or not lending it to them. He also stated that he was informed in person by Ms. Williamson that he should not have investigated and should

not do so in the future. He also had a conversation with Dr. Lewis and was told not to be in contact with the students and that a letter would be forthcoming.

This witness also acknowledged that at some time in either 1978 or 1979 he had paid the respondent's mother $40 or $50 to do his tax returns.

The respondent also testified in this case that he had been employed by the Irvington Board of Education since February 16, 1976. He was originally hired as an interim school suspension teacher in 1976. Prior to that he had been a teacher in a self-contained classroom situation in Newark. He remained a teacher with the Irvington Board of Education from 1976 through 1979 as an interim and then went from 1979 to 1980 as an interim at the Myrtle Avenue School. In September 1980 he functioned as a fifth grade teacher at the Myrtle Avenue School and continued in that capacity until October 1980. From October 16, 1980 he was made administrative assistant in the high school which was a non-tenured position as an aide to the principal. In 1981 he became an assistant principal which was a title change and remained in that position from that point on. He has a bachelor of arts degree from Bloomfield College which he received in 1968 and a teaching certificate which he received in 1975. He also has a masters degree received in 1980 from Seton Hall.

The respondent testified that he knows N.M. He stated that he was senior class administrator for the class of 1992 in which N.M. was a student. N.M. was introduced to him by M.H. as his girlfriend. He knew M.H. because he was a basketball player and the respondent was involved with the basketball team. He stated that in the 1992-93 school year he had two offices. First he was acting principal then in mid-November he moved back to his original office. Prior to December 1992 he did not recall N.M. was ever in his first school office. He stated that she may have been in his office one or two times. On the ordinary school day in 1992-93 the respondent testified that he usually arrived at school at 7:45 a.m. He was involved in a number of different programs including the prom, senior class night, awards and graduation. During the 1991-92

school year he was also involved in the senior fashion show. He stated that he knew M.S. who was in the ninth grade and was a student in a group of girls who performed in the 1992-93 fashion show doing Jamaican dances. G.S. also performed in the fashion show. He did not know them in any other way and stated that he never spoke to M.S. except in the context of the fashion show. He did speak with T.S. during the year in passing. He testified that he never asked either of them on a date or inquired about their personal life. Other than school administration he and both students had no relationship.

On December 2, 1992 he testified that he arrived at 7:45 a.m. In the morning he got a call at approximately 8:30 a.m. from M.H. who had now graduated from high school and was away. He was asked by M.H. to do him a favor in that he needed a tape of a game to show to a basketball recruiter. The witness stated that Mr. Torturo told him that if he provided a blank tape a copy of it could be made by the audiovisual unit. His conversation with Mr. Torturo took place at approximately 9:00 a.m.

On that date period two had a special class lecturer of Joe Clark who was the former principal at East Side High School. It was a tenth grade assembly and other students would have to report to their homeroom to watch the assembly via TV feed. He also indicated that he had a group of 12 to 16 students in his office. According to him N.M. was one of those students. She was there with C.A., another student. The respondent stated that he did not know R.M. but did know C.A. He stated that he said nothing to N.M. during the period two assembly program which finished at approximately 10:30. At that time all the students left his office.

On that date he had a duty assignment until 11:55. From 11:55 which was the end of 5B to 12:26 which was the end of 5C he was to remain in his office for school-wide discipline. This was during junior and senior lunch. At 12:30 he was then scheduled to be in the cafeteria with Ms. Crespo. He did not arrive at that time and at approximately 12:30 he left his office and took a few steps at which point he was met by

Mr. Coburn and three young ladies whom Mr. Coburn said were involved in a verbal confrontation in the gym. Coburn informed him that one was also "running amok" in the building. None of these four individuals were C.A.; R.M. or N.M. The witness stated three more students came in with hats and coats making a total of six students in his office, again none being the three individuals listed above. There were there for approximately 25 to 28 minutes in his estimation and he was trying to mediate a dispute. These were ninth and tenth grade students. At some point N.M. came in during period 6A but he did not send for her. He did not know why she was there and she came in and sat on a table for a minute. She did not say anything and neither did he. He stated that she might have left because he was dealing with six other students and two ringing phones. When he was finalizing the other matter he asked N.M. to wait while he was writing passes. He stated that he thought he could get her to help M.H. and he gave her ten dollars and said she should keep the change. She would bring the tape back at 3:30. She stated that she needed a pass and he also gave her a pass to Ms. Jacobs. He left the office and went to his right and she exited and went to the left. According to him the door was open the entire time. He stated that his personal policy is that his door is always open except in extraordinary circumstances. He stated that sometimes it is necessary to "drag" fighting students into the office. That might be an extraordinary circumstance or if there was a loud parent.

During period 6A N.M. was not with any other student but was by herself. He stated that when he left the office the door shuts but it is only locked to the outside.

Respondent denied ever touching N.M.'s hand, denied having kissed her or having had her touch his penis or as he put it his "private parts."

It was not until September 28, 1995 that he ever saw her again other than that day, and that was in Superior Court. He did see her later on December 2, 1992 and gave her a thumbs up sign from approximately 30 feet away in the evening at the parent night. She was wearing her ROTC uniform. He stated that he did not know C.B.

or R.M. although he does believe that N.M. was with a male student but there were other cadets in the vicinity.

On December 3, 1992, the day after the incident, he arrived at school at 7:45 a.m. and was handling a matter with a student and her father. He was called by Mr. Pilone via a walkie-talkie radio and asked to go to Mr. Pilone's office. He stated that only Mr. Pilone was there and that Mr. Pilone first went and closed the shades, the door, as well as the sliding door and looked around him. He stated that Pilone told him that there had been an allegation that a student said he had "French kissed" her and tried to force her to touch his "privates." He indicates that he denied it and was told to write a statement. He was then told that they would check the time frame. He stated that Pilone told him the student was an illegal attendee in Irvington and was told that they were awaiting the student's mother's arrival. He indicated he then resumed his normal duties. He did say that he spoke with Ms. Crespo and asked her what time he was back on duty on December 2, 1992 and that she told him that it was around 1:00 p.m.

Respondent indicated that on December 3, 1992 he did not speak to the Irvington police, the prosecutor's office or the Division of Youth and Family Services. He did write a letter in Mr. Pilone's office (R-7) which only surfaced in the middle of the trial and had not been seen by either side's attorneys but was provided suddenly by the respondent. On December 3, 1992 he was told by Mr. Pilone at approximately 2:00 p.m. to remain after 3:30 for a letter from Dr. Lewis. The letter said to report to school and avoid contact with female students and that there would be a DYFS investigation.

On December 5, 1992 which was a Saturday he received a certified letter of suspension and was suspended from that point until February 4, 1994 at which time he was reinstated. The letter reinstating him (R-3) was by way of vote of the Board of Education as the result of official documentation showing that no indictment was returned by the grand jury.

Respondent stated that on December 4, 1992 he did respond to the Irvington Police Department and spoke with Detective Nigro, Captain Lombardo and two or three other detectives. He gave a statement to Detective Nigro and that statement (P-14) accurately reflects what he said at the time.

Respondent also met with Ms. Williamson from DYFS along with his attorney Mr. Amdur. The meeting took approximately 45 minutes and Ms. Williamson was writing notes during the meeting. She interviewed him and asked about his educational background, the alleged incident and his interaction with administrators. He told her that other than asking N.M. to purchase a tape for M.H. he had no other conversation with N.M.

Respondent stated that he did tell her that he loaned money to students for lunch sometimes and that he considers it "an act of charity". He denied doing anything of which he was accused in this matter.

On cross-examination Ciufi stated that he did not recall contact with N.M. other than perhaps "hello" being said on occasion prior to her being in his office on December 2, 1992. He did agree that she may have been in his office more than once. He states that N.M. was with a friend, C.A. when she came in and not with R.M. and that there were other students in his office initially. During cross-examination he stated that the number of students was approximately fifteen plus N.M. and C.A. making a total of seventeen.

He states that he told Detective Nigro that he had approximately fifteen students in his office during the assembly. It was earlier that he had fewer students. His statement to the principal, however, (R-7) does not indicate any particular number of students. On October 18, 1995 which was the preceding day of testimony he testified that there were twelve to sixteen people in his office, "maybe to use a phone". Some of

the individuals were for telephone calls according to him and some were not. Each individual had a pass or they would not be let into his office. He stated that he would normally go to cafeteria duty at 12:30 p.m. but for the fact that he was approached by Mr. Coburn due to the problem involving the other young ladies.

According to respondent, on N.M.'s first visit she was accompanied by her friend and he observed this. He acknowledged that he had never said this before. He said this is because no one had asked the question and that he did not feel that it was important. In his statement to Ms. Williamson he said that N.M. came to his office because she had no place to go. In cross-examination he stated that he simply does not remember making the statement.

After 12:30 p.m. he was approached by Mr. Coburn who was what is referred to as a "T.S.A." which in his terminology is "bouncers with degrees", who said he had three young ladies involved in an altercation. Instead of going to lunch duty he decided to reopen his office and it was open until approximately 1:00 p.m. N.M. returned to his office during this period of time. He was behind the desk and N.M. was in the doorway and approximately seven students were between him and N.M. On cross-examination he stated that she was in and out "floating" and he was trying to deal with disciplinary matters. He states that he told her to stay because she would need a pass. He knew that she was supposed to be in gym because he states that she told him that. He had originally testified that he just told her to wait and did not say anything else. Now he testified that he asked where she needed a pass to, which was the gym. He gave her a pass for Ms. Jacobs, the Phys. Ed. teacher, because she told him that was the teacher to whom she had to go. She was by the door and he remained at the desk with the others walking out. She was the last pass that he wrote out.

The respondent was confronted with N.M.'s report card for the 1992-93 school year which listed her teachers and listed a different gym teacher, Ms. Engle, other than Ms. Jacobs.

On cross-examination he was shown the report of Ms. Williamson which quoted him as saying that there had been no conversation and he testified that there was talk about a pass "if that is a conversation." Predicated upon that he stated that there was a conversation and that he gestured to her and asked her to wait at which time he got up from the chair and walked out and asked if she would get the blank tape and gave her the ten dollars. He did not recall the names of any of the students that had been present at approximately the time N.M. was at his office. He testified that it came to him in the middle of dealing with the altercation that she was a friend of M.H. and she would be perfect to get the tape.

Respondent was not actually a part of the program in the school that evening although he was present. It began at approximately 6:00 p.m. and he states that his duties ended at 8:00 or 9:00 p.m. that day. He had arranged for N.M. to purchase the tape and she stated that she would return with the tape at around 3:30 p.m. According to him she did not show up. He was aware that she was part of the R.O.T.C. Program and knew that she had to be there for the evening program. He states that it did not strike him in any way odd that she did not come back at 3:30 p.m.

Respondent stated that he had to get the tape for M.H. but it did not have to be the same day. He acknowledged that he could have made the purchase personally.

After issuing the pass he states that he departed and she made a left which struck him as odd since it was the wrong way to the gym. He indicated that it could have been that she went the wrong way. He then went to lunch duty. He denies ever having told DYFS investigator that R.M. was with N.M.

He describes that when he asked her to stay at his office he did not encourage her to stay. In his terminology during testimony she was never really "in" his office. Her head was "bopping in and out".

Respondent acknowledged that when he wrote the statement for Mr. Pilone (P-7) he indicated that he never asked or told N.M. to come to his office or encouraged her. He also acknowledged that as of that point no one had ever accused him of doing so.

Respondent also acknowledged that the ten dollars given to N.M. to buy the tape were with the understanding that she should keep the change. He further acknowledged that in the DYFS interview he spoke of "lending" money to students but this sum was not a loan.

FINDINGS OF FACT

Having listened to the testimony of the witnesses and having observed their demeanor and having taken into account all of the evidence presented in this case, I **FIND** that this case turns solely and exclusively on the credibility of the witnesses. I **FIND** the following to be **FACT:**

1. Nicholas A. Ciufi, III, is a tenured teaching staff member in the Irvington School District.

2. Mr. Ciufi was initially employed in the Irvington School District on or about February 16, 1976.

3. As of 1980 Mr. Ciufi became an administrative assistant followed by the position of assistant principal which he continues to hold as of the date of the hearing and held in December 1992. He is a tenured staff member.

4. At Irvington High School, assistant principals are assigned as class administrators and Mr. Ciufi was the administrator for the senior class in 1991-92. During the 1992-93 school year Mr. Ciufi was the administrator for the freshman class.

5. Anthony Pilone is a tenured teaching staff member at the Irvington School District. During the 1992-93 school year Mr. Pilone was the principal at Irvington High School.

6. Ethel Davion is a tenured teaching staff member in the Irvington School District and during the 1992-93 school year she was assigned as a vice-principal.

7. Janice West is a tenured teaching staff member in the Irvington School District and in the 1992-93 school year Ms. West was a guidance counselor for N.M., a student at the school.

8. Albert Joy is a tenured teaching staff member at the Irvington School District and was assistant principal in the 1992-93 school year.

9. Michele Evelyn is a tenured teaching staff member in the Irvington School District as a student assistance counselor and has held that position from 1991 until the time of the hearing.

10. During the 1991-92 school year N.M. was enrolled at Irvington High School and was in the 11th grade. She was also a member of the R.O.T.C. Program.

11. N.M. was characterized credibly by Sgt. Zeigler as an excellent student who showed a lot of discipline.

12. N.M. also attained a leadership position in the R.O.T.C. Program and achieved the rank of squad leader.

13. Respondent Ciufi was characterized as friendly with the students of Irvington High School and allowed them to use his office to make phone calls or to "hang out".

14. Ciufi also had a practice of lending or giving money to students for various items, including lunch money, and considered it "an act of charity".

15. N.M. had known Ciufi since sometime when she was introduced to him by N.H., who was a prior student at the school and whom N.M. dated.

16. N.M. had been to Ciufi's office on previous occasions and on occasion had heard Ciufi tell her how pretty she was.

17. On or about December 2, 1992 an incident occurred involving N.M. and Ciufi at Ciufi's office in Irvington High School.

18. On the date of the incident Ciufi was responsible, as customary, for school-wide discipline and was scheduled to provided sixth period cafeteria coverage at 12:30 p.m. On that date he was in his office at 12:30 p.m. rather than in the cafeteria.

19. At approximately 12:30 p.m. during the sixth period, N.M. and her friend, R.M. proceeded to Ciufi's office to obtain a pass to return them to their sixth period class.

20. N.M. was scheduled to attend physical education during sixth period with Ms. Engle, a physical education teacher.

21. When N.M. first entered Ciufi's office he was dealing with approximately six students who had been involved in a verbal altercation in the gym.

22. After N.M. and R.M. appeared Ciufi sent some of the students back to their classrooms and directed that the remaining students be escorted to the holding room in the school.

23. Once N.M. and R.M. were alone with Ciufi, N.M. requested a pass to return to her classroom. She was instructed to wait and Ciufi asked her to remain.

24. Ciufi confirmed that N.M. was the last pass that he wrote during this particular transaction on that day.

25. Ciufi issued R.M. a pass and that student was escorted to her classroom leaving N.M. at Ciufi's office.

26. While alone in Ciufi's office and awaiting the pass N.M. began to write a letter and while writing the letter Ciufi told N.M. that he gets jealous when he "sees her with other guys."

N.M. attempted to leave, however, Ciufi took her left hand and began to rub it repeatedly. At this point, N.M. became apprehensive and attempted to leave. Ciufi explained to N.M. that he wished to purchase a video tape for M.H. and gave her ten dollars to do so telling her she could keep the change. N.M. attempted to leave the room. However, upon opening the door on several occasions, Ciufi closed it.

27. Ciufi took N.M.'s hand and kissed N.M. placing his tongue in her mouth.

28. Ciufi then took N.M.'s hand and forced her to feel his penis. At this point in time N.M. panicked and froze.

29. N.M. ultimately exited the office and was crying.

30. Subsequent to the incident N.M. proceeded to the R.O.T.C. room where she was observed crying and asked by another R.O.T.C. what was wrong. She then told R.M. what had occurred.

31. N.M. remained in school that evening because the R.O.T.C. students were escorting parents to classrooms at Back-to-School Night and was dressed in R.O.T.C. uniform.

32. Along with N.M. and R.M. as R.O.T.C. cadets participating were C.B., and K.J.

33. On that evening, after viewing N.M. as being upset C.B. asked why she was upset and she asked C.B. to stay with her because she was apprehensive of Ciufioif.

34. After the incident N.M. did not immediately tell her mother or her sister because she was scared and just wanted to forget what had occurred.

35. On December 3, 1992 was advised by R.M. that she should go to Sgt. Zeigler's office whom R.M. had told that N.M. had a problem to discuss.

36. N.M. shared the information regarding the incident with Ciufioif with Sgt. Zeigler.

37. During the discussion, Sgt. Zeigler observed N.M. crying and sobbing heavily.

38. After this meeting Sgt. Zeigler went to Mr. Joy's office who was the vice principal and met with him.

39. After being informed of the incident Joy told Zeigler that the student, N.M. should put the allegations in writing.

40. Zeigler returned to his office where N.M. was located and stated that Mr. Joy would not be able to do anything about the incident unless she prepared a signed written statement.

41. A signed written statement was presented describing the incident with Ciufioif.

42. Zeigler and N.M. then responded to Mr. Joy's office and were met by Anthony Pilone.

43. N.M.'s mother was asked to report to the school by Pilone by a telephone and Mr. Joy and Mr. Pilone questioned N.M. regarding the incident with Zeigler present. During this N.M. became upset and began to cry and Zeigler consoled N.M.

44. On several occasions both Pilone and Joy asked N.M. whether her statement was accurate and whether she was telling the truth. On both occasions N.M. responded that she was.

45. Ultimately, N.M.'s mother along with an Irvington police officer responded to the high school.

46. On different occasions Ms. Evelyn and Ms. Davion were present in the office. Davion discussed the information with N.M. and stated that it was apparent that something had happened.

47. West, who had been a counselor, responded but was told she was not needed.

48. Evelyn also noted that N.M. was visibly upset, crying and shaking during their discussion both subsequent to and while she was in Joy's office. In addition to that she noted N.M. to be withdrawn.

49. The matter was ultimately assigned to a DYFS investigator, Mary Carol Williamson.

50. Statements were ultimately taken, reports generated and a criminal complaint signed.

51. Subsequent to the incident N.M. noted a change in behavior of her friends as well as the manner in which teachers treated her and as a result felt the need to transfer to another school because she felt uncomfortable.

52. The criminal complaint in this case was ultimately presented to a grand jury who made a determination not to indict Ciufi for criminal conduct.

In addition to those facts which have been stipulated to above and form the operational facts in this case, I **FIND** the above recitation to be the operational facts in this case.

DISCUSSION

In this case the matter turns solely and exclusively on the credibility of the witnesses as observed in the hearing along with the other evidence presented. The burden upon the Board of Education is to prove the tenure charges by a preponderance of the credible evidence. (*School District of the City of Paterson v. Eddie Lee Harrell*, 186 S.L.D. 356, 358)

In this case the school district has, as demonstrated by the Findings of Fact above, proved the tenure charges by a preponderance of the credible evidence. It should be noted that the undersigned has had the opportunity to observe the witnesses in this case. Not only the testimony of N.M., who was a reluctant witness, but that of Ciufi himself. Not only was Ciufi's testimony not credible, as shown in the above findings, but his very demeanor added greatly to this determination. Ciufi fidgeted, perspired and was evasive in his answers and the totality of the circumstances

regarding his demeanor as well as contradictory answers given by him led the undersigned to determine that he did not make a credible witness.

In addition to this discussion of credibility it should be noted that the undersigned was, at best surprised, and at worse appalled at the idea that an allegation of institutional abuse would be internally investigated by the school without referral either to the Division of Youth and Family Services or the local police department. While it is true that the matter was subsequently referred, individuals with no training in investigation or in the manner in which occurrences such as these should be treated, dealt with each of the individuals and conducted an "investigation." These actions may also be considered intimidating to students when individuals who are not outside parties act in an investigative capacity and may also have a chilling affect upon the reporting of actions such as this. Having said this the undersigned does not attribute any adverse or improper motive to what occurred but comments merely upon the fact that this "internal investigation" did occur.

Having found that the tenure charges in this case have been sustained by the burden applicable in an administrative hearing, this matter is not swayed in any way by the fact that the grand jury chose not to indict the respondent in this case. Grand jury proceedings are secret in nature and there is no indication as to what information was presented to them for them to reach that conclusion. The return of a no bill or a lack of indictment by the grand jury is not synonymous with a finding that events did not occur when testimony is taken in an administrative proceeding.

There is no question that respondent, in his position, had supervisory control of N.M. by virtue of his employment and, although not directly the advisor for her class still stood in a position in which that supervisory control existed. This is reinforced by the fact that N.M. had to request a pass from him to return to her class.

The conduct which has been sustained in this case and the facts that have been found constitute conduct unbecoming. The remaining question is whether or not the conduct which has been found to be unbecoming and substantiated as to the specifics of the charge is sufficient to require Ciufi's dismissal.

Teachers are in a position of trust with respect to students in schools in which they serve. Contact of a sexual nature between a teacher and a student is a violation of the pupil-teacher relationship which is traditionally regarded as a very special bond. Such contact cannot and will not be tolerated. Additionally the egregious nature of this conduct shows that a single instance of misconduct as alleged here is sufficient to remove a teacher. It shows unfitness to hold that position and to deal with students.

CONCLUSION

Taking the totality of the circumstances and weighing the aggravating and mitigating circumstances as well as the teacher and his prior record I **CONCLUDE** that dismissal and removal of respondent's tenure is the only appropriate remedy in this case.

ORDER

It is hereby **ORDERED** that the tenure charges have been sustained and that respondent be **DISMISSED** and his tenure be forfeited for engaging in conduct unbecoming a teacher.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/18/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

7/23/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

am/mh(FV)mxl

APPENDIX

Witnesses

For petitioner:

N.M.
Ethel Davion
Michelle Evelyn
Anthony Zeigler (by way of videotaped testimony
C. B.
Mary Williamson
Jean Nigro

For respondent:

Albert Joy
Janice West
Anthony Pilone
Nicholas A. Ciufi, III

Exhibits

J-1 Joint stipulation of facts
J-2 Daily schedule
J-3 Protective order for closed hearing

P-1 Two-page written statement of N.M. produced on December 3, 1992 regarding December 2, 1992 incident with Nicholas Ciufi

P-2 Two-page typewritten report of Michelle D. Evelyn, SAC, dated December 3, 1992 regarding incident involving N.M. and Nicholas Ciufi

P-3 One-page Division of Youth and Family Services (DYFS) initial response incident report dated December 3, 1992

P-4 Two-page DYFS critical incident report dated December 4, 1992

P-5 One-page DYFS child abuse/neglect report dated January 8, 1993

P-6 One-page correspondence from Mary Carroll-Williamson, DYFS investigator to Nicholas Ciufi, regarding request for interview dated December 11, 1992

P-7 Two-page correspondence from Susan Manion, Administrator, DYFS, to Rodgers M. Lewis dated June 2, 1993 regarding finding of sexual abuse

P-8 Two-page correspondence from Susan Manion, Administrator, DYFS to J.M. (mother of minor) dated June 2, 1993 regarding finding of sexual abuse

P-9 Two-page correspondence from Susan Manion, Administrator, DYFS to Nicholas Ciufi dated June 2, 1993 regarding finding of sexual abuse

P-10 Thirteen-page DYFS institutional abuse and neglect report prepared by DYFS investigator Mary Carroll-Williamson regarding December 2, 1992 incident involving N.M. and Nicholas Ciufi

P-11 Four-page major incident report, Irvington Police Department and additional information sheet dated December 3 and December 4, 1992

P-12 One-page Miranda warning signed by Nicholas Ciufi dated December 4, 1992

P-13 One-page typewritten statement of N.M. signed by parent J.M. and N.M. dated December 4, 1992

P-14 Two-page typewritten and signed statement of Nicholas Ciufi, dated December 4, 1992

P-15 Transcript of videotape deposition of Anthony Zeigler

P-16 Videotape deposition of Anthony Zeigler

P-17 (Id. only) photocopy of photograph

P-18 Hand drawn diagram

P-19 Irvington public schools schedule for N.M.

R-1 Two-page typewritten statement entitled Victim Impact Statement, dated April 7, 1993 signed by N.M.

R-2 Letter to Nicholas Ciufi from Pamela McCauley-Puchel, Essex County Prosecutor's Office, dated January 24, 1994 concerning Grand Jury disposition of matter involving Nicholas Ciufi (2 pages)

R-3 Letter to Nicholas Ciufi from John D'Angelo, board secretary, Irvington Board of Education, dated February 3, 1994, reinstating him as high school assistant principal effective January 24, 1994

R-4 Letter to John D'Angelo from Nicholas Ciufi dated May 16, 1994 concerning the filing of tenure charges

R-5 (Id. only) Letter to Nicholas Guarino from Sanford Amdur, Esq., dated April 12, 1993 concerning investigation in *State v. Ciufi*, with attachments (3 pages)

R-7 Ciufi handwritten statement

OAL DKT. NO. EDU 6022-94

IN THE MATTER OF THE TENURE	:	
HEARING OF NICHOLAS CIUFI,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4. To the extent the parties' submissions constitute what is essentially a verbatim recitation of those arguments raised before the ALJ, said arguments are not summarized below.

Respondent excepts to the ALJ's finding that he was not a credible witness. He further challenges the ALJ's characterization of his demeanor at the hearing asserting that, since his 25-year career was at stake, "[a]nyone in his position would appear nervous.***" (Respondent's Exceptions at p. 2) As to his perspiring during the hearing, petitioner asserts that the hearing room was extremely warm. That the ALJ implies respondent's answers to have been contradictory and evasive with respect to the events of December 2, 1992, is also, according to respondent, incorrect. Respondent emphasizes that the events took place three years prior to the hearing, and remembering specific details was difficult. (*Id.* at p. 3) Moreover, respondent

affirms that the ALJ made "an issue" of his statement that he gave N.M. a pass to return to gym class taught by Ms. Jacobs, rather than Ms. Engle, the teacher noted on N.M.'s report card. Respondent contends, "There was nothing in the record as to who the actual teacher was. Both were teachers of physical education. Who the teacher was is not a material fact.***" (*Id.*) Lastly, respondent asserts that the ALJ's finding on page 24 of the initial decision that he acknowledged on cross-examination that he had not before noted that N.M. was accompanied by her friend on the first visit to his office is an inaccurate statement, which is unsupported by the record. (*Id.* at pp. 3, 4)

Respondent next excepts to the ALJ's finding that N.M. is a credible witness. Respondent contends that this finding is not supported by the record and argues that the ALJ does not heed the words of the Commissioner in *Palmer v. Audubon Bd. of Ed.*, 1939-49 *S.L.D.* 183, 188, stating that the testimony of children must be used with extreme care. (Respondent's Exceptions at p. 7) Here, respondent attests that the testimony of N.M. should not be the basis for destroying his professional career marked, heretofore, by an unblemished record. Respondent recounts the testimony of Ethel Davion who, upon knowing respondent, avers that she finds it difficult to believe the charges, as stated, actually occurred. (*Id.*)

Finally, respondent excepts to the ALJ's reliance upon the DYFS report which, he contends is "***too flawed to be the basis for dismissing Mr. Ciufi from his tenured position.***" (*Id.*)

In reply, the Board counters that the ALJ properly determined that N.M. was a credible witness, but that respondent was not. The Board also asserts that the ALJ properly relied upon the DYFS report in this matter.

Upon careful and independent review of the record in this matter, which included the transcripts from the hearing at the OAL,[1] the Commissioner finds no basis either in the transcripts or in the record as a whole to challenge the ALJ's credibility determinations and resultant conclusions and, therefore, concurs that the Board has established by a preponderance of credible evidence that respondent has engaged in unbecoming conduct. (Initial Decision at p. 33) In this regard, the Commissioner finds respondent's exception arguments to be unpersuasive.

As to the appropriate penalty, the Commissioner has considered respondent's apparently unblemished record with the Board, but nonetheless determines that the charges established against him are "sufficiently flagrant" to warrant dismissal. *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (*Sup. Ct.* 1943); aff'd 131 *N.J.L.* 326 (*E. & A.* 1944). See also, *In the Matter of the Tenure Hearing of Ward Campbell and Ward Campbell v. Board of Education of the Princeton Regional School District*, Superior Court of New Jersey, Appellate Division, A-6280-92T3, decided May 17, 1995. (Even a single act of misconduct may be sufficient to terminate a tenured teacher.) The Commissioner further finds that respondent's actions in this matter evidence a lack of self-restraint and controlled behavior which are compelled by his position as a professional employee in a public school system holding great influence over the lives of children. See *In re Sammons*, 1972 *S.L.D.* 302, 321. This is particularly so in that respondent, as an assistant principal, has a higher responsibility as a building leader.

Notwithstanding the decision herein, the Commissioner is nevertheless concerned by the manner in which the Board initially handled the allegation of sexual assault in this case.

[1] Hearing dates were October 10, 11, 13, 18, and December 13, 1995.

Therefore, the Board is directed to review and update, where necessary, its policy and procedures concerning allegations of child abuse and neglect, adopted pursuant to *N.J.A.C.* 6:29-9.1 *et seq.*, and to submit the policy and procedures to the Office of the Essex County Superintendent for review within 120 days of the date of this decision.

Accordingly, the initial decision of the OAL, directing that respondent be dismissed from his tenured position as an assistant school principal is adopted for the reasons expressed therein. This matter shall be forwarded to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6. A copy of this decision shall also be forwarded to the Office of the Essex County Superintendent, who shall ensure compliance with the Commissioner's direction regarding revision of policies and procedures.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 3, 1996
Date of Mailing, September 4, 1996

371-96

EDU #6022-94
C # 371-96
SB # 69-96

IN THE MATTER OF THE TENURE :
HEARING OF NICOLAS CIUFI, SCHOOL : STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP OF : DECISION
IRVINGTON, ESSEX COUNTY. :

Decided by the Commissioner of Education, September 3, 1996

For the Petitioner-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nicholas Celso, III, Esq., and Joseph R. Morano, Esq., of Counsel)

For the Respondent-Appellant, New Jersey Principals & Supervisors Association (Wayne J. Oppito, Esq., of Counsel)

On April 29, 1994, the Board of Education of the Township of Irvington (hereinafter "Board") certified tenure charges of unbecoming conduct against Nicholas Ciufi (hereinafter "respondent"), a tenured teaching staff member serving as an assistant principal. Those charges alleged that respondent had kissed a student, N.M., in his office and placed her hand on his genitals.

On July 18, 1996, an Administrative Law Judge ("ALJ") found that the Board had demonstrated the charges by a preponderance of the credible evidence. The ALJ concluded that respondent's conduct was sufficiently flagrant to warrant his dismissal from his tenured employment.

On September 3, 1996, the Commissioner of Education adopted the findings and conclusions of the ALJ and directed that respondent be dismissed from his tenured

July 1, 1998

position. The Commissioner also directed the Board to review and update, where necessary, its policy and procedures concerning allegations of child abuse and neglect.

Respondent filed the instant appeal to the State Board.

After an exhaustive review of the record, including the transcripts of the hearing held in the Office of Administrative Law in this matter, we affirm the decision of the Commissioner for the reasons expressed therein. In so doing, we concur fully with the ALJ that the student, N.M., was a credible witness and note, in addition, that there was testimony from both a student and members of the school's staff that N.M. was visibly upset, shaking and crying after the incident. Tr. 10/11/95, at 45, 85; exhibit P-15, in evidence, at 23.

Consequently, we agree with the Commissioner that the Board met its burden of demonstrating the tenure charges against respondent by a preponderance of the credible evidence, and, under the circumstances, we affirm the Commissioner's determination to dismiss respondent from his tenured employment.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

373-96

373-96

JULIA ANN FULLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

September 5, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 883-94

AGENCY DKT. NO. 404-12/93

JULIA ANN FULLER,

Petitioner,

v.

BOARD OF EDUCATION,

CITY OF ORANGE,

Respondent.

Vickie A. Donaldson, Esq., for petitioner
(Banks Erlanger, attorneys)

Connie Bentley McGhee, Esq., for respondent
(Ashley and Charles, attorneys)

Record Closed: October 19, 1995 Decided: December 4, 1995

BEFORE **DIANA C. SUKOVICH**, ALJ

PROCEDURAL HISTORY

On December 2, 1993, Julia A. Fuller (Fuller or petitioner) filed a petition with the Department of Education (DOE) naming the City of Orange (Orange) Board of Education (Board or respondent), as well as Bernice Davis (Davis) and Thomas Beese (Beese), respondent's Superintendent Of Schools and Director of Student Services, respectively, as respondents and contesting her termination of employment by the

Board. Respondent filed an answer on January 18, 1994. The DOE transmitted the matter to the Office of Administrative Law (OAL) on January 31, 1994 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Conferences were conducted throughout the proceedings. Several hearing dates were adjourned at the request of the parties for various reasons. Peremptory hearing dates were thereafter scheduled for February 16 and 17, 1995. In the interim, respondent filed a motion for summary decision, which was subsequently denied, and petitioner's counsel filed a letter stating an intention to file a motion to be relieved. Oral argument on the latter request was scheduled for February 16, 1995. The parties appeared on that date and conferred. As a result, Fuller's counsel withdrew the request to be relieved, and the parties reached a tentative resolution of the matter. The hearing scheduled for February 17, 1995 was adjourned.

The Board subsequently rejected the proposed settlement agreement, and a hearing was scheduled for July 14, 1995. The parties appeared on that date, conferred, and agreed that the matter could be decided on the basis of stipulations. The parties agreed on the record as to the stipulated facts. In addition, petitioner moved to remove Beese and Davis as respondents, which motion was granted.

A briefing schedule was established, which schedule was subsequently extended at the request of the parties. Respondent and petitioner filed initial briefs on August 11, and August 23, 1995, respectively. The Board filed a supplement to its initial brief on August 14, 1995. The briefing schedule was extended to allow respondent to file a reply to Fuller's initial brief, which was submitted subsequent to the scheduled deadline. The Board subsequently requested and received extensions for the filing of its reply brief. The Board filed a reply on October 19, 1995, on which date the record was closed.

NATURE OF THE CASE

Fuller was employed as a social worker by respondent for several years. In July 1993, the Board acted to terminate her employment. Fuller initially raised several arguments in support of her position that the Board's action should be reversed, that she should be reinstated, and that she should be deemed to have tenure with respondent. Fuller's petition contained three counts: Count 1 alleged violations by respondent of the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 to -21, relevant to proceedings conducted by respondent pertaining to Fuller's status. Count 2 alleged that respondent acted to terminate Fuller's employment even though petitioner had never received unsatisfactory evaluations and that respondent acted to terminate Fuller, on approximately July 13, 1993, without the benefit of notice to petitioner nor a hearing. Fuller argued in this respect that the Board's action violated her due process rights under the United States Constitution. Count 3 of the petition argued procedural irregularities, with emphasis on a proceeding conducted by the Board on September 28, 1993, in violation of statutes and regulations applicable to nontenured school employees. Respondent in its answer generally denied all of the allegations.

On July 14, 1995, the parties agreed that resolution of the issues turned on what is deemed to be the effective date of termination of petitioner and the date of any notice of such termination given to Fuller by the Board. More specifically, the dispute focuses on whether she had gained tenure prior to her actual termination. If she did, it is clear that the Board did not adhere to statutory provisions regarding the procedures for termination of tenured employees and that Fuller would have to be reinstated.

In her briefs, petitioner does not pursue her claims regarding argued OPMA violations. These claims are therefore not addressed herein.

STIPULATIONS

The parties stipulated to the following facts:

1. Fuller was hired by the Board on or about September 1, 1990 as a nontenured social worker.

2. On or about July 8, 1993, respondent sent petitioner a "60-day notice" letter advising her of the Board's intent to include petitioner on its agenda for Tuesday, July 13, 1993.

3. At the July 13, 1993 meeting, the Board terminated Fuller from employment, effective October 31, 1993.[1]

4. By letter dated July 15, 1993, the New Jersey Education Association (NJEA) representative for Fuller sent a letter to the Board requesting reasons for petitioner's termination.

5. At its July 27, 1993 meeting, the Board first rescinded its July 13, 1993 action which terminated petitioner, and secondly, terminated Fuller, effective immediately.

6. By letter dated July 28, 1993, the Board informed Fuller that they would be sending a check in the amount of $7,054.50 to compensate for sixty days' pay, consistent with the contract.

7. By letter dated August 6, 1993, Fuller wrote the Board and requested a hearing regarding her termination.

8. By letter dated August 19, 1993, Fuller acknowledged receipt of sixty days' pay and requested the social worker stipend of $1,895. A social worker stipend is an amount over and above the regular rate of pay given to social workers because they normally work a later day than teachers, until 4:00 p.m. It is an extended day of pay for all child study team workers.[2]

9. By letter dated August 24, 1993, Assistant Superintendent Michael Cohn indicated that a stipend would not be paid to Fuller. This letter was sent to petitioner.

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[1]Petitioner's statement of the stipulations in her initial brief reflects an effective date of October 1993, while respondent's articulation of the stipulations in the Board's initial brief states an effective date of October 31, 1993. This judge's notes are consistent with the latter date.

[2] The parties stipulated that the date of Fuller's letter was August 19, 1993. However, the documentary evidence indicates that the actual date was August 16, 1993. (Ex. R-10).

10. By letter dated September 9, 1993, the NJEA representative requested that the social worker stipend be paid to Fuller, consistent with the union contract.

11. By letter dated September 22, 1993, Board counsel sent a letter to Fuller, indicating that petitioner could have a termination hearing before the Board on September 28, 1993.

12. On September 28, 1993, at a meeting of the Board, respondent awarded Fuller her social worker stipend in the amount of $397, prorated for 60 days. The period used to calculate the stipend was September 1, 1993 through October 31, 1993. During this period, it was agreed, Fuller did not work or perform any services for the Board.

13. Fuller did not work during September 1, 1993 through October 3, 1993. She was not required to work 60 days until her termination date by the Board. Petitioner was paid by respondent through September 27, 1993, under the 60-day notice provision issued July 27, 1993. Fuller received regular pay, *i.e.,* pay other than the stipend, through September 27, 1993.

14. By letter dated September 29, 1993 to Fuller, the Board agreed to pay petitioner the stipend.

FINDINGS OF FACT

Based upon a review of the documentary evidence, I **FIND** the following to be additional facts.

The July 8, 1993 letter from Davis, respondent's Superintendent of Schools, to petitioner specifically advised Fuller that the Board would discuss matters pertaining to petitioner which "could adversely affect your employment with the Orange Board" and that the discussion would take place in closed, executive session, during a special meeting of the Board to be held at a designated location, commencing at 6:30 p.m., on July 13, 1993. The letter also indicated that if petitioner wished matters pertaining to her employment to be publicly discussed, she had to notify Davis, in writing, no later than Monday, July 12, 1993 and if she did not, petitioner was deemed to have waived her right to compel public discussion. (Ex. R-7).

Board members did not discuss Fuller during the public session held on July 13, 1993. The minutes of the closed session state that public notice of the July 13, 1993 public session had been given to the public by adoption of a resolution at a public meeting held on June 22, 1993, that the closed session would be held to discuss personnel items, legal matters, negotiations-contracts, and evaluations, and that at the appropriate time, the general public would be informed as to the matters under discussion. The minutes of the closed session indicate that Fuller had been given what was referred to as a "Rice Letter," with an option to have her case heard by the Board in closed or public session; that petitioner had informed the Board that she wanted her case heard in closed session; that Beese, respondent's Director of Special Services, informed the Board of poor performance and lack of follow-up in evaluating and placing students by petitioner; that Mary Mitchell (Mitchell), an NJEA representative, and Robert Fields (Fields), an Orange Education Association representative, were present at the meeting and addressed the Board regarding the matter; and that Fuller addressed the Board, informing them of the procedures utilized to evaluate and place students; and that the Board discussed the specifics of the case. The minutes of the public session, in a section regarding terminations, stated that Fuller was terminated, effective October 31, 1993, for reasons pertaining to her performance.

The July 15, 1993 letter on behalf of petitioner was sent by Mitchell to Lee, the Board's Secretary.

The minutes of both the closed and public portions of the Board meeting conducted on July 13, 1993 were approved by respondent at the meeting held on July 27, 1993. The minutes of the latter meeting reference a "RESCINDED TERMINATION" pertaining to Fuller, which had been effective October 31, 1993, as well as a "TERMINATION" of petitioner effective July 28, 1993. The latter notation contains the following comment: "(60 DAYS 9/27/93)" (Ex. R-3, p. 21). A closed session was also conducted on July 27, 1993. Notice of the closed session had been given by adoption of a resolution at the public meeting held on July 13, 1993. The minutes of the closed session of July 27, 1993 state that the closed session was held to discuss personnel matters, legal matters, negotiations-contracts, and

evaluations. The minutes also indicate that petitioner's request for a statement of the reasons for her termination was discussed.

The July 28, 1993 letter to Fuller, which was sent by Davis, advised petitioner that the Board, on July 27, 1993, voted to terminate petitioner's employment "due to performance, effective immediately." (Ex. R-9A).

By letter dated August 18, 1993, counsel for the Board provided Mitchell with a statement of the reasons for petitioner's termination, referencing an alleged failure by Fuller to complete a social history for classified students and concluding that the Board had approved a recommendation to terminate petitioner.

By letter dated August 30, 1993, respondent's counsel responded to Fuller's letter of August 6, 1993, advising that the Board was then considering dates on which to hold a hearing and concluding "Your continued patience in this matter is greatly appreciated." (Ex. P-3)

The minutes of the closed session conducted by respondent on September 28, 1993 indicate that public notice of that session was given by adoption of a resolution at a public meeting held on September 14, 1993, that the closed session would be held to discuss personnel items, legal matters, negotiations-contracts, and evaluations, and that at the appropriate time, the general public would be informed of the matters discussed. The minutes also reflect that petitioner was invited to attend "for an informal hearing" in response to her request for the reasons for her termination; that petitioner and Mitchell addressed the Board regarding petitioner's opposition to her termination; that the Board discussed their presentations; and that respondent sustained its previous action terminating petitioner. (Ex. R-6, p.1). The minutes of the public session of the meeting conducted on September 28, 1993 reflect that the Board approved a "TERMINAL PAY ADJUSTMENT" for petitioner and referenced petitioner as a "Social Worker": Student Services (Term). (Board Agenda 7/27/93) (Ex. R-5, p. 52).

The September 29, 1993 letter to petitioner, which was sent by Davis, advised Fuller of respondent's action on September 28, 1993 approving a "Terminal Pay Adjustment," effective September 1, 1993 through October 31, 1993. (Ex. R-13).

Fuller was evaluated on April 27, 1993, which evaluation was a final one for the 1992-93 school year. Her performance was rated as either strong or effective in all areas evaluated. The written comments were complimentary. Recommendations were to continue petitioner's employment and to grant tenure.

Petitioner was observed on April 29, 1993. Her performance in all areas indicated were rated as strong or effective.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies and disputes arising under the local school laws. *N.J.S.A.* 18A:6-9.

Tenure attaches after employment in a district by a local board for three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or the equivalent of more than three academic years within a period of any four consecutive years. *N.J.S.A.* 18A:28-5 (Supp. 1995). Tenured employees shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or unbecoming conduct and then only in a prescribed manner. *Ibid.* Specified procedural requirements are applicable to the discipline of tenured individuals. *N.J.S.A.* 18A:6-10 to -18.1.

Applicable statutory provisions address the status of nontenured school employees. On or before May 15 of every year, a local board of education is required to give each nontenured teaching staff member continuously employed by it since the

preceding September 30 either a written offer of a contract for employment for the next succeeding year, providing for at least the same terms and conditions of employment, but with such increases in salary as may be required by law or policies of the board of education, or a written notice that such employment will not be offered. *N.J.S.A.* 18A:27-10 (Supp. 1995).

If a board of education does not give a nontenured teaching staff member either an offer of employment contract for the next succeeding year or a notice that such employment will not be offered within the required time, the board of education is deemed to have offered to that individual continued employment for the next succeeding school year upon the same terms and conditions, but with such increases in salary as may be required by law or policies of the board of education. *N.J.S.A.* 18A:27-11.[3] However, if a nontenured teaching staff member desires to accept employment, he/she shall notify the board of education of such acceptance, in writing, on or before June 1 of any given year, in which event such employment shall continue. In the absence of such notice of acceptance, the applicable statutory provisions regarding the employment status of nontenured employees do not apply. *Id.* at §12. In general, if the employment of a teaching staff member is terminated on notice, pursuant to a contract entered into with a board of education, it is within the board's option whether or not the individual in question shall continue to perform his/her duties, during the period between the giving of the notice and the date of termination of employment thereunder. *Id.* at §27-9.

Respondent did not provide Fuller with a written notice that her employment would not be offered for the 1993-94 school year prior to May 15, 1993, as required by *N.J.S.A.* 18A:27-10. Arguably, petitioner therefore had continued employment status, pursuant to *N.J.S.A.* 18A:27-11. However, petitioner cannot obtain the benefits of such

[3] "Teaching staff members" is defined broadly to include employees in positions which require them to hold appropriate certificates. *N.J.S.A.* 18A:28-5 (Supp. 1995). *N.J.A.C.* 6:3-4.1(g). A school social worker endorsement is required for service as a school social worker in any school district in this State. *N.J.A.C.* 6:11-11.8(a). Petitioner is therefore a "teaching staff member" pursuant to the applicable statutory provisions, including those relevant to the status of nontenured individuals.

status because she did not provide written notice of an intent to continue employment, as required by *N.J.S.A.* 18A:27-12.

A nontenured teaching staff member shall be observed and evaluated at least three times during each school year but not less than once during each semester. Evaluations must occur before April 30 of each year and cover the period between April 30 of one year and April 30 of the succeeding year, except in the first year of employment. Each evaluation shall be followed by a conference, the purpose of which is to make recommendations regarding reemployment, identify any deficiencies, extend assistance for correction, and improve professional competence. *N.J.S.A.* 18A:27-3.1 (Supp. 1995). *See* also, *N.J.A.C.* 6:3-4.1. In addition, every nontenured staff member shall be subject to a written annual evaluation. *N.J.A.C.* 6:3-4.1(d).

Any teaching staff member who receives notice that a contract for the succeeding year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment, which statement shall be provided in writing within 30 days after the receipt of such request. *N.J.S.A.* 18A:27-3.2. Whenever a nontenured teaching staff member has requested and received such a statement, he/she may request, in writing, "an informal appearance" before the board of education, which request must be submitted within ten calendar days of receipt of the board's statement of reasons. *N.J.A.C.* 6:3-4.2(a). Such "informal appearance" shall be scheduled within 30 days from receipt of the board's statement of reasons. *Id.* at §(b). A nontenured teaching staff member's appearance before a board "shall not be an adversary proceeding." The purpose is to allow the staff member to convince board members to offer reemployment. *Id.* at §(c). The local board of education has discretion to determine a reasonable length of time of such proceeding, depending on the specific circumstances. *Id.* at §(d). The board shall provide "adequate" written notice to the employee regarding the date and time of the appearance. *Id.* at §(e). The nontenured teaching staff member may be represented by counsel. *Id.* at §(f). He/she may present witnesses, but such witnesses need not present testimony under oath and shall not be cross-examined. Witnesses shall be called into the meeting to address the board one at a time and shall be excused after making their statements. *Id.* at §(g).

The proceeding may be closed to the public pursuant to *N.J.S.A.* 10:4-12(b)(8). *Id.* at §(h). Within three days following the informal appearance, the local board of education shall notify the affected staff member, in writing, of its final determination. Notification may be delegated to the superintendent of schools or board secretary. *Id.* at §(i).

The July 15, 1993 letter requesting reasons for Fuller's termination was timely submitted, whether measured from the July 8, 1993 board letter or the July 13, 1993 board meeting. The August 18, 1993 response was late by several days. The termination hearing was held on September 28, 1993. The September 28, 1993 meeting was not timely scheduled, whether the operative date is August 6, 1993 or August 18, 1993.

"[A]bsent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." *Dore v. Bedminster Tp. Bd. of Ed.,* 185 *N.J. Super.* 447, 456 (App. Div. 1982) (*Dore*). In light of its "virtually unlimited discretion in hiring or renewing nontenured teachers," a local board of education can base a decision not to reemploy on matters outside of the employee's evaluations. *Id.* at 453. A statement of reasons for such non-reemployment does not have to be supported by evaluations of the individual in question. *Dore* at 456. In addition, a failure by a local board to evaluate an employee in accordance with *N.J.S.A.* 18A:27-3.1 is not a sufficient reason to afford the employee reinstatement or financial reward. *Dore* at 455.

Boards of education have broad discretionary authority in the granting of tenure. *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* 236, 241 (1974) (*Donaldson*). A local board's decision not to grant tenure does not have to be based on unsatisfactory classroom or professional performance; there are many unrelated valid reasons why a board may conclude that tenure should not be granted. *Donaldson* at 241. However, a local board of education may not refuse to hire an individual because of his/her membership in a labor union or his/her exercise of constitutional rights. *Donaldson* at 242. Constitutionally impermissible grounds for non-reappointment include

determinations based on race or participation in "protest movements." *Ibid.* However, the requirement that reasons for non-reemployment be provided does not "in nowise curb the breadth of the board's discretionary authority to decide whether any particular teacher should or should not be reengaged." *Donaldson* at 245-46.

The Court in *Donaldson* noted with approval a prior determination by the Commissioner that action by a local board to not reemploy a nontenured individual could be set aside if it were 'arbitrary, unreasonable, capricious or otherwise improper' or based on "'statutorily proscribed discriminatory practices, *i.e.,* race, religion, color, etc.,'" or on "'frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served'" and that the burden of sustaining an appeal was on the teacher. A "'bare'" allegation of arbitrariness is "'insufficient to establish grounds for action.'" *Donaldson* at 247. The Court also noted with approval a prior determination of the Commissioner to not enter into a reevaluation of the teacher's classroom performance and teaching competence. *Donaldson* at 249.

A request for damages for non-reappointment, for whatever reason except the denial of due process, must be based on a claim to the right of reappointment. *Bd. of Ed., Tp. of Wyckoff v. Wyckoff Ed. Ass.,* 168 *N.J. Super.* 497, 500 (App. Div. 1979), *certif. den.* 81 *N.J.* 349 (1979) (*Wyckoff*). A hearing conducted subsequent to a request for such by the individual in question, after the employee has been given a statement of the reasons for non-reappointment, which hearing even allowed the employees to be heard in order to convince the board to offer reemployment comports with due process requirements. *Wyckoff* at 500-501. The right not to renew the contracts of nontenured employees is a "management prerogative" of the local board of education, and a board is not obligated to renew the contracts of all nontenured teachers "who do a 'good job.'" *Wyckoff* at 501.

As respondent argues, the facts in the current case are substantially similar to those in *Winston v. Jersey City School District*, 94 *N.J.A.R.* 2d. 41 (Dept. of Ed.) (*Winston*). Winston sought a determination that he had tenure as a school psychologist with the State-operated school district of the City of Jersey City and that

this termination, effective January 13, 1992, violated his tenure rights. By letter dated January 10, 1992, petitioner, who was initially hired effective February 27, 1989 and entered into subsequent reemployment contracts for the following school years, was advised that his employment would be terminated effective at the conclusion of January 13, 1992. He received 60 days' termination pay, in accordance with a contract which required 60 days' notice. Petitioner would have gained tenure during the 60-day period following the notification that he was to be terminated. (*Id.* ar 42). The presiding administrative law judge (ALJ) determined that Winston did not achieve tenure in the position of school psychologist. In doing so, in an extensive discussion, he did not find persuasive arguments of due process violations pursuant to the Fourteenth Amendment, referencing *Board of Regents v. Roth*, 408 *U.S.* 514, 92 *S. Ct.* 2701, 33 *L.Ed. 2d.* 548 (1972) (*Roth*) and *Perry v. Sindermann,* 408 *U.S.* 593, 92 *S. Ct.* 2694, 33 *L.Ed. 2d.* 570 (1972) (*Sindermann*). The Commissioner, concurring with the ALJ's analysis, adopted the initial decision. (*Id.* at 44).

The ALJ as well as the Commissioner, relied in *Winston* on *Canfield v. Bd. of Ed. of Pine Hill Boro*, 97 *N.J. Super.* 483 (App. Div. 1967), *rev'g on dissent,* 51 *N.J.* 400 (1968) (*Canfield*). The board of education appealed from a final decision of the State Board of Education, affirming a decision of the Acting Commissioner that petitioner Canfield had tenure as a teacher and was entitled to immediate reinstatement. Four written contracts of employment were entered into between the board and Canfield, commencing with one dated December 12, 1962. The fourth contract, dated April 20, 1965, provided for Canfield's employment from September 1, 1965 to June 30, 1966 and contained a clause pursuant to which the parties were required to give 60 days' written notice of an intent to terminate. Prior contracts contained similar provisions, except they provided for 30 days' notice. On November 15, 1965, the board sent Canfield a letter, notifying her that as of November 15, 1965, the Board was terminating her teaching contract, effective immediately, with a provision of two months' pay. Canfield returned the check, asserting she had tenure. The Commissioner and the State Board, ruled that petitioner had tenure. The board disputed the Commissioner's ruling that Canfield's employment did not terminate on November 15, 1995 but 60 days thereafter. The majority of the appellant division affirmed. *Canfield*, 97 *N.J. Super.* at

485-487. The New Jersey Supreme Court reversed for reasons expressed in the dissenting opinion of Judge Gaulkin, *Canfield* at 51 *N.J.* 401. He stated in part:

> It seems to me that tenure and contract are two different concepts; tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is a breach of an employment contact, which, if not breached, would have extended to a date which would have given tenure. [citation omitted]
>
> . . .
>
> Finally, I find nothing in the contact which justifies the conclusion reached by my Brothers that the dismissal was not effective on the date the notice of dismissal was given. If this were a dispute arising out of the breach of the contract itself in which the question of the date of termination of the contract became important, it might be held that the termination was not effective until 60 days after the notice of dismissal was given. Examples of such cases are those involving cancellation of insurance policies or similar contacts, . . . [citation omitted] [b]ut here we are concerned not with the contract which was breached, but with its status of the plaintiff -- *i.e.,* tenure. It seems to me that the dismissal immediately stopped the running of the time to tenure. The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved. I do not think a municipality should be trapped into tenure by the construction of words which neither party expected to have that meaning. *Canfield*, 97 *N.J. Super.* at 490-493.

Judge Gaulkin in his analysis referenced *N.J.S.A.* 18:13-11. *Id.* at 491.

The burden of proof in the instant case is on petitioner. *Donaldson, supra*. I am persuaded that she has not met her burden.

Although the reasons for the Board's action rescinding the July 13, 1993 termination are not clear from the record, it is apparent that the Board acted to terminate Fuller at its July 27, 1993 meeting, effective immediately, with the provision of 60 days' notice. As respondent argues, petitioner received 60 days' termination pay. I am persuaded in this respect by the reasoning of *Canfield* and *Winston* that she was terminated effective July 28, 1993, and the fact that she subsequently received termination pay for the following 60-day period is not determinative. Nor is the fact that Fuller would have gained tenure during the 60-day period following notification of

termination if the Board action in question had not been taken. Fuller, in fact, acknowledged her termination by letter dated August 16, 1993, at which time she requested the social worker's stipend. The fact that the Board, for whatever reason, subsequently agreed to pay petitioner a social worker stipend, which was calculated to pay Fuller for the 60-day termination notice period, does not change the fact that she was terminated by Board action on July 27, 1993. This conclusion is supported by the fact that it is within a local board's discretion whether to continue the provision of services subsequent to notice of termination, *N.J.S.A.* 18A:27-9, which provision, as noted hereinabove, was referenced by Judge Gaulkin in *Canfield*, *supra*.

I am also persuaded that the Board complied with the requirements to provide a statement of reasons, as well as the provision of a hearing, which proceeding, as discussed hereinabove, was not required to be an adversarial one. As found, the Board allowed petitioner and union representatives to make presentations, in efforts to reverse the Board's determination. The proceedings satisfied due process requirements. I am not persuaded, in this respect, by Fuller's reliance on *Roth* and *Sindermann*, for the reasons stated in *Winston, supra*. *Dore* supports a conclusion that the fact that the statement of reasons and the September meeting were not timely should not result in reinstatement.

In addition, I am persuaded that petitioner has not demonstrated that the Board's decision to terminate her employment was arbitrary, capricious, or unreasonable nor based on prohibited rationales. As discussed hereinabove, local boards of education have broad discretion in making determinations on retention of nontenured employees, such determinations do not have to be directly based on the evaluation of such individuals, and even a failure to not strictly comply with provisions regarding evaluations or observations will not result in reinstatement. *Donaldson, supra; Dore, supra; Wyckoff, supra*. The record is devoid of any inference that the Board terminated Fuller for prohibited reasons. In addition, the record, as evidenced in the above findings of fact, reflects consideration by the Board of Fuller's performance of her duties vis-à-vis classified students. I am persuaded that the Board's rationale for its determination was not unreasonable.

The fact that the Board subsequently conducted an informal proceeding in September 1993 did not nullify its action of July 27, 1993 terminating petitioner. If Fuller had not requested an opportunity to appear before the Board, a subsequent proceeding would not have been required. The purpose of the September proceeding was to give Fuller an opportunity to try to persuade the Board to reverse its prior action, which efforts were not successful. Subsequent reimbursement to Fuller was for the 60-day period subsequent to the Board action terminating her, not reimbursement for services provided subsequent to termination. The September proceeding comported with regulatory requirements. Petitioner and her representatives were allowed to make presentations to the Board. Cross-examination and the other characteristics of an adversarial proceeding were not required.

CONCLUSIONS

I **CONCLUDE** that the Board terminated petitioner on July 27, 1993, providing Fuller with 60 days' notice of such termination; that termination of Fuller by respondent was not arbitrary, capricious, nor unreasonable nor based on any prohibited rationales; that the Board's action terminating Fuller, and the proceeding conducted on September 28, 1993, comported with applicable statutory and regulatory provisions; and that Fuller did not achieve tenure in the position of social worker with respondent.

ORDER

It is hereby **ORDERED** that Fuller's petition filed with the DOE on December 2, 1993, be and his hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

12/6/95

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Exhibits in Evidence:

P-2 Performance Evaluation dated April 27,1993 and Observation Report dated April 29, 1993[4]

P-3 Letter dated August 30, 1993[4]

R-1 Public session meetings of the Board held on Tuesday, July 13, 1993

R-2 Closed session meetings of the Board, held on July 13, 1993

R-3 Public session meetings of the Board, held on July 27, 1993

R-4 Closed session minutes of the Board, held on July 27, 1993

R-5 Public session meetings of the Board, held on September 28, 1993

R-6 Closed session minutes of the Board, held on September 28, 1993

R-7 Letter dated July 8, 1993, to petitioner from Davis

R-8 Letter dated July 15, 1993, to Ron Lee from Mary Lou Mitchell

R-9A Termination letter dated July 28, 1993, to petitioner from Davis

R-9B Copy of Board minutes, page with termination action indicated

R-10 Letter dated August 16, 1993

R-11 Letter dated August 24, 1993

R-12 Letter dated September 9, 1993

R-13 Letter dated September 29. 1993

[4]These documents were attached in an appendix with the initial brief filed on behalf of petitioner on August 23, 1995; the evaluation and observation report were designated as Exhibit B; and the August 30, 1993 letter, as Exhibit C. Respondent did not subsequently object to these documents and they are deemed to be moved into evidence, redesignated with the exhibit numbers indicated hereinabove.

OAL DKT. NO. EDU 883-94

JULIA ANN FULLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The initial decision of the Office of Administrative Law (OAL) in this matter has been reviewed, however, the record has not yet been received. In that the Commissioner is unable to render a final determination in this matter absent a careful and independent review of the record, which has apparently been lost, the Commissioner is constrained to remand this matter for reconstruction of the record.

Accordingly, for the reasons expressed herein the Commissioner hereby remands this matter to OAL for further proceedings consistent with the above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 5, 1996

Date of Mailing, September 5, 1996

374-96

374-96

IN THE MATTER OF THE TENURE HEARING OF PRISCILLA COLLINS, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
PRISCILLA COLLINS, PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, RESPONDENT.	:	

September 5, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 6778-95

AND EDU 10690-95

AGENCY DKT. NOS. 166-5/95

AND 411-10/95

(CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF PRISCILLA COLLINS, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

AND

PRISCILLA COLLINS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,

Respondent.

Karen A. Murray, Esq., appearing on behalf of the Board of Education of the City of Camden (Murray, Murray & Corrigan, attorneys)

Keith Waldman, Esq., appearing on behalf of Priscilla Collins (Selikoff & Cohen, attorneys)

Record Closed: June 18, 1996 Decided: July 17, 1996

BEFORE **NAOMI DOWER-LABASTILLE,** ALJ, t/a:

This matter concerns the tenure charges filed against Priscilla Collins, a teaching staff member, for allegedly excessive absences and tardiness. The matter was transmitted to the Office of Administrative Law (OAL) on June 29, 1995 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On October 17, 1995, Collins filed a petition contesting the Board's withholding of her increment, which was transmitted to OAL on November 17, 1995 and consolidated with the tenure case on December 21, 1995.

Five days of hearings were held over a period of five months following delay for resolution of a recusal motion filed by Collins and suspension of hearings to resolve a subsequent recusal motion filed by the Board. Collins testified for hours on June 14, 1996, revealing her personal history which included over 20 years teaching in Camden until she experienced a divorce, depression, substance abuse, attendance problems, suspension, treatment, recovery and rehabilitation.

Evidence demonstrated that Collins was a fine teacher for many, many years and until her recent problems. Collins was present at each hearing over a five month period, affording me an opportunity for close observation. It is clear that she has successfully rehabilitated herself. Because I **FIND** the above to be true, I do not recommend that action to be taken against Collins' teacher certification.

On June 18, 1996, the parties placed a stipulation setting forth the terms of settlement on the record. The signed stipulation is attached and fully incorporated herein.

I have reviewed the record and settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. Both parties have waived an exceptions period.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 17, 1996
DATE

Naomi Dower - LaBastille
NAOMI DOWER-LABASTILLE, ALJ, t/a

Receipt Acknowledged:

1/23/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

SELIKOFF & COHEN, P.A.
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(609) 778-6055
Counsel for Respondent,
Priscilla Collins

IN THE MATTER OF THE TENURE HEARING OF PRISCILLA COLLINS, BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO. 166-5/95
DOCKET NO. EDUOR-10690-95S

(CONSOLIDATED CASE)

PRISCILLA COLLINS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, COUNTY OF CAMDEN,

Respondent.

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is entered into by and between the Board of Education of the City of Camden (hereinafter "Board") and its tenured employee Priscilla Collins (hereinafter "Collins")(the Board and Collins are hereinafter jointly referred to as the "Parties");

WHEREAS, Collins has been continuously employed by the Board as a teaching staff member since April 1, 1972;

WHEREAS, on May 8, 1995, the Board certified to the Commissioner of Education charges against Collins which it felt under the circumstances, if true, were sufficient to warrant her dismissal;

WHEREAS, on June 22, 1995, Collins filed an Answer to the charges denying the allegations as stated;

WHEREAS, on June 26, 1995, the Board acted to withhold Collins's salary adjustment for the 1995-96 year, giving her notice of the Board's action on August 1, 1995;

WHEREAS, on October 18, 1995, Collins filed a Petition of Appeal, alleging that the Board arbitrarily withheld her salary adjustment in violation of N.J.S.A. 18A:29-14, captioned Priscilla Collins v. Board of Education of the City of Camden, Camden County, OAL Docket No. EDUOR 10690-95S;

WHEREAS, on or about November 13, 1995, the Board filed its Answer to the Petition of Appeal denying the allegations;

WHEREAS, on December 21, 1995, the Honorable Naomi Dower-LaBastille, A.L.J. t/a, entered an Order consolidating the Board's action seeking Collins's dismissal and Collins's Petition of Appeal from the Board's action withholding her salary adjustment;

WHEREAS, this matter was heard in part by ALJ Dower-LaBastille and the Parties having agreed to a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS Collins and the Board have entered into this stipulation with a full understanding of their rights, recognizing that this stipulation and their agreement is subject to the review and approval of the Commissioner of Education, and with Collins's further understanding that pursuant to N.J.A.C. 6:11-3.6(a)1 any determination made by the Commissioner of Education resulting in a loss of tenure or dismissal may be referred to the State Board of Examiners for determination of possible revocation or suspension of teaching certificate;

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. Collins tenders her resignation effective June 30, 1996. A copy of the letter of resignation is attached as Exhibit A to this Stipulation. The Board accepts Collins's resignation and hereby agrees that all of its official records shall reflect that the reason for Collins's leaving the Board's employ was that she resigned "in good standing." The Board will pay Collins her salary and all customary benefits and emoluments of employment until June 30, 1996. The Board hereby withdraws with prejudice the tenure charges that it has filed against Collins.

2. Collins hereby withdraws with prejudice her Petition of Appeal alleging that the Board arbitrarily withheld her salary adjustment in violation of N.J.S.A. 18A:29-14.

3. The Parties enter into this agreement with the mutual understanding that the Order adopting this Stipulation will: (a) contain the findings set forth by Collins's counsel on the record on June 18, 1996 or similar findings and (b) will provide that the Board will not refer this matter to the State Board of Examiners for revocation of Collins's teaching certificate and the OAL will not take any action to initiate proceedings before the State Board. This agreement is expressly conditioned on these or similar findings being made. Provided, however, that nothing in this agreement is intended to restrict the State Board of Examiners from taking any action it deems appropriate.

4. The Board will immediately provide Collins with a neutral letter of reference setting forth her dates of employment, the job titles held by her, her last salary and noting that Collins resigned from the Camden schools in good standing. The Board agrees that all inquiries it receives regarding Collins will be directed to the Board's current Director of Personnel, D. Parthenia Cogdell, or her successor.

5. In consideration of the savings of time, effort and legal expense that this settlement will create, the Board agrees to immediately take all steps necessary to convert Collins's suspension from May 9, 1995 to September 6, 1995 to a Board-approved leave of absence without pay. The Board will not be responsible for making any contribution into the Teachers' Pension and Annuity Fund ("TPAF") for this leave period, but Collins is free to do so should TPAF permit her to.

6. Collins agrees that she will not hereafter apply to the Board for employment.

7. This Stipulation constitutes a full release of any and all claims of either party against the other. Specifically, Collins forever releases the Board from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including claims for damages (including but not limited to back pay and front pay), equitable relief, and attorney fees or costs, which Collins now has, or claims to have, or which Collins at any time may have had or claimed to have had, or which Collins

at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which she signs the document.

Nothing in this paragraph is intended to operate as a release, waiver, or forfeiture of Collins's rights, and the Board's obligations under:

(a) Any state worker's compensation act or statute, or

(b) any State of New Jersey retirement, pension, savings, or 401(k) plan in which Collins is a participant;

8. The Board forever releases Collins from any and all complaints charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including, but not limited to, claims for damages, equitable relief, attorney fees or costs, which the Board now has, or claims to have, or which the Board at any time may have had or claimed to have had, or which the Board at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which this document is signed on its behalf.

9. The parties agree to waive exceptions.

10. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present action.

11. By signing this agreement, Collins certifies that she has had the opportunity to discuss this stipulation with counsel. She is fully satisfied with the services of her counsel with respect to both this Stipulation and all other aspects of this case and she enters into this Stipulation knowingly, willingly and without any coercion or improper inducements.

12. The Parties further agree that this agreement is contingent upon approval by the Office of Administrative Law and the Commissioner of Education. Neither party will take any legal action whatsoever that is inconsistent with this Agreement before the Office of Administrative Law or any other forum.

13. The parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

FOR THE CITY OF CAMDEN BOARD OF EDUCATION

DATED: 7/11/96

By: Karen Murray
Karen A. Murray, Esquire

SELIKOFF & COHEN, P.A.
Attorneys for Priscilla Collins

DATED: 7/9/96

By: Keith Waldman
Keith Waldman, Esquire

DATED: 7/2/96

By: Priscilla Collins
Priscilla Collins

F:\WPDOCS\PUBLIC\STEVEN\COLLINS\STIPULAT

June 18, 1996

To Whom it may concern:

I hereby resign my position as teacher of English with the Camden Board of Education effective June 30 1996.

Priscilla Collins

IN THE MATTER OF THE TENURE HEARING OF PRISCILLA COLLINS, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
PRISCILLA COLLINS, PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms, but cautions that such approval is contingent upon the understanding that the parties' agreement does not prevent the Commissioner from forwarding this matter to the State Board of Examiners and may not be construed to relieve the Board of its obligation to cooperate with the State Board of Examiners in any action that body may decide to take with regard to this matter. With these attendant contingencies, the Commissioner is satisfied that the settlement terms comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the

final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846.*

The matter is hereby dismissed, subject to compliance with the terms of the settlement, but shall be forwarded to the State Board of Examiners for its consideration.

ACTING COMMISSIONER OF EDUCATION

September 5, 1996
Date of Mailing, September 5, 1996

* The Commissioner notes that the terms of the settlement appear to have already been partially effectuated through respondent's resignation from her position effective June 30, 1996, and admonishes the parties that settlements of controverted matters are of no force or effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

377-96

377-96

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHELLE LA MONICA,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	
	:	

September 6, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9788-95

AGENCY DKT. NO. 242-6/95

IN THE MATTER OF THE TENURE HEARING OF MICHELE LA MONICA, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY

Patricia A. Taylor, Assistant General Counsel, for petitioner State-Operated School District of the City of Jersey City (Charlotte Kitler, General Counsel)

Philip Feintuch, Esq., for respondent Michele LaMonica (Feintuch, Porwich & Feintuch, attorneys)

Record Closed: July 22, 1996 Decided: July 22, 1996

BEFORE **EDITH KLINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 7, 1995, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Hearings scheduled on April 24, 26 and 29, 1996 were

adjourned because the matter was settled. When no settlement was received, the matter was rescheduled for hearing on October 18, 1996.

On July 22, 1996, the parties submitted the attached agreement indicating the terms of agreement which are incorporated herein by reference.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement on the record.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

3. The agreement conforms with the *Cardonick* standards and with the concerns of the Commissioner of Education as set forth in his decision. *In re Cardonick*, decided by Commissioner, April 7, 1982, *affirmed*, State Bd. of Ed., 1990 *S.L.D.* 842, 846 (April 6, 1983).

I **CONCLUDE** that this agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 22, 1996
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 30 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

JUL 22 11 27 AM '96

PATRICIA A. TAYLOR
Assistant General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 09788-95N
AGENCY REF. NO. 242-6/96

IN THE MATTER OF THE :
TENURE HEARING OF :
MICHELE LA MONICA :
STATE OPERATED SCHOOL :
OF JERSEY CITY, :
HUDSON COUNTY. :

This agreement is made this 16th day of July, 1996, by and between the State Operated School District of Jersey City, New Jersey 07305, hereinafter referred to as the "District,"

AND

Michele LaMonica, whose home address is 102 Cottage Street, Jersey City, New Jersey 07306, hereinafter referred to as "Ms. LaMonica."

WITNESSETH:

WHEREAS, Ms. LaMonica has been employed by the District for a sufficient number of years to have obtained tenure, and

WHEREAS, Ms. LaMonica's employment continued in said district when it became the State-Operated School District of Jersey City on October 4, 1989; and

WHEREAS, tenure charges of unbecoming conduct were certified against Ms. LaMonica by Frank M. Sinatra, Interim State District Superintendent, on February 15, 1995; and

WHEREAS, the tenure charges were certified to the Commissioner of Education on June 30, 1995; and

WHEREAS, Ms. LaMonica's attorney filed an Answer and Cross-Petition denying said charges on August 17, 1995; and

WHEREAS, in lieu of proceeding with the tenure charges in accordance with the Tenure Employees Hearing Law, the District and Ms. LaMonica desire to resolve the matter without resort to full litigation, which would require substantial expense to the time and resources of both parties; and

WHEREAS, Ms. LaMonica feels that her current teaching assignment as a teacher of Special Education is incompatible with her medical needs, which include a condition easily aggravated by stress; and

WHEREAS, Ms. LaMonica has expressed a desire and intention to resign from said assignment and from her tenured employment with the school district; and

WHEREAS, the public interest would best be served by resolving the present controversy;

NOW THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The District agrees to withdraw, with prejudice, the tenure charges of Inefficiency and Incompetence/Incapacity bearing Agency Docket No. 242-6/96 and OAL Docket No. EDU 09788-95N

2. Ms. LaMonica agrees to resign from her tenured employment with the school district.

3. Ms. LaMonica agrees to forfeit any monies withheld as a result of her suspension without pay from the date of certification of the tenure charges, June 30, 1995.

4. The school District will continue to pay Ms. LaMonica's regular salary through June 30, 1996.

5. The school District will maintain Ms. LaMonica's current level of medical

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benefits through September 1, 1996.

6. The District and Ms. LaMonica agree that the withdrawal of the tenure charges will serve as full and final settlement of the tenure matter.

7. Ms. LaMonica has been advised by her attorney of the Commissioner of Education's duty pursuant to N.J.A.C. 6:11-3.6 to refer tenure determinations to the State Board of Education for possible revocation of certificates.

8. The District and Ms. LaMonica acknowledge that the terms of this Agreement are contingent upon the review and approval of both the Office of Administrative Law and the Commissioner of Education. In the event that either agency disapproves the terms of the settlement, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this settlement.

9. The parties recognize that each has been represented by legal counsel of her or its own choosing and that each signs this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

10. This Agreement shall be subject to the laws of the State of New Jersey.

11. All terms of this Agreement are deemed material. This document may not

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be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

FOR THE RESPONDENT

Philip Feintuch, Esq.
Feintuch, Porwich & Feintuch

Dated: 7/18/96

FOR THE STATE-OPERATED SCHOOL DISTRICT

Frank M. Sinatra

Dated:

Patricia A. Taylor
Assistant General Counsel

Dated: 7-16-96

OAL DKT. NO. EDU 9788-95

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHELLE LA MONICA,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement, but shall be forwarded to the State Board of Examiners for its consideration.

ACTING COMMISSIONER OF EDUCATION

September 6, 1996
Date of Mailing, September 9, 1996

378-96

378-96 DHP-B

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF P.F.	:	DECISION
	:	

September 6, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3009-96
AGENCY DKT. NO. DHP#8-96

PATRICIA FAUGHNAN,
Petitioner,
v.
NEW JERSEY BOARD OF EDUCATION,
Respondent.

Patricia Faughnan, *pro se*

State Board of Education, appearing pursuant to *N.J.A.C.* 1:1-5.6

Record Closed: May 22, 1996 Decided: June 14, 1996

BEFORE **MARGARET M. HAYDEN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner had been employed with the Linden Board of Education as a bus driver since Fall 1995. On January 11, 1996, the respondent New Jersey Department of Education (the Department) notified the petitioner that a fingerprint search conducted in accordance with *N.J.S.A.* 18A:39-19.1 revealed that petitioner had been convicted of a disqualifying crime occurring on August 5, 1988. Accordingly, she was disqualified

from continued employment for any school or institution under the supervision of the Department. On or about February 13, 1996 petitioner filed a Petition of Appeal from the disqualification. On March 15, the Department transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14B-1 to 13. A hearing was held at the OAL on May 22, 1996.

The issue to be resolved is whether the petitioner has demonstrated by clear and convincing evidence that she is rehabilitated.

FACTUAL DISCUSSION

Petitioner presented the following undisputed evidence:

In July, 1988, petitioner was ironing clothing while having an argument with her 9-year-old son. In exasperation at his rebelliousness, when her son walked by her she struck him in the arm with the hot iron, causing a third degree burn. Petitioner immediately regretted the act, and she dressed the burn for her son which healed without leaving a scar. Three weeks later petitioner was arrested and charged with a violation of *N.J.S.A.* 2C:24-4(a) (endangering the welfare of a child).

Petitioner, who was not represented by an attorney, plead guilty to the indictment and received a sentence of three years probation. The Division of Youth and Family Services (DYFS) removed her 9-year-old son as well as her 12-year-old son from the home. The petitioner successfully completed psychological counseling as well as family counseling. By the end of the year her older son returned to live with her and soon thereafter her younger son also returned.

Other than the crime in question, the petitioner has never had any trouble with the law or DYFS. During the period before she was arrested, petitioner was under a great deal of stress in her home. After going through a divorce, she had difficulty getting support payments and had to attend many court sessions. Petitioner had to

move back to her mother's home to live and worked as a secretary to support the family. Petitioner had been taking diet pills for about two years and now realizes that this made her short tempered. Petitioner's younger sister was also living in the home and she was a drug addict who caused chaos in the house.

Petitioner has also been helping raise her sister's child. Due to petitioner's younger sister's addictive behavior, the petitioner's mother had custody of the sister's child. In August 1994, after the petitioner's mother's death, the petitioner was awarded custody of her 9-year-old nephew on the recommendation of DYFS with a finding that such custody was in the best interest of the child.

Petitioner worked for a private school bus company transporting Catholic school children for about two years. Petitioner did very well on this job and had no trouble with children. Indeed the parents of the children gave her gifts and thank you cards for being so helpful and kind. Petitioner only left that job for the Linden Board of Education job because the Linden job had health benefits.

Petitioner's treating doctor, Felicia Oliver-Smith, M.D., re-evaluated her in 1996 and found that "[t]here are no indications at this time that Mrs. Faughnan would endanger a child. "Neighbors also described petitioner as "very kind" and "hard-working" and beloved by their own children. Her older sister testified that petitioner, the "good kid" of the family, had never had a problem hitting her children or other children before or after the incident. Petitioner deeply regrets striking her son and believes she would never strike any child again.

Having observed the demeanor of the witness and read the documents presented, I **FIND** the above to be **FACTS**.

LEGAL DISCUSSION AND CONCLUSION

In determining whether an individual had affirmatively demonstrated rehabilitation, the following factors, contained in *N.J.S.A.* 18A:6-7.1e, shall be considered:

(1) The nature and responsibility of the position which the convicted individual would hold;
(2) The nature and seriousness of the offense;
(3) The circumstances under which the offense occurred;
(4) The date of the offense;
(5) The age of the individual when the offense was committed;
(6) Whether the offense was an isolated or repeated incident;
(7) Any social conditions which may have contributed to the offense;
(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendations of persons who have had the individual under their supervision.

I now must apply the above factors to the facts presented in this hearing. The position of school bus driver involves direct and regular contact with school children. The offense, while plainly unacceptable behavior, was not of such a serious degree as to merit incarceration. The circumstances of the offense, which happened almost eight years ago and was a one time complete aberration of petitioner's behavior, involved an extreme overreaction of a parent to her child's misbehavior. The stressful conditions in petitioner's life greatly contributed to this one time criminal act, included financial difficulties due to lack of child support, inappropriate taking of prescribed diet pills, and chaos in the home due to a drug-addicted sister.

Petitioner presented strong evidence that she has been successfully rehabilitated. Both before and since the crime the petitioner has been a model citizen. Petitioner received mental health therapy and family counseling which has enabled her to cope with stressful situations in a more rational manner. Petitioner was released from probation early due to her complete fulfillment of all the conditions of probation. DYFS returned the children to her and recommended the petitioner for custody of her nephew in 1994. Petitioner has truly paid her debt to society for her criminal behavior and now is contributing in possible ways to her family and community.

Based on the whole record, I **CONCLUDE** that the petitioner has demonstrated her rehabilitation by clear and convincing evidence within the meaning of *N.J.S.A.* 18A:6-7.1.

ORDER

Accordingly, it is **ORDERED** that the Department's action disqualifying petitioner as a school bus driver is **REVERSED**. Petitioner has affirmatively demonstrated rehabilitation.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 1996
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

6/18/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF P.F.	:	DECISION
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner reverses the conclusions in the initial decision of the Administrative Law Judge (ALJ) and finds that the within petitioner has not demonstrated rehabilitation by clear and convincing evidence in accordance with *N.J.S.A.* 18A:39-19.1 and is, therefore, not qualified for school employment within the intent of the criminal history record check laws.

In reaching this determination, the Commissioner of Education is mindful of his obligation to review appeals of disqualification from school employment to determine whether an appellant has affirmatively demonstrated rehabilitation by clear and convincing evidence. The burden of proving rehabilitation is, therefore, on the appellant and the following factors must be considered:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense; and

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational

schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision. (*N.J.S.A.* 18A:6-7.1)

The Commissioner has considered the above factors, as well as the circumstances surrounding the offense as explained in the initial decision and the ALJ's determinations regarding rehabilitation in reaching this decision. The ALJ classified petitioner's offense as an "extreme overreaction" caused by "stressful conditions in petitioner's life [which] greatly contributed to this one time criminal act***" but that she presented strong evidence of rehabilitation. (Initial Decision at p. 4) The Commissioner finds, however, that so recent and serious a conviction for Endangering the Welfare of a Child cannot be reconciled with petitioner's desire to work for the schools as a bus driver, a position laden with great responsibility wherein one is entrusted, often on a sole basis, with the care and safety of children as they are transported to and from school.

The Commissioner further finds that notwithstanding that petitioner may be making progress toward rehabilitation, he cannot subject children to the possibility of another violent overreaction by petitioner, as there is little doubt that stressful conditions exist on school buses as a result of both traffic conditions and the presence of large numbers of children who may be generally unruly or more seriously disruptive. Also disturbing to the Commissioner is the fact that the incident leading to petitioner's conviction occurred when she was 31 years of age and presumably mature enough to understand the consequences of her actions.

As such, the Commissioner cannot be persuaded by clear and convincing evidence, as required by statute, that petitioner is rehabilitated sufficiently to work in such a capacity.

Accordingly, for the reasons expressed herein, the Commissioner reverses the initial decision of the OAL as the final decision in this matter and petitioner is deemed disqualified from school employment as a bus driver.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 6, 1996
Date of Mailing, September 9, 1996

379-96

379-96

DAVID J. WYNNE,

PETITIONER,

V.

DR. WIN L. TILLERY, CAMDEN COUNTY SUPERINTENDENT OF SCHOOLS, PETER B. CONTINI, ASSISTANT COMMISSIONER OF EDUCATION AND BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, monitor who was not reappointed, contended respondents (Board and Department officials) acted improperly in setting a substitute teaching certificate requirement for the position of Student Enrichment Program Site Monitor.

ALJ found that petitioner filed his petition untimely, waiting well beyond the 90-day filing period before filing his petition. Moreover, ALJ found no violation of state or federal regulations and statutes by respondents. Respondents' motions for summary decision and to dismiss the petition were granted.

Commissioner concurred with the ALJ that the matter was untimely filed and that, even if the matter had been timely filed, petitioner had not established that any violation of law occurred or that the County Superintendent acted in an improper manner. Petition was dismissed.

September 11, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 2669-96

AGENCY DKT. NO. 57-2/96

DAVID J. WYNNE,

Petitioner,

v.

DR. WIN L. TILLERY, CAMDEN COUNTY SUPERINTENDENT OF SCHOOLS; PETER B. CONTINI, ASSISTANT COMMISSIONER OF EDUCATION; and CHERRY HILL BOARD OF EDUCATION,

Respondents.

David J. Wynne, petitioner, *pro se*

Arlene Goldfus Lutz, Deputy Attorney General, for respondents, Dr. Win L. Tillery and Peter B. Contini (Peter Verniero, Attorney General of New Jersey, attorney)

Marc C. Singer, Esq., for respondent, Cherry Hill Board of Education (Landman Corsi Ballaine & Ford, attorneys)

Record Closed: July 19, 1996 Decided: July 26, 1996

BEFORE **ROBERT S. MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter petitioner seeks to declare invalid the actions of respondents creating the position of site monitor in the Cherry Hill School District and establishing the requirements therefor.

On April 8, 1996, the matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act. A telephone prehearing conference was held on May 30, 1996 scheduling the case for hearing on November 6, 1996.

A series of motions followed. By letter dated June 22, 1996, petitioner mailed what he called a "motion" to compel compliance with his discovery requests. On June 28, 1996 respondent Cherry Hill School District filed a motion for summary decision returnable on July 19, 1996. A second motion for summary decision was filed by Deputy Attorney General Lutz on behalf of respondents Tillery and Contini; this was received in the Office of Administrative Law on July 8, 1996. The latter two motions were supported by the certifications of Leslie Koller (Student Enrichment Program Coordinator), Jack McGee (Director of Human Resources for the Board of Education), Dr. Win L. Tillery (Camden County Superintendent of Schools), and Mark C. Singer, Esquire, which certifications include copies of various letters, memoranda, and other written material.

On July 8, 1996, petitioner filed an answering letter with attached "affidavit" dated July 4, 1996. The "affidavit" is neither acknowledged nor notarized by any official. Nevertheless, I will consider it as if it were an affidavit since petitioner is *pro se* and I am required to treat his papers indulgently. Judson v. Peoples Bank and Trust Company, 17 N.J. 67, 74-5 (1954).

I have read and reviewed all of the papers, and, viewing them in a light most favorable to the non-moving party (petitioner), have determined that there is no genuine issue as to any material fact, and that the moving party (respondents) are entitled to prevail as a matter of law.

See, N.J.A.C. 1:12.5(b) and R. 4:46-2. See also, Brill v. the Guardian Life Insurance of America, 142 N.J. 520, 540 (1950).

The undisputed facts are as follows.

FACTS

In April 1995 the Cherry Hill Board of Education ("Board") decided to create the Student Enrichment Program ("STEP") for after-school supervision of students for the 1995-96 school year.

On June 26, 1995 the Board approved the appointment of a number of new employees in order to help implement STEP. These employees were to be given the title of "Student Enrichment Program Site Monitors" ("Site Monitors").

By letter dated July 6, 1995, Patricia Lucas, Former Assistant Superintendent for Personnel, sought approval from Dr. Winifred Tillery, Camden County Schools Superintendent, for this job title. A proposed job description was included in the letter. Among the qualifications for the job was the possession of a substitute instructional certificate. Among the duties and responsibilities were the following: assists in monitoring the Student Enrichment Program; assist with student registrations, course assignments, and collection of tuition monies for the site: maintains an accurate schedule of course offerings and student registration; coordinates with course instructors and building personnel the acquisition of necessary equipment and/or supplies; communicates course cancellations and student absences to all involved parties; prepares attendance and other clerical reports; and escorts children to front door for dismissal.

Within a few weeks thereafter, Dr. Tillery reviewed the Job Description, had discussions with representatives of the Board, and noted that the position involved personal interaction with students. He then determined that the "minimum of level of certifications for the position should be a country substitute certificate.... (which) may be issued to individuals who have a minimum of 60 semesters hours completed in an accredited college."

During this period of time the Board sought to employ persons as Enrichment Instructors and Site Monitors for STEP for the 1995-1996 school year. Advertisements were placed in a local newspaper and notices posted at various facilities in the township. The initial advertisement stated that a minimum of 60 college credits were required for the Site Monitor position, that it was a part-time position, and that it paid $8.00 per hour, but it made no mention of a substitute teaching certificate.

On or about July 15, petitioner submitted an application for a Site Monitor position. Three days later Ms. Leslie Koller (STEP Coordinator) circulated a memorandum addressed to "All Cherry Hill School District teachers, teaching assistant and substitute teachers." The memorandum included the following sentence: "The Site Monitor position does require 60 college credits, and if employed, a Camden County Substitute Teaching Certificate must be obtained."

In late July or early August petitioner was interviewed by Ms. Koller for the position of Site Monitor. At the interview petitioner was given a copy of the Job Description, which at this time contained the substitute teaching certificate requirement. (Whether or not Ms. Koller personally informed him of the substitute teaching requirement is in dispute - - she says she did; he says she didn't).

On August 24, 1995 Ms. Koller wrote to petitioner advising him that he was appointed as a Site Monitor for the Fall semester, subject to Board approval, and that he should bring to the Personnel Office a copy of his substitute teaching certificate if he already had one, or a copy of his college transcript plus a $50 application fee (for the certificate), if he did not.

On September 6, 1995 Anthony Cost, the former Assistant Superintendent for Personnel and former interim Director of Human Resources, appointed petitioner as STEP Site Monitor for the Fall semester from September 27, 1995 through December 14, 1995. Fourteen other persons were also appointed as Site Monitors for the Fall semester. Prior to December 14, 1995 all of the appointees, with the exception of petitioner, who did not already have a teaching or substitute

teaching certificate, obtained one. Petitioner is a graduate of an accredited college and is eligible for a substitute teaching certificate.

On or about December 20, 1995, all of the previously appointed Site Monitors except for petitioner were re-appointed for the Spring Semester. Petitioner was not reappointed for the Spring Semester. Petitioner was not reappointed because he had neither obtained nor applied for a substitute teaching certificate. The re-appointed Site Monitors were, in petitioner's words, all "middle-class white females."

An exchange of correspondence between petitioner and respondents Tillery and McGee ensued. The present Petition was filed in the Department of Education on February 14, 1996.

ISSUES AND ANALYSIS

As far as I can determine, the crux of petitioner's case is that there is no reasonable basis for requiring a substitute teaching certificate for the position of Site Monitor.

Petitioner relies on a November 1995 Department of Education publication entitled "Comprehensive Plan for Education Improvement and Financing," wherein the phrase "certificated staff" is defined as: "Professional staff such as teachers, nurse practitioners, counselors, social workers, program facilitators, and collaborations facilitators." In the same publication, "non-certificated staff" means: "Non-professional staff such as teachers' aides, clinical receptionist, school and family liaisons, attendance monitors, and school-community liaisons."

He alleges that most, or all, of the Site Monitor duties fall within the "non-certificated" category and that few, if any, of the duties are "professional." He contends that the making of the Site Monitor position dependent upon obtaining a substitute teaching certificate violates N.J.A.C. 6:11-3.1, 6:11-2.2, 6:11-4.6, 6:56-1.1(d), 6:4-1.2, and 6:4-1.6(b); that it results in employment discrimination; and that it violates the 1964 and 1991 Civil Rights Laws, the New Jersey Law Against Discrimination, the Americans with Disabilities Act, and the Federal Uniform Guidelines on Employee Selection Procedures.

By way of relief, petitioner requests that: the Commissioner review and analyze the essential job functions of the Site Monitor position and determine whether certification is appropriate or not; "the Department clarify," "explain" and "indicate the need for" such matters as "whether the County Superintendent must comply with State certification law or can expand it;" reimburse him "for lost income for the Spring Semester" and "costs of pursuing this complaint;" he be awarded punitive damages; and he be employed as an "expert job analyst" and evaluator of the school district's human resources, equal employment opportunity, and related programs.

There are several reasons for granting respondents' motions for summary decision.

1.

N.J.A.C. 6:24-12(c) provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

No later than late August 1995, petitioner knew of the need to obtain a substitute certificate. Nevertheless, he did not file his petition until February 4, 1996, at least 5 months after being put on notice of that requirement.

The standard for determining if a party has notice of an order, ruling, or other action triggering the 90-day provision of N.J.A.C. 6:24-1.2 is whether the notice provided by the action is specific and definite, so that the petitioner is informed both of the action and of the fact that he is affected thereby. See, e.g. Stockton v. Trenton Board of Education, 210 N.J. Super. 150, 157-58 (App. Div. 1986). Adequate notice must be sufficient to inform a person of some fact that he or she has the right to know and that the communicating party has a duty to communicate. Kaprow v. Berkley Township Board of Education, 131 N.J. 592(1993). Petitioner admits that on or a few days after August 24, 1995, he had notice, by reason of the job description, of the

requirement of a substitute teaching certificate and of the fact that he was affected by that action. Thus, the 90 days in which the petitioner was required to file his appeal began to run no later than September 1, 1995. Any appeal by him had to be filed by November 30, 1995. It was not filed until February 4, 1996, which was clearly out of time.

Our courts have consistently affirmed the Commissioner's right to dismiss petitions filed after the expiration of the 90-day period. See, e.g., North Plainfield v. Board of Education of the Borough of North Plainfield, 96 N.J. 587 (1984). When a plaintiff or petitioner knows, or has reason to know, that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice, as well as broader considerations of repose, coincide to bar his action. Farrell v. Votator, 62 N.J. 111, 115 (1973). See also, Weir v. Board of Education of Northern Valley Regional High School District, 1984 S.L.D. (dec. June 7, 1984) (pointing out that the 90-day rule should be applied even if the result - - the barring of a possible valid claim - - seems harsh).

2.

N.J.A.C. 6:11-3.3(b) provides as follows:

> If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such a detailed Job Description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. (emphasis added)

Within the scope of legislatively delegated authority, the actions of administrative agencies are presumptively valid, and where that authority confers discretion upon those agents, their actions will ordinarily not be overturned by the courts unless they are manifestly corrupt, arbitrary or misleading. Gormley v. Lan, 88 N.J. 26 (1981). Courts are not free to substitute their

judgment as to the wisdom of a particular administrative action or that of the agency so long as the action is statutorily authorized and not otherwise defective because it is arbitrary or unreasonable. City of Newark v. Natural Resource Council, 82 N.J. 530 (1980), cert. den., 449 U.S. 983 (1980). Arbitrary and capricious means willful and unreasoned action, without consideration and in disregard of circumstances. Worthington v. Fauver, 88 N.J. 123 (1982). Abuse of discretion is a finding that is so wide of the mark that a manifest denial of justice results. State v. Kelly, 97 N.J. 178 (1984). Only if an act of an administrative agency is so clearly against the logic and effect of the facts as to demonstrate it is unreasonable, arbitrary or capricious, will the court reverse. Elizabeth Lodge No. 289, B.P.O.E. v. Legalized Games of Chance Control Commission, 67 N.J. Super. 240, 246 (App. Div. 1961).

Public officials, because of their peculiar knowledge of local conditions, must be allowed wide latitude in their delegated discretion. Bove v. Board of Adjustment of Emerson, 100 N.J. Super. 95 (App. Div. 1968). Accordingly, courts should be extremely cautious in interfering with administrative procedures. Ferrari v. Melleby, 134 N.J. Super. 83 (App. Div. 1975).

Petitioner does not deny that Dr. Tillery carefully reviewed the Job Description submitted by the Board of Education and that he had considerable discussion with Board representatives. Because the position included substantial contact with students, he approved the Board's request to include a substitute teaching certificate as one of the job requirements. On its face that decision was not unreasonable, arbitrary, or capricious.

3.

Petitioner admits that he is qualified and eligible to obtain the required substitute teaching certificate. All he had to do was present his college transcript and pay a minimal fee. He chose not to do so. Any harm he suffered therefore was self-inflicted.

It bears repeating that judicial and quasi-judicial forums are established to deal with real and substantial cases and controversies. They are not created in order to render advisory opinions, nor to act as a super legislature or super administrator.

In order to have "standing" to begin any civil action, an individual must ordinarily sustain some real harm, economic or otherwise. Davis, Administrative Law Treatise (2d ed.), p. 240. An abstract injury, i.e., a broad and general injury that allegedly affects the entire public, does not ordinarily suffice. Id., p. 245. Under the Administrative Procedure Act the right to litigate depends on the petitioner being able to demonstrate a particularized property right or other special interest. Spalt v. New Jersey Dept. of Env. Protection, 237 N.J Super. 206, 212 (App. Div. 1989). Semble: Limongelli v. N.J. St. Bd. of Dentistry, 137 N.J. 317 (1993); Application of County of Bergen, 268 N.J. Super. 403 (App. Div. 1993).

Petitioner has suffered no real harm, at least none that he himself could not have easily avoided. His disagreement with the decision of the Board of Education and of the county superintendent to require a substitute teaching certificate for the Site Monitor position is not enough to sustain this action.

4.

Petitioner's assertions that respondents have violated various state and federal regulations and statutes is without merit. He has presented a wholly insufficient factual basis for this claim and cites not a single case or other pertinent authority. Bare-bones assertions of arbitrary, unreasonable and capricious action, of illegal discrimination, and of abuse of authority will simply not do. As for respondent Contini, petitioner has alleged nothing at all regarding his conduct that constitutes a cause of action.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that respondents' motions for summary decision and to dismiss the petition should be **GRANTED.** It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 26, 1996
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

1/30/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 31 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

DAVID J. WYNNE,	:	
PETITIONER,	:	
	:	
V.		COMMISSIONER OF EDUCATION
	:	
DR. WIN L. TILLERY, CAMDEN COUNTY SUPERINTENDENT OF SCHOOLS, PETER B. CONTINI, ASSISTANT COMMISSIONER OF EDUCATION AND BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by petitioner and by respondents, Drs. Tillery and Contini, and also by the Board in accordance with *N.J.A.C.* 1:1-18.4. An additional submission was filed by petitioner on August 21, 1996. In that *N.J.A.C.* 1:1-18.4 makes no provision for such submission beyond exceptions, it was not considered herein.

Petitioner initially sets forth objections pertaining to the procedures established by the Administrative Law Judge (ALJ) at hearing. He further objects to the ALJ's statement that petitioner did not provide case law in that he was *pro se* and was not required to submit briefs. (Petitioner's Exceptions at p. 2) Next, petitioner asserts that the ALJ did not analyze the germane provisions to this action, specifically *N.J.A.C.* 6:11-3.1(a)i and 6:11-4.5(c), or the Board's

implementation of such provisions. (Petitioner's Exceptions at p. 2) Further, petitioner excepts to the ALJ's factual findings objecting that respondents did not provide answers regarding certification requirements and, further, contends that the ALJ failed to note several facts in the initial decision. (*Id.* at pp. 3-4)

Petitioner next excepts to the Issues and Analysis section of the initial decision by exhaustively reviewing the hearing record. He explains that he did not comply with requirements "since the certification decision was arbitrary capricious and unreasonable***." (Petitioner's Exceptions at p. 6) Petitioner excepts that he has suffered harm and that economic discrimination would befall him if he were compelled to pay a fee in order to become employed, asking if New Jersey wishes to operate its education human resources program by requiring applicants to buy jobs. *(Id.)* Petitioner then presents his own findings of facts and re-argues the substantive issues of his case. (*Id.* at pp. 8-23) Petitioner also avers that the "[le]gal arguments provided carefully circumvent discussion of those requirements that apply but were not followed***." (*Id.* at p. 19)

In reply, Drs. Tillery and Contini aver that petitioner's exceptions, while verbose, contain "very little that is relevant***." (Department's Exceptions at p. 1) Further, they contend that petitioner fails to provide sufficient reasons to prove that the ALJ was wrong when he dismissed the petition, stating that "petitioner's exceptions emphasize nonmaterial facts, cite regulations and statutes that do not govern this matter, and even find fault with respondents' answers to the petition.***" (*Id.*) Lastly, these respondents incorporate the brief and reply letter submitted to the ALJ in support of their motion to dismiss. *(Id.)*

Respondent Board of Education submits reply exceptions, as well, which encourage adoption of the initial decision. The Board avers that the ALJ's conclusion

> is amply supported by the following findings of fact and conclusions of law: (1) petitioner failed to file his petition within the 90 day time period prescribed by *N.J.A.C.* 6:24-12(c); (2) Dr. Win Tillery's decision to require a substitute teaching certificate was not "unreasonable, arbitrary, or capricious" pursuant to *N.J.A.C.* 6:11-3.3(b); (3) petitioner suffered no harm for which relief could be granted; and (4) petitioner's assertions of violations of various state and federal regulation and statutes are without merit. (Board's Exceptions at p. 1)

The Board then illustrates why each of these points was correct. With regard to timeliness, the Board points out that in petitioner's exceptions he confirms he was notified of the substitute teaching certificate requirement "no later than September 1, 1995" and, therefore, the ALJ's determination that the petition was time barred was appropriate. (*Id.* at p. 2)

The Board also avers that Dr. Tillery's finding must stand and that petitioner suffered no economic harm for which relief could be granted. *(Id.* at p. 3)

Additionally, the Board avers that, "[p]etitioner failed to produce any factual or legal support to carry his burden of proof for the alleged violations***" and that "[h]is assertions are conclusory and in no way support claims of discrimination or arbitrary and capricious action by any of the respondents.***" (*Id.*) Lastly, he argues that "[p]etitoner cannot now attempt to include additional facts or legal arguments in his exceptions to the Initial Decision to support his claims.***" (*Id.* at p. 3)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the present matter was untimely filed, and even assuming, *arguendo*, that the matter was filed on a timely basis, petitioner has not established that any violation of law occurred or that the County Superintendent acted in an arbitrary, capricious or

unreasonable manner. See *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

Additionally, the Commissioner fully concurs with the ALJ in his assessment of the role of this agency's review that,

> ***judicial and quasi-judicial forums are established to deal with real and substantial cases and controversies. They are not created in order to render advisory opinions, nor to act as a super legislature or super administrator. (Initial Decision at pp. 8-9)

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

September 11, 1996
Date of Mailing, September 11, 1996

379-96

EDU #2669-96
C # 379-96
SB # 70-96

DAVID J. WYNNE,

PETITIONER-APPELLANT,

V.

DR. WIN L. TILLERY, CAMDEN COUNTY SUPERINTENDENT OF SCHOOLS, PETER B. CONTINI, ASSISTANT COMMISSIONER OF EDUCATION,

RESPONDENTS-RESPONDENTS,

AND

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 11, 1996

For the Petitioner-Appellant, David J. Wynne, pro se

For the Respondents-Respondents Win L. Tillery and Peter B. Contini, Arlene G. Lutz, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Respondent-Respondent Board of Education of the Township of Cherry Hill, Landman, Corsi, Ballaine & Ford (Mark Singer, Esq., of Counsel)

The decision of the Commissioner of Education dismissing the petition in this matter as untimely pursuant to N.J.A.C. 6:24-1.2(c) is affirmed substantially for the reasons expressed therein. We note that petitioner acknowledges receiving notification in August 1995, more than five months before he filed his petition, that he was required

1/8/97

to obtain a county substitute certificate. Given such determination, we need not pass upon the merits of petitioner's claim.

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

380-96

LAWRENCE WILLIAMS, PRESIDENT OF THE BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,

PETITIONER,

V.

STEVEN CILIBERTO,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board President alleged respondent Board member had a conflict of interest under *N.J.S.A.* 18A:12-2 and sought to have him removed from the Board and to void the vote he had cast for the Board attorney.

ALJ found that as a result of a residency dispute, *i.e., S.C., on behalf of T.P. v. Point Pleasant*, respondent was "interested directly or indirectly in [a] ... claim against the [BOE]." Further, the Board had a claim for tuition against respondent. ALJ found that, as such, respondent had to be removed from office by operation of *N.J.S.A.* 18A:12-2 and ordered respondent removed from office, thus, barring him from voting and/or otherwise acting as a Board member.

Commissioner concurred with the determination of the ALJ that respondent had a disqualifying conflict of interest, pursuant to *N.J.S.A.* 18A:12-2, so as to warrant his immediate removal from the Board for the reasons set forth by the Commissioner. However, actions taken by him prior to such removal, pursuant to long-standing case law, could not be deemed invalidated on the basis of the conflict of interest established herein as respondent acted as a "*de facto*" board of education member when he voted, in that he "held office under color of a known election or appointment and [his] ineligibility was unknown to the public at the time [he] [voted]." (*Pijeaux*) Commissioner ordered respondent removed from the Board as of the date of this decision.

September 11, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4776-96

AGENCY DKT. NO. 192-6/96

LAWRENCE WILLIAMS, PRESIDENT
OF THE BOARD OF EDUCATION
OF THE BOROUGH OF POINT PLEASANT,

Petitioner,

v.

STEVEN CILIBERTO,

Respondent.

Lawrence Williams, petitioner pro se

Nicholas C. Montenegro, Esq., for the Board of Education of the Borough of Point Pleasant (Wilbert & Montenegro, attorneys)

Francis J. Campbell, Esq., for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: July 29, 1996 Decided: August 1, 1996

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

In his petition, Lawrence Williams, president of the Board of Education of the Borough of Point Pleasant (BOE), submits that, pursuant to N.J.S.A. 18A:12-2, Steven Ciliberto, a member of the BOE, is disqualified from holding that office and Mr. Williams seeks an order "barring [Mr. Ciliberto] from taking part in any actions as a school board member." Essentially, Mr. Williams claims that Mr. Ciliberto must be immediately removed from office. I agree.

More particularly, the case is summarized as follows: In a case captioned as S.C., on behalf of T.P., a Minor v. BOE of the Borough of Point Pleasant, OAL Dkt. No. EDU 8928-95 (April 6, 1996), aff'd, Commissioner of Education, (June 6, 1996), Mr. Ciliberto claims that the BOE should be ordered to allow his granddaughter to continue to attend school in the BOE's school system (without payment of tuition.) In my initial decision, pursuant to N.J.S.A. 18A:38-1, I ordered Mr. Ciliberto's claim dismissed and the BOE was allowed to assess Mr. Ciliberto for tuition for his granddaughter's past attendance in its school system. My initial decision was affirmed by the Commissioner and Mr. Ciliberto has appealed his claim against the BOE to the State Board of Education (and, thereby continued the claim.) N.J.S.A. 18A:6-27, N.J.A.C. 6:2-1.1 et seq. However, N.J.S.A. 18A:12-2 states, "No member of any board of education shall be interested directly or indirectly in any . . . claim against the board." Consequently, by operation of N.J.S.A. 18A:12-2, Mr. Ciliberto must be removed from office.

PROCEDURAL HISTORY

On June 3, 1996, Mr. Williams' petition and notice of motion for emergent relief were filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law where, on June 12, 1996, it was filed as a contested case. N.J.S.A. 52:14B-2(b). The case was assigned to me and, by letter dated June 19, 1996, I notified the parties that I had adjourned the hearing on Mr. Williams' motion, in order to confirm that all persons whose interests might be affected had received copies of the petition and notice of motion. Wilbert & Montenegro's letter and a certification (BOE-1) in response to the motion for emergent relief were filed on July 2, 1996. Mr. Campbell entered the case and, in a letter filed on

July 8, 1996, he confirmed that, based upon his recent entry, etc., the argument on the motion for emergent relief was (again) adjourned. In Mr. Campbell's letter, filed on July 15, 1996, he argued that, given the appeal of Mr. Ciliberto's claim to the State Board of Education, this case is not ripe for disposition. N.J.S.A. 18A:6-27, N.J.A.C. 6:2-1.1 et seq. In Mr. Williams' letter, filed on July 16, 1996, he restated his contention that, given Mr. Ciliberto's claim against the BOE and the decision in S.C., on behalf of T.P., supra, by operation of N.J.S.A. 18A:12-2, Mr. Ciliberto must be removed from the BOE. On July 24, 1996, the parties and I engaged in a telephone conference relative to the petition and motion for emergent relief. In Mr. Campbell's and Mr. Williams' letters, filed on July 26 and 29, 1996, they restated their arguments made during the conference.

In Mr. Williams' petition, in addition to seeking an order "barring [Mr. Ciliberto] from taking part in any actions as a school board member," he sought an order "declaring the vote by Mr. Ciliberto for the [BOE] attorney to be void and of no effect." In this regard, I note the following:

As set forth in S.C., on behalf of T.P., supra, at 5: By memorandum dated April 7, 1995, George Kane, superintendent of the BOE's school system, notified Mr. Ciliberto of the requirements of N.J.S.A. 18A:38-1 and notified Mr. Ciliberto that, pursuant to N.J.S.A. 18A:38-1, he and his daughter (the mother of the child in the BOE's school system) were required to submit sworn statements and documentation supporting their contention that Mr. Ciliberto's granddaughter was domiciled with him. Later, Mr. Ciliberto presented to Scott D. Thompson, an attorney with the law firm of Wilbert & Montenegro, a number of allegations which, at Mr. Ciliberto's request, Mr. Thompson arranged in affidavit form. In the affidavit, which Mr. Ciliberto executed on June 1, 1995, Mr. Ciliberto stated falsely that, in 1983, his daughter "came to reside" with him and his wife in the school district. In the affidavit, Mr. Ciliberto also stated falsely that, since 1983, his granddaughter had "continued to reside with" him and his wife. In the affidavit, Mr. Ciliberto also falsely stated that he and his wife "provide[d] for all of [his granddaughter's] expenses, including food, clothing and any incidental expenses." Emphasis added. Mr. Ciliberto submitted the misleading affidavit to the BOE. And Mr. Ciliberto's daughter, in a June 1, 1995 letter to the BOE, falsely stated that her ex-husband had failed to pay child support for "many years."

However, there is no evidence that the law firm knew that the statements made by Mr. Ciliberto (in his affidavit) and by his daughter (in her letter) were false. The false statements are attributable solely to Mr. Ciliberto and his daughter and there was no bad faith and/or misrepresentation on the part of the law firm. BOE-1. Also, the law firm did not provide to Mr. Ciliberto and/or his daughter any legal advice, e.g., whether the affidavit and letter satisfied the requirements of N.J.S.A. 18A:38-1. (They did not.) And the law firm never appeared for Mr. Ciliberto and/or his daughter before the BOE. Given the above, it has been represented to me that Mr. Williams has withdrawn his claim relative to Mr. Ciliberto's vote for appointment of Mr. Montenegro, of the law firm, as the BOE's attorney.

FINDINGS OF FACT

The "Findings of Fact" set forth in S.C., on behalf of T.P., supra, are adopted and incorporated into this decision.

The above facts are supplemented as follows: Mr. Ciliberto remains a member of the BOE. Mr. Ciliberto is appealing his claim against the BOE brought in S.C., on behalf of T.P., supra, to the State Board of Education. Mr. Ciliberto has not paid to the BOE the (two and one-half years') tuition assessed, pursuant to N.J.S.A. 18A:38-1(b)(2), for his granddaughter's attendance in its school system.

CONCLUSIONS OF LAW

The "Conclusions of Law" set forth in S.C., on behalf of T.P., supra, are adopted and incorporated into this decision.

A public official is a fiduciary and trustee of the public and must serve the public interest with exclusive loyalty and the highest fidelity. Such a public official must exercise his judgment unaffected and undiluted by any interest that might inure to him individually. When a public official's personal or private interest is different from that of the public, he is thereby disqualified

from acting in that regard and even an indirect such interest will so disqualify him. Aldom v. Borough of Roseland, 42 N.J. Super. 495 (App. Div. 1956).

Consistent with the above principles, N.J.S.A. 18A:12-2 states, "No member of any board of education shall be interested directly or indirectly in any . . . claim against the board."

The relationship between Mr. Ciliberto and the BOE is illustrated by the following, set forth in S.C., on behalf of T.P., supra, at 10:

> For almost two months (from Mr. Kane's April 7, 1995 memorandum notifying [Mr. Ciliberto] of the requirement of the sworn statements, etc., until the submission of [Mr. Ciliberto's] affidavit and [his daughter's] letter in June 1995), [Mr. Ciliberto] and [his daughter] refused and/or failed to submit "sworn statement[s]" and "documentation to support the validity of the sworn statements" as required by N.J.S.A. 18A:38-1(b)(1). When [Mr. Ciliberto] did submit his affidavit ("sworn statement") to the BOE, he refused to submit supporting "documentation," and [his daughter] continued to refuse and/or fail to submit a sworn statement and documentation as required by N.J.S.A. 18A:38-1(b)(1). Consequently, [Mr. Ciliberto] knowingly failed the requirements of submission to the BOE of the "sworn statement[s]" and "documentation" supporting the claim that [his granddaughter] was domiciled with him. N.J.S.A. 18A:38-1(b)(1).

This is the kind of problematic relationship that N.J.S.A. 18A:12-2 is intended to prevent. And, contrary to Mr. Ciliberto's argument, in S.C., on behalf of T.P., supra, now before the State Board of Education, he is "interested directly or indirectly in [a] . . . claim against the [BOE]." (Further, the BOE has a claim for tuition against Mr. Ciliberto.)

By operation of N.J.S.A. 18A:12-2, Mr. Ciliberto must be removed from office and there is no issue in fact or in law that requires a delay in an order to that effect. N.J.A.C. 1:1-12.5, -12.6

ORDER

I **GRANT** the motion for emergent relief and **ORDER** Mr. Ciliberto removed from office.

Removal of Mr. Ciliberto from office effectively grants the relief claimed by Mr. Williams, e.g., "barring" Mr. Ciliberto from voting and/or otherwise acting as a BOE member. Consequently, this case is ended.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 1996
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

8/2/96
DATE

DWA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

LAWRENCE WILLIAMS, PRESIDENT OF THE BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STEVEN CILIBERTO,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent and those of petitioner, along with replies to petitioner's exceptions from participant, Wilbert & Montenegro,[1] (hereinafter "participant") were timely filed pursuant to the applicable provisions of *N.J.A.C.* 1:1-18.4.

Respondent initially excepts to what he contends were serious deficiencies in the procedures followed by the Administrative Law Judge (ALJ) in the handling of this matter and in

[1] It is noted that Wilbert & Montenegro was accorded participant status in this matter pursuant to a letter of the ALJ, dated June 19, 1996, which, in pertinent part, stated

> ***The petition (in its "First Count") alludes to Mr. Ciliberto's providing information to Wilbert & Montenegro; Wilbert & Montenegro's preparation*** of an affidavit, based upon that information; Mr. Ciliberto's execution of that affidavit; and Mr. Ciliberto's submission of that affidavit to the BOE in his unsuccessful attempt to appear that he had satisfied the "sworn statement" requirement of *N.J.S.A.* 18A:38-1b(1). The petition also alludes to the BOE's May 3, 1996 vote to appoint Wilbert & Montenegro as BOE attorney and Mr. Ciliberto's vote in favor of that appointment. On those bases, the petition claims that the vote and appointment should be voided.***
>
> Given the above, Wilbert & Montenegro ***should have notice and an opportunity to protect their interests which may be affected by the disposition of this case.***

the initial decision. He asserts that in conducting the telephonic oral argument on July 24, 1996, the ALJ failed to tape-record such proceedings, thereby precluding compliance with *N.J.A.C.* 1:1-12.6(i) which specifies

> ***The Clerk shall file with the agency head any papers in support of or opposition to the application which were not previously filled with the agency *and a sound recording of the oral argument on the application, if any oral argument has occurred.* (emphasis in text)
> (Respondent's Exceptions at p. 2)

Respondent argues that this procedural error is exacerbated by the insufficiency of the ALJ's initial decision in that he failed to appropriately address the legal arguments made at the telephonic hearing and in respondent's July 12, 1996 and July 25, 1996 submitted letters with respect to the central issues of this matter, *i.e.*, irreparable harm and the "ripeness" of the instant case for adjudication at this point in time (*id.* at p. 4), thereby precluding the Commissioner from reviewing proffered arguments on these critical issues. In this connection, respondent asserts that, as was stressed in his oral argument and in his filed letter briefs, a foundational requirement necessary for the granting of emergent relief, irreparable harm, has not been established herein. (*Id.* at p. 3) Rather, he asserts, the ALJ ***"once again focused on his findings in the previous case of *S.C. on behalf of T.P. v. Point Pleasant Borough Board of Education.*" (*Id.* at p. 2) Further, respondent alleges that his arguments regarding the "ripeness" of this matter for adjudication, advanced at the oral hearing and in "***letters filed with the ALJ on July 15, 1996 and July 26, 1996,[2] [along with] [t]he authorities cited by respondent's counsel on this issue are also totally avoided or ignored by the ALJ." (*Id.* at p. 4)[3]

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[2] To preclude any confusion as to referenced dates of respondent's letter submissions, it is noted that such submissions were dated July 12, 1996 and July 25, 1996 and were filed with the OAL on July 15, 1996 and July 26, 1996, respectively.

[3] Respondent's argument on this issue, fully developed in the above-referenced letters, is that because the matter of *S.C. v. Point Pleasant Board of Education*, decided by the Commissioner on June 6, 1996, has been appealed to the State Board of Education, it cannot be considered a final agency action and, therefore, the instant case cannot be ripe for action until *S.C.* is decided by the State Board. Respondent cites *N.J.S.A.* 18A:4-1 and the State Board's citation

Finally, respondent proffers that, in addition to the clear procedural deficiencies of the ALJ's decision, he also failed to address the "***substantive issue of the nature of respondent's 'claim' in the underlying case***"(*id.* at p. 5), which respondent maintains could be dispositive of this case. He references arguments raised in his July 25, 1996 letter, wherein he distinguishes the type of claim filed by the respondent Board member in this case, from the pecuniary claims for damages involved in the decisional precedent cases cited by the parties in letter briefs filed below (*id.* at p. 5)[4] and, therefore, argues that the instant claim does not fall within the intended proscription of the statute as developed in such cases.

Respondent contends that, due to these egregious deficiencies, the Commissioner should deny the requested relief or, in the alternative, remand the matter for reargument before a different ALJ.

Petitioner excepts to the ALJ's statement, on page 4 of the initial decision, indicating that petitioner had withdrawn his claim in this matter with respect to the voiding of respondent's vote for the appointment of participant as the Board's attorney. Rather, petitioner asserts "***I did advise the court that I would agree that there was not a conflict simply because

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of same in *Matter of Lyndhurst School District*, 92 *N.J.A.R.* 2d (EDU) 621, at 627 as his authority for such position. (See Respondent's letter to the ALJ dated July 25, 1996 at p. 2)

[4] Respondent's argument in this regard, presented in his letter to the ALJ dated July 25, 1996, seeks to distinguish the "claim" in this matter from those existing in *Board of Education of Education of the Township of Holmdel v. O'Connell,* 1990 *S.L.D.* 674 and *Board of Education of the Township of Jackson v. Acevedo*, 92 *N.J.A.R.* 2d 163, cited by petitioner in his July 15, 1996 letter to the Court. Respondent proffers

> ***In those cases, the Board Members had each filed lawsuits seeking compensatory damages against the Boards on which they were trustees. In contrast, Mr. Ciliberto's claim was procedurally dictated by *N.J.S.A.* 18A:38-1, in order to prevent his granddaughter's removal from the school system that she has attended from kindergarten through eighth grade.
>
> No personal enrichment was sought by Ciliberto in his action filed in this case. In the case of *Hogan v. Kearny Board of Education*, 1982 *S.L.D.* 329, at 344, the Commissioner defines the word claim as set forth in *N.J.S.A.* 18A:12-2 citing the case of *Famette v. Board of Education of the Borough of Wood-Ridge*, 1964 *S.L.D.* 42, as "To demand as one's own...cause of suit or cause of action...a demand for compensation or for payment..."***. (Respondent's letter to the ALJ dated July 25, 1996 at p. 1)

[participant's] office prepared the Affidavit that was used by [respondent] in his action against the Board.***" (Petitioner's Exceptions at p. 1) He, however, maintains that he continues to contend that respondent's vote for the Board attorney was in conflict in that such attorney is the individual who would eventually be required to take the necessary actions to collect tuition from respondent. Further, petitioner advances, if respondent were not eligible to function as a Board member by virtue of his action against the Board, such ineligibility should have precluded him from voting for the Board attorney.

In response, participant advances that should the within respondent lose his claim against the Board, "the former Board attorney who commenced the investigation and is representing the Board in obtaining tuition reimbursement from [respondent] on behalf of the Board, continues to this day to represent the Board in that action***" rather than participant as is indicated by petitioner. (Participant's Reply Exceptions at p. 1) As such, participant urges that petitioner's within claims against it be dismissed.

Upon a careful and independent review of the within record, the Commissioner fully concurs, for the reasons which follow, with the conclusions of the ALJ that the facts of this matter are sufficient to make a finding on the merits of this case that respondent has a disqualifying conflict of interest, pursuant to *N.J.S.A.* 18A:12-2, so as to warrant his immediate removal from the Board of Education of the Borough of Point Pleasant.

Initially, the Commissioner observes that respondent's exception contention that the ALJ's failure to tape-record the oral argument of this matter or to fully address all of his legal arguments in the initial decision constitutes prejudicial error warranting reversal or remand of the decision is without merit. As is observed in the initial decision, and repeatedly acknowledged by respondent in his exceptions, "***In Mr. Campbell's and Mr. Williams' letters filed on July 26

and July 29, 1996, they restated their arguments made during the conference." (Initial Decision at p. 3) As such, the Commissioner finds that the within record, which included these letters and all other submissions made by the parties in this regard, provided ample opportunity for him to properly and completely consider all proffered arguments and the basis for the initial decision below.

The Commissioner finds, simply stated, that at issue herein is whether the facts in this matter, which are essentially undisputed, constitute a situation wherein, pursuant to *N.J.S.A.* 18A:12-2, the respondent can be said to have a disqualifying direct or indirect interest in any claim against the Board. If such interest is found to exist, then by operation of law, he must be disqualified from Board membership. The Commissioner's examination of the circumstances existing in this matter and applicable case law in this area leads him to the conclusion that such disqualifying interest is, indeed, present in the within case and he finds respondent's protestations to the contrary clearly unfounded.

Initially, as noted by the Court in *Board of Education of the Township of Holmdel v. O'Connell*, 1990 *S.L.D.* 674

> On its face, *N.J.S.A.* 18A:12-2 mandates that no board member may serve who has filed a claim against the board of education on which he sits. Case law has further established that any such claim must be examined on a case-by-case basis in arriving at a determination as to whether the circumstances in the matter demonstrate that the board member would benefit in a substantial and material way from said claim. If so, the statute should be applied and the board member disqualified from serving on said board. See *Board of Education of the City of Newark, Essex County v. Edgar Brown and Oliver Brown*, [1984 *S.L.D.* 671, aff'd State Board, 1984 *S.L.D.* 683] See *Thomas D. Hogan et al. v. Kearny Board of Education and Kearny Board of Education v. Thomas D. Hogan*, decided April 12, 1982, aff'd State Board of Education August 4, 1982.*** (*Holmdel, supra,* at 680)

Further, as stated by the State Board in *Woodstown-Pilesgrove Regional Board of Education, Salem County v. John J. Ketas*, 1980 *S.L.D.* 1563, and contrary to the argument advanced by respondent, a conflicting interest does not have to confer a pecuniary benefit to be disqualifying, but can also be one which is psychological or personal in nature. See *Aldom v. Borough of Roseland*, 42 *N.J. Super.* 495, 502 (App. Div. 1956). The Commissioner further observes that "in making a determination as to whether a particular interest is sufficient to disqualify "[t]he question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.***" *Van Itallie v. Franklin Lakes*, 28 *N.J.* 258, 268 (1958).

In the instant matter, respondent is patently interested in a claim against the Board by reason of his Petition of Appeal before the Commissioner, and his subsequent appeal of the Commissioner's decision to the State Board, wherein he opposes the determination of the Board, that he has not satisfied the requirements of *N.J.S.A.* 18A:38-1b(1), which would entitle his granddaughter to a free public education in the Board's school system. Moreover, respondent faces a substantial future pecuniary loss should he lose his action against the Board in that, pursuant to *N.J.S.A.* 18A:38-1b(1), he would be responsible for payment of tuition to the Board for the total period of his granddaughter's ineligible attendance in the school district. As such, his conflict with the Board is strong and persistent. The Commissioner further finds that respondent's pronouncements regarding the "ripeness" of this matter for adjudication at this time in that State Board has not yet made a finding on the *S.C.* matter, are directly antithetical to the position he is advocating, in that rather than serving as a basis for the dismissal of this matter, these, instead, conclusively establish the continuing conflicting nature of respondent's personal interests and those of the Board. Respondent's contention that the ultimate outcome of the *S.C.*

matter is relevant to the within proceedings is totally misguided. It is respondent's act of conducting and continuing his litigation against the Board, irrespective of the outcome of such litigation, which constitutes the conflict situation prohibited by *N.J.S.A.* 18A:12-2.

Notwithstanding the within finding that respondent has a disqualifying interest in a claim which precludes him from being a Board member, the Commissioner cannot grant petitioner's requested relief of voiding this Board member's vote for participant as the Board attorney, as such would be contrary to long-established law in this area. When respondent voted to employ participant, he did so as a *"de facto"* Board of Education member in that he "held office under color of a known election or appointment and [his] ineligibility was unknown to the public at the time [he] [voted]." (*Maxine J. Pijeaux v. Board of Education of the City of Orange, Essex County*, 94 *N.J.A.R.* 2d (EDU) 345, 346) As such,

> Its members had certainly a color of title, and their actual incumbency was complete....Under these circumstances the acts of the board, in which third persons are interested, cannot be impugned on the ground that the title of the members is defective. (*Pijeaux, supra,* at 346, quoting *Kimball v. Hendee*, 57 *N.J.L.* 307, 309 (S. Ct. 1894))

More specifically, as found by the Commissioner in *Monsees et al. v. Board of Education of the Borough of Bloomingdale, and Theodore Lovell*, 1982 *S.L.D.* 1409, this issue has long been decided. See *Claire M. Egan and Basil H. Blair v. Joseph G. Brody et al.*, 1970 *S.L.D.* 153, wherein it was stated

> It is*** well established that the acts of a de facto officer are valid and may not be challenged and set aside on the grounds that he did not hold title de jure.
>
> > "The official acts of a de facto school officer, which a de jure officer would be authorized to do, are, if performed in the prescribed manner, as valid and binding on the public and third persons as the acts of de jure officers, and authority to act cannot be questioned collaterally. This is true even though the acts are performed pending a contest or quo warranto proceeding that subsequently terminates in

> the ouster of the de facto officer from office." 78 Corpus Juris Secundum section 133, p. 877
>
> See also *Oliver v. Jersey City*, 63 *N.J.L.* 634 (*E. & A.* 1899). There can be no question, therefore, that, in general the acts in which [the member] participated while he occupied a seat on the Board, were validly performed and are not subject to challenge by reason of the fact that he was de facto and not de jure***. (*Monsees, supra,* at 1409-10 quoting *Egan et al., supra,* at 154, 155)

The Commissioner, thus, concludes that respondent was acting within the scope of his authority as a *de facto* Board member when he voted for the employment of participant as Board attorney, and, as such, there is no basis upon which to invalidate respondent's vote.

Accordingly, based on the foregoing analysis, respondent is deemed removed from the Point Pleasant Board of Education as of the date of this decision; however, actions taken by him prior to such removal shall not be deemed invalidated solely on the basis of the conflict of interest established herein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

September 11, 1996
Date of Mailing, September 11, 1996

382-96

382-96

L.C., on behalf of her minor child, B.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent alleged that minor child, B.C., was wrongfully denied admission to school due to residency dispute. Petitioner contended she and B.C. were homeless pursuant to *N.J.A.C.* 6:3-8.1 *et seq.* after losing their rented home in Branchburg.

Citing *Maurice River*, ALJ concluded that petitioner was neither domiciled in Branchburg nor homeless since she had a "fixed, regular and adequate residence" in Somerville with a relative. ALJ ordered that the Board's decision to remove B.C. from the Branchburg schools be affirmed.

While clarifying the significance of the holding in *Maurice River*, Commissioner adopted findings of ALJ as his own and directed petitioner to remit to the Board tuition for B.C., prorated to the time of her ineligible attendance in Branchburg.

September 12, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2459-96

AGENCY DKT. NO. 66-2/96

L.C. ON BEHALF OF HER MINOR CHILD B.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,

Respondent.

L.C., petitioner, appearing *pro se*

David B. Rubin, Esq., appearing for respondent

Record Closed: June 7, 1996 Decided: July 31, 1996

BEFORE **BARBARA A. HARNED** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

L.C., on behalf of her minor child, B.C., filed a petition with the Commissioner of Education (Commissioner) on February 26, 1996. The petition seeks to reverse the determination by the Board of Education of the Township of Branchburg, Somerset County (Board), that B.C. be removed from the Branchburg Township school system because she is not domiciled in Branchburg. On March 28, 1996, the Commissioner transferred the matter to the Office of Administrative Law (OAL) for

hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held in the OAL in Trenton, New Jersey, on June 7, 1996, and the record closed on that date.

FACTUAL FINDINGS

Unless otherwise noted, the facts set forth below are undisputed and I adopt them as findings of fact. Disputed facts are noted, followed by findings as to those disputes.

Until September, 1995 L.C. and her daughter, B.C., rented a house in Branchburg, New Jersey for ten years. B.C. attended a private, parochial school in Somerville through the fourth grade when she began having emotional problems aggravated by chronic respiratory problems. L.C. decided to enroll her daughter in the Branchburg public school system and B.C. entered the fifth grade in the public school system in September, 1994 (R-1). L.C. drove B.C. to and from school because fumes from and the motion of the school bus aggravated B.C.'s respiratory ailment. B.C. did very well in the fifth grade in the Branchburg school system.

Prior to 1993, L.C. was employed. Since that time, however, she has become permanently disabled as a result of a disc problem. Currently, disability payments are her only income although L.C. is taking classes and hopes in the future to find employment compatible with her disability. As a result of her disability and loss of employment, L.C. encountered financial problems and fell behind on her rent. A Warrant of Removal from the Branchburg premises was issued on August 28, 1995, and served on September 7, 1995 (R-2, R-3). L.C. tried to find another rental in Branchburg but was unsuccessful. L.C.'s brother, N.A., has an apartment in Somerville and told L.C. they could move in with him. L.C. and B.C. moved to the Somerville apartment gradually during the last week of August and first week or so of September, 1995. While the Notice of Eviction required L.C. to vacate the premises by September 7, 1995, they did not completely move out until September 10, 1995.

L.C. views the move as a temporary one. She intends to return to Branchburg when she locates affordable housing. The Somerville apartment is small and contains her brother's possessions. Since there is no room for L.C.'s possessions they are in storage. As of the date of the hearing, June

7, 1996, L.C. and B.C. were still living in the Somerville apartment. L.C. pays half the rent in the apartment although the lease is in her brother's name. In February, 1996, her brother signed a new lease which expires in February, 1997. Her brother lives in the apartment only part of the time, staying with friends at other times. L.C. did not change the address on her driver's license to the Somerville address. At first her mail was delivered to a post office box at the Somerville post office (R-13) and she told Somerville post office employees that it was a temporary situation. In March, 1996, however, the post office advised the Board that mail to L.C. was delivered to the Somerville apartment address (R-11, R-12).

It is undisputed that B.C. entered the sixth grade in the Branchburg school in September, 1995, and that L.C. did not advise Branchburg school officials that she no longer lived in Branchburg at that time. L.C. did not try to enroll B.C. in the Somerville school system because she intended to return to Branchburg. In November, 1995, school officials began to suspect that L.C. and B.C. were no longer living in Branchburg because they had noticed B.C. being driven to and from school by L.C. rather than taking the school bus. No inquiry was made as to whether B.C. had ever taken the bus. James P. Butler, Attendance Officer, was asked to investigate. On November 7, 1995, he visited L.C.'s prior Branchburg address and found the premises vacant. Mr. Butler contacted the owner who advised him that L.C. had been evicted. The owner was not sure where L.C. could be located but did advise Mr. Butler that she had a brother in Somerville.

Mr. Butler called L.C.'s brother who declined to tell him where L.C. could be located. Mr. Butler then gave his beeper number to L.C.'s brother and asked that she contact him. Mr. Butler called the Somerville apartment five more times, leaving his beeper number. He received only one response, when L.C.'s brother called him and told him that L.C. had gone out. Mr. Butler testified that prior to a January 29, 1996, Board hearing, L.C. had given the school no information as to where she was living and he had been unable to ascertain where she was living. In contrast, L.C. testified that she did try to call Mr. Butler back but did not use his beeper number. Instead she would call the Board number and when she could not reach Mr. Butler, she spoke with the principal of B.C.'s school and Acting Superintendent of Schools George T. Resavy. She further testified she told Acting Superintendent Resavy she was no longer living in Branchburg; that she was homeless and living in temporary shelter in Somerville and that she gave Mr. Resavy a telephone number where she could be

reached but refused to give him her address. I found both Mr. Butler and L.C. to be credible witnesses in this regard. Therefore, **I FIND** that while L.C. did not respond directly to Mr. Butler's telephone calls, she did speak with Acting Superintendent Resavy and told him she was no longer living in Branchburg; was living in temporary shelter in Somerville; gave him a telephone number where she could be reached but refused to tell him her address in Somerville.

By letter dated November 28, 1995, Acting Superintendent Resavy notified L.C. that as she had not resided in Branchburg Township since the beginning of the school year, she would be charged tuition for B.C.'s attendance from September 6 through November 22, 1995, at a per diem rate of $56.91, resulting in a total charge to date of $2,959.32 (R-4). L.C. was further advised that for each day beyond November 22, 1995, she would be charged an additional $56.91 (R-4). By letter dated December 5, 1995, Acting Superintendent Resavy notified L.C. that the tuition charges through December 1, 1995 were $3,300.78 (R-5).

On December 21, 1995, counsel for the school district wrote L.C. and advised her that the school administration planned to apply to the Board for removal of B.C. from the school district and to seek tuition reimbursement in the amount of $4,039 as of that date (R-6). This letter further advised L.C. that she had a right to a hearing prior to the removal of B.C. and that the hearing would be held before the Board on January 8, 1996 (R-6). By letter dated January 18, 1996, counsel for the school district advised L.C. that the hearing had been rescheduled for January 29, 1996 (R-7).

L.C. testified that she found the atmosphere at the hearing hostile and intimidating. Instead of being sensitive to B.C.'s need for stability, she testified the Board seemed interested only in "hurrying" B.C. out of Branchburg. L.C. made a point of testifying that all members of the Board are white, perhaps trying to suggest some racial bias since she and B.C. are black. L.C. offered no specific examples of intimidation, hostility or bias other than a statement that without a permanent address in Branchburg, B.C. could remain in the Branchburg school only if L.C. paid approximately $10,000 in tuition for the school year. Such a statement constitutes no more than a statement of the Board's position. Lacking any specificity, I cannot render any finding supportive of L.C.'s conclusory allegation of hostility, bias or intimidation.

Following the hearing, the Board voted unanimously that B.C. is not domiciled in Branchburg and thus is not entitled to a free education in the Branchburg school system (R-9). The Board directed that B.C. be removed from the Branchburg school district as of February 23, 1996 and that L.C. be notified of the decision and her right to appeal prior to February 2, 1996 (R-9). By letter dated January 30, 1996, L.C. was provided a copy of the Board resolution; advised that B.C. would not be allowed to attend Branchburg Township schools after February 23, 1996 and advised that she had the right to appeal the decision to the Commissioner (R-8). The letter did not advise L.C. that B.C. could remain in the Branchburg school pending the outcome of an appeal. L.C. found this out later from the new Superintendent of Schools. In the meantime, school officials from B.C.'s school continued to tell her that B.C. would have to leave the school by February 23, 1996. When L.C. spoke with Principal Resavy (no longer Acting Superintendent) about the statutory requirement, he did acknowledge that B.C. had a right to stay in the Branchburg school pending the outcome of L.C.'s appeal.

All of the above described letters and the Board Resolution (R-4 through R-9) were hand delivered by Attendance Officer Butler when L.C. came to the school to pick up B.C. Then Acting Superintendent Resavy asked Mr. Butler to hand deliver the documents because L.C. had refused to give them her address in Somerville. L.C. considered delivery of the papers in this manner as harassment. She testified that Mr. Butler intimidated B.C. by stopping her outside school and giving some of the documents to B.C. rather than L.C. However, I credit Mr. Butler's testimony that he never gave any of the documents to B.C. and, in fact, never got closer than 10 or 15 feet from B.C. Mr. Butler's testimony that he was sensitive to B.C.'s situation, felt sorry for her and, with over twenty years as a counselor, was very careful not to intimidate B.C., was convincing. In addition, while Mr. Butler is a tall man, he is also quite soft-spoken. Moreover, I do not find L.C.'s other contentions of harassment by Mr. Butler plausible. While L.C. testified that Mr. Butler could have called her and asked her to pick up the documents rather than giving them to her in front of B.C. and other children, I credit Mr. Butler's testimony that while Acting Superintendent Resavy may have had L.C.'s telephone number, Mr. Butler did not. In addition, since L.C. admittedly did not return Mr. Butler's calls by paging his beeper but rather chose to call Acting Superintendent Resavy directly, it was reasonable for Mr. Butler to decide to deliver the papers to L.C. when he knew she would be coming to the school. Nor do I find that bringing documents to L.C.'s car and asking her to sign a

receipt for at least one of the documents can be viewed as harassment. Mr. Butler was merely trying to deliver papers to someone who had refused to give the school her address in the most efficient manner he could devise.

CONCLUSIONS OF LAW

Pursuant to *N.J.S.A.* 18A:38-1, free public education shall be provided to any person over five and under twenty years of age who is domiciled within the school district. The terms "residence" and "domicile" are not synonymous since a person may have several residences but only one domicile at a time. *State v. Benny*, 20 *N.J.* 238, 251 (1955). As stated in *Matter of Unanue*, 255 *N.J. Super.* 362, 374 (Law Div. 1991)

> [i]n a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving.

Under this definition it is clear that L.C. and B.C. are not domiciled in Branchburg. While L.C. may have every intention of returning to Branchburg, at the current time she has no "true, fixed, permanent home and principal establishment" in that township.

L.C. contends, however, that she and B.C. are homeless and therefore B.C. is entitled to continued enrollment in the Branchburg school system pursuant to *N.J.S.A.* 18A:38-1f. That portion of the statute requires that free public education be provided to "[a]ny person whose parent or guardian moves from one school district to another school district as a result of being homeless and whose district of residence is determined pursuant to section 19 of *P.L.* 1979, c. 207 (C. 18A:7B-12)." The relevant portion of *N.J.S.A.* 18A:7B-12 states that

> [t]he district of residence for children whose parent or guardian temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless. For the purpose of this amendatory and supplementary act, "homeless" shall mean an individual who temporarily lacks a fixed, regular and adequate residence.

Applying this statutory definition **I CONCLUDE** that L.C. is not "homeless" since she has "a fixed, regular and adequate residence." She has been living continuously in the Somerville apartment since September, 1995; receives her mail there and pays one-half of the rent; making that apartment both "fixed and regular." Moreover, there was no testimony presented that the apartment is inadequate in the sense that it lacks any essentials of a residence such as heat, electricity or cooking facilities. L.C. contends that her situation satisfies the statutory criteria because she does not intend to make the Somerville apartment her permanent residence but rather intends to return to Branchburg. However, the statute does not require that the "fixed, regular and adequate residence" be permanent. Rather, the statute is intended to address situations, for example, of a parent who has no place to live, or moves frequently from place to place or is temporarily living in a motel. While the Somerville apartment may not be L.C.'s permanent address in the sense that she will never move again, it is sufficiently permanent to be considered her domicile for purposes of *N.J.S.A.* 18A:38-1.

This conclusion is further supported by regulations adopted by the Department of Education pursuant to the above quoted statutes. *N.J.A.C.* 6:3-8.1 *et seq.* The purpose of the regulations is "to establish uniform Statewide policies and procedures for ensuring that homeless children and youth have access to a free and appropriate public education." *N.J.A.C.*. 6-3-8.1. The regulation defines a "homeless" child using identical language as that used in *N.J.S.A.* 18A:7b-12c to define a "homeless" parent. That is, a "homeless" child is "one who lacks a fixed, regular, and adequate residence." *N.J.A.C.* 6:3-8.2. The regulation further establishes criteria for when a child shall be considered homeless. *N.J.A.C.* 6:3-8.3(a), (b). The only criteria arguably applicable to B.C.'s situation is the provision that a child shall be considered homeless if he or she is "[t]he child of a homeless family which is out of necessity living with relatives or friends." *N.J.A.C.* 6:3-8.3(b)6. In an analogous situation the Commissioner of Education and the state Board of Education affirmed Administrative Law Judge Holmes' conclusion that a child was not homeless under the regulation when the child lived with his mother in his grandmother's house following a divorce. *Board of Education of the Township of Maurice River, Cumberland County v. Board of Education of the City of Wildwood, Cape May County*, 93 *N.J.A.R.* (EDU) 895. As Judge Holmes reasoned

> [m]erely living with relatives or friends, even out of necessity does not render a person homeless. [The regulation] covers a typical situation in which a family, already homeless, places one or more of its children with relations or friends. It is not

> intended to make all children who reside with relations and friends out of necessity, homeless. Especially when they are living with their mother. *Id.* at 897.

Similarly, **I CONCLUDE** that B.C. is not homeless because she does not "lac[k] a fixed, regular, and adequate residence."

ORDER

Based on the foregoing, **I ORDER** that the decision of the Board to remove B.C. from the Branchburg Township school district be **AFFIRMED.**

I hereby **FILE** my initial decision with the **COMMISSIONER OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. If the Commissioner of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 31, 1996
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

8/2/96
DATE

DNA
COMMISSIONER OF EDUCATION

Mailed to Parties:

AUG 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

DOCUMENTS IN EVIDENCE

For respondent:

R-1 Student enrollment form, note dated

R-2 Warrant of Removal, Superior Court of new Jersey Special Civil Part, Somerset County, dated August 28, 1995

R-3 Eviction Notice, dated August 30, 1995

R-4 Letter from George T. Resavy, Acting Superintendent to L.C., dated November 28,1995

R-5 Letter from George T. Resavy, Acting Superintendent to L.C., dated December 5,1995

R-6 Letter from Robert J. Merryman, Esq. to L.C., dated December 21, 1995 (3 pages)

R-7 Letter from Robert J. Merryman, Esq. to L.C., dated January 18, 1996

R-8 Letter from Dr. Robert J. Sopko, Superintendent of Schools to L.C., dated January 30, 1996

R-9 Findings and Conclusions in In the Mater (sic) of the Residency hearing of B.C., adopted at a meeting of the Board of Education of the Township of Branchburg, dated January 29, 1996

R-10 L.C.'s petition of appeal, dated February 23, 1996 (3 pages)

R-11 Letter from James Butler, Attendance Officer to Postmaster, Somerville, dated March 14, 1996

R-12 Request for Change of Address or Boxholder Information Needed for Service of Legal Process, from Robert J. Merryman, Esq. to Postmaster, Somerville, dated March 13, 1996 (2 pages)

R-13 Response to employment and mailing address inquiry, dated March 18, 1996

R-14 Letter from Robert J. Merryman to L.C., dated April 2, 1996

R-15 Interrogatories and Request for Production of Documents, from Robert J. Merryman, Esq., dated April 1, 1996, with attachments (6 pages)

WITNESSES

For Petitioner:

L.C., petitioner

For Respondent:

James P. Butler, Attendance Officer

L.C., on behalf of her minor child, B.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner asserts that the ALJ did not properly consider the evidence in this matter. Specifically, petitioner contends that the ALJ failed to recognize that, at the point she was evicted from her home in Branchburg, she and her daughter became homeless, and were without a *"fixed, regular or adequate residence."* (emphasis in text) (Petitioner's Exceptions at pp. 1, 2) Petitioner maintains that she and her daughter remain homeless, notwithstanding that they live with her brother in his apartment, and argues, *"Parent and child can still be homeless where both are living with relatives out of necessity."* (emphasis in text) (*Id.* at p. 2) Thus, petitioner urges the Commissioner to consider all the evidence in this matter and to rule in her behalf.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's conclusion that petitioner is neither domiciled in Branchburg, where she no longer maintains a permanent home or principal establishment, nor "homeless," as per *N.J.A.C.* 6:3-8.1 *et seq.*, in that, while her living arrangements with her brother may not be *permanent* in the sense

that she may wish to eventually return to Branchburg, the evidence shows them to have become sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness. Indeed, petitioner's circumstances are more analagous to temporary residency and eventual domicile (in Somerville) as envisioned by *N.J.S.A.* 18A:38-1d. Thus, petitioner has failed to establish that B.C. is entitled to a free public education in the Branchburg school district pursuant to either *N.J.S.A.* 18A:38-1a or *N.J.S.A.* 18A:38-1f.

The Commissioner notes, however, that while agreeing with the ALJ's conclusions and basic analysis as clarified above, and agreeing that the case of *Maurice River, supra,* is applicable herein, it is necessary to clarify that the outcome in that matter did *not* hinge on the mother and child's approximately two-week period of residency with the child's grandmother, but on the fact that the mother subsequently obtained a regular, fixed and adequate apartment, which removed her from homeless status, notwithstanding that her initial months of rental were subsidized by a social service agency. The situation addressed in *Maurice River* is germane to the one at issue herein, in that a family initially forced to relocate with family members on a temporary basis subsequently became residents of the district, in *Maurice River* by obtaining an apartment, and here by petitioner's brother's home having, in the months since September 1995, effectively become petitioner's regular and fixed residence.

Accordingly, the determination of the ALJ to dismiss the Petition of Appeal is, for the reasons expressed therein as clarified above, hereby adopted as the final decision in the matter and the decision of the Board to remove B.C. from its school system is affirmed. Pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, petitioner is directed to remit to the Board tuition for B.C., prorated to the time of her ineligible attendance in the District.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

September 12, 1996
Date of Mailing, September 12, 1996

383-96

383-96

BILLIE JO RENTERIA,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF SECAUCUS, HUDSON COUNTY,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
CHARLES WEENING AND RALPH MERLO,	:	
RESPONDENTS.	:	
	:	

September 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11773-95

AGENCY DKT. NO. 287-5/95

BILLIE JO RENTERIA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF SECAUCUS, HUDSON COUNTY, AND CHARLES WEENING AND RALPH MERLO,

Respondents.

Diane K. Murray, Esq., attorney for petitioner

Dennis A. Maycher, Esq., attorney for respondents

Record Closed: July 22, 1996 Decided: July 22, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioner alleges that respondent, Board of Education of the City of Secaucus, Hudson County (the Board), acted in an arbitrary and capricious manner in retaining her daughter in the first grade.

PROCEDURAL HISTORY

On July 14, 1995, petitioner filed a Petition of Appeal. She filed an Amended Petition of Appeal on September 18, 1995. On October 27, 1995, the Commissioner of Education transferred this matter for a hearing. A hearing was scheduled for July 22, 1996. Prior to the start of the hearing, the Board moved for summary disposition.

DISCUSSION AND CONCLUSION

Petitioner claimed that the Board acted arbitrarily and capriciously in retaining her daughter in the first grade. Petitioner sought an Order compelling the Board to place her daughter into the second grade. By the time this matter came on for a hearing, however, petitioner's daughter had transferred to the Township of North Bergen School District and had repeated the first grade in that District. Petitioner admitted that her daughter would continue attending school in the Township of North Bergen and would not return to Secaucus.

Based upon petitioner's admissions, the Board moved to dismiss the matter.

By reason of the foregoing, I **CONCLUDE** that petitioner's daughter no longer attends school in the City of Secaucus School District.

ORDER

I, therefore, **ORDER** that the Board's motion be and hereby is **GRANTED** and this matter be and hereby is **DISMISSED**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 22, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

8/2/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 5 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 11773-95

BILLIE JO RENTERIA,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF SECAUCUS, HUDSON COUNTY,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
CHARLES WEENING AND RALPH MERLO,	:	
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon such review of the record, the Commissioner concurs with the Administrative Law Judge in her initial decision that this matter is properly dismissed, as petitioner's daughter no longer attends the respondent Board's school system.

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and this matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 12, 1996
Date of Mailing, September 12, 1996

384-96

384-96

JOSEPH STAUB, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY, : DECISION

RESPONDENT. :

:

September 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11721-95
AGENCY DKT. NO. 395-10/95

JOSEPH STAUB,

Petitioner,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

Respondent.

Jay Joseph Friedrich, Esq., for petitioner
(Gallo, Geffner, Fenster, P.C.)

Mark J. Blunda, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A.)

Record Closed: July 24, 1996 Decided: July 30, 1996

BEFORE **STEPHEN G. WEISS**, ALJ:

This matter was transmitted to the Office of Administrative Law as a contested case by the Department of Education on October 24, 1995. In his petition of appeal Staub maintained that the respondent's determination to withhold his increment was arbitrary, capricious and unreasonable. Thereafter, a telephone prehearing conference

was scheduled to be conducted by the undersigned administrative law judge but was adjourned when counsel jointly advised that the matter was the subject of serious settlement negotiations.

Subsequently, a stipulation of settlement was prepared and submitted to the undersigned administrative law judge. That document, which is attached hereto and made part hereof, contains the terms and conditions of the parties' amicable resolution of the case and is signed by the petitioner, Joseph Staub, and also by a representative on behalf of the respondent Board of Education of the Village of Ridgewood.

I have reviewed the terms and conditions of the proposed settlement as set forth in the stipulation attached hereto and **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures of counsel which appear on the amended settlement agreement;

2. The settlement as set forth in the amended settlement agreement fully disposes of all issues in controversy and is consistent with law.

I hereby **FILE** my initial decision with **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. If the Commissioner does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise

extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

July 30, 1996
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8/2/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 5 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/mh

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

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SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for The Board of Education
of the Village of Ridgewood

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
AGENCY DOCKET NO. 395 - 10/95
OAL DOCKET NO. EDU11721-95

JOSEPH STAUB,

Petitioner,

-vs-

RIDGEWOOD PUBLIC SCHOOL SYSTEM,

Respondent.

STIPULATION OF
SETTLEMENT AND DISMISSAL

It is hereby stipulated and agreed by the undersigned parties that the above-captioned matter is fully and finally resolved on the following terms:

1. Petitioner, Joseph Staub, shall continue to perform full-time teaching duties for the Respondent Ridgewood Board of Education for the balance of the 1995-96 school year;

2. Petitioner has notified the Respondent Board of Education of his intention to retire effective June 30, 1996 and simultaneous with the execution of this Agreement is submitting his irrevocable resignation from employment in the Ridgewood School District effective June 30, 1996;

3. In light of the uncertainty and cost of litigation, and in consideration of the withdrawal with prejudice of the above-captioned matter and his performance during the 1995-96 school year, the Respondent Board of Education shall restore Petitioner's increment retroactive

to July 1, 1995, in accordance with the demands of the Petition of Appeal. Petitioner's salary for the 1995-96 school year shall be $73,920.00 (Step Fifteen) plus the appropriate professional growth pathway ($300.00) and applicable longevity ($1,150.00), representing a total payment of $75,370.00 for the full academic year;

4. Upon retirement, Petitioner shall be entitled to payment for unused accumulated sick days in the total amount of $28,000.00;

5. The parties hereby release and relinquish any and all claims which either party may have against the other up to the present date;

6. The above-captioned matter shall be dismissed with prejudice.

PETITIONER
JOSEPH STAUB

By: _____
Joseph Staub

RESPONDENT
BOARD OF EDUCATION OF THE
VILLAGE OF RIDGEWOOD

By: _____

OAL DKT. NO. EDU 11721-95

JOSEPH STAUB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

September 12, 1996

Date of Mailing, September 12, 1996

385-96

ARLINE R. PHILLIPS, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS. : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, candidate for certification, contended Board arbitrarily refused to issue her permanent certification for Student Personnel Services.

ALJ concluded that the State Board of Examiners correctly determined that the applicant had failed to prove acceptable teaching experience and the application was, therefore, properly denied.

Commissioner concurred with the ALJ that the Board's denial of permanent certification because petitioner failed to establish that she had served one year of successful full-time teaching, pursuant to a proper teaching certificate, must be sustained. Petition was dismissed.

September 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12474-94S
AGENCY DKT. NO. 447-11/94

ARLINE R. PHILLIPS,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: June 14, 1996 Decided: July 31, 1996

BEFORE **JEFF S. MASIN**, ALJ:

Arline R. Phillips applied to the respondent Board of Examiners ("Board") for permanent certification for Student Personnel Services. This certification is issued by the Board pursuant to *N.J.S.A.* 18A:6-38 and *N.J.A.C.* 6:11-11.11. The Board rejected the application, based upon its determination that she had failed to establish that she had one year of successful full-time teaching experience pursuant to a proper teaching certificate, as required by subpart (b) 3 of the regulation. Ms. Phillips appealed, and the Commissioner of Education transferred the matter to the Office of Administrative Law ("OAL") as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -21 and *N.J.S.A.* 52:14F-1 to-13. A hearing was held before this judge on June 14, 1996, at the OAL in

Mercerville. The record closed following the presentation of witnesses and exhibits and oral summations by counsel.

Ms. Phillips testified that she graduated from Northeastern University in 1979 with a Bachelor's Degree in Education and obtained a teaching certificate from Trenton State College in 1986. In the summer of 1985 she was attending class at Trenton State College to get a vocational instruction certificate. She learned of a job opportunity at Mercer County Vocational-Technical School ("Vo-Tech") and applied for it and was hired. She was aware that she had to apply for an emergency certification. She knew that she had to get a certified check and obtain necessary paperwork and that after she completed her portion of the paperwork she had to give it to the school district, which would then present the paperwork to the State. She obtained the check and the paperwork, filled in her portion and then gave it to the Board of Education's representatives so that they could fill in their part. She "never gave it another thought." From September to November of 1985, Ms. Phillips served as a practical aide instructor for the J.T.P.A. Program, teaching disadvantaged adults marketable skills in a "twilight program" at the Vo-Tech. She also began to work as a substitute teacher when an instructor suddenly left. She performed both of these jobs until Thanksgiving and was then appointed to a full-time position from December through the end of the school year in June 1986. She was rehired for the 1986-87 school year, but she decided to pursue a business opportunity with her then husband and left the education field. She never received a document representing the certification.

Ms. Phillips reentered the education field in 1994. She had a regular teaching certificate by that time. She was hired as a school counselor in Hamilton Township, Mercer County. In this position she had to follow a curriculum which included an educational component, including drug addiction and self-awareness. She spent 50% of her time in group settings with students and no other teacher present. She was rehired, but had applied for and obtained a position as a counselor at Ewing High School. This position involved no teaching duties. She performed successfully. In 1995-96 she worked at the Alternative High School. She spent 50% of her time as a counselor, 50% as a life skills teacher.

Ms. Phillips has been unable to locate any copy of the check which she recalls having drawn to pay for the fee for the certificate in 1985. She has no doubt that she prepared her

portion of the necessary paperwork. She acknowledged that subsequent to 1985 when she applied for certificates they arrived at her house.

Dr. Elrich A. Cicchetti, Superintendent of the Mercer County Vocational-Technical School District, was the Superintendent when Ms. Phillips taught at that school in 1985-86. He confirmed her recitation of the facts regarding her employment in the district. She worked as an instructor in personal life services under an emergency services certificate. He was "absolutely" familiar with the procedures for obtaining certificates and explained that most of the teachers hired at the Vo-Tech had to go through the emergency process. He would look at the prospective employees work experience at the interview, and if he felt that the work experience paralleled what was needed he would get information from the person's prior employer(s) and then send out a form to the employer regarding the person's job duties. This form usually took some time to get back. Then the form was sent to the Division of Vocational Education ("Division"), who might ask for further information from the prior employer. Once the Division advised that the work experience was satisfactory, the paperwork would then be submitted to the Division for the issuance of an emergency certification. When the certificate was received at the school it would be submitted to the County Superintendent for an endorsement process and the teacher would sign the certificate. It was not at all uncommon for the process to take quite a bit of time and for the certificate to arrive late in the school year. Emergency certificates were always sent to the district by the State and it was necessary to let the employee know that the certificate had been received.

While the witness did not suggest that he had any personal recollection of seeing Ms. Phillip's paperwork in 1985, he was certain that the proper application was forwarded to the State, as the process within the district was "automatic." His secretary at the time would see that the necessary work was accomplished. He has no recollection of whether he ever checked on the status of Ms. Phillips' application. Although he does not recall if the district was monitored that year, the monitoring process included an examination to assure that all teachers were properly certificated and therefore he is sure that the matter was taken care of. However, except for payroll records, the district has destroyed all of the records from the mid-1980's.

Dr. Cicchetti denied that he was confusing the emergency certificate process with the vocational-technical certificate process.

Elizabeth Ann Strother, employed by the Office of Licensing since September 1980, testified that the reason for denial of the student personnel services certificate was the lack of a full year of teaching experience. She explained that the process for obtaining an emergency teaching certificate has not changed since 1985-86. The school district is really the applicant for an emergency certificate. The process does not require that candidate's vocational experience be examined. Applications for such certificates are handled as a priority, since the candidate must be filling a vacancy in order to even qualify for the certificate.

Ms. Strother advised that an extensive search by four staff members for a little over a day failed to turn up any evidence that an application for an emergency certificate had been made on behalf of Ms. Phillips in 1985-86. If it had, the old fee logs would have shown an entry, and these were checked without success. The County Superintendent's Office would also have a file, and a check with that office was also unsuccessful in locating any evidence of an application.

The witness explained that no credit toward the experience requirement can be given for Ms. Phillips' teaching in the J.T.P.A. program as it involved a class of adults, and no credit is given for substitute teaching either. When Ms. Phillips worked in Ewing Township and then in Hamilton Township, she was evaluated as a guidance counselor, not as a teacher, and as such that experience cannot be counted either. However, her teaching experience in 1995-96 will count toward the experience requirement.

DISCUSSION

The Board of Examiners determined that Ms. Phillips had not demonstrated that she had the one year of teaching experience required by regulation. It does not dispute that she taught from December 1985 through June 1986, but argues that in the absence of any evidence that that experience was obtained while Ms. Phillips was properly certificated, she cannot be given any credit for the time toward the necessary one year.

Pursuant to *N.J.S.A.* 18A:26.2 "no teaching staff member shall be employed . . . unless he is the holder of a valid certificate to teach, ..." While it is clear that a teacher may be employed and may continue to teach while the process for obtaining an emergency certificate is completed, in the Board's view, where the evidence is lacking that the process was actually completed and the proper certificate issued, the proof that the teaching experience was performed pursuant to the law is also lacking, and it would therefore be inappropriate to accept the experience. To do so would reward work performed in a manner which is not permitted by the applicable statutes and regulations.

The only evidence which Ms. Phillips has to support that she sought to obtain an emergency certificate is her own testimony that she prepared the necessary paperwork and obtained the proper check and turned these in to the district, assuming that it would then prepare its portion of the paperwork and forward the material to the proper state authority. Neither she nor the district's superintendent have any documentation of their own to prove that all of this occurred. I found Ms. Phillips' belief that she in fact started the process to be sincere, and while the Superintendent may have mixed up parts of the emergency certificate and the vocational-technical certificate processes, nevertheless, I **FIND** that there is every reason to believe that both Ms. Phillips and the Board were fully aware of the need for her to obtain the certificate, and for the Board to do its part to obtain it, both for the protection of the teacher and the Board. Dr. Cicchetti's description of the regularity with which the district had to deal with the need for its employees to obtain emergency certificates and the automaticity of the process within the district also support the likelihood that the process was at least started, albeit never completed. However, nothing else offered here demonstrates that what Phillips and Cicchetti believe occurred did in fact happen.

Assuming that Ms. Phillips' belief that she turned in the paperwork accurately reflects what happened, the unanswerable question is what happened to the paperwork after Ms. Phillips turned it over to the Board? Neither Ms. Phillips nor Dr. Cicchetti can tell us. I **FIND** that there is currently no documentary evidence of an application for the emergency certificate, no check or other bank record to show that a check was cut, that it was ever presented for payment, etc. Further, I **FIND** that a thorough search of the available records of the Department of Education

has failed to uncover any evidence that the application and accompanying check were received, or that the emergency certification was ever issued. Thus, based upon the now available evidence, I **FIND** that if Ms. Phillips initiated the process for applying for the emergency certification, somewhere between her obtaining and completing her portion of the paperwork and the receipt of the certificate by either the Board or Ms. Phillips, the process broke down, papers were lost or mislaid, and the certificate was never received, and quite probably was never actually issued by the Board of Examiners.

The Board of Examiners argues that despite the fact that Ms. Phillips actually taught, its position denying any credit for that experience is a reasonable one. Its conclusion that the experience cannot be credited unless supported by a proper certificate is one which is rooted in the demands of the statute and regulations. Teaching in this state must be performed in accordance with rather stringent certification requirements. While the requirements needed to qualify for an emergency certificate may themselves be limited, the need to obtain such a certificate is unquestioned, and Boards of Education are, as Dr. Cicchetti testified, monitored in regard to their compliance with certification requirements. Since the Board's position is not arbitrary, it argues that it should be upheld.

Certainly, it is reasonable for the Board to expect that teaching experience which occurs in New Jersey be performed in accordance with the regulations which govern who may teach and under what conditions. While there have been cases where the Commissioner has recognized that form should not prevail over substance and that someone who was eligible for and/or initiated the process to obtain a certificate, but could not produce it in hand at a later date, should nevertheless be given credit for having it, *Kane v. Hoboken Bd. of Ed.*, 1975 *S.L.D.* 12, 17; *Givens v. Newark Bd. of Ed.*, 1974 *S.L.D.* 906, 908, these cases have involved situations where the proofs regarding the initiation of an actual application to the State have been more conclusive than the proof herein, which involves only the unsupported testimony at hearing of the teacher that she gave the district the initial paperwork. While it appears that if her recollection is accurate, then the failure of Ms. Phillips to actually receive the document was not "of [her] own doing," *Givens, supra.*, the Board's unwillingness to credit teaching performed without any substantial proof that it was performed under color of an attempt to bring it into conformity with State law is understandable and should be honored. Therefore, I **CONCLUDE** that the Board correctly determined that the

applicant had failed to prove acceptable teaching experience and the application was therefore properly denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 31, 1996
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

8/2/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None.

FOR THE RESPONDENT:

Resume of Arline Phillips Friedland with Addendum

ARLINE R. PHILLIPS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS.	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the initial decision was mailed to the parties on August 6, 1996 and the exceptions were filed on August 20, 1996. Accordingly, the exceptions are not considered herein.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's findings, as well as his ultimate conclusion, that the decision of the New Jersey State Board of Examiners denying the issuance of permanent certification for Student Personnel Services to petitioner because she failed to establish that she had served one year of successful full-time teaching, pursuant to a proper teaching certificate, must be sustained. The Commissioner is unable to find that the Board's refusal "to credit teaching performed without any substantial proof that it was performed under color of an attempt to bring it into conformity with State law ***" (Initial Decision at p. 6) is arbitrary, capricious or unreasonable.

Accordingly, as the Commissioner may not substitute his judgment for that of the Board as lawfully applied, the recommendation of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter for the reasons expressed in the initial decision.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

September 12, 1996
Date of Mailing, September 12, 1996

386-96

386-96

H.C.J., on behalf of her minor daughter, C.J.,:

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning parent challenged Board's residency determination that her child, C.J., was a nonresident of the District and, thus, not entitled to a free public education. Board alleged that as of November 19, 1995, and for at least two school years prior thereto (1993-94 and 1994-95), petitioner had not been a legal resident of the District, and, therefore, her daughter's attendance was improper.

ALJ determined that petitioner did not prove by a preponderance of credible evidence that she was domiciled in the District during the school years in question. Petition was dismissed and the Board's claim for reimbursement of tuition in the amount of $19,682 (February 1992 to October 1995) was granted.

Commissioner concurred with the ALJ with modification. Commissioner directed petitioner to remit to the Board the $19,682 owed, plus a prorated amount of tuition for the period from November 1995 to June 1996, while this action was pending, representing out-of-district tuition for C.J.'s full period of ineligible attendance.

September 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1755-96

AGENCY DKT. NO. 27-1

H.C.J. ON BEHALF OF HER MINOR DAUGHTER, C.J.,

Petitioner,

v.

BOARD OF EDUCATION

OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT,

UNION COUNTY,

Respondent.

Ronald C. Hunt, Esq., for petitioner

(Hunt, Hamlin & Ridley, attorneys)

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: July 16, 1996 Decided: July 26, 1996

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This school residence case was transmitted to the Office of Administrative Law by the Department of Education on February 20, 1996 as the result of the filing of a petition of appeal by H.C.J., the mother of C.J., a minor, who disputed the respondent school district's claim that as of November 19, 1995, and for at least two school years prior thereto (1993-94 and 1994-95), H.C.J. had not been a legal resident of Scotch Plains and, therefore, her daughter's attendance in the district's public schools without payment of tuition during that period was improper. As a result, although C.J. is permitted to continue to attend Scotch Plains High School pending a decision, tuition reimbursement is sought from petitioner. See *N.J.S.A.* 18A:38-1(a).

A plenary hearing was scheduled in an expedited fashion and was conducted by the undersigned administrative law judge on June 13, 1996. Post-hearing proposed findings of fact and conclusions of law then were submitted and the record closed on July 16, 1996. The following constitutes my initial decision.

TESTIMONY

A. FOR PETITIONER

H.C.J. was the sole witness on her own behalf. She is the mother of C.J. who, at the time of the hearing on June 13, 1996, was about to complete 10th grade at Scotch Plains High School. H.C.J. maintained that since February 1992, at least, she has resided permanently with her daughter, C.J. (as well as with her other older children from time-to-time) at the premises located at 2682 Plainfield Avenue, Scotch Plains. That residence, she said, is a one family house owned by one Mary Crawford who now lives in Hollywood, Florida. H.C.J. said she originally moved there as Crawford's tenant in February 1992 and signed a one year lease (Exhibit P-1) which she renewed last October (Exhibit P-2). According to H.C.J. she always paid rent either by mail to Crawford, or directly to Crawford's boyfriend, in the amount of $750 per month.

In October 1995, H.C.J. signed the second lease with Crawford (Exhibit P-2) and said she also became responsible for the utility bills herself (Exhibits P-4(a), P-4(b), P-5). In June 1995, H.C.J. and her daughter temporarily had moved to Linden since H.C.J. was doing carpentry work for a Mr. Carter who owned property there. Thus, H.C.J. insisted that except for that period (June to September 1995) she and her daughter, C.J. continuously resided in Scotch Plains.

Also, although prior to October 1995 H.C.J. did not have a telephone in her own name (she said it was in the name of her older daughter), she has had a telephone in her name since that time (Exhibit P-6). Moreover, H.C.J. also produced three other documents to attempt to prove her Scotch Plains residence. They included: (1) a receipt for cleaning a septic tank, dated January 19, 1996 (Exhibit P-8); (2) a summons issued in December 1995 for maintaining a nuisance (Exhibit P-10); and (3) a court appearance rescheduling notice pertaining to the septic problem (Exhibit P-9).

On cross-examination, H.C.J. insisted that she lived continuously at the Plainfield Avenue property since 1992, and although she did own a motor vehicle it was stolen from her last year. She also conceded that she has filed no federal or state income tax returns for the past three years. With respect to the February 1992 lease (Exhibit P-1), H.C.J. claimed that Crawford prepared and mailed it to her, already signed. With respect to the 1995 lease (Exhibit P-2), H.C.J. could not recall who actually prepared it, but she did say it was she who filled in the blanks and admitted that she signed Crawford's name.

Sometime during November 1995, after being notified there was a problem with her daughter's right to attend Scotch Plains High School, H.C.J. spoke to someone in the school guidance office and was told a school attendance officer would call to come to see her. This officer (Mr. Carl Sicola) called her and she asked him to wait about fifteen minutes since she had to get dressed. When Sicola arrived she proceeded to let him in to the house by unlocking a door from the sun porch to the interior of the house.

On redirect examination H.C.J. explained that although she had signed Crawford's name to the October 1995 lease (Exhibit P-2), Crawford had given her authority to do so. She also insisted that all of her belongings, including clothing and furniture, were at all times located in the house in Scotch Plains.[1]

B. FOR RESPONDENT

Two witnesses testified on behalf of the respondent school district, Carl Sicola, the attendance officer, and Susan Tillis, Director of Special Services who also coordinates residency verification matters.

Prior to September 1995, Sicola had been employed as a detective with the Scotch Plains Police Department. Upon his retirement from police service he became employed as attendance-residency officer for the respondent. Sicola personally was familiar with the premises located at 2682 Plainfield Avenue and recalled that during the Spring of 1995, while he was still a member of the local police force, information was received that the house was being used by juveniles for drug and alcohol related activities. Periodically, he would check the property, as would other police officers, and crack vials often were found there. At no time during this entire period did he or other police officers find any evidence that persons actually lived in the house on a permanent basis.

During the summer of 1995 the property, according to Sicola, remained abandoned and he also learned from the Township that no one was to be permitted to live there since it was the subject of a tax delinquency foreclosure action.

In September 1995, the school district's residency verification officer, Tillis, showed Sicola several letters which had been sent to H.C.J. at the 2682 Plainfield Avenue address. All had been returned with notations on the envelopes that the

[1] Prior to closing the record I asked H.C.J's counsel to submit a photocopy of H.C.J.'s New Jersey driver's license for 1993-95. This was never done even though Exhibit P-7 purports to show that her license privileges had been restored to her in March 1996 following her payment of a restoration fee. My follow up letter of July 11, 1996 again requesting submission of the photocopy was never answered.

addressee (H.C.J.) had "moved, left no address" (Exhibit R-1). All nine envelopes were postmarked between June 2, 1995 and September 27, 1995.

Periodically throughout September and October 1995, Sicola visited the subject premises at various hours during both the day and night and he never observed any signs that persons actually were living there. Whenever he knocked on the door there was no response and the municipal tax officials advised him that as far as they knew no one was living at the house.

After school began, Sicola learned that electricity and water services to the premises had been turned on, and that persons now were living in the house. Sicola then spoke to C.J. and at his request she brought in the 1995 lease (Exhibit P-2), which H.C.J. has admitted signing both her own name and that of Mary Crawford. Sicola also called Crawford in Florida and was told that H.C.J. was intending to purchase the house from her.

On November 20, 1995, Sicola learned that H.C.J. had called Tillis and that Tillis told her she would send Sicola to see her. At approximately 10:30 a.m. that day Sicola drove to the property, went up the front steps to a sun porch and knocked on an inside door. He received no response. He then went back across the street to a telephone booth and called the telephone number which had been provided him. H.C.J. answered the call and asked Sicola to give her fifteen minutes to come to open the door for him. Sicola waited and watched the premises. About fifteen minutes later a car drove up to the house and a black female, with blond hair, exited the vehicle and proceeded to enter the rear of the house. Sicola could not identify if the person was H.C.J.

Sicola then proceeded to cross the street, walk back up the steps and through the unlocked door to the sun porch. He then knocked on the interior door and was admitted by H.C.J. When Sicola went in to the house he saw dining room furniture and numerous extension cords. He did not mention seeing any other persons.

On cross-examination, Sicola agreed that his visit on November 20, 1995 was the first time he had actually been inside the house. Also, he repeated that he could not identify the person whom he saw drive up shortly before H.C.J. let him into the house, except she was a black female.

Finally, in response to a question posed by the undersigned, Sicola estimated that during the period September-October-November 1995, he visited the subject property several times between 6:00 a.m. and 8:30 a.m. and at no time did he ever observe anyone living there - certainly he never saw C.J. leave the house to go to school.

The last Board witness was Susan Tillis, Director of Special Services who, as noted, also coordinates residency verification matters. During June, July and August 1995, nine letters sent to H.C.J. at 2682 Plainfield Avenue were returned to the school district unclaimed. Thus, she decided that an inquiry ought to be made and she asked Sicola to contact C.J. to have her mother complete a residency form. Tillis did not believe that the October 1995 lease (Exhibit P-2) had any probative value since it contained various omissions and the signatures did not appear to be proper.

According to Tillis, even though the last day of school in the 1994-95 school year was June 20, 1995, four of the returned letters were postmarked between June 2 and June 16, 1995, when school was still in session. She also noted that the first day of school for the 1995-96 school year was either September 6 or September 7, 1995, and that one of the returned letters was mailed on September 6, and another on September 27.

With respect to tuition costs allegedly owed by H.C.J. for C.J.'s attendance in Scotch Plains, Tillis noted that the latest "official" figures were calculated for the 1993-94 school year. The annual tuition charged to a student sent to the district that school year was approximately $8692. The business office has estimated that the tuition costs for 1994-95 were approximately $9127, and for 1995-96 were approximately $9583.

DISCUSSION

If, as petitioner claims, she actually resided with her daughter, C.J., at the Scotch Plains residence since February 1992 to date, and was temporarily absent during the summer of 1995 only in order to assist in carpentry work in Linden, then her daughter was entitled to attend the Scotch Plains public schools and no tuition reimbursement would be owed to the Board. However, from my review and consideration of the evidence in this case, including the credible testimony offered by the respondents and the serious discrepancies and gaps in the version offered by the petitioner, I am led inexorably to the conclusion that prior to November 1995 petitioner was not a legal resident of Scotch Plains. Thus, her daughter C.J.'s attendance at the school in Scotch Plains without payment of tuition during 1993-94, 1994-95 and the first two months of 1995-96 therefore was improper under *N.J.S.A.* 18A:38-1(a).

As noted, petitioner's credibility was extremely suspect. Her claim that she and her daughter lived at the Plainfield Avenue premises beginning in February 1992, and continuously thereafter except for a portion of the summer of 1995, was unworthy of belief. To begin with, the lease dated February 1992 (Exhibit P-1) must be rejected on its face since it is on a form which shows a 1993 copyright date. Also, there are critical omissions, including a description of the leased premises, the term and whom the occupants shall be. The second lease purportedly signed on October 2, 1995 (Exhibit P-2) is even less credible since petitioner admitted that she signed Mary Crawford's name to it. Whether or not Crawford authorized this to be done essentially is irrelevant. The documents, on their face, are so suspect as to provide no reliable basis to corroborate petitioner's contention.

There are a host of other difficulties with H.C.J.'s credibility. Although she claimed to be living at the premises since February 1992, the earliest utility bill which she produced was for October 1995 (Exhibit P-4(a)). Even if, as petitioner claimed, Crawford paid the utility bills before then, petitioner easily could have produced records from the utility to prove that they were sent to Crawford. Moreover, it was undisputed

that real estate taxes were not paid and the property is the subject of a pending tax foreclosure action.

Thus, the documentary evidence produced by petitioner (the Public Service bills, the overdue phone bill notice, the septic tank cleaning bill, the summons and complaint, etc.) prove nothing with respect to whether H.C.J. actually resided at the premises prior to November 1995. Having admitted that she signed Crawford's name to the October 1995 lease, having produced a 1992 lease on a form that was not even in existence until 1993, and further having admitted filing no state or federal income tax returns with respect to her earnings, petitioner presented herself, quite simply, as an incredible witness.[2]

By contrast, the solid testimony of Sicola was most persuasive. For example, he related without contradiction that during the Spring of 1995, when he was still a detective on the Scotch Plains police force, the property was a known hang-out for drug and alcohol users and that no one lived there. So too, his testimony that he often visited the property during 1995 and observed no one living there also was free of dispute. The "icing on the cake" seems to me to be the nine letters sent to H.C.J. at the Scotch Plains address between early June and late September 1995 (Exhibit R-1). All were returned unclaimed with the notation, "moved, left no address". Although H.C.J. attempted to explain that situation by claiming she and her daughter lived in Linden during that summer, this does not explain why several of the letters sent to the house while school was still in session in June 1995, and after school opened again in September 1995, also were returned.

Yet another undisputed fact militating against petitioner's credibility is Sicola's testimony concerning his surveillance of the property on November 20, 1995. Only after some unknown black female drove up to the house and went inside was there any sign of life within the premises. Just prior to that time Sicola attempted, without success, to rouse any persons inside and it is reasonable to assume that no one was

[2] Even the alleged "rent receipts" (Exhibits P-3(a), 3(b), 3(c)) were deficient. First, they were for $500 each, not $750, and have no intrinsic value as to whether they related to "rent" at all. Moreover, two of them give a Westfield, N.J. address for H.C.J. (Exhibits P-3(a) and P-3(b) and all are dated in 1993

there. The person who then drove up to the house and entered in the rear, in all reasonable likelihood, was petitioner herself since she soon emerged to let Sicola into the house and he observed no one else there.

The terms "domicile' essentially refers to that place where the responsible custodial parent has his or her true and fixed permanent home and to which, whenever he or she is absent, he or she has the intention to return. None of the school laws cited by petitioner in the area of residence and domicile support her claim. Petitioner did not own the house and her claim to have been a tenant living there since 1992 was incredible. No telephone, water, electric or other utility bills were produced to show that during the period between February 1992 and October 1995 she paid for any of those services, no less used them, and the unequivocal and undisputed testimony by Sicola that he often personally observed no one living at the property when petitioner claimed she was there clearly call for a determination in favor of the respondent. As Board counsel pointed out in his post-hearing memorandum, petitioner simply was unable or unwilling to produce any solid, reliable evidence of a permanent record concerning her living in Scotch Plains during the critical period in question. There were no voting records, no tax returns, no time relevant utility or other bills and no reliable rent receipts. Moreover, despite her counsel's representation that his client would comply, H.C.J. also failed to produce a photocopy of her driver's license.

In short, petitioner woefully has failed to carry her statutory burden of proving by a preponderance of the credible evidence that she was a legal resident or domiciliary of Scotch Plains between February 1992 and November 1995. Accordingly, she owes tuition to the Scotch Plains-Fanwood school district for the attendance of her daughter in that period, and in the amount set forth below:

a) September 1993-June 1994 ($8,692)

b) September 1994-June 1995 ($9,127)

c) September 1995 to November 1995 (est. 35 school days) - $1863)[3]

[3] The figure of $1863 is calculated as follows: $9583÷180 x 35. I have not assessed any cost for November although it is likely that the non-residence status existed until on or about November 20, 1996.

Therefore, the total owed to respondent is $19,682

CONCLUSION AND ORDER

For the reasons set forth above, I **CONCLUDE** that the petitioner, H.C.J., has failed to demonstrate by a preponderance of the credible evidence that during the period between February 1992 and November 1995 she was a legal resident or domiciliary of Scotch Plains. Therefore, her daughter's attendance in the Scotch Plains Public Schools during this period without payment of tuition was unlawful and in violation of *N.J.S.A.* 18A:38-1(a). Accordingly, it is hereby **ORDERED** that her petition of appeal be **DISMISSED** and that the Board's claim for reimbursement of tuition in the amount of $19,682 be **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 26, 1996
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

7/31/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 31 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/mh

APPENDIX

Witness List:

For Petitioner: H.C.J.

For Respondent: Carl Sicola
Susan N. Tillis

Exhibit List:

P-1	Residential lease dated February 1, 1992
P-2	Residential lease dated October 2, 1995
P-3(a), P-3(b) and P-3(c)	Receipts
P-4(a)	Photocopy of October 19, 1995 PSE&G bill
P-4(b)	Photocopy of January 19, 1996 PSE&G bill
P-5	Payment receipt from PSE&G for outstanding balance
P-6	Photocopy of Bell Atlantic suspension notice, January 3, 1996
P-7	Photocopy of restoration fee - Division of Motor Vehicles, March 13, 1996
P-8	Rotor-Rooter invoice, January 19, 1996
P-9	Photocopy of court rescheduling date
P-10	Photocopy of summons, November 11, 1995
R-1	Photocopies of envelopes mailed to H.C.J. between June 2 and September 27, 1995

OAL DKT. NO. EDU 1755-96

H.C.J., on behalf of her minor daughter, C.J.,:		
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent in accordance with *N.J.A.C* 1:1-18.4.

Respondent agrees with the findings and conclusions of the Administrative Law Judge (ALJ) that petitioner was not domiciled within the School District. (Exceptions at p. 1) Respondent suggests, however, that the ALJ failed to assess tuition for the period of November 1995 through June 1996, during which respondent was under legal obligation, pursuant to statute, to continue the education of petitioner's child while the matter was pending before the Commissioner of Education. Respondent, therefore, seeks modification of the Commissioner's decision to expand the period of time through June 1996 for the payment of tuition and to state that C.J. is not presently entitled to be enrolled in the respondent District. (Exceptions at p. 2)

Upon a careful and independent review, the Commissioner concurs with the findings of the ALJ but modifies the decision as follows. Commissioner concurs that, pursuant to *N.J.S.A.* 18A:38-1, C.J. is not, and was not during the period at issue, entitled to a free public education in the Scotch Plains-Fanwood School District. It is observed that in reaching this decision, the Commissioner had no cause to question the ALJ's assessment of petitioner's credibility as such assessment is not belied by the record. However, the Commissioner modifies the determination to assess tuition against petitioner for the period of November 1995 through June 1996 for C.J.'s ineligible attendance in the District in that the ALJ did not find petitioner's circumstances with regard to domicile to have changed after November 1995, and controlling statute provides that, if in the determination of the Commissioner the evidence does not support the claim that the child is eligible for a free education in the District, the resident shall be assessed tuition for the student.

Accordingly, petitioner is directed to remit to the Board $19,682, plus a prorated amount of tuition for the period of November 1995 to June 1996, representing out-of-district tuition for C.J.'s full period of ineligible attendance, and the within appeal is hereby dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

September 12, 1996
Date of Mailing, September 12, 1996

388-96

388-96

G.A., on behalf of minor brothers and sisters, Z.A., A.A., A.A., A.A., and A.A.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged Board's residency determination that her brothers and sisters were nonresidents of the District and, thus, not entitled to a free public education.

ALJ determined that petitioner did prove by a preponderance of credible evidence that each of the five minors herein were domiciliaries of Somerville and no tuition moneys were owed to the Board. Although guardianship is not required by *N.J.S.A.* 18A:38-1b, G.A. had proven that each minor child, as he or she arrived in Somerville from the Philippines, came under the *de facto* guardianship of G.A. Petition was granted and the Board's resolution to disenroll the pupils was set aside.

Commissioner concurred with the findings of the ALJ in the initial decision. Commissioner found petitioner satisfied requirements of *N.J.S.A.* 18A:38-1b(1) and established that her siblings were eligible to attend respondent's schools.

September 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10306-95

AGENCY DKT. NO. 407-10/95

G.A., ON BEHALF OF MINOR BROTHERS AND SISTERS, Z.A., A.A., A.A., A.A. AND A.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE,

Respondent.

James F. Ryan, Jr., for petitioner (Bogart, Ryan & Campisano, attorneys)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: June 19, 1996 Decided: August 1, 1996

BEFORE **BRUCE R. CAMPBELL,** ALJ:

This matter is a residency dispute. The petitioner claims that a minor in her care and custody was wrongfully denied admission to the public schools operated by the Somerville Board of Education, respondent. *N.J.S.A.* 18:38-1.

The Board generally denies the allegations and asserts a counterclaim for costs of tuition.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held on February 1, 1996. The conference was continued to February 15, 1996 because the parties were discussing settlement. When it became apparent that settlement would not be achieved, I set the matter down for hearing on May 24 and June 5, 1996. Because of scheduling difficulties that were not the fault of either party, the first date was adjourned, and the matter was heard on June 5, 1996, in the Montgomery Municipal Court. Counsel timely filed written summations and the record closed on June 19, 1996.

PAROL AND DOCUMENTARY EVIDENCE

The Somerville Superintendent of Schools testified. The district's Director of Special Services received a letter and telephone call in September 1995 advising that Alphaeus A., a handicapped child, was coming from the Philippines. The district learned from the mother's letter several other siblings were enrolled. The children's files were collected. Ms. G.A. was asked to come in. The district had received documents from the children's father who lives or lived in Jersey City.

The superintendent informed G.A. that because the father was in Jersey City, the children should be in school there. In late September, Mr. A. claimed a Somerville address. He presented a driver license and voter registration card, both issued September 25, 1995.

The witness took this information to the Board which passed a resolution excluding the children pursuant to *N.J.S.A.* 18A:38-1(b)(2). This appealed followed.

The district prepared a tuition analysis, not including Alphaeus A., showing a total of $29,410.76 in tuition the district says the family owes (R-1). The superintendent met with G.A. in

September to discuss Alphaeus. Residency and domicile are the only issues the Board sees in the case.

G.A. testified. She is 26 years old and lives with eight brothers and sisters. Four persons in the household, including herself, are over 18 years of age. Five are minors. Alphaeus A. presently is in a special education placement.

The witness has lived in Somerville since 1993. Her brothers and sisters attending school are supported by the older siblings. The parents contribute nothing; the older siblings are the sole means of support.

There are five wage earners in the household, one of them still attending school. Five siblings are attending school. None have left the United States since 1993. It is their intent to remain in the United States and none of them has the present intent to return to the Philippines. The witness has a lease on a house at 113 [S.] Street, Somerville (J-21).

The witness learned after the fact that her father had presented documents (driver license and voter registration) to the district. Her siblings have never lived with her father. He is remarried and has a child by the second marriage.

When the siblings arrived in 1993, they all came to her Somerville apartment. In 1994, Aristides A. arrived. In 1995 Achilles A., Jr., Alexis A. and Alphaeus A. arrived.

The witness provided a consent to guardianship (J-16) because she was told when she enrolled Z.G.A. in 1993 that she needed documentation. Exhibit J-17 similarly applies to Aristides A.

G.A. wrote to the Somerset County Director of Special Services upon the advice of a person in the Middlesex County Office of Special Education. The witness also provided income tax returns for the year 1995 showing that she and her adult siblings "divided" the minor siblings for tax purposes. She did not individually claim all siblings as dependents. All adult siblings contributed to the household and each adult sibling claimed one or more deductions.

The witness stated she never said to any Somerville Board of Education employee that the father makes any contribution whatsoever to the maintenance of her minor siblings.

The witness also testified as to the take-home pay of her siblings and herself and their monthly expenses.

THE ARGUMENTS

The Petitioner

This matter was opened as a petition appealing the Somerville Board of Education's decision to remove four of G.A.'s brothers and sisters from the public school system and to deny a fifth sibling the right to register. The appeal had the effect of preventing the Board from dismissing the first four children. An application for formal guardianship was granted by the Somerset County Surrogate on November 20, 1995. As a result of the Surrogate's action, the fifth child was admitted and the Board ceased its efforts to disenroll the children.

The petitioner maintains there is no need to continue the original petition. The only issue is the counterclaim in which the Board contends that G.A. is responsible for back tuition for her siblings because of a deliberate misrepresentation and a violation of school laws. The only proofs submitted were the documents agreed to, R-1 and R-2, and the superintendent's testimony.

G.A. testified that she has resided in Somerville for the past three years and that she and her eight other brothers and sisters lived together in a setting where the five working siblings (one works part-time as well as attending school) all contribute to support of the household. G.A. testified that she made the decisions relating to her school-age siblings. She stated that all of the siblings were permanent residents of Somerville, that at no time have they ever been sent back to the Philippines, and that the parents do not contribute to their support. She submitted 1995 tax returns showing that the working siblings divided the tax deductions for the siblings in school.

The controlling statute, *N.J.S.A.* 18A:38-1(a), states:

> Public schools shall be free to the following persons under five and under 20 years of age:
>
> a. Any person who is domiciled within the school district; . . . .

The statute was amended in 1977 because of a concern that parents sometimes attempted to send their children to schools in districts other than their own, without actually changing residence. This is not the case in this matter. The children live in Somerville permanently. They are being supported by their siblings in Somerville and not by either parent. They are domiciled in Somerville. Moreover, G.A. is another person domiciled within the school district and is supporting the children as if they were her own. Part (b) of the statute provides, among other things, that the public schools shall be free to persons over five and under 20, if those persons are kept in the home of another person domiciled within the school district and are supported by the other person gratis as if they were such other person's own children. Not only are the children domiciled in Somerville, but G.A. could run afoul of compulsory attendance laws if she did not send the children to school.

The process of becoming guardian involved application to the Surrogate, obtaining affidavits from the parents and an order of the Surrogate. Until the Guardian Certificates issued, G.A. was the *de facto* guardian as the affidavits from the parents indicate.

As soon as G.A. received Mr. Rogers' September 21, 1995 letter, she went ahead with the guardianship applications. In all respects, she had been complying with Somerville requirements. When they added an additional requirement of guardianship, which the statute does not seem to require, G.A. nevertheless complied.

The Respondent

The Board resolved to exclude the children in this matter because the school district learned that G.A.'s siblings were living with her and not their father. G.A. was not their legal guardian when the Board learned of the situation. The father fraudulently represented to the district that he was a resident of Somerville when in fact he lived in Jersey City. The Board voted to exclude the children and to not permit the arriving sibling from the Philippines to register.

The petitioner took advantage of the residency statute by filing a petition with the Commission which had the effect of permitting the children to remain in school while she rushed to the Surrogate's office for guardianship papers.

The school district filed a counterclaim for back tuition for the period in which the children were improperly enrolled in the school system. The proofs demonstrate that G.A.'s siblings have arrived in the United States from the Philippines periodically over the past several years and have come to live with her in Somerville. There is no dispute that G.A. is a Somerville resident. There is also no dispute that the mother of the children lives in the Philippines and the father in Jersey City. G.A. was not the guardian of her siblings until November 20, 1995. Her guardianship application was prompted solely by the district's challenge to the children's eligibility to attend the Somerville Public Schools.

The relevant statute subsection in this matter is *N.J.S.A.* 18A:38-1(b)(1). Prior to January 11, 1994, a child could live in the home of another person and attend the local public school if the child were supported gratis as if he were such person's own child, if the person would assume all personal obligations for the child relative to school requirements and if the person intended to keep and support the child gratuitously for a longer time than merely the school year. The statute was significantly amended effective January 11, 1994. In addition to the existing requirements, a mandate was added to the statute that the child's parent or guardian not be capable of supporting or providing care for the child because of a family or economic hardship and that the child not be residing with the resident for the sole purpose of receiving a free public education. The resident has the burden of proof, by a preponderance of the evidence, that the child is eligible for a free education under the statutory criteria. If the resident's claim is not established, the Commissioner

must assess tuition against the resident for the time of ineligible attendance. These recent statutory amendments compel the assessment of tuition for the amount claimed by the school district.

The petitioner has failed to offer any proof that the father of these children is incapable of supporting them due to a family or economic hardship. In fact, the father owns a tax service business in Jersey City.

The statute was amended in 1994 to strengthen the requirements for public school eligibility and not to have parents and students "shopping" for the school of their choice. The burden is now on the resident to demonstrate compliance with the statutory criterion. It is now mandatory that tuition be assessed for any period that a student is deemed ineligible.

Parents or guardians are not permitted under the statute to deposit children with relatives without proving that they satisfy the statutory criteria. The Legislature has spoken and prohibits a parent from simply given guardianship to another and washing his or her hands of responsibility. What makes matters worse here is that the father fraudulently attempted to convince the school district that he was a Somerville resident. There is no evidence or documentation that the father was incapable of supporting or providing care for the children due to a family or economic hardship and that the children were not residing with the petitioner for the sole purpose of receiving a free public education.

DETERMINATION

From the evidence adduced at hearing, I **FIND**:

1. G.A. has resided in Somerville for at least three years;

2. Three adult siblings reside with G.A. and all four are gainfully employed;

3. All four adults are domiciled in Somerville;

4. Five school age siblings also reside with G.A.;

5. The four adult siblings, with a contribution from a younger sibling who works part-time while attending school, support the household;

6. The natural mother of all nine persons resides in the Philippines;

7. She makes no contribution to the support of the unemancipated siblings;

8. The natural father of all nine persons resides in Jersey City, has remarried, has a child by the second marriage and makes no contribution to the support of the unemancipated siblings;

9. G.A. and her siblings intend to remain in the United States and have no present intention to leave the United States;

10. G.A. became the legal guardian of Aristides A., Alexis D.A., Z.G.A., Achilles A., Jr., and Alphaeus A. on November 20, 1995;

11. G.A. has been the *de facto* guardian of each minor sibling since each arrived in the United States.

Two subsidiary issues must be addressed. First, the natural father's attempt to show he resided in and was domiciled in Somerville. This judge is convinced that he is and was neither. This appears to have been a misguided attempt to satisfy school authorities' legitimate questions concerning the true legal status of the five minor siblings. It is likely the natural father knew he was misrepresenting. Whether he was attempting to avoid a possible tuition liability or trying to help his children settle a controversy with school authorities or both remains unknown. In any event, it is beyond the compass of this case.

The second and related issue is the status of the minor siblings between their arrival in the United States and November 20, 1995 when Guardian Certificates issued. G.A.'s testimony in

this regard was credible. I **FIND** that each minor child, as he or she arrived in Somerville, came under the *de facto* guardianship of G.A. She and her emancipated siblings assumed complete responsibility for each minor child. And guardianship is not required by the statute.

This tribunal must decided in favor of the party on whose side the evidence preponderates and according to the reasonable probability of truth. *Jackson v. D.L. and W.R.R.*, 111 *N.J.L.* 487, 490 (E. & A. 1933). Because a trier of fact may reject testimony that is inherently incredible or inconsistent with common experience, the trier of fact should accept that which is credible and consistent with experience. *See, Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

I **CONCLUDE** that each of the five minors who are the subject of this case were domiciliaries of Somerville at all times pertinent to this matter and that no tuition moneys are owed to the respondent Board. The counterclaim, therefore, is **DISMISSED**.

No ill motive should be ascribed to the Board in this matter. At a time when resources are straitened as perhaps never before, the Board had both a right and a duty to examine the circumstances present here. It is undisputed that one of the minor children is in a special education placement. It is common knowledge and common experience that the costs associated with such placements are increasing as State aid for special education is static at best and may, in terms of purchasing power if not real dollars, actually shrink. The Somerville Board of Education and its administrators have demonstrated vigilance, not ill will.

The petitioner having shown by a preponderance of the credible evidence in the record that her minor siblings are and were at all pertinent times domiciled in Somerville, her petition of appeal is **GRANTED** and the Board's resolution to disenroll those pupils is **SET ASIDE**. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1 AUGUST 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/2/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

WITNESSES

For Petitioner:

G.A.

For Respondent:

Carolyn F. Leary

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Tuition analysis done by School Business Administrator
R-2 U.S. Individual Income Tax Returns, 1995, G.A., A.A., A.A. M.A., 14 pp.*

Joint Exhibits:

J-1 Guardian Certificate, Aristides A. to G.A., November 20, 1995
J-2 Guardian Certificate, Alexis D.A. to G.A., November 20, 1995
J-3 Guardian Certificate, Z.G.A. to G.A., November 20, 1995
J-4 Guardian Certificate, Achilles A., Jr. to G.A., November 20, 1995
J-5 Guardian Certificate, Alphaeus A. to G.A., November 20, 1995
J-6 Letters of Guardianship, G.A. of Aristedes A., October 23, 1995
J-7 Letters of Guardianship, G.A. of Z.G.A., October 23, 1995
J-8 Letters of Guardianship, G.A. of Achilles A., October 23, 1995
J-9 Letters of Guardianship, G.A. of Alexis, D.A., October 23, 1995
J-10 Letters of Guardianship, G.A. of Alphaeus, October 23, 1995
J-11 Certification of G.A., Superior Court of New Jersey, Somerset County, Chancery Division, October 17, 1995, 3 pp.
J-12 Proof of Service, present petition, October 18, 1995
J-13 Certification of A.A., Sr., Superior Court of New Jersey, Somerset County, Chancery Division, October 17, 1995
J-14 Letter, Rogers, Esq., to G.A., October 20, 1995 and telephone facsimile cover sheet, Ryan, Esq. to Leary, October 18, 1995

* Transmittal to Department of Education in sealed envelope. It is requested that exhibit be resealed when Commissioner concludes his consideration.

J-15 Letter and telephone facsimile transmission report, Rogers, Esq., to G.A. and A.A., Sr., September 27, 1995

J-16 Child Guardianship Consent Form executed by A.A., Sr., November 3, 1993 re: Z.G.A.

J-17 Affidavit of Consent executed by T.M.A., mother of Aristides A., November 4, 1994 re: Aristides A. This form was executed in Quezon City, the official capital of the Philippines, sworn to and recorded there

J-18 Pupil emergency form re: Z.G.A. signed by G.A., December 1, 1993

J-19 Pupil emergency form re: Aristides A., unsigned and undated

J-20 Letter, Rogers, Esq., to G.A., September 21, 1995, 2 pp., CERTIFIED

J-21 Immunization records, Alphaeus A., 5 pp.; visa and passport papers, Alphaeus A., 3 pp.; lease agreement between R. Delmanto and G.A. for premises at 113 [S.] Street, 2 pp.; Affidavit of Consent executed by T.M.A., mother of Alexis A., March 7, 1995 re: Alexis A. This form was executed in Quezon City, sworn to and recorded there; Affidavit of Consent executed by T.M.A., mother of Alphaeus A., September 15, 1995 re: Alphaeus A. This form was executed in Quezon City, sworn to and recorded there; letter G.A. to Director of Special Services, Somerset County, September 15, 1995; Baptismal Certificate, Alphaeus A., July 4, 1981; Birth Certificate, Alphaeus A., October 15, 1980; visa and passport papers, Alphaeus A., 3 pp.

J-22 Incomplete duplicate of J-21

J-23 Affidavit of Consent executed by T.M.A., mother of Z.G.A., November 9, 1995 re: Z.G.A. This form was executed in Quezon City, sworn to and recorded there

OAL DKT. NO. EDU 10306-95

G.A., on behalf of minor brothers and sisters, Z.A., A.A., A.A., A.A., and A.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the findings of the Administrative Law Judge (ALJ) in the initial decision, and further agrees that petitioner, satisfying the requirements of *N.J.S.A.* 18A:38-1b(1), has established that her siblings were, at all times pertinent to this matter eligible to attend respondent's school district.[1]

Accordingly, the recommended decision of the OAL granting petitioner's appeal to set aside the Board's decision to disenroll her siblings is adopted as the final decision in this matter. The counterclaim by the Board is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The Commissioner herein underscores that, as noted by the ALJ, the pertinent statute does not require that the resident(s) establish guardianship. (Initial Decision at p. 9)

September 13, 1996
Date of Mailing September 16, 1996

389-96

LINDA CEBULA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE NORTH ARLINGTON SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged Board's residency determination that her child, C.J., was a nonresident of the District and, thus, not entitled to a free public education.

ALJ determined that petitioner did not prove by a preponderance of credible evidence that C.J. was domiciled in North Arlington during the 1995-96 school year. Board, therefore, was not required to provide him a free public education pursuant to *N.J.S.A.* 18A:38-1.

Commissioner concurred with the ALJ and directed petitioner to remit to the Board the $7,500 representing out-of-district tuition for the 1995-96 school year.

September 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12036-95

AGENCY DKT. NO. 375-9/95

LINDA CEBULA,

Petitioner,

v.

NORTH ARLINGTON BOARD OF EDUCATION,

Respondent.

Linda Cebula, petitioner, *pro se*

Glenn T. Leonard, Esq., for North Arlington Board of Education, respondent

Record Closed: June 12, 1996 Decided: July 26, 1996

BEFORE **DIANA C. SUKOVICH**, ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

By letter dated September 6, 1995, Dr. Jerilyn Caprio (Caprio), the Acting Superintendent of Schools for the North Arlington school district, formally advised Linda Cebula (Cebula or petitioner) of a determination by the North Arlington Board of Education (Board or respondent) to deny petitioner's application to enroll Cebula's son as a student in the district. Cebula filed a petition with the State Department of Education (DOE), contesting the denial. The DOE transmitted the matter to the Office

of Administrative Law (OAL) on November 20, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

OAL personnel attempted to reach petitioner on December 4, 5, and 6, 1995 in order to schedule a hearing during that week. These efforts were unsuccessful, and a hearing was subsequently conducted on May 30, 1996. Petitioner thereafter filed copies of Exhibits P-1 and P-2, which documents were not available at the hearing, and the record was closed on June 12, 1996.

FINDINGS OF FACTS

Based upon a review of the entire record, including credibility determinations, I **FIND** the following to be facts.

In the fall of 1994, petitioner's mother had executed an affidavit stating that petitioner and petitioner's son, C.J., were then living in her (the mother's) residence, which is located in North Arlington. C.J. was enrolled in a district school during the 1994-95 school year. He left during that school year and subsequently returned in April 1995.

As of June 1995, Caprio was respondent's Acting Superintendent. She assumed the position of Superintendent in December 1995.

Caprio met with petitioner, in the then superintendent's office, in August 1995. At Cebula's request, the principal of North Arlington High School was also present. Cebula requested that her son, C.J., be enrolled in the district's schools. Petitioner had previously been informed by Board personnel that she had not filed the necessary paperwork for enrollment and had requested that Caprio meet with her.

At the August 1995 meeting, Caprio reviewed with petitioner respondent's pertinent policy, which requires that a student establish his/her residency in North Arlington.

The Board's admission policy in this respect is as stated in paragraph 1 of Exhibit R-1. That policy provides that proof of residency may be in the form of a sales contract for a housing unit or a copy of a lease or rental agreement. If a parent and child reside with a relative who is a bona fide resident of the school district, that relative is required to sign an affidavit attesting to the residency.

Caprio discussed this policy in detail with Cebula, indicating that a sales contract or a lease pertinent to a rental situation should be provided. Cebula stated that she had no such documents. They then discussed the question of what other documents might be sufficient to establish C.J.'s residency, including an affidavit from an individual with whom Cebula and C.J. resided. Caprio reviewed with petitioner the standard affidavit form utilized by the Board. The content of such form is as stated in Exhibit R-2. Petitioner, in turn, told Caprio that she was familiar with the form.

Petitioner also indicated that she and her son were living with Cebula's mother since April of 1995 and that the mother refused to sign an affidavit. Cebula stated that she and her son lived in the mother's house, on Madison Avenue, in North Arlington, and that petitioner paid some expenses. Cebula asked if the Board would make an exception to allow C.J. to enter a district school without execution of an affidavit. They did not discuss other financial matters, including who provided support for C.J. The focus of the discussion was on petitioner's and C.J.'s domicile.

Subsequent to the meeting, Caprio contacted petitioner by telephone, some time in August 1995, advising that Board personnel had informally met and determined that there would be no exception to their admissions policy. Petitioner insisted that C.J. be enrolled in a district school, indicating that it was a high priority that he be in class the first day of school. Petitioner again discussed with Caprio difficulties she would have in providing documentation consistent with the Board's policy. Caprio advised Cebula

that an appeal could be made to the DOE and subsequently provided her with the necessary paperwork. Board personnel assisted Cebula in completing the appeal documents and filing them with the DOE to ensure that C.J. was enrolled in school on the first school day in September 1995.

C.J., in fact, was enrolled in respondent's middle school from September 1995 until at least May 30, 1996. Caprio never received an affidavit from petitioner's mother, and it was clear to her, based on communications with Cebula, that such would not be forthcoming. Petitioner never paid tuition to respondent. Annual tuition for the 1995-96 school year was $7,500.

Petitioner's W-2 form for 1995 stated her address as 101 Orient Lane, Lyndhurst, New Jersey. In April 1996, Cebula received a federal income tax refund. The refund check was sent to her at the address of 5 Madison Street, North Arlington. The State Division of Taxation also sent her a 1995 tax refund check to that address. When petitioner filed her State tax return forms for 1995, she executed an application for a homestead rebate property tax refund, indicating that her primary residence in 1995 was 101 Orient Lane, Lyndhurst. The form contained a statement to the effect that providing false information would result in the imposition of a penalty. Cebula understood, when she executed the document, that she was providing information under possible penalties for perjury. Petitioner established a savings account in April 1996 and never provided Board personnel with copies of bank statements indicating her address.

Petitioner does not own an automobile. She works at a business entity located in Hasbrouck Heights, New Jersey. Petitioner previously had a drivers' license, which was suspended more than one year ago. The address on that license was 101 Orient Way, Lyndhurst, New Jersey. Petitioner does not have a current driver's license. Cebula last owned an automobile during June 1995. It was registered to petitioner at 101 Orient Way, Lyndhurst, New Jersey. Cebula does not have any credit cards, and she never registered to vote. Petitioner previously had a checking account, which has since been closed. The referenced address for the account was 101 Orient Way,

Lyndhurst, New Jersey. Cebula never provided Board personnel with copies of the deed to the house located at 5 Madison Avenue in North Arlington.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. (Supp. 1996). Pertinent statutory provisions address residence requirements relevant to attendance at local district schools.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including to individuals who are domiciled within the school district. *Id.* at §38-1(b).

Local school districts are also required to provide a free education to individuals who are kept in the home of another person domiciled within the school district, and supported by such other person gratis, as if he/she were such other person's own child, upon the filing by that person with the board of education of a sworn statement. Such statement shall, if so required by the board, state that he/she is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements. The sworn statement also must state that he/she intends to keep and support the child gratuitously through the school term. A copy of the lease, if a tenant, or a sworn statement by a landlord acknowledging tenancy, if residing as a tenant without a written lease, shall also be filed. The child's parent or guardian shall file with the local board of education a sworn statement that he/she is incapable of supporting or providing care for the child because of a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education therein. The statement shall be accompanied by documentation supporting the validity of the sworn statements. If in the board's judgment the evidence does not support the validity of the residence claim, the board may deny admission to the child. *Id.* at §(b)(1).

Pertinent statutory provisions also address procedures if a local board denies admission. The resident may contest a decision to the Commissioner and shall be entitled to a hearing on the validity of the claim. The resident shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the statutory criteria. No child shall be denied admission during the pendency of such proceedings. If the child in question is then currently enrolled in the district, he/she shall not be removed during the period in which the resident may contest the board's decision nor during the pendency of the proceedings before the Commissioner. *(Ibid.)*

If in the judgment of the Commissioner the evidence does not support the residence claim, the Commissioner shall assess tuition for the student, prorated to the time of the student's ineligible attendance in the district. (I*bid.*)

It is respondent's position that C.J. was not properly enrolled as a tuition-free student, that Cebula should be required to pay tuition for the 1995-96 school year, which tuition was $7,500, and that an affidavit addressing residency executed by petitioner would not be sufficient to establish the domicile of C.J. Cebula maintains that she and C.J. resided in North Arlington during the 1995-96 school year.

I am persuaded that petitioner has not met her burden of proof. Cebula did not demonstrate by a preponderance of the credible evidence that she and C.J. were domiciled in North Arlington. Her testimony in this respect was not credible.

Petitioner testified that, between 1991 and through 1995, she moved among North Arlington, Kearny, Lyndhurst, and Rutherford, New Jersey. However, her testimony in this respect was ambiguous and contrary on direct and cross-examination. In addition, Cebula testified that she did not live in Lyndhurst during 1995, even though she filed an application for a State homestead rebate, indicating therein that her primary residence was in Lyndhurst and she was aware that the provision of incorrect information could result in penalties for perjury. Petitioner's testimony regarding the

reasons for her actions in that respect was not believable. The fact that income tax refund checks were mailed to petitioner at an address in North Arlington is not sufficient to establish C.J.'s or petitioner's domicile.

Petitioner's testimony in other respects was also ambiguous. Cebula testified that her mother has resided at the address in question in North Arlington for at least 35 years, the family initially moving there when petitioner's parents were married. She stated that at some point, petitioner's father left the home, the parents divorced, and the father, who is now deceased, "left his half of the house to the four kids," including petitioner. (Petitioner's testimony on cross-examination.) However, as found, petitioner never provided Board personnel with a copy of the deed. When queried regarding whether or not her name was on the deed, petitioner stated that she "thinks she saw the deed approximately ten years ago." (*Ibid.*) Cebula also testified that her mother told her, sometime in 1980, that her parents had divorced. However, she also testified that she never saw any documents pertinent to the divorce and did not discuss the matter with her mother. In light of the entire record, her testimony in this respect, as well as petitioner's testimony that her brother drives her to work on a daily basis, did not have the ring of truth.

For the above reasons, I am persuaded that petitioner has not proven by a preponderance of the credible evidence that C.J. was domiciled in North Arlington during the 1995-96 school year. Respondent was therefore not required to provide him a free public education pursuant to *N.J.S.A.* 18A:38-1a.

Respondent's actions requesting affidavits from petitioner's mother were consistent with the applicable statutory provisions. Petitioner did not provide documentation required pursuant to *N.J.S.A.* 18A:38-1b, nor any other documentation establishing that she and/or C.J. were domiciled in North Arlington. Respondent therefore was not required to provide C.J. with a free public education pursuant to *N.J.S.A.* 18A:38-1b. The Board's actions in initially denying petitioner's request that he be enrolled, commencing September 1995, assisting her in completing and filing an

appeal to the Commissioner, and maintaining him in a district school pending resolution of the matter were consistent with the pertinent statutory provisions.

However, Cebula is responsible at this time for payment of tuition, in the amount of $7,500 on an annual basis, to respondent, pursuant to those provisions, for the 1995-96 school year. As found, C.J. was a student in a public school of North Arlington as of May 30, 1996. The parties did not subsequently advise this judge that he did not complete the school year in the district. I am therefore persuaded that Cebula should be required to reimburse respondent in the amount of $7,500, representing tuition for the 1995-96 school year.

CONCLUSIONS

I **CONCLUDE** that petitioner has not demonstrated by a preponderance of the credible evidence that C.J. was domiciled in North Arlington during the 1995-96 school year and that he therefore was not entitled to a free public education in North Arlington for the time in question pursuant to *N.J.S.A.* 18A:38-1a; that petitioner did not demonstrate by a preponderance of the credible evidence that C.J. was maintained in the home of any other individual, during the school year in question, within the school district and was supported by such other person gratis as if he were such other person's own child; and that C.J. therefore was not entitled to a free public education in North Arlington for the school year in question pursuant to *N.J.S.A.* 18A:38-1b. Finally, I **CONCLUDE** that Cebula should be required to reimburse respondent for tuition for the 1995-96 school year in the amount of $7,500.

ORDER

It is hereby **ORDERED** that petitioner reimburse respondent in the amount of $7,500 for tuition for C.J. for the 1995-96 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 26, 1996
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

7/31/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 31 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Witnesses:

For Petitioner:

Linda Cebula

For Respondent:

Jerilyn Caprio

Exhibits in Evidence:

P-1 Copy of check dated April 5, 1996
P-2 Copy of envelope addressed to petitioner

R-1 Admission policy
R-2 Affidavit form

OAL DKT. NO. EDU 12036-95

LINDA CEBULA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH ARLINGTON SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) for the reasons well-expressed therein. In so finding, the Commissioner concurs that, pursuant to *N.J.S.A.* 18A:38-1, C.J. is not entitled to a free public education in the North Arlington School District. It is observed that in reaching this decision, the Commissioner had no cause to question the ALJ's assessment of petitioner's credibility as such assessment is not belied by the record. Moreover, it was the ALJ who had the opportunity to hear petitioner's sworn testimony so that she was in the optimum position to make such determination.

Accordingly, petitioner is directed to remit to the Board $7,500 representing out-of-district tuition for the 1995-96 school year in accordance with the ALJ's instructions, and the within appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 13, 1996
Date of Mailing, September 16, 1996

390-96

390-96 SEC

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
FRANK A. SPEZIALI, JR., BOARD MEMBER, GLASSBORO BOARD OF EDUCATION, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

September 16, 1996

SCHOOL ETHICS COMMISSION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
FRANK A. SPEZIALI, JR., BOARD MEMBER, GLASSBORO BOARD OF EDUCATION, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	
	:	

The record in this matter, along with the decision of the State Board of Education granting the parties' request for a remand, have been reviewed. Upon such review, the Commissioner finds it necessary to remand this matter to the School Ethics Commission for a determination by that body as to whether the alleged conduct constitutes a violation of the School Ethics Act, inasmuch as Mr. Speziali, by submissions received subsequent to the Commissioner's decision of April 18, 1996, avers that he did not begin serving his first *full* term until April 1995, and he obtained the requisite training on March 16, 1996, so as to comply with the regulations implementing the Act.

Accordingly, this matter is remanded to the School Ethics Commission for determination consistent with the above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 16, 1996
Date of Mailing, September 17, 1996

391-96

391-96 SEC

IN THE MATTER OF WAYNE RICE,	:	
STOW CREEK BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY.	:	DECISION
_____	:	

September 16, 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
WAYNE RICE	:	
STOW CREEK BOARD OF EDUCATION	:	
	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Mr. Rice was elected to the school board in April 1995 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995
September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, said board member failed to respond; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, said board member chose not to appear, and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF WAYNE RICE, :

STOW CREEK BOARD OF EDUCATION,: COMMISSIONER OF EDUCATION

CUMBERLAND COUNTY. : DECISION

_____:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member for his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to respond to the Order to Show Cause; and

Whereas, the Commission voted on June 18, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 20, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named Board member chose not to submit comments with respect to the Commission's recommended penalty for the Commissioner's consideration; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the date of this decision.

COMMISSIONER OF EDUCATION

September 16, 1996
Date of Mailing, September 17, 1996

392-96

392-96SEC

IN THE MATTER OF	:	
DEBORA ALLEN, AUDUBON	:	COMMISSIONER OF EDUCATION
PARK BOARD OF EDUCATION,	:	DECISION
CAMDEN COUNTY.	:	
_____	:	

September 16, 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DEBORA ALLEN	:	
AUDUBON PARK BOARD OF EDUCATION	:	
	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Ms. Allen was elected to the school board in April 1995 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995

September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, the School Ethics Commission considered the board member's reply to the Order, but found same to be insufficient in light of the aforementioned notices and opportunities to attend training; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF	:	
DEBORA ALLEN, AUDUBON	:	COMMISSIONER OF EDUCATION
PARK BOARD OF EDUCATION,	:	DECISION
CAMDEN COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N. J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member having replied to the Order, the Commission found the same to be insufficient; and

Whereas, the Commission voted on June 18, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 20, 1996 the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was received by the Commissioner; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the date of this decision.

COMMISSIONER OF EDUCATION

September 16, 1996
Date of Mailing, September 17, 1996

393-96

393-96 SEC

IN THE MATTER OF	:	
DONALD PROUT, SUSSEX-	:	COMMISSIONER OF EDUCATION
WANTAGE REGIONAL BOARD	:	DECISION
OF EDUCATION, SUSSEX COUNTY.	:	
_____	:	

September 16, 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DONALD PROUT	:	
SUSSEX WANTAGE REGIONAL BOARD OF EDUCATION	:	
	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Mr. Prout was elected to the school board in April 1995 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995
September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, said board member failed to respond; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, said board member chose not to appear, and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF	:	
DONALD PROUT, SUSSEX-	:	COMMISSIONER OF EDUCATION
WANTAGE REGIONAL BOARD	:	DECISION
OF EDUCATION, SUSSEX COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to respond to the Order; and

Whereas, the Commission voted on June 18, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 20, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was received by the Commissioner; and

Whereas, the School Ethics Commission thereafter confirmed that the above-named Board member has resigned as a member of the Sussex-Wantage Regional Board of Education and so informed the Commissioner of Education, by letter dated July 10, 1996; now therefore

The recommended penalty of the School Ethics Commission is deemed moot due to the resignation of the above-named Board member.

COMMISSIONER OF EDUCATION

September 16, 1996
Date of Mailing, September 17, 1996

394-96

394-96 SEC

IN THE MATTER OF	:	
ROBERT HARGROVE, JR.,	:	COMMISSIONER OF EDUCATION
PLEASANTVILLE BOARD OF	:	DECISION
EDUCATION, ATLANTIC COUNTY.	:	
	:	

September 16, 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ROBERT HARGROVE, JR.	:	
PLEASANTVILLE BOARD OF EDUCATION	:	
	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Mr. Hargrove was elected to the school board in April 1995 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995

September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, said board member failed to respond; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF	:	
ROBERT HARGROVE, JR.,	:	COMMISSIONER OF EDUCATION
PLEASANTVILLE BOARD OF	:	DECISION
EDUCATION, ATLANTIC COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to respond to the Order; and

Whereas, the Commission voted on June 18, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 20, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was received by the Commissioner; and

Whereas, the School Ethics Commission thereafter confirmed that the above-named Board member has resigned as a member of the Pleasantville Board of Education and so informed the Commissioner of Education, by letter dated July 15, 1996; now therefore

The recommended penalty of the School Ethics Commission is deemed moot due to the resignation of the above-named Board member.

COMMISSIONER OF EDUCATION

September 16, 1996
Date of Mailing, September 17, 1996

395-96

MYRNA ARNOLD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teaching staff member who was riffed from her Reading Specialist position, claimed entitlement to Learning Disability Teacher-Consultant (LDTC) positions subsequently filled by the Board with nontenured individuals. Board contended petition was untimely filed.

ALJ found that petitioner did not receive "adequate notice" of the fact that the Board had hired two nontenured individuals for the previously vacant LDTC positions until her attorney was notified by the Board via letter dated May 24, 1995. Thus, petition was timely filed. ALJ concluded that petitioner should have been reemployed by the Board in one of the two new LDTC positions on September 1, 1994 and that her petition seeking instatement to the position of LDTC, retroactive to September 1, 1994, should be granted.

Commissioner concurred with the ALJ that the knowledge which petitioner acquired in April 1995 of the hiring of the LDTC's was insufficient to constitute adequate notice of a potential claim against the Board where said knowledge was reached pursuant to a casual conversation in the faculty room. Moreover, the Commissioner concurred that petitioner was entitled, by virtue of her tenure rights, to be reemployed subsequent to her RIF, in one of the two LDTC positions which became available in June 1994, and which were subsequently filled by nontenured teachers, effective September 1, 1994. Commissioner directed Board to place petitioner in one of the aforementioned positions with compensation.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8279-95
AGENCY DKT. NO. 323-8/95

MYRNA ARNOLD,
Petitioner,
v.
BOARD OF EDUCATION OF THE BRIDGEWATER RARITAN REGIONAL SCHOOL DISTRICT,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Seid, attorneys)
Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Soriano, attorneys)

Record Closed: June 26, 1996 Decided: July 30, 1996

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by Myrna Arnold (petitioner) from a decision of the Board of Education of the Bridgewater Raritan Regional School District, Somerset County (respondent or the Board)

denying her claim to a Learning Disability Teacher Consultant (LDTC) position after she had been laid-off from her Reading Specialist position due to a reduction in force (RIF).

On September 8, 1995, the instant matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act. A telephone prehearing conference was held on December 11, 1995. The hearing itself was held on April 10, 1996. The record closed upon the filing of reply briefs by the parties.

The essential facts in this matter are not in dispute, having been established by a stipulation of facts (Exhibit J-1) made by the parties at the outset of the hearing, by the admission without objection of 3 pieces of correspondence, and by the credible testimony of petitioner herself.

FACTS

Petitioner possesses an instructional certificate with an elementary classroom teacher endorsement, along with an educational services certificate with a reading specialist endorsement and a learning disabilities teacher-consultant endorsement ("LDTC"). Petitioner also holds an administrative certificate with supervisor and principal endorsements.

She has acquired tenure under her educational services certificate, with more than twenty-one years of seniority credit as a reading specialist. However, she has no seniority credit as an LDTC. With regard to her instructional certificate, she has acquired tenure and has accrued over ten years of seniority credit as an elementary classroom teacher.

Petitioner has been employed by respondent for over twenty years. Commencing on September 1, 1974 and continuing through June 30, 1984, she was assigned as a reading specialist. During the 1985-1986 school year, she was then reassigned as a half-time reading specialist and a half-time kindergarten teacher. Subsequently, she was reassigned as a full-time reading specialist from September 1, 1986 through June 30, 1993. During the summers of 1985, 1986, and 1987, she was employed by the Board for fourteen (14) days as an LDTC specialist.

On April 27, 1993, respondent abolished petitioner's reading specialist position, effective June 30, 1993. As a result, petitioner was reassigned as a full-time elementary classroom teacher on September 1, 1993. During this school year, *i.e.*, 1993-1994, respondent did not employ any non-tenured LDTCs, either at the time petitioner's reading specialist position was abolished on April 27, 1993 or at any other time throughout the 1993-1994 school year. However, because two LDTC positions became available on June 30, 1994 due to retirements, respondent proceeded to hire two persons, effective September 1, 1994, from outside the school district to fill the vacancies. Petitioner did not apply for either LDTC position.

Sometime during April of 1995, petitioner overheard a conversation between teachers in the faculty room at the school where she was employed. In particular, she heard a teacher say that the school's long-time LDTC was being transferred to another school and would be replaced by a new LDTC. As a result she notified her attorney, who then proceeded to contact the Assistant Superintendent of the board by letter dated May 24, 1995. The Board responded to this correspondence by letter of the same date, confirming the hiring of two LDTCs.

In a petition filed on August 10, 1995 with the Commissioner of Education, petitioner alleged that respondent had violated her tenure and recall rights pursuant to *N.J.S.A.* 18A:28-12. In particular, the petitioner claimed that the Board failed to appoint her to one of the two LDTC positions which became available on September 1, 1995. Respondent denied petitioner's allegations and raised affirmative defenses in an answer which was filed on August 29, 1995. The matter was then transferred to the Office of Administrative Law as a contested case.

ISSUES AND ANALYSIS

The threshold issue in this case is whether the petition of appeal should be dismissed because it was filed beyond the 90-day limitation period set forth in *N.J.A.C.* 6:24-1.2(c). In other words, the question to be decided first is whether a conversation overheard by petitioner between teachers in a school faculty room constitutes adequate notice to her that she had a claim against the Board under the applicable tenure laws.

N.J.A.C. 6:24-1.2(c) provides:

> The petitioner shall file a petition no later than the 90th day from the date of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

This provision, commonly referred to as "the ninety-day rule," has been strictly applied, and generally requires that a petition be dismissed as untimely when an action is commenced beyond the ninety day period. *See, Boles v. Bergen County Voc. Schools Bd. of Ed.*, 92 *N.J.A.R.*2d (EDU) 554, 556; *Riley v. Bd. of Ed. of Hunterdon Central Regional High School District*, 173 *N.J. Super.* 109, 113 (App. Div. 1980); *Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Assn.*, 79 *N.J.* 311, 326-327 (1979). In cases involving tenure claims, the ninety day limitation period begins to toll on the date that the petitioner first becomes aware that a non-tenured person was hired to fill a position for which the petitioner has tenure. *Cahn v. Borough of Deal Bd. of Ed.*, 94 *N.J.A.R.*2d (EDU) 330, 331; *Davenport v. Butler Bd. of Ed.*, 92 *N.J.A.R.*2d (EDU) 614, 616.

Here, petitioner claims that she received "adequate notice" of her right to pursue a claim on or about May, 24, 1995, *i.e.*, the date the Board's attorney confirmed that two persons from outside the school district were previously hired to fill vacant LDTC positions. Respondent contends that adequate notice was obtained by petitioner in early April of 1995 when she overheard a colleague indicate that a new LDTC position had been created.

"Adequate notice" for purposes of the ninety-day rule was addressed by the Supreme Court in *Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572 (1993). In *Kaprow*, the Court held that an unofficial and informal notice from the local board secretary to the petitioner, stating that two positions were created and filled by other persons, sufficed to trigger the ninety day period against the petitioner's tenure claim.

The Supreme Court declared that adequate notice under *N.J.A.C.* 6:24-1.2(c)

> should [(1)] effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the

> existence of facts that may equate in law with the post-RIF cause of action . . . [and (2)] further considerations of repose by establishing an objective event to trigger the limitations period in order `to enable the proper and efficient administration of the affairs of government.'
>
> [*Kaprow, supra,* 131 *N.J.* at 587 (citations omitted)].

Although the notice afforded to Kaprow was unofficial and informal, the Court determined that, under the circumstances presented, additional or more specific notice would not have furthered the above objectives, but instead would have defeated the considerations of repose and interfered with the efficient administration of the school laws. *Id.* at 589. The Court, however, did express a preference for official notice by stating, "[i]n the future, it would be better if such information and notice is officially authorized and communicated by the local board." *Id.* at 588. Nonetheless, the Court determined that Kaprow had received sufficient notice which permitted him to make a judgment that the board had in fact taken "final and formal action." *Id.* at 588. As such, Kaprow's petition was dismissed as untimely.

In the instant matter, I am of the opinion that petitioner did not receive "adequate notice" of the fact that respondent had hired two individuals for the previously vacant LDTC positions until her attorney was notified by respondent via letter dated May 24, 1995.

The key concept in reaching this determination is reasonable reliance. The notice afforded in *Kaprow*, namely an unofficial letter from the board secretary, was sufficient to trigger the ninety day limitation period because petitioner could have reasonably relied upon the secretary's statements, the secretary being connected with the board in a businesslike capacity. It would thus not have been unreasonable for Kaprow to believe that the secretary's representations were truthful. Conversely, in the instant situation, casual conversation, especially when it originates from those who have no direct and apparent connection with the decision-makers on the board, is not the type of information that would generally lead to a reasonable belief in the accuracy and truthfulness of the statements made therein. Here, petitioner overheard certain statements and made diligent inquiry as to their validity by consulting her attorney. Her attorney also acted diligently by writing to the board on or about April 19th of that same month. Within 90 days of receiving confirmation from the Board of the factual accuracy of the statements she had overheard the previous month, she proceeded to file her petition. Clearly, she did not "sleep on her rights."

It is important to note that the purpose of the ninety day-rule is to encourage timely filing of viable claims, not to encourage the litigation of possible claims. Just as the failure to file a timely claim can interfere "with the efficient administration of the school laws," *Kaprow, supra* 131 *N.J.* at 589, so too can premature filing by opening the floodgates to petitions before a disagreement actually evolves into a controversy. *See, Stockton v. Trenton Bd. of Ed.,* 210 *N.J. Super.* 150, 157-158 (App. Div. 1986).

The second objective underlying *N.J.A.C.* 6:24-1.2(c) is to "further considerations of repose by establishing an objective event to trigger the limitations period in order 'to enable the proper and efficient administration of the affairs of government.'" *Kaprow, supra,* 131 *N.J.* at 587 (citation omitted). Here, the conversation overhead by petitioner is not the type of information which she could have reasonably relied upon to determine whether she had a valid claim.

In short, I **CONCLUDE** that the limitation period for petitioner's cause of action began running on May 24, 1995. Since her petition was filed on August 10, 1995, her petition is timely.

The substantive issue in this matter is whether petitioner had a statutory right to be appointed to one of the two LDTC positions which the Board created in September 1994. This issue turns on an interpretation of *N.J.S.A.* 18A:28-12, which, in pertinent part, provides:

> If any teaching staff member shall be dismissed as a result of [a RIF], such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs, and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, ...

Petitioner claims that the LDTC endorsement on her educational services certificate qualified her for the LDTC position when and after she was "RIFFED" in 1993. As a result, she avers, the Board had a duty under *N.J.S.A.* 18A:28-12 to place her on a preferred eligible list and

consequently offer her the position of LDTC. She asserts that the Board's failure to do so violated her tenure, seniority and recall rights under the applicable school laws.

The respondent counters by arguing that petitioner's appeal should be dismissed because she had no statutory right to be included on the preferred eligible list since she had no seniority credit for the position of LDTC. The Board essentially claims that a teaching staff member is required to acquire seniority in the position prior to the RIF in order to be placed on a preferred eligible list. Since petitioner did not possess any seniority rights as an LDTC at the time of the 1993 RIF, the Board contends, she had no statutory entitlement to be included on the preferred eligible list.

In support of its position, the Board cites *Ellicott v. Board of Educ. of Frankford, Sussex County*, 251 *N.J. Super.* 342 (App. Div. 1991), where the court upheld a State Board determination that a teaching staff member had a tenure right to a newly created full-time LDTC position which was filled by a non-tenured teaching staff member. *Id.* at 345.

Ellicott involved a petitioner who held an educational services certificate with speech correctionist and LDTC endorsements. *Id.* at 345-346. In particular, she served as both a speech correctionist and LDTC for approximately one year during various periods between March 1981 and June 1982. Subsequently, she worked as a speech correctionist for four days per week until the 1986-87 term, at which time her employment was reduced to two days per week. *Id.* at 346. In June of 1988, the respondent board created a full-time LDTC position for the 1988-89 school year. Although the petitioner claimed an entitlement to the position by virtue of her tenure status, the respondent nevertheless hired a non-tenured teacher to fill the position. On appeal, the Appellate Division affirmed the State Board's determination that the petitioner was entitled to the LDTC position "following a RIF as against a non-tenured teaching staff member," stating that the petitioner's tenure extended to all endorsements held by her under her educational services certificate. *Id. at 346-347.*

Respondent attempts to utilize *Ellicott* for the proposition that a legal entitlement to employment under *N.J.S.A.* 18A:28-12 is predicated upon, among other things, seniority which was attained up and until the time the RIF occurred. Although this proposition is true to some

extent,* *Ellicott* does not extend so far. Instead, that case merely stands for the proposition that "a [RIFFED] tenured teacher, at the time of her RIF, has tenure rights to a vacancy in a position that is within the scope of the teacher's certificate and endorsements thereon as of the date of the RIF." *Francey v. Bd. of Educ. of the City of Salem, Salem County*, 286 *N.J. Super.* 354, 364 (App. Div. 1996). In sum, *Ellicott* does not hold, or even imply, that seniority rights must be attained at the time of the RIF in order to entitle a qualified individual to a position on the preferred eligible list.

Tenure and seniority are different concepts. Tenure is created by statute and is to be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service. *Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 239, 241 (App. Div. 1987) (citing *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 74 (1982)). Tenure rights essentially define an individual's entitlements to a position or positions against *non-tenured* persons in the event that the tenured person's position is eliminated in a RIF. Seniority, on the other hand, is a statutory concept which applies to certain rights of tenured personnel and only has meaning when a reduction in force occurs. Thus, the concept of seniority applies to effectuate the order of preference of dismissal in a RIF as to *tenured* individuals. "It does not purport to create employment rights for non-tenured employees." *Bednar, supra,* 221 *N.J. Super.* at 242. Indeed, tenure may not be defeated by a seniority claim, as a tenured teacher is entitled to retention as against a non-tenured individual regardless of seniority, in the event of a RIF. *Ibid.; Capodilupo v. West Orange Tp. Ed. Bd. 218 N.J. Super* 510, 514 (App. Div. 1987).

The instant matter concerns a tenured employee and a non-tenured employee. The applicable statute, *N.J.S.A.* 18A:28-12, mandates that an individual who is dismissed as a result of a RIF is to be placed upon a preferred eligible list for reemployment in a position for which that person is qualified. The preferred eligible list will then be determined according to seniority. Here, petitioner was in effect dismissed from her job as a reading specialist and then transferred to another position under her instructional certificate. As a result, she was entitled to be placed upon

* Such a proposition is correct in the situation where two qualified teachers are competing for a position on the preferred eligible list because seniority will increase the preferential status of a tenured employee by establishing rights as against other tenured people. However, as is discussed below, seniority does not come into play unless tenured individuals are competing for the same position.

a preferred eligibility list for reemployment under her educational services certificate, either as a reading specialist or an LDTC.

In sum, *N.J.S.A.* 18A:28-12 is a reemployment statute designed to reestablish a prior employment relationship. *Francey v. Board of Educ. of Salem, Salem County*, 286 *N.J. Super.* 354, 359 (App. Div. 1996). The petitioner in this case transferred from an employment position under her educational services certificate to another position under her instructional certificate. Assuming that this transfer constitutes a "dismissal" pursuant to *N.J.S.A.* 18A:28-12, petitioner was entitled to be placed upon a preferred eligible list for positions under her educational services certificate for which she was "qualified." Since it is "clear that 'qualified' within the scope of tenure rights means qualified as to the particular position in which a teacher has attained tenure and all other positions within the scope of the teacher's teaching certificate and endorsements thereto, . . . regardless of whether one has actual experience in that area . . .," *id.* at 358 (citations omitted), there is no dispute that petitioner was qualified for the LDTC position at the time of the RIF. Thus, the only relevance seniority has in regard to petitioner's presence on a preferred eligible list is where on that list she should be placed. Nonetheless, by virtue of her attaining tenure for that position, her right to it is superior to that of individuals with no tenure.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that petitioner should have been re-employed by the Board in one of the two new LDTC positions on September 1, 1994 and that her petition seeking instatement to the position of LDTC, retroactive to September 1, 1994, should be **GRANTED.**

It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 30, 1996
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

8/2/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

For petitioner:

Myrna Arnold

EXHIBITS

Joint:

J-1 Stipulation of Facts

J-2 Letter dated April 28, 1993 from Joseph McGarry to Myrna Arnold

J-3 Letter dated April 19, 1995 from Stephen E. Klausner, Esq., to Dr. Sam Crosby

J-4 Letter dated May 24, 1995 from Daniel C. Soriano, Esq. to Stephen E. Klausner, Esq.

MYRNA ARNOLD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions and the replies thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Initially, the Board takes exception to the Administrative Law Judge's (ALJ) findings of fact on the issue of the timeliness of the Petition of Appeal in this matter. Here, the Board asserts that "[t]he ALJ erroneously found that Petitioner's knowledge was limited to an overheard conversation." (Board's Exceptions at p. 2) However, the Board urges the Commissioner to recognize the language in the Petition of Appeal[1], and to "***find as fact that Petitioner knew early in April of 1995 that the Board was employing two non-tenured LDTCs [Learning Disabilities Teacher Consultant]." (*Id.*)

[1] The Petition of Appeal states, in pertinent part, "In April, 1995, after Petitioner discovered that Respondent had hired two (2) non-tenured L.D.T./C.'s, effective September 1, 1994, Petitioner, by her attorney, wrote to Respondent to exercise her tenure and seniority rights." (Petition of Appeal at paragraph 7, cited in the Board's Exceptions at p. 2)

The Board further argues that, inasmuch as the ALJ erroneously found that petitioner's knowledge was limited to an overheard conversation, the ALJ, on page three of the initial decision, incorrectly framed the relevant issue as to the timeliness of the petition. The Board posits that "the relevant question is whether this knowledge constituted adequate notice to Petitioner that she had a tenure claim against the Board." (*Id.* at p. 3) The Board maintains that petitioner, in early April of 1995, knew that the Board had hired the nontenured LDTC's and the letter from her attorney to the Board, dated May 24, 1995, "***was not a request for information but was an attempt to negotiate a settlement***." (*Id.*) Thus, the Board urges the Commissioner to conclude that petitioner had adequate notice in early April 1995, so as to constitute the start of the 90-day limitations period.

As to the substantive issue in this matter, the Board again argues, as it did before the ALJ, that "since Petitioner has no seniority as an LDTC, her name should not have been on the preferred eligible list for the position of LDTC***." (*Id.* at p. 5) The Board adds, that it

> ***must concede that the [s]eniority evolution appears to have emasculated the circumscribed tenure right recognized by the State Board in *Capodilupo* and commented upon in *Geiling-Hurley* and has created a new and expanded preferred eligible concept. In light of *dicta* appearing in *Dennery v. Board of Educ.*, 131 *N.J.* 626 (1993) and the Appellate Division's use of this *dicta* in recent decisions, it is difficult for the Board to criticize the ALJ's reliance on the concepts of tenure contained in *Francey v. Bd. of Educ. of the City of Salem*, 286 *N.J. Super.* 354 (App. Div. 1996). (*Id.* at p. 6)

In reply, petitioner argues that the Board has "totally ignored" her testimony, subject to cross-examination, which established that "***she overheard a special education teacher talking to others in the room that the long-time building LDT/C was being replaced by a new LDT/C as a result of a district reorganization***." (Petitioner's Reply at p. 2) Petitioner

further contends that her testimony showed that, but for the gossip she overheard, "***she would not have had the slightest hint that the Board had hired the two non-tenured LDT/C's***." (*Id.*) Petitioner affirms that neither her principal nor any central office administrator informed her of the hirings. Her first communication from anyone in authority, petitioner attests, was the letter her counsel received from the Board's counsel. (*Id.*) Moreover, petitioner observes that the Board offered no rebuttal witness to her testimony, and the ALJ found her to be a credible witness.

Further, as for the language set forth in the Petition of Appeal, petitioner argues that pleadings are not evidence. (*Id.*) Petitioner adds, "Counsel's letter to the Board's Assistant Superintendent may be evidential but must fail in [the] face of unrebutted testimony that amplifies or clarifies counsel's statements." (*Id.*) Petitioner reasons that the ALJ's analysis and consideration of the Court's guidance in *Kaprow, supra*, was thorough and thoughtful. (*Id.* at p. 3) Thus, petitioner argues that the ALJ's conclusion as to the timeliness of this petition should be affirmed. (*Id.* at p. 5)

With respect to the substantive issue herein, petitioner observes that the Board "***all but concedes that the Administrative Law Judge's decision on the merits is correct." (*Id.*)

Upon careful and independent review of the record in this matter, including a transcript of the hearing conducted on April 10, 1996, the Commissioner concurs with the findings and conclusions of the ALJ. With respect to the timeliness of the petition, the Commissioner finds that the outcome in this matter would not be altered by the Board's proposed change in the issue as framed. That is, even under the facts as asserted by the Board, the

knowledge which petitioner acquired in April of 1995 of the hiring of the LDTC's was insufficient to constitute adequate notice of a potential claim against the Board, where said knowledge was reached pursuant to a casual conversation in the faculty room, and where it originated from persons "who have no direct and apparent connection with the decision-makers on the board ***." (Initial Decision at p. 5)

The Commissioner further agrees that petitioner was entitled, by virtue of having acquired tenure under her educational services certificate, to be reemployed subsequent to her RIF, in one of the two LDTC positions which became available in June of 1994, and which were subsequently filled by teachers with no tenure in the District, effective September 1, 1994.[2]

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the Board is directed to place petitioner in one of the aforementioned positions, and to reimburse petitioner for lost pay and benefits, as appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 16, 1996
Date of Mailing, September 17, 1996

[2] While page 3 of the initial decision indicates that the positions in question became available on September 1, 1995, the record supports the conclusion that respondent hired the two persons to fill the LDTC positions effective September 1, 1994. (Stipulation of Facts, J-1)

396-96

396-96

ANTHONY NEALE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 17, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1510-96

AGENCY. NO.: 277-6/92

ANTHONY NEALE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,

Respondent.

James M. Weinberg, Esq., for petitioner
(Weinberg and Weinberg, P.A., attorneys)

Steven Parness, Esq., for respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: July 25, 1996 Decided: August 1, 1996

BEFORE: **THOMAS E. CLANCY**, ALJ

This matter was transmitted to the Office of Administrative Law (OAL) on February 2, 1996, for determination as a contested case, pursuant to *N.J.S.A. 52:14B et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached documents.

Having reviewed the contents of the attached documents, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C. 1:1-19.*1 and I hereby approve same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/1/96
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

8/5/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 16 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

RESOLUTION - APPROVAL OF SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, Anthony Neale ("Neale") claimed that the Livingston Board of Education (the "Board") was required to pay him certain monies in accordance with N.J.S.A. 18A:30-2.1; and

WHEREAS, the Board disputed Neale's claim, resulting in Neale filing a Petition of Appeal with the Commissioner of Education of the State of New Jersey; and

WHEREAS, the Board and Neale have reached an amicable resolution of this dispute, the terms of which are set forth in the attached "Settlement Agreement and Release";

NOW, THEREFORE, BE IT

RESOLVED, that the Livingston Board of Education hereby approves the attached "Settlement Agreement and Release"; and be it

FURTHER RESOLVED, that the Board authorizes Superintendent Thomas Butler to enter into the "Settlement Agreement and Release" on behalf of the Board.

Certified to be a true and
exact copy of a Resolution
approved on June 24, 1996.

WILLIAM J. BLOCK, JR.
Interim Business Administrator/Board Secretary

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WEINBERG AND WEINBERG, P.A.
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IRWIN WEINBERG
MEMBER OF DIST. OF COLUMBIA BAR
JAMES M. WEINBERG

July 25, 1996

Via Fax and Regular Mail

Honorable Thomas Clancy
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102-3011

Re: Anthony Neale v. Township of Livingston Board of Education, Essex County
OAL Docket No.: EDU 01510-96-N
Agency Ref: 277-6/96

Dear Judge Clancy:

Pursuant to our conversation today, I am submitting the Settlement and Release executed by Anthony Neale. As instructed, I am faxing a copy of the Settlement Document to your office. Additionally, Your Honor and counsel for the Livingston Board of Education are being mailed all such documents.

If there are any questions or problems contact me at your convenience.

Very truly yours,

Weinberg and Weinberg, P.A.

James M. Weinberg

JMW/nsh
cc: Steve Parness, Esq.
Anthony Neale

7-25-1996 4:24PM FROM WEINBERG WEINBERG PA 2013795790 P.2

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is made on this day of , 1996, by and between respondent, the Livingston Township Board of Education (the "Board") and Petitioner, Anthony Neale ("Petitioner"), in a matter before the Commissioner of Education of the State of New Jersey, known as Neale v. Livingston Board of Education.

WHEREAS Petitioner alleged that he was due certain monies from the Board in accordance with N.J.S.A. 18A:30-2.1; and

WHEREAS the Board denied Petitioner's request and determined that Neale was not entitled to such payment; and

WHEREAS this matter was transmitted to the Office of Administrative Law for a hearing on the matter before Administrative Law Judge Thomas Clancy; and

WHEREAS the parties desire to amicably resolve this dispute in order to avoid the risk, cost and inconvenience of litigation;

NOW THEREFORE, in consideration of the mutual covenants and promises set forth below, the Board and Petitioner agree to the following terms and conditions:

1. The Board agrees to pay Petitioner the total sum of fourteen thousand dollars and no cents ($14,000.00).

2. By this Agreement, Petitioner withdraws his request for a hearing with prejudice in the above matter, and further stipulates that he is abandoning and dismissing with prejudice all claims brought against the Board in this matter. Counsel for

Petitioner agrees that he will draft and file all papers necessary to withdraw the request for a hearing on notice to the Board.

3. This Agreement is made without any admissions of liability or responsibility by any party hereto and shall not be admissible in any legal proceeding except to enforce its terms.

4. The actions of the parties in the compromise and settlement of the subject claim do not constitute past practice or precedent and may not be used in any future hearing or judicial proceeding.

5. The above is subject to the approval of the Board by way of Resolution.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

By: Thomas F. Butler
Thomas F. Butler, Superintendent
Livingston Board of Education

Sworn and subscribed
before me this 26th
day of June, 1996.

Judith E. Corvelli
Notary Public

Judith E. Corvelli
Notary Public of NJ
My Commission Expires
December 1, 1998

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

By: _____
Anthony Neale

Sworn to and subscribed
before me this 19th
day of June, 1996.

_____ Esq
Notary Public
An Attorney At Law State of New Jersey

OAL DKT. NO. EDU 1510-96

ANTHONY NEALE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

September 17, 1996
Date of Mailing, September 18, 1996

397-96R

397-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT A. LILLO,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF EDISON, MIDDLESEX COUNTY.	:	DECISION ON REMAND
	:	

September 17, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6249-96

AGENCY DKT. NO. 454-11/95

(ON REMAND EDU 103-96)

IN THE MATTER OF THE TENURE HEARING OF ROBERT A. LILLO, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

Francis X. Journick, Jr., Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Robert C. Krieger, Esq., for respondent (Wysoker, Glassner & Weingartner, attorneys)

Record Closed: July 25, 1996 Decided: August 2, 1996

BEFORE **BARBARA A. HARNED**, ALJ:

This matter was remanded from docket number EDU 103-96 by the Department of Education to the Office of Administrative Law on July 8, 1996 for revision of a settlement document and expansion of the record.

The parties have agreed to redraft the settlement and have prepared a Revised Stipulation of Settlement and Dismissal Without Prejudice indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 2, 1996
DATE

Barbara A Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

8/5/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 7 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

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STATE OF NEW JERSEY
OFFICE OF

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095-0958
(908) 636-8000
Attorneys for Petitioner
Edison Township Board of Education

NEW JERSEY OFFICE OF
ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-00103-96S
AGENCY REF. NO. 454-11/95

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, Petitioner, v. ROBERT A. LILLO, Respondent.	On Referral from the Commissioner of Education, New Jersey Department of Education **REVISED STIPULATION OF SETTLEMENT AND DISMISSAL WITHOUT PREJUDICE**

WHEREAS, on November 22, 1995, petitioner, the Board of Education of the Township of Edison (the "Board"), filed certified tenure charges against respondent, Robert A. Lillo ("Lillo"), with the Commissioner of Education alleging that as a tenured maintenance tool person in the employ of the Board, Lillo had exhibited conduct unbecoming of such an employee as described in the said tenure charges and seeking the termination of Lillo's employment by the Board; and

WHEREAS, on December 26, 1995, Lillo filed an answer to the said tenure charges with the Commissioner and the Commissioner thereafter referred the matter to the Office of administrative Law as a contested case; and

WHEREAS, the Board and Lillo have conferred with respect to this matter and have mutually agreed upon certain terms by which this matter may be settled, such terms being set forth herein; and

WHEREAS, the settlement of this matter is reasonable and in the public interest because the settlement involves Lillo's retirement from the Board's employ and the payment to Lillo of retroactive salary to which Lillo is entitled as well as unused vacation days, and the settlement will avoid the cost and expense and risk of having this matter proceed through the formal hearing process;

IT IS hereby stipulated and agreed by and between the Board and Lillo as follows:

1. Lillo shall retire from the employ of the Board effective as of November 16, 1995. Within 10 days of the date of this Stipulation of Settlement and Dismissal Without Prejudice by the parties, Lillo shall (1) formally notify the Board in writing of his retirement from its employ as of November 16, 1995 and (2) if he has not already done so, file an application with the Public Employee Retirement System ("PERS") for disability

retirement as of November 16, 1995, which may include such other retirement benefits as may be available to Lillo from PERS. The Board shall cooperate in Lillo's application for disability retirement to PERS.

2. Within 15 days of the Board's receipt of the notice of retirement and a copy of the completed and executed retirement application filed with PERS required by Paragraph 1, the Board shall, consistent with law and the terms of the collective bargaining agreement which pertains to Lillo's employment by the Board, pay to Lillo (a) the sum of $20,543.60, less the usual tax and other salary deductions, which the parties agree represents the value of retroactive salary due to Lillo for the period from May 26, 1995 to November 16, 1995, and (b) the sum of $1,281.06, less the usual tax and other salary deductions, which the parties agree represents the value of Lillo's accumulated and unused vacation days as of November 16, 1995.

3. Lillo hereby waives all rights to continued employment or reemployment by the Board, including but not limited to any and all rights based on tenure and/or seniority and any and all rights to be recalled to employment by the Board or appear on any recall or other list of employees eligible for employment or reemployment by the Board. Lillo also hereby waives and releases any and all claims, whether known or unknown, against the Board which arise out of or relate to his employment

by the Board, including but not limited to claims for unpaid salary or other employment benefits. Similarly, the Board hereby waives and releases any and all claims, whether known or unknown, against Lillo which arise out of or relate to his employment by the Board.

4. This matter is hereby dismissed without prejudice. Notwithstanding the foregoing and any provision in this Stipulation of Settlement to the contrary, should PERS deny Lillo's application for retirement, then (a) Lillo's retirement and notice thereof referred to in Paragraph 1 above shall be of no force nor effect, (b) the Board shall have the right to reinstate tenure charges against Lillo seeking the termination of his employment with the Board and/or such other relief as may be appropriate, including, but not limited to the recovery of the payment referred to in Paragraph 2 above, and (c) the waivers and releases referred to in Paragraph 3 above shall be of no force nor effect and shall not be binding upon Lillo or the Board.

DATED: April 19, 1996

WILENTZ, GOLDMAN & SPITZER A Professional Corporation Attorneys for Petitioner Edison Township Board of Education	WYSOKER, GLASSNER & WEINGARTNER Attorneys for Respondent Robert A. Lillo
By: _____ FRANCIS X. JOURNICK, JR.	By: _____ ROBERT C. KRIEGER

OAL DKT. NO. EDU 6249-96 (EDU 103-96 ON REMAND)

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT A. LILLO,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF EDISON, MIDDLESEX COUNTY.	:	DECISION ON REMAND
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

September 17, 1996
Date of Mailing, September 18, 1996

398-96

M.L., on behalf of her minor child, K.L., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, : DECISION

RESPONDENT. :

:

September 17, 1996
Date of Mailing, September 18, 1996

OAL DKT. NO. EDU 11370-95

M.L., on behalf of her minor child, K.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

399-96

399-96

R.P., on behalf of his minor child, R.D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ABSECON, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

September 17, 1996

OAL DKT. NO. EDU 10806-95

R.P., on behalf of his minor child, R.D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ABSECON, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 17, 1996
Date of Mailing, September 18, 1996

400-96

400-96

WARREN M. BENEDETTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 18, 1996

OAL DKT. NO. EDU 12637-95

WARREN M. BENEDETTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 18, 1996
Date of Mailing, September 19, 1996

401-96

401-96

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

September 18, 1996

OAL DKT. NO. EDU 5146-95

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 18, 1996
Date of Mailing, September 19, 1996

402-96

ROBERT LILLO AND THE EDISON TOWNSHIP CUSTODIANS AND MAINTENANCE ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 18, 1996

OAL DKT. NO. EDU 8575-95

ROBERT LILLO AND THE EDISON TOWNSHIP CUSTODIANS AND MAINTENANCE ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 18, 1996
Date of Mailing, September 19, 1996

403-96

403-96

A.T., on behalf of her minor child, A.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

September 18, 1996

OAL DKT. NO. EDU 8335-95

A.T., on behalf of her minor child, A.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 18, 1996
Date of Mailing, September 19, 1996

404-96

404-96 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
VINCENT L. LINDSEY.	:	
_____	:	

SEPTEMBER 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO EDU 3699-96

Agency Dkt. No. DHP #10-96

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF VINCENT L. LINDSEY

Vincent L. Lindsey, *pro se*

New Jersey Department of Education, appearing pursuant to *N.J.A.C.* 1:1-5.6(a), for respondent

Record Closed: July 16, 1996 Decided: July 31, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Vincent L. Lindsey, was employed as a custodian by the Teaneck Board of Education (BOE). On January 29, 1996, the New Jersey Department of Education (Department) notified appellant that a fingerprint search conducted by the New Jersey State Police and the Federal Bureau of Investigation (FBI) had revealed that he was convicted in the state of New Jersey on November 20, 1987 for the possession of cocaine and sentenced to four years of imprisonment. Also, appellant was convicted on January 22, 1993 for possession of marijuana and sentenced to five years probation, 150 hours of community service, one year suspension of his driver's license and $1,100 fine. The convictions disqualified appellant from continuing employment with any school or other institution under the supervision of the

Department. *N.J.S.A.* 18a:6-7.1. Appellant's criminal history check also revealed two disqualifying convictions for possession of a weapon in 1989 and 1993.

Appellant appealed the decision of the Department to disqualify him from continued employment based on the grounds of rehabilitation. The matter was transferred to the Office of Administrative Law (OAL) on April 9, 1996, as a contested case pursuant to *N.J.S.A.* 52:14b-12-15 and *N.J.S.A.* 52:14f-1-13.

The issue is whether appellant can demonstrate by clear and convincing evidence that the is rehabilitated.

UNDISPUTED FACTS

Appellant does not dispute his criminal record. Thus, I **FIND** the following as **FACT**:

1. On November 20, 1987, appellant was convicted of possession of cocaine and sentenced to four years imprisonment.
2. On January 22, 1993, appellant was convicted for possession of marijuana and sentenced to five years of probation, 150 hours of community service, one suspension of his driver's license and $1,100 fine.
3. On May 18, 1989 and January 22, 1993, appellant was convicted for possession of a weapon.

SUMMARY OF EVIDENCE

Lindsey was born in New York City's Harlem on July 22, 1965. He lived with his parents and seven siblings. His father was a police officer with the New York City Housing Authority. Lindsey's father was also an alcoholic and an abusive husband and parent. Lindsey's rebellion against his father's abusive behavior caused constant

confrontations between father and son. By the age of 13, Lindsey's home was the streets of Teaneck where the family had moved in 1970. He had a "rep" in the community as a "juvenile delinquent" and a "bad boy."

In December 1986, Lindsey was arrested for possession of cocaine and sentenced to four years imprisonment. He served three years of the sentence in Bergen County Jail, Yardsville Correctional Facility and the Wagoner Youth Correction Facility, a/k/a Bordentown. While at Bordentown, Lindsey joined Narcotics Anonymous (NA) and has remained drug free. He also joined Alcoholics Anonymous (AA). He was on parole during the last year of his sentence and was placed at the Pyramid Halfway House in Newark, New Jersey. He continued to attend NA and enrolled in Essex County College.

Lindsey explained the circumstances surrounding his conviction in May 1991. He and his brother attended a party in Englewood Cliffs, New Jersey. Lindsey's brother-in-law offered him a ride home to Teaneck. They were stopped by the Englewood Cliffs police who searched the vehicle and found 3 ounces of marijuana and cocaine in the trunk. The police also found a gun three or four feet from the car. Lindsey pled guilty and was sentenced to five years probation.

After the second incident, Lindsey vowed to stay away from his old associates and negative influences. In 1992, Lindsey earned his GED from Essex County College and completed three semesters in the radiology program. In 1993 Lindsey married. He and his wife, Sherri, have two children, ages 2 years old and 16 months old. They are expecting their third child in December 1996. Lindsey and his family live in Teaneck.

Lindsey is involved in numerous community activities. The most notable is a program started by Lindsey in 1995, "Box Team for Kids" a/k/a "Teaneck School of Hard Knocks." Lindsey established the boxing program for 12 to 17 years old boys and girls to develop their self-confidence, pride, and physical skills. His boxing program has gained wide support and encouragement from the City of Hackensack, PAL, and

Teaneck Recreation Department. The prior administration of the Bergen County Prosecutor's office helped to fund the program.

Lindsey also explained his personal reasons for creating the program. Having overcome a lifestyle of drug use, crime and "street life," Lindsey believes that adolescents who are in a similar position today as he was 25 years ago need a mentor and a means to turn their lives around. Lindsey is their mentor. Walking through public housing projects, he observed no children playing outside and youngsters wearing tee shirts with negative messages. Looking back on his own life, the connection had been made; these kids were heading down the same path that he had been. Thus, he has taken under his wing a group of students, ages 12 to 18, whom he describes as "at risk youths," He leads them through activities such as calisthenics, jogging and swimming. Parents also participate in the exercises with their children.

Lindsey is also active in his church and works with youth groups and senior citizens. Lindsey's community activism and his rapport with teenagers have been recognized by people who interact with him on a daily basis. Their attestation to his rehabilitation and good character are summarized herein:

> Over the past several years, Mr. Lindsey has worked successfully on a volunteer basis with high school students and young adults in Teaneck and the surrounding community. Please be aware that his efforts have not gone unnoticed by the Teaneck School District and the community. I urge you to review his application at your earliest convenience. . . .
>
> Yours truly,
>
> A. Spencer Denhem,
> Assistant Supernatant of School
> March 6, 1996
>
> * * *
>
> I am writing this letter in support of Vincent Lindsey who is a candidate for employment with the Teaneck Board of Education (BOE). I have known Mr. Lindsey for over 20 years. Although Mr. Lindsey has used poor judgment in past years, it is evident that he has been able to turn his life around in a positive direction.

Recently, I have had the pleasure to work with Mr. Lindsey in a community boxing program to help troubled youth. Mr. Lindsey has served as a positive role model an influence in the lives of these youths.

I feel the employment of Mr. Lindsey by the Teaneck Board of Education would benefit our school system and allow him to continue to serve as a role model to our youth.

Sincerely yours,

William Brogdan, Lieutenant, Detective
Bureau Commander, Township of
Teaneck
February 26, 1996

* * *

On January 22, 1993, Mr. Lindsey was sentenced on a charge of possession of a weapon/pistol without permit and possession of marijuana with intent to distribute. Since January 1993, Mr. Lindsey has been under the immediate suppression of the undersigned senior probation office. . . Lindsey has reported as scheduled and has shown a very positive attitude to his adjustment to the rules and condition of probation. Mr. Lindsey has been tested for drug use and all random samples have been returned as negative.

During the past three years Mr. Lindsey has always demonstrated the positive attitude and motivation towards bettering himself and his family.

At the present time, Mr. Lindsey is responsible for reporting to our office on a once a month basis. Initially, Vincent was responsible for reporting on a weekly basis and adhered to that schedule. However, due to Mr. Lindsey's positive adjustment to the rules of probation, he is now classified as a minimum probation case and his supervision requires him to report monthly. Therefore, the undersigned officer is glad to report that Mr. Lindsey is making a very serious effort in rehabilitating himself and it appears that this time that the goals that Mr. Lindsey has set for himself, demonstrates the positive direction which should lead to a favorable outcome for Mr. Lindsey as well as the community.

Very truly yours,

Frank Peco, Senior Probation Officer,
Superior Court of New Jersey, Bergen
County
February 15, 1996

* * *

This letter is written in support of an appeal for Vincent Lindsey, a candidate for employment with the Teaneck Board of Education, . . . I have worked closely with Vincent Lindsey over the past 8 months and have found him to be a positive influence in a variety of voluntary efforts to assist students who might otherwise come in contact with the criminal justice system or become school dropouts. I believe that Vincent Lindsey has rehabilitated himself to the point where he can be approved for regular employment and contact with students. He has been a

positive influence in our community and has worked hard to develop creative and effective programs to involve students.

There are weeks when I see him three or four times a week. These contacts are always positive, focused and with purpose. He has not displayed any characteristics which are abnormal, problematic or unusual that would lead me to question his motivation, interest or that would make me have concern that his rehabilitation has not been complete. He has a mature outlook on his situation and real concern for the future. I believe he deserves action on his appeal.

Sincerely yours,

James R. Delaney, Principal,
Teaneck High School
February 15, 1996

* * *

On behalf of Vincent Lindsey, former student in Teaneck Public Schools, I would like to make reference to the outstanding leadership he has assumed with many of our male students at Teaneck High School. Vincent has been very open regarding his personal experiences and previous record, attempting to make a positive impact on our at risk students. He has single-handedly organized a boxing unit with very positive guidelines, chaperoned many of our after school functions, and worked in cooperation with our recreation department. Vincent needs to be commended for his efforts in instituting positive programs.

Very truly yours,

Cheryl Miller-Porter, Teacher/Dean,
Teaneck High School
February 14, 1996

* * *

Please accept this letter as a character reference for Vincent Lindsey. For the past few years, I have witnessed Vincent in various roles attempting to work with and reclaim "troubled youths." He is a mature, hardworking individual who has demonstrated a talent for communicating with young people in a way they can understand.

Sincerely,

Richard McClean, Teacher/Dean,
Teaneck High School
February 14, 1996.

* * *

It is my pleasure to write this character reference on behalf of Vincent Lindsey. . . . I have known Vincent Lindsey for several years and found him to be a kind, decent and respected young man who cares about the positive development of our Teaneck Youth. Vincent establishes and supervises the Teaneck Ring Aerobics program here at Thomas

Jefferson Middle School which is an afternoon conditioning program for adolescents. The program is co-sponsored by the Teaneck Recreation Department and the Teaneck High School forum.

As the principal of Thomas Jefferson, I can truly say that he is always cooperative, dependable and responsible in running this program and makes sure that the participants do what is expected of them. They seem to like him, and they work well with him. I am proud of what Vincent is attempting to do and like interacting with him. He always seem so positive and energetic. Simply put, Vincent Lindsey has much to offer as a responsible citizen and I am convinced that he will continued to do so.

Sincerely,

Joseph O. White, Principal,
Thomas Jefferson Middle School
February 13, 1996

* * *

I have known Vincent Lindsey for at least ten (10) years in my position as guidance counselor and presently as Associate Principal at Teaneck High School. During that time, I have watched him grow from an outgoing directionless adolescent to a young man who has acquired serious respect for himself and his community. One of Vincent's greatest assets has been his ability to have empathy for and a sincere understanding of young people. We have utilized and depended on him in countless crisis situations where other forms of communication were closed. We have truly benefited from his efforts.

For the past several years, Vincent has spearheaded a boxing program in our community, virtually single-handedly. He has lobbied for funds, counseled students and coached on a less than shoestring budget experiencing considerable success.

Vincent's action and his involvement in positive activities indicate to me that he has reached a high level of maturity. It is my pleasure to recommend him with confidence and my complete endorsement.

Yours truly,

Charles A. Cob, Teaneck High School
February 13, 1996

* * *

Mr. Lindsey was baptized and has been a faithful member of the Genesis Community Baptist Church for the past three years. He has been working with the Youth Ministry of the church as well as attending Bible Study and church worship services. Mr. Lindsey has proven himself to be biblically sound and spiritually filled.

Although Mr. Lindsey made inappropriate choices in his earlier years, he now focuses on positive ventures and wants to help other young people to make positive choices in their lives. He is always available to work with our young people and enjoys sharing the Bible with them.

> Mr. Lindsey is moving in the right direction now and we support him in his effort to continue to make positive advances in his life. The entire Genesis Church family believes that Mr. Lindsey should be granted the opportunity to continue his work with the Teaneck Board of Education.
>
> Sincerely,
>
> Rev. Michael J. Jordan, Pastor,
> Genesis Community Baptist Church
> Englewood, New Jersey
> February 13, 1996

* * *

Lindsey candidly testified about his past lifestyle and his rehabilitation. He believes that time has allowed him to mature and reform his old habits. Family and church are important to him. Lindsey's abiding faith in God and a self-made promise to live a moral and straight life under the teachings of his church have been a strong influence. Lindsey and his wife enjoy a close marital relationship of mutual respect, love and emotional support for each other. Further, they are committed to rearing their children in a home guided by their religious beliefs and values. Lindsey believes that his determination to turn his life around has enabled him to become a positive role model for teenagers at risk. He sums up his appeal for employment with straightforward conviction:

> My past and the mistakes I made. . . serve as a learning experiences that made me want to better myself to secure a stable future for me and my family. Having fathered three children of my own, their upbringing and futures mean everything to me, endangering the welfare of a child would be an unthinkable well beyond my train of thought. My only hope in terms of your considering my appeal is that you read each of the letters enclosed with a clear mind and an objective heart. The time and energy that I have put into rehabilitating myself is something that I hope will not be in vain. Regardless of the results of my appeal, I will remain committed to my goals which by the will of God will be to better myself and all of mankind. . .
>
> Sincerely,
>
> Vincent L. Lindsey
> February 27, 1996

DISCUSSION AND CONCLUSION

N.J.A.C. 18A:6-7.1 prohibits the employment by the Department of Education and Boards of Education of persons who have been convicted of certain crimes and offenses. However, if the individual has affirmatively demonstrated to the Commissioner clear and convincing evidence of his or her rehabilitation, the individual shall not be disqualified from employment. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

1. The nature and responsibility of the position in which the convicted individual would hold;

2. The nature and seriousness of the offense;

3. The circumstances under which the offense occurred;

4. The date of the offense;

5. The age of the individual when the offense was committed;

6. Whether the offense was an isolated or repeated incident;

7. Any social condition which may have contributed to the offense;

8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, participation in correctional work release programs, or the recommendations of person who have had the individual under their supervision.

Lindsey seeks a position with the Teaneck Board of Education as a custodian. *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974, S.L.D. 178, the Commissioner stated that:

> A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. Its function far exceeds opening and closing the school house and keeping it clean and tidy. The safety and welfare of the children may depend on the proper discharge of his duties.

Because Lindsey has developed a rapport with teenagers through his boxing program and other community activities, he will be called upon to interact with students in crisis situations. The students and staff have confidence in his ability to reach out and communicate with them. Students trust him and their parents welcome him into their children's lives. Consequently, Lindsey will be more than a custodian at the high school. He will be entrusted, to some extent, with the care and custody of school children. He will mold habits and attitudes and influence the opinion of students who come into his presence. Indeed, he will hold a position demanding public trust.

Lindsey spent four years in prison for possession of drugs and is currently serving a five year probation for possession of marijuana and a weapon without a permit. In addition to his drug addiction, he had a reputation of being the neighborhood "hoodlum." I am persuaded by his candid and straightforward testimony that he has been rehabilitated. Indeed, he joined NA and AA programs to combat his addiction to drugs and has been successful in remaining drug-free. As attested to by his parole officer, Lindsey has not broken his vow to stay away from his former associates and other negative influences. The evidence supports a conclusion that Lindsey is no longer the person that he used to be. His community work and his commitment to his family and church manifest a changed man. Indeed, it has been 10 years since the first conviction which resulted in imprisonment. Lindsey's parole officer has seen a serious effort to reform and he is confident that Lindsey will make it.

Public officials and educators who have observed Lindsey in the community and the school setting believe that he will be a positive and necessary role model to the students in Teaneck High School. They have attested to his ability to communicate with the students and will continue to work closely with him. Their comments, praises, and recommendations are testimony to Lindsey's good character. Lindsey's efforts and his commitment to the neighborhood boxing program speak for itself. He is applauded by town officials, law enforcement officers and parents.

Lindsey has lived on both sides of the fence and chose to reform his unacceptable lifestyle. He is, perhaps, more capable than others to guide children who are at risk towards the right direction. From a societal point of view, to disqualify Lindsey from employment by the Board of Education would be a detrimental loss to the students. He has demonstrated through his personal accomplishments that he is not the same person today as he was ten years ago or even five years ago. He has earned the respect and confidence of his superiors, peers, students and their parents. Lindsey is a person worthy of employment by the Teaneck Board of Education.

Based on the whole of the record, I **CONCLUDE** that appellant has affirmatively demonstrated his rehabilitation by clear and convincing evidence within the meaning of *N.J.S.A.* 18a:6-7.1(e).

ORDER

It is hereby **ORDERED** that the Department's action to disqualify appellant from employment with the Teaneck Board of Education is **REVERSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 31, 1996
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

8/5/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Appellant:
Vincent Lindsey
Cheryl Miller-Porter
Edward M. Henderson

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF	:	DECISION
VINCENT L. LINDSEY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner cannot concur with the conclusion of the Administrative Law Judge (ALJ) that Mr. Lindsey has demonstrated rehabilitation by clear and convincing evidence in accordance with *N.J.S.A.* 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws. Rather, in examining the evidence presented in the record and at the hearing against the statutory factors which must be considered in reviewing an individual's assertion of rehabilitation, the Commissioner is unable to find Mr. Lindsey qualified within the intent of the statute at this time.

Initially, the Commissioner observes that Mr. Lindsey's first disqualifying offense was in December 1986, when he was 21 years old, for Possession of Cocaine. Court records indicate that Mr. Lindsey was sentenced on November 20, 1987 to serve five years probation. Although apparently not explicated at the hearing, the record further shows that Mr. Lindsey was

charged with violating the terms of his probation by leaving an in-patient treatment facility on April 12, 1988 and by failing to pay requisite court-ordered fines. (New Jersey Superior Court, Bergen County, *State of New Jersey v. Vincent L. Lindsey, a.k.a. Delroy Banton*, Judgment of Conviction and Order for Commitment, S.B.I. No. 331-900-B) Additionally, on August 20, 1988, Mr. Lindsey was charged with two nondisqualifying crimes, Felony Resisting an Officer and Felony Possession of a Weapon, for which he was sentenced to serve four years in confinement. Mr. Lindsey testified that he served three of the four years of his sentence. (Initial Decision at p. 3)* In 1991, Mr. Lindsey was charged with, and later convicted of, Possession of Marijuana with Intent to Distribute, in violation of *N.J.S.A.* 2C:35-5b(1). On January 22, 1993, he was sentenced, *inter alia*, to serve five years on probation. Notwithstanding his explanation of the circumstances surrounding this offense, the Commissioner finds extremely disturbing Mr. Lindsey's pattern of finding himself on the wrong side of the law, while apparently still on probation and under the supervision of the Court.

With respect to the nature and responsibility of the position Mr. Lindsey wishes to occupy, although a custodial position is not generally one where the incumbent has direct involvement with students in that he is responsible for their care, supervision or instruction, the Commissioner has been consistently mindful that such a position nevertheless affords an individual significant and otherwise unsupervised access to children, a consideration which must not be minimized when examining rehabilitation pursuant to *N.J.S.A.* 18A:6-7.1. *In the Matter of the Disqualification from School Employment of Gregory Campbell*, decided by the Commissioner January 30, 1996, affirmed by the State Board of Education July 10, 1996. That

* It is herein noted that both the initial decision and the personal statements of Mr. Lindsey, suggest that the four-year sentence was imposed upon conviction for the first charge, Possession of Cocaine. The Court records, however, do not substantiate this view.

Mr. Lindsey has assumed a direct role in working with children via his boxing program serves to underscore the Commissioner's concerns in this regard. Finally, the Commissioner is continually mindful of his responsibility to ensure that the students in this state are provided with environments which are safe and free of alcohol and other drugs.

Based on the above considerations, the Commissioner cannot be persuaded, as he must by law, that Mr. Lindsey has, at this time, demonstrated rehabilitation by clear and convincing evidence, notwithstanding his evidence of progress in this regard. This decision does not, however, preclude Mr. Lindsey from later seeking a determination of rehabilitation after a passage of sufficient time to demonstrate that he has ultimately removed himself from all involvement in criminal activity.

Accordingly, the initial decision of the OAL is reversed and Mr. Lindsey's disqualification from school employment is sustained.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1996
DATE OF MAILING SEPTEMBER 19, 1996

405-96

405-96

J. JOYCE C. PAYNE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, nontenured Director of Education, alleged Board's nonrenewal of her contract was arbitrary, capricious and unreasonable and procedurally deficient.

ALJ found that although Board was not in full compliance with the Open Public Meetings Act (OPMA), it would serve no productive end for the Board to re-conduct the hearing and to then deliberate in public as the deliberations conducted in private are available for public review. Moreover, the ALJ concluded that the provisions of *N.J.S.A.* 18A:27-11 and the facts relevant to *N.J.S.A.* 18A:27-12 did not operate in the within matter to grant petitioner a contract of employment for the next succeeding school year. ALJ found that the Board's reasons given for nonreemployment were advanced in good faith. Respondent's motion for summary decision dismissing the petition was granted.

Commissioner adopted findings and determination in initial decision as his own and directed Board to conduct any nonreemployment hearings it may hereafter hold in full compliance with the OPMA.

SEPTEMBER 19, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8785-95

AGENCY DKT. NO. 382-9/95

J. JOYCE C. PAYNE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

Respondent.

Melissa Vance Kirsch, Esq., for petitioner

James P. Granello, Esq., for respondent

Record Closed: May 7, 1996 Decided: August 5, 1996*

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on September 21, 1995, when J. Joyce C. Payne (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order

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* An extension of time for issuing the initial decision was requested and granted pursuant to N.J.S.A. 52:14B-10c.

determining that the actions of the Board of Education of the Township of Willingboro (hereinafter respondent) in failing to continue her employment were arbitrary, capricious and unreasonable and procedurally deficient. An answer on behalf of respondent was filed on September 26, 1995, and on September 29, 1995, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F- 1 to -13.

A prehearing conference was conducted on December 5, 1995, at which time the following were identified as issues for determination at hearing:

1. Did respondent violate petitioner's contractual or statutory rights in failing to renew her contract as specifically alleged in the petition of appeal?

2. If the answer to the previous question is yes, what are the appropriate remedies?

On February 2, 1996 respondent filed a notice of motion for summary decision with supporting papers. A response and cross-motion for summary decision on behalf of petitioner were filed on March 11, 1996, and petitioner's supplemental certification was received on March 13, 1996. Respondent replied by letter memorandum, dated March 14, 1996 and received on March 18, 1996. Thereafter, oral argument on the cross-motions for summary decision took place by telephone conference call on May 7, 1996, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner became employed by respondent in the position Director of Education pursuant to an individualized employment contract which provided, inter alia, for a term of employment to run from the first day of September 1992 to the thirtieth day of June 1995, a salary of $73,800 per

annum, and termination of the contract without cause upon sixty days written notice and the payment of one year's salary. Petitioner performed her duties for the entire contract period. At the end of her third year of employment, respondent did not provide to petitioner either of the notices required in N.J.S.A. 18A:27-10, i.e., respondent did not advise petitioner on or before May 15, 1995, either that she was being offered a contract of employment for the next succeeding school year or that such employment would not be offered. Petitioner and respondent's superintendent of schools thereafter proceeded to function under the apparent assumption that petitioner's employment would continue. On April 27, 1995, petitioner advised the district of her intention to take vacation days in July and August 1995. On May 16, 1995, petitioner received a letter from the superintendent recommending her for a trip to South Africa to take place during the summer. On June 6, 1995, petitioner received a memo from the superintendent assigning her to projects, some of which were due in July of 1995.

On June 14, 1995, petitioner received a notice from respondent that her reappointment might be discussed by the Board of Education at its conference meeting of June 20, 1995 and/or its public meeting of June 26, 1995. Petitioner appeared at the June 20, 1995 work shop meeting and answered questions concerning a program that a principal under her supervision had placed into operation without the knowledge or consent of the administration. At this meeting petitioner advised respondent that she had advised the principal in question that it was necessary for her to obtain Board approval before instituting the program and that it was not until April 24, 1995 that petitioner discovered that the program had in fact been put into place in January 1995. Petitioner acknowledged that she had not instructed the principal in writing concerning the necessity for obtaining Board approval. She also advised the Board members that she had no idea that the program had been put in place. It was also revealed during this meeting that although petitioner was aware that the principal had written letters directly to the County Superintendent and the Commissioner of Education concerning the accelerated program and petitioner had received copies, petitioner had not reprimanded the principal in writing for contacting the County Superintendent or the Commissioner without Board approval. Petitioner advised that as of the date of the meeting she had received no reply from the principal to a written memorandum, dated May 15, 1995, requesting a written report by May 17, 1995, concerning the resolution of

meetings with parents to notify them of their students' non-accelerated status or to one she had sent her on May 19, 1995, criticizing the inappropriate nature of a letter the principal had sent to parents who thought their students had been enrolled in an accelerated program. "She did not respond to my letter, but I will be meeting with her on Thursday morning," petitioner replied.

At the regular public Board of Education meeting on June 26, 1995, petitioner's name appeared on the list of non-tenured personnel recommended by the superintendent for reappointment and, therefore, tenure. Petitioner's name was separated from the group and the recorded roll call vote on the motion to reappoint her failed with four Board members voting yes and five board members abstaining.

Pursuant to N.J.S.A. 18:27-3.2, by letter dated July 11, 1995, petitioner's counsel requested "a written statement of reasons for her non-employment within the timeframe prescribed by law." By letter dated August 2, 1995, respondent's counsel provided those reasons as follows:

> As Board negotiator/special labor counsel, I have been asked to respond to your letter dated July 11, 1995 in which you requested that your client, Ms. Payne, be provided with a written statement of reasons for her non-reemployment with the Willingboro Board of Education.
>
> Please be advised that on Tuesday, August 1, 1995 those members of the Board of Education who abstained from voting on Ms. Payne's employment at the Board meeting held on June 26, 1995 issued their statement during the public portion of the meeting as was requested by your client pursuant to her letter dated July 31, 1995 directed to the Board Secretary.
>
> The reasons given last evening were as follows:
>
> 1. Mrs. Payne would have received tenure within the district had she been reappointed. Tenure must be considered as giving someone permanent employment. A reappointment vote which will result in an administrator receiving tenure demands the highest level of scrutiny of the individual employee's entire employment history

> by an responsible board member. They would not grant tenure to anyone that they had concerns about.
>
> 2. Mrs. Payne did not adequately manage or oversee the Alternate School and its principal, as were her responsibilities as Director of Education. The board discovered in Spring 1995 that an illegal, unapproved accelerated grade-skipping program had been set up in the Alternate School. Such a program needs board and state approvals which had not been received. The district could have failed state monitoring for this serious infraction. In addition, once discovered, Mrs. Payne did not take adequate steps to make sure this mistake was honestly communicated to parents and students, resulting in a situation that further damaged the credibility of the district, the superintendent, and the board. Mrs. Payne met with the board of education on June 20, 1995 and reviewed these matters with the board of education in executive session.

By letter dated August 11, 1995, petitioner's counsel requested that petitioner be granted an informal appearance before the Willingboro Board of Education. She also advised that petitioner wished to exercise her rights under the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(8), to have her informal appearance before the respondent held in public. Respondent's letter advising that the informal appearance had been scheduled for August 31, 1995 at 8:00 p.m. concluded, "Furthermore, you are advised that the Board has reserved its right to deliberate on this matter in closed session on the date in question." Petitioner's counsel responded by letter dated August 29, 1995, providing in pertinent:

> First, Mrs. Payne desires to have any discussion of this matter by the Board of Education done in public in accordance with the Open Public Meetings Act. That decision rests with Mrs. Payne, not the Board, in accordance with N.J.A.C. 6:3-4.2(h) which specifically references N.J.S.A. 10:4-12(b)(8).

At the special meeting held on August 31, 1995, petitioner and several witnesses testified on her behalf before the Board. At the conclusion of the presentation, the Board went into executive session where it discussed with its attorney the procedural merits of petitioner's request

to observe their deliberations. They also discussed the merits of petitioner's presentation and thereafter voted 5-4 to stand by its previous decision not to continue petitioner's employment. Petitioner was notified in writing on September 1, 1995, that respondent determined to stand by its previous decision not to renew her employment for the 1995-96 school year. The within matter followed.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was recently modified in Brill v. Guardian Life Insurance Company of America, and KRA Insurance Agency, Inc., 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exits a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter both parties agree that if respondent's actions in failing to continue petitioner's employment constitute a termination of petitioner's contractual or statutory employment rights, as opposed to non-reappointment of a non-tenured employee, then a hearing must be conducted to determine whether the termination was with or without cause. Because the discussion which follows concludes that respondent's actions simply constituted a non-reappointment of a non-tenured employee, however, whatever factual disputes exist with respect to cause or no cause for termination are not relevant to a determination of this matter. During oral argument of this matter on May 7, 1996, petitioner took the position that even if the discontinuation of petitioner's employment constituted non-reappointment, as opposed to termination, nevertheless a hearing would be necessary to explore the factual circumstances giving rise respondent's conclusion that petitioner failed to supervise the principal of the alternative school. As a matter of law, those facts, whatever they may be, are not material to a determination of petitioner's rights in a non-reemployment situation. In Donaldson v. Board of Ed. of No. Wildwood, 65 N.J. 236 (1974), when the Supreme Court determined that a local board of education should be required to provide a statement of reasons for non-renewal of non-tenured staff members, it did so with the explicit recognition of the local board's broad discretionary authority in the granting of tenure. Subsequent to Donaldson, the court in Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982), emphasized the broad nature of the board's discretion: "Implicit in this language (Donaldson's) is the recognition by the court that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." N.J.A.C. 6:3-4.2 provides a procedure for non-tenured teaching staff members to appear before a district board of education upon receiving notice of non-reemployment. Once that procedure is completed, there is no right to a

hearing before the Commissioner of Education under the school laws, unless of course a petitioner provides adequately-detailed allegations of proscribed conduct, i.e., unlawful discrimination, deprivation of constitutional rights, etc. See Nasuti v. Bd. of Ed. of West Amwell, 1979 S.L.D. 11, 18. There have been no such allegations set forth in the petition in this matter. Accordingly, I **CONCLUDE** that this matter is ripe for summary decision.

Petitioner bases her allegations that respondent wrongfully terminated her employment upon the provisions of N.J.S.A. 18A:27-10, which reads:

> On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
>
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increase in salary as may be required by law or policies of the board of education, or
>
> b. A written notice from the chief school administrator that such employment will not be offered.

It is undisputed that respondent failed to provide either a notice of non-reemployment or an offer of employment by May 15, 1995, either to petitioner or apparently to anyone else. All reappointment issues were dealt with at the June 26, 1995 Board meeting. Petitioner notes in her motion papers that this is not the first time that respondent has missed the statutory deadline. In 1993, at the end of petitioner's first year of employment, respondent did not act to renew her contract until June 14, 1993, she says.

The consequences of failing to provide notice to non-tenured employees prior to May 15, of any year are established in N.J.S.A. 18A:27-11, which provides:

> Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.

While respondent's lack of diligence in this regard must be deplored, in the present matter it cannot provide the basis for the relief which petitioner seeks because petitioner herself failed to comply with the requirements of N.J.S.A. 18A:27-12, which provides:

> If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1 in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.

Petitioner argues that she should be deemed to have substantially complied with the acceptance requirements of N.J.S.A. 18A:27-12 because from all of the surrounding circumstances respondent was certainly aware of the fact that she intended to continue her employment in the district. Where, as here, however a statutory remedy provides the means to eliminate the Board's exercise of its discretion with respect to reemployment of a non-tenured employee, the statute should be strictly construed. The statute creates an offer of employment which exists only between May 15 and June 1 of any particular year. If " the offer" is not explicitly accepted in writing after May 15 and on or before June 1, the offer expires. Petitioner's April 27, 1995 written vacation request addressed not to respondent but rather to the Assistant Superintendent, her immediate supervisor, says nothing about accepting any offer of employment; furthermore, the written communication precedes the May 15, 1995 deadline for respondent to issue its notice concerning employment intentions and accordingly on April 27, 1995 there was no "offer" to

accept. The other communications cited by petitioner are communications from respondent or respondent's representatives to petitioner and at most evidenced the superintendent's understanding that petitioner would be continuing her employment. Respondent is not required to conclude from the circumstances that an employee wishes to accept the statutory contract offered between May 15 and June 1 in any year where the Board fails to comply with the notice requirements. An employee's written acceptance of the offer must be clear and a matter of record. Accordingly, I **CONCLUDE** that the provisions of N.J.S.A. 18A:27-11 and the facts relevant to N.J.S.A. 18A:27-12 did not operate in the within matter to grant petitioner a contract of employment for the next succeeding school year.

Based upon the foregoing conclusions, when respondent voted on petitioner's employment status on June 26, 1995, it was voting on a motion to renew the employment contract of petitioner, a non-tenured employee, but one who would gain tenure with the first day of a new contract. N.J.S.A. 18A:27-4.1b provides in pertinent part in this regard:

> A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.

. . .

Respondent articulated two reasons for its failure to reappoint petitioner: 1) this was petitioner's tenure year and it did not wish to grant tenure to a staff member about whose performance it had concerns and 2) it had serious concerns about petitioner's failure to supervise the principal of the alternative school and to thereby prevent unauthorized implementation of an accelerated program.

There is nothing in respondent's meeting minutes to indicate that their actual reasons for non-reappointment differed in any way from those articulated in the written notification. The function of the Commissioner of Education reviewing the reasons articulated by a board of

education in support of its discretionary decision is not to assess whether respondent's decision was wise or whether the reasons were good or even adequate. The Commissioner need determine only whether the reasons given were advanced in good faith, i.e., that they were not willfully false or a pretext for some unlawful, arbitrary or capricious motivation. Brenner v. Board of Education of the Township of Middlesex, 96 N.J.A.R. 2d (EDU) 81. As previously noted, petitioner has advanced no specifically articulated proscribed motivation on respondent's part and none appears from any of the exhibits attached to the briefs or certifications of either party. Neither reason is arbitrary; uncontested facts exist to support respondent's conclusions, and whether the facts might also support a different conclusion is not a matter properly reviewed by the Commissioner.

Petitioner's final argument, that respondent violated her rights pursuant to the Open Public Meetings Act, N.J.S.A. 10:4-12(8), when it declined to honor her request to discuss her employment in public at the meeting on August 31, 1995, is not without merit.

N.J.S.A. 10:4-12(a) requires all meetings of public bodies to be open to the public at all times, subject to certain exceptions. Among those exceptions is the so-called "personnel" exception of N.J.S.A. 10:4-12(b)(8), which reads as follows:

> b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

The personnel exception of the Open Public Meetings Act is intended to protect the privacy of the employee. "The right belongs to the individual, not the public body." Plainfield Ed. Assoc. v. Bd. of Ed. of the City of Plainfield, 1985 S.L.D. 1578. Pursuant to N.J.A.C. 6:3-4.2(h) and N.J.S.A. 10:4-12(b)(8), incorporated therein, the affected employee has the right to require public discussion at any open meeting upon his request in writing. Jamison v. Morris Sch. Dist. Bd. of Ed., 198 N.J. Super. 411 App. Div. 1985). Petitioner exercised her right to have this matter discussed in public by sending two letters through her attorney and again renewing her request the evening of the meeting. Although the Board repeatedly stated that it reserved its right to deliberate in private, it had no such legal right to reserve. The legal right was petitioner's. Although that portion of the executive session wherein the Board discussed with its attorney whether the Open Public Meetings Act permitted them to deliberate in private notwithstanding petitioner's request to the contrary might come within the attorney/client exception to the Open Public Meetings Act, N.J.S.A. 10:4-12(7), the discussion concerning whether petitioner should be retained was required to be done in public. The regulations governing the appearance process for nonrenewals, N.J.A.C. 6:3-4.2, do not state that a board may deliberate in private. Furthermore, although the informal appearance must be in public at the employee's written request, a number of the specific regulatory provisions contain language which applies only when there has been no such request and the appearance is conducted in private. See e.g., subsection (g), which provides that witnesses shall be called into the meeting to address the Board one at a time and shall be excused from the meeting after making their statements. While respondent maintains that the portions of the regulation permitting it three days to respond, subsection (i) implies that the deliberation may be done in private, petitioner accurately points out that these provisions were undoubtedly designed to accommodate the situation where the hearing is done in private and therefore the deliberations would be private. In a case such a this one where the employee has chosen to have everything in public, respondent has no right to keep its deliberations from the public.

Although I **CONCLUDE** that petitioner has established a violation of the Open Public Meeting Act, a remedy for the violation is a different issue. Petitioner suggests that the respondent should be required to re-conduct the "Donaldson hearing" and deliberate in public. If

respondent had taken any action at the meeting which did not conform to the provisions of the Act, the action would be voidable and respondent would be required to take remedial action by acting de novo at a public meeting held in conformity with the provisions. To require respondent to expend additional public monies in this matter to re-conduct the hearing (which apparently was done in public) and then to deliberate in public would not accomplish any productive end. The deliberations which respondent conducted in private in violation of the Open Public Meetings Act have been recorded and transcribed verbatim in minutes of the meeting which are available to petitioner and which can be made available to any member of the public so wishing. It should also be noted that, in conducting their deliberations in private, respondent was relying upon the legal advice of counsel with which the within opinion simply disagrees.

For all of the foregoing reasons, respondent's motion for summary decision dismissing the within petition of appeal is hereby **GRANTED** and the within proceedings are hereby **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug. 5, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8/5/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 7 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

J. JOYCE C. PAYNE, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Both the Board and petitioner filed timely exceptions; the Board also filed a timely reply to petitioner's exceptions, pursuant to *N.J.A.C.* 1:1-18.4.

The Board's exceptions offer no new arguments. Rather, the Board merely asserts that the Administrative Law Judge (ALJ) "appears to have ignored" its arguments set forth in its prior brief contending that petitioner's request for an informal appearance before the Board, pursuant to *N.J.A.C.* 6:3-4.2, did not give petitioner the right to witness the Board's deliberations after such an appearance. (Board's Exceptions at p. 1) Thus, the Board requests that the Commissioner reject the ALJ's conclusion that it violated the Open Public Meetings Act (OPMA).

Although she agrees with the ALJ's conclusion that the Board violated the OPMA, petitioner urges the Commissioner "to fashion some remedy to punish the Board for its wrongdoing." (Petitioner's Exceptions at p. 1) Petitioner rejects the ALJ's remedy that

interested people can review the transcripts of the Board's informal hearing in this matter, arguing

> ***At the Donaldson hearing, many members of the public were present. The public had a right to witness the deliberations and react as it wished. To permit the Board to hide between legal opinion only encourages further violations of the OPMA.*** (*Id.* at p. 2)

Petitioner further contends that the ALJ failed to address her arguments concerning the provisions of her contract which required that she be given notice of her deficiencies, and an opportunity to correct them. Petitioner requests that the Commissioner rule on this issue.

In reply to petitioner's exceptions, the Board directs the Commissioner's attention to the provisions of *N.J.S.A.* 18A:27-12 which establish a date beyond which a board will not be subject to the statutory imposition of an employment contract. The Board continues,

> ***If the Legislature saw fit to limit the exposure of a board of education to the statutory provisions under *N.J.S.A.* 18A:27-10, *et seq.*, the Commissioner of Education should construe that as a clear indication that there should be no other penalty if the employee fails to meet [his/her] responsibility under the law.*** The Administrative Law Judge found no evidence of an explicit acceptance of this statutory offer by the petitioner. (Board's Reply at pp. 1-2)

As to petitioner's arguments with respect to her contract, the Board counters that the Commissioner is without jurisdiction to interpret contractual provisions, and the ALJ properly avoided engaging in such interpretation. (*Id.*)

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's findings and conclusions with respect to petitioner's *N.J.S.A.* 18A:27-10 *et seq.* and OPMA claims. The Commissioner herein determines it unnecessary to reach to petitioner's contractual claim, inasmuch as the ALJ clearly established

that the Board's actions in the present matter constituted a nonreappointment of a nontenured employee, rather than the termination of a contract. (Initial Decision at p. 7) The Commissioner further concurs with the ALJ's opinion that the Board's lack of diligence with regard to the provisions of N.J.S.A. 18A:27-11 is to be deplored (*id.* at p. 9), but finds that the ALJ properly determined that it would serve no productive end for the Board to reconduct the hearing, and to then deliberate in public, inasmuch as the deliberations conducted in private were recorded and transcribed and are available for public review. (*Id.* at p. 13)

Accordingly, the initial decision of the ALJ granting the Board's motion for summary decision and dismissing the Petition of Appeal is adopted for the reasons expressed therein. Additionally, the Board is hereby directed to conduct any nonreemployment hearings it may hereafter hold in full compliance with OPMA.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1996
DAATE OF MAILING SEPTEMBER 19, 1996

410-96

410-96B

BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF POMPTON LAKES,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $117,000 made by governing body following voter rejection of proposed budget on April 16, 1996.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the District, Commissioner determined to restore $83,000. However, in view of the fact that additional budgeted state aid sufficient to cover this amount is available to the District, the Commissioner let stand the General Fund tax levy of $11,601,093 as certified by the Borough for 1996-97 school purposes.

SEPTEMBER 23, 1996

BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF POMPTON LAKES,	:	DECISION
RESPONDENT.	:	

For the Board, Cherie L. Maxwell, Esq. (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A.)

For the Borough, Carol Kehoe

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on May 29, 1996, through the filing of a Petition of Appeal by the Pompton Lakes Board of Education (Board), seeking restoration of reductions to the school budget made by the Borough Council of the Borough of Pompton Lakes (Borough) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election held on April 16, 1996.

At that election, the voters rejected a public question proposing a General Fund tax levy of $11,718,093 for the 1996-97 school year. The 1996-97 budget submitted to the voters included an approved Commissioner's cap waiver of $301,400, deemed necessary due to increased special education costs. On May 16, 1996, following consultation with the Board as required by law, the Borough adopted a resolution determining to certify a General Fund tax levy of $11,601,093 as sufficient to provide for a thorough and efficient system of education (T & E) in the District. This amount represented a reduction of $117,000 from the tax levy proposed by the Board, and was effectuated through cuts in four line items, for the reasons given in

Schedule A attached to the implementing Borough's resolution. By resolution, dated May 22, 1996, the Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Borough	
General Fund	$11,718,093	General Fund	$11,601,093

Amount of Reduction by Borough		Amount of Reduction in Dispute	
General Fund	$ 117,000	General Fund	$ 117,000

The Borough declined to submit an answer or position papers in this matter. The Board filed its Position Statement on June 18, 1996. On August 7, 1996, the parties were advised that official notice would be taken of documentation filed in conjunction with the Board's requested Commissioner's cap waiver, as noted above. Although provided an opportunity to submit comment, neither party responded to the notice.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner, dated March 13, 1996, and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1996-97 budget the amount of anticipated undesignated surplus.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such T & E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such

restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T & E. *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township*, 116 *N.J.* 305 (1989). With respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and unable to be derived from further allocation within the base budget. *Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County, and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County*, State Board decision July 7, 1993; *Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County*, State Board Decision July 6, 1994.

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Number 1

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07010	11-000-240-103	Undist. Supp. Svcs. Sch. Admin./Sal. of Principals/Asst. Principal	$527,002	$76,000

The Borough's rationale for the reduction is that the person in this position has resigned; it argues that leaving this nonmandated position vacant will not impact on T & E.

The Board argues that this position is essential to its ability to provide T & E, and that the need for the position has been acknowledged through the Commissioner's cap waiver process. In the review process, the Board contends, there was no reallocation made and no suggestion that the position be eliminated. The Board asserts that the vice principal at the high school serves a vital role in the District in that he/she has primary responsibility for disciplinary

matters and for implementation of the attendance policy*, in addition to a wide range of duties under the direction of the principal. The Board further contends that the vice principal serves as a key individual in the area of school-community relations and in the ongoing interaction between staff, parents and students. The vice principal is responsible for orientation of new staff and for staff development, as well as oversight and troubleshooting of the administration's computer network, processing of report cards, progress reports, etc. Further, he/she takes an active role in scheduling and is the immediate supervisor of teachers of foreign language, home economics and music. The Board additionally observes that its high school has an enrollment of 600 students which clearly requires one vice principal to maintain discipline and order and to provide necessary assistance in the supervision of instruction. Finally, the Board notes that it has made efficient use of its administrative staff; it was recognized this year with a reward of $25,000 for low administrative costs under the School Efficiency Program Act and was cited by Governor Whitman in her State of the State Address for keeping administrative costs down.

Upon review, while noting that he is not bound in the present context by cap waiver review panel acceptance of a district's overall staffing patterns, the Commissioner determines that the Board has demonstrated the necessity of the vice principal's position, while the Borough has failed to show how current vice principal functions may be feasibly distributed among existing administrators, in the absence of a vice principal, so as not to impact upon the provision of T & E. Accordingly, the reduction of $76,000 is restored.

Disputed Line-Item Number 2

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07420	11-000-290-290	Undist. Expenditures Busn. & Other Supp. Svcs./Other Empl. Benefits	$1,803,472	$24,000

The Borough's contention is that, since the position of vice principal is vacant, associated costs within the Other Employee Benefits account will not be needed. Further, it argues that the 1995-96 budget had no appropriations for unused sick days, so that none are

* Here, the Board argues that the vice-principal's responsibilities will increase as a result of the reduction of the attendance officer's position to half-time in 1996-97.

needed this year either. If such appropriations are needed, however, the Borough asserts that the maximum allowable amount per employee is $9,000, but a lesser amount may be allocated depending on the amount of unused sick days. The Borough affirms that the Board is aware of only one employee who may retire.

The Board underscores that the vice-principal's position is essential to the provision of T & E and, accordingly, the contractual benefits corresponding to such an essential position must be funded. Further, with respect to appropriating funds for unused sick days, the Board contends that this is a contractual obligation and a liability which the auditor has noted should be funded.

As part of the required materials for a 1996-97 cap waiver request, districts were instructed to complete and submit the "1996-1997 Cap Waiver Request Additional Supporting Documentation Package." This document provided additional information regarding the 1996-97 proposed budget in comparison to prior year budgeted and actual amounts, including district explanations for fluctuations. It was used by the county superintendent and cap panel in their review of the cap waiver request. In that document, the District reflects inclusion of $36,980 for "misc./unused sick days" in the $1,803,472 budgeted for Other Employee Benefits.

Upon review, the Commissioner finds that in view of the Board's failure to take exception to the Borough's statement that one employee is anticipated to retire during the 1996-97 year with a potential maximum payment of $9,000 to the employee for unused sick days under contract, it appears that the District has budgeted funds well in excess of that needed for the payment of unused sick days. Under generally accepted accounting principles (GAAP), although a contractual obligation may exist for the payment of unused sick time, funds are not

appropriated until the year that payment is anticipated. Accordingly, the Commissioner determines to sustain the reduction of $24,000 in this line item.

Disputed Line-Item Number 3

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06930	11-000-230-339	Undist.Expenditures Support Svcs./Gen'l Admin. Other Purch. Prof'l Svcs.	$43,769	$7,000

The Borough maintains that there is $22,739 budgeted for accountant's fees. The current contract, however, is for $14,100.

The Board argues that its budgeted amount of $22,739 is to cover the cost of the annual audit and additional financial advice throughout the year. The Board estimates that the audit, as mandated by *N.J.S.A.* 18A:23-1, will cost $14,100, per last year's cost. Thus, the Board reasons, implementation of the Borough's reduction in this area would leave insufficient monies for financial services throughout the year and would cause this line item to be underbudgeted.

Upon review, the Commissioner finds that the 1996-97 proposed appropriation of $43,769 reflects a 16% reduction from the 1994-95 actual expenditures and a 25% reduction from the 1995-96 budgeted amount. Based on the prior year's spending patterns, the Board's claim with respect to the need for appropriations for further financial services appears substantiated. Accordingly, the Commissioner determines to restore the reduction of $7,000 in this line item.

Disputed Line-Item Number 4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07170	11-000-260-610	Undist. Expenditures Op. of Maintenance of Plant Svcs./Gen'l Supplies	$299,415	$10,000

The Borough contends that, with the elimination of freshman sports and the music program, there will be less wear on the building and, consequently, the need for supplies and building repairs will be reduced.

The Board contends that this reduction is entirely without foundation. It argues that, regardless of whether there is a music program or freshman sports, the number of students within the District remains the same, as does the length of time the students are in school and the number of classrooms in use. Thus, the Board reasons, there will be no reduction in the need for upkeep and repair; in accordance with *N.J.S.A.* 18A:18A-43 and 18A:21-1, it is responsible for providing clean schools which are safe from hazards.

Upon review, the Commissioner finds that neither the Board's supporting documentation nor its prior year's expenditures and appropriations justify the increase proposed in this category from a 1995-96 appropriation of $210,040 to a 1996-97 proposed appropriation of $299,415. The Commissioner concurs with the Borough that reduction of this line item will not impact upon the Board's ability to offer a T & E system of education. Accordingly, the $10,000 reduction is sustained.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of $162,854 and allocated $0 as revenue, leaving $162,854 as undesignated unreserved surplus, which was well below 3% of its proposed 1996-97 budget.

The Board's annual financial report filed pursuant to *N.J.S.A.* 18A:17-10 (June 30 Board Secretary's report) reveals that the projected balance was understated. Based on the above, the Commissioner determines, subject to verification through the Board's 1995-96 annual year-end audit report, that no excess surplus funds are available to offset the restorations ordered herein.

ADDITIONAL STATE AID

Additionally, the Commissioner notes that on August 7, 1996, the Board was notified that the recently approved appropriations act for the fiscal year ending June 30, 1997, contained, from the QEA Formula Correction Aid account, an appropriation of $180,000 in additional school aid for the Pompton Lakes School District. By letter dated August 21, 1996, the parties were provided an opportunity to submit written comment with regard to the Commissioner's use, within the context of this budget appeal, of such additional funds.

The Board filed a comment on August 28, 1996, essentially contending that this one-time revenue should not affect the Commissioner's decision with respect to the instant

appeal. The Board observes that a Commissioner's cap waiver of $301,400 was approved, together with a non-T & E Voter Cap Waiver of $499,028 approved for presentation to the voters. The Board maintains that the non-T & E cap waiver was primarily intended to fund the continuation of the music program, the basic skills supervisor, media aides, freshman athletic programs and the outdoor education program in the District. In that the cap waiver was defeated, the Board was unable to fund these programs for the 1996-97 school year. Thus, the Board argues that this additional state aid is but a one-time revenue which is not a part of its regular budget, yet is needed for the continuation of vital educational programming, and should, therefore, not affect the Commissioner's decision with regard to the within appeal.

Upon review, the Commissioner observes that, upon application for a Commissioner's cap waiver, the budget is subjected to the scrutiny of both the county superintendent of schools and a panel of department employees for possible reallocations of appropriations budgeted for nonmandated and non-T & E items. Such items may be presented to the voters in a separate ballot questions as a non-T & E Voter Cap waiver. As a result of the reallocation analysis, the base budget waiver, approved by the Commissioner, contains only those items deemed necessary for the provision of T & E in the district. Since the non-T & E waiver items have been identified as nonmandated or unnecessary for T & E, and inasmuch as the Board's voter cap question, as well as its base budget containing the Commissioner cap waiver were defeated at the polls, the Commissioner must reject the Board's contention that the additional state aid of $180,000 should be applied to restore non-T & E items. Having received approval for a Commissioner's cap waiver, the Board cannot now apply these unanticipated funds to restore non-T & E items; rather, the funds may be used only to restore T & E items or to reduce the tax levy required to fund a T & E system of education. Accordingly, the additional funds will be considered by the Commissioner as revenues available to offset the restorations directed herein.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Borough's line-item reductions to appropriations as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with *N.J.A.C.* 6:20-2A.11(b)3.

Description	Account Number	Sustained	Restored
Undist. Supp. Svcs./ Sch. Admin/Sal. of Principals/Asst. Principal	11-000-240-103	$ -0-	$ 76,000
Undist. Expend. Busn. & Other Supp. Svc./Other Empl. Benefits	11-000-290-290	$ 24,000	$ - 0 -
Undist. Expend. Supp. Svcs./Gen'l Admin. Other Purch. Prof'l Svcs.	11-000-230-339	$ -0-	$ 7,000
Undist. Expend. Op. of Maintenance of Plant Svcs./Gen'l Supplies	11-000-260-610	$ 10,000	$ -0-
TOTAL LINE-ITEM DETERMINATIONS		$ 34,000	$ 83,000

	Amount
Tax Levy Certified by Governing Body	$11,601,093
Restoration of Reductions	$ 83,000
Amount of Restoration Funded by Unbudgeted State Aid	$ (83,000)
Amount of Restoration Funded by Surplus	$ -0-
Total Tax Levy for 1996-97	$11,601,093

Accordingly, the tax levy for General Fund purposes of the Pompton Lakes Board of Education for the 1996-97 school year shall stand as certified to the Passaic County Board of Taxation. A copy of this decision shall be forwarded to the Passaic County Superintendent of Schools to ensure that the remainder of the additional state aid is applied in conformance with appropriate parameters as noted above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1996

DATE OF MAILING SEPTEMBER 23, 1996

411-96

411-96

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought reimbursement for the academic costs of special education pupil J.G. Subsequent to signing of an agreement between J.G.'s father and petitioner assigning petitioner the responsibility of paying for J.G.'s out-of-district placement for two years, the father purchased and occupied a residential property in respondent's district. Petitioner claimed respondent was, therefore, responsible for J.G.'s education.

ALJ concluded that the Commissioner of Education lacked subject matter jurisdiction to hear this dispute because it did not arise under the school laws and it involved issues of contractual and quasi-contractual law. (*Middletown Twp. Ed. Assoc.*) ALJ dismissed petition for lack of jurisdiction.

Commissioner adopted findings and determination in initial decision as his own, concurring that matter is contractually based. Commissioner noted that the question as to which party was responsible for J.G.'s tuition assignment had to be based on the validity of the contract between the father and petitioner, a question of contract interpretation not a question of school law within Commissioner's jurisdiction.

SEPTEMBER 23, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING MATTER FOR
LACK OF JURISDICTION
OAL DKT. NO. EDU 10065-95
AGENCY DKT. NO. 383-9/95

CHERRY HILL BOARD OF EDUCATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF HADDONFIELD,

Respondent.

Nathanya G. Simon, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Joseph Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: July 11, 1996 Decided: August 2, 1996

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Two Boards of Education dispute responsibility for the academic costs of a special education pupil placement.

The Cherry Hill Board of Education (Cherry Hill) filed a petition before the Commissioner of Education alleging that during the 1993-94 school year, J.G., a classified pupil who resided with his father, L.G., was legally domiciled in Cherry Hill and was eligible for educational services from Cherry Hill. J.G. was classified and placed in the Elan School in Poland Springs, Maine as a residential pupil in June 1993. In April 1994, Cherry Hill began to pay for J.G.'s residential education at Elan based upon its belief that he was domiciled in Cherry Hill and pursuant to a settlement reached between Cherry Hill and L.G.

Cherry Hill asserts that L.G. sold his residence in Cherry Hill on or about April 29, 1994. On or about June 28, 1994, L.G. purchased and occupied a residential property in Haddonfield. Cherry Hill further asserts that from on or about April 29, 1994, J.G. has been legally domiciled in Haddonfield. Thus, it was Haddonfield's responsibility to provide J.G. with a free appropriate public education effective on or about that day and to the present. The Haddonfield Board of Education (Haddonfield) is liable for reimbursement to Cherry Hill for the tuition, room and board and all related educational costs for J.G.'s attendance at Elan from April 29, 1994 through June 30, 1995. The amount of money in dispute is in excess of $51,000.

The Haddonfield Board of Education (Haddonfield) generally denies all allegations and demands that the petition of appeal be dismissed.

The matter was transmitted by the Department of Education to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

Following a series of conferences and the taking of L.G.'s deposition, the matter proceeds to summary judgment on stipulated facts and supporting papers.

Cherry Hill argues that the obligation to pay the costs of a special education program is statutorily allocated to the pupil's district of residence and any agreement to the contrary is *ultra vires*. Haddonfield is responsible for payment of tuition and interest for the costs Cherry Hill incurred in connection with J.G.'s education at Elan from April 29, 1994 until the obligation was satisfied.

Haddonfield asserts that the agreement reached between Cherry Hill and L.G. is binding. Those two parties entered into an agreement in which Cherry Hill agreed to fund a two-year, out-of-state residential placement at a time when Dr. Gooberman had his home in Cherry Hill under contract for sale and also had a contract to purchase a home in Haddonfield. Within weeks of executing the agreement to fund the residential placement, L.G. moved to Haddonfield and then waited more than a year to inform Haddonfield of his residence and J.G.'s existence. He also requested Haddonfield to continue the placement.

Haddonfield further argues that L.G. had already signed contracts to sell his house in Cherry Hill and to purchase a house in Haddonfield at the time of the settlement agreement. L.G. testified at his deposition that he believed Cherry Hill would pay J.G.'s tuition costs for two years pursuant to the agreement. He further stated he was not aware of any requirement that he remain a resident of Cherry Hill for the agreement to be valid.

Approximately thirteen months later, L.G. contacted the Haddonfield Child Study Team (CST) for the first time. This was Haddonfield's first knowledge that L.G. and J.G. were resident in Haddonfield.

The settlement agreement is a valid contract and requires Cherry Hill to pay for J.G.'s residential placement at Elan. Cherry Hill waived all claims it may have had for reimbursement when it signed the settlement agreement with L.G. Haddonfield cannot be held liable for J.G.'s placement because it had no knowledge of the placement. Because Haddonfield is not liable to L.G., Cherry Hill's claim against Haddonfield also must fail. Haddonfield could not be held liable for J.G.'s placement under the equitable doctrine of laches. L.G. failed to assert a claim for more than thirteen months. Such delay is inexcusable. The equitable doctrine of unclean hands also applies against L.G. L.G. entered into a settlement agreement with Cherry Hill when he knew he was moving from the district in a very short time. L.G. should be responsible for J.G.'s tuition at Elan from the time of the settlement agreement to the time of contacting the Haddonfield CST.

DETERMINATION

Counsel have discovered and provided to this judge a memorandum of understanding between L.G.'s attorney and Cherry Hill's attorney dated April 12, 1994:

> In order to bring the above matter to a conclusion, the Cherry Hill Board of Education will pay for J.G.'s residential placement at ELAN SCHOOL, POLAND SPRINGS, MAINE 04274-9711. J.G. was admitted to ELAN on June 3, 1993. It is our understanding that the ELAN program is close to two years in length.
>
> The cost of ELAN is broken down into three categories; room and board, education and support services. The total yearly cost is currently $38,765 payable $3,230.42 per month.
>
> The Board will reimburse the individual or individuals who have made payment to date upon presentation of appropriate paid bills and provide for future payments.
>
> In consideration of the above, the parents will pay for all other costs in connection with this matter, including but not limited to, transportation, your attorney's fees and costs and any other costs that may have been incurred by them.

The State has a strong public policy in favor of settlements. *Department of Public Advocate v. N.J. Board of Public Utilities*, 206 *N.J. Super.* 523, 528 (App. Div. 1985); *Pascarella v. Bruck*, 190 *N.J. Super.* 118, 125 (App. Div. 1983), certif. den., 94 *N.J.* 600 (1983); *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 427, 476 (App. Div. 1961), certif. den., 35 *N.J.* 61 (1961); *Honeywell v. Bubb*, 130 *N.J. Super.* 130 (App. Div. 1974). Courts will therefore "strain to give effect to the terms of a settlement wherever possible." *Dept. Pub. Adv.*, 206 *N.J. Super.* at 528.

An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into, and which a court, absent a demonstration of "fraud or other compelling circumstances" shall honor and enforce as it does other contracts. *Pascarella v. Bruck*, above, 190 *N.J. Super.* at 124-125.

It is black letter law that the Commissioner of Education has no jurisdiction to decided issues of contractual and *quasi*-contractual law. *See, e.g., Middletown Township Education Association v. Middletown Township Board of Education*, OAL DKT. EDU 7429-86 (May 13, 1987), adopted in part and reversed in part, Comm'r of Ed., July 14, 1987. In *Middletown*, the Commissioner's last statement was, "Those portions of the ALJ's determination which rely upon contract interpretation and exposition are rejected as not being within the Commissioner's jurisdiction."

I **FIND** and **CONCLUDE** that the Commissioner of Education lacks subject matter jurisdiction to hear this dispute because it does not arise under the school laws and does not even tangentially require educational expertise to be brought to bear. The Commissioner's jurisdiction arises strictly from law.

In this case, a contract existed between L.G. and Cherry Hill. Whether there was fraud in the inducement or any other void or voidable element of that contract is a question for the Superior Court. Ordinarily, courts will enforce a settlement agreement without reviewing the reasonableness of its terms. *Chattin v. Cape May Greene, Inc.*, 216 *N.J. Super.* 618, 626 (App. Div. (1987), aff'd in pertinent part and rev'd in part on other grounds, 243 *N.J. Super.* 590 (App. Div. 1990). But, "where fraud, mutual mistake, or other compelling circumstances are shown, a court has the discretion to deny enforcement of a settlement agreement." *Chattim*, 216 *N.J. Super.* at 626. A court may refuse to enforce a settlement if the moving party can demonstrate, by clear and convincing proof, fraud or other compelling circumstances. *DeCaro v. DeCaro*, 13 *N.J.* 36 (1953).

The important word in each of these holdings is court. There is no jurisdiction in an administrative tribunal to address the matter of a settlement *qua* contract. Jurisdiction over the subject matter lies exclusively in the Superior Court.

Accordingly, I **ORDER** this petition of appeal **DISMISSED** for lack of jurisdiction.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2 AUGUST 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/6/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:
Barbara A Harned

AUG 7 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

/cat

OAL DKT. NO. EDU 10065-95

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the Agreement at issue, and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner excepts to the initial decision in its entirety. Specifically, petitioner objects to the Administrative Law Judge's (ALJ) decision for three general reasons. Initially, petitioner contends that the Commissioner of Education is not being asked to enforce or interpret an agreement. It avers that the issues presented herein strictly involve the application of the school laws, *N.J.S.A.* 18A:1-1 *et seq.*, which are clearly within the jurisdiction of the "Commissioner of Education [who] has 'fundamental and indispensable jurisdiction over all disputes arising under the school laws...' *Hinfey v. Matawan Regional Bd. of Educ.*, 77 *N.J.* 514, 525 (1978)***." (Petitioner's Exceptions at p. 3) It elaborates by asserting that the obligation to provide a special education program and the authority to do so by agreement are governed by *N.J.S.A.* 18A:11-1 *et seq.*, *N.J.S.A.* 18A:46-1 *et seq.*, *N.J.A.C.* 6:28-1 *et seq.* and 20 *U.S.C.* Section 1401 *et seq.* Furthermore, the prerequisite of the residency obligation flows from school law, *N.J.S.A.* 18A:38-1. Thus, since these issues involve application and interpretation of

school law, they are within the Commissioner's jurisdiction. (Petitioner's Exceptions at pp. 2-3) Petitioner then cites case law to buttress its position that the instant matter is within the Commissioner's jurisdiction in that the Commissioner has ruled on contracts where school law is implicated and integral to the determination. Specifically, it cites *New Jersey Educ. Assn. et al. v. Trenton Bd. of Educ. and Whittle Communications, L.P.*, 92 *N.J.A.R.* 2d (EDU) 481; 93 *N.J.A.R.* 2d (EDU) 90; aff'd Appellate Division, Dkt. No. A-2165-92, August 2, 1994; and *Middletown Twp. Educ. Assn. v. Middletown Twp. Bd. of Educ.* 1987 *S.L.D.* 1548. (Petitioner's Exceptions at p. 6)

Second, petitioner objects that the issue of subject matter jurisdiction was never raised by a party, the Commissioner, or the Administrative Court. It avers that the ALJ's *sua sponte* determination that subject matter jurisdiction was lacking was not in accord with *N.J.A.C.* 1.1-3.2 and that if the ALJ was concerned that subject matter jurisdiction did not lie in the Administrative Court, it was incumbent upon the ALJ to raise the issue and have both parties brief the matter, prior to conclusion. (Petitioner's Exceptions at p. 13)

Third, petitioner avers that the Settlement Agreement, negotiated between Dr. Gooberman (Dr. G.) and Cherry Hill, cannot operate to nullify the statutory allocation of fiscal responsibility for the provision of a program of special education for students who are residents within the school district citing *N.J.S.A.* 18A:38-1. (Petitioner's Exceptions at p. 15)

Lastly, petitioner avers that the ALJ's determination vitiates the statutory allocation of fiscal responsibility for special education programs under the *Individuals with Disabilities Act* (IDEA), 20 *U.S.C.* Section 1401 et *seq.* (Petitioner's Exceptions at p. 16)

In its reply, respondent asserts that the ALJ's initial decision was proper and should be affirmed. (Respondent's Reply Exceptions at p. 12) Respondent avers that this case is not a residency matter in that the residency of Dr. G. is not disputed and respondent readily concurs that Dr. G lives in Haddonfield. Respondent avers, however, that petitioner is seeking to "pass along its responsibility of enforcing the terms of the settlement agreement ***to a nonparty to the agreement*** under the guise of a residency dispute, hoping that its various and meaningless citations to education statutes would hide its true motives.***" (Respondent's Reply Exceptions at p. 3) Respondent contends that the subject of this dispute is the contract entered into between Cherry Hill and Dr. G. at the time Dr. G was a resident of the petitioning

district. Respondent asserts that "***Again, this is an issue of contract law, not education law.***" (Id.. at p. 4) It further cites case law for the proposition that contract disputes are exclusively within the jurisdiction of the Superior Court, specifically, *Middletown Twp. Educ. Assn., supra.*

Next, respondent specifically distinguishes the cases cited by petitioner noting that in *Whittle Communications, supra,* the claim was based on a violation of statutory educational mandates. It avers that incidental interpretation of the contract was necessary to resolve the education claims and, therefore, agency jurisdiction was proper in *that* instance. However, respondent contends, this matter does not involve incidental interpretation of a contract. Rather, "[p]ure contractual interpretation is at the core of this controversy" and "***there is no concurrent jurisdiction." (Respondent's Reply Exceptions at pp. 5-7) It avers that since discovery revealed J.G.'s residency, the only thing left to decide is the validity of the contract between Cherry Hill and Dr. G.

Lastly, respondent disagrees that petitioner's contract with Dr. G was *ultra vires* and, therefore, unenforceable. But, even assuming that the agreement is *ultra vires,* respondent avers that petitioner's claim lies against Dr. G. not Haddonfield.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that this matter is contractually based. The law is clear that a school board may enter into contractual agreements. *See, eg., Remedial Educ. & Diag. Serv. v. Essex County Educ. Serv.*, 191 *N.J. Super.* 524, 527 (App. Div. 1983) (public body may enter into contracts within its express or implied authority). Logically, this would include the ability to enter into agreements with a parent or guardian to undertake educational responsibility for his/her child. This proposition is clearly set forth at *N.J.S.A.* 18A:38-3a which states:

> Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.

Furthermore, the residency claims of J.G. are not at issue in this matter in that Dr. G. and J.G. admittedly live in Haddonfield. Therefore, the question as to which party is responsible for J.G's tuition assignment must be based on the validity of the contract between Dr. G. and petitioner. If the contract is valid, despite the defenses raised, petitioner would then

be responsible for J.G.'s tuition. However, the Commissioner will not make such determination on the enforceability of this contract nor will he assign responsibility for J.G.'s tuition absent a finding as to whether this contract is enforceable, in light of the claims that it is not, in that the interpretation of this contract is the primary issue at hand and not merely implicated in a question of the school laws.

Lastly, in considering petitioner's contentions of impropriety with regard to the ALJ's finding that subject matter jurisdiction was lacking, the Commissioner finds that, even accepting petitioner's contentions *arguendo*, no harm inured to petitioner in that this issue was addressed and briefed in exceptions prior to the Commissioner's final determination. Therefore, any error or claim of lack of due process in this regard has been corrected and petitioner's arguments have been duly considered and rejected.

Accordingly, the Commissioner concurs with the ALJ's findings as further explicated herein and hereby orders that the within Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1996
DATE OF MAILING SEPTEMBER 23, 1996

411-96

EDU #10065-95
C # 411-96
SB # 75-96

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 23, 1996

For the Petitioner-Appellant, Schwartz, Simon, Edelstein, Celso, & Kessler (Nathanya G. Simon, Esq., of Counsel)

For the Respondent-Respondent, Capehart & Scatchard (Joseph F. Betley, Esq., of Counsel)

This matter was initiated when the Board of Education of the Township of Cherry Hill (hereinafter "Cherry Hill" or "Cherry Hill Board") filed a petition of appeal with the Commissioner of Education seeking to invoke the Commissioner's jurisdiction under N.J.S.A. 18A:6-9[1] in order to obtain reimbursement from the Board of Education of the Borough of Haddonfield (hereinafter "Haddonfield" or "Haddonfield Board") for the costs of a residential placement for a special education student.

[1] N.J.S.A. 18A:6-9 provides that:

> The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

12/3/97

The Cherry Hill Board had paid such costs for the period from June 3, 1993 through May 15, 1995 pursuant to a memorandum of understanding dated April 12, 1994 between the Cherry Hill Board and an attorney representing Dr. Lance Gooberman, the student's father. This memorandum terminated due process proceedings before the Office of Administrative Law ("OAL") which had been initiated by Dr. Gooberman pursuant to N.J.A.C. 6:28-2.7.[2] Dr. Gooberman had initiated such proceedings in order to contest a determination by Cherry Hill's child study team that an in-district placement, rather than the residential placement he had requested, was appropriate for his son and to challenge Cherry Hill's refusal to reimburse him for the costs he had incurred since June 1993 when he unilaterally placed his son in the residential treatment program.

Pursuant to the memorandum, Cherry Hill paid the costs for the residential placement through June 1995, at which time it was notified by the Haddonfield Board that Dr. Gooberman was domiciled in Haddonfield. The Haddonfield Board indicated that, as a result, it was assuming responsibility for payment.

Upon investigation, Cherry Hill discovered that Dr. Gooberman had actually moved to Haddonfield on April 29, 1994. The Cherry Hill Board concluded that it had therefore not been responsible for the payments it had made for the costs of the residential placement after that date. Consequently, the Cherry Hill Board sought relief

[2] N.J.A.C. 6:28-2.7 ensures that all pupils with educational disabilities are provided with an appropriate free education under the standards of the Individuals with Disabilities Education Act, see N.J.A.C. 6:28-1.1, by providing, in pertinent part, for a due process hearing at the parent's request with regard to the identification, evaluation, or educational placement of their child or after notice of a proposed or denied action. N.J.A.C. 6:28-2.7(a) and (b). The regulation further specifies the manner in which such hearings shall be conducted. N.J.A.C. 6:28-2.7(d) through (h). According to those procedures, if a conference conducted by the Department of Education does not result in a settlement, the matter is transmitted to the Office of Administrative Law, which then has jurisdiction to issue a final binding decision. N.J.A.C. 1:6A-5.4.

in the form of reimbursement from the Haddonfield Board by filing a petition with the Commissioner pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §1401 et seq., and New Jersey special education law, N.J.S.A. 18A:46-1 et seq., N.J.S.A. 18A:46-14 and N.J.A.C. 6:28-1.1(d).

The matter was transmitted to the Office of Administrative Law as a contested case. Hence, in contrast to the due process proceedings that had resulted in the memorandum between Dr. Gooberman and the Cherry Hill Board, the Commissioner, rather than an Administrative Law Judge ("ALJ"), was responsible for making the final decision in the instant matter. Compare N.J.A.C. 1:1-18.6 (agency head makes final decisions in contested cases) with N.J.A.C. 1:6A-18.3 (decision of an ALJ in a special education matter is appealable directly to either Superior Court or Federal District Court).[3]

The ALJ issued an initial decision in the matter and transmitted it to the Commissioner for a final decision. The ALJ concluded that the matter was contractual in nature and recommended that the Commissioner dismiss it for lack of subject matter jurisdiction.

After considering the exceptions filed by the parties, the Commissioner adopted the ALJ's recommendation, finding that the Cherry Hill Board's claim involved primarily the interpretation of a contract over which the Superior Court, rather than this agency,

[3] See N.J.A.C. 1:1-1.1 et seq. (setting forth the rules governing the procedural aspects of transmission to OAL, hearing, and the rendering of initial and final decisions in all contested cases in the Executive Branch of the State Government) and N.J.A.C. 1:6A-1.1 et seq. (setting forth the rules governing hearing and decision of matters arising out of the Special Education Program of the Department of Education pursuant to N.J.A.C. 6:28 and implementing the IDEA).

would have jurisdiction. He therefore dismissed the petition, and the Cherry Hill Board appealed.

We agree with the Commissioner that he did not have jurisdiction to entertain this matter. However, our determination is not based on the conclusion that the matter is contractual. In this respect, we stress that while the Commissioner does not have jurisdiction over claims that are purely contractual in nature, Salley v. Newark Bd. of Ed., 1984 S.L.D. 1714, he does have the authority under N.J.S.A. 18A:6-9 to resolve contractual matters as they relate to disputes arising under the education laws. E.g., Millstone Township Teachers Association v. Board of Education of the Township of Millstone, decided by the Commissioner, 93 N.J.A.R.2d (EDU) 802, appeal dismissed by the State Board, 95 N.J.A.R.2d (EDU) 254.

Nonetheless, careful examination of this matter reveals that this dispute is not one over which the Commissioner of Education has jurisdiction pursuant to N.J.S.A. 18A:6-9, and we reject Cherry Hill's arguments to the contrary.

The Cherry Hill Board argues that the question of which school district is obligated to pay for the special education program at issue during the relevant period is not contractual, but rather involves statutory interpretation concerning the authority of a board to enter a contract to provide a special education program to a student who is not a resident of the district. It contends that the responsibility to fund special education programs is allocated by statute and cannot be altered by agreement. It asserts that because the child's entitlement to a free education and the determination regarding which district is responsible for payment is contingent on the domicile of the child, Cherry Hill was without authority to agree to pay the costs of the residential placement

involved here once Dr. Gooberman moved to Haddonfield and was no longer a resident of Cherry Hill within the meaning of N.J.S.A. 18A:38-1. Cherry Hill therefore asserts that such portion of the agreement was ultra vires and is unenforceable as a matter of law. Finally, it contends that a "settlement agreement that violates the IDEA cannot stand." Appeal Brief, at 29.

Despite the circuitous arguments presented to us on behalf of the Cherry Hill Board, our review of its submissions indicates that this dispute is not a controversy arising under Title 18A over which the Commissioner has jurisdiction. As the Cherry Hill Board recognizes, the "agreement" in question was a settlement agreement intended to resolve due process proceedings initiated by Dr. Gooberman pursuant to N.J.A.C. 6:28-2.7 to effectuate his son's rights under the IDEA and our special education laws. In contrast to disputes which are subject to the Commissioner's jurisdiction pursuant to N.J.S.A. 18A:6-9, disputes involving the placement of a child who is entitled to special education and related services under the IDEA and New Jersey's special education laws are not subject to the Commissioner's jurisdiction. Rather, the procedures which apply to these matters are specifically designed to guarantee that this agency does not act as the decisionmaker. N.J.A.C. 1:6A-1 et seq. See, supra, n.3.

Under the applicable procedures, settlement of a dispute such as that initiated by Dr. Gooberman is accomplished by OAL and is not subject to review by the Commissioner or appeal to the State Board. See, supra, n.3. In that the agreement which the Cherry Hill Board is seeking to set aside constitutes the settlement of due process proceedings, neither the Commissioner nor the State Board has jurisdiction.

The fact that the Cherry Hill Board points to various New Jersey statutes does not confer jurisdiction on us to grant the relief it seeks. See Rabinowitz v. New Jersey State Board of Education, et al., 550 F. Supp. 481 (D.N.J. 1982). Again, the substantive entitlements underlying the Cherry Hill Board's agreement with Dr. Gooberman are those conferred by the IDEA and New Jersey's special education statutes. As conceded by Cherry Hill, the validity of this settlement agreement must be judged under the IDEA. Appeal Brief, at 29. Furthermore, the question of whether the residential placement which Dr. Gooberman unilaterally made was the appropriate one is invariably implicated by any determination to set aside the agreement so as to hold Haddonfield responsible. Quite simply, it would be inappropriate in these circumstances for this agency to exercise jurisdiction in order to direct the Haddonfield Board to reimburse Cherry Hill for the costs of this residential placement. Cf. Roxbury Bd. of Ed. v. Milford Bd. of Ed., 283 N.J. Super. 505 (App. Div. 1995), certif. denied, __ N.J. __ (1996); D.K. v. Roseland Board of Education, and West Orange Board of Education, 903 F. Supp. 797 (D.N.J. 1995); Woods v. New Jersey Department of Education, et al., 823 F. Supp. 254 (D.N.J. 1993).

Therefore, for the reasons stated herein, the State Board of Education dismisses the petition.

Attorney exceptions are noted.

December 3, 1997

Date of mailing DEC 05 1997

412-96

412-96

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES BARNES, BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against attendance officer/field monitor for allegedly soliciting and accepting bail monies (together with his partner) from parents/guardians of truant students but never giving said monies to municipal court.

ALJ found that, based on the factual record reviewed, the Board failed to demonstrate that the tenure charges against respondent were sustainable. Thus, the tenure charges were dismissed.

Having considered the record, including deposition testimony, Commissioner concurred with the ALJ that the Board failed to prove the charges were sustainable. Commissioner noted that he could not reject the ALJ's findings without reviewing the transcripts, which were not provided by the Board. (*In re Morrison*) Tenure charges were dismissed.

SEPTEMBER 23, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12097-93

AGENCY DKT. NO. 389-11/93

BOARD OF EDUCATION

OF THE CITY OF TRENTON,

Petitioner,

v.

JAMES BARNES,

Respondent.

Giuffre M. Hollingsworth, Esq., on behalf of petitioner (Sumners Council George & Dortch, attorneys)

Lemuel H. Blackburn, Jr., Esq., on behalf of respondent

Record Closed: July 17, 1996 Decided: August 5, 1996

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

At its meeting of November 18, 1993, the school district of the City of Trenton determined that probable cause existed to support charges against Mr. Barnes pursuant to N.J.S.A. 18A:6-11 warranting his dismissal as a field monitor based upon his attaining of tenure

under N.J.S.A. 18A:38-33. The charges, contained in a statement of tenure charges filed with the Commissioner of Education on November 19, 1993, alleged misbehavior and official misconduct.

More specifically the charge concerned allegations that Mr. Barnes, in his capacity as a field monitor, in concert with another, on various occasions misrepresented his authority as a field monitor by demanding and collecting sums of money from various individuals for the alleged purpose of taking it to the City of Trenton Municipal Court, to post bail to satisfy outstanding arrest warrants for the individuals' failure to defend charges of violating N.J.S.A. 18:38-31 and rescheduling a new court date for the truancy charges. The money allegedly was not given to the municipal court but kept by Mr. Barnes for his own personal gain. No new truancy court dates were scheduled after the bail moneys were given.

In his answer, Mr. Barnes denies any wrongdoing, asserting that he was at all times acting within the scope of his position and under the direct authority of the Board of Education.

Following the filing of the various pleadings before the Commissioner of Education, the matter was transmitted to the Office of Administrative Law as a contested case on December 21, 1993.[1] The matter was scheduled for a prehearing conference to be conducted on April 6, 1994; however, as a result of the substitution of counsel, the matter was adjourned and rescheduled to be heard on April 20, 1994. A prehearing conference was conducted on that date as scheduled and on the following date, April 21, 1994, my office issued a prehearing order defining the issues and scheduling the matter for plenary proceedings to be held on August 16, 17 and 19, 1994, at the Office of Administrative Law (OAL), Mercerville, New Jersey. A status conference was also scheduled for July 14, 1994, to discuss various prehearing matters. Following the July 14, 1994 status conference, the scheduled hearing dates were adjourned at the request of Mr. Sumners[2] based upon his request to file a brief to substantiate the position of the petitioner (Trenton) that Mr. Barnes was not in a tenurable position. As a result of his request, a briefing schedule was devised requiring Mr. Sumners to submit by July 25 and Mr. Blackburn to respond by

[1] At the initial stages of these proceedings, Mr. Barnes was represented by Michael T. Barrett, Esq., of the firm of Bergman & Barrett. On February 18, 1994, Mr. Lemuel H. Blackburn, Jr., Esq., submitted a substitution of attorney, signed by himself as well as by Mr. Barrett.

[2] Mr. Sumners appeared throughout the prehearing aspects of these matters and Mr. Hollingsworth represented the petitioner at hearing.

August 31, 1994. Mr. Sumners was also given the opportunity to submit a reply brief by not later than September 8, 1994. In addition, the hearing dates were rescheduled for October 25, 28 and 31, 1994. Unfortunately, Mr. Blackburn inadvertently failed to respond to the motion for dismissal having misfiled the papers. As a result, both parties agreed that the scheduled October 20, 28 and 31 hearing dates be adjourned, so as to afford Mr. Blackburn the opportunity to oppose the motion for dismissal.

As it turned out, the motion instituted by Trenton was for summary decision and on January 25, 1995, my office issued a nine-page ruling and order denying that motion holding inter alia that without an evidential record I could not determine whether, as a matter of law, Mr. Barnes did or did not acquire tenure in his position as an Attendance Officer/Field Monitor. I, therefore, ordered that the motion be denied and that the matter proceed to hearing. It was also noted in the ruling and order that I advised counsel of the disposition of this motion by telephone call placed to their offices on January 19, 1995. By separate letter generated on that same date, I memorialized several aspects of the telephone conversations that were conducted with counsel. One of those being that Mr. Blackburn would be unavailable for the newly scheduled hearing dates of February 14, 15 and 16, 1995, because of an emergent criminal matter to which he had been assigned. No objection to the adjournment was voiced by Mr. Sumners and as a consequence it was agreed that the matter would be rescheduled and proceed in a bifurcated fashion: the issue of whether Mr. Barnes was or was not tenured would be adjudicated on April 12, 13 and 17, 1995, at OAL. If it were determined that he was in an nontenured position, the matter would be moot. If it were determined that Mr. Barnes was a tenured employee,[3] the charges instituted against him were under the tenure statute were to be adjudicated on July 17, 18 and 19, 1995, at OAL. We created the hiatus between the two hearing proceedings so as to allow counsel to submit briefs on the issue tenure in advance of having to adjudicate the propriety of the tenure charges themselves. When the matter was scheduled to proceed in April, I met with counsel at OAL and it was agreed on April 13 , 1995 that the parties would stipulate that Mr. Barnes from September 16, 1991 through November 18, 1993, when tenure charges were certified against him by Trenton, obtained tenure as an attendance officer consistent with N.J.S.A. 18A:38-33. That stipulation was reduced to writing signed by both counsel on April 20, 1995. It

[3] Pending the outcome of these proceedings, Mr. Barnes remains a paid employee with the Trenton Board of Education.

was consequently agreed that the matter would then proceed to hearing commencing July 17, 1995, solely on the charges that were instituted by Trenton against Mr. Barnes based upon his tenure. By mid-July, the parties tentatively agreed that the matter could then be decided on cross-motions for summary decision and the submission of a stipulation of facts. At my request, Mr. Sumners on July 13, 1995, submitted a letter setting forth this procedure and agreeing that a joint stipulation of facts would be filed by August 14, 1995, and that briefs would be concurrently submitted by not later than August 28, 1995, and that each party would have the opportunity to submit replies by September 5, 1995. A status conference was conducted on November 15, 1995, following the inability of counsel to comply with the briefing schedule at that time. At that time I was advised that despite a good faith effort on the part of counsel, a joint stipulation of facts and cross-motions could not be agreed upon and as a consequence it was agreed -- once again -- to reschedule the matter for proceedings to be conducted on April 22, 23, 25, 1996, at OAL. This agreement was memorialized in a letter I requested from Mr. Blackburn dated November 15, 1995. The matter eventually proceeded to hearing on April 23 and April 25, 1996.[4] At the conclusion of the evidential phase of the proceedings, a briefing schedule was devised.

On May 10, 1996, following a request for an extension of the originally scheduled submission date, Mr. Hollingsworth submitted his closing arguments by letter brief dated May 20, 1996. By letter of May 29, 1996, which was received by the Office of Administrative Law on June 3, Mr. Blackburn advised that he would not be submitting a brief in response to the submission made by respondent.

Following a review of the record in the matter, I requested that the parties provide, by way of stipulation or other appropriate form, a supplement to the factual record concerning certain actions taken against a co-worker of the petitioner, Mr. James Edwards. Thereafter, on July 17, 1996, my office received a stipulation signed by counsel addressing the issue which I had raised.[5] Accordingly, the record closed in this matter on the date that my office received the joint stipulation of facts alluded to, July 17, 1996.

---

[4] The April 22 date was not used because Mr. Barnes, for reasons which were unclear, did not appear in a timely fashion and the parties were excused.

[5] Signing the stipulation on behalf of the Trenton Board of Education was Mr. Thomas W. Sumners, Esq., a principal of the firm with which Mr. Hollingsworth had been associated when he represented respondent at hearing. At the time of the entrance of the stipulation, Mr. Hollingsworth was no longer associated with the firm.

ISSUES AND BURDEN OF PROOF

Since the issue of Mr. Barnes' tenure has already been resolved in his favor, the fundamental issue to be addressed in these proceedings is whether the conduct of Mr. Barnes as alleged in his capacity as a field monitor warrants his removal pursuant to N.J.S.A. 18A:6-11. Assuming arguendo that the charges can be sustained, then the question reduces itself to whether removal would be the only appropriate penalty. In respect to both charges, the burden rests solely and exclusively upon petitioner: the Trenton Board of Education must prove the allegations as well as the propriety of Mr. Barnes' dismissal by a preponderance of the relevant and credible evidence.

THE FACTS AND ANALYSIS

The tenure charges against the respondent, James Barnes, of conduct unbecoming of a Field Monitor, misbehavior and official misconduct consist of eleven allegations. Each contends that the respondent, in his capacity as a field monitor in concert with another field monitor, James Edwards, on various occasions, misrepresented his authority as a field monitor by demanding and collecting sums of money from various parents/guardians of truant students. The money was collected for the alleged purpose of taking it to the City of Trenton Municipal Court to post bail to satisfy outstanding arrest warrants for failure to defend charges of violating N.J.S.A. 18A:38-31 and rescheduling a new court date for the truancy charges. The money allegedly was not given to the municipal court but kept by respondent, and Mr. Edwards, for their own personal gain. No new truancy court dates were scheduled after the bail moneys were given.

In his answer to the charges, respondent denied any wrongdoing and asserted that he was at all times acting within the scope of his position and under the direct authority of the petitioner, the Trenton Board of Education. Respondent also points out that following the investigation and his arrest on or about September 20, 1993, by the Trenton Police Department, which formed the basis for the tenure charges against him, respondent was informed by the Mercer County

prosecutor by letter dated March 5, 1994, that the case against him was closed due to the lack of sufficient evidence to sustain the return of an indictment against him.

As noted above, the tenure charges against respondent consist of eleven charges. All of the charges assert that respondent demanded and collected money to allegedly satisfy outstanding arrest warrants for failure to defend charges of truancy under N.J.S.A. 18:38-31 from the following persons: Charges One and Two, Carol Beickert; Charge Three, Wetonah Carter; Charge Four, George Slack; Charge Five, June Angelo; Charge Six, Shirley Chavies; Charge Seven, Lillian Carter; Charge Eight, Patricia Chrzempiec; Charge Nine, Emma Watson; and Charge Ten, Patricia Steindle. Charge Eleven asserts that the totality of respondent's conduct warrants dismissal.

With the exception of Charge Five involving June Angelo, the only submissions on the remaining charges are the written statements of those respective parents/guardians to the police. These statements were submitted to the Commissioner as exhibits to the affidavit of Bernice Venable, Superintendent of the Trenton School District, in support of the petitioner's tenure charges against respondent, which were sent to the OAL in the initial transmittal of the case. A brief summary of each statement follows:

Carol Beickert's statement, dated September 15, 1993, and Lillian Carter's statement, dated September 10, 1993, focus on the field monitor, James Edwards, and that the money demanded and collected was given to him. They both mention respondent in their statements but are unclear as to when he was present or if he was present when the money was given to Edwards.

In her statement to police dated September 8, 1993, Wetonah Carter identified respondent as the man who accompanied Edwards. She stated that no one, including respondent, was present in the room at the board of education when she gave the money to Edwards.

In George Slack's statement, dated September 7, 1993, there is only one possible reference to respondent. Slack noticed Edwards' partner when Edwards came out of his office

and into the hallway at the board of education to meet Slack. Slack stated that "Edwards' partner was in the office with him. He was a white guy, but I did not get a good look at him."

Shirley Chavies does not mention respondent at all in her statement.

Patricia Chrzempiec stated on September 23, 1993, that Edwards and Barnes were the truant officers who came to her house. She indicated that money was given to Edwards. No further reference to respondent was made.

No specific mention of respondent was made by Patricia Steindle in her statement dated August 27, 1993. She stated that a white male with blondish hair was with Edwards when he came to her house on August 26, 1993.

In Emma Watson's statement, dated September 6, 1993, she did not identify the truant officers by name and instead gave physical descriptions. She described the black male officer as the one who talked and collected the money. The white truant officer was described as the one who always drives. Barnes is white.

In addition to June Angelo's statement to police, the parties consented to the admission of part of her deposition transcript from the civil matter she has pending in the Superior Court, Law Division, captioned June Angelo, et al. v. Trenton Bd. of Educ. et al. She indicated in her statement to the police, dated September 3, 1993, that she called respondent at the board of education from her workplace after receiving a summons for an outstanding warrant charging truancy. Because the summons had been sent to her old address, the court date listed had already passed. She spoke first with respondent who informed her she had to post bail because she was in contempt of court and that if she did not, he could come to her job and pick her up. Thereafter, she went with her mother to the board of education. Both respondent and Edwards were there when she arrived. When Edwards asked if she had the money she responded, "no" to which Edwards instructed respondent cuff her and take her down to the station. Edwards remained adamant on the payment of the money even after Ms. Angelo's mother indicated that June had a heart problem and if something happened to June she would sue the board of education.

Respondent told Ms. Angelo they needed the money and suggested that she call her husband. Ms. Angelo waited about two hours until her husband showed up with the money. She paid Edwards the $100.00 who then provided a receipt and informed her of a June 3, 1993, court date.

Ms. Angelo's deposition testimony, dated November 29, 1995, varies somewhat from her statement to the police. The deposition indicates that there were a number of phone calls with both respondent and Edwards before she came down to the board of education. She testified that over the phone respondent informed her that she could not be arrested if she didn't pay the money. After a phone call with Edwards, who said they would come and pick her up at work, she went down to the board of education where both Edwards and Barnes were present. She testified that Edwards made the demands and that respondent told her that she could be locked up if the fine wasn't paid. Later, however, she testified that her conversations were with both respondent and Edwards, not primarily one or the other. She offered her wedding ring to pay off the fine but they refused. During her interaction with both respondent and Edwards, respondent tried to calm her and left at one point to get a nurse. In summary, Ms. Angelo's testimony is unclear and somewhat contradictory as to her conversations and interactions with respondent.

Separate from and addition to the deposition testimony which was part of the transmittal file to the OAL, the oral testimony provided at hearing in my view provided no competent providence to support the tenure charges.

Mr. Barnes testified on his own behalf. He had been in the position of Attendance Officer for only a short time before his title was changed to Attendance Officer/Field Monitor sometime in mid-1992. After his change in title, in or about July of 1992, he met with Mr. Harry Barber who at the time (and presumably as of the date of the hearing) served as the Director of Security, Attendance, and Legal Hearings for the respondent Board. He was also the respondent's supervisor. When he was assigned to work with Mr. Edwards, the testimony demonstrated that essentially he was told to follow Mr. Edwards around and to essentially learn on the job. Mr. Edwards was in the position that he occupied for twenty-five years. Initially, Mr. Barnes did not even know that bail was being collected but eventually he was informed of that by Mr. Barber who also advised him at that time that that practice should cease.

Mr. Barber testified as well as acknowledged that he instructed Mr. Barnes to follow Edwards around because he wanted Edwards to provide the respondent with "on-the-job training." He further acknowledged that he only told Mr. Barnes that a field monitor's job did not include the collection of bail money after Mr. Barber was informed by the local police that it was happening. Barber also assessed Mr. Barnes as being a good employee, someone who followed orders and did what he was told. He also acknowledged that after the incident involved which resulted in Mr. Edwards' indictment, a written policy was formulated by the Trenton Board of Education which explicitly precluded the field monitor/attendance officer to be in any way involved in the issuance of or enforcement of bench warrants.

As was noted in the procedural section of this opinion, the factual record did not make clear as to the circumstances and subsequent disposition of any action, civil or criminal, taken against respondent's co-worker, Mr. James Edwards. As a result, I solicited from counsel a stipulation of facts which I have marked into evidence as Joint Exhibit 1 (J-1). That stipulation indicates that tenure charges were filed against Mr. Edwards on the basis of the same facts and circumstances upon which the charges were brought against Mr. Barnes. The tenure matter instituted against Mr. Edwards by the Trenton Board of Education has been held in abeyance by the Department of Education (by letter attached to the stipulation dated September 10, 1994) as a result of the former's indictment for official misconduct and theft by unlawful taking brought against him by a Mercer County grand jury. The facts upon which that indictment were based, notes the stipulation, are the same as those which form the basis of the tenure charges against Edwards. Lastly, those criminal charges against Edwards have yet to be resolved.

As has been previously noted, the burden of proof in this matter rests upon the petitioner to demonstrate that the allegations against respondent are sustainable and that if so, dismissal from his position is appropriate.

See also, Kresse v. Metropolitan Life Ins. Co., 111 N.J.L. 474, 479 (E. & A. 1933) (where the court held that if proofs presented by each side turn out to be equally persuasive on the issue in the case, which in Kresse questioned whether plaintiff's decedent met his death by

accidental means as limited by the insurance policy, it is the duty of the jury to find for the (defendant). In other words, the burden of proof is not satisfied where the evidence on an issue of fact is evenly balanced between the parties.

The evidence need not, however, have the "quality of certainty" to satisfy this burden of proof,

> but it must be a presumption grounded in reason and logic; mere guess or conjecture cannot be substituted for legal proof. The burden of persuasion is not sustained unless the evidence demonstrates the offered hypothesis as a rational inference, that is to say, a presumption grounded in a preponderance of the probabilities according to the common experience of mankind. It is not easy to lay down with precision the line of demarcation between a just and reasonable inference and mere conjecture or surmise. The accepted standard of persuasion for the triers of the facts is that the determination be probably founded in truth. A bare quantitative preponderance is not enough. The evidence must be such in quality as to lead a reasonably cautious mind to the given conclusion. The measure of the weight of the evidence is "the feeling of probability which it engenders." Bornstein v. Metropolitan Bottling Co., 27 N.J. 263 (1958)O, citing Wigmore on Evidence (3d ed.) § 2498. See Sivak v. City of New Brunswick, 122 N.J.L. 197 (E. & A. 1939).
>
> [Joseph v. Passaic Hospital Ass'n., 26 N.J. 557, 575 (1958).]

On the whole, the foregoing evidence in the matter sub judice does not establish by a preponderance of the believable evidence that the incidents occurred. The quality of the evidence not only fails to lead a reasonably cautious mind to the conclusions asserted by the petitioner, but requires a great deal of conjecture to sustain the charges against respondent. Moreover, the statements to the police and excerpts from the deposition testimony constitute hearsay evidence. Though admissible in administrative hearings, there must be a residuum of legal and competent evidence in the record to support the ultimate findings of fact, N.J.A.C. 1:1-15.5(b), which is nonexistent here.

Based on the factual record reviewed, the petitioner has failed to demonstrate that the tenure charges against respondent are sustainable. Consequently, the tenure charges should be dismissed.

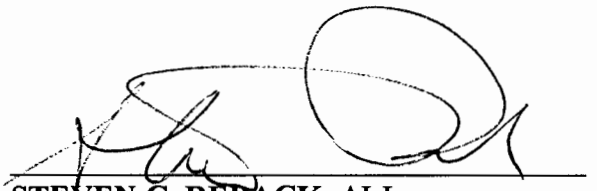
Accordingly, it is **ORDERED** that the tenure charges instituted against Mr. Barnes be and are hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/5/96
DATE


STEVEN C. REBACK, ALJ

Receipt Acknowledged:

8/8/96
DATE

DNA
DEPARTMENT OF EDUCATION

AUG 9 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jz

WITNESSES

On behalf of petitioner:

James Barnes

Harry Barber

EXHIBITS

Jointly submitted:

J-1 Joint Stipulation of Facts, signed by both counsel

On behalf of petitioner:

P-1 Job Description for Attendance Officer

P-2 Job Description for Attendance Officer/Field Monitor

P-3 Transcript of testimony of James Barnes in related Superior Court matter, November 29, 1995, page 25

P-4A Interrogatories and answers propounded on respondent by petitioner on or about October 24, 1994

On behalf of respondent:

R-1 Certification of Harry Barber, March 5, 1996, taken as an incident to the related Superior Court action

R-2 Subsequent certification of Harry Barber, March 26, 1996

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES BARNES, BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by the Board pursuant to *N.J.A.C.* 1:1-18.4.

The Board initially contends in its exceptions that there is sufficient evidence to sustain the within tenure charges on the basis of respondent's testimony. (Petitioner's Exceptions at p. 2) Here, the Board summarizes respondent's testimony at the hearing and points to relevant portions of the transcript of his deposition taken in a related civil matter to demonstrate that "***it is unreasonable to believe Respondent could have thought his participation in Edwards' attempts to collect bail money was authorized under any Board policy.***" (*Id.* at p. 3)

The Board further asserts that the deposition testimony of June Angelo, also taken in the related civil matter, was uncontradicted by respondent and "***clearly demonstrates Respondent's involvement in a scheme to extort money from parents.***" (*Id.* at p. 5) Thus, the Board reasons that this testimony should be considered "trustworthy and credible evidence of

Respondent's inappropriate conduct ***" and the tenure charges brought against respondent should be sustained. *(Id.)*

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board has failed to establish by a preponderance of credible evidence that the charges brought against respondent are sustainable. It is noted that to the extent the Board raises exceptions with respect to the hearing testimony of the witnesses and to the credence and weight ascribed to such witnesses by the ALJ, the Commissioner is cognizant that he cannot properly reject the ALJ's findings without reviewing those portions of the hearing transcript(s) relevant to the Board's exceptions. *Rowley v. Board of Education of Manalapan-Englishtown*, 205 *N.J. Super.* 65, 75 (App. Div. 1985); *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). Inasmuch as it was the Board's duty to provide the Commissioner with such portions of the hearing transcript, (*Morrison* at 158), and the Board failed to do so, no obligation arises for the Commissioner to review them before rendering a final decision regarding the findings and recommendations of the ALJ. Moreover, as to the deposition testimony of June Angelo, which *was* made a part of the record herein, the Commissioner is not persuaded that such testimony offers an explicit showing of inappropriate conduct sufficient to sustain the within charges.

Accordingly, the initial decision of the Office of Administrative Law is adopted for the reasons expressed therein, and the within tenure charges brought by the Board against respondent are hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1996

DATE OF MAILING SEPTEMBER 23, 1996

413-96

413-96

HIGHLAND PARK EDUCATION ASSOCIATION AND DONALD RALPH,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF HIGHLAND PARK, MIDDLESEX COUNTY AND ROBERT TERRANO,	:	DECISION
RESPONDENTS.	:	

SEPTEMBER 23, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL
FOR FAILURE TO PROSECUTE
OAL DKT. NO. EDU 6268-95
AGENCY DKT. NO. 215-6/95

HIGHLAND PARK EDUCATION ASSOCIATION AND DONALD RALPH,
Petitioners,
v.
BOARD OF EDUCATION OF HIGHLAND PARK, MIDDLESEX COUNTY AND ROBERT TERRANO,
Respondents.

Stephen E. Klausner, Esq., on behalf of petitioners (Klausner, Hunter & Seid, attorneys)
Derlys Maria Gutierrez, Esq., on behalf of respondents (Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Record Closed: August 5, 1996 Decided: August 5, 1996

BEFORE **ROBERT S. MILLER,** ALJ:

The above-entitled matter was transmitted to the Office of Administrative Law for emergent relief hearing on June 19, 1995. The matter was scheduled for hearing on June 23, 1995. Before the scheduled hearing the petitioners' attorney, Stephen E. Klausner, Esquire,

requested that the Order to Show Cause be withdrawn and requested that the matter proceed to a regular hearing. A telephone prehearing conference was scheduled for October 23, 1995 at 4:00 p.m., at which time the parties requested an adjournment pending settlement discussions. After several telephone calls and letters to counsel to ascertain the status of the matter and to determine whether petitioners intended to pursue their claim, I faxed a letter to Mr. Klausner on July 16, 1996 stating that unless I heard from him by July 25, 1996 I would dismiss the matter for failure to prosecute and/or for mootness

To date, Mr. Klausner has not responded to my letter of July 16, 1996. Accordingly, it is **ORDERED** that the appeal of the Highland Park Education Association, Inc. and Donald Ralph be and is hereby **DISMISSED** for failure to prosecute.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 5, 1996
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

8/7/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 8 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 6268-95

HIGHLAND PARK EDUCATION ASSOCIATION AND DONALD RALPH,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF HIGHLAND PARK, MIDDLESEX COUNTY AND ROBERT TERRANO,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ) dismissing this matter for failure to prosecute. Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the within application for emergent relief and the Petition of Appeal are dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1996

DATE OF MAILING SEPTEMBER 24, 1996

414-96

414-96

D.S., on behalf of her minor daughter, T.S., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY, : DECISION

RESPONDENT. :

:

SEPTEMBER 23, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4458-96

AGENCY DKT. NO. 119-4/96

D.S. ON BEHALF OF HER MINOR DAUGHTER T.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,

Respondent.

No appearance by or on behalf of petitioner

Harvey C. Johnson, Esq., for respondent

Record Closed: August 5, 1996 Decided: August 7, 1996

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on April 1, 1996, when D. S., parent and natural guardian of T. S., (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education contesting the March 18, 1996 determination of the Board of Education of the Borough of Lawnside (hereinafter respondent) that T. S. was not entitled to attend the public schools of the

district free of charge. An answer and counter-claim for tuition were filed on behalf of respondent on April 15, 1996. On May 21, 1996, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for July 3, 1996 at the Trenton office of the Office of Administrative Law before the undersigned. By letter dated June 12, 1996, the undersigned had written to petitioner advising her as follows:

> The hearing which you requested in the above-captioned matter has been scheduled for July 3, 1996, 9 a.m., Office of Administrative Law, 9 Quakerbridge Plaza, Mercerville, New Jersey. At that time you will be responsible for presenting evidence on the following issues:
>
> 1. Have petitioners (D. S. and T. S.) been domiciled continuously in respondent's school district from November 22, 1995 through the present?
>
> 2. If the answer to the previous question is no, was petitioner's child nevertheless entitled to attend the schools in respondent's district free of charge, pursuant to N.J.S.A. 18A:38-1d or otherwise?
>
> 3. If the answers to issues number one and two are no, what is the amount of tuition payments owed by petitioner for the time of the student's ineligible attendance in the schools?
>
> I am enclosing a copy of N.J.S.A. 18A:38-1 for your convenience. The burden of proof to establish entitlement for T. S. to attend respondent's schools free of charge is upon you by a preponderance of the competent and credible evidence.

> By copy of this letter I am informing respondent's attorney, Mr. Johnson, of the time, place and date for the scheduled hearing. If you send me any correspondence you must also sent a copy to Mr. Johnson.

On the morning of the scheduled hearing a telephone message was received from petitioner at approximately 8:30 a.m. advising that her transportation to the hearing had failed to show up. At 9:00 a.m. a telephone conference call took place between petitioner, counsel for respondent and the undersigned. During this call petitioner was advised by the undersigned that she should provide a full explanation in writing concerning all of the details of her transportation arrangements, her efforts to contact Denise Lee, the person whom she indicated was supposed to give her a ride to the hearing, Ms. Lee's explanation for not appearing, etc. and forward it to the undersigned with a copy to Mr. Johnson. The correct mailing address for the undersigned was given to petitioner at this time. Petitioner was advised that if her written explanation were deemed satisfactory, the hearing would be promptly rescheduled; otherwise the matter would be dismissed.

To date, no written explanation has been forthcoming from petitioner. Based upon the foregoing, I **CONCLUDE** that petitioner has abandoned her request for a hearing in this matter, and accordingly, respondent's determination that T. S. was an ineligible student in the district schools from November 22, 1995 (the date of enrollment) to the present is hereby **AFFIRMED** and the petition of appeal is **DISMISSED WITH PREJUDICE.**

With respect to respondent's counter-claim for tuition, respondent's answer attaches an official publication available in the Board office and in public libraries showing the total per pupil cost for educating students in the district based upon the 1995-96 School Year Budget to be $8,181. Petitioner is hereby **ORDERED** to reimburse respondent the pro-rated cost for 1995-96 tuition commencing with November 22, 1995. Respondent is directed to send petitioner a bill setting forth the exact amount due within thirty (30) days after this decision becomes final.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 7, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8/8/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 9 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 4458-96

D.S., on behalf of her minor daughter, T.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs that petitioner, by her lack of diligence in responding to the OAL, has abandoned her request for a hearing in this matter.

Accordingly, the initial decision of the Administrative Law Judge affirming the Board's determination that T.S. was an ineligible student in the District from November 22, 1995 to the present is adopted for the reasons expressed therein. Pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, petitioner is directed to remit to the Board of Education tuition for T.S., prorated to the time of her ineligible attendance in the District.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 23, 1996

DATE OF MAILING SEPTEMBER 24, 1996

415-96

415-96

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
LACEY SCHOOL DISTRICT, OCEAN	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

Petitioning citizens alleged there were improprieties and violations of law in the conduct of a special school election held on a referendum proposal to issue bonds to fund construction of new school buildings. The proposal was approved by the voters. Petitioners sought inquiry into the matter.

ALJ dismissed the petition, finding 1) the petition was not signed by "10 qualified voters *at [the December 2, 1995] school election*" (*N.J.S.A.* 18A:14-63.12); 2) the claim was without any reasonable basis due to absence of assertion of personal knowledge by petitioners; and 3) the petition failed to state a claim upon which relief might be granted. Thus, petitioners were unable to establish that the will of the people as expressed by the results of the special election were thwarted as the allegations did not provide any basis for voiding the results of the election.

Commissioner adopted determination of the ALJ with modification. Commissioner did not find that it was necessary to reach the question as to whether the petition required the signatures of 10 qualified voters who actually voted in the election in order to have standing to bring this matter before the Commissioner. Instead, even granting every inference to petitioners by assuming, *arguendo*, that the signatures were legitimate to challenge the election, the Commissioner concurred with the ALJ that the within record did not substantiate the irregularities alleged to have occurred in this matter, nor that they were sufficient to have affected the outcome of the election within the meaning of the standard long interpreted by the courts. Moreover, Commissioner did not rule on campaign financing violations as these properly belong before the Election Law Enforcement Commission. Petition was dismissed.

SEPTEMBER 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

(CORRECTED)
INITIAL DECISION

OAL DKT. NO. EDU 12572-95

AGENCY DKT. NO. #463-12/95

IN THE MATTER OF THE SPECIAL SCHOOL ELECTION IN THE LACEY SCHOOL DISTRICT,

---

Thomas Palczewski, petitioner, pro se

Arthur Stein, Esq., for respondent Lacey Board of Education

Edward H. O'Hare, Esq., for intervenor Lacey Township Education Association (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: July 2, 1996 Decided: July 31, 1996

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

In the Lacey School District, a special election was held on a referendum proposal to issue $16,790,000 in bonds to fund construction of new school buildings and the voters "at [the] school election" approved the proposal 2,254 to 1,907. N.J.S.A. 18A:24-12; 18A:20-4.2(d); 18A:14-

63.12, emphasis added. Thomas R. Palczewski has alleged that actions by the Lacey Board of Education's (BOE's) school system's employees and the Lacey Township Education Association (LTEA) affected the outcome of the election and he has demanded that the New Jersey Commissioner of Education undertake an "investigation" and make "inquiries" relative to such actions. P-1. See N.J.S.A. 18A:14-63.12 (now repealed)

More particularly, in Mr. Palczewski's letter (treated as a petition) to the Commissioner, he has written the following:

> Below I have listed various items that took place during or prior to the December 2, 1995 School Referendum. I am requesting that you review these items and perform the necessary investigation inquiries:
>
> 1. Employees of the school system used public funds that may have influenced the outcome of the referendum. This took place when the Lacey High School Principal wrote letters to past graduating classes encouraging them to vote via absentee ballot. . . . (School Grounds and Equipment)
>
> 2. School Officials campaigned by wearing yes stickers and also asked students to vote yes for the referendum during school classroom time. Students were asked to write essays as to why they need a new school. These essays most likely influenced parents as to how to vote. (School Grounds and Equipment)
>
> 3. Students held mock elections in a manner that created great peer pressure to vote yes. Alternative viewpoints were never presented.
>
> 4. Interviews of [BOE] members in favor of the referendum were made on School-Sponsored TV Channel 21. Opposing viewpoints were never asked [for] or given equal time to present their view point. (School Grounds and Equipment)
>
> 5. The example of how to vote (in balloting booth) was completed with a yes vote. This obviously was designed to influence people to vote yes. Districts 9 and 10.
>
> 6. Absentee Ballot lists were not present at district locations.

> 7. To the best of my knowledge, Lacey Teachers Association [the Lacey Township Education Association] did not declare themselves as a PAC. The same may be true for the Parents-Teachers Association.
>
> 8. Phone calls encouraging people to vote were made from a local professional firm that may benefit from the construction of a new school.
>
> [R-A.]

The BOE and the LTEA submit that the petition must be dismissed, for reasons including the following: (1) Mr. Palczewski's letter (petition) was not signed by "10 qualified voters at [the] school election," required for standing to bring the claim for the inquiry, etc. N.J.S.A. 18A:14-63.12, emphasis added (now repealed) (2) The signers of Mr. Palczewski's letter (petitioners) do not have the personal knowledge necessary to bring the claim. (3) Mr. Palczewski's letter (the petition) fails to state a claim upon which relief may be granted. (4) Because Mr. Palczewski has filed a petition for candidacy for election to the BOE, he has a conflict of interest and his claim, which is essentially against the BOE, should be barred. See N.J.S.A. 18A:12-2.

PROCEDURAL HISTORY

On December 6, 1995, a letter requesting an "investigation," etc., signed by Mr. Palczewski and ten other persons was filed with the Commissioner of the Department of Education. The Department treated the letter as a petition within the meaning of N.J.S.A. 18A:6-9 and transmitted the matter to the Office of Administrative Law (OAL) where, on December 13, 1995, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On January 30, 1996, the BOE filed objections to certain interrogatories served by Mr. Palczewski. On February 23, 1996, the LTEA's papers were filed in support of a notice of motion to intervene. On February 29, March 19 and April 12, 1996, the BOE's papers were filed in support of a motion to dismiss Mr. Palczewski's claim for relief. (In the BOE letter filed March 19, 1996, it also requested an order placing "appropriate parameters" on the parties' "public statements concerning this matter." However, I deny that request as an impermissible abridgment of the freedom of speech. U.S.

Const. amends. I, XIV; N.J. Const. art. 1, ¶ 6. On March 22, 1996, Mr. Palczewski's letter was filed, objecting to the BOE's motion to dismiss. On March 26, 1996, the LTEA's papers were filed in support of the BOE's motion. On February 21, March 12 and May 9, 1996, Mr. Palczewski's letters, etc., were filed in support of his request for more responsive answers to interrogatories served on the BOE. On March 21, 1996, the BOE's letter was filed in response to Mr. Palczewski's letters relative to interrogatories. On May 14, 1996, Donna Kirk's letter was filed, relative to interrogatories the BOE directed to her. On July 2, 1996, a copy of Mr. Palczewski's letter to the BOE's attorney and copies of portions of the Lacey Middle School "Ninety-Six" yearbook were received (and they have been marked as exhibit P-5) and this last exhibit closes the record. (Given my granting of the BOE motion for summary decision, I will not address Mr. Palczewski's demand relative to interrogatories.)

On March 1, 1996, in the case captioned In the Matter of the Annual School Election Held in the School District of the City of Paterson, Passaic County, bearing OAL docket number EDU 4712-95N, a motion was made to dismiss based on the repeal of N.J.S.A. 18A:14-1 et seq., i.e., based on the contention that the Commissioner of the Department of Education, and therefore the OAL, no longer had jurisdiction over the matter. Barbara A. Harned, Chief Administrative Law Judge, entered a limited order of consolidation of OAL education cases bearing OAL docket numbers EDU 4706-95, EDU 4712-95, EDU 5149-95, EDU 12393-95, EDU 12572-95, EDU 360-96 and EDU 3010-96. No decisions were made on motions pending in this case, and the hearing was adjourned from its previously scheduled (June 4 and 5, 1996) dates pending entry of Chief ALJ Harned's order on the motion to dismiss. On June 11, 1996, Chief ALJ Harned entered an order denying the motion to dismiss and determining that the statutory change did not remove jurisdiction of this and the other cases from the Commissioner and the OAL. N.J.S.A. 18A:6-9.

FINDINGS OF FACT

Lacey Township is being developed and, consequently, since 1991, the number of students enrolled in the BOE's school system has increased by approximately 500. This has caused "non-traditional space and temporary trailers [being] used" for school buildings. Development is

expected to continue and, based upon data available to the BOE, from 1996 to 2001 student enrollment is expected to increase by 500 to 700. R-B.

Given the above circumstances, the BOE determined that new school buildings should be constructed and it provided for a special election on December 2, 1995, to authorize $16,790,000 in bonds for such construction. R-B; N.J.S.A. 18A:11-1(d); N.J.S.A. 18A:20-4.2(d); N.J.S.A. 18A:24-12; N.J.S.A. 18A:33-1.

The LTEA, the duly certified bargaining representative of teachers employed in the BOE's school system, also determined that, to alleviate significant classroom overcrowding in the BOE's school system, a new school building was required. The LTEA created a committee to promote passage of the bond referendum and, consistent with the reporting and disclosure requirements of the New Jersey Campaign Contributions and Expenditures Reporting Act, timely completed forms and filed them with the New Jersey Election Law Enforcement Commission (ELEC). N.J.S.A. 19:44A-1 et seq. LTEA-1; LTEA-A; LTEA-B; LTEA-C.

Donna Kirk, who signed Mr. Palczewski's letter, stated the following in her answers to interrogatories: She observed teachers wearing "Yes" stickers, possibly at the BOE's middle school. Students were "made to watch a very one sided video of why we need the new school and why the referendum must be voted on." "In the middle school, the teachers had the kids very 'riled' up over voting 'yes' for their mock referendum. When my daughter had the foresight to use her own mind and vote the way she wanted, kids stated yelling at her." She did not see a sample ballot showing how to vote on the referendum proposal. She "believe[d] [she] overheard 2 of the women speaking about not having the [absentee ballot] list - but [she] can't remember who they were." A "friend" told her she had received a telephone call encouraging her (the friend) to vote in favor of the referendum and, after she "pressed *69," she saw that the call was from Henderson & Breen, "a local engineering firm." P-4; see also P-5.

The election was held on December 2, 1995, from 9:00 a.m. to 9:00 p.m. in the school system's five districts (polling places). James G. Savage, Jr., the BOE's business administrator and secretary, had supplied to each polling place a copy of the absentee voting list. The voting

procedure was as follows: A prospective voter signed a register. Each voter was provided a card to be marked showing her or his vote. Each voter was provided a private voting booth in which to mark the card. In the booth, a sample ballot with instructions as to how to complete a ballot was provided. Each voter took the marked card to and inserted it in a tabulating machine. No worker monitored the booth, but an election worker was stationed at the tabulating machine. At 11:00 a.m., at one polling place, a voter notified the judge of elections that the sample ballot in one of the booths had been marked to show a "yes" vote and, immediately, the judge of elections removed the marked ballot and replaced it with an unmarked sample. R-B.

In the election, relative to the signers of Mr. Palczewski's letter: Mr. Palczewski voted. 1. Mary A. Palkovics did not vote. 2. Joe Palkovics did not vote. 3. Ernest F. Smith did not vote. 4. Carol M. Smith did not vote. 5. Thomas Smith did not vote. 6. Donna Kirk voted. 7. William P. Brady voted. 8. Veronica Brady voted. 9. Joan Jacobs did not vote. 10. Patricia Clancy voted. R-B. That is to say, the letter (petition) was not signed by ten persons who voted at the election. See N.J.S.A. 18A:14-63.12.

The 'voters at [the] school election" approved the bond proposal 2,254 to 1,907. N.J.S.A. 18A:14-63.12.

CONCLUSIONS OF LAW

(1) Standing to Request the Inquiry (Bring the Claim)

A board of education, such as the BOE here, has the power to "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." N.J.S.A. 18A:11-1(d). And such a board of education must "provide . . . suitable educational facilities including proper school buildings." N.J.S.A. 18A:33-1.

When a board of education contemplates school construction, it may adopt educational specifications and plans, develop cost estimates, etc. N.J.S.A. 18A:18A-16; N.J.A.C. 6:22-1.2, -

1.4(a), -1.4(d). However, the school district's voters' authorization, expressed in a special election, is required for the board of education to issue a bond to fund school construction (or land acquisition). N.J.S.A. 18A:20-4.2, 18A:24-10.

An official inquiry into an election procedure and/or a challenge to an announced result of an election have profound and disruptive effects on governmental offices and activities and standing to request such an inquiry and/or bring such a challenge does not arise in common law; it is created and limited by statute. Jones v. Mitchell, 194 N.J. Super. 387, 391 (Law Div. 1983), aff'd, 194 N.J. Super. 337 (App. Div. 1984).

That is to say, election laws are construed liberally to provide a broad right of franchise to vote. However, standing to compel an inquiry into an election procedure and/or to bring a challenge to an announced result of an election is limited.

Effective March 14, 1996, L. 1995, c. 278, amended and repealed sections of Title 18A, which previously governed the conduct of school elections. L. 1995, c. 278, requires, generally, that school elections be conducted pursuant to Title 19, which governs elections in New Jersey. For example, N.J.S.A. 18A:6-9 was amended to state:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.
>
> [Emphasis added.]

At the time of the subject special election and at the time of the filing of the petition, in N.J.S.A. 18A:14-63.12 (repealed as described above), the Legislature limited standing to compel an inquiry into election procedures, etc.:

> Upon written request within 5 days of the announcement of the result of an election by any defeated candidate, or, in the case of

> a question, proposition or referendum, upon petition of 10 qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election.
>
> [Emphasis added.]

Of Mr. Palczewski and the signers of his letter, only five actually voted "at [the] school election" and the first issue is whether the letter constitutes the "petition of 10 qualified voters at [the] school election," i.e., whether they have standing to compel the Commissioner to undertake the inquiry. N.J.S.A. 18A:14-63.12.

"Qualified voters at any school election," "voters at any school election" and "voter" are not among the definitions in N.J.S.A. 18A:1-1. N.J.S.A. 18A:14-63.12.

In N.J.S.A. 19:28-1, using words and phrases similar to those of N.J.S.A. 18A:14-63.12, the Legislature also limits standing to compel an inquiry into an election procedure and its effect on elections:

> When any candidate at any election shall have reason to believe that an error has been made by any district board or any board of canvassers in counting the vote or declaring the vote of any election, he may, on or before the second Saturday following such election, or declaration of any board of canvassers, apply to a judge of the Superior Court assigned to the county wherein such district or districts are located, for a recount of the votes cast at the election in any district or districts.
>
> When ten voters at any election shall have reason to believe that an error has been so made in counting or declaring the vote upon any public question at any election, such voters may, within a like time, make like application [to a judge of the Superior Court] for a like recount of the votes cast at the election on such public question.
>
> [Emphasis added.]

"Voters at any election" and "voters" are not among the definitions in N.J.S.A. 19:1-1. N.J.S.A. 19:28-1. "Election" is defined as "the procedure whereby the electors elect persons to fill public office or pass on public questions." N.J.S.A. 19:1-1.

N.J.S.A. 1:1-1 states:

> In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.

Consistent with N.J.S.A. 1:1-1, "voters," as used in N.J.S.A. 18A:14-63.12, must be read and construed as "voters at any school election." Emphasis added.

In N.J.S.A. 18A:14-63.12 and N.J.S.A. 19:28-1, the Legislature limited standing: The Legislature limited to a "defeated candidate" and a "candidate at any election," i.e., one whose name actually appeared on the ballot, standing, e.g., to apply for a recount relative to such an election and/or to inquire into alleged violations of election laws. Similarly, the Legislature limited to "voters at any school election" standing, e.g., to request inquiry into "alleged violations of statutorily prescribed procedures" for elections relating to a referendum. N.J.S.A. 18A:14-63.12. Emphasis added. The Legislature (made up of elected officials) declined to extend such standing to persons who, e.g., merely had the legal right to vote at the time of the election - but who failed to actually vote. That is to say, the general meanings of "voter" are "one that votes or [one that] has the legal right to vote." Webster's Ninth New Collegiate Dictionary 1323 (1987) (emphasis added). However, the second meaning is inconsistent with the context of N.J.S.A. 18A:14-63.12 and the "manifest intent of the legislature," and, therefore, is inapplicable in this context. N.J.S.A. 1:1-1.

Here, a $16,790,000 bond proposal was approved by a vote of 2,254 to 1,907. Six of the letter (petition) signers failed to vote and there is no evidence that any of them was unable to do so because of justifiable incapacity. N.J.S.A. 19:57-2. (N.J.S.A. 19:57-2 defines "Absentee

voter," "Civilian absentee voter," "Incapacitated absentee voter," and "Military service voter" as persons who, due to justifiable incapacity, are unable to cast or complete their ballots at the usual polling places.)

Given the above, the letter (petition), which was not signed by "10 qualified voters at [the December 2, 1995] school election," must be dismissed. N.J.S.A. 18A:14-63.12; emphasis added.

Given the above conclusion, no decision may be necessary relative to the other bases for the BOE's motion. Nonetheless, on the other bases I would conclude as follows:

(2) The Requirement of Personal Knowledge by the Petitioners

Administrative adjudication is governed by judicial principles, such as notice, due process and fundamental fairness and, consistent with these principles, an administrative claim must give to the adverse party fair notice of the factual allegations and the legal basis for the relief claimed. N.J.S.A. 52:14B -9; N.J.A.C. 1:1-1.3(a); R. 4:5-2; R. 4:6-2(e); Juzek v. Hackensack Water Co., 48 N.J. 302, 314-15 (1966); Department of Envtl. Protection v. Stavola, 103 N.J. 425, 436 n.2 (1986); City of Hackensack v. Winner, 82 N.J. 1, 32-34 (1980).

It is enough that a claimant have "reason to believe" the allegations in the claim that there should be a recount of an election result. N.J.S.A. 19:28-1. And N.J.S.A. 18A:14-63.12 did not include the (unusual) requirement that a petitioner (claimant) have personal knowledge and/or verify the facts on which is based his request for the Commissioner's inquiry. Consequently, the absence of assertion of personal knowledge and/or verification of the facts alleged does not, of itself, require dismissal of the claim.

Here, however, the BOE served on Mr. Palczewski interrogatories asking him to set forth the "knowledge or information" of the ten person who signed his letter upon which the letter's allegations are based. To these interrogatories Mr. Palczewski answered, e.g., "I do not know what they know" and "I do not know. I did not ask." R-A1; R-B1; R-C; R-C1; R-D; R-E. This

constitutes an absence of good faith "reason to believe" the allegations in the letter (statement of claim) and requires dismissal of the claim (petition.) N.J.S.A. 19:28-1. Compare N.J.S.A. 2A:15-59.1, where a friviolous claim is one without any reasonable basis.

(3) Statement of a Claim upon which Relief May be Granted

An administrative petition may be dismissed for failure to state a claim upon which relief may be granted. N.J.A.C. 1:1-1.3(a); R. 4:5-2; R. 4:6-2(e).

The letter's Item 1 alleges that "the Lacey High School Principal wrote letters to past graduating classes encouraging them to vote via absentee ballot." However, voting by absentee ballot is provided for by statute and the letter fails to cite any law violated by the alleged action. N.J.S.A. 19:57-2. Consequently, Item 1 fails to state a claim upon which relief may be granted and is dismissed.

The letter's Item 2 alleges, "School Officials campaigned by wearing yes stickers and also asked students to vote yes for the referendum during school classroom time. Students were asked to write essays as to why they need a new school." Construed liberally, Item 2 states a claim that, e.g., during school classroom time, school officials wrongfully attempted to influence students relative to the election.

The letter's Item 3 alleges, "Students held mock elections in a manner that created great peer pressure to vote yes. Alternative viewpoints were never presented." However, the letter attributes no wrongdoing to, e.g., school officials, and it fails to cite any law violated by the alleged action. Consequently, Item 3 fails to state a claim upon which relief may be granted and it is dismissed.

The letter's Item 4 alleges, "Interviews of [BOE] members in favor of the referendum were made on School-Sponsored TV Channel 21. Opposing viewpoints were never asked [for] or given equal time to present their view point." The letter fails to identify, e.g., school officials who used the "School-Sponsored TV Channel 21" to unfairly influence the election and fails to

cite any law violated by the alleged action. However, if the petitioners supply such information, this allegation could be the subject of an inquiry.

The letter's Item 5 alleges that the "[e]xample of how to vote (in balloting booth) was completed with a yes vote. This obviously was designed to influence people to vote yes." However, the letter fails to identify who caused the "example" to be in the voting booth; when and where this occurred; and whether the will of the voters was thereby thwarted. Consequently, Item 5 fails to state a claim upon which relief may be granted and it is dismissed.

The letter's Item 6 alleges, "Absentee Ballot list was not present at district locations." The letter fails to identify the locations at which the list was not present and fails to cite any law violated by the alleged action. However, if the petitioners supply such information, etc., this could be the subject of an inquiry.

The letter's Item 7 alleges that the "[LTEA] did not declare [itself] a PAC. The same may be true for the Parents-Teachers Association." However, the letter alleges no facts upon which it may be found that these organizations were required to register themselves as PACs fails to cite any law violated by the alleged action. Consequently, Item 7 fails to state a claim upon which relief may be granted and it is dismissed.

The letter's Item 8 alleges, "Phone calls encouraging people to vote were made from a local professional firm that may benefit from the construction of a new school." However, the letter fails to identify the "local professional firm;" fails to state that the claimant has a reasonable basis to believe the facts alleged (it merely speculates that the firm "may [possibly] benefit from the construction"); and fails to cite any law violated by the alleged action. Consequently, Item 8 fails to state a claim upon which relief may be granted and it is dismissed.

(4) The Effect of Petitioner's Petition for Candidacy for Election to the BOE

"No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." N.J.S.A. 18A:12-2.

Mr. Palczewski's petition charges wrongdoing by "School Officials," and such charges are, at least indirectly, against the BOE. However, Mr. Palczewski is not (yet) a member of the BOE and I would not dismiss the petition on the basis of conflict of interest. (However, see Howell Township Board of Education v. Suchcicki, 93 N.J.A.R.2d (EDU) 157, where, as a result of a candidate's conflict, (1) he was deemed not legally qualified for election to a board of education; (2) his nominating petition was invalid, null and void; and (3) his name as a candidate was removed from the ballot for election to the board.)

ORDER

I **ORDER** the petition **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 31, 1996
DATE

John R. Tassini
JOHN R. TASSINI, ALJ with corrections August 8, 1996

Receipt Acknowledged:

_____
DATE

_____
DEPARTMENT OF EDUCATION

Mailed to Parties:

_____
DATE

_____
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Petitioner's:

P-1 Mr. Palczewski's letter, dated December 4, 1995, to Commissioner of Department of Education requesting "investigation," etc.

P-2 Mr. Palczewski's letter, dated December 27, 1995, to Commissioner of Department of Education

P-3 Portion of Asbury Park Press "Vote" article, December 1, 1995

P-4 Ms. Kirk's letter, dated April 29, 1996, answers to BOE "Interrogatories to Donna L. Kirk (First Set), undated, etc.

P-5 Copies of portions of Lacey Middle School "Ninety-Six" yearbook (cover and pages 2 and 64)

Respondent's:

R-A Mr. Palczewski's letter, dated December 4, 1995, to Commissioner of Department of Education requesting "investigation," Portion of Asbury Park Press "Vote" article, December 1, 1995, etc.

R-B Certification of James G. Savage, Jr., with voting signature registers

R-C Interrogatories to Petitioner (First Set) and answers

R-A1 BOE's attorney's cover letters, dated March 21, 1996, accompanying interrogatories to persons who signed the letter requesting an "investigation," etc.

R-B1 Post office records (green card, etc.), dated March 22, 23 & 25, 1996, showing delivery of above-described cover letters and interrogatories.

R-C1 BOE's attorney's letters, dated April 3, 1996, to persons who signed the letter requesting an "investigation," etc.

R-D BOE's attorney's letter, dated April 3, 1996, to Donna Kirk

R-E Post office record (green card, etc.), dated April 4, 1996, showing delivery of above-described letter, dated April 3, 1996, to Donna Kirk

R-1 Affidavit of Patricia Clancy

R-2 Supplemental Affidavit of Patricia Clancy

R-3 Certification of Arthur Stein

Intervenor Lacey Township Education Association's:

LTEA-1 Certification of Linda Devlin

LTEA-A Election Law Enforcement Commission Memorandum, dated November 9, 1995

LTEA-B Election Law Enforcement Commission, Registration Statement, etc.; Certification of Independence of Political Committee, dated November 16, 1995; Report of Contributions and Expenditures, etc.

LTEA-C Election Law Enforcement Commission note of Assistant Compliance Officer, dated December 14, 1995, with portion of definitions of "Political Committee," etc.

IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
LACEY SCHOOL DISTRICT, OCEAN	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. Respondent filed timely cross-exceptions, as well as reply exceptions. Intervenor also filed timely reply exceptions. Both petitioners and respondent submitted additional filings not provided for in regulation, which are not considered herein.

Petitioners' exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that respondent "[campaigned] consistently ***throughout the school system, during school hours on school grounds" for a bond referendum and used "*[d]efenseless children* while in the sanctity of their classrooms*** for these political activities." (emphasis in text) (Petitioners' Exceptions at p. 2) To buttress these arguments, petitioners present 19 allegations, some which repeat initial allegations set forth in the petition along with new examples of alleged Board impropriety. *(Id.* at pp. 7-10) In that petitioners' claims were already fully and fairly considered by the ALJ at hearing, and in that new allegations may not be raised in exceptions, these arguments are not addressed herein.

Petitioners next generally aver that they filed the instant petition as "lay person[s]" and are "saddened that the judicial system is more concerned with the letter of the law than the spirit in which it was created.***" They assert that "[t]o administratively dismiss this petition would demonstrate that the legal system does not protect children unless the petitioner is properly represented by an attorney." (*Id.* at p. 2)

Petitioners further except that the six registered qualified voters who signed the petition but did not vote in this election did vote in prior school-related elections. They aver

> [t]he phrase "At any election" does not refer to a specific election. If this phrase was meant to pertain to a specific election it would have been worded as "Qualified Voters who voted *in the* election." (emphasis in text) (*Id.* at p. 6)

To illustrate their point, petitioners attach, a petition signed by 10 qualified voters in the matter entitled, *In the Matter of the Annual School Election held in the School District of the Township of Willingboro, Burlington County,* 92 *N.J.A.R.* 2d (EDU) 564. Petitioners say that such case was initiated based on the signatures of 10 *registered* voters and see no reason why the ALJ would allow for a "double standard" (presumably, in accepting that petition and not the present petition). (Petitioners' Exceptions at p. 6)

Lastly, petitioners aver that respondent did not file with the Election Law Enforcement Commission. *(Id.* at p. 10)

In reply, respondent disputes each of petitioners' points with regard to Board impropriety in conducting its election. As noted, in that these arguments were generally addressed by the ALJ in the initial decision, they will not be considered again herein.

Respondent next contends, in regard to petitioners' *pro se* status, that it is "black letter law" that everyone is conclusively presumed to know, and in the absence of statutory or constitutional requirements, an agency is not required to give actual notice of the law. Respondent cites in support of its proposition, *Board of Education of the Township of Howell v. Ben Suchicki,* 93 *N.J.A.R.* 2d. (EDU) 157, 158, as well as *Graham v. N.J. Real Estate Comm'n,* 217 *N.J. Super.* 130, 138 (App. Div. 1987), and *In re Krah,* 130 *N.J. Super.* 366 (App. Div. 1974). (Reply Exceptions at p. 11) Respondent avers that,

> [a]lthough the Department of Education is frequently confronted with litigation involving pro se parties, the regulation [*N.J.A.C.* 6:24-1.3] does not distinguish a lay person from any other petitioner. And certainly, the regulation does not state, or even suggest, that it is not reasonable to comply with its requirements. (Reply Exceptions at p. 12)

Further, respondent submits that the ALJ did not consider the Board's contention that it is nonetheless entitled to summary judgment since petitioners cannot establish that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *In the Matter of the Annual School Election Held in the School District of the Township of Madison, Middlesex County*, 1974 *S.L.D.* 744, 751, quoting *Love v. Freeholders of Hudson County*, 35 *N.J.L.* 269 (Sup. Ct. 1871).

With regard to petitioners' arguments that they had proper standing in that 10 qualified voters signed the petition, the Board replies that

> ***[s]ignificantly, Petitioner[s] [have] not submitted any proofs to support this suggestion. Of course, such submission would presume that voting in prior school-related elections is relevant to whether one may sign a petition relating to a subsequent election.*** (Reply Exceptions at p. 15)

In the same vein, respondent further excepts that petitioners' reliance on *In the Matter of the Annual School Election Held in the School District of the Township of Willingboro, supra*, is misplaced in that the case contains no discussion whatsoever of the statutory meaning of "voters at any school election."

Respondent next avers that the 19 allegations presented by petitioners to demonstrate misconduct in conducting the school election are "additional items ***outside the scope of the filed petition and are beyond the record," citing *In the Matter of the Annual School Election held in the Parsippany-Troy Hills School District, Morris County*, 1975 *S.L.D.* 203.

Intervenor avers that petitioners' claims that intervenor did not comply with the reporting and disclosure requirements of the New Jersey Campaign Contributions and Expenditures Reporting Act (hereinafter "Act"), were false. (Intervenor's Exceptions at p. 3) Further, it argues that even assuming that intervenor did not comply with the reporting and disclosure requirements of the Act such failure may not serve as the basis for voiding the results of the election. *(Id.* at p. 4) In this regard, it argues that the Act sets forth specific penalties for violations of the Act; voiding the result of a referendum election is simply not an option and cites *N.J. Election Law Enforcement Commission v. Brown*, 206 *N.J. Super.* 206 (App. Div. 1985). Next, it urges that the ALJ correctly held that the petition alleges no facts upon which it may be

found that [intervenor was] required to register as [a PAC and] fails to cite any law violated by the alleged action." (Intervenor's Exceptions at p. 5)

Intervenor further concurs with and adopts arguments set forth at length in the cross-exceptions and response exceptions filed by the Board of Education, stating that "the Board presents compelling, indeed dispositive, reasons for adoption of the Initial Decision and dismissal of the petition.***" (Intervenor's Exceptions at p. 6) It further concurs that the petition is *prima facie* invalid. Citing *N.J.S.A.* 18A:14-63.12, intervenor argues that "***the petition was not signed by the statutorily prescribed '10 qualified voters at any school election'*** and should be sustained and adopted on that basis alone***." (Intervenor's Exceptions at p. 6) Then as a matter of law, it argues, petitioners are unable to establish that the will of the people as expressed by the results of the special election has been thwarted as the allegations do not provide any basis for voiding the results of the election. *(Id.)*

Upon a careful and independent review of the record, the Commissioner determines to affirm the determination of the ALJ with modification as explicated herein.

Initially, in view of the fact that the statute at issue has now been repealed, and given that the ALJ proceeded with a hearing on the merits notwithstanding his threshold determination on standing, the Commissioner finds that it is not necessary to reach the question as to whether the petition required the signatures of 10 qualified voters who actually voted in the election in order to have standing to bring this matter before the Commissioner. Instead, even granting every inference to petitioners by assuming, *arguendo*, that the petition's signatures were legitimate to challenge the within election, the Commissioner nonetheless agrees with the findings and conclusions of the ALJ that the within record does not substantiate the irregularities alleged to have occurred in this matter, nor that, even if they did occur, they were sufficient to have affected the outcome of the election within the meaning of that standard as long interpreted by the courts.

As to petitioners' exceptions to the contrary, the Commissioner finds these to be unpersuasive based on the record presented and herein notes that to the extent petitioners' challenge to the findings of the ALJ relies on proffered testimony, he cannot in the absence of hearing transcripts, which were not provided by the parties, ascertain the merits of petitioners' claims. *In re Morrison*, 216 *N.J. Super.* 143, 157, 158 (App. Div. 1987).

Lastly, with regard to petitioners' allegations of campaign financing violations, the Commissioner notes that campaign financing matters properly belong before the Election Law Enforcement Commission pursuant to *N.J.S.A.* 19:44A-5 and 19:44A-6. The Commissioner will not consider such questions herein.

Thus, the Commissioner concurs with the ALJ that petitioners have not met the burden necessary to prevail in an election inquiry. Notwithstanding this finding, however, in view of certain allegations raised herein, the Commissioner reminds respondent and other boards of education of the provisions of *N.J.S.A.* 18A: 42-4 which state:

> No literature which in any manner and in any part thereof promotes, favors or opposes ***the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section.

Boards are further reminded of their obligation to develop policy and procedures in conformance with this statute so incidents of the type alleged herein may be prevented, or dealt with appropriately if they do occur.

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, as modified above, and the instant appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 25, 1996

DATE OF MAILING SEPTEMBER 25, 1996

415-96

EDU #12572-95
C # 415-96
SB # 74-96

IN THE MATTER OF THE SPECIAL ELECTION HELD IN THE LACEY SCHOOL DISTRICT, OCEAN COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 25, 1996

For the Petitioner-Appellant, Thomas Palczewski, pro se

For the Respondent-Respondent, Arthur Stein, Esq.

For the Intervenor, Zazzali, Zazzali, Fagella & Nowak (Edward H. O'Hare, Esq., of Counsel)

Thomas R. Palczewski (hereinafter "petitioner") filed a petition with the Commissioner of Education contending that irregularities had occurred during and prior to a bond referendum election held on December 2, 1995 in the Lacey Township school district. The Board of Education of the Township of Lacey (hereinafter "Board") filed a motion for summary decision, arguing, inter alia, that petitioner had failed to state a claim upon which relief could be granted and that his petition had not been signed by 10 individuals who had actually voted in that election, as allegedly required by N.J.S.A. 18A:14-63.12.[1]

[1] N.J.S.A. 18A:14-63.12, which was repealed by L.1995, c. 278, s. 46, eff. March 14, 1996, provided that the Commissioner of Education was required to inquire into alleged violations of statutorily prescribed procedures for school elections "upon petition of 10 qualified voters at any school election."

2/5/97

The Administrative Law Judge ("ALJ") recommended dismissing the petition, agreeing that the petition had not been signed by "10 qualified voters at any school election." N.J.S.A. 18A:14-63.12. The ALJ also found that the majority of petitioners' allegations failed to state a claim upon which relief could be granted.

The Commissioner adopted the ALJ's recommended decision with modification. The Commissioner found it unnecessary to reach the question of whether the petition was required to be signed by ten individuals who had actually voted in the election since the statute at issue had been repealed and "given that the ALJ proceeded with a hearing on the merits." Commissioner's Decision, slip op. at 20. The Commissioner concluded that the "record does not substantiate the irregularities alleged to have occurred in this matter, nor that, even if they did occur, they were sufficient to have affected the outcome of the election...." Id. Consequently, he dismissed the petition.

After a careful review of the record, we agree with the Commissioner's ultimate determination to dismiss the petition. We do so, however, for the reasons expressed herein, and modify his decision accordingly.

We find initially that petitioner has set forth several claims in his petition upon which relief could be granted. Petitioner alleges that teachers in the district involved students in a number of school activities designed to advocate passage of the bond referendum, in violation of N.J.S.A. 18A:42-4 and the Board's rules implementing that statute.[2] Petitioner further contends that a school principal sent letters to alumni on

[2] N.J.S.A. 18A:42-4 provides:

> No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or

district stationery urging their support for the referendum, in violation of the district's implementing rules prohibiting staff members from conducting political activities during school hours and on school property.

However, viewing the record in a light most favorable to petitioner, including the papers he filed in response to the Board's motion for summary decision, we are compelled to conclude that he has not come forward with any proofs or asserted any facts that would show a nexus between the violations alleged in his petition and the outcome of the election. In this respect, we stress that in order for an election to be invalidated, it must be shown that the irregularity influenced the election so as to have repressed a full and free expression of the popular will. In re Wene, 26 N.J. Super. 363, 383 (Law Div. 1953), aff'd, 13 N.J. 185 (1953). "It is well established that elections are to be given effect whenever possible and are not to be set aside unless it can be shown that the will of the people was thwarted, was not properly expressed, or could not fully be determined." In the Matter of the Annual School Election of the School District of Lacey Township, decided by the Commissioner, 91 N.J.A.R.2d (EDU) 3, 6, quoting In the Matter of the Annual School Election Held in the Township of Pittsgrove, decided by the Commissioner, 1976 S.L.D. 585, 589.

In this instance, the bond referendum at issue passed by a vote of 2,254 to 1,907, a difference of 347 votes, and petitioner, in response to the Board's motion for summary decision, has failed to offer any proofs showing that the irregularities alleged

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on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section.

in his petition, even if true, had the effect of thwarting the will of the electorate. An election will not be set aside on the basis of mere speculation that the result would have been different. See In re Clee, 119 N.J.L. 310 (1937); In the Matter of the Annual School Election Held in the Borough of Ringwood, decided by the Commissioner, 1974 S.L.D. 591.

In this context, we correct the Commissioner's apparent misconception that the ALJ conducted a hearing on the merits of this matter. The ALJ's recommended decision was based on a motion for summary decision, and there is no indication in the record that he conducted a hearing or considered the merits of petitioner's claims.

Accordingly, for the reasons expressed herein, we grant the Board's motion for summary decision and dismiss the petition. Given our determination, and in light of the fact that N.J.S.A. 18A:14-63.12 was repealed in 1996, we find no need to address the Board's contention that the petition was invalid because it had not been signed by ten individuals who had actually voted in the challenged election.

However, we cannot ignore the proofs submitted by petitioner regarding school activities conducted prior to the election, and we strongly admonish the Lacey Board that school children may not be "requested or directed by any official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any...candidacy, bond issue, proposal or public question." N.J.S.A. 18A:42-4. We direct the Board to reexamine its rules governing such activities, along with its means of implementing those rules, in order to insure that future elections do not involve any such conduct.

Since we have rendered our final determination in this matter, we deny as moot the Board's motion to accelerate the proceedings. We also deny the Board's request to file a response to petitioner's reply brief as unnecessary for a fair determination of this case.

February 5, 1997

Date of mailing FEB 0 7 1997

416-96

416-96

J.S. AND P.S., on behalf of minor child, D.S.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN SCHOOL DISTRICT, HUNTERDON COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
THE HUNTERDON CENTRAL REGIONAL BOARD OF EDUCATION,	:	
INTERVENING RESPONDENT.	:	

SYNOPSIS

Petitioning parents sought emergent relief requiring the District to allow their daughter, D.S., to "skip" the eighth grade and proceed directly to her freshman year at Hunterdon Central. D.S. had been retained in first grade. Board contended matter was not only untimely but that D.S. needed the "transitional learning phase" of eighth grade to prepare for high school.

Commissioner denied emergent relief for failure to meet the *Crowe* standards. Additionally, the Commissioner found that even if petitioners' appeal were to be considered timely, petitioners could not demonstrate that the Board's decision was arbitrary, capricious or unreasonable as is required in law for it to be reversed, so that no purpose would be served by further proceedings in this matter. Petition was dismissed. Commissioner directed that the file be returned to the agency by OAL.

SEPTEMBER 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 8081-96
AGENCY DKT. NO. 334-8/96

J.S. AND P.S. ON BEHALF OF MINOR CHILD, D.S.,

Petitioners,

v.

BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN SCHOOL DISTRICT, HUNTERDON COUNTY,

Respondent,

&

THE HUNTERDON CENTRAL REGIONAL BOARD OF EDUCATION,

Intervening Respondent.

J.S. and **P.S.** appearing on behalf of their minor child, **D.S.**, petitioners, *pro se*

Deborah White, Esq., for respondent, Flemington-Raritan Regional Board of Education (Rand, Algeier, Tosti & Woodruff, attorneys)

James P. Granello, Esq., for intervening respondent, Hunterdon Central Regional Board of Education

Record Closed: September 5, 1996 Decided: September 6, 1996

BEFORE **STEVEN C. REBACK**, ALJ:

This is a ruling and order issued in response to a motion instituted by J.S. and P.S. on behalf of their minor child, D.S., requesting that respondent, the Board of Education of the Flemington-Raritan School District, Hunterdon County ("Flemington-Raritan"), in which D.S. is currently enrolled, be placed in the ninth grade for the 1996-1997 school year, thus skipping her eighth grade class. D.S. completed her seventh grade class for the 1995-1996 school year. They further ask that D.S. be placed in the high school within the Hunterdon Central Regional Board of Education District (Hunterdon) to commence her ninth year of study in that her current placement, in the Reading Fleming Middle School, runs through the eighth grade only. For the following reasons, the petitioners' motion is **DENIED**.

I

On August 19, 1996, the petitioners filed an Amended Petition of Appeal and Motion for Emergent Relief with the Commissioner of Education, seeking the relief previously articulated. On August 29th the respondent, Flemington-Raritan, filed its answer opposing the motion for emergent relief on its merits and also asserted a variety of affirmative defenses including but not limited to the "ninety day Rule," as delineated at *N.J.A.C.* 6:24-1.2.[1] Thereafter, on August 30, 1996, the matter was transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education on the emergent relief motion. On September 3, 1996, oral argument was conducted and, in addition, the petitioners' exhibits, which were attached to the Petition of Appeal, were admitted collectively into the record.

In addition, James P. Granello, Esq., counsel to the Hunterdon Central Regional Board of Education, had corresponded in writing with the Commissioner of Education on August 16 and August 20, 1996, advising the latter of his intention to move to intervene in the proceeding. He was advised that he should appropriately make such motion once the case had been transmitted to the OAL. Accordingly, Mr. Granello was kept on the service list and appeared at the OAL on September 3, 1996, at which time he brought a motion to intervene on behalf of Hunterdon,

[1] Petitioners argued that, to the best of their knowledge, the respondent's answer was not submitted until August 30, 1996, one day after the ten day regulatory timeframe. I took official notice that the copy of the respondent's answer, which was transmitted by the Commissioner of Education, was officially stamped "in" on August 29, 1996, and have proceeded to decide the motion under that basis.

which motion was unopposed by Flemington-Raritan or the petitioners. In addition, Mr. Granello had not had the opportunity to review respondent's pleadings in the matter and was granted the opportunity to review those and also the opportunity to submit either an appropriate response to the petition of appeal from Hunterdon and/or a written argument on behalf of his client. He indicated that he would do so with all due expedition and hoped that the latest for that submission would be September 5, 1996. In the interest of due process and fundamental fairness I granted him that right. On September 5, 1996, my office received a hard copy of documents faxed the previous day on behalf of Hunterdon. Mr. Granello submitted an answer on behalf of respondent/intervenor to the petition of appeal. He also submitted a letter brief, dated September 3, 1996, embodying the arguments offered on behalf of Hunterdon in opposition to the motion. Accordingly, the record on the motion closed on the latter date, September 5, 1996. Because the school year began for D.S. on September 4, 1996, and because there was a strong probability that the written ruling and order in respect to the motion *sub judice* might not be received by the parties until several days thereafter, my secretary contacted the petitioners as well as counsel and advised them, as a courtesy, on September 5, 1996, of the disposition of the motion.

II

STANDARD FOR THE MOTION FOR EMERGENCY RELIEF

The standards utilized within the administrative forum in respect to motions for emergent relief are substantially the same if not identical to those applicable to temporary restraining orders or similar interim remedies within the courts. Both under *N.J.A.C.* 1:1-12.6 and under well established rules within the judiciary in order for a moving party to prevail on a motion for interim relief, the moving party must demonstrate:

> (1.) The reasonably likelihood that it will prevail on the merits at a full plenary disposition of the proceedings;
>
> (2) immediate and irreparable harm will in all likelihood result to the moving party should the motion be denied; and

> (3) the remedies sought would be as limited in scope and temporary as is possible so as to allow the party or parties opposing the motion not to suffer undue harm.
>
> See the seminal case of ***Crowe v. De Gioia***, 90 N.J. 126, 132-33 (1982); ***Wolfington Board Company Inc. v. Hunterdon Central Board of Education***, 92 N.J.A.R. 2d (EDU) 622, 624; ***M.S. v. Barnegate Township Board of Education***, 93 N.J.A.R. 2d. (EDS) 16, 17]

The Court must also evaluate the relative hardship to the parties and the public interest in granting or denying relief. *Id.*

"Harm is generally considered irreparable. . . if it cannot be redressed adequately by monetary damages. In certain circumstances, severe, personal inconvenience can constitute injury justifying issuance of injunctive relief." ***Crowe*** at 132-33.

The requirement that petitioner show a reasonable likelihood of success on the merits "is usually tempered by the principle that mere doubt on the claim's validity is not an adequate basis for refusing to maintain the status quo. So frequently, emergency relief is granted to prevent a decree on the merits from becoming futile or useless by preventing the *res* from destruction or impairment." See, 37 N.J. Practice (Lefelt, Administrative Law and Practice) sec. 196 at 204. "Indeed the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began." ***Crowe*** at 134.

III

The facts of this matter have been derived exclusively from the petition of appeal submitted by the parties, the certification and affidavit, as well as the petitioners' exhibit 1, a compilation of D.S.'s school records through grades one through seven. Unless otherwise noted, the following is a substantially uncontradicted narrative of the operative facts on this motion. Where, however, a factual dispute presents itself, I shall set forth its adversarial basis and derive an express finding of fact, giving reasons to support it. Accordingly, I **FIND**:

D.S. is a fourteen year old girl who completed her seventh grade in the 1995-1996 school year, attending the Reading-Fleming Middle School in Flemington, New Jersey, and within respondent Flemington-Raritan School District. D.S. commenced her first grade within the district, attending the Barley Sheaf School in the 1988-1989 school year. As an incident to the first year of her schooling, D.S. was administered the Gesell Institute Of Human Development School Readiness Screening, referred to by the petitioners in their petition of appeal as the "Gesell Test." The petitioners note in their petition that they were advised by a school administrator in 1988-1989 that D.S.'s score on the Gesell Test was "below average," and at a level between kindergarten and first grade. At paragraph six of the petition they note that as a consequence, the administration "recommended to the petitioners that D.S. should not be promoted to second grade." In the following paragraph, paragraph seven, the petitioners indicate that "On reliance upon the administration, the petitioners did not oppose the retention of D.S. in the first grade in the 1989-1990 school year," which indeed D.S. repeated.

Thereafter, D.S. completed the second, third, fourth, fifth, sixth and seventh grades consecutively, and based upon the petition of appeal, maintained what was described as "above average" academic grades.

The petitioners contend that in June 1996, they conferred with a guidance counselor at the Reading-Fleming Middle School and were advised that the district mistakenly advised them as to D.S.'s score on the Gesell Test; they contend that in fact her score in 1989 was such that she should not have been retained in first grade and compelled to repeat it.

It is based essentially on this factual scenario that the petitioners seek an order requiring the Flemington-Raritan District to essentially allow D.S. to "skip" the eighth grade and proceed directly to her freshman year in high school. Should that order be granted, D.S. would not continue at the Middle School where she has been educated for the past several years but rather would be, at her own request, placed at the Hunterdon Central Regional High School.

The petitioner's father, J.S., submitted an affidavit, dated August 13, 1996, which essentially addressed the procedures and efforts made by himself and representatives of the

Flemington-Raritan School District to effect a non-adjudicatory remedy. The affidavit was embellished upon by J.S. in his oral argument. Essentially, he expressed his frustration in what he believed was an uncooperative school district in failing to comply with his request and also in failing to provide him guidance in respect to how he might seek redress should his informal efforts be unsuccessful. Essentially, the affidavit as well as J.S.'s testimony, describe decisions on various fronts which denied his request to have his daughter go directly from the seventh to the ninth grade based upon the reasons provided.

While I can certainly understand the frustration that the petitioners have experienced-indeed they acknowledge that the issue has been "tearing them apart"-from almost immediately after they agreed to D.S. being retained at first grade,-the circumstances of respondent's decision while it may have been delivered more courteously and sensitively in J.S.'s view, are not particularly probative in respect to the motion for emergent relief.

One aspect of the affidavit however was somewhat disturbing, J.S. notes at paragraph seven that one of the reasons which was provided to him the Superintendent of Schools of the Flemington-Raritan District for not promoting his daughter was that such action "was typically never done and that [the superintendent] could only follow the procedure set by the principal of the middle school." Affidavit J.S. at paragraph seven. In addition, on inquiry to respondent's counsel, I was advised that she was unaware of any written policy or board resolution which addressed the issue of when and under what circumstances a child may be advanced beyond the next expected grade. She did, however, note that on occasion there were circumstances under which exceptionally gifted children were allowed to take advance courses. While it may be beyond the purview of this decision as well as the purview of the law imposed upon local school districts, the respondent Board might find it worthwhile to consider adopting a written policy addressed to when and under what circumstances a child may advance a grade.

Lastly, the parents articulated what, in my judgment, was the central reason for their request to have D.S. skip a grade. They noted in their statements at oral argument that D.S. was physically very mature for her age and that because she appeared to be older than her classroom peers, she suffered from a lack of self-esteem, experienced difficulties in socialization and was

bored and unmotivated. The petitioners related that many of her teachers referred to D.S. as the "mother of the class" in that she assisted teachers in various ways and exceeded the skills and maturity of her classmates. That circumstance, petitioners indicated, was the primary reason why they decided at this time to try to right the wrong that they believed occurred when D.S. repeated her first grade.

I have perused the various school records presented on behalf of the petitioners in support of their motion. I think it would be fair to characterize D.S.'s performance throughout the years as satisfactory to above average in terms of her grades. In addition, comments by teachers if anything indicated that she is a highly motivated child who strives to improve. In addition, there are areas of her academic performance that through the years are noted as requiring improvement. (It should be noted as well that some of the comments are illegible because the documents are not originals but photocopies). For example, her report card for her seventh grade, dated June 25, 1996, indicates for the fourth marking period a scattering of grades from A+ to B in a variety of course work. This represents improvement in a variety of courses, notably in foreign language skills. The teacher's comments reinforce this conclusion by indicating that D.S. has improved test grades in that area and that she demonstrates considerable effort and "is a pleasure to have in class". Her activities in class were described as "active" and her work product as "excellent". Thus, in my opinion, the results of the report card for seventh grade strongly suggest that, notwithstanding the argument offered by D.S.'s parents, the record demonstrates that D.S. is a motivated, involved, participatory child notwithstanding the suggestions made by her parents that she is not as motivated as she should be and is bored. In addition, her classwork, while good, is certainly not considered so exemplary either in the seventh grade or previous grades to warrant the conclusion that, separate and apart from what occurred in the first grade, she should skip her final grade in middle school and proceed directly to high school.

This conclusion is also reinforced by the submissions made on behalf of Flemington-Raritan. It should of course be noted that while D.S.'s parents impress me as being intelligent and knowledgeable, they are not expert educators, are deeply and emotionally involved in the issue of D.S.'s education and to that extent one must assume that they have been extraordinarily involved not just at this time but since the decision was made at D.S.'s first grade level not to dispute the

decision to have to repeat that grade. To that extent, their expressions in respect to their views of D.S.'s educational growth and capability must be viewed with some skepticism since it is colored by their love and emotional commitment to their daughter's educational experience.

Reinforcing the assessment that I have derived through an examination of the educational packet submitted on behalf of D.S. by her parents, was the certification of Mr. Paul G. Metzger, the principal of the Reading-Fleming Middle School which D.S. attends. Principal Metzger unequivocally states that D.S. has not been inappropriately placed in the eighth grade for the 1996-1997 school year. Moreover, he notes, "advanced placement to the ninth grade would be *detrimental* to D.S.'s educational development [Certification, Paul G. Metzger, paragraph four, emphasis added]. He notes as well, that in considering the request made by the petitioners in this case to advance D.S. to the ninth grade at Hunterdon Central High School he conferred with D.S.'s guidance counselor and her seventh grade teachers. He also thoroughly reviewed her academic record. Based upon these assessments, Principal Metzger, in conjunction with the views expressed by D.S.'s seventh grade teachers and her guidance counselor, unambiguously concluded that "advanced placement in this case would not be appropriate." Id. at paragraph seven.

All of the educators directly involved with D.S. determined that D.S. must complete the eighth grade curriculum so as to be successful when entering high school as a freshman ninth grader. Counsel for Flemington-Raritan emphasized at oral argument that the reason that the eighth grade experience is so significant is because its provides a launching pad for the learning experience at the high school level. Particularly, she noted, that in eighth grade students commence independent study particularly in respect to language skills as well as mathematics-both important factors in the development of the student so that he or she may satisfactorily make the transition to a high school curriculum.

Principal Metzger uses the word "vital" to characterize D.S.'s need to continue in the eighth grade so as to encourage appropriate educational development. Id. at paragraph ten. In respect to the eighth grade curricula and educational approach to learning that I have previously touched upon, Principal Metzger at paragraph eleven of his certification, indicates and embellishes

upon what counsel argued on the motion. He noted that the approach to foreign languages, mathematics and science is "significantly different" than learning instruction received in the seventh grade and that the eighth grade course of study and the approach taken at the middle school "is essential to adequately prepare D.S. for our regional high school curriculum." Principal Metzger characterized the independent learning skills taught in the eighth grade as a "transitional learning phase," necessary and vital for the preparation for high school. He also concludes that based upon D.S.'s tests scores and performance in the seventh grade it is the view of D.S.'s teachers as well as the principal that the educational program which is offered in the eighth grade "is necessary for D.S.'s educational and social development." Id. at paragraph twelve. Further, he notes that were D.S. to be accelerated to a ninth grade level and attend the regional high school in Hunterdon, the result would "not be in her best interests."

Principal Metzger also addressed himself to the concerns articulated by the petitioners at hearing and elsewhere that D.S. as a fourteen year old, will be significantly older than the other students entering eighth grade in September. He notes at paragraph fifteen that based upon his review with the guidance office, the student body entering eighth grade in D.S.'s middle school in September would have approximately 30% of its class attaining the age of fourteen by December of 1996. The petitioners dispute that finding indicating at hearing that 30 *children* rather than 30% of the class would reach that age. Clearly, I cannot make a factual determination in regard to this issue at the emergent relief level; nevertheless, in my view the question of how many other students will be fourteen is not of significant probative value in assessing the standards for granting or denying the petitioners' motion.

IV

Based upon the foregoing factual scenario, I shall now address the standards set forth earlier in this opinion in respect to when a motion for emergent relief should or should not be granted and whether the petitioners have been able to meet their burden of proof.

The first requirement in order to determine that the motion should be granted is that the moving party shall demonstrate a reasonable likelihood that it will prevail on the merits at a full

plenary disposition of the proceedings. In my judgment, the petitioners have failed to meet their burden in this regard. Based upon the pleadings in this matter, as well as the affidavit, certification and oral argument, the genesis of the petitioners' claim that D.S. rightfully belongs in ninth grade is their assertion that during D.S.'s first grade experience in 1988-1989, when she was required to repeat that grade as a consequence of what petitioners indicate was her score on the Gesell Test, the guidance counselor who assessed that test and determined to require D.S. to repeat first grade was mistaken. In fact, had the guidance counselor properly read the results of D.S.'s score on the Gesell Test, petitioners assert, she would have proceeded directly to second grade.

Pursuant to *N.J.A.C.* 6:24-1.2, in order to properly initiate a proceeding before the Commissioner of Education to determine a controversy or dispute arising under the school laws:

> [A] petitioner shall file with the Commissioner the original copy of the petitioner, together with proof of service of a copy thereof on the respondent or respondents. Such petition shall be filed within ninety (90) days after receipt of the notice by the petitioner of the order ruling or other action concerning which the hearing is requested.

Any consideration of the timeliness issue must begin with the determination of when the petitioner received "notice . . . of the order, ruling or other action" complained of. The petitioners fully acknowledge that when they were advised by an administrative representative of respondent in 1988-1989 that D.S.'s scores were such that she should repeat first grade they did not oppose that action and reluctantly agreed to the decision. They knew or reasonably should have known in 1988-1989 that if they believed that the district was improperly compelling their daughter to repeat first grade, a means of redress would be available. Petitioners struck me as intelligent people. D.S.'s mother formerly was employed by a law firm. D.S.'s father is, to the best of my recollection, active in the local board of education where he resides. The fact that an administrator may have told the petitioners that the decision was final should not place any parents in the position of assuming that they could not seek redress outside of the school itself. Indeed, that was not even the scenario alleged here. D.S.'s parents *agreed* to the decision (see petition at paragraph seven).

In my judgment, a very serious question is thus raised as to whether the claim asserted in this matter comports with the ninety (90) day rule. A very strong case could be made that the basis of this appeal,-if indeed that is the basis-there was some ambiguity in respect to the positions expressed by the petitioners at oral argument,-is stale. The petitioners could have and should have, if they felt aggrieved when it was decided that their daughter should repeat first grade, opposed that decision. Perhaps a telephone call to an attorney who has some experience in education law would have been the appropriate thing to do and could have, in theory, (I am not judging the issue of whether the decision to hold D.S. back to repeat first grade was or was not proper) resolved the matter to the satisfaction of the petitioners eight years ago. Thus, there is a reasonable likelihood in my opinion that the petitioners cannot overcome the initial hurdle to prevailing on the merits in this matter-demonstrating that their assertions in respect to the genesis of this problem has been timely brought before the Commissioner pursuant to the ninety (90) day rule as set forth under *N.J.A.C.* 6:24-1.2.

But even if *arguendo* the petitioners are able to overcome the ninety (90) day rule, it is my view that they still have not been able to demonstrate a likelihood of prevailing on the merits in this matter. Determinations in respect to pupil promotion and remediation rests in the sound discretion of the local school districts. See *N.J.S.A.* 18A:35-4.9; *N.J.A.C.* 6:8-7.1(a). The exercise of this sound discretion must be examined in the context of the general proposition that pupils in New Jersey are entitled to a free and appropriate public education. See 20 *U.S.C.* 1401(a)(20). Thus, even if the petitioners would be able to overcome the obstacle of the probable untimeliness of their appeal, when based upon an argument that the decision to hold their daughter back to repeat first grade was improper, they still have not approached the burden of proof necessary to prevail. They would unlikely be able to to demonstrate that the decision arrived at by the respondent, to require D.S. to complete eighth grade, with full knowledge of the arguments offered by the petitioners in respect to what they described as a mistake made in holding their daughter back in first grade, was arbitrary, capricious, unreasonable and contrary to the obligation of Flemington-Raritan to provide D.S. with a free and appropriate public education. All of the evidence presented demonstrates that from an academic and learning perspective D.S. belongs in eighth grade. I will not repeat the factual basis of this determination but will refer the reader back to my discussion of the school records offered by the petitioners as part of its motion

and to the certification of the principal of the middle school, Mr. Metzger. It would seem that the position that D.S. should proceed to eighth grade and satisfactorily complete that program was a unanimous one taken by all of those educators directly involved in her learning experience at Flemington-Raritan. The petitioners themselves have no complaints in respect to the quality of her education or her learning experience. That they may believe that D.S. has become bored with school work may very well be true. There are many students who are bored with school work who nevertheless must overcome that boredom to obtain a foundation for higher education.

The primary basis, in my opinion, of the decision by the parents to request that D.S. skip eighth grade is their perception of her emotional discomfort. She, in their opinion, is physically more mature and more developed than other children in her grade level and she perhaps is also more emotionally mature. That, however, is not a reason to allow a child to skip a grade. For if we were to adopt that approach, all chaos would break loose within our school system. One can only imagine if the Commissioner of Education would adopt as a standard for promotion or demotion the physical maturity of the child and/or his or her emotional development. Would that mean that if a child is maturing more slowly than his or her peers he should be demoted? Obviously, children develop at different periods of time in their lives. One cannot determine when hormones become active. There is no authority provided by the petitioners or found by my office which would remotely suggest that with all else being equal, a child should be permitted to skip a grade because she has become more physically mature than her peers.

While I sympathize with the position articulated by the petitioner in respect to the possible emotional impact D.S.'s maturity may have on her, in of itself that cannot serve as a basis to allow her to skip eighth grade. The overriding educational objectives which have been presented on this motion are far more compelling in respect to allowing her to continue on the educational track that she has been on since second grade. It should also be noted as an aside that no argument has been offered to demonstrate that *even if a child has been improperly held back* at first grade level the appropriate remedy would be to permit that child to skip a grade eight years later. In my view, it would be much more damaging to D.S. to miss the educational experience of the eighth grade and proceed directly to high school,-even if she found herself among children and young men and women who were as physically advanced as she. Based upon the foregoing, I

CONCLUDE that the petitioners have been unable to demonstrate a reasonable likelihood of succeeding on the merits of this matter should it proceed to plenary hearing.

The second prong to be satisfied in order to be granted emergent relief is for the petitioners to demonstrate that immediate and irreparable harm will in all likelihood result to the moving party should the motion be denied. In my judgment, the petitioners have failed to satisfy this standard as well. School is scheduled to begin September 4, 1996. This holds true for both the middle school and for the Hunterdon-Regional High School. Why this matter came before me as late as it did remains unclear. The point is however that there is a greater likelihood that irreparable harm would result by *granting* the motion then by denying it. So for example, if D.S. were granted her request to skip eighth grade and sent to ninth grade and if thereafter either the Commissioner reverses this decision by the administrative law judge or he upholds it and the district requests a full plenary hearing, that plenary hearing may not be conducted until several months from now and a final decision arrived at months thereafter. Suppose that decision reverses the initial ruling which sent D.S. to high school and sometime in mid-semester, perhaps as late as early 1997, she is returned to eighth grade? As Mr. Granello noted in his oral argument, under those circumstances, D.S. would in all likelihood be unable to complete eighth grade by the conclusion of the 1996-1997 school year and would thus find herself falling even further behind chronologically then where she already stands. In addition, the emotional impact on her could be traumatic. But even if this scenario were rejected, in my judgment, there is no immediate and irreparable harm here. The petitioner has been satisfactorily performing academically and it makes much more sense to have her stay put in eighth grade unless and until her parents are able to demonstrate on the substantive merits of this proceeding that she is improperly placed. Since I have already indicated that there is very little likelihood of there being able to establish that, both from a timeliness perspective as well as substantively, there is a far greater likelihood that harm would result to D.S. by dropping her into high school and finding several months from now that she was improperly placed. Accordingly, I **CONCLUDE** that the petitioners have been unable to demonstrate that immediate and irreparable harm will in all likelihood result to D.S. should the motion be denied.

The final prong of the emergent relief standard requires that the remedy sought be as limited in scope and temporary as possible. In this instance, the remedy sought is, on the contrary, as broad in scope as can be effected: the petitioners are requesting that D.S. be plucked out of middle school after having completed seven successive grades and dropped into a brand new much more sophisticated environment-the Hunterdon Regional High School. One can only think of the trauma she may experience under those circumstances. She cannot be a "little bit" in high school; she would be totally uprooted from an educational environment she has been on track with since second grade. I therefore **CONCLUDE** that the petitioners have failed to demonstrate that the remedy which it has sought is limited in scope and is as temporary as is possible. Indeed, it is my view that from every perspective (perhaps excepting the argument offered by the petitioners that D.S. may feel awkward because she is more physically mature then other young girls surrounding her) it is in D.S.'s best interests to remain in eighth grade, continue to achieve success from an academic perspective, continue to mature, and then enter high school successfully prepared to meet the academic, emotional and social challenges with which she will be confronted. She will hopefully learn from them and they will enrich her life.

For all of the foregoing reasons, the petitioners' motion for emergency relief be and is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

September 3, 1996

DATE

STEVEN C. REBACK, ALJ

ej

WITNESSES

For Petitioner:

None

For Respondent:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Packet of Educational materials relating to D.S.'s entire school experience

P-2 Affidavit of J.S.

For Respondent (Flemington-Raritan)

R-1 Certification of Mr. Paul G. Metzger

J.S. AND P.S., on behalf of minor child, D.S.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN SCHOOL DISTRICT, HUNTERDON COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND	:	
THE HUNTERDON CENTRAL REGIONAL BOARD OF EDUCATION,	:	
INTERVENING RESPONDENT.	:	

The audiotape of emergent proceedings before the ALJ, and the initial decision on Motion for Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) denying emergent relief as petitioner failed to meet the standards for such relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), *N.J.A.C.* 1:1-12.6, and *R.* 4:52-1.

Further, upon review of the facts and arguments presented in the petition and answer, and in reviewing both parties' arguments as to petitioners' likelihood of success on the merits and the ALJ's findings in such regard, it is clear that petitioners' filing is untimely, based on the fact that she is challenging a Board determination from the 1988-89 school year when she was required to remain in first grade, so that this matter must be dismissed on the merits. *N.J.A.C.* 6:24-1.2(c) plainly states that a petition "***must be filed within 90 days after receipt of

the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested."

However, even if petitioner's appeal were to be considered timely, it is equally plain from the existing record that the Board has advanced a reasonable basis upon which it denied petitioners' request for D.S. to bypass the eighth grade. Thus, the Commissioner finds that petitioners cannot demonstrate that the decision arrived at by the Board was arbitrary, capricious or unreasonable as is required by law in order for it to be reversed, so that no purpose would be served by further proceedings in this matter.

Accordingly, the ALJ's determination to deny emergent relief is adopted for the reasons expressed therein, and the Petition of Appeal is hereby dismissed. Consistent with this holding, the Commissioner directs that the file of this matter be returned to the agency by OAL in accordance with *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 25, 1996

DATE OF MAILING SEPTEMBER 25, 1996

417-96

417-96 SEC

IN THE MATTER OF MARCY MATLOSZ,	:	
MANSFIELD TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, WARREN COUNTY.	:	DECISION
	:	

SEPTEMBER 26, 1996

Resolution Adopting Decision

In the Matter of Marcy Matlosz
Mansfield Township Board of Education

Whereas, Marcy Matlosz was appointed as a new board member to the Mansfield Township Board of Education in June 1993; and

Whereas, Marcy Matlosz was elected to the Mansfield Township Board of Education for a three-year term in April 1994; and

Whereas, the School Ethics Act at N.J.S.A. 18A:12-33 requires all new board members to attend board member training within one-year of appointment or election to the board; and

Whereas, on June 19, 1995, the School Ethics Commission issued an Order to Show Cause against Marcy Matlosz for failing to comply with the statutory requirement; and

Whereas, Marcy Matlosz supplied a certification on July 11, 1995, stating that she was not aware of the requirement; and

Whereas, the New Jersey School Boards Association publishes the requirement to attend training, the dates of training and sends correspondence to board members who have not attended training; and

Whereas, the New Jersey School Boards Association held sixteen training sessions between May 1994 and March 1996, five of which occurred after the Order to Show Cause issued in June 1995; and

Whereas, Marcy Matlosz was appointed to the board in 1993, elected to a full three-year term in 1994 and did not attend training until March 16, 1996; and

Whereas, the School Ethics Commission, having considered her initial response, but being unaware of her subsequent registration for training, recommended her removal from the Mansfield Township Board of Education on January 23, 1996, and forwarded its recommendation to the Commissioner of Education; and

Whereas, the Commissioner of Education, being apprised of her subsequent attendance at training, remanded the case to the School Ethics Commission for further proceedings in light of the evidence that Ms. Matlosz attended training; and

Whereas, the School Ethics Commission considered all of the aforementioned documents and heard testimony from Marcy Matlosz at its meeting of May 28, 1996, regarding her reasons for not attending training until March 16, 1996; now therefore

BE IT RESOLVED that the School Ethics Commission recommends that the Commissioner of Education impose a penalty of a two-month suspension for failing to attend training until March 16, 1996, in violation of N.J.S.A. 18A:12-33.

Paul C. Garbarini 6/18
Paul C. Garbarini, Chairman

Upon adoption of this formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 225 East State Street, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." You must copy the School Ethics Commission on your comments.

I hereby certify that the Resolution was adopted by the School Ethics Commission at its public meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

ljb/matl528

IN THE MATTER OF MARCY MATLOSZ, :

MANSFIELD TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, WARREN COUNTY. : DECISION

:

The Commissioner of Education has carefully considered the record of this matter and the Resolution Adopting Decision of the School Ethics Commission, dated June 18, 1996, including a recommendation for respondent's two-month suspension from office for failure to attend Board member training until March 16, 1996, in violation of *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4.

Respondent's comments concerning the recommended sanction were timely filed with the Commissioner on June 19, 1996. Respondent requests that the Commissioner deny the Commission's recommendation of suspension in that she is "a working mother and was unable to take a course prior to March of 1996 due to her hectic schedule." Respondent further notes that if March 1996 were too late to take the course, she should have been notified of this fact in July 1995 when she registered for such course.

Upon review, the Commissioner adopts as his own the recommendation of the Commission. The Commissioner concurs that a two-month suspension is appropriate in view of respondent's significant and insufficiently justified delay in obtaining the required training, noting that

> the New Jersey School Boards Association held sixteen training sessions between May 1994 and March 1996, five of which occurred after the Order to Show Cause issued in June 1995***.
> (Resolution Adopting Decision at Para. 7)

In reaching this determination, the Commissioner notes that *N.J.S.A.* 18A:12-33 is clear in its mandate for training within the first year of board membership and imposes no requirement upon either the School Ethics Commission or the New Jersey School Boards Association to grant extensions for noncompliance. Rather, pursuant to *N.J.A.C.* 6:3-9.4(c),the School Boards Association need only "present to the School Ethics Commission a list of those board members who have not fulfilled the training mandate for the previous filing period" for enforcement as set forth at *N.J.A.C.* 6:3-9.4(d).

Accordingly, IT IS HEREBY ORDERED that respondent be suspended from office for a period of two months from the date of the Board's receipt of this decision.

COMMISSIONER OF EDUCATION

SEPEMBER 26, 1996

DATE OF MAILING SEPTEMBER 26, 1996

418-96

418-96

THOMAS FEDOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning principal contended that the Board improperly reduced his salary in violation of his tenure rights when it transferred him from high school principal to elementary principal. During the 1994-95 fiscal year, petitioner's salary remained frozen at $83,341, the amount he had previously earned as a high school principal. In May 1995, the Board adopted a resolution increasing petitioner's salary for the 1995-96 fiscal year to $87,463. Three weeks later, however, the Board adopted a second resolution purportedly rescinding the earlier resolution and reinstating the salary of $83,341.

ALJ concluded that the Board's attempt to reduce petitioner's existing salary for 1995-96 violated the statutory protection of the tenure law. *N.J.S.A.* 18A:28-5 provides that principals who have acquired tenure in their positions "shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause." ALJ ordered the Board's action of May 30, 1995, by which it sought to reduce petitioner's salary to $83,341, declared to be null and void. Board was ordered to reinstate petitioner's salary of$87,463 for the 1995-96 school year and to pay him the difference of $4,122 within thirty days of the date of the Commissioner's decision.

Commissioner concurred with the conclusion of the ALJ that the Board's attempted action to rescind petitioner's vested salary was invalid in that such action contravened petitioner's tenure rights pursuant to *N.J.S.A.* 18A:28-5. Commissioner directed payment to petitioner.

SEPTEMBER 26, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9787-95

AGENCY DKT. NO. 306-7/95

THOMAS FEDOR,

Petitioner,

v.

ELMWOOD PARK

BOARD OF EDUCATION,

Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Matthew P. DeMaria, Esq., for respondent

Record Closed: May 13, 1996 Decided: August 9, 1996

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a school principal who contends that a board of education improperly reduced his salary in violation of his tenure rights. Effective July 1994, the board of education transferred petitioner from principal of the high school to principal of

an elementary school. Both principalships are twelve-month positions.[1] During the 1994-95 fiscal year, petitioner's salary remained "frozen" at $83,341, the higher amount that he had previously earned as a high school principal. On May 9, 1995, the board adopted a resolution increasing petitioner's salary for the upcoming 1995-96 fiscal year to $87,463. Three weeks later, however, the board adopted a second resolution purportedly rescinding the earlier resolution and reinstating the salary of $83,341.

Basically, the case presents two issues: First, whether the action of the board constitutes a "reduction in compensation" in contravention of petitioner's tenure rights under *N.J.S.A.* 18A:28-5. Second, whether petitioner's salary should remain frozen at the high school principal's salary for 1993-94 or be increased to reflect the rate for an elementary principal on the 1995-96 salary guide. Petitioner claims that he is entitled to receive the salary of an elementary principal on a ten-month salary guide, adjusted to twelve months. Respondent argues that petitioner is entitled to the same salary that he was receiving as high school principal at his year of transfer until such time as the salary on the elementary principal's guide would be greater.

Procedural History

On July 31, 1995, petitioner Thomas Fedor ("Fedor") filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent Elmwood Park Board of Education ("Board") filed its answer on August 15, 1995. Subsequently, on September 7, 1995, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for determination as a contested case. Since all material facts are undisputed, the parties have agreed to submit the matter for disposition on stipulated facts. They filed a written stipulation of facts on February 28, 1996. Thereafter, both parties filed legal briefs and petitioner filed a reply brief. The record closed on May 13, 1996. Exhibits are listed in the appendix.

[1]Ordinarily, an elementary principalship in this district is a ten-month position.

Findings of Fact

The parties have entered into the following stipulation of facts:[2]

1. Petitioner is a tenured principal employed by the respondent. By virtue of his service, petitioner had tenure as a principal prior to the 1993-94 school year.

2. For the period July 1, 1993 to June 30, 1994, petitioner was appointed by the respondent to the position of High School Principal. This was a 12 month position and petitioner's annual salary for that time was $83,341 ($82,766 base salary plus $575 longevity).

3. By letter dated February 25, 1994, the petitioner was notified that he was being reassigned from his position as Principal, Elmwood Park Memorial Junior/Senior High School to Principal of the Gilbert Avenue School, effective July 1, 1994.

4. Petitioner received a memorandum, dated September 26, 1994, providing him with a copy of the job description adopted by the respondent and applicable to his assignment as an Elementary Principal.

5. Petitioner was employed by the respondent as Principal of the Gilbert Avenue School from July 1, 1994 through June 30, 1995. He received an annual salary of $83,341 because his previous salary as a High School Principal was higher than that of an Elementary School Principal.

6. Petitioner was reappointed by the respondent as Principal of the Gilbert Avenue School, effective July 1, 1995 and is scheduled to work through June 30, 1996. This employment was confirmed in a resolution adopted by the respondent on May 9,1995.

7. On May 9, 1995, the respondent took the following action:

   BE IT RESOLVED: that the superintendent recommends that the board of education approve the appointment(s) of the following school district administrators for the 1995-1996 school year as listed below:

[2] References to the attached exhibits have been omitted.

NAME	POSITION	SALARY
	* * *	
Thomas Fedor	Principal (Gilbert)	$87,463
	* * *	

NOTE: Salaries include longevity if applicable

Approved unanimously by roll call vote of the members present.

8. Petitioner received a memo, dated May 10, 1995, confirming his appointment for the 1994-95 school year and establishing his salary for such employment at $83,341 per year. Petitioner signed and returned the annual notice of salary for the 1994-95 school year.

9. Petitioner received a memo, dated May 10, 1995 providing him with an annual notice of salary for the 1995-96 school year. Consistent with he respondent's resolution of May 9, 1995, the annual notice indicates that petitioner's 1995-96 salary would be $87,463 per year. Petitioner signed and returned this annual notice.

10. On May 30, 1995, the respondent took the following action:

PERSONNEL

MOTION OF: Mr. Freitag
SECONDED BY: Dr. Landou

BE IT RESOLVED: that the superintendent recommends that the board of education rescind the resolution (May 9, 1995) with reference to the following administrator:

NAME	SALARY	LONGEVITY	TOTAL SALARY
Tom Fedor	$86,888.	575	$87,463.*

*12 month position

The above motion was carried by a vote of eight (8) ayes and one (1) no (Dr. Landou).

MOTION OF: Dr. Landou
SECONDED BY: Mr. Luke

BE IT RESOLVED: that the superintendent recommends that the board of education approve the salary (1995-1996) for the following administrator per contractual that the superintendent recommends that the board of agreement:

NAME	SALARY	LONGEVITY	TOTAL SALARY
Tom Fedor	$82,766.	575.	$83,341.*

12 month position

The above motion was carried by a vote of eight (8) ayes and one (1) no (Dr. Landou).

11 Petitioner received a memo, dated May 31, 1995, notifying him of the respondent's action of May 30, 1995, rescinding the resolution it adopted on May 9, 1995, establishing petitioner's salary at $87,463 for a 12 month position and approving his salary for the 1995-96 school year at $83,341 for a 12 month position.

12. The respondent and the Elmwood Park Administrators Association have entered into a collective negotiations agreement establishing terms and conditions of employment for the 1993-94 through 1995-96 school years. This agreement is applicable to, among others, Principals employed by the respondent. Salaries for employees covered by the agreement, including principals, are contained in Article VI of the agreement.

13. Respondent's Gilbert Avenue School is an elementary school.

14. Twelve month principals employed by the respondent are paid in 24 equal installments during the course of the school year. While employed as Principal of the Gilbert Avenue School, petitioner was paid his annual salary in 24 equal installments from July 1, through June 30.

15. Twelve month principals employed by the respondent receive 20 vacation days and 12 sick days per year. While employed as Principal of the Gilbert Avenue School, petitioner has received 20 vacation days and 12 sick days plus two additional sick days for years of service.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board's attempt to reduce Fedor's existing salary for 1995-96 violates the statutory protection of the tenure law.

Fedor never challenged the Board's original decision to transfer him from principal of the high school to the equivalent rank of elementary school principal. *See Williams v. Plainfield Bd. of Educ.*, 176 *N.J. Super.* 154, 158 (App. Div. 1980), *certif. den.* 87 *N.J.* 306 (1981). Similarly, he did not complain about any loss of potential earning power, in light of the settled legal principle that "future increases in salary, or salary expectation, is not an appropriate factor to be considered in determining the validity of a transfer." *Williams,* at 162. However, when the Board voted to increase his salary for 1995-96 and then voted to rescind that increase, Fedor initiated both a grievance proceeding and the present action before the Commissioner to vindicate his tenure rights. In non-binding arbitration conducted as part of the grievance procedure, the arbitrator determined that Fedor does not possess any contractual entitlement to the larger salary. Nonetheless, the arbitrator expressly acknowledged that he had "no authority to rule on any question with statutory tenure" and "could only rule on contractual tenure, if appropriate." *Elmwood Park Bd. of Educ. and Elmwood Park Adm'rs & Supervisors Ass'n*, Case No. 18 390 00428 95 (April 15, 1996) (at 13). Moreover, the nature of the arbitrator's nonbinding opinion is advisory only. Thus, the arbitration decision does not resolve the question of Fedor's rights under Title 18A, which falls clearly within the Commissioner's general jurisdiction "to hear and determine . . . all controversies and disputes arising under the school laws." *N.J.S.A.* 18A:6-9.

N.J.S.A. 18A:28-5 provides that principals who have acquired tenure in their positions "shall not be dismissed or *reduced in compensation* except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause." (Emphasis added.) *N.J.S.A.* 18A:6-10 reiterates that no tenured teaching staff member shall be *reduced in compensation*, except for inefficiency, incapacity, unbecoming

conduct or other just cause and then only after a hearing held in accordance with the Tenure Employees Hearing Law. Related statutory provisions, not pertinent here, authorize school boards to reduce the size of its staff for reasons of economy or efficiency and place any affected employees on a preferred reemployment list. *N.J.S.A.*. 18A:28-9 to -14.

A long line of school law decisions has interpreted this reduction-in-compensation language as prohibiting a local board from rescinding a resolution approving a tenured employee's salary in a given year, unless the board successfully brings tenure charges or the employee is laid off or demoted as the result of a reduction in force. Illustratively, in *Anson v. Bridgeton Bd. of Educ.*, 1972 *S.L.D.* 638, 640 (Comm'r Dec. 5), the Commissioner declared that tenured teachers "acquired vested rights to the salaries established for them by the Board's adoption of their salary placement" and that they could not "be deprived of a right they had acquired by action of the board". *Accord, Docherty v. West Paterson Bd. of Educ.,* 1967 *S.L.D.* 297 (Comm'r Oct. 23), where the Commissioner ruled that a board may not adopt a subsequent resolution to correct a mistake in a tenured teacher's placement on the salary guide, if the mistake "was not of [the teacher's] making." *See also, Rivers v. Mercer Cty. Area Vo-Tech. Schs.*, 1984 *S.L.D.* 102, 108 (Comm'r Jan 17) and *Galop v. Hanover Twp. Bd. of Educ.*, 1975 *S.L.D.* 358 (Comm'r May 16), *aff'd* 1975 *S.L.D.* 366 (St. Bd. Sept. 10), where the Commissioner invalidated attempts by local boards to recoup small overpayments of salary that were not "of windfall proportions."

Recently, in *Gerity v. Woodbridge Bd. of Educ.*, 95 *N.J.A.R.* 2d (EDU) 522, 525 (Comm'r Sept. 12), the Commissioner reaffirmed the continuing validity of this precedent by delaying a school board from taking any corrective action until the contract year following approval of an erroneous salary amount. One reported appellate opinion recognizes that the tenure law prevents a board from reducing a tenured teacher's salary where both parties have "undertaken performance of the contract" and the teacher has already started to work. *Stockton v. Trenton Bd. of Educ.*, 210 *N.J. Super.* 150, 157 (App. Div. 1986). But the Commissioner's decisions go even further and protect a teacher's vested interest as soon as the board has

adopted a resolution setting the new salary, regardless of whether the teacher has yet worked under the new salary guide. *Cf. Docherty, supra* (school board fixed teacher's salary on April 6 and superintendent endeavored to correct error on June 7).

It may be that the State Board will someday want to reconsider whether the tenure law was truly intended to bar a school board from correcting clearly-erroneous payments of public funds to an employee. *But see Rivers, supra*, at 114, wherein the Commissioner cautioned that "until such authority is overruled by a change in the law," the statutory interpretation adopted by the State Board of Education is binding at the lower level. In any event, the current facts do not present an appropriate opportunity for the State Board to conduct a reappraisal of its earlier rulings. Contrary to respondent's unsupported assertion, this is not a situation where a school board is simply seeking to correct a clear error. Rather, the original resolution represents a good faith effort by the Board to set a fair salary for an administrator who had been involuntarily transferred to a new position. Faced with the task of adjusting a ten-month salary guide to fit the circumstances of an elementary principal who works for twelve months, the Board opted for the rationale choice of paying him at the elementary principal's rate for a full twelve months.[3] There is no logical inconsistency in paying twelve months of salary to an employee who actually works for twelve months and is treated like a twelve-month employee in terms of sick leave and vacation pay. Hence, the situation is very different from genuine mistake, such as inadvertently placing a teaching staff member on the wrong step of the salary guide for a person with his particular experience and qualifications.

In view of the conclusion that the Board's attempted rescission of Fedor's vested salary was invalid, it is unnecessary to address the second issue of when salary frozen at a higher level due to a lateral transfer should be "defrosted." It is noteworthy, however, that cases involving comparable situations have granted tenured employees

[3] Although the record does not disclose why Fedor was given a twelve-month assignment whereas most elementary principals in the district work only ten months, the Board may have felt that if he were to continue being paid at the frozen salary of a high-school principal, he should work a full twelve months.

a prorated share of salary calculated at their current rate on the salary guide. *See Bassett v. Oakland Bd. of Educ.*, 223 *N.J. Super.* 136 (App. Div. 1988) (full-time teacher transferred to a part-time position must be compensated at the salary rate for full-time teachers rather than at a lower hourly rate); *Casey v. Cinnaminson Bd. of Educ.,* 95 *N.J.A.R.* 2d (EDU) 585 (St. Bd. Oct. 5) (teacher's aide suffered a reduction of compensation when her salary rate dropped, even though her annual salary increased as a result of an extended work year). *See also, Allen v. Newark Bd. of Educ.*, OAL DKT. EDU 12013-93 (Oct. 13,1994), *adopted*, Comm'r (Nov. 30, 1994) (supervisor sustained no real damage as result of her transfer to a teaching position because her per-diem rate as a teacher exceeded her per-diem rate as a supervisor). Thus, the Board's original decision to pay Fedor at the elementary principal's rate is consistent with existing case law. Otherwise, Fedor would have be forced to work a longer year at a lower rate of pay than the other elementary principals in the district.

Order

It is **ORDERED** that the Board's action on May 30, 1995 by which it sought to reduce petitioner's salary to $83, 341 is declared to be null and void.

And it is further **ORDERED** that the Board reinstate petitioner's salary of $87, 463 for the 1995-96 school year and pay him the difference of $4,122 within thirty days of the date of the final administrative decision.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 9, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 12 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX
List of Exhibits

No.	Description
P-1	Copy of letter to Thomas E. Fedor from Melindo A. Persi, dated February 25, 1994
P-2	Copy of memorandum to designated staff personnel from Melindo A. Persi, dated September 26, 1994, with attached job description for elementary school principal
P-3	Copy of resolution adopted by the Elmwood Park Board of Education on May 9, 1995
P-4	Copy of memorandum to all district administrators from Joseph F. Casapula, dated May 11, 1995, with attachments.
P-5	Copy of annual notice of salary for 1994-1995, dated May 10, 1995
P-6	Copy of letter to staff member from Joseph F. Casapula, dated May 10, 1995, with attached annual notice of salary for 1995-96
P-7	Copy of resolution adopted by the Elmwood Park Board of Education on May 30, 1995
P-8	Copy of memorandum to Tom Fedor from Joseph F. Casapula, dated May 31, 1995, with attachments
P-9	Copy of negotiated agreement between the Elmwood Park Board of Education and the Elmwood Park administrators Association covering 1993-1994, 1994-1995 and 1995-1996.

P-10 Copy of opinion and award of arbitrator in the matter entitled Elmwood Park Board of Education and Elmwood Park Administrators and Supervisors Association, Case No. 18 390 00428 95, dated April 15, 1996

THOMAS FEDOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner concurs with the conclusion of the Administrative Law Judge that the Board's attempted action on May 30, 1995, to rescind petitioner's vested salary was invalid in that such action contravened petitioner's tenure rights pursuant to *N.J.S.A.* 18A:28-5.*

Accordingly, the initial decision is adopted as the final decision in this matter for the reasons articulated therein. The Board is directed to pay petitioner the difference in earnings to which he is entitled in accordance with the Commissioner's determination herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* The Commissioner finds it unnecessary to reach to the ALJ's dicta, on pages 8-9 of the initial decision, as to when salary frozen at a higher level due to a lateral transfer should be "defrosted."

419-96

419-96 SEC

IN THE MATTER OF BERNARDINE BEDELL, :

PEMBERTON BOROUGH BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, BURLINGTON COUNTY. : DECISION

:

SEPTEMBER 26, 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
BERNARDINE BEDELL	:	
PEMBERTON BOARD OF EDUCATION	:	
	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Ms. Bedell was elected to the school board in September 1994 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995

September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, the School Ethics Commission considered the board member's reply to the Order, but found same to be insufficient in light of the aforementioned notices and opportunities to attend training; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF BERNARDINE BEDELL,	:	
PEMBERTON BOROUGH BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BURLINGTON COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, on May 10, 1996, the Board secretary responded to such Order advising that the above-named Board member was scheduled to attend the October 22, 1996 training session; and

Whereas, the Commission, having considered such response, voted on June 18, 1996 to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, and forwarded this matter to the Commissioner of Education pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated June 20, 1996 from the Commission, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's decision recommending removal; and

Whereas, on July 9, 1996, the Pemberton Borough Board of Education filed a response to such decision stating that the above-named Board member has demonstrated her willingness to comply with the training mandate and has offered valid reasons for her inability to previously attend, further advising that this Board member was registered for the October 1996 training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and determines that, in light of the above-named Board member's demonstrated inability to attend prior sessions and registration at the next available training session in October 1996, the severe penalty of removal is not warranted at this time; now therefore

IT IS ORDERED that the above-named Board member shall not be removed, but shall be suspended for a period of two months to commence upon the Board's receipt of this decision, or until the required training is completed, whichever is longer.

COMMISSIONER OF EDUCATION

SEPTEMBER 26, 1996
DATE OF MAILING SEPTEMBER 26, 1996

420-96

420-96 SEC

IN THE MATTER OF TOM BURTON,	:	
STOW CREEK BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY.	:	DECISION
	:	

SEPTEMBER 26, 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
TOM BURTON	:	
STOW CREEK BOARD OF EDUCATION	:	
	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Mr. Burton was elected to the school board in April 1995 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995

September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, the School Ethics Commission considered the board member's reply to the Order, but found same to be insufficient in light of the aforementioned notices and opportunities to attend training; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF TOM BURTON, :

STOW CREEK BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

CUMBERLAND COUNTY. : DECISION

:

Whereas, the School Ethics Commission has acted pursuant to the authority granted it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, on May 2, 1996, the above-named Board member responded to such Order, advising that he planned to take the training course scheduled for October 22, 1996; and

Whereas, the Commission considered the reply to the Order and found same to be insufficient in light of the aforementioned notices and opportunities to attend training; and

Whereas, the above-named Board member was given an opportunity to appear before the Commission at a meeting concerning his failure to take the training course but did not appear; and

Whereas, the Commission voted on June 18, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 20, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner comments to the Commission's resolution recommending removal; and

Whereas no comments to the aforesaid resolution were filed; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission. After such review, the Commissioner finds that, based on the Board member's assertions that he intends to take the required training on October 22, 1996, the severe penalty of removal is not warranted at this time; however, some lesser penalty is warranted for such Board member's insufficiently explicated delay in meeting the requirements of *N.J.S.A.* 18A:12-33. Wherefore, the Commissioner modifies the Commission's penalty determination of removal to suspension of the above-named Board member; now therefore

IT IS ORDERED that the above-named Board member shall not be removed, but rather shall be suspended from office for a period of two months from the date of the Board's receipt of this decision, or until such time as he completes the required training, whichever is longer.

COMMISSIONER OF EDUCATION

SEPTEMBER 26, 1996
DATE OF MAILING SEPTEMBER 26, 1996

421-96

421-96 B

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF LAWNSIDE,	:	DECISION
CAMDEN COUNTY.	:	
	:	

SYNOPSIS

Board appealed General Fund cap waiver in the amount of $381,425 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of the full amount of $381,425 in cap waiver monies for a total General Fund tax levy of $2,117,150 for the 1996-97 school year.

SEPTEMBER 30, 1996

IN THE MATTER OF THE CAP WAIVER	:	
APPEAL OF THE BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF LAWNSIDE,	:	DECISION
CAMDEN COUNTY.	:	
	:	

For the Board of Education of the Borough of Lawnside,
Harvey C. Johnson, Esq.

For the Borough Council of the Borough of Lawnside,
Wayne Bryant, Esq. (Freeman, Zeller & Bryant)

This matter was opened before the Commissioner of Education on June 17, 1996, through the filing of a Petition of Appeal by the Lawnside Board of Education (Board), seeking to appeal the defeat of the Board's cap waiver proposal at the annual school election.

PROCEDURAL HISTORY

In March 1996, the Board advised the County Superintendent that the Board would need a "voter cap waiver" pursuant to *N.J.S.A.* 18A:7D-28(f) in order to be able to provide for a thorough and efficient system of education (T & E) in the District. Following a series of meetings and discussions, the County Superintendent ultimately determined, by way of letter dated March 13, 1996, that the entire amount of the Board's proposed $381,425 voter cap waiver was necessary for T & E and, therefore, appealable in the event of voter defeat.

At the annual school election on April 16, 1996, the Board submitted a proposed General Fund tax levy question of $1,817,725, as well as its proposed cap waiver question of $381,425, to the voters of Lawnside; both questions were defeated by the voters. On May 21, 1996, the Board of Education determined to reduce the 1996-97 budget by $82,000 due to a change of circumstance in the District. Pursuant to *N.J.S.A.* 18A:22-37, the Mayor and Council reviewed the defeated budget, and determined to certify a tax levy of $1,735,725 reflective of the

$82,000 reduction made by the Board. As a result of this reduction, the Mayor and Council of the Borough of Lawnside expressed support for the original cap waiver amount; so that the appeal filed on June 17, 1996 was deemed uncontested.

On June 17, 1996, the County Superintendent submitted his affidavit and supporting documents attesting to the process that led to his conclusion, and that of the Department of Education's Cap Waiver Review Panel, that the cap waiver funds finally approved were both necessary for T & E and unable to be reallocated from within the base budget. No replies to this filing were made by the parties.

The Board's Position Statement was duly filed on July 2, 1996, at which time the record was deemed closed, pending receipt of the June 30 report below.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner, dated March 12, 1996, and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1996-97 budget the amount of anticipated undesignated surplus.

The amounts at issue in this appeal are as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Council	
General Fund	$1,817,725	General Fund	$1,735,725

Amount of Reduction by Council		Amount of Reduction in Dispute	
General Fund	$ 82,000	General Fund	$ -0-

Amount of Cap Waiver as T & E and Appealed Herein	$381,425
Amount of Cap Waiver Not Approved as T & E and Appealed Herein	$ -0-
TOTAL AMOUNT ON APPEAL	$381,425

The cap waiver requested by the Board included the following line items, which were determined by the County Superintendent to be necessary for T & E as set forth below:

Account Title	Account Number	Amount
Kindergarten-Teacher Salaries	11-110-100-101	$ 5,427
Grades 1-5-Teacher Salaries	11-120-100-101	27,626
Grades 6-8-Teacher Salaries	11-130-100-101	33,436
Other Salaries for Instruction	11-190-100-106	13,020
Other Salaries for Instruction	11-205-100-106	6,990
Other Salaries for Instruction	11-230-100-106	13,019
Tuition -Regular	11-000-100-561	103,200
Attend & SW Salaries	11-000-211-100	12,867
Child Study Team Salaries	11-000-219-104	7,400
Clerical Salaries	11-000-219-105	1,379
Principal/Assistant Principal Salaries	11-000-240-103	43,181
Clerical Salaries	11-000-240-105	12,941
Maintenance Salaries	11-000-260-100	29,100
Transportation-Other H/S	11-000-270-512	1,000
Other Employee Benefits	11-000-290-290	49,289
Transfers to Cover Deficit	11-000-310-930	21,550
	CAP WAIVER REQUEST TOTAL	$ 381,425

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such T & E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T & E. *Board of Education of East Brunswick Township v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township,* 116 *N.J.* 305 (1989). With respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and

unable to be derived from further reallocation within the base budget. *Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County*, State Board decision July 7, 1993; *Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County,* State Board decision July 6, 1994.

Mindful, then, of the standards to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

By way of introduction, the Commissioner notes the Board's comments regarding the District's fiscal and programmatic status for the past few years, noting the Board has maintained a high quality instructional program while maintaining funding at a level below the district cap, thereby providing property tax relief. Further, the 1994-95 audit showed that the District had $645,923 in current expense surplus funds for the 1995-96 school budget. As of June 1996, the current expense surplus for the 1995-96 school year was anticipated to be approximately $222,898 of which $100,000 has been appropriated for the 1996-97 budget. This will leave an estimated surplus of $122,898 as of June 30, 1997. Consequently, the District contends, there are insufficient funds in the projected surplus to appropriate the cap waiver amount of $381,425. If the entire projected amount of $122,298 were appropriated, there would be a deficit of $259,127 and no surplus to cover any contingencies. According to guidelines issued by the Commissioner of Education, the Board should have a minimal surplus balance of 3% of its budget. Using a current expense budget of $4,233,529, the Board argues it should, at a minimum, have a surplus of $127,006. The Commissioner notes that the proposed 1996-97 budget, including the cap waiver amount of $381,425, reflected an increase of 2.5% over the revised 1995-96 budget. The appropriation of surplus in the 1995-96 school budget created the need for the voter cap waiver in 1996-97 since those funds were no longer available and the District was required to make up the shortfall with property taxes.

The Board generally contends that the cap waiver sought maintains existing programs, provides no new programs, and accurately reflects the cost of operation of those programs. Each of the items included in the cap waiver relates directly to the District's T&E

goals. Moreover, the base budget and the cap waiver request were carefully reviewed by the Camden County Superintendent who determined that the cap waiver was needed, and approved the 1996-97 budget for advertising as being sufficient to provide T & E upon the condition of the submission of a cap waiver in the amount of $381,425. The Board and Council Body were able to agree upon reductions of $82,000 in the base budget because two teachers who retired after the budget was submitted could be replaced at a savings of $43,831 and the Tuition-Private School for the Handicapped line item was reduced by $38,169. The Council supports the need for certain specific line items as set forth below.

Description	Account Number	Amount
Kindergarten - Teacher Salaries	11-110-100-101	$ 5,427
Grades 1-5 - Teacher Salaries	11-120-100-101	27,626
Grades 6-8 - Teacher Salaries	11-130-100-101	33,436

One of the positions affected in this account grouping is Physical Education. The program promotes and attempts to maintain health, safety and physical well-being. Without a physical education program, continued efforts to encourage positive physical-health habits would not exist. The other position affected in this grouping is the part-time computer instruction teacher. Without this position, advancement in the area of technology will be limited and not in keeping with State goals and objectives.

Upon review of the record, the Commissioner finds that these amounts have been proven necessary for T & E. The budgeted amounts relate to existing positions. The Commissioner finds that the Board has demonstrated the need for maintenance of its educational programs.

Description	Account Number	Amount
Other Salaries for Instruction	11-190-100-106	$ 13,200
Other Salaries for Instruction	11-205-100-106	6,900
Other Salaries for Instruction	11-230-100-106	13,019

The Board says the existing program includes three instructional assistants, one of which is assigned to the Special Education Department. Presently, two instructional assistants support classroom instruction by providing individualized attention to students experiencing academic difficulty. In addition, these assistants offer opportunities for students to receive

supplemental help as they prepare for state and local standardized tests. The instructional assistants assigned to the special education program provide the individualized attention needed for the students to achieve academic and emotional success. If this position is removed, the Board avers its efforts to continue to provide an environment which is least restrictive would not exist.

Upon review of the record, the Commissioner finds that these amounts are necessary for maintenance of T & E.

Description	Account Number	Amount
Tuition-Regular	11-000-100-561	$103,200

This is a mandatory expense in conjunction with the sending/receiving contract for educational services for our high school students. The Board avers it cannot be reduced.

Upon review of the record, the Commissioner concurs that this amount is necessary for T & E. However, upon such review, it also appears that the District may have underbudgeted this line item, in that the number of students for whom tuition has been appropriated between the budget and cap waiver appears to be less than the number given in the advertised enrollment. Accordingly, the County Superintendent is directed to inquire into this matter and recommend appropriate corrective action as necessary.

Description	Account Number	Amount
Attendance & SW Salaries	11-000-211-100	$ 12,867

The Board explains that the position affected in this area is the home/school coordinator. Presently, this position provides a link between home and school. In addition, this position facilitates a positive working relationship with borough officials in an effort to coordinate activities and programs for our youth. Without this position, the Board contends these efforts would not be maintained.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E.

Description	Account Number	Amount
Child Study Team Salaries	11-000-219-104	$ 7,400

This category affects the school psychologist position. Presently, the psychologist services the Board's special needs population three days per week. These salaries will be reduced to two days per week. In order to adequately provide continuous mandated services, the Board argues that the present status of this position needs to maintain its three-day schedule.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E.

Description	Account Number	Amount
Clerical Salaries	11-000-219-105	$ 1,379
Clerical Salaries	11-000-240-105	$ 12, 941

Two part-time clerical positions are affected in this grouping. One is the Basic Skills Clerk Typist who supports the Title I program and the other supports the Child Study Team. The Board avers that such positions are essential in order to maintain and expedite necessary forms, applications, and general communications as needed.

Upon review of the record, the Commissioner finds that these amounts have been proven necessary for T & E.

Description	Account Number	Amount
Principal/Assistant Principal Salaries	11-000-240-103	$ 43,181

The existing position provides leadership in school level planning for improvement of instruction, staff development and implementation of performing objectives, and core course proficiencies. This leadership also establishes and maintains an effective learning climate for all students. The Board argues that if this position were to be eliminated, monitoring and implementation of programs affecting student achievement would not exist.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E.

Description	Account Number	Amount
Maintenance Salaries	11-000-260-100	$ 29,100

This existing position affects the head custodian. In order to ensure a safe, clean, healthy environment for staff, students, and the community, the Board avers the head custodian's

position is necessary in that its elimination would impede the coordination of maintenance efforts and operation of the facility.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E.

Description	Account Number	Amount
Transportation-Other H/S	11-000-270-512	$ 1,000

The Board explains that this line item provides opportunities for the students in grades K-8 to visit education-oriented facilities that coordinate with classroom experiences.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E.

Description	Account Number	Amount
Other Employee Benefits	11-000-290-290	$ 49,289

The Board notes that this line item is a mandatory expense covered by an employment contract and cannot be reduced.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E.

Description	Account Number	Amount
Transfers to Cover Deficit	11-000-310-930	$ 21,550

The Board avers that this line item is a necessary expense to support the operation of the Food Service Program provided for the student population.

Upon review of the record, the Commissioner finds that this amount has been proven necessary for T & E.

The Commissioner notes that the total of the amount budgeted for this line is comparable to 1994-95 expenditures and reflects an increase over the 1995-96 budgeted amount. During 1995-96, the District appropriated all available surplus funds accumulated by the food service to reduce the Board contribution amount in that year. The increase over the 1995-96 budgeted amount is comparable to the appropriated surplus amount, making all three years comparable. The Commissioner approves these appropriations as necessary for maintenance of T & E.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected $222,898 in surplus and allocated $100,000 as revenue, leaving $122,898 as undesignated unreserved surplus. The Board's annual financial report filed pursuant to *N.J.S.A.* 18A:17-10 (June 30 Board Secretary's report) reveals that the District's projection was reasonable and that no excess surplus funds are available.

Based on the above, subject to verification through the Board's 1995-96 annual year-end audit report, the Commissioner determines that no allocation from surplus is possible to fund any of the line-item appropriations approved herein as necessary for T & E.

SUMMARY

In summary, the Commissioner finds that $381,425 appealed by the Board herein is necessary for provision of a thorough and efficient system of education in the District and, further, that the monies in question cannot be derived from reallocation within the General Fund budget. The Commissioner additionally notes that all line-item waivers to expenditure limitations granted herein, as summarized below, represent restricted appropriations in accordance with *N.J.A.C.* 6:20-2A.11(b)3.

Account Title	Account Number	Amount Necessary	Not Necessary
Kindergarten-Teacher Salaries	11-110-100-101	$ 5,427	$ -0-
Grades 1-5-Teacher Salaries	11-120-100-101	27,626	-0-
Grades 6-8-Teacher Salaries	11-130-100-101	33,436	-0-
Other Salaries for Instruction	11-190-100-106	13,020	-0-
Other Salaries for Instruction	11-205-100-106	6,990	-0-
Other Salaries for Instruction	11-230-100-106	13,019	-0-
Tuition-Regular	11-000-100-561	103,200	-0-
Attendance & SW Salaries	11-000-211-100	12,867	-0-
Child Study Team Salaries	11-000-219-104	7,400	-0-
Clerical Salaries	11-000-219-105	1,379	-0-
Princ./Assist. Princ. Salaries	11-000-240-103	43,181	-0-
Clerical Salaries	11-000-240-105	12,941	-0-
Maintenance Salaries	11-000-260-100	29,100	-0-
Transportation-Other H/S	11-000-270-512	1,000	-0-
Other Employee Benefits	11-000-290-290	49,289	-0-
Transfers to Cover Deficit	11-000-310-930	21,550	-0-
	TOTAL WAIVER REQUEST	$ 381,425	

	AMOUNT
Tax Levy Certified by Council	$ 1,735,725
Approved Cap Waiver	$ 381,425
Amount of Cap Waiver to be Funded by Surplus	$ (-0-)
Total Tax Levy for 1996-97	$ 2,117,150

Accordingly, the Camden County Board of Taxation is directed to make any necessary adjustments, subject to verification of surplus amounts through the year-end audit, to raise $2,117,150 in the tax levy for General Fund purposes of the Lawnside Board of Education for the 1996-97 school year as set forth above. Additionally, in view of the possible underbudgeting noted above, the County Superintendent is directed to inquire into the actual number of students for whom tuition must be paid to Haddon Heights and to recommend such corrective measures as he deems appropriate to address any underbudgeting that may have occurred in the tuition account.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 30, 1996
DATE OF MAILING OCTOBER 1, 1996

422-96

422-96 SEC

IN THE MATTER OF FRANK MONTAGNA,	:	
BELLEVILLE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

SEPTEMBER 30, 1996

IN THE MATTER	:	**Before the School**
	:	**Ethics Commission**
OF	:	
	:	**Docket No.: C40-95**
FRANK MONTAGNA, Respondent	:	
BELLEVILLE BD. OF EDUCATION	:	**DECISION**
ESSEX COUNTY	:	
	:	

PROCEDURAL HISTORY

The above-captioned case arises from a claim that Belleville Board of Education member Frank Montagna violated the School Ethics Act by influencing the hiring of his wife as game personnel. Complainant Gabriel Nazziola filed the complaint on November 9, 1995. Mr. Montagna filed his answer pursuant to an extension by the Commission on January 9, 1995. He subsequently filed an amendment to the answer on January 18, 1995. After investigating the matter, the Commission notified the parties that the matter would be heard at the Commission's April 23, 1996 meeting. However, Mr. Montagna retained counsel who requested an adjournment. Thus, the case was rescheduled for the May 28, 1996, meeting of the Commission.

At its meeting of May 28, 1996, the School Ethics Commission heard testimony from Frank Montagna, Ralph Mazzuca, Karen Fuccello and Marguerite Moscatello during its executive session. Mr. Montagna was represented by Lisa Rusciano, Esq. Mr. Nazziola did not appear. At its public meeting, the Commission found probable cause that Frank Montagna violated N.J.S.A. 18A:12-24(c) and (g) by presenting his wife's name for consideration as game personnel by the Supervisor of Athletics and later voting on the resolution to approve her appointment. On May 31, 1996 the Commission forwarded letters to the parties setting forth the facts that it believed to be undisputed and asking the parties to file written statements on whether the respondent's conduct constituted a violation of N.J.S.A. 18A:12-24(c) and (g) of the School Ethics Act. Mr. Nazziola requested an extension of time to file his statement and the Commission extended the date until July 9, 1996. The matter was scheduled for decision at the Commission's July 23, 1996 meeting. The complainant's statement was received on June 19, 1996. Respondent's attorney alleged that she never saw the letter setting forth July 9, 1996 as the new deadline and requested an extension to file. Respondent's written statement was received on July 16, 1996.

STATEMENT OF FACTS

In September 1995, the Belleville Board of Education advertised for names of candidates for game personnel to be submitted to the Athletic Supervisor. Game personnel consist of persons who assist and student athletic events. The board of education pays them $28.00 per game. Mr. Montagna submitted the name of his wife and Richard Fisicarro in an envelope that he delivered to the Athletic Supervisor. Mr. Montagna says that he did so without comment; however, this is disputed by the complainant who says that Mr. Montagna attempted to exert undue influence upon the Athletic Supervisor. The Athletic Supervisor testified that Mr. Montagna only handed her the names of his wife and Mr. Fisicarro. Further, she testified that she in no felt that he was trying to exert influence over her by doing so.

After hearing all of the testimony and reviewing the pleadings, documents and written statements submitted, the Commission finds there to be no dispute with regard to the following facts.

1. Frank Montagna was elected to the Belleville Board of Education in April 1995. Mr. Montagna's first meeting as a board member was the reorganization meeting of the board on May 1, 1995.

2. In September 1995, Mr. Montagna heard an announcement, possibly through the superintendent, that the Supervisor of Health, Driver Education and Athletics, Karen Fuccello, was seeking persons to serve as game personnel. Game personnel are persons who assist at student athletic events by taking tickets and assisting with seating and other duties.

3. Sometime in September 1995, Mr. Montagna delivered to Karen Fuccello in her business office an envelope containing the names of his wife and another district resident. He told her he was submitting the name of his wife and the other citizen for the game personnel positions.

4. The board pays game personnel $28.00 per game.

5. On October 10, 1995, the board voted on a general resolution to approve the list of 33 game personnel including respondent's wife, Rita Montagna. Mr. Montagna voted on the resolution and the resolution passed unanimously.

6. Although the resolution referred to an attached list of names of persons who were recommended to be game personnel, no list was attached to the agenda when the respondent voted at the October 10, 1995, meeting. According to the board president, this was a common practice. The list had been attached to the agenda in the closed session prior to the open meeting.

7. The 33 persons who applied to be game personnel were hired and the games were distributed without preference.

8. Rita Montagna worked two football games in the fall and two wrestling matches in the winter.

Mr. Montagna states that since the vote was unanimous, his vote did not have any impact on the passage of the resolution. Further, he urges the Commission to recognize that he defeated the complainant, Mr. Nazziola, in the election on April 7, 1995, and to attribute the filing of the complaint to this fact.

ANALYSIS

Complainant sets forth that Mr. Montagna's actions violated N.J.S.A. 18A:12-24(b), (c), (f) and (g) of the School Ethics Act. The Commission found probable cause with respect to N.J.S.A. 18A:12-24(c) and (g) N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

In the present case, respondent admits to presenting the Athletic Supervisor with his wife's application and later voting for the resolution naming her as game personnel. The resolution passed unanimously, so respondent is correct that his vote was not the deciding vote in whether his wife would be approved. Nevertheless, his participation in the vote constitutes acting in his official capacity in a matter in which his immediate family member had a financial and personal involvement that might reasonably be expected to impair his objectivity. The fact that he did not have the list of 33 names in front of him will be considered as a mitigating factor when determining the penalty. However, it does not excuse his violation. The list was provided prior to the meeting, although it was not attached at the meeting. Mr. Montagna knew that his wife applied for the position, having submitted the application himself. The resolution certainly should have triggered his memory that his wife was on the list. It was incumbent upon Mr. Montagna to be aware of the items on which he is voting. Thus, the Commission concludes that respondent violated N.J.S.A. 18A:12-24(c).

The Commission did not find probable cause that respondent violated N.J.S.A. 18A:12-24(b) or (f) and so ruled at its May meeting. Given the fact that all of the persons who submitted their names to be game personnel were hired, the Commission cannot find respondent used his official position to secure *unwarranted* privileges, advantages or employment for his wife. For the same reason, we also do not find that respondent violated N.J.S.A. 18A:12-24(f). This subsection prohibits a school official from using his public office to secure financial gain for himself or a member of his immediate family. The Commission's investigation did not show that respondent attempted to coerce or otherwise unduly influence the Athletic Supervisor into

hiring his wife. Thus, the Commission found no probable cause with respect to N.J.S.A. 18A:12-24(b) and (f).

Subsection (g) of the School Ethics Act prohibits a member from representing any person or party other than the school board in connection with any cause, proceeding, application or other matter pending before the school district in which he serves. Initially the Commission found probable cause that respondent violated subsection (g). Although respondent did not present the Athletic Supervisor with the application to coerce her, subsection (g) does not require proof of a coercive purpose. In presenting the application, respondent appeared to have represented his wife in connection with her application to the position. However, after reviewing the documents, the written statements, the Commission finds that respondent did not violate subsection (g) by presenting the application. In reviewing the School Ethics Act, the statute appears to require an actual representation, not just the mere turning in of an application. The facts are undisputed that he at no time acted as an advocate for his wife. Therefore, the Commission dismisses the charges under subsection (g).

DECISION

For all of the foregoing reasons, the Commission finds no probable cause to credit the allegations in the complaint with respect to N.J.S.A. 18A:12-24(b) and (f). However, the Commission did find probable cause with respect to N.J.S.A. 18A:12-24(c) and (g). Because there were no material facts in dispute, the Commission determined that there was no need for fact-finding at to the Office of Administrative Law to determine whether the Act was actually violated. Thus, based on the undisputed facts, the Commission finds that respondent violated N.J.S.A. 18A:12-24(c), but dismisses the charge that he violated N.J.S.A. 18A:12-24(g). Based on Mr. Montagna's inexperience on the board at the time of the vote and the fact that the list of names was not attached to the resolution to hire game personnel, the Commission recommends to the Commissioner of Education a penalty of a reprimand.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's penalty recommendation pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 225 East State Street, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Respectfully submitted,

Paul C. Garbarini

Paul C. Garbarini
Chairman, School Ethics Commission

Resolution Adopting Decision -- C40-95

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and if applicable, has considered the arguments raised by parties in subsequent submissions; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on July 23, 1996

Lisa James-Beavers
Executive Director

IN THE MATTER OF FRANK MONTAGNA, :

BELLEVILLE BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

ESSEX COUNTY. : DECISION

:

The record of this matter and the decision of the School Ethics Commission have been reviewed.

Complainant Gabriel A. Nazziola, submitted timely comment regarding the Commission's recommended penalty, urging that Mr. Montagna's penalty should reflect the fact that his action was deliberate and intentional, considering his knowledge of the pertinent law.[1] Although Mr. Montagna submitted comment, said comment was untimely filed and cannot be considered herein.[2]

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter.

IT IS HEREBY ORDERED that Frank Montagna be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] Mr. Nazziola's submission also takes issue with the fact-finding of the Ethics Commission; however, the Commissioner is bound by such fact-finding and his review is limited to the recommended sanction.

[2] Records of the School Ethics Commission indicate that the Commission's decision was mailed to Mr. Montagna and his counsel on July 24, 1996. Mr. Montagna's comments were received on August 8, 1996, outside the 13-day submission period established by the Commission.

SEPTEMBER 30, 1996
DATE OF MAILING OCTOBER 1, 1996

423-96

423-96 SEC

IN THE MATTER OF ROBERT A. WILGUS,	:	
KINGSWAY REGIONAL HIGH SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, GLOUCESTER	:	DECISION
COUNTY.	:	

SEPTEMBER 30, 1996

IN THE MATTER	:	**Before the School**
	:	**Ethics Commission**
OF	:	
	:	**Docket No.: C35-95 and**
ROBERT A. WILGUS,	:	**C37-95 Consolidated**
KINGSWAY REGIONAL	:	
BOARD OF EDUCATION	:	**DECISION ON ATTENDANCE AT**
	:	**EXECUTIVE SESSION**

PROCEDURAL HISTORY

Complainants Judith A. Steward and Anne Bush filed separate complaints against Kingsway Regional board member Robert Wilgus on November 14, 1995. They allege that respondent violated various provisions of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., by voting on matters of interest to him and his immediate family member and participating in a closed session of the board on a matter in which he had a conflict. The Commission consolidated the two complaints for decision as they were identical.

On May 28, 1996, the Commission found no probable cause and dismissed the part of the complaint that alleged respondent violated the School Ethics Act, N.J.S.A. 18A:12-24(c) by voting for Delta Dental as the dental insurer for teachers when his spouse is a teacher in the district. However, the Commission found probable cause on the charge that respondent violated the Act by attending the closed session of the board in which the board discussed parameters for negotiations. The Commission invited the parties to submit written statements on whether the respondents agreed that the facts were not in dispute and whether the conduct as agreed upon constituted a violation of the Act. The Commission received the complainants' written statement on June 7, 1996, and received respondent's statement on June 14, 1996.

FACTS

The parties agree that the following facts pertaining to the remaining claim are undisputed. Complainant Judith Steward was a member of the Kingsway Regional High School Board of Education from April 1990 to April 1993 representing the residents in Woolwich Township. Complainant Anne Bush was a member of the board between April 1991 and April 1994 representing East Greenwich Township. Respondent Robert Wilgus has been a member of the board since April 1992, having been re-elected in 1995. He represents the residents of East Greenwich Township.

Mr. Wilgus' spouse is employed as a secretary with the Kingsway Regional Board of Education. She is a member of the Kingsway Education Association, the bargaining unit of the district employees.

At the June 26, 1995, board meeting, the board members discussed School Ethics Commission Advisory Opinion A33-95[1] in the presence of the complainants. Each board member had a copy of the Advisory Opinion including Mr. Wilgus. The Board authorized the board solicitor to seek clarification of the Advisory Opinion with the School Ethics Commission.

At the August 15, 1995, regular meeting of the board, Robert Wilgus moved to enter into executive session to discuss personnel, negotiations, and legal issues. The motion passed unanimously. According to the minutes from the executive session, the board discussed statistics for the mediator. The minutes further indicate that the consensus of the Board was to provide a maximum of 4.6% increase. Robert Wilgus remained in executive session during the discussion.

ANALYSIS

The remaining issue in the above complaint is whether respondent violated the School Ethics Act by attending the closed session of the board on August 15, 1995, during which the board discussed parameters for the negotiations. In Advisory Opinion A33-95, the Commission advised that if a board member attended closed sessions of the board when it discussed parameters for negotiation, he could violate N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24(f) of the School Ethics Act, along with the general admonition in N.J.S.A. 18A:12-22 that school officials must avoid conduct which creates a justifiable impression among the public that the public trust is being violated.

As the Commission previously discussed, the executive session minutes from the August 15, 1995, meeting show that the board discussed statistics for the mediator. Further, they show that the board polled the members present to determine that the consensus of the board was to provide a maximum of a 4.6% increase to the union. The minutes do not indicate whether Mr. Wilgus recused himself from the discussion. Mr. Wilgus admits to being present at the executive session, but denies participation in any contract negotiation or discussion involving any represented group at Kingsway Regional High School. Terrence Crowley was Acting Board Secretary at the time. Mr. Crowley testified before the Commission that Mr. Wilgus attended the executive session of the board in which the board discussed parameters for the mediator. However, he further testified that Mr. Wilgus did not participate in the discussion and did not suggest a range for the mediator.

Mr. Wilgus argues in his written statement that he did not receive the board solicitor's written opinion on recusal until the August 15, 1995, meeting and did not read it until after that meeting. He argues that since that time he has excused himself from any executive sessions in which the same issue may arise. It is immaterial whether he read the board solicitor's opinion before or after the meeting. Mr. Wilgus was provided with a copy of Advisory Opinion A33-95

[1] In Advisory Opinion A33-95, the School Ethics Commission advised that a board member who is prohibited from negotiating and voting on a collective bargaining agreement due to a conflict of interest may not be present during closed sessions to discuss negotiation strategy.

in June. The opinion specifically stated that a board member who has a conflict of interest preventing him from participating in negotiations cannot attend closed sessions of the board in which parameters for negotiations are discussed. His attendance at a closed session, out of the public view, created a reasonable perception that he was trying to influence the contract in which he and his wife have a personal and financial interest. This violated N.J.S.A. 18A:12-24(c).

The Commission set forth in Advisory Opinion A33-95 that even if the conflicted board member merely sat in the closed session discussions, he still would reasonably appear to be acting in his official capacity in a matter in which he had a personal and financial interest in violation of subsection (c). Similarly, if he merely sat in a closed session, but provided no input, he could be privy to confidential information that could lead to a financial gain for him and his spouse in violation of subsection (f). In the present case, it is a reasonable inference that Mr. Wilgus attempted to use information that he gathered in the executive session to secure financial gain for himself and his spouse. Therefore, the Commission concludes that respondent violated N.J.S.A. 18A:12-24(c), N.J.S.A. 18A:12-24(f) and the general prohibition in N.J.S.A. 18A:12-22, that board members should avoid conduct that creates a justifiable impression that the public trust is being violated.

DECISION

We therefore find that respondent violated N.J.S.A. 18A:12-22, N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24(f) by his presence in the board's closed session in which it discussed negotiations and parameters for the mediator. However, the penalty is mitigated by witness testimony indicating that he did not participate in the discussion.

Considering the foregoing, we recommend that the Commissioner impose a penalty of reprimand for respondent's violation of the School Ethics Act.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 225 East State Street, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Respectfully submitted,

Paul C. Garbarini /HB

Paul C. Garbarini
Chairman, School Ethics Commission

Resolution Adopting Decision on Attendance at Executive Session
C35-95 and C37-95 Consolidated

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof, testimony of a neutral party and the arguments raised by parties in subsequent submissions; and

Whereas, the Commission concludes that respondent has violated the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of staff and agrees with the proposed decision with the inserted penalty recommendation of "reprimand" and minor wording changes;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini 6/18/96
Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on June 18, 1996

Lisa James-Beavers
Executive Director

ljb/c3795dec

IN THE MATTER OF ROBERT A. WILGUS, :		
KINGSWAY REGIONAL HIGH SCHOOL	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION, GLOUCESTER	:	DECISION
COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed.

Complainant Anne Bush submitted timely comments regarding the Commission's recommended penalty, essentially contending that the recommended sanction in this matter was too lenient, and underscoring that Mr. Wilgus should be removed as a Board member. The comments of Complainant Judith Steward and Respondent Mr. Wilgus regarding the recommended penalty were untimely filed and are, therefore, not considered herein.[1]

Upon a thorough review of the record, the Commissioner determines that, in view of the fact that Mr. Wilgus was provided with a copy of Advisory Opinion A33-95, which addressed the issue of the attendance of conflicted board members in closed sessions to discuss negotiation strategy, and said opinion expressly warned that, notwithstanding a member's silence at a closed session, his mere attendance could reasonably create the perception that he is

[1] Records of the School Ethics Commission indicate that the Commission's decision was mailed to Mr. Wilgus on June 25, 1996 and to Ms. Steward on June 26, 1996. Mr. Wilgus' comments were received on July 18, 1996, well outside the 13-day submission period established by the Commission. Ms. Steward's comments were received on July 11, 1996, also outside the 13-day submission period.

"advancing the interests of the local units or hearing privileged information ***," (A33-95 at p. 2) censure, rather than reprimand, is the appropriate penalty in this matter.[2]

IT IS HEREBY ORDERED that Robert A. Wilgus be censured as a school official found to have violated the School Ethics Act.

COMMISSIONER OF EDUCATION

[2] Censure calls for formal public action read into the record of the School Ethics Commission rebuking the school official who was determined to have violated the School Ethics Act. *N.J.A.C.* 6:3-9.2

SEPTEMBER 30, 1996
DATE OF MAILING OCTOBER 1, 1996

424-96

424-96 SEC

IN THE MATTER OF	:	
EDWARD VANDERBECK,	:	COMMISSIONER OF EDUCATION
OAKLAND TOWNSHIP BOARD OF	:	DECISION
EDUCATION, BERGEN COUNTY.	:	
_____	:	

SEPTEMBER 30, 1996

In the Matter of Edward Vanderbeck	:	**Before the School Ethics Commission**
Oakland Twp. Board of Education, County of Bergen	:	**Docket No. C33-95**

PROCEDURAL HISTORY

The above complaint arises from a claim that Edward Vanderbeck, a member of the Oakland Board of Education, violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. by participating in discussions on and indirectly participating in negotiations of the teachers' contract. James Mokhiber filed the complaint on September 19, 1995. The Commission served Mr. Vanderbeck with the complaint on November 27, 1995. Mr. Vanderbeck received an extension of time to retain counsel and filed his answer on January 4, 1996. The Commission duly investigated the complaint questioning various members of the board of education to determine whether there is probable cause to credit the allegations in the complaint.

Commission staff notified the parties that the Commission would discuss their case on April 23, 1996. However, counsel for Mr. Vanderbeck, Ms. Monica Peck, Esq., notified the Commission that she would be unable to attend that meeting and asked that the Commission refrain from rendering a decision until Mr. Vanderbeck had the opportunity to address the Commission. The Commission tabled the case at the meeting as a result of Ms. Peck's request and the Commission's desire to have more information before rendering a decision. The case was then rescheduled for May 28, 1996; however, the Commission was still in the process of gathering information from its investigation. Therefore, the Commission adjourned the matter until June 18, 1996. The staff notified both parties on May 30, 1996, that the Commission would hear the case on June 18, 1996. Staff advised them of the right to have counsel, bring witnesses and testify before the Commission.

Mr. Vanderbeck appeared with his attorney and testified before the Commission during the Commission's executive session on June 18, 1996. In the public meeting following the executive session, the Commission found probable cause that Mr. Vanderbeck had violated the School Ethics Act based on his admission that he commented on the provisions of the collective bargaining agreement prior to the board vote, an issue from which he necessarily recused himself.

Since the material facts regarding Mr. Vanderbeck's comments to the board on the collective bargaining agreement prior to the vote were not in dispute, by letter dated June 20, 1996, the Commission advised the parties to submit written statements on whether

Mr. Vanderbeck's actions constitute a violation of the Act. Mr Vanderbeck submitted his papers by letter dated July 15, 1996. Mr. Mokhiber did not submit a statement.

STATEMENT OF FACTS

The following facts are undisputed. Mr. Vanderbeck's spouse is a teacher in the Oakland school district and a member of the local bargaining unit, the Oakland Education Association (OEA). Because of his wife's position, Mr. Vanderbeck did not participate in negotiations and abstained on voting on the contract with the OEA. He is currently a member of the team negotiating the collective bargaining agreement with the clerical employees in the district. He had previously recused himself from closed session discussions and negotiations. Mr. Vanderbeck admitted in testimony before the Commission that he participated in the discussion of the collective bargaining agreement prior to the vote on it. Specifically, Mr. Vanderbeck voiced concern over the salary guidelines, stating that there was an uneven salary distribution.

ANALYSIS

The School Ethics Commission has previously advised that a board member whose immediate family member is a member of the local bargaining unit cannot participate in negotiations; nor can the board member participate in closed sessions in which the board discusses the parameters for the negotiation team or the mediator. SEC Advisory Opinions A01-93, A10-93, A10-93(b) and A07-94 consolidated, and A33-95. The Commission so ruled based on the wording of the School Ethics Act at N.J.S.A. 18A:12-24(c) and (f), which provide respectively:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

and

> No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his or office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated.

The Commission reasoned that such conduct would violate (c) because it would create the reasonable perception among the public that the member was participating in negotiations to benefit himself or his immediate family member rather than the public that he or she was meant to serve. Similarly, the Commission reasoned that participating in closed session discussions and negotiations could result in a violation of (f) because

the board member could gain access to confidential information that he could pass on to the local bargaining unit. The local bargaining unit could use this information to gain an advantage in negotiations. The Commission felt that this was a particular concern given the Legislature's declaration in the School Ethics Act that school officials "must avoid conduct which is in violation of their [sic] public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22.

Mr. Vanderbeck argues in his written statement that he could not have violated N.J.S.A. 18A:12-24(c) because he did not "act" as set forth in the statute. Further he argues that the Commission's policy guideline #2, which set forth the meaning of "recusal," did not adequately provide Mr. Vanderbeck with notice that commenting on the contract after negotiations would violate the Act. He also argues that policy guideline #2 is invalid as a rule which was not promulgated in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-4. After careful analysis of the facts of the present case, the Commission concludes that the facts before it show that Mr. Vanderbeck committed conduct that violated N.J.S.A. 18A:12-24(c) when he participated in the discussion in the public meeting.

The complainant also alleges that Mr. Vanderbeck spoke to a board member about the proposed contract before the board voted on it and attempted to discuss the contract in progress during executive sessions of the board. The complainant further alleges that Mr. Vanderbeck spoke for over 35 minutes about the contract during the meeting in which the board ratified the contract. Last, the complaint sets forth that Mr. Vanderbeck is currently improperly a part of the negotiating team because the clerical employees are allegedly members of the same union as Vanderbeck's spouse. Mr. Vanderbeck denies that he committed any of the conduct charged and denies that the clerical employees are members of the same union as the teachers.

The Commission's investigation disclosed that Mr. Mokhiber appears to be the only board member who recalls Mr. Vanderbeck attending executive sessions of the board in 1994. Mr. Mokhiber recalled Mr. Vanderbeck attending four such sessions despite Mr. Mokhiber statement that he left such sessions. Also, Mr. Mokhiber is the only board member who recalls Mr. Vanderbeck trying to influence negotiations with the OEA. Mr. Mokhiber said that he did this by disagreeing on the effective date of the retirement clause and also by being involved in salary guide used in negotiation. Last, Mr. Mokhiber is the only board member who believes that the clerical workers are part of the same union with the OEA.

Mr. Mokhiber had support for his assertion that Mr. Vanderbeck spoke to a board member regarding negotiations with the OEA. However, Ms. Lorraine Koscielny, Board President stated that Mr. Vanderbeck called her only to advise her that all teachers, including his wife, had copies of the salary schedule for three years, while he had the salary schedule for one year. She said that no other conversation took place regarding negotiations with the OEA.

There is insufficient proof that Mr. Vanderbeck participated in negotiations with the OEA. Further, there is insufficient proof that made telephone calls to or otherwise contacted board members in an attempt to influence negotiations with the OEA. Similarly, there is insufficient evidence that Mr. Vanderbeck attended any closed sessions of the board in which the board discussed parameters of negotiations or other aspects of the contract. Presently, there are no witnesses to these meetings that Mr. Mokhiber says Mr. Vanderbeck attended. Indeed, Mr. Mokhiber admits to not even being there himself except to see him there and then leave. Thus, there is no way of knowing whether Mr. Vanderbeck left immediately after Mr. Mokhiber.

For the foregoing reasons, the Commission finds no probable cause to credit the allegations in the complaint concerning Mr. Vanderbeck's alleged attendance at closed sessions and alleged attempts to influence the negotiation process with the OEA and hereby dismisses those allegations in the complaint.

DECISION

For the foregoing reasons, the Commission finds that Mr. Vanderbeck violated N.J.S.A.18A:12-24(c) and recommends to the Commissioner a penalty of reprimand.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 225 East State Street, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Respectfully submitted,

Paul C. Garbarini

Paul C. Garbarini
Chairman

Resolution Adopting Decision -- C33-95

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and if applicable, has considered the arguments raised by parties in subsequent submissions and testimony; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on July 23, 1996

Lisa James-Beavers
Executive Director

IN THE MATTER OF	:	
EDWARD VANDERBECK,	:	COMMISSIONER OF EDUCATION
OAKLAND TOWNSHIP BOARD OF	:	DECISION
EDUCATION, BERGEN COUNTY.	:	
	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed. Although Mr. Vanderbeck submitted comment regarding the Commission's proposed penalty, said comment was untimely filed and cannot be considered herein.*

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter, in view of the Commission's determination, which is not reviewable by the Commissioner herein, that a violation of the act occurred under the circumstances set forth in the decision.

IT IS HEREBY ORDERED that Edward Vanderbeck be reprimanded as a school official found to have violated the School Ethics Act.

COMMISSIONER OF EDUCATION

* Records of the School Ethics Commission indicate that the Commission's decision was mailed to Mr. Vanderbeck and his counsel on July 24, 1996. Mr. Vanderbeck's comments were received on August 8, 1996, outside the 13-day submission period established by the Commission.

SEPTEMBER 30, 1996
DATE OF MAILING OCTOBER 1, 1996

425-96

425-96 SEC

IN THE MATTER OF TOBI WEINSTEIN,	:	
ROCKLEIGH BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY.	:	DECISION
	:	

SEPTEMBER 30, 1996

IN THE MATTER OF	:	BEFORE THE SCHOOL
	:	ETHICS COMMISSION
	:	
TOBI WEINSTEIN	:	
ROCKLEIGH	:	
BOARD OF EDUCATION	:	
BERGEN COUNTY	:	RESOLUTION

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Ms. Weinstein was elected to the school board in April 1995 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995
September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why she had not attended training up until that time; and

WHEREAS, the School Ethics Commission considered the board member's reply to the Order, but found same to be insufficient in light of the aforementioned notices and opportunities to attend training; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, said board member chose not to appear, and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: July 23, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on July 23, 1996.

Lisa James-Beavers
Executive Director

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IN THE MATTER OF TOBI WEINSTEIN,	:	
ROCKLEIGH BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be impose for such failure; and

Whereas, the above-named Board member provided to the Commission an answer stating that she planned to take the training in October 1996 and that the Board had issued a check to her for such purpose; however, such explanation was deemed as an insufficient reason for her nonattendance; and

Whereas, the Commission voted on June 4, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute,

memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 25, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named Board member chose not to provide comments to the Commissioner regarding this resolution; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds that based on the Board member's assertion that she planned to take the course in October, removal is not warranted at this point; however, some penalty is warranted in view of her insufficiently explicated delay in meeting statutory requirements; now therefore

IT IS ORDERED that the above-named Board member shall not be removed from office but, rather, shall be suspended from office for a period of two months to commence as of the Board's receipt of this decision, or until such time as she obtains the required training, whichever is longer.

COMMISSIONER OF EDUCATION

SEPTEMBER 30, 1996

DATE OF MAILING OCTOBER 1, 1996

426-96

426-96 SEC

IN THE MATTER OF EDDIE FREAY,	:	
HACKENSACK BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BERGEN COUNTY.	:	DECISION
	:	

SEPTEMBER 30, 1996

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
EDDIE FREAY	:	
Hackensack Board of Education	:	
Bergen County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Eddie Freay was elected to serve three-year term on the Hackensack Board of Education on April 15, 1995; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" and mails correspondence in December to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 15, 1995; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted eight training sessions between May 1995 and May 1996 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 16, 1996, but the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent; and

WHEREAS, the Commission issued an Order on April 25, 1996, directing Eddie Freay to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Freay replied that he planned to attend the June 21-23, 1996 orientation; and

WHEREAS, at its meeting of June 18, 1996, the Commission voted to dismiss the Order against Mr. Freay if he attended the session, but recommend his removal from the board if he failed to attend; and

WHEREAS, the NJSBA notified the Commission that Mr. Freay registered for, but did not attend, the June 21-23, 1996 orientation; and

WHEREAS, Mr. Freay was notified of the Commission's decision to remove him if he failed to attend; and

WHEREAS, Mr. Freay has now failed to attend the required training program for well over the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 1995 to June 1996 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is removal from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Eddie Freay violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: July 23, 1996

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 23, 1996

Lisa James-Beavers
Executive Director

Upon adoption of this resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 225 East State Street, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF EDDIE FREAY,	:	
HACKENSACK BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, BERGEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(I), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, on May 8, 1996, the above-named Board member responded to such Order advising that he would be attending training in June 1996; and

Whereas, the Commission, having considered such response, voted on June 18, 1996, to advise the Board member that it would dismiss the Order to Show Cause if the Board member attended the June training, but would adopt a resolution at its next meeting to remove him from the Board if he failed to attend such training; and

Whereas, the Commission, having been informed that the above-named Board member failed to attend training in June 1996, voted on July 23, 1996, to recommend removal of the

above-named Board member for failure to attend training sessions in violation of State statute, and forwarded this matter to the Commissioner of Education pursuant to *N.J.S.A* 18A:12-29; and

Whereas, by letter, dated July 25, 1996, from the Commission, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's decision recommending removal; and

Whereas, on August 2, 1996, the Superintendent of Hackensack Public Schools filed a response to such decision stating that the above-named Board member has demonstrated his willingness to comply with the training mandate and has offered valid reasons, as attested by evidence, for his inability to previously attend, further advising that this Board member was registered for the September 1996 training session; and

Whereas, the Commissioner has received confirmation that the above-named Board member did attend the training session conducted September 6-8, 1996; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and determines that, in light of the above-named Board member's demonstrated inability to attend prior sessions and his attendance at the training session in September 1996, the severe penalty of removal is no longer warranted; now therefore

IT IS ORDERED that no penalty be imposed on the above-named Board member as a consequence of the proceedings herein.

COMMISSIONER OF EDUCATION

SEPTEMBER 30, 1996
DATE OF MAILING OCTOBER 1, 1996

427-96

427-96 R

JOHN SHEFFIELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured teacher who had been displaced from Ancora Psychiatric Hospital and transferred to Marlboro sought return to Ancora. In a prior decision, the State Board found that petitioner's displacement, notwithstanding that he maintained the same title and salary, did trigger tenure protections. The State Board remanded primarily for a review of petitioner's claims that his duties were transferred to someone else at Ancora and that seniority entitled him to locate a more favorable assignment. However, since the remand, petitioner was reinstated with no loss in pay, benefits or seniority.

ALJ found that there was now no broad public interest in pursuing the factual claims and no reason to believe that like questions could not be fully reviewed in the future as they arise. ALJ concluded petitioner failed to show that the circumstances at bar warranted an exception to the mootness doctrine. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

SEPTEMBER 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4242-95

AGENCY DKT. NO. 432-12/91

(ON REMAND EDU 558-92)

JOHN SHEFFIELD,

Petitioner,

v.

STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,

Respondent.

Joel N. Weissman, Esq., on behalf of petitioner (Weissman & Mintz, attorneys)

Deborah J. Gottlieb, Deputy Attorney General, on behalf of respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: July 5, 1996 Decided: August 15, 1996

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter is in the Office of Administrative Law on remand. The procedural history is reviewed in the prior decisions of the former Chief Administrative Law Judge, the Commissioner and the State Board of Education, all of which is incorporated herein by reference. The issue has,

however, changed. The parties agree that petitioner, a tenured teacher, has been returned to his position as supervisor of education at Ancora Psychiatric Hospital and that he has suffered no loss of pay, benefits or seniority. The case is moot. The question now is whether it should proceed nevertheless, as an exception to mootness doctrine. Respondent has filed a motion for summary decision which petitioner opposes.

Our courts will entertain a case that is moot when the issue is of significant public importance and is otherwise likely to evade review. In *De Vesa v. Dorsey*, 134 *N.J.* 420, 428 (1993), the New Jersey Supreme Court reached past mootness to evaluate the question of senatorial courtesy. The issue involved the respective powers of governmental branches and would likely continue to escape judicial review because of the short time periods involved in the renomination process. In *Oxfeld v. New Jersey State Board of Education*, 68 *N.J.* 301, 303-04 (1975), the Court would not hear the case of high school students who attacked a school rule regulating the distribution of pamphlets and leaflets on school grounds. The students had long since graduated. *In re Geraghty*, 68 *N.J.* 209 (1975), concerned the problem of involuntary civil commitment. Though the case was moot regarding the individual in question, the Supreme Court initially entertained the matter because of its public importance. It then dismissed without reaching the merits because its own rule revisions provided the guidance it thought necessary. In *John F. Kennedy Memorial Hospital v. Heston*, 58 *N.J.* 576 (1971), the Court dealt with the case of a Jehovah's Witness who had been hospitalized after an automobile accident and needed a blood transfusion lest she expire. Her mother refused to authorize it on religious grounds, a lower court appointed a guardian with authority to consent to the transfusion, surgery followed and the woman survived. Though the case was moot, the Supreme Court went on to uphold the hospital's position, the issue being one of life and death.

Petitioner's case embraces a nuance of the tenure law and certain factual allegations concerning his seniority rights and respondent's bad faith. The legal question presented was whether respondent's decision during a reduction in force to displace petitioner at Ancora Psychiatric Hospital and transfer him to work at Marlboro Psychiatric Hospital, in the same title and without loss of pay, or benefits, triggered tenure protections. The State Board of Education has now ruled that it did and remanded primarily for a review of petitioner's claim that his duties were actually transferred to someone else, and even if not, seniority entitled him to locate a more

favorable assignment. Marlboro Psychiatric Hospital is distant from petitioner's home. Since the remand petitioner has been reinstated to his former position at Ancora. There simply is no broad public interest in pursuing his factual claims and no reason to believe that like questions cannot be fully reviewed in the future as they arise.

Based on the foregoing, it is my conclusion that petitioner has failed to show that the circumstances at bar warrant an exception to mootness doctrine and it is **ORDERED** that this matter be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/15/96
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

8/16/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

JOHN SHEFFIELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge that this matter is properly dismissed for mootness. Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 30, 1996
DATE OF MAILING OCTOBER 1, 1996

434-96

434-96

M.M., on behalf of her minor nephew, I.I., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY, : DECISION

:

RESPONDENT.

:

SEPTEMBER 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1757-96
AGENCY DKT. NO. 1-1-96

M. M., ON BEHALF OF HER MINOR NEPHEW, I.I.,
Petitioner,
v.
BLOOMFIELD BOARD OF EDUCATION,
Respondent.

M. M., petitioner, *pro se*

Nathanya Simon, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 24, 1996 Decided: August 16, 1996

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 20, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a letter/stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, which by law is authorized to make a final decision in this matter. If the Commissioner does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

8/14/96
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

8/22/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 22 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
Ten James Street
Florham Park, NJ 07932
(201) 301-0001
Attorneys for Respondent-Counterclaimant,
Bloomfield Board of Education

M.M., on behalf of her minor nephew, I.I.,	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	: Agency Ref. No. 1-1/96 : OAL Dkt. No. EDU 1757-96
vs.	: Administrative Action
Bloomfield Board of Education,	:
Respondent-Counterclaimant.	: STIPULATION OF SETTLEMENT

This Agreement is made between M.M., on behalf of her nephew, I.I., the Petitioner, and the Bloomfield Board of Education, the Respondent-Counterclaimant in this matter.

WHEREAS, the parties hereto desire to enter into a voluntary settlement of any and all issues relating to I.I.'s entitlement to a free public education in the Bloomfield School District,

NOW, THEREFORE, in consideration of the parties' mutual promises contained herein, it is agreed as follows:

1. The Petitioner's Petition of Appeal, and the Board of Education's Counterclaim, are being simultaneously withdrawn, with prejudice; and

2. I.I. is not entitled to attend Bloomfield High School, in the absence of a Court Order affirmatively determining his eligibility to attend the School.

The parties hereto acknowledge that each of them has had ample opportunity to consult with competent legal counsel concerning the terms and conditions of this settlement agreement, prior to signing same, and that each of them fully understands and agrees to all of the terms and conditions set forth herein.

The parties hereto further acknowledge that the instant agreement embodies the entire agreement between them, and that it constitutes full and final settlement of all issues which were, or could have been, raised in this matter.

Monica Muncaciu (M.M.),
on behalf of I.I.

Dated: July 22, 1996

Dr. Leonard Elovitz, Superintendent,
on behalf of Bloomfield Board of Education

Dated: July 24, 1996

OAL DKT. NO. EDU 1757-96

M.M., on behalf of her minor nephew, I.I.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

SEPTEMBER 30, 1996

DAATE OF MAILING OCTOBER 1, 1996

435-96

435-96

C.A., on behalf of minor, L.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12034-95

AGENCY DKT. NO. 376-6/95

CRISTOBAL AMPUDIA, on behalf of LENIN AMPUDIA,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON,

Respondent.

Cristobal Ampudia, *pro se*

Anthony V. D'Elia, Esq., for respondent

Record Closed: August 19, 1996 Decided: August 19, 1996

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 20, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached settlement agreement indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Aug. 19, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

8/21/96
DATE

DHA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 21 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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ANTHONY V. D'ELIA, ESQ.
Court Plaza North
25 Main Street
Hackensack, NJ 07601
(201)342-0245
Attorney for Respondent,
Clifton Board of Education

STATE OF NEW JER
OFFICE OF
AUG 19 10 45 AM '96

CRISTOBAL AMPUDIA, on behalf of LENIN AMPUDIA, Petitioners, vs. BOARD OF EDUCATION OF THE CITY OF CLIFTON, Respondents.	OFFICE OF ADMINISTRATIVE LAW OAL Docket No: EDUOS 12034-95N Agency Ref. No: 376-6/95 **SETTLEMENT AGREEMENT**

WHEREAS, Clifton Board of Education, on September 11, 1995, denied Petitioner's request to enroll Lenin Ampudia at Clifton High School and,

WHEREAS, the Petitioner filed an appeal of that decision with the Commissioner of Education and,

WHEREAS, a hearing is scheduled with regard to that appeal before the Office of Administrative Law in or about September of 1996 and

WHEREAS, both parties seek to resolve this matter by amicable agreement,

IT IS STIPULATED AND AGREED by and between the parties that the captioned matter be settled with the following understanding:

PETITIONER hereby withdraws the instant appeal with prejudice and agrees to pay a total sum of $2,000.00 to the Respondent, Clifton Board of Education payable in installments of $100.00 per month commencing on August 1, 1996 and the first day of every month thereafter; and

IT IS FURTHER AGREED that Petitioner shall pay the aforementioned installments to the Clifton Board of Education Business Administrator's office, at 745 Clifton Avenue, Clifton, New Jersey 07015 via check or certified funds made payable to the Clifton Board of Education and

IT IS FURTHER AGREED that if the Petitioner defaults in the payment as set forth above, and after a grace period of 45 days, Respondent will be permitted to enter a Judgment against Petitioner for $7,500.00 plus interest from August 1, 1996 and costs of suit, credit to be given for any payment made prior to the default. Respondent is specifically permitted to enter judgment against Petitioner ex parte in this amount in the Superior Court of New Jersey without notice to the Petitioner and

IT IS FURTHER AGREED that the Respondent will release Petitioner from any and all claims for any tuition reimbursement under the terms of this Settlement Agreement.

IT IS FURTHER STIPULATED AND AGREED that both parties consent to an Order being entered by the Court in accordance with this Agreement.

Anthony V. D'Elia, Esq.
Attorney For ~~Respondent~~,
Clifton Board of Education

Cristobal Ampudia,
Petitioner

STATE OF NEW JERSEY, COUNTY OF Passaic S.S.:
I CERTIFY that on July 22nd., 1996,

Cristobal Ampudia personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed, and delivered this document as his act and deed.

EDGAR PALACIOS
Notary Public
State of New Jersey
My Commission Expires Oct 19,1999

BOARD\AMPUDIA.AGR

C.A., on behalf of minor, L.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

SEPTEMBER 30, 1996
DATE OF MAILING OCTOBER 1, 1996

436-96

436-96

MARLENE MARBUT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, riffed secretarial/clerical employee, claimed Board violated her tenure rights and sought order for reinstatement to a full-time position with compensation.

ALJ found that no current statutory provision provides tenure for paraprofessional employees like petitioner. Prior to the 1994-95 school year, petitioner's duties were primarily those associated with her paraprofessional attendance duties; to the extent petitioner performed clerical duties, they were incidental. Although the focus of her duties shifted in the 1994-95 school year, her position was not, at that time, recategorized as a clerical one. Thus, petitioner never achieved tenure in a clerical position.

Commissioner adopted findings and determination in initial decision as his own. Petition was dismissed.

SEPTEMBER 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8281-95

AGENCY DKT. NO. 302-7/95

MARLENE MARBUT,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

John E. Collins, Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: May 17, 1996 Decided: August 15, 1996*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on July 28, 1995, when Marlene Marbut (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order declaring that she is a tenured secretarial/clerical employee of the Board of Education of the Township of South

---

* An extension of time for issuing the initial decision was requested and granted pursuant to N.J.S.A. 52:14B-10(c).

Brunswick (hereinafter respondent) and ordering respondent to reinstate her to a full-time secretarial/clerical position together with reimbursement for any lost back pay and benefits. An answer was filed on behalf of respondent on August 17, 1995, and on September 8, 1995, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on November 16, 1995, at which time the following were identified as issues for determination at hearing:

1. Does petitioner have tenure/seniority rights to a full-time position currently occupied by non-tenured or less senior secretarial/clerical personnel?

2. If the answer to the foregoing question is yes, what are the appropriate remedies?

The hearing was scheduled for March 4 and March 6, 1996, at the Trenton office of the Office of Administrative Law and commenced as scheduled. Following the conclusion of testimony on March 4, 1996, the record remained open for the receipt of written submissions. Respondent's initial post-hearing written submission was received on April 3, 1996; petitioner's was received on April 4, 1996. Respondent replied by letter memorandum dated April 12, 1996 and received on April 19, 1996. Petitioner's letter advising that she would not be filing a reply memorandum was received on May 17, 1996, whereupon the record closed.

FINDINGS OF FACT

The facts necessary to a disposition of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner's employment with respondent commenced in 1972. At that time she performed the duties of playground and lunchroom monitor on a part-time basis. Later she was assigned to a classroom where she performed the duties of an aide for handicapped students on a one-to-one basis, after which she was assigned to function as a monitor on a special education van. Commencing in 1981 she also worked part-time in the high school, in the comp/ed program. Starting in 1983, she worked in the attendance office part-time and continued to perform her duties on the special education van. While she was performing her attendance duties she worked with Anthony Biddle, Assistant Principal in Charge of Student Affairs. Mr. Biddle's duties included supervision of student attendance and discipline. Petitioner's function in the attendance office was to call parents of students who were absent and to keep records of excuses. In 1984 the number of hours she worked in the attendance office increased; she was then responsible for keeping track of student cuts from classes. In connection with her calls to parents, she had occasion to update directory information on the students' attendance cards, i.e., new phone numbers, etc. She also answered telephones in the attendance office and relayed information she obtained from her telephone calls to guidance counselors. She did minimal typing in connection with her attendance duties. She also issued special bus passes to students if they missed their regular bus and she completed forms acknowledging receipt of confiscated radios.

Commencing with the 1985-86 school year, petitioner was employed full-time as an "Instructional Call-up Aide." Because her regular hours were 7:30 a.m. to 4:00 p.m. (eight hours with one-half hour unpaid lunch) and the regular hours of Mr. Biddle's secretary, Nancy Sandvick, were 8 a.m. to 4 p.m., during the time period before Ms. Sandvick arrived, petitioner would take telephone messages for Mr. Biddle. She also performed Ms. Sandvick's functions when Ms. Sandvick was absent. When Ms. Sandvick was present and performing her own functions, petitioner assisted her upon occasion with secretarial duties. Between the 1985-86 and 1988-89 school years petitioner's personnel card listed her as a thirty hour per week call-up aide and a ten hour per week hall monitor. Petitioner candidly testified at the hearing, however, that she did not perform any hall monitoring duties during this period of time, and for purposes of a determination herein, no finding is necessary with respect to this dispute since it is undisputed that she was a full-time Instructional Call-up Aide for at least the six school years beginning in 1989-

90 and ending in 1994-95. Petitioner, and the other employees who functioned as instructional call-up aides for respondent were classified as paraprofessional aides and their bargaining representative was the South Brunswick Association of Paraprofessionals. Petitioner's entire employment history is recorded on personnel cards entitled "Paraprofessional Aides" or "Paraprofessional Personnel," with the exception of her part-time bus aide and bus driver responsibilities from 1982-83 to 1984-85; those employment experiences appear on a card entitled "Bus and Van Drivers." No written job description for the position Instructional Call-Up Aide can be located, and neither petitioner nor the administrators who testified ever recall seeing one.

Each year commencing at least with 1983-84, petitioner's position and those of the other call-up aides were listed on the "Annual Report of Persons Employed in School Aide Positions" submitted to the county superintendent of schools for approval. (On the 1988 report, the position title was inadvertently omitted on the report to the superintendent; prior to 1988, there had been a number of employees functioning in that position and commencing with 1988, petitioner was the only person employed in the job title, and Michael Lacey, Director of Personnel, who was responsible for submitting the report, simply forgot to include it.) Each year prior to the 1994-95 school year, petitioner was expected to call the parents of all of the students who were recorded absent, unless she had been given a prior explanation. The number of absent students ranged between 80 to 120 per day. Mr. Biddle estimated that making the telephone calls constituted eighty percent of petitioner's work load; petitioner estimated that it took approximately four hours of her seven or eight hour day, but she acknowledged that she was rarely able to call each and every parent whose student was absent that day, because of the number of other things she was doing, i.e., answering the phone, giving messages to teachers, getting students for the nurse, answering a walkie-talkie used by hall monitors who required to Biddle's assistance and assisting Ms. Sandvick with her secretarial duties. Upon occasion she typed letters when Ms. Sandvick asked her to do so. Sharing the secretarial work was just something that petitioner and Ms. Sandvick did; Mr. Biddle did not instruct petitioner to help.

During the 1994-95 school year, petitioner's duties changed. The new high school principal determined that daily telephone calls to the parents of all absent students should cease

and thereafter only those parents and students were called as directed by Mr. Biddle. Mr. Biddle estimated that during the 1994-95 school year petitioner's call-up duties consumed approximately forty percent of her time. Petitioner estimated that call-up duties during 1994-95 consumed approximately one hour each day. During the 1994-95 school year petitioner also performed all of Ms. Sandvick's duties on a couple of occasions, once when Ms. Sandvick was sick and another time when Ms. Sandvick went on vacation, with the exception of duties petitioner advised Mr. Biddle she could not perform because they were "secretarial functions." During the 1994-95 school year petitioner was assigned additional duties, such as inputting student directory information into a new computer system, and keeping records of student discipline and Saturday detentions.

Respondent's answers to interrogatories, offered as an exhibit by petitioner on her direct case, described petitioner's duties for each year prior to 1994-95 as follows:

1. Calling up absent students and their parents, as well as other calls as directed by the Assistant Principal

2. Calling students to the office to explain their absences and latenesses

3. Collecting and filing notes from parents regarding student absences and latenesses

4. Completing absence and lateness forms to be forwarded to teachers.

Respondent's interrogatory answers add the following additional duties for 1994-95:

5. Computer input of discipline forms

6. Computer input regarding Saturday detentions.

Petitioner always performed her duties in an exemplary manner. Her performance evaluations praise her outstanding communications skills, her personal interactions with parents, students and staff, and her thorough knowledge of each student.

After petitioner's call-up functions had been drastically limited, Michael Lacey, Director of Personnel for respondent, reviewed the three existing paraprofessional jobs and after consulting with the secretarial association and the paraprofessional association, he determined that the three positions, as they then currently existed, were more secretarial than paraprofessional.

On or about May 2, 1995, respondent posted the following position vacancy notice for Secretary - Level I - 10 Month:

TITLE: Secretary - Level I - 10 Month

LOCATION: High School

REPORTS TO: Assistant Principal - Student Affairs

DESCRIPTION: Computer input, knowledge of Mac necessary. Organize and maintain records on student detentions and tardies. Other duties include filing, phone calls, parent and student contact and any other duties as assigned.

SALARY: Per Negotiated Salary

. . .

The job description which was prepared for the job listed in the May 2, 1995 posting, provided as follows:

TITLE: Clerk Typist

LOCATION: South Brunswick High School

REPORTS TO: Assistant Principal for Student Affairs

GENERAL DUTIES INCLUDE:

Types memos, letters, reports, purchase orders and related materials for the department and school. Operates standard office machines. Prepare and order supplies. Maintains student files. Screens and routes materials, correspondence and phone calls. Conveys some departmental and school information of a routine nature to parents, staff and outside individuals. All other jobs as assigned by supervisor.

ADDITIONAL DUTIES:

DAILY:

Inputs student discipline information into Mac School. Signs in and maintains accurate records for attendance. Processes and maintains detention records and contacts students and parents on detentions.

REGULAR AND PERIODIC:

Retrieve from computer and prepare discipline description portfolio on students. Prepare forms and maintain records on truant students. Contact students and facilitate conferences with school personnel.

OCCASIONAL:

Prepares forms, work orders, bus passes and purchase orders.

EDUCATION AND EXPERIENCE:

High School Diploma required. Training or experience in secretarial skills including typing. Knowledge of arithmetic, English and grammar. Operation of basic office equipment including MAC computer, copying/duplicating machines.

Upon the advice of the Paraprofessional Association, petitioner did not submit an application for the posted vacancy. Petitioner's position and that of the Paraprofessional Association was that petitioner already held the job described, although petitioner acknowledges that she never

prepared or ordered supplies or prepared purchase orders. The posted position was thereafter filled by another employee who had applied. By letter dated June 22, 1995, respondent wrote to petitioner as follows:

> During recent weeks the administrative staff and I have been wrestling with some rather difficult questions about paraprofessional staffing for the 1995-96 school year.
>
> It appears that at the present time, you will be reappointed for the 1995-96 school year but unfortunately at a lesser number of hours than we have been able to assign in preceding years.
>
> In the event you have any questions about your hours and your assignment please contact your principal.
>
> I want you to know that we value the paraprofessional unit very highly and regret that we must make these reductions.

The paraprofessional job to which petitioner was assigned for the 1995-96 school year involves performing hall monitor duties for six and one-half hours per day with one-half hour unpaid lunch break. Petitioner's collective bargaining unit filed a grievance with respondent in which the Paraprofessional Association alleges that petitioner's contractual seniority rights have been violated by the reduction in hours, and petitioner filed the petition of appeal which commenced the within matter.

APPLICABLE LAW AND DISCUSSION

Since tenure is a statutory status and not a contractual one, petitioner must base her claims in this matter upon specific statutory provisions. Not all school board employees are protected by statutory job security. The Education Act makes specific provisions for tenure of teachers and other employees holding certificates issued by the State Board of Examiners (N.J.S.A. 18A:28-5 and 6); secretaries, assistant secretaries, business administrators, business managers, secretarial and clerical employees (N.J.S.A. 18A:17-2); janitorial employees (N.J.S.A. 18A:17-3); and

attendance officers (N.J.S.A. 18A:38-33). In Plumbers and Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83, 87 (App. Div. 1978), the court held that board of education employees whose tenure is not provided for by the Legislature may negotiate job security with their employer. The court noted:

> The existing protections are the result of successful appeals by the covered groups for the passage of protective laws. Their ad hoc nature is implicit in the diversity of sections in which they are found. Each legislative grant has been sui generis. The failure to provide a specific tenure should not be interpreted as a legislative prohibition [of negotiated job security]. See Maywood Education Assn., Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551, 554-555 (Ch. Div. 1974); Camden v. Dicks, 135 N.J. Super. 559, 562-563 (Law Div. 1975).

Currently no statutory provision provides tenure for paraprofessional employees. Petitioner's bargaining unit, the South Brunswick Association of Paraprofessionals, in recognition of this statutory omission has apparently negotiated some job protection with respondent as evidenced by the notation in the verified petition concerning the seniority grievance filed by the Association on petitioner's behalf. The Commissioner has previously recognized that paraprofessional titles established pursuant to N.J.A.C. 6:11-4.6 (formerly N.J.A.C. 6:11-4.9) are not tenure eligible. In Rossi v. Willingboro Twp. Bd. of Educ., Agency Docket Number 294-8/78 (September 24, 1980), adopted (Comm'r. November 7, 1990), aff'd August 5, 1981), the Commissioner determined that Mr. Rossi's Learning Resources Center (LRC) Aide Position was a paraprofessional position and therefore not eligible for tenure. The job description at issue in Rossi provided:

> Under the supervision of a certified librarian and teachers, the aide's duties will be:
>
> 1. To assist with processing books, supplies, materials, magazines, journals, newspapers in the Resource Center.
>
> 2. To assist with preparation of displays to motivate student interest and to provide supplementary instructional information.

3. To assist in checking out and retrieving of materials.

4. To assist instructional staff with preparation of special bibliographies and reading lists.

5. To care for the housekeeping duties of the Resource Center.

6. To assist with roll taking.

7. To assist with general typing.

8. To assist with collecting and filing of free materials.

9. To assist with cataloging and care of audio visual materials in the Resource Center.

10. To assist pupils with locating books and materials applicable to their individual needs.

The same document identified the function of an LRC aide as, "To maintain and operate Learning Resource Centers under the direction of the librarian." The document also identified the responsibility of the position:

> The Learning Resource Center Aide is responsible to the librarian and the secondary school principal and through him to the Director of Secondary Education, the Assistant Superintendent of Schools and the Superintendent of Schools.

Adopting the administrative law judge's decision as his own, and recognizing that Barnes v. Board of Education of Jersey City, 85 N.J. Super. 42 (App. Div. 1964), cert. den. 43 N.J. 450 (1964), required a broad, inclusive reading of the clerical title, the Commissioner nevertheless ruled:

> Some of the listed duties are clearly clerical, some may be clerical and some clearly are not. Petitioner urges that a simple preponderance of clerical duties is sufficient to warrant a decision that she is a clerk irrespective of title. I cannot agree.

> The Board hires many employees. The Willingboro district is a fairly large one. Differentiation of staff is at once necessary, inevitable and desirable. Aide positions, such as petitioner's, have been created pursuant to law for specific purposes. The function and duties of LRC aide are clearly stated in the job description. It is not a purely clerical position. Even if clerical duties predominate, the position is not necessarily a clerical one.
>
> The Board recognized the special nature of some of the duties involved, particularly as they relate to pupils but also as they relate to professional staff, and decided the position was neither clerical nor professional. In brief, it was paraprofessional. On the basis of that decision, the required approval of the county superintendent of schools was sought and received.
>
> Petitioner knew the title of the position and the nature of the duties attendant when she applied for it. It is noticed in this connection that the job description is a joint exhibit.

Although in the within matter respondent regrettably failed to comply with the provisions of N.J.A.C. 6:11-4.6(c), requiring district boards of education employing school aides or classroom aides to submit to the county superintendent of schools a job description for each type of aide to be employed,* petitioner herein, like the petitioner in Rossi, was well aware of the nature and parameters of her call-up duties over the years she held the position, and she herself considered the position a paraprofessional one rather than a non-professional one. Prior to the 1994-95 school year, petitioner's duties primarily and predominantly involved telephone communication with parents and students and interaction with school professional staff members. Clearly some of petitioner's duties were clerical in nature but those clerical duties which were hers, as opposed to Mr. Biddle's secretary's duties, were incidental to her paraprofessional attendance duties. As respondent pointed out in its initial post-hearing written submission, most jobs contain some functions which could be classified as clerical. "Performing nominal clerical duties does not make one a clerical employee within the meaning of the statute." Effenberger v.

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* Respondent did comply with the annual requirement of N.J.A.C. 6:11-4.6(c)3 to submit to the County Superintendent a report of those persons employed in school aide positions. These reports always included petitioner and her call-up aide position.

Board of Education of Toms River Regional Schools, 95 N.J.A.R.2d (EDU) 66, 69; aff'd State Board, 95 N.J.A.R.2d (EDU) 203. As in Rossi, supra, petitioner's primary duties prior to 1994-95 involved assisting a certificated teaching staff member, the assistant principal, in performing his school attendance functions. The communications skills required to perform these duties and the interaction necessitated between petitioner and pupils, parents and professional staff, remove call-up aide from the category of non-professional clerical employees contemplated in N.J.S.A. 18A:17-2. The same cannot be said with respect to the nature of petitioner's position during the 1994-95 school year, however, when her paraprofessional-type duties were minimal and incidental to the predominantly and primarily clerical duties she performed. Respondent recognized this change, and thereafter recategorized the position as a clerical one, commencing with the 1995-96 school year.

None of the cases cited by petitioner in support of her claims to be declared a tenured clerical employee require a different conclusion. In Quinlan v. Bd. of Ed. of North Bergen Tp., 73 N.J. Super. 40 (App. Div. 1962), the court held that an employee who held tenure in a district in a clerical position and who was then assigned to a hybrid position, clerk-attendance officer, wherein the board of education controlled the number of duties she performed in the non-tenure eligible portion of her position,* did not lose her tenured clerical status simply because during some years she was primarily doing the work of an attendance officer. When the attendance officer position was eliminated, the court ruled, Ms. Quinlan was entitled to return to her tenured clerical position. If the facts in the within matter had been chronologically reversed, i.e., if petitioner's position had been primarily clerical as it was during 1994-95 for the number of years required to obtain tenure in a clerical position, and the nature of the position then changed primarily to paraprofessional status, Quinlan might have some applicability. As the facts stand in the within matter, however, petitioner never achieved tenure in a clerical position, and Quinlan does not provide any basis for the relief which petitioner seeks.

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* At the time Quinlan was decided the position Attendance Officer was a non-tenure eligible position. The statute providing tenure for attendance officers was not adopted until 1968.

Berardi v. South Orange School District Board of Education, 95 N.J.A.R.2d (EDU) 239, also cited by petitioner, is likewise not controlling under the facts of the present matter. In Berardi, the Commissioner determined that the job description "Clerical Aide" placed petitioner's clerical position within the broad range of coverage intended in Barnes, supra. Although Ms. Berardi's job duties included most of those encompassed by petitioner's Call-Up Aide position herein, i.e., checking student attendance daily and calling parents concerning absences, Ms. Berardi was also specifically assigned her own unrelated clerical duties, e.g., sorting incoming and outgoing mail, assisting secretarial staff with filing and Xeroxing, etc. The Berardi case was tried on stipulated facts and there is no indication in the record concerning whether the paraprofessional functions she performed were primary or incidental. Based upon the outcome of the case, a fair conclusion is that Ms. Berardi's call-up functions were incidental, as were petitioner's during the 1994-95 and as reflected in the position posted on May 2, 1995 for a clerk typist.

Finally, the determination in Roach v. South Orange-Maplewood School District, 96 N.J.A.R.2d (EDU) 370, that the position "media aide (clerical)" was a tenure eligible clerical position rather than an aide position under N.J.A.C. 6:11-4.6, is based upon a fact-specific analysis that petitioner's duties therein were predominantly clerical in nature. The administrative law judge's determination also appears to be based, at least in part, upon his conclusion that Ms. Roach had her own unique duties to perform and did not merely assist others in performing their professional responsibilities, as well as his conclusion that the board manipulated Ms. Roach's job title and assignments in an attempt to divest her of tenure protection. No such bad faith motivation exists or was even alleged in the within matter. Respondent holds petitioner in high regard as a paraprofessional employee within the district. She is understandably unhappy about her reduction in hours and resultant compensation for the 1995-96 school year; however, as a non-tenured employee her forum to address those concerns is the grievance procedure in the negotiated agreement, as the verified petition of appeal indicates and recognizes.

For all of the foregoing reasons, I **CONCLUDE** that petitioner does not hold any tenure/seniority rights to a full-time position currently occupied by non-tenured or less senior

clerical personnel. Accordingly, the petition of appeal is **DISMISSED** and these proceedings are hereby **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 15, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

8/15/96
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

AUG 16 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioner:

P-1 Position vacancy posting, dated May 2, 1995

P-2 Job description Clerk Typist (Level I)

P-3 Memorandum from Michael Lacey, Director of Personnel, to petitioner, dated May 17, 1995

P-4 Letter from respondent to petitioner, dated June 22, 1995

P-5 Petitioner's Performance Evaluation, dated 5/6/91 (2 pages)

P-6 Petitioner's Performance Evaluation, dated 6/4/92

P-7 Petitioner's Performance Evaluation, dated 6/9/93

P-8 Petitioner's Performance Evaluation, dated 6/23/94

P-9 A blank bus pass

P-10 Photo copies of bus passes (2 types)

P-11 Form letter signed by assistant principal re: Attendance Review - Time Owed for Unexcused Lateness

P-12 Form letter signed by assistant principal re: Summer Make-Up Time

P-13 Form letter signed by assistant principal re: Attendance Review - Required Make-Up Summer 198-

P-14 Form letter signed by assistant principal re: Attendance Review - Final Reminder

P-15 Form letter signed by assistant principal re: Attendance Review - Required Make-Up Summer 1988

P-16 Form letter signed by assistant principal re: Attendance Review

P-17 Blank Truant from School form

P-18 In-school truancy notice

P-19 Absentee Call-In sheets, blank

P-20 Blank Withdrawal from South Brunswick High School form, signed by assistant principal

P-21 South Brunswick High School Attendance Card, blank (2 pages)

P-22 Example of South Brunswick High School attendance sheet, dated 11/1/95

P-23 Respondent's answers to interrogatories

For respondent:

R-1 Petitioner's employment history cards (3 pages)

R-2 Letter from Michael Lacey, Director of Personnel, to County Superintendent of Schools, dated November 14, 1988 (6 pages)

R-3 South Brunswick High School attendance sheet 4/25/94 (2 pages)

R-4 Annual Report of persons employed in School Aide positions 1983-84 (3 pages)

R-5 Letter from County Superintendent of Schools to respondent approving Annual Report of Persons Employed in School Aide Positions, dated January 8, 1985 (6 pages)

R-6 Letter from County Superintendent of Schools to respondent approving Annual Report of Persons Employed in School Aide Positions, dated January 6, 1986 (6 pages)

R-7 Letter from County Superintendent of Schools to respondent approving Annual Report of Persons Employed in School Aide Positions, dated November 23, 1986 (6 pages)

R-8 Memorandum from County Superintendent of Schools to Chief School Administrators, dated September 21, 1988 with attachments (7 pages)

R-9 Letter from County Superintendent of Schools to respondent approving Annual Report of Persons Employed in School Aide Positions, dated October 26, 1989 (10 pages)

R-10 Letter from County Superintendent of Schools to respondent approving Annual Report of Persons Employed in School Aide Positions, dated November 7, 1990 (8 pages)

R-11 Letter from County Superintendent of Schools to respondent approving Annual Report of Persons Employed in School Aide Positions, dated August 22, 1994 (7 pages)

R-12 Letter from County Superintendent of Schools to respondent approving Annual Report of Persons Employed in School Aide Positions, dated October 25, 1995 (19 pages)

WITNESSES

For petitioner:

Marlene Marbut

For respondent:

Anthony Biddle

Michael Lacey

OAL DKT. NO. EDU 8281-95

MARLENE MARBUT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4. Inasmuch as both submissions essentially constitute a verbatim reiteration of the parties' arguments advanced before the Administrative Law Judge (ALJ), and the Commissioner finds that said arguments were fully and fairly considered by the ALJ, they are not summarized herein.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner has failed to establish that school law accords her a tenure and/or seniority right to the full-time position currently occupied by nontenured, or less senior, personnel. Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 30, 1996
DATE OF MAILING OCTOBER 1,, 1996

436-96

EDU #8281-95
C # 436-96
SB # 77-96

MARLENE MARBUT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 30, 1996

For the Petitioner-Appellant, Klausner & Hunter (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Carroll & Weiss (John E. Collins, Esq., of Counsel)

On October 24, 1996, appellant's counsel filed a notice of appeal to the State Board of Education from the Commissioner's decision, which had concluded that appellant had not achieved tenure as a clerical employee. Pursuant to N.J.A.C. 6:2-1.11(a), a brief in support of an appeal must be filed "within 20 days after the appeal has been filed." Thus, as mandated by N.J.A.C. 6:2-1.11(a) and computed under N.J.A.C. 6:2-1.4, appellant's counsel was required to file an appeal brief by November 13, 1996. No brief was filed by that date, nor did counsel for Appellant request an extension for such filing.

1/8/97

By letter dated November 19, 1992, appellant's counsel was notified of his failure to file a brief in support of the appeal. Counsel was advised that the matter was being referred to the Legal Committee of the State Board of Education for consideration of his failure to perfect the appeal as provided for by N.J.A.C. 6:2-1.12, which authorizes dismissal of an appeal on motion of the State Board for failure to meet the filing deadline for the appeal brief. Appellant's counsel failed to respond to this notice.

As described above, pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief was due on November 13, 1996. Appellant's counsel did not file a brief by that date and has not acted to rectify this failure in any way. Nor has he at any time requested an extension or provided any explanation for his failure to file a brief. Because appellant's counsel has failed to perfect the appeal, the State Board of Education therefore dismisses it. N.J.A.C. 6:2-1.12(a). Paszamant v. Highland Park Board of Education, Docket # A - 4812-91-3 (App. Div. 1993).

Jean D. Alexander abstained.

January 8, 1997

Date of mailing JAN 10 1997

437-96

437-96 SEC

STEPHEN A. STUART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
RONALD R. GRAHAM,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 3, 1996

OAL DKT. NO. EDU 3575-96 (EDU 2825-95 ON REMAND)
AGENCY DKT. NO. 106-4/94

STEPHEN A. STUART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
RONALD R. GRAHAM,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on August 27, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1996
DATE OF MAILING OCTOBER 3, 1996

438-96

438-96

IN THE MATTER OF THE TENURE HEARING	:	
OF GERTRUDE SAUNDERS, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE BOROUGH OF	:	DECISION
HADDON HEIGHTS, CAMDEN COUNTY.	:	
_____	:	

OCTOBER 3, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8588-95
AGENCY DKT. NO. 343-8/95

HADDON HEIGHTS BOARD OF EDUCATION (CAMDEN COUNTY),
Petitioner,
v.
GERTRUDE SAUNDERS,
Respondent.

Robert P. Becker, Jr., Esq., for petitioner (Hannold, Marshall & Becker, attorneys)

Steven R. Cohen, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: August 16, 1996 Decided: August 21, 1996

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

The within matter was commenced on August 23, 1995, by the Board of Education of Haddon Heights (hereinafter petitioner) with the filing of tenure charges in accordance with the requirements of N.J.S.A. 18A:6-11 against Gertrude Saunders (hereinafter respondent). Petitioner certified charges alleging unbecoming and unprofessional conduct, specifically that respondent had intentionally and surreptitiously altered students' answer sheets to the Iowa Test of Basic Skills in order to influence and improve the scoring of her sixth grade students on the test. On September 15, 1995, respondent filed an Answer denying the charges and on September 20, 1995, the matter was transmitted to the Office of Administrative Law for a determination as a

contested case, pursuant to N.J.S.A. 52:14B-1 to -13. A prehearing conference was conducted on November 21, 1995 by Jeff S. Masin, the administrative law judge then assigned to the case. Trial dates were scheduled for April 15, 16, 18, 22, 23 and 24, 1996, and the case was transferred to the undersigned for hearing. Prior to the scheduled hearing dates, the parties advised that because petitioner wished to avoid having to produce the student witnesses and because it had concluded that it lacked sufficient evidence to prove the charges, the parties would be attempting to resolve this matter without the necessity for a hearing. Following several telephone status conferences, on August 16, 1996, the parties forwarded a signed Settlement Agreement/Release and Stipulation of Dismissal which is attached hereto and made a part hereof as if set forth herein at length.

I have reviewed the record and the terms of settlement and I **CONCLUDE** that in view of all of the circumstances, it would not be improper for the Commissioner of Education to approve this settlement as an appropriate voluntary resolution of this matter entirely consistent with the law and the philosophy expressed in Cardonick v. Board of Education of the Borough of Brooklawn, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1983 by the State Board of Education. The parties have set forth in their written settlement agreement all of the circumstances which have caused petitioner to conclude that a hearing on the merits in this matter would probably not serve the public interest. Petitioner has some concerns about what respondent may have done, but recognizes nonetheless that the charges must be established on the record by a preponderance of the competent and credible evidence.

Based upon additional information obtained in the discovery process, petitioner now believes that it will be unable to sustain its burden of proof, and it wishes to avoid the costs of protracted litigation with little likelihood of success on the merits. Petitioner recognizes that respondent's record is otherwise unblemished over an 18-year teaching career, and the arrangements made in the settlement agreement for respondent to be reassigned from a classroom to a special education resource room or a basic skills position where there will be other teaching staff members present will remove the possibility of any conduct ever occurring similar to that alleged in the charges. Resumption of salary payments to respondent pursuant to N.J.S.A. 18A:6-

14 has occurred already; the only additional payment to respondent provided in the settlement agreement is for the 120-day period of suspension without pay which commenced August 23, 1995, and respondent will be returning to petitioner the net payment; this will give respondent pension credit for the 120 days, but it will also help to defray petitioner's costs for payment of salary to the substitute teacher(s). If respondent engaged in any unprofessional conduct, she undoubtedly has learned from this experience, and there is unlikely to be any future incident.

Under all of the circumstances, the proposed Settlement Agreement and Stipulation of Dismissal appears to be an appropriate resolution of the matter.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the Settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Aug 21, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8/23/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 26 1996
DATE

Barbara A Harnad
OFFICE OF ADMINISTRATIVE LAW

cc

HANNOLD, MARSHALL & BECKER
47 Cooper Street - P.O. Box 57
Woodbury, New Jersey 08096
PHONE (609) 845-1000 * FAX (609) 845-0265

Attorneys for Petitioner

HADDON HEIGHTS BOARD OF EDUCATION (CAMDEN COUNTY),	:	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner	:	**SETTLEMENT AGREEMENT/ RELEASE/STIPULATION OF DISMISSAL**
vs.	:	
GERTRUDE SAUNDERS, Respondent	:	

RE: In The Matter of the Tenure Hearing of Gertrude Saunders, Board of Education of Haddon Heights School District, Camden County, OAL Docket No. EDU 08588-95, Agency Docket No. 343-8/95

WHEREAS, this Settlement Agreement/Release is made by and between the parties, Haddon Heights Board of Education of the County of Camden, hereinafter referred to as "Petitioner", and Gertrude Saunders, hereinafter referred to as "Respondent", based upon an action filed before the Office of Administrative Law charging the Respondent, a tenured sixth grade teacher, with unbecoming and unprofessional conduct which Petitioner alleged was sufficient to warrant a dismissal of Respondent; and,

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47 COOPER STREET
WOODBURY, NEW JERSEY
08096

WHEREAS, the parties are able to agree on a compromise with respect to this matter, based upon a careful review of the facts and circumstances surrounding the incident, a careful review of the evidence to be submitted in regard to the matter, certain concessions and conditions which have been agreed to by the Respondent, and the parties' desire to avoid the uncertainty of prolonged litigation; and

WHEREAS, on September 15, 1996, Respondent filed an Answer to the charges denying the allegations as stated; and

WHEREAS, the Petitioner having instituted the charges based upon initial information received pertaining to the allegations, and subsequent to the placing of this matter in litigation, during the "discovery" phase and in preparation for hearing, having conducted a more detailed and full independent investigation into the allegations, having obtained all relevant information and documentation; and having determined that it will not be able to meet its burden of proof by a preponderance of the credible evidence; and

WHEREAS, this full investigation of all the evidence that might be presented during the tenure hearing having provided the Petitioner with the opportunity to explore a means of resolving this dispute in a manner consonant with the public interest; and in light of the commendable employment record of Respondent over her long-standing tenure of some eighteen years, her age (69), and other mitigating factors; and the Petitioner having concluded that it is in the best interests of

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the public, including the students and the Haddon Heights community that Respondent continue in her long standing position as a teaching staff member for the Haddon Heights School District uninterrupted; and being satisfied that no further incident of the nature alleged would occur; and

WHEREAS, the Respondent is agreeing to reassignment and continued supervision by the District Superintendent of the school district of Petitioner, which assignment will be in a controlled and supervised setting; and

WHEREAS, the Respondent has agreed to pay back certain monies to defray the costs of the substitute which was necessarily hired based upon the charges being brought by the Petitioner; and

WHEREAS, the parties desire to resolve this matter subject to the approval of the Office of Administrative Law and the Commissioner of Education of the State of New Jersey; and

WHEREAS, both Petitioner and Respondent have agreed as to what they believe to be a settlement which is in the best interest of all concerned.

IT IS HEREBY AGREED that the entire controversy in dispute by and between Petitioner and Respondent is to be settled and resolved in the following manner:

TERMS OF SETTLEMENT

In consideration of the mutual covenants and agreements as set forth below, the parties on this 21st day of August, 1996, stipulate and agree as follows:

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WOODBURY, NEW JERSEY
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1. The Petitioner agrees to pay over to the Respondent $15,749.75 less deductions which are identified as follows:

Federal Withholding . . .	$2,008.79
Medicare	231.00
FICA	887.84
Summer Pay	1,275.00
NJIT	276.57
TPAF	755.16
Union Dues	207.20

Upon making these deductions and payment, the amount of $10,008.19 shall be paid over to Respondent by Petitioner. The Respondent agrees to accept the above-mentioned sum in full satisfaction of any and all claims and interest that it now has or may have in the future with respect to the tenure charges against the Respondent or as to salary owed. The Respondent agrees to the amounts which are being deducted and paid and notes that contribution insurance, pension loan, tax shelter, and Washington National deductions which are normally deducted from the Respondent's pay are not being paid by Petitioner and are Respondent's responsibility.

2. Respondent agrees to be reassigned to the Junior/Senior High School to a Special Education and/or Basic Skills position providing special education and/or basic skills instruction, or, to be reassigned in any other area of appropriate certification based upon the needs of the District at the discretion of the Superintendent. The Respondent agrees

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to this reassignment and shall enjoy all other rights and privileges of her employment as heretofore was her right under her contract of employment.

3. The parties agree that the terms of this compromise and settlement agreement bind the parties to this agreement, their heirs, executors, administrators, and assigns.

4. The parties to this agreement in consideration of the covenants contained in this agreement, do hereby mutually release each other from any and all claims of any kind or character which they or any any of them may have, by reason of any matter or thing whatever.

5. Petitioner and Respondent hereby releases and discharges themselves, their legal representatives, successors and assigns, from any and all claims, demands, damages, action cause of action, or suits at law or equity, of any kind or nature, in any manner arising out of the tenure charges brought by Petitioner against Respondent.

6. Petitioner agrees to file a Dismissal with Prejudice of the above-mentioned legal action against Respondent.

7. This Agreement and the obligation of the parties as set forth herein is specifically contingent and conditioned upon the approval of this Agreement by the Office of Administrative Law and the Commissioner of the New Jersey Department of Education. In the event that either the Office of Administrative Law and/or the Commissioner of the State of New Jersey disapproves this Agreement, then in that event, this

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08096

matter shall be relisted for Trial with the Office of Administrative Law.

8. In the event the Office of Administrative Law and/or the Commissioner of Education of the State of New Jersey does not approve this Agreement, then in that event, it is specifically understood and agreed that no part of this Agreement, nor the fact that the parties entered into this Agreement shall be admissible or used in any manner in any subsequent proceedings between Petitioner and Respondent.

9. Petitioner and Respondent believe this Agreement is consistent with the public interest and public policy and is in the public's best interest.

10. For the reasons set forth above, Petitioner and Respondent believe that an amicable and expeditious settlement of the dispute based upon the foregoing terms is in the interest of themselves and the public. In consideration of these terms and subject to the approval of the Commissioner of Education, Petitioner and Respondent hereby agree that the dispute between them shall be resolved, based upon the terms and conditions as set forth herein. It is further agreed that should the Commissioner of Education of the State of New Jersey reject this Agreement, all provisions thereof shall be null, void and of no further effect, and the parties shall retain all the legal rights they had prior to their consent to this Agreement.

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RELEASE OF ALL CLAIMS

In consideration of payments being made as aforesaid by Petitioner to Respondent and then Respondent to Petitioner and Respondent submitting to a transfer of work assignment as aforesaid, the Respondent does release Petitioner and, likewise, the Petitioner does release Respondent from all claims, demands and cause of action that either has had or may have against the other based upon the disagreement which is the subject of the tenure charges.

The Respondent agrees that no representations have been made regarding this settlement except those as set forth in this settlement document.

In consideration of mutual relinquishment of their respective legal rights with references to the disputes and in consideration of the execution of this mutual release and fulfillment of the conditions of the settlement as aforesaid, it is hereby acknowledged that each of the parties hereby expressly releases the other, and their heirs, executors, administrators, successors or assigns from all liability or claims and demands arising out of this tenure action.

STIPULATION OF DISMISSAL

Based upon the settlement and release aforesaid, the Petitioner does hereby move for dismissal of the tenure charges which have been filed against Respondent and considers the matter fully settled.

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WOODBURY, NEW JERSEY
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We hereby consent to the form and entry of the above stipulations:

HANNOLD, MARSHALL & BECKER

Date: August 13, 1996 By: _____
ROBERT P. BECKER, JR., ESQ.
Attorneys for Petitioner

SELIKOFF & COHEN, P.A.

Date: August 15, 1996 By: _____
STEVEN R. COHEN
Attorney for Respondent

Date: August 21, 1996 _____
M. KATHLEEN DUNCAN, A.L.J.

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MARSHALL & BECKER
47 COOPER STREET
WOODBURY, NEW JERSEY
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IN THE MATTER OF THE TENURE HEARING	:	
OF GERTRUDE SAUNDERS, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE BOROUGH OF	:	DECISION
HADDON HEIGHTS, CAMDEN COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. However, in view of the seriousness of the underlying allegations, this matter shall be forwarded to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1996

DATE OF MAILING OCTOBER 3, 1996

439-96

439-96

B.M., on behalf of minor child, F.M., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, : DECISION

RESPONDENT. :

:

OCTOBER 3, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 1758-96

AGENCY DKT. NO. 483-12/95

B.M. ON BEHALF OF MINOR CHILD, F.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

B.M., petitioner, *pro se*

Joanne L. Butler, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: August 19, 1996 Decided: August 26, 1996

BEFORE **ELINOR R. REINER**, ALJ:

On or about January 3, 1996, petitioner B.M., on behalf of her minor child, F.M., filed a verified petition of appeal with the Commissioner of Education challenging the residency determination of the South Orange Maplewood Board of Education. Respondent filed an answer on February 13, 1996, alleging that F.M. is not entitled to a free public education in respondent's school district pursuant to *N.J.S.A.* 18A:38-1.

Respondent asserted in its counterclaim that B.M. is responsible pursuant to *N.J.S.A.* 18A:38-1 for the tuition costs for the period of ineligible attendance of the pupil F.M., the 1995-96 school year, and sought reimbursement. On February 20, 1996, this matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on April 7, 1996, and a telephone prehearing conference was scheduled for July 1, 1996. A notice advising B.M. of the conference was sent to B.M. at one address that appeared in the file. On July 1, 1996, this judge attempted to place the call with petitioner at three different telephone numbers that appeared in the file for her, but to no avail. Since petitioner could not be reached, the prehearing conference could not be held on July 1, 1996. Notices of an in-person prehearing conference scheduled for July 31, 1996, at 3:30 p.m. at the OAL were sent on July 9, 1996, to the three addresses that appeared in the file for B.M. In addition, the undersigned wrote a letter to B.M. (see attached letter dated July 5, 1996), advising her of the OAL's attempt to place the conference call on July 1, 1996. The letter further indicated that an in-person prehearing conference had been scheduled for July 31, 1996, at 3:30 p.m. at the OAL. B.M. was advised that this was a peremptory date, and that if she did not appear her case would be dismissed for failure to appear.

On the date and time scheduled for the in-person prehearing conference, respondent's attorney appeared. B.M. failed to appear or provide the OAL with reasons for her non-appearance. As a result, the conference was not held. The undersigned advised counsel for respondent to prepare an order pursuant to the five-day rule, dismissing petitioner's claims and granting respondent's counterclaim seeking reimbursement of tuition for the 1995-96 school year. Respondent's counsel filed the order under the five-day rule on August 12, 1996, and sent a copy to B.M. B.M. was advised that pursuant to *N.J.A.C.* 1:1-14.9(c) she could object to the form of the order in writing within five days. B.M. has failed to respond to the order, to any of the notices sent to her scheduling prehearing conferences on July 1, 1996, and July 31, 1996, or to this judge's letter of July 5, 1996. As a result, I **CONCLUDE** that petitioner has abandoned her request for a hearing in regard to her petition and in response to the counterclaim. I therefore **ORDER** that the petition is dismissed, and that respondent's

counterclaim seeking reimbursement of tuition for the 1995-96 school year is granted. The attached order incorporates the terms of this decision.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 26, 1996
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 29 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
Aug 12 11 40 AM '96

SCHENCK, PRICE, SMITH & KING
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for Board of Education of
South Orange/Maplewood School District

B.M. ON BEHALF OF MINOR CHILD F.M.,	STATE OF NEW JERSEY
Petitioner(s),	OFFICE OF ADMINISTRATIVE LAW
vs.	OAL DOCKET NO. EDUOS 01758-96N
BOARD OF EDUCATION OF SOUTH ORANGE/MAPLEWOOD SCHOOL DISTRICT,	AGENCY REF NO. 483-12/95
Respondents.	**ORDER**

THIS MATTER having come before the Court in response to Petitioner/Counterclaim Respondent's failure to participate in the pre-hearing conference call on July 1, 1996, and the Court having directed the appearance of the parties at a pre-hearing conference on July 31, 1996, and counsel for Respondent/Counterclaimant Board of Education having appeared, and there being no appearance by Petitioner/Counterclaim Respondent; and for good cause shown;

IT IS on this 26th day of August, 1996,

ORDERED, that the Petition be dismissed in its entirety;

IT IS FURTHER ORDERED, that the Counterclaim seeking reimbursement of tuition for the 1995-1996 school year is granted.

Elinor R. Reiner
Honorable Elinor Reiner

F:\APPS\SSOLDATA\WP\JLB\180074.1

OAL DKT. NO. EDU 1758-96

B.M., on behalf of minor child, F.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs that petitioner, by her repeated failure to respond to the attempts by the OAL to schedule this matter for hearing or to respond to the proposed Order, has abandoned her request for a hearing.

Accordingly, the initial decision of the Administrative Law Judge affirming the Board's determination that F.M. was an ineligible student in the District for the 1995-96 school year, and assessing relevant tuition costs, is adopted for the reasons expressed therein. Pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, petitioner is directed to remit to the Board of Education tuition for F.M., prorated to the time of her ineligible attendance in the District.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1996

DATE OF MAILING OCTOBER 3, 1996

440-96

440-96

BARBARA DODD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 3, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12863-95

AGENCY DKT. NO. 422-10/95

BARBARA DODD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

Michael B. Berman, Esq., for petitioner (Collins & Berman, attorneys)

James T. Hundley, Esq., for respondent (Hundley and Parry, attorneys)

Record Closed: August 23, 1996 Decided: August 27, 1996

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE

Petitioner, a certified teaching staff member, based on a work-related injury, seeks restoration of sick time and benefits pursuant to N.J.S.A. 18A:30-2.1. The matter was transmitted to the Office of Administrative Law (OAL) on December 28, 1995, for hearing as a

contested case. The matter was scheduled for a telephone prehearing conference on March 5, 1996, but was adjourned until April 9, 1996. On April 9, 1996, a telephone prehearing conference was held and because of ongoing settlement discussions, the matter was continued to May 7, 1996. On May 7, 1996, the parties indicated that the matter would be settled and that upon resolution of certain outstanding matters, a stipulation of settlement would be provided. The matter was rescheduled for hearing on July 17, 18 and 19, 1996. Prior to the scheduled hearing date, the parties notified the administrative law judge that the matter had been settled. A Stipulation of Settlement was submitted on August 23, 1996, and by this Stipulation of Settlement a copy of which is attached, the parties have agreed to settle this matter.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 27, 1996
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

8/28/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 30 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

HUNDLEY & PARRY, P.C.
35 Pilgrim Pathway
P.O. Box 488
Ocean Grove, NEW JERSEY 07756
(908) 775-3100
Attorneys for Respondent

BARBARA DODD Petitioner, v. BOARD OF EDUCATION OF TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY Respondent.	: : : : :	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO. EDUOR 12863-95S AGENCY REF. NO. 422-10/95 STIPULATION OF SETTLEMENT

WHEREAS, the Petitioner filed a Petition of Appeal before the Commissioner of Education seeking restoration of sick leave for a work related injury; and

WHEREAS, the parties agree that on September 27, 1993, Petitioner was employed by Respondent as a certified teaching staff member; and

WHEREAS, the parties agree that on September 27, 1993, Petitioner suffered a personal injury caused by an accident arising out of and in the course of her employment within the meaning of N.J.S.A. 18A:30-2.1; and

WHEREAS, the parties agree that on December 17, 1993, Petitioner was first absent from her post of duty as a result of the September 27, 1993 accident and injury; and

WHEREAS, the parties agree that in the 1993-94 school year during the period December 17, 1993 through June 30, 1994 inclusive, the Petitioner was absent from her post of duty on thirteen (13) days as a result of the September 27, 1993 accident and injury; and

WHEREAS, the parties agree that in the 1994-95 school year, during the period September 6, 1994 and December 17, 1994, inclusive, the Petitioner was absent from her post of duty on sixty-eight (68) days as a result of the September 27, 1993 accident and injury; and

WHEREAS, the parties agree that the thirteen (13) days Petitioner was absent in the 1993-1994 school year, during the period December 17, 1993 and June 30, 1994, as a result of the September 27, 1993 accident and injury should not be charged to Petitioner's annual sick leave or accumulated sick leave pursuant to the provisions of N.J.S.A. 18A:30-2.1; and

WHEREAS, the parties agree that the sixty-eight (68) days Petitioner was absent in the 1994-1995 school year, during the period September 6, 1994 and December 17, 1994, as a result of the September 27, 1993 accident and injury should not be charged to Petitioner's annual sick leave or accumulated sick leave pursuant to the provisions of N.J.S.A. 18A:30-2.1.

NOW, THEREFORE, Be it Resolved between the Petitioner, Barbara Dodd, and the Respondent, the Board of Education of the Township of Neptune, Monmouth County, as follows:

1. Petitioner's following absences in the 1993-1994 school year shall not be charged against Petitioner's annual sick leave or accumulated sick leave. Any of the following absences charged against Petitioner's annual and accumulated sick leave will be restored to Petitioner's sick leave bank:

1. December 17, 1993
2. December 21, 1993
3. December 22, 1993
4. December 23, 1993
5. January 20, 1994
6. January 21, 1994
7. February 4, 1994
8. March 8, 1994
9. April 12, 1994
10. May 6, 1994
11. May 12, 1994
12. May 26, 1994
13. June 17, 1994

2. Petitioner's following absences in the 1994-1995 school year shall not be charged against Petitioner's annual sick leave or accumulated sick leave. Any of

the following absences charged against Petitioner's annual and accumulated sick leave will be restored to Petitioner's sick leave bank:

1. September 6, 1994
2. September 7, 1994
3. September 8, 1994
4. September 9, 1994
5. September 12, 1994
6. September 13, 1994
7. September 14, 1994
8. September 15, 1994
9. September 16, 1994
10. September 19, 1994
11. September 20, 1994
12. September 21, 1994
13. September 22, 1994
14. September 23, 1994
15. September 26, 1994
16. September 27, 1994
17. September 28, 1994
18. September 29, 1994
19. September 30, 1994
20. October 3, 1994
21. October 4, 1994
22. October 5, 1994
23. October 6, 1994
24. October 7, 1994
25. October 11, 1994
26. October 12, 1994
27. October 13, 1994
28. October 14, 1994
29. October 17, 1994
30. October 18, 1994
31. October 19, 1994
32. October 20, 1994
33. October 21, 1994
34. October 24, 1994
35. October 25, 1994
36. October 26, 1994
37. October 27, 1994
38. October 28, 1994
39. October 31, 1994
40. November 1, 1994
41. November 2, 1994
42. November 3, 1994
43. November 4, 1994
44. November 7, 1994
45. November 9, 1994
46. November 14, 1994
47. November 15, 1994
48. November 16, 1994
49. November 17, 1994
50. November 18, 1994
51. November 21, 1994
52. November 22, 1994
53. November 23, 1994
54. November 28, 1994
55. November 29, 1994
56. November 30, 1994
57. December 1, 1994
58. December 2, 1994
59. December 5, 1994
60. December 6, 1994
61. December 7, 1994
62. December 8, 1994
63. December 9, 1994
64. December 12, 1994
65. December 13, 1994
66. December 14, 1994
67. December 15, 1994
68. December 16, 1994

3. This Stipulation of Settlement may not be used as a precedent in any future proceedings, disputes or litigation.

4. This Stipulation of Settlement will be submitted to the Administrative Law Judge for inclusion in an initial Decision.

Date: By: _____
Barbara Dodd, Petitioner

Date: By: _____
Michael B. Berman, Attorney
for Petitioner

Date: 8/16/94 By: _____
Michael T. Lake, Superintendent
Neptune Board of Education

Date: By: _____
James T. Hundley, Attorney
for Respondent

OAL DKT. NO. EDU 12863-95

BARBARA DODD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1996

DATE OF MAILING OCTOBER 3, 1996

441-96

441-96

IN THE MATTER OF THE TENURE :

HEARING Of MANUEL MARRERO, :

STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE CITY OF JERSEY CITY, : DECISION

HUDSON COUNTY. :

:

SYNOPSIS

District certified tenure charges of unbecoming conduct against respondent school psychologist due to allegedly improper interaction with female student and teacher.

In light of evidence in the record and testimony of witnesses, ALJ concluded the District did demonstrate that respondent exhibited conduct of a sufficiently inappropriate, suggestive and flagrant nature as to constitute conduct unbecoming a staff member. ALJ determined that respondent's conduct toward a female teacher was conduct unbecoming, and further found that respondent inappropriately used a student to relay messages to said teacher. Moreover, the ALJ found that respondent engaged in improper interaction with another minor female student, indicating a pattern of unbecoming conduct which warranted dismissal from his position as a Child Study Team member.

Commissioner adopted findings and determination in initial decision as his own. Commissioner concurred with ALJ that the District proved its charges, revealing not one incident of serious lack of judgment on respondent's part, but a pattern of unacceptable behavior warranting dismissal. Commissioner ordered respondent dismissed from his position and matter forwarded to the State Board of Examiners for further appropriate action.

OCTOBER 3, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO EDU 1239-95

Agency Dkt. No. 9-1/95

IN THE MATTER OF THE TENURE HEARING OF MANUEL MARRERO, STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY

Patricia Taylor, Esq., for petitioner
(Assistant General Counsel, Jersey City School)

Howard Feintuch, Esq., for respondent
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: May 2, 1996 Decided: June 28, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, State Operated School District of Jersey City ("District"), certified tenure charges of conduct unbecoming a staff member against respondent, Manuel Marrero, a tenured psychologist. The District submits that Marrero's conduct warrants his dismissal from employment. Respondent denies any charges of wrongdoing.

The Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) on February 1, 1995 for a determination as a contested case pursuant to *N.J.S.A.* 52:14b-1 to-15 and *N.J.S.A.* 52:14f-1 to-13. Hearings were held

on October 2, 3, 5 and 31, 1995. The parties filed posthearing briefs and the record closed on May 2, 1996.

The forty-five (45) day statutory period within which to file the initial decision with the Department of Education expired on May 2, 1996. Based on the administrative law judge's voluminous case load, a forty-five (45) day extension of time to complete the initial decision was granted. *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8.

SUMMARY OF THE CHARGES

The District filed two charges of unbecoming conduct against Marrero. The charges are summarized as follows:

Charge No. 1:

1. Marrero, a school psychologist assigned as a member of the Child Study Team (CST) at Dickinson High School, has exhibited conduct on school premises and during school hours of a sufficiently inappropriate, suggestive and flagrant nature as to constitute conduct unbecoming a staff member in the Jersey City Public Schools.

2. On April 19, 1994, S.R., a minor female student who is classified for special education purposes, was called to the CST office to take a test related to her re-evaluation. Mary Ann Van Dyke, S.R.'s assigned case worker, told S.R. that Marrero would test her. During the test, Marrero began asking S.R. questions such as if she had a boyfriend, if she "hung out" and if so, what did she do. Marrero told S.R. that she should get glasses instead of the hazel contacts that she was wearing at the time because they made girls look prettier.

3. On the next day, April 20, 1994, S.R. returned to the CST office to drop off some papers. Marrero called her over to his desk. He said that he had driven by her house the previous day and had not seen her outside. He commented that the new hairstyle that she was wearing made her look very pretty, and told her if she "ever needed anything" that she should just "come down."

4. The following day, April 21, 1994, S.R. returned to the CST office to complete testing. When Marrero got up from his desk to get some papers, he slipped S.R. a note reading, "[S.] can I call you at your house? Yes-No." S.R. wrote back on the note - "Why? My phone is disconnected," but then decided not to return the note and instead slipped it under some papers.

5. After S.R. finished the test and Mrs. Van Dyke was preparing a pass for her to return to class, Marrero asked Mrs. Van Dyke not to put a time on it.

6. Marrero asked S.R. to sit in the chair closest to him. He asked if he could call S.R. or take her places, and what was she doing on the weekend. S.R. asked "for what" reason would he ask her this and said that she would probably spend the weekend out with her mother. Marrero then asked if she always went out with her mother. S.R. then began nervously looking at the calendar and at her watch so Marrero said that she had passed her test and to tell him when her phone was reconnected.

7. S.R. returned to school with her mother and made a police report. In speaking with a detective investigating the matter, Marrero admitted that these incidents had occurred and stated that he had exceeded his guidelines as a psychologist because S.R. needed help.

8. As a result of Marrero's behavior, he was suspended from his duties with pay effective April 22, 1994. He was served with notice of suspension by hand-delivery on the same date.

9. S.R. was so severely traumatized by these incidents that she went on home instruction for the remainder of the school year and for September and October of the following school year.

10. It is the District's position that inappropriate and suggestive behavior of this type directed toward an underage, educationally handicapped pupil by a professional in a position requiring confidentiality and trust is sufficiently flagrant to sustain termination on a tenure charge of unbecoming conduct.

Charge No. 2:

1. In the fall of 1993, Marrero began sending verbal messages through a female student to a fellow female teacher, Janet Gabriel, that Ms. Gabriel was attractive and asking if she was married.

2. Over the next two months, Marrero continued to send verbal messages through the student and wrote Gabriel a total of three letters expressing that he was attracted to her, that he looked at her every morning, and that he knew that she was married but that he would like to be friends and to give her gifts.

3. It is the position of the District that conduct of this obviously inappropriate nature, including the use of a student for its accomplishment, represents conduct unbecoming a staff member of the Jersey City Public Schools.

FINDINGS OF FACTS

Based on the evidence, I **FIND** the following as **FACT**:

1. Marrero has been employed as a school psychologist and a member of the CST at Dickinson High School in the Jersey City Public Schools since 1979.
2. In school year 1993-94, S.R. was 16 years old and a tenth grade student at Dickinson.
3. S.R., a student with disabilities, was classified perceptually impaired, (P.I.).
4. On or about April 19, 1994, Mary Ann Van Dyke, Learning Disabilities Teacher Consultant (LDTC) and case manager of the CST, called S.R. to the CST office for testing.
5. Van Dyke informed S.R. that Marrero would begin the tests.
6. Marerro tested S.R. for approximately 1 1/2 to 2 hours. He asked her questions such as with whom and where did she lived; if she had a boy friend, and if she "hung out"; and if so, what did she do. Marrero also commented on S.R.'s contact lenses and suggested that she should wear

glasses because they made girls look prettier. When the testing was completed, Marrero wrote S.R. a pass to return to class. S.R. was also told to return some consent papers with her mother's signature the next day to Van Dyke.

7. The next day, S.R. returned some papers to the CST office. Marrero called her over to his desk and told S. that he had driven by her house the previous day, but had not seen her outside. He remarked that her hairstyle made her look pretty, and told her that if she ever needed anything that she should come down.

8. The following day, S.R. returned to the CST office to complete testing with Van Dyke. While Marerro was testing another student he left his desk and slipped S.R. a note which asked, "[S.] can I call you at home? Yes- No". S.R. replied on the note, "Why? My phone is disconnected (sic).". . S.R. did not return the note to Marrero; instead, she slipped it under some papers.

9. Van Dyke completed testing S.R. and prepared a pass for her to return to class. Marrero asked Van Dyke not to put a time on it because he wanted to speak to S.R. Marrero asked S.R. to sit in the chair closest to his desk. He then asked her what she was doing on the weekend and if he could call to take her places. S.R. asked him why he asked such questions and responded that she would probably spend the weekend out with her mother. Marrero than asked if she always went out with her mother. S.R. did not answer. Instead, she responded by looking down and away from his direction. Marrero then told her that she had passed his test and to tell him when her phone was reconnected.

10. S.R. returned to her Geometry class and told her teacher, Gina Herrero, what Marrero had said. Herrero advised S.R. to tell her mother what had occurred.

11. S.R. left school and met her cousin, J.G., on the way home.

13. J.R. returned to school with S.R. and met with principal Frank Dooley and vice-principal John Powers.

14. Powers recorded S.R.'s description of the occurrence in a school incident report (P-9). The report also stated that "an Asian-American female math teacher reported Mr. Marrero to Mr. Dooley earlier this year for harassing her. She reported that Mr. Marerro kept asking her for dates and would not take 'no' for an answer. Mr. Dooley counseled Mr. Marerro, and he stopped speaking with the teacher."

15. On April 24, 1994, detective John Whalen filed an investigation report, "harassment/endangering the welfare of a minor" (P-4). Detective Whalen took statements from S.R. and Marrero. S.R. described the incidents which occurred in the CST office on April 19, 20, and 21, 1994. Marrero "admitted saying what the victim had told but that it was taken out of context." *Id* Marrero also stated that "he may have gone outside his guidelines as a psychologist...and that he may have gotten to involved with the victim in trying to help her." *Id.*

16. J.R. filed a criminal complaint against Marrero charging him with sexual harassment, stalking and endangering the welfare of a minor. The matter was postponed several times and thereafter the complaint was dismissed.

17. Janet Gabriel is a math teacher who was assigned to Dickinson for the 1993-94 school year. Marerro wrote Gabriel three letters expressing his feelings toward her. In one letter, Marerro stated:

> I have never been affected by a woman as much as I have by you. When I first saw you from a distance, I recognized your beauty, but yesterday up close, I realized that you were ravishing. I know that you are married and I respect you as such, however, this does not negate the truth that you are an astonishing, beautiful woman. I also believe that your beauty goes beyond your physical attributes. You appear to be (illegible). I would like to be your friend. I hope that you are not offended by my frankness. I am a gentleman and respect the established boundaries. I ask you to be my friend and grant me permission to occasionally write to you. If I can, I would like to give you something for Christmas. I don't want anything except your friendship. Thank you.
>
> Sincerely,
>
> Mannie
>
> [P-7]

18. Gabriel destroyed the other letters. She recalled, however, that he wrote that he looked at her every morning. She was frightened by his confession because they had spoken only face-to-face once when he came to her classroom and requested that she fill out a form regarding a special education student in her class. Thus, she realized that he had been watching her. After she received the third letter, P-7, approximately one week before Christmas, Gabriel reported the incident to principal Dooley. Dooley told Marerro that day to "cease and desist."

DISCUSSION AND CONCLUSIONS

I

THE CHARGES:

Tenured employees are protected "in their employment when they are subject to unfair and improper attacks, when they are unable to perform efficiently because of conditions not of their own making or beyond their control." *In re Tenure Hearing of Joseph A Maraeta, Township of Riverside*, 1966 *S.L.D.* 77, *aff'd* State Board of Education 1966 *S.L.D.* 106. *N.J.S.A.* 18A:6-10 further provides that no tenured teacher shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing are required under the law to protect tenured teachers from arbitrary dismissal or "unfounded or flimsy reasons." *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63, 73 (1968). Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in any events leading up to the allegations made against the employee which may help to explain the situation. *In re Tenure Hearing of Romaroli, School District of Willingborough*, 1975 *S.L.D.* 352.

Petitioner has the burden of proof to establish claims against the tenured teacher by a fair preponderance of the evidence. *In Re Polk License Revocation*, 90 *N.J.* 550, 560 (1982). Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis,* 67 *N.J.* 47 (1975). The evidence must be such as to lead a reasonable cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div 1959).

With regard to charge one, Marerro conceded that when he administered the WISC-R intelligence test to S.R., he asked her if she had a boyfriend or "hung out", and told her to come see him if she needed anything. He maintained that he asked these questions to all students to establish a rapport. He claimed that he told S. that she would look pretty if she wore glasses because her eyes appeared to be irritated from contact lenses. At the hearing, Marrero also conceded the charge that he told S. that he had driven by her house and did not see her outside. "He also described the cement wall outside her complex which bears the address numbers." P-4. He claimed that it was common for him to divulge to the student that he lives in the same City; the student then realizes that he will "understand the plight of the urbanite". Respondent's Brief at 5. Respondent's testimony contracts his initial response to the charge. In the answer filed with the Department of Education respondent stated that "he may have advised the student that he passed or passes her residence, however he does not specifically remember doing so". Respondent's Answer.

Marerro explained that his note to S. which asked, "Can I call you at your house Yes -- No?" was written "in a hurry while he was testing another student in an attempt to confirm with S.R. that he wanted to talk with S.R.'s mother about declassifying S. from special education". Respondent's Brief at 5. Respondent submits that because

these acts occurred in the CST center with other CST members present, it was impossible to do or say anything inappropriate. *Id.*

Respondent presented several witnesses who are experienced CST members. Robert Hanlon, a school psychologist and CST member, explained that the Vineland Psychological Test assesses the student's social level and includes questions about dating. However, Marerro administered the WISC-R intelligence test to S.R., not the Vineland Psychological Test. Hanlon and other CST members including Edward Fawerbach, Robert Scalh, Joseph Mills, Liz Sanchez, Paul Donnelly, Anthony Annacone, Dennis Forker agreed that personal questions about dating and directing the student where to sit during the evaluation help the CST member develop a rapport with the student. However, none would acknowledge that the questions which Marerro asked S.R. and the note he gave her were appropriate. Instead, they agreed that appropriate conduct, questions, and remarks by the CST member depend on the circumstances, the situation, and the demeanor of the student. For example, if the student is shy, questions should be confined to general items. Indeed, questions about personal relationships, *e.g.,* do you have a boyfriend, should be initiated by the student.

Marerro conceded that he asked S. some personal questions but, claimed that his remarks were taken out of context. Moreover, he believed that there was nothing improper about his approach. I disagree. Marerro described S.R. as shy and timid. Indeed, the CST members who testified for respondent agreed that if the student is shy, questions should be confined to general items. Marrero's remarks, however, focused specifically on S.R.'s physical appearance and personal relationships. S.R. had never met with Marerro before he administered the test, and felt uncomfortable about the personal questions. In prior years, she had been tested several times by other CST members but, they never asked her if she had a boyfriend, did she "hang out", or what she did on weekends. Nor had she ever been told by an evaluator that he lived in the same neighborhood as she and that he had passed by her home.

I am persuaded by her straightforward testimony that S.R. did not misperceive Marerro's questions and conduct. Although S.R. may have maintained her composure in Marerro's presence, she was upset by the series of incidents which had occurred over the three day period. Marerro's communication was not always verbal or written. While Van Dyke administered her portion of the re-evaluation test, S. saw him starring at her from his side of the room. S.R. first confided in her teacher, Gina Herrera. S. tried to ignore Marerro's initial comments about her appearance but was frightened after he told her that he driven by her home and did not see her outside. Herrera described S. as extremely upset and sent her home to tell her mother about the incidents. On her way home S. ran into her cousin, J.G. J.G. credibly testified that S.R. appeared to be extremely upset. Thus, I reject respondent's suggestion that "it was S.R.'s mother's reaction and the subsequent lynch mob mentality of the school administration that made her upset." Respondent's Brief at 7.

S.R.'s mother, J.R., believed that the questions asked by Marrero were suggestive and had no relationship to the re-evaluation. Although S. had recently experienced the loss of several family members and she has been classified as PI for several years, J.R. maintained that her daughter had not exhibited any behavioral problems at home or academic problems in school. J.R. had three other children enrolled in the District and she had always been contacted by a staff member directly when he wanted to speak to her about her children. J.R. had never received a handwritten note similar to the one that Marrero had written to her daughter.

I have also considered the testimony and police report presented by Det. Whalen. He observed S.R., her mother, and Marerro on April 21, two days after S.R. first met with Marerro. S.R. and her mother were very upset about the incidents that occurred on April 19, 20, and 21, 1994. Marerro gave statements to Det. Whalen concerning the incidents. Det. Whalen believed S.R. and Marerro although their perceptions of Marerro's conduct differed. Det. Whalen testified that he believed Marerro's conduct was improper considering "the collectiveness of everything that was said...."

Proof of the charges filed against Marerro depend largely on the credibility of the witnesses and the believable evidence. In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Tp. v Murdoch,* 73 *N.J. Super.* 511 (App. Div. 1962). One factor to consider to determine which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v Salimone,* 19 *N.J. Super.* 600, 608 (App. Div. 1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." *Congleton v Pura-Tex Stone Corp.,* 53 *N.J. Super.* 282, 287 (App. Div. 1958). The record reveals no reason S.R. might be biased or hold any grudges against Marerro whom she had just met. S.R.'s testimony was credible and she was more believable than was Marerro. Thus, I accept her version of the incidents that occurred in April 1994. *In the Matter of the Tenure Hearing of Robert* Mantone, 93 *N.J.A.R.* (EDU) 322; *In the Matter of the Tenure Hearing Dennis Cooke,* 92 *N.J.A.R.* (EDU) 220.

Marerro's assertion that the purpose of his note to S. was to discuss declassification with the parent is bogus. He handed the note to S. and expected an answer to his question, "[S.] can I call you at your house? Yes- No".

> **Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as a common experience and observation of mankind can approve as probable under the circumstances.**
>
> ***Spagnuolo v. Bonnet*, 16 *N.J.* 546, 554-55 (1954); *In re Perone,* 5 *N.J.* 514, 522 (1950).**

Marerro was asking permission to call S., not the parent. Moreover, Marerro's attempt to communicate information to S. or her mother about declassification in this manner is contrary to school policy. Dr. Elias, Executive Director of Pupil Services, explained that the declassification of a student is a collective decision of the CST. Besides, no CST

member should discuss declassification with the student before the completion of the revaluation, the CST has met, and recommendations have been presented.

I also reject respondent's notion that S.R.'s classification of P.I. may have caused her to misperceive or misinterpret his questions and conduct. Dr. Elias description of a perceptually impaired student is consistent with the definition provided in *N.J.A.C.* 6:28-3.5(d)8ii. She described P.I. as a discrepancy of about one and one half years between the pupil's achievement and intellectual ability. Thus, I am also persuaded that S.R.'s was telling the truth about Marrero's request that she sit in the chair which was closest to his desk and then proceeded to ask if he could call her and take her places. She did not misinterpret his remarks as inappropriate.

Based on the evidence, I **CONCLUDE** that the District has proven the allegations in charge one. I further **CONCLUDE** that the District has demonstrated that Marrero exhibited conduct of a sufficiently inappropriate, suggestive and flagrant nature as to constitute conduct unbecoming a staff member in the Jersey City Public Schools.

With regard to charge two, Gabriel credibly testified that Marerro sent her messages that "he liked her" through a former student, M.R. who was also a special education student. Gabriel acknowledged that she asked M.R. to tell Marerro that she was married and had no intent to go out with him. Marrero also wrote three letters to Gabriel expressing his affection, emotional attachment, and a desire to be part of her life. His expressions were neither *de minimis* nor inconsequential. Gabriel found Marerro's letters demeaning and suggestive. When Gabriel did not return his affection after receiving the first letter, Marrero continued to pursue her with more letters expressing his feelings of passion. After the third letter, Gabriel reported the matter to the building principal who ordered Marrero to stop.

Marerro's testimony does not supporthis assertion that his letters to Gabriel and his offer to give her gifts were work related. Marerro claimed that he wrote the first

letter to apologize for looking at her in a manner which made her feel uncomfortable. The second note was written to thank her for completing a questionnaire concerning a student. He claimed that the third letter was a friendship card, P-7, which he sent to her around Christmas. He explained that the "gift" which he alluded to in his statement "I would like to give you something for Christmas", P-7, was removing a problem student from her class. Marerro's explanations defy common sense. Any reasonable person would interpret Marerro's declaration as personal, not business related. His thought was explicit:

> I have never been affected by a woman as much as I have by you. When I first saw you from a distance, I recognized your beauty, but yesterday up close, I realized that you were ravishing. I know that you are married and I respect you as such, however, this does not negate the truth that you are an astonishing, beautiful woman.
>
> P-7

The letter sends an implicit message that given the opportunity, Marerro would be more than a friend to Gabriel. I also agree that Marerro's actions "could be construed as creating a hostile work environment, an element of the charge of sexual harassment." Petitioner's Brief at 8.

Based on the preponderance of the credible evidence, I **CONCLUDE** that the Board has demonstrated that respondent's conduct toward a female teaching staff member was conduct unbecoming a staff member in the Jersey City Public Schools.

II

THE PENALTY:

Unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but it is best evidenced by a series of incidents. *See Redclay v. State Board of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326 (E. & A. 1944) I have carefully considered Marrero's testimony regarding the charges and observed his demeanor. He has been employed in the Jersey City Public School system for many years. He is a certified school psychologist. Except for the pending charges, Marrero's record is unblemished. Indeed, several of Marerro's colleagues who worked with him testified that they never heard any negative comments about him. Several former

students saw him as a dedicated and attentive CST member who cared about his students.

These mitigating factors do not negate conduct which is improper or might be viewed improper by the ordinary person. Marrero exercised poor judgment by asking S.R. personal questions and sending her notes which asked if he could call her at home. Like teachers, school psychologists are entrusted with the care and custody of school children and thus, they play important roles in the community. They have close contact with students who are emotionally, physically, or educationally challenged. CST members interact with students whose deficits may cause them to be more vulnerable and impressionable than the non-educationally disabled student or who may lack the inner resources which led S.R. to report improper conduct. Thus, CST members must be held to a high standard of conduct. Parents, law enforcement officials and the general public expect them to impart social and moral values appropriate to the setting. Like teachers, school psychologists :

> ...are public employees to who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinion of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 *S.L..D.* 97, 98. It is essential that CST members avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated. School psychologists are expected to exercise exemplary restraint and mature self-control. Consequently, it is appropriate to sanction those employees who behave with impropriety or the appearance of impropriety.

Based on the whole of the record, I **CONCLUDE** that Marrero, a tenured staff member with many years of experience, engaged in a pattern of improper interaction with a minor student whose interest he is mandated to safeguard. I further **CONCLUDE** that

Marrero violated the public and private trust. I also **CONCLUDE** that there are no mitigating factors to support continued employment with the Jersey City Public Schools. Consequently, I **CONCLUDE** that respondent should be dismissed from his position as a CST staff member in the Jersey City Public Schools.

Finally, in his brief respondent mentions but does not address "numerous procedural and substantive errors which pre-date the hearing..." Consequently, these unsupported assertions will be disregarded.

ORDER

It is **ORDERED** that respondent be dismissed from his position as school psychologist for the State Operated School District of Jersey City.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 28, 1996
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

July 3, 1996
DATE

DS Contractor/pe
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 3 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

S.R.
J.R.
Mary Ann Van Dyke
Gina Herrera
Sylvia Elias
Janet Gabriel
Francis X. Dooley
John Whalen
John Powers

For Respondent:

Manuel Marrero
Tereasa Hernandez
Edward Fawerbach
Suany Barahona
Robert Scalh
Joseph Mills
Robert Hanlon
Liz Sanchez
Perry Cecchini
Paul Donnelly
Anthony Annacone
Dennis Forker

Exhibits:

P-1 Note to Stacey.

P-2 Pass dated April 21, 1994.

P-3 Policy Report dated April 21, 1994.

P-4 Police Supplement Report - Statement of R.S. dated April 21, 1994.

P-5 Police Report of April 26, 1994. (Identification Only)

P-6 Complaint against Marrero (undated).

P-7 Christmas Card/Note.

P-8 Letter to Marrero from Superintendent dated April 22, 1994.

P-9 Incident Report dated April 24, 1994.

P-10 Memorandum from William Ronzitti to Elias dated April 21, 1994.

R-1 Psychological Evaluation of S.R. dated April 18, 1994. (Identification Only)

R-2 Vineyard Adoptive Behavior Scale Test. (Identification Only)

R-3 WISC III Manual. (Identification Only)

IN THE MATTER OF THE TENURE	:	
HEARING Of MANUEL MARRERO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	
	:	

The record of this matter, which includes four days of hearing transcripts, and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. No reply exceptions were filed by petitioner.

Respondent generally excepts that the Administrative Law Judge (ALJ) did not give any weight to the witnesses who testified on his behalf. Respondent avers that each of these witnesses said that there was nothing inappropriate in his actions concerning student, S. R. (Respondent's Exceptions at p. 1)

Respondent then, by way of example, summarizes the testimony of each of the witnesses who testified on his behalf by presenting excerpts from the transcripts of the hearing to bolster the position that he did not act inappropriately in performing his Child Study Team (CST) evaluation of S.R. (*Id.* at pp. 2-3)

Respondent next avers in Exceptions 2 and 3, that the ALJ gave no weight to his prior students who testified that he was extremely helpful to them and did not make them feel uncomfortable. (*Id.* at p. 3) He avers in Exception 4 that the ALJ did not give any weight to the testimony of a social worker on the CST who was in the room during S.R.'s evaluation and said that he did not observe S.R. "in a state of agitation or ***upset." (*Id.*) Next, respondent avers that due weight was not given to the testimony of an individual who said he never witnessed or

heard of respondent ever doing anything inappropriate in the 20 or 30 cases for which he was respondent's supervisor. (*Id.* at p. 4)

Respondent also objects that the ALJ ignored testimony of a learning consultant who worked in the same school as respondent and said it is important to establish a friendship or a rapport with an exceptionally shy student, as in the case of S.R.

Respondent then avers that the ALJ gave too much weight to the testimony of S.R. and her friend, J.G., and to the testimony establishing that S.R. was extremely upset by respondent's actions. (*Id.* at p. 7)

Respondent further contends that the ALJ violated respondent's constitutional protections by allowing into evidence criminal charges that were ultimately withdrawn and the testimony of Detective Whalen who testified that respondent's conduct was improper, stating that the prejudicial effect of his testimony outweighed any probative value. Respondent characterizes such testimony as, "double hearsay testimony" which is "violative of the confrontation clause of the United States Constitution." (*Id.* at pp. 8-9) He further avers that what happened in the municipal court and what happened with respect to police investigations is not relevant to the case at bar and the ALJ erred in admitting the police report and Detective Whalen's testimony into the record. (*Id.* at p. 9)

In his final exception, respondent again claims that the District violated the confrontation clause of the U.S. Constitution in proving Charge II generally by failing to call the student as a witness who it alleged to have served as respondent's conduit in carrying messages from respondent to female coworker, Janet Gabriel. Respondent avers, in that a student was allegedly used as a conduit to send information, the ALJ's finding that this is true, without the testimony of the student, defies logic. (*Id.* at p. 10)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that respondent's actions, as proven, constitute unbecoming conduct for the reasons expressed therein. The Commissioner finds that the ALJ considered all testimony and weighed its content according to the credibility of the witnesses. The Commissioner further finds the excerpts of transcripts put forth by respondent, when reviewed in their full context, could reasonably support such findings. See *In re Morrison*, 216 *N.J. Super.*

143 (App. Div. 1987) and *Campanile v. Middletown Board of Education, Monmouth County*, decided by the Commissioner March 2, 1982.

In so ruling, the Commissioner is mindful that respondent raises extensive exceptions regarding proper versus improper behavior of school officials when evaluating a student as a member of a CST and notes that conflicting testimony on this subject was present in the record, including testimony from the District's Executive Director of Special Education who testified that the note passed to S.R. by respondent was not appropriate, nor was it appropriate to pursue asking her questions of a personal nature when she was uncomfortable, nor was it appropriate to drive by her house. The Commissioner is satisfied with the ALJ's explanation that all testimony proffered by respondent was considered by her and weighted accordingly. Specifically, the ALJ noted,

> ***several of Marrero's colleagues who worked with him testified that they never heard any negative comments about him. Several former students saw him as a dedicated and attentive CST member who cared about his students.
>
> These mitigating factors do not negate conduct which is improper or might be viewed improper by the ordinary person. Marrero exercised poor judgment by asking S.R. personal questions and sending her notes which asked if he could call her at home.***
>
> (Initial Decision at pp. 13-14)

The ALJ further found S.R.'s testimony to be credible in that she had no reason to lie and she was more believable than was respondent, stating

> ***Thus, I accept [S.R.'s] version of the incidents that occurred in April 1994. ***
>
> Marrero's assertion that the purpose of his note to [S.R.] was to discuss declassification with the parent is bogus.***
>
> Marerro was asking permission to call [S.R.], not the parent. Moreover, Marrero's attempt to communicate information to [S.R.] or her mother about declassification in this manner is contrary to school policy.***Besides, no CST member should discuss declassification with the student before the completion of the revaluation, the CST has met, and recommendations have been presented. (*Id.* at pp. 11-12)

The ALJ found S.R.'s credibility reinforced by her actions subsequent to the alleged incident:[1] She cried and told a friend's mother about the incident and her own mother who then reported the incident to the police and school officials were notified within a day of the incident.

In sum, the Commissioner will not challenge the ALJ's credibility determinations and resultant conclusions with respect to the charges against respondent in that the ALJ was in the best position to observe the demeanor of the witnesses and of respondent and to carefully measure conflicts and inconsistencies. Consequently, respondent's exceptions challenging the ALJ's credibility determinations and the factual findings predicated thereon, are hereby rejected.

While the ALJ admitted the police report, initially stating that it would have no impact on her determination but would give the trier of fact better focus on the issues (Tr. 10/2/96 at pp. 80-81), the Commissioner notes that the ALJ subsequently did admit the police report on October 5, 1996, and advised that she would consider it as part of the record. (Tr. 10/5/96 at p. 17) Even assuming *arguendo* that such admission was improper, it is clear that the ALJ reached no conclusion that would not have been reached without the report in that, as noted by respondent's own attorney,

> [Detective Whalen] testified about everything that's contained within the report. His testimony's now part of the record. ***[U]nder the Best Evidence Rule his -- his testimony's better than the report.*** (Tr. 10/5/96 at p. 17, lines 13-16)

Therefore, in that the author of the report was present at hearing, testified about everything contained in the report, and was available for cross-examination at a *de novo* hearing, the Commissioner rejects respondent's objections to such evidence as without merit.

The Commissioner further concurs that the District proved its charges of unbecoming conduct in Charge 2. The Commissioner concurs that any reasonable person would conclude that the content of respondent's letter to Janet Gabriel was personal, and not business related. (Initial Decision at p. 13) Further, his expressions were "suggestive" and "***neither *de*

---

[1] The Commissioner has weighed student credibility in past tenure cases of this nature by assessing a student's motives and subsequent actions following the incident leading to dismissal. See *In the Matter of the Tenure Hearing of William Matthews*, decided by the Commissioner December 20, 1979, aff'd St. Bd. May 7, 1980, teacher dismissed for offering to give student an "A" in exchange for sexual favors. Commissioner found student's testimony was credible because she had no motive to lie and had repeated the incident to other teachers immediately after it had happened.

minimis nor inconsequential.***" (*Id.* at p. 12) The Commissioner also determines that the ALJ reasonably concluded, based on the testimony, that these expressions were relayed from respondent to Ms. Gabriel by a student. This is so without the testimony of the student "conduit" in that the female teacher who received respondent's letters and messages of overt interest, Janet Gabriel, testified that a student relayed such messages and letters to her from respondent. This testimony was based on Ms. Gabriel's own first-hand knowledge and Ms. Gabriel underwent cross-examination. (Tr. 10/3/96 at pp. 8-81) For such reason, there is no finding that a violation of the confrontation clause occurred.

With regard to the evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner concurs with the ALJ that the tenure charges, as proven, are sufficient to warrant respondent's termination from employment, pursuant to *N.J.S.A.* 18A:6-10 and 11.

In reaching such determination, the Commissioner is aware that he is required to consider the totality of respondent's record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation, or aggravation and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer,* 93 *N.J. Super.* 404, 421-22 (App. Div. 1967).

The Commissioner finds removal appropriate despite the fact that respondent's record prior to these charges is unblemished, given that the District has proven not one, ***but both*** of its charges, revealing not one incident of serious lack of judgment on the part of respondent, but a pattern of unacceptable behavior.

> The Commissioner concurs that school psychologists
>
> are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils.*** (*In re Tordo, supra,* at 98)

As such, the Commissioner has removed teachers in the past for making unwarranted advances upon students. See, *In the Matter of the Tenure Hearing of*

Robert Mantone, 93 *N.J.A.R.* 2d (EDU)322, aff'd St. Bd. 93 *N.J.A.R.* 2d (EDU) 789.[2] In a recent case, the Commissioner found

> that by forcing his attentions on young girls who looked to him, as their teacher, to assure their protection, and continuing such behavior despite the clear indication of these students that his*** behavior was causing them to be frightened, embarrassed and uncomfortable***, Mantone misused his authority and clearly betrayed the trust of his students, his school district, and his community. The Commissioner opines that sexual harassment on the part of any individual is intolerable behavior but when engaged in by an educator it is utterly reprehensible. (*Mantone*, 93 *N.J.A.R.* at 326)

Moreover, although several of respondent's witnesses classify his actions as "not inappropriate," the Commissioner does not concur and finds that school psychologists, like teachers, "***must exhibit a high degree of exemplary behavior" (*In re Tyler*, 13 *N.J.A.R.* 297, 308 (1991)), a standard which was clearly breached by the conduct proven herein.

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein and respondent is ordered dismissed from his position as a school psychologist for the State-operated School District of Jersey City. This matter will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1996
DATE OF MAILING OCTOBER 4, 1996

[2] Teacher dismissed after a finding that he had sent love notes to students.

441-96

EDU #1239-95
C # 441-96
SB # 80-96

IN THE MATTER OF THE TENURE	:	
HEARING OF MANUEL MARRERO,	:	
STATE-OPERATED SCHOOL DISTRICT	:	STATE BOARD OF EDUCATION
OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	

Decided by the Commissioner of Education, October 3, 1996

For the Petitioner-Respondent, Patricia A. Taylor, Esq.

For the Respondent-Appellant, Feintuch, Porwich & Feintuch (Philip Feintuch, Esq., of Counsel)

After a thorough review of the record, including the transcripts of the hearings held in the Office of Administrative Law in this matter, we affirm the decision of the Commissioner of Education dismissing respondent from his tenured employment for the reasons expressed therein.

March 5, 1997

Date of mailing MAR 07 1997

442-96

442-96 SEC

IN THE MATTER OF NOLA G. CAULEY, :

MIDDLESEX COUNTY :

VOCATIONAL BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, MIDDLESEX COUNTY. : DECISION

_____:

OCTOBER 8 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
NOLA G. CAULEY	:	
MIDDLESEX COUNTY VOCATIONAL BOARD OF EDUCATION	:	
	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Ms. Cauley was elected to the school board in April 1995; and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995

September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, said board member failed to respond; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF NOLA G. CAULEY,	:	
MIDDLESEX COUNTY	:	COMMISSIONER OF EDUCATION
VOCATIONAL BOARD OF	:	DECISION
EDUCATION, MIDDLESEX COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted it by N.J.S.A. 18A:12-21 et seq. to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to N.J.A.C. 6:3-9.3(I), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to respond to such Order; and

Whereas, the Commission voted on June 18, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, and forward this matter to the Commissioner of Education pursuant to N.J.S.A. 18A:12-29; and

Whereas, by letter from the Commission dated June 20, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner comments to the Commission's decision recommending removal; and

Whereas, counsel for respondent submitted comments, dated June 26, 1996, urging that the recommended penalty of the Commission was excessive and unwarranted for the "technical non-compliance" involved here and suggests, instead, that respondent be suspended upon condition of mandatory participation within a fixed time frame*; and

Whereas, on September 25, 1996, the Commissioner received a certification from Toby R. Simon, Assistant Executive Director/Membership Development for the New Jersey School Boards Association (NJSBA), stating that the above-named Board member had attempted to register for and to attend the training session held September 6-8, 1996, but was refused admittance because NJSBA personnel believed, and the above-named Board member did not clearly dispute, that she had already been removed from the Board by the Commissioner; and

Whereas, Ms. Simon further states that on September 10, 1996, she contacted the School Ethics Commission to verify this Board member's status and was informed that, although the Commission had recommended her removal from the Board, the Commissioner had not yet acted; and

Whereas, Ms. Simon advises that upon receiving this information she promptly contacted the above-mentioned Board member informing her of her eligibility to register for and

*The Commissioner notes counsel's contention that removal of this Board member, together with the potential removal of another member of this Board for the same violation presently pending, would reduce a five member Board to only three members, thereby jeopardizing its ability to take public action. In that, despite the potential of two vacancies on this Board, a quorum remains and in that there is a provision in law for prompt filling of Board member vacancies, such contention is unpersuasive and the Commissioner will not hesitate to remove this Board member if she does not promptly attend training.

to attend either the training session scheduled for October 22, 1996, or the one on January 4, 1997; and

Whereas, the Commissioner of Education has carefully considered the record of this matter, the decision of the School Ethics Commission, the comments filed on behalf of respondent and the certification of Ms. Simon. After such review, the Commissioner finds that, based on this Board member's attempt to register for and attend the September training session, removal is not warranted at this point; however, some penalty is warranted for the Board member's insufficiently explicated delay in meeting the requirements of *N.J.S.A.* 18A:12-33. Wherefore, the Commissioner modifies the Commission's penalty determination to a suspension of the above-named Board member for a period of two months; now therefore

IT IS ORDERED that the above-named Board member shall not be removed from office, but rather shall be suspended for a period of two months to commence upon the Board's receipt of this decision, or until such time as she obtains the required training, whichever is longer.

COMMISSIONER OF EDUCATION

OCTOBER 8 1996

DATE OF MAILING OCTOBER 9, 1996

443-96

443-96 SEC

IN THE MATTER OF THOMAS PANCONI,	:	
MIDDLESEX COUNTY VOCATIONAL	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

OCTOBER 8, 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
THOMAS F. PANCONI	:	
MIDDLESEX COUNTY VOCATIONAL BOARD OF EDUCATION	:	
	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Mr. Panconi was elected to the school board in November 1994 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995
September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, the School Ethics Commission considered the board member's reply to the Order, but found same to be insufficient in light of the aforementioned notices and opportunities to attend training; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, said board member chose not to appear, and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. The Commission therefore, recommends to the Commissioner of Education that said board member be removed from office. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF THOMAS PANCONI,	:	
MIDDLESEX COUNTY VOCATIONAL	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member for his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member responded to the Order to Show Cause through his attorney advising that he planned to take the training course in January 1997;[1] and

Whereas, the Commission considered the reply to the Order and found same to be insufficient in light of the aforementioned notices and opportunities to attend training; and

Whereas, the above-named Board member was given an opportunity to appear before the Commission at a meeting concerning his failure to take the training course but did not appear; and

[1] Although not specifically noted in the Commission's resolution, respondent did submit three responses to the Order to Show Cause under separate cover dated April 29, 1996, May 6, 1996 and May 24, 1996, which were all included in the record reviewed herein. Additionally, the Commission forwarded in the record reviewed herein a letter in support of respondent from Joseph Colombo, Superintendent of the Middlesex County Vocational Technical School dated June 12, 1996.

Whereas, the Commission voted on June 18, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 20, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, counsel for the above-named Board member submitted comments, dated June 26, 1996, urging that the recommended penalty of the Commission was excessive and unwarranted for the "technical non-compliance" involved here and suggests, instead, that respondent be suspended upon condition of mandatory participation within a fixed time frame;[2] and

Whereas, the Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission and the comments filed on behalf of respondent. After such review, the Commissioner finds that, based on respondent's assertions that he intends to take the required training in January 1997, removal is not warranted at this point; however, some penalty is warranted for respondent's insufficiently explicated delay in meeting the requirements of *N.J.S.A.* 18A:12-33. Wherefore, the Commissioner modifies the Commission's penalty determination to a suspension of the above-named Board member for a period of two months; now therefore

IT IS ORDERED that the above-named Board member shall not be removed from office, but rather shall be suspended for a period of two months to commence upon the Board's receipt of this decision, or until such time as he obtains the required training, whichever is longer.

COMMISSIONER OF EDUCATION

[2] The Commissioner notes counsel's contention that removal of this Board member, together with the potential removal of another member of this Board for the same violation presently pending, would reduce a five member Board to only three members, thereby jeopardizing its ability to take public action. In that, despite the potential of creating two vacancies on the Board, a quorum remains and in that there is a provision in law for prompt filing of Board member vacancies, such contention is unpersuasive and Commissioner will not hesitate to remove this Board member if he does not attend training in January 1997.

444-96

444-96

PELLEGRINO POLO, on behalf of his minor child, R.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 8, 1996

OAL DKT. NOS. EDU 11459-95 AND EDU 11025-95
AGENCY DKT. NO. 374-9/95

PELLEGRINO POLO, on behalf of his minor child, R.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 8, 1996

DATE OF MAILING OCTOBER 8, 1996

445-96

445-96

S.Q., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 8, 1996

OAL DKT. NO. EDU 8771-95
AGENCY DKT. NO. 348-9/95

S.Q., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on August 23, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed.*

Accordingly, in that no explanation has been filed by the parties, and in that it appears petitioner is no longer appealing the Board's determination, this matter is hereby dismissed. Petitioner is directed to remit to the Board the amount owed for her minor children's ineligible attendance as calculated pursuant to *N.J.S.A.* 18A:38-1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Upon review of the record, it is noted that on July 3, 1996, the Board, through its attorney, notified the Administrative Law Judge that Petitioner removed her children from its schools on October 30, 1995.

OCTOBER 8, 1996
DATE OF MAILING OCTOBER 8, 1996

446-96

446-96

INSTITUTIONAL SYSTEMS SERVICES CORPORATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning contractor contended Board awarded a contract in excess of $1 million to another contractor for the upgrade of the fire alarm equipment in certain schools operated by the Board. Petitioner contended this contract was awarded contrary to the requirements of the Public School Contracts Law since it was made without having been preceded by public advertisement for the receipt of bids.

ALJ concluded that there was an emergent situation with respect to the disrepair of the fire and security systems that justified the Board's award without going through public bidding process. Board had invoked the emergency purchase exception found in *N.J.S.A.* 18A:18A-7. Moreover, the ALJ found that the steps taken by the Board following its invocation of the emergency declaration were legally sufficient. Petition was dismissed.

Commissioner concurred with ALJ's findings and determination in initial decision.

OCTOBER 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

OAL DKT. NO.EDU 3315-94

AGENCY DKT. NO. 64-4/94

INSTITUTIONAL SYSTEMS SERVICES CORPORATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,

ESSEX COUNTY,

Respondent.

Robert T. Lawless, Esq., for petitioner (Hedinger & Lawless, attorneys)

Melvin C. Randall, Esq., for respondent (Love & Randall, attorneys)

Record Closed: August 14, 1996 Decided: August 14, 1996

BEFORE **STEPHEN G. WEISS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2 on August 14, 1996.

The procedural history of this case may be described as follows. On or about April 8, 1994, petitioner, Institutional Systems Service Corporation (hereafter referred to as "Institutional") filed a petition with the Commissioner of Education wherein it set forth that it was a qualified installer and distributor of fire alarm equipment utilized in the public schools and that in February 1994, a few months earlier, the respondent East Orange Board of Education had awarded a contract in excess of $I million to a respondent at that time, Metro Fire and Communication Systems, for the upgrade of the fire alarm equipment in certain schools operated by the respondent Board. The petition went on to contend that this contract was awarded contrary to the requirements of the Public School Contracts Law since it was made without having been preceded by public advertisement for the receipt of bids. The petitioner maintained that it had the qualifications, financial ability and experience to perform the services and to deliver the equipment required under that contract and that by virtue of the Board's action in awarding it without bidding, petitioner had been deprived of its right to participate in the proceedings. The petitioner therefore requested that the Commissioner set the contract aside and order the Board to publicly advertise for the receipt of bids in proper accordance with the requirements of the statute and the regulations. The matter then was promptly transmitted to the Office of Administrative Law by the Commissioner since Institutional was seeking a stay of the carrying out of the Board's intention to award the contract to Metro. Also, I believe that the stay application included a request for summary decision.

A hearing in connection with that application was conducted by Judge Elinor R. Reiner on May 6, 1994. She denied Institutional's request for emergent relief and for summary judgment and directed that the matter proceed to plenary hearing on the issue of whether or not a statutory emergency legitimately existed thereby justifying the Board's award to Metro without having gone through the public bidding process. I should note, as well, that in June 1994 a company known as Tenavision Inc., filed a separate petition challenging the Board's award after public bidding of a contract to a

company known as Electro-Es for actual installation of the fire alarm equipment which was to be delivered by Metro. Later that month Judge James A. Ospenson denied Tenavision's request for a stay of the installation contract to Electro-Es, thereby permitting all of the work ultimately to proceed.

In July 1994, the State Board of Education affirmed Judge Reiner's denial of Institutional's application for a stay and for summary judgment and by October 1994 much of the equipment essentially had been delivered to the sites in East Orange by Metro in accordance with its contract and essentially installed by Electro-Es. Thereafter, in February 1996, Metro was dismissed as a respondent by stipulation (copy attached) whereby it agreed to be bound by any decision in this matter, or in any other forum. The delay from 1994 when the petition was filed, until 1996 when the case was tried was due to a variety of reasons which I shortly will discuss.

Ultimately, on April 4, 1996 I conducted a plenary hearing at which time the testimony of two individuals was received. First, from the Superintendent of Schools, Dr. John D. Howard, Jr. and also from an architectural consultant employed by the Board, Dr. Robert J. Dean. In addition, a variety of exhibits were offered and received on that date.

Following the close of the testimony a schedule for the filing of post-hearing proposed findings of fact and conclusions of law was established. Those documents ultimately were filed with me and I am today rendering my oral decision pursuant to *N.J.A.C.* 1:1-18.2. At this juncture I would note that the delay prior to my conducting a hearing in April 1996, even though the case came to the OAL in April 1994, was the result, as I said, of a variety of reasons, including requested adjournments by counsel. Also a substantial aspect of that delay was to provide both the Board and Institutional with time to respond to certain issues which I raised *sua sponte* respecting a concern I had regarding the very propriety of my even proceeding with a hearing in light of the

fact that the equipment had already been installed and it did not seem to me that any relief could be awarded either by me or by the Commissioner. Therefore, I raised the question of whether we should be spending the time of the court and counsel, and the money of their clients, with respect to the matter. Counsel thereafter submitted memoranda in connection with the issues I raised. In fact, to be a little more specific, in September 1995, after we had set hearing dates and while I was awaiting receipt of the stipulation of dismissal with respect to Metro, I wrote to counsel (copy of letter attached) and asked them to address and to submit memoranda of law with respect to the following three issues: (a) what specific relief is sought in this matter by Institutional which the OAL has jurisdiction to grant? (b) if the object of continuing to pursue this case before OAL was to establish a record for a separate Superior Court action, was that activity essentially a waste of judicial and administrative efficiency since two separate fora were involved? and (c) what would be the likelihood that proceeding in the Superior Court rather than at OAL on the issues involved would lead to a determination by the Superior Court to transfer all or part of the case back to OAL to have the hearing under the exhaustion of remedies doctrine? Counsel, as I said, ultimately submitted memoranda of law with respect to the issues I raised and by letter dated January 4, 1996 (copy attached) I wrote to counsel and reviewed the status of the case at that time. I noted that as a result of the receipt of the memoranda it seemed to me that Mr. Lawless, on behalf of petitioner, seemed to agree that the question of my continuing to retain jurisdiction was not an inappropriate one to consider and, in fact, I believe he noted and I said so in my letter that he would not object to my transferring the case to the Superior Court where all of the issues could be heard and decided at once. He also suggested I make certain recommendations in that order to see to it that the case perhaps would be expedited. Mr. Randall, on behalf of the East Orange Board of Education, to the contrary, took the position that the matter was appropriately before me, not that it would not also perhaps be appropriate to be heard directly in the Superior Court. However, he maintained that as long as it was here before me I might as well decide it. I then determined, based upon my receipt of those briefs, that even

though I continued to entertain extremely serious reservations regarding my proceeding with the case it was technically, at least, a "school law controversy" and I therefore would assert jurisdiction and conduct a plenary hearing to establish a record, leaving petitioner to whatever remedies, if any, it believed it might be entitled as a result of whatever I said. So, with those trepidations, and I still continue to have those concerns, nevertheless I did proceed and I will today render my oral initial decision.

FINDINGS OF FACT

Based upon my review of the testimony received at the plenary hearing from Drs. Howard and Dean, as well as my consideration of the documentary evidence, I make the following Findings of Fact:

1. In March 1993 the Board hired L. Robert Kimball & Associates, an architectural firm, to design and superintend the award of contracts for the installation of a new fire alarm system for all of the Board's buildings. The fire alarm and security system had been in a state of deterioration for a considerable period of time before the Kimball firm was hired.

2. Thereafter, in September 1993, the Board advertised for the receipt of bids for a contract to both furnish and install district-wide fire and security systems. Unfortunately, only one bid was received in response to that advertisement and that bid had to be rejected because it exceeded the school district's budget for the project by approximately $2 million, at least.

3. Subsequent to the rejection of that bid the Board's architect began an in-depth investigation of the fire and security systems. Also included in that investigation was a company known as ADT which, I believe,

had been engaged temporarily to provide some corrective action, at least in an emergent, stop-gap sort of way, while the Board was continuing to look at its more long term problems. As a result of that review and investigation, which took place following the September 1993 rejection of the only bid, the architect found that the fire and security systems were much worse than initially had been believed, that the only early warning notice regarding fire protection or prevention in many of the schools would be if a neighbor actually saw fire or smoke and called the fire department or some other person and, in short, that the condition of the fire and security systems was deplorable and tantamount to an emergent situation requiring prompt corrective action.

4. Therefore, on or about December 7, 1993 and pursuant to a letter received from the Board's architect, Mr. David E. Chase, the Superintendent of Schools, Dr. Howard, officially declared and determined that there was an emergent situation in connection with the fire and security systems. On that same date, the Board passed a resolution declaring that a condition of emergency did exist with respect to that situation (Exhibits R-1, R-2).

5. On December 14, 1993 the then County Superintendent of Schools, Mr. Peter Carter, was advised that the Board intended to invoke the emergency purchase exception to the public bidding requirements found in *N.J.S.A.* 18A:18A-7. A communication from Dr. Howard to Mr. Carter is part of the record in this case (Exhibit R-4). The basis for the determination by the Superintendent and Board for declaration of emergency was essentially the letters received not only from Mr. Chase, the architect, but also from the East Orange Fire Department as well (Exhibit R-3), and there are documents in the record in that

respect. Dr. Howard also testified that even prior to December 14, 1993 he had been in conversation with Mr. Carter regarding the situation and had expressed his belief that this was an emergent situation.

6. In response to the information provided to him Dr. Howard, Mr. Carter determined that the district's belief that an emergent situation existed did find support in the correspondence from the architect and from the East Orange Fire Department and based upon that documentation, and in light as well of conversations he had previously with Dr. Howard and apparently with Board counsel, Carter authorized the East Orange Board to invoke and apply the provisions of the statute concerning the emergency purchase of, in this case, equipment - fire and security alarm equipment. The school district specifically was instructed by Mr. Carter to "adhere to the statute and code as well as take whatever precautions it deemed necessary and appropriate with regard to all fiscal and physical aspects of the situation" (Exhibit R-5). The county superintendent also directed the school district to obtain three proposals for the security system. Thereafter, although the district actually requested proposals from four potential suppliers, only two were received - one from Simplex Time Recorder Company and the other from Metro. Metro's proposal was approximately $700,000 less than the other one and the Board therefore determined simply to consider Metro only with regard to the award of the contract.

7. Sometime during January 1994 the other proposer, Simplex, informally challenged the anticipated award to Metro by complaining about it to some entity in the Department of Education, but there was never any formal filing of a petition by Simplex, either with the Commissioner or anyone else regarding Simplex's concern.

8. Subsequently, on February 1, 1994 the East Orange Board, having determined following its review of the status of the bids to award the delivery and equipment contract to Metro, passed a resolution awarding the contract to that company (Exhibit P-4).

9. Previous to this award an issue had been raised concerning whether Metro was properly pre-qualified to be awarded such a contract and several communications on that issue were made part of the record including exchanges between counsel for Metro, then counsel for Institutional and from Ms. Adams, the DBC Director in Trenton (Exhibits R-7 to R-11). Ultimately, Ms. Adams advised counsel for Metro that her office had no jurisdiction over the project and that any complaints concerning the absence of prequalification had to be addressed to the Board (Exhibit R-12).

10. Thereafter, into March 1994, Metro and the Board were negotiating over payment terms and particularly various payment options. Ultimately that was ironed out and Metro indicated that deliveries would commence sometime in April and hopefully would be completed by June. Thus, on April 8, 1994, the Board issued a letter of intent to Metro (Exhibit P-6). Some of the delay in ordering the equipment (recognizing, of course, that the emergency determination was made in December 1993 and that in March 1994 people are still talking about what the parameters of the deal are) was due to the challenge made to, and questions about the installation award (that was the Tenavision-Electro-Es situation) as well as the school district's interpretation of the instructions from the County Superintendent to proceed cautiously - that at least was Dr. Howard's explanation of part of the reason for the length of time that had transpired.

11. However, the fact that the installation contract was not awarded simultaneously with the equipment contract did not substantially delay the project after it was started since there was testimony, undisputed, that procurement of the equipment even after it was ordered would take approximately ten to sixteen weeks and that the installation, for obvious reasons, could not commence until after that equipment was received.

12. The installation contract bids originally were opened following some litigious activity at the end of April 1994. In fact, at that time both of the bids, I believe, were rejected and the Board then had to go out and rebid. Again, Tenavision and Electro-Es submitted bids and there was a challenge. However, in early June 1994, the Board awarded the installation contract to Electro-Es. That, too, was challenged and Judge Ospenson's decision to reject the challenge thereafter was rendered in OAL Docket No. EDU 5611-94. I mention that fact only to give whomever is to read this decision some flavor of what was going on "on the ground" so to speak with respect to the "fits and starts" that were taking place regarding the Board's attempt to deal with the situation.

13. As noted, eventually by either October or November 1994, the entire project was completed. However, that did not stop Institutional from continuing to pursue this case for the reasons that I have previously noted even though all agreed I could not under any circumstances, and certainly not now, award any damages, nor could the Commissioner, as petitioner was not technically an unsuccessful or low bidder since it never participated in the process. However, it does have a legitimate nexus to the case with respect to its status, as set forth in its petition.

DISCUSSION

The major issue, obviously, is whether or not in the context of this case the Board's determination to declare an emergency and therefore to avoid following the dictates of the Public School Contracts Law with respect to advertising for the receipt of bids in a public fashion and so forth was legitimate. The statute previously mentioned, *N.J.S.A.* 18A:18A-7, specifically provides that a contract may be awarded without that public activity where there is, "an emergency affecting the health or safety of occupants of school property" and where it is required that, "the immediate delivery of the articles or the performance of the service" is necessary. The statute also provides that a written requisition for the performance of such work or labor, or the furnishing of materials, supplies or services, has to be filed with the contracting agent or his deputy which describes the nature of the emergency, when it occurred, the need for invoking the section and a certification by the employee in charge. Also involved in this type of case is the provision set forth in *N.J.A.C.* 6:20-8.5 which requires that a copy of the contract awarded without public bidding, including a copy of the written requisition mentioned in the statute, has to be filed with the Bureau of Facilities Planning Services and with the Office of the County Superintendent of Schools within three days after the award of the contract or the agreement. I believe in this case it is not disputed that preparation of that written requisition setting forth the essential aspects was never done and the petitioner maintains that is a fatal defect.

Petitioner maintains not only that there was no emergency and that there was no proper written requisition, it also pursues a contention regarding the fact that Metro was not properly prequalified. Those are the three reasons set forth by Institutional with respect to its claims that the Board's action in this case was improper.

The case law which deals with whether or not an emergency exists is to be found in decisions not only in the Public School Contracts Law area, but in other public

contract areas as well. Both counsel cited, for example, the decision in *Scatuorchio v. Jersey City Incinerator Authority*, 14 *N.J.* 72 (1953) where the court indicated that a statutory emergency must be "a sudden or unexpected occurrence or condition calling for immediate action". Both counsel, I believe, also made reference to the decision in *Board of Education of Asbury Park v. Hoek*, 38 *N.J.* 213, 240 (1962) where the court's language respecting whether an emergency would justify a contract award without public bidding involved a situation which was, "so imminent a need that normal procedures may be dispensed with". I don't think counsel cited any school law decisions in regard to emergency and I don't know if there are any that are pertinent to this case. The petitioner's thrust, however, is that the emergency exception in the statute is not intended to be an avenue to go around the public bidding requirements which must faithfully be followed where the situation so requires.

In my view, having considered the testimony, the documentation and whatever case law might be pertinent, the facts of this case reveal that for purposes of *N.J.S.A.* 18A:18A-7 an "emergency" did exist in December 1993, at least, thereby justifying the Board's determination to invoke the emergency procedures. While in hindsight one might question that determination, hindsight is always perfect. At the time, in December 1993, when it reviewed the situation, I believe that the Board and its senior administrative agents, including its superintendent and its architect, properly concluded that there was an emergent situation threatening the health and safety of the students and the employees using the schools whose fire and security alarms systems were in pathetic condition.

While it is true that prior to December 1993 the state of disrepair of that system was quite serious, and arguably could have supported a much earlier request that it be treated as an emergency, in my view that is not a reason in retrospect to declare that no true emergency existed in December. While perhaps the Board could and should have acted more quickly before December, at least it did take appropriate action in that

month. The temporary stop-gap measures which had been put in place by ADT clearly did not suffice. I would also note, as I noted in the Findings of Fact, that the Board had attempted to get the entire project done, both delivery and installation, earlier, but unfortunately the Simplex bid in September 1993 was way beyond the Board's budget and had to be rejected. Let me also note that at that time during 1993, East Orange was under Level II State Monitoring and no substantial fiscal activities could take place without review by the Department of Education. Indeed, that is why the superintendent had to have communications with Mr. Carter during December - because of that particular relationship between the school district and the State. Also, the fact the Board did not move earlier to declare an emergency, as both Dr. Dean and Dr. Howard noted, was due to the fact that apparently neither fully recognized the extent of the problem. As I say, perhaps they should have, but the fact that they did not does not convert an emergency into a non-emergency.

Secondly, at first blush the decision simply to seek delivery of the equipment on an emergent basis, and not install it as well, appears to militate against the existence of a true emergency. After all, if the problem is that there might be a fire and there is not a warning system, having equipment sitting on the ground without being installed does not do very much in that regard. However, with respect to that view, both Dr. Howard and Dr. Dean testified that they considered that aspect of the situation and both felt, particularly in view of the cautionary suggestion made by Mr. Carter, that they should approach this entire matter without taking precipitous action. I am satisfied that they reasonably took such steps as were necessary, particularly in view of the fact as testified by Dr. Dean, if not Dr. Howard as well, that there was a substantial lag time even after one awarded the equipment delivery contract until the items actually were delivered. As Dr. Dean particularly observed, the Board also was very concerned about cost, especially given the history of the intent to bid the entire job during 1993, and that, too, had to be taken into account. Ultimately, as it turned out, the delivery of

equipment did take place, installation thereafter followed by October, perhaps November 1994, and the matter was then complete at that point.

So, not only can I not find no emergency because the Board did not act earlier than it did and perhaps should have, neither does it make the situation a non-emergency because the Board did not complete the project for a quite a long period of time. Each case has to be decided on its specific facts. The language, of course, of "imminent need" and so forth is generic language. In this case the testimony was that there was built-in "lag time" because this material and equipment was a "shelf item" and there was nothing much the parties could do about it but act as quickly as they could, bearing in mind the particular constraints they had. Could the Board have acted more quickly? Surely it could have. Fortunately, no catastrophe took place. But neither of those aspects, as I said, make an emergency a non-emergency. The Board also noted that some of the delay was due to the fact that there was a Christmas break and the Board's own architectural people had to spend some time looking over the bid specs and so forth. Also, the Electro-Es-Tenavision problem was going on - those are all certainly factors which caused delay. But again, neither alone nor in combination do they make an emergency a non-emergency. All they do, really, is to highlight the fact that the Board perhaps should have acted more quickly.

Nor can I agree with petitioner that Mr. Carter's approval of the emergent nature of the situation was based upon his erroneous assumption that what the Board intended to do was to move forward simultaneously both with delivery and installation and that it was not made clear to him that all the Board was talking about was delivery of the equipment and that had it done so perhaps Carter might not have acted the way he did with respect to the approval. In that regard, while it is not "crystal clear" to me that Carter actually was totally cognizant of the somewhat limited nature of the request, the testimony by Dr. Howard, as well as the pertinent documents, essentially support the Board's position that it was clear enough to Carter I will not challenge the

emergency determination on the basis that Mr. Carter either was misled or that he misunderstood the situation.

With respect to the different opinions concerning whether Carter actually wanted the Board to proceed cautiously, I believe that Dr. Howard and the Board's approach was at least minimally appropriate. As I noted, in 1993 this school district was in Level II monitoring and its financial activities, to say the least, were under close scrutiny by the State. Acting too quickly was therefore not to be encouraged - even in an emergency situation such as this. This Board had to be very careful with regard to everything it did with respect to spending money. As I said, the Board perhaps could and should have moved with greater dispatch. But I cannot say that its measured pace was legally insufficient and certainly, as I will repeat again, its conduct did not make an emergent situation a non-emergent one. As Dr. Dean noted, the Board, overall, acted with prudence, with adequate enough speed and with reasonable consideration of its fiscal constraints.

Nor do I agree with Institutional that the award to Metro must be set aside because that bidder was not properly prequalified. First, it is highly arguable that this issue is moot since the material successfully was delivered and presumably has successfully been installed as the Board argues. Also, the Division, through Ms. Adams, advised counsel for Metro, previous counsel for Institutional and Board counsel as well that the determination with respect to prequalification was one for the Board to make (Exhibit R-12). There is also an opinion expressed by Mr. Chell from the Department of Education, cited by Metro in one of its letters, that Metro had gotten an indication that prequalification for equipment purchases was not even a legal requirement (Exhibit R-7). On balance, then, I can see no reason - even if prequalification is required and I do not believe the case was made out that it was, but even if prequalification was required, that now in retrospect, years later really, that this

is an appropriate reason to require either the Board or Metro to respond in any way to Institutional's petition.

Similarly, I see no basis to grant relief to the petitioner because Dr. Howard failed, which he admitted, to see to it that a written requisition was prepared and certified as required by sub-section A of *N.J.S.A.* 18A:18A-7 and by the regulation I cited which requires that a copy be filed in appropriate places. Thus, having found on the facts that a true emergency under the statute reasonably did exist and justified the Board's invocation of the procedure which it followed, for me now to set aside the action because of the failure to follow the written requisition requirements would in the context of this case exhalt form over substance.

CONCLUSION AND ORDER

Essentially, that is my determination with respect to the case. A record has been made in the sense that testimony was received from Drs. Howard and Dean, the pertinent documentation is now part of that record, and the final nail, so to speak, is the determination that I now have made disposing of the matter. Formally, then, I therefore **CONCLUDE** that in light of the Findings of Fact previously made, that an emergency situation did exist in December 1993 justifying the invocation by the East Orange School District of the statutory procedures set forth in *N.J.S.A.* 18A:18A-7 and that the steps taken by the Board following its invocation of that emergency declaration were legally sufficient. Thus, the ultimate award of the contract for the delivery of fire and security equipment to Metro without public bidding substantially was in accordance with the statutory requirements and the appropriate regulations and therefore I will not order that it be set aside. Accordingly, I **ORDER** that the petition by Institutional Systems be **DISMISSED**.

In accordance with OAL regulations regarding oral decisions I will attach to this oral initial decision a witness and an exhibit list so that that is also part of the record. Of course, this initial decision goes to the Commissioner of Education who will review it. I believe under our regulations this oral decision has to be transcribed within fifteen days of today's date, which it will be, and it will be sent to the Department. Both counsel will receive a copy of my determination. I also will attach to this decision my letters of September 29, 1995 and January 4, 1996 with respect to the other issues. They may be moot, but I think it is important as part of the record in this case, even though I said so in my decision, to indicate my continuing concern regarding the propriety of my proceeding with the case.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

OAL DKT. NO. EDU 3315-94

I, Marie V. Hackett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Stephen G. Weiss' oral decision rendered in the above matter on August 14, 1996.

August 19, 1996
DATE

Marie V Hackett
MARIE V. HACKETT

August 19, 1996
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 21 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

\mh

APPENDIX

Witness List:

For petitioner: Dr. John D. Howard, Jr., Superintendent of Schools
Dr. Robert J. Dean,

For respondent: None.

Exhibit List:

P-1 Telefax communication for Carl Letterie to Peter E. Carter

P-2 Invitation for proposals

P-3 Proposal form, contract 0152-1 Equipment Fire/Security Program

P-4 Extract from minutes of meeting of Board of Education of East Orange, February 1, 1994.

P-5 Letter, March 8, 1994 from Johnny L. Neismath to Nilkanth Patel

P-6 Letter of Intent, April 8, 1994, David E. Chase, AIA to Metro Fire and Communications Systems, Inc.

P-7 Standard form of agreement, April 8, 1994, between East Orange School District and Metro Fire and Communications Systems, Inc. re district-wide fire/security program.

P-8 Excerpts from equipment contract for emergency electrical work, contract #0152-1, December 20, 1993.

P-9 Letter, January 13, 1994 from Dr. John D. Howard, Jr. to David E. Chase.

P-10 Extract from minutes of Board of Education of East Orange meeting, May 3, 1994.

P-11 Letter, March 4, 1993 from David E. Chase to John Garcia

P-12 (Identification Only) Certification of John D. Howard, Jr. with attachments.

R-1 Letter, December 7, 1993 from David E. Chase to Nilkanth Patel.

R-2 Extract from minutes of meeting of Board of Education of East Orange, December 7, 1993

R-3 Letter, December 14, 1993, from Elliott Peterkin, Fire Chief, City of East Orange to Dr. John D. Howard, Jr.

R-4 Letter, December 14, 1993, from Dr. John D. Howard, Jr. to Peter E. Carter, Essex County Superintendent of Schools.

R-5 Telefax communication from Carl Letterlie to Peter E. Carter (identical to Exhibit P-1).

R-6 Letter, January 5, 1994, from Nilkanth Patel to Peter E. Carter.

R-7 Letter, January 17, 1994, from Thomas J. Gallahue, Jr., Esq. to Michael Porter, Construction Supervisor.

R-8 Letter, January 21, 1994 from Diane C. Nardone, Esq. to Maureen Adams, Director, Division of Building & Construction.

R-9 Letter, January 31, 1994 from Melvin C. Randall, Esq. to Maureen Adams.

R-10 Letter, February 23, 1994 from Charles Kawiecki to Commissioner Leo Klagholtz

R-11 Letter, March 2, 1994 from Thomas J. Gallahue, Jr., Esq. to Maureen Adams.

R-12 Letter, March 10, 1994 from Maureen Adams to Thomas J. Gallahue, Jr., Esq.

R-13 Tabulation of proposals, district-wide fire/security program, January 3, 1994

INSTITUTIONAL SYSTEMS SERVICES CORPORATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

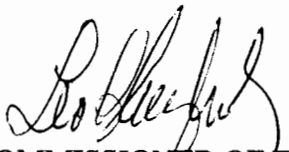
The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that the Board, under the particular circumstances herein, properly concluded that there was an emergent situation which existed with respect to the disrepair of its fire and security systems, thereby rendering it appropriate to invoke *N.J.S.A.* 18A:18A-7, notwithstanding that the Board could have acted more swiftly. (Initial Decision at pp. 11, 12) Further, like the ALJ, the Commissioner is not persuaded that petitioner has established that Metro's apparently deficient prequalification was fatal to the contract formed in his matter,* or that petitioner should prevail on the basis of the Board's failure to address the filing requirements of *N.J.S.A.* 18A:18A-7a and *N.J.A.C.* 6:20-8.5. (*Id.* at p. 14)

* The initial decision refers to the opinion expressed by Mr. Chell, who, according to Exhibit R-7, is Contractor Administrator for the New Jersey State Department of Treasury, rather than for the Department of Education, as erroneously stated in the initial decision. (Initial Decision at p. 14)

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

OCTOBER 8, 1996

DATE OF MAILING OCTOBER 8, 1996

447-96

447-96

JAMES MC KEON, SR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY; MANUEL GONZALEZ; THOMAS J. FICARRA; JOSEPH PAPETTI; MARYANN ECKENRODE; JOAN RAPALLA; SCIBAL ASSOCIATES; JOSEPH HARVEY; FLORENCE LOEWY; NOREEN UNNAMED; PAT UNNAMED; AND RITA ROUMINE,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning teacher claimed entitlement to salary, pursuant to *N.J.S.A.* 18A:30-2.1, as a consequence of an alleged work-related injury.

ALJ found that petitioner had 90 days from May 2, 1995, the date his statutory benefits were discontinued, to file his appeal with the Commissioner of Education pursuant to *N.J.A.C.* 6:24-1.2(c), even though his cases were pending before the compensation court. (*Verneret*) Petitioner did not file until October 1995, well beyond the 90 days. Thus, the ALJ concluded that the petition was filed untimely. Petition was dismissed.

Commissioner concurred with the determination of the ALJ.

OCTOBER 8, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 12491-95

AGENCY DKT. NO. 408-10/95

JAMES C. MCKEON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY; MANUEL GONZALEZ; THOMAS J. FICARRA; JOSEPH PAPETTI; MARYANN ECKENRODE; JOAN RAPALLA; SCIBAL ASSOCIATES; JOSEPH HARVEY FLORENCE LOEWY; NOREEN UNNAMED; PAT UNNAMED; AND RITA ROUMINE

Respondents.

James C. McKeon, *pro se*

Robert E. Murray, Esq., for respondent, Elizabeth Board of Education (Murray, Murray & Corrigan, attorneys)

Jorge A. Batista, Esq., for respondents, Manuel Gonzalez, Thomas J. Ficarra, Joseph Papetti, Maryann Eckenrode, and Joan Rapalla

Record Closed: July 15, 1996 Decided: August 20, 1996

BEFORE **EDITH KLINGER**, ALJ:

On October 13, 1995, petitioner, James C. McKeon, filed a petition with the Commissioner of Education alleging that the Elizabeth Board of Education and named individual members of the Board withheld income from him in violation of *N.J.S.A.* 18A:30-2.1.

On December 29, 1995, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The substance of the appeal is whether respondents wrongfully discontinued making payments to McKeon pursuant to *N.J.S.A.* 18A:30-2.1.

The respondents moved for summary decision in this matter on the grounds that the petition was not timely filed according to the ninety-day rule, *N.J.A.C.* 6:24-1.2(C).

The facts, as they appear in the pleadings and in respondents' motion, with no dispute by petitioner, are these:

Respondents, the Elizabeth Board of Education and the named individual members of the Board, hired James McKeon as a teacher on September 1, 1989. For convenience, all of the respondents will be referred to collectively as the "Board" in this decision.

The Board was aware that McKeon was involved in an automobile accident that year but denies any knowledge of the circumstances, including whether the accident occurred before or after he commenced employment. Since 1989, McKeon was also involved in seven separate accidents resulting in seven separate injuries which he alleges are work-related. Specifically, the claim petitions filed with the New Jersey Department of Labor, Division of Worker's Compensation, in 1995, are for one injury

occurring in 1991 and one in 1992, two injuries occurring in 1993, and three injuries occurring in 1994. All of these cases are currently pending before the Worker's Compensation Court. In all of these proceedings, the Board is contesting, among other things, that the injuries are work related.

At the request of the Board, McKeon was examined by Dr. Gerald Ross on April 19, 1995, because of the latest injury which occurred on December 2, 1994. According to Ross, petitioner would reach the maximum medical benefit of treatment on May 1, 1995, and could return to work on May 2, 1995.

Up until this time, pursuant to *N.J.S.A.* 18A:30-2.1, respondent had been paying petitioner both his full salary and the expenses of his medical treatment due to the December 1994 accident without deducting petitioner's sick days. When he did not return to work on May 2, 1995, the Board immediately began to deduct sick days.

The petition filed by McKeon with the Department of Education on October 13, 1995, alleges that the Board wrongfully discontinued the benefits which he was receiving pursuant to *N.J.S.A.* 18A:30-2.1. These benefits are only available for work-related injuries. It is precisely the issue of whether any or all of them are work-related which is presently pending before the Compensation Court.

Respondent argues that the petitioner had ninety days from May 2, 1995, the date his statutory benefits were discontinued, to file his appeal with the Commissioner of Education pursuant to *N.J.A.C.* 6:24-1.2(C).

Petitioner originally brought his complaints to the Commissioner in March 1995 in the form of correspondence, but he did not attempt to file a petition until October 1995. This petition was not accepted for filing because it did not meet the Department's filing requirements. It was refiled in October 13, 1995 in its present form.

After receiving correspondence from McKeon relating to his disputes with the Board, Deborah Antanaitis, Acting Director, Department of Controversies and Disputes,

informed McKeon, in a letter dated September 28, 1995, that he had not filed a petition with the Department. Petitioner was also advised of the existence and the substance of the "ninety-day rule" and cautioned to file his petition on time.

A careful review of the final petition shows that the latest violation of the school laws alleged by McKeon followed the accident or injury of September 1994. The petition makes no mention of the injury of December 1994 or any violation of law by the Board related thereto. Violations subsequent to this date were alleged in various letters from petitioner to the agency prior to the unsuccessful October 1995 filing, but they do not seem to relate to disputes arising under the education laws. For example, the only request by McKeon to amend his allegations, which appear in a letter to the Commissioner dated September 20, 1995, is to add that the Board's worker's compensation carrier, Scibal Associates, made no payments to his physical therapists since June 1995 and that the Board had provided him with inaccurate W-2 statements for 1994. Even these do not appear in the final version of the petition. This matter was dismissed as to Scibal Associates at the prehearing conference.

I, therefore, **CONCLUDE** that the petition was not filed in a timely manner, pursuant to the ninety-day rule, *N.J.A.C.* 6:24-1.2(C). McKeon's letters to the Commissioner of March 1994 show that he was aware that he had grievances against the Board at that time but never filed a petition with the Department of Education until he was advised by the Department to do so in September 1995. When finally filed in October 1995, the petition did not refer to Board violations related to any accident or injury after September 1994.

Consequently, I **CONCLUDE** that the petition should be dismissed as to all respondents because it was filed out of time. See *Kaprow v. Bd. of Ed. of Berkeley Tp.*, 131 *N.J.* 572 (1993). He was required to file his petition with the Department of Education in accord with the ninety-day rule even though his cases are presently pending before the compensation court. *Verneret v. Bd. of Ed. of the City of Elizabeth, Union Co.*, EDU 3718 -91 (St. Bd., Jan. 4, 1995)

Accordingly, it is **ORDERED** that the petition of James McKeon is hereby **DISMISSED WITH PREJUDICE** for untimely filing.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 20, 1996
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

8/22/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 22 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

md

JAMES MC KEON, SR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY; MANUEL GONZALEZ; THOMAS J. FICARRA; JOSEPH PAPETTI; MARYANN ECKENRODE; JOAN RAPALLA; SCIBAL ASSOCIATES; JOSEPH HARVEY; FLORENCE LOEWY; NOREEN UNNAMED; PAT UNNAMED; AND RITA ROUMINE,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate substantive arguments advanced before the Administrative Law Judge (ALJ), again contending, *inter alia*, that the Board wrongfully discontinued benefits which petitioner was receiving pursuant to *N.J.S.A.* 18A:30-2.1. Petitioner further avers that the ALJ's finding that this matter was, "***in error [and] counter to the facts placed before the Commissioner which are Official State and Federal documents***." (Petitioner's Exceptions at p. 4) Petitioner next provides a timeline of all events leading to his cessation of benefits. *(Id.* at p. 5)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the petition was not filed in a timely manner, pursuant

to *N.J.A.C.* 6:24-1.2(c). *Kaprow, supra.*[*] The law is clear that the requirement to file a Petition of Appeal on a timely basis remains even though similar claims are pending before the compensation court. *Veneret, supra.* As such, the Commissioner finds that no relaxation or waiver of *N.J.A.C.* 6:24-1.2(c) is warranted in this instance.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL that the instant Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 8, 1996

DATE OF MAILING OCTOBER 8, 1996

[*] Although the petitioner did send to the Commissioner correspondence in March 1995, as noted by the ALJ, that correspondence complained of the school administration and its handling of his claims and also predated the arising of petitioner's cause of action, when benefits to petitioner ceased, on May 2, 1995.

4/477-96

EDU #12491-95
C # ~~477-96~~
SB # 78-96

JAMES MC KEON, SR.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

RESPONDENT-RESPONDENT,

V.

MANUEL GONZALEZ, THOMAS J. FICARRA, JOSEPH PAPETTI, MARY ANNE ECKENRODE, JOHN RAPALLA, SCIBAL ASSOCIATES, JOSEPH HARVEY, FLORENCE LOEWY, NOREEN UNNAMED, PAT UNNAMED AND RITA ROUMINE,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 7, 1996

For the Petitioner-Appellant, James C. McKeon, Sr., pro se

For the Respondent-Respondent Board of Education of the City of Elizabeth, Murray, Murray & Corrigan (Robert E. Murray, Esq., of Counsel)

For the Respondents-Respondents Manuel Gonzalez, Thomas J. Ficarra, Joseph Papetti, Mary Anne Eckenrode, John Rapalla, Scibal Associates, Joseph Harvey, Florence Loewy, Noreen Unnamed, Pat Unnamed and Rita Roumine, Jorge A. Batista, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

March 5, 1997

Date of mailing MAR 0 7 1997

451-96

451-96

A.S., on behalf of minor, A.S., and N.S. AND R.F.S.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 10, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 1103-96

AGENCY DKT. NO. 465-12/95

ALEESE SIMMONS, ON BEHALF OF MINOR, A.S.,

BISHOP AND MRS. NATHANIEL SIMMONS,

Petitioners,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

Aleese Simmons, Bishop and **Mrs. Nathaniel Simmons**, *pro se*

Joanne L. Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: August 13, 1996 Decided: August 22, 1996

BEFORE **EDITH KLINGER**, ALJ:

On December 8, 1995, petitioners, Aleese Simmons and Bishop and Mrs. Nathaniel Simmons, filed a Petition with the Commissioner of Education seeking to require the Board of Education of the South Orange - Maplewood School District (Board) to provide her minor daughter, A.S., a free public school education in the district.

On December 27, 1994, the Board filed its answer and on January 10, 1996, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was scheduled for hearing on August 13, 1996 and notice was sent to the parties at the address provided.

The Board admitted A.S. as a pupil in the district pending the outcome of the appeal and filed a counterclaim against petitioners seeking payment of tuition for A.S. from the date of her admission into the school system.

Petitioners failed to respond to any of respondent's requests for discovery and did not appear on the scheduled hearing date. No explanation for this failure to appear was offered. I, therefore, **CONCLUDE** that petitioners no longer wish to pursue their appeal, and it is **ORDERED** that their petition is hereby **DISMISSED WITH PREJUDICE**.

I further **CONCLUDE** that petitioners do not contest the counterclaim for tuition filed against them by the district and, therefore, the Board's request for tuition should be granted by default.

The annual tuition for a student in the district, as set forth in the Affidavit of Resident and the Affidavit of Parent/Guardian filed by petitioners with the district in December 1995, is $9,370. The affidavits warn the resident and parent/guardian that they will be responsible for payment of this tuition in the event the information provided in the affidavits proves to be false. Copies of the affidavits were attached to respondent's Motion for Default, filed with this forum on July 22, 1995.

Since A.S. attended school in the district from December 1, 1995 through June 1996, the Board seeks to recover the prorated amount of tuition due. I **FIND** that this is seven-tenths of the full tuition for the year or $6,559. I **CONCLUDE** that petitioners are liable to the Board in this amount.

Consequently, it is **ORDERED** that petitioners pay to respondent $6,559 as tuition for A.S.'s attendance in the district's school between December 1, 1995 and the end of June 1996.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 22, 1996
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

8/26/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 26 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 1103-96

A.S., on behalf of minor, A.S., and N.S. AND R.F.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioners contend that they were not properly notified of the hearing which was scheduled for August 13, 1996. Since they were not aware of the hearing, and therefore failed to appear, they were assessed with tuition which they claim they are unable to pay. Thus, petitioners request that the Commissioner reschedule the hearing in order to permit them to present their case and to respond to the Board's counterclaim.

The Board finds it "curious" that petitioners did not receive a copy of their hearing notice, when same was sent to their correct address. (Board's Reply at p. 1) The Board further notes that, apparently petitioners received *other* correspondence, such as the Board's Interrogatories forwarded on or about July 12, 1996; the Board's Motion for Default Judgment,

which was forwarded on or about July 22, 1996; a copy of the Board's August 6, 1996 correspondence to the ALJ; and a copy of the Board's Certification of Counsel regarding the amount of tuition owed, which was forwarded on August 13, 1996. None of these submissions, the Board avers, was returned to it as undeliverable. Accordingly, the Board requests that the Commissioner deny petitioners' request for a new hearing date.

Upon a careful and independent review of the record in this matter, the Commissioner cannot concur with the ALJ's conclusion that this matter must be dismissed. In that petitioners attest they were not notified of the hearing date, and were unaware of such date, the Commissioner determines that, in the interest of fundamental fairness and A.S.'s ability to obtain an education, this matter must be returned to the OAL for further proceedings consistent with *N.J.A.C.* 1:1-1 *et seq.*

Accordingly, the initial decision of the OAL is reversed and this matter shall be returned to the OAL for further proceedings, along with a request that this matter be heard on an expedited basis as it involves a residency dispute.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 10, 1996
DATE OF MAILING OCTOBER 11, 1996

450-96

450-96

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GERARDO FERNANDEZ, JR.,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought declaratory judgment on whether it was obligated to reimburse respondent Board member for legal expenses he incurred in defending charges that he violated the School Ethics Act, *N.J.S.A.* 18A:12-21.

ALJ found that respondent was duly engaged in Board activity when he cast his vote that resulted in the filing of an ethics complaint against him. ALJ found no discernible difference between the defense of an ethics complaint and a civil matter for the purposes of recognizing legal fees pursuant to the indemnity statute. Both arise out of and during the course of one's duties as a member of the local Board of Education. Thus, the ALJ concluded that respondent was entitled to be reimbursed for the legal expenses incurred as a result of defending a charge that he violated the school ethics law when he voted on an expenditure matter.

Commissioner reversed the determination in the initial decision. Commissioner concluded that, in accordance with the standards set forth in *N.J.S.A.* 18A:12-20 and in light of existing case law, respondent herein was not entitled to reimbursement. As clearly stated by the State Board and the Appellate Division in the *Drabich* State Board decision and in *In re Borrelli* Appellate Division decision, although indemnification is provided for school employees in civil and criminal matters, there is no authority for extension of any of the education law indemnification statutes to a situation such as that involved in this case. Commissioner determined that unless and until the Legislature acts to enlarge the scope of indemnification, respondent, and similarly situated individuals, can claim no entitlement for expenses incurred in their defense of administrative charges.

OCTOBER 10, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12117-95

AGENCY DKT. NO. 249-7/95

BOARD OF EDUCATION OF THE
CITY OF PASSAIC, PASSAIC COUNTY,

Petitioner,

v.

GERARDO FERNANDEZ, JR.

Respondent.

Matthew J. Michaelis, Esq., for petitioner

Xavier G. Rodriguez, Esq., for respondent

Record Closed: March 22, 1996 Decided: August 20, 1996

BEFORE **IRENE JONES**, ALJ:

On July 6, 1995 petitioner, the Passaic Board of Education (Petitioner or BOE) filed a petition with the Commissioner of Education seeking a declaratory judgment on the issue of whether it was required to pay legal expenses arising out of a school ethics matter. On November 27, 1995, the Commissioner of Education transmitted the petition to the Office of Administrative Law for hearing. A prehearing conference was

conducted and a briefing schedule was established. The record closed on March 22, 1996.

FACTS

I **FIND** the following to be undisputed and thus are adopted as the facts herein:

The respondent, Gerardo Fernandez, Jr., is a member of the Passaic BOE. During the course of a BOE public meeting, the respondent voted on the issue of the use of time clocks for the school district. As a result of casting said vote, a complaint was filed against the respondent alleging violations of the School Ethics Act, *N.J.S.A.* 18A:12-22. The complaint alleged that since the respondent had a family member who was employed by the Passaic Board of Education, he should not have voted on the use of time clocks by the district. (See Appendix, attached hereto). The complaint was subsequently dismissed and withdrawn by the school ethics commission.

As a result of defending the school ethics complaint, the respondent incurred attorneys fees for which he seeks reimbursement pursuant to *N.J.S.A.* 18A:2-20. In support, respondent submits a certification of services detailing the legal fees.

DISCUSSION, FINDINGS AND CONCLUSION

The only issue presented herein is whether the BOE is obligated to reimburse the respondent for legal expenses he incurred in defending charges that he violated the School Ethics Act, *N.J.S.A.* 18A:12-21.

Initially, it is noted that this is an issue of first impression. The relevant statute in this matter is *N.J.S.A.* 18A:12-20 that provides:

> Whenever a civil or criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as

> a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including, reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

Thus, the statute provides indemnification to school board members for legal actions arising out of and during the course of their duties when a civil or criminal matter is brought against them.

A school ethics complaint proceeding, however is neither a civil or criminal proceeding. Therefore, it is necessary to review the legislative intent underlying the statute. It is clear that the legislative purpose of the statute to assure that persons who desire to serve on local boards of education, for which there is no compensation, can do so without the fear of being subjected to costs of defending legal actions brought against them as a result of actions taken during the deliberate process of the Board. *Errington v. Mansfield TP. Bd. of Ed.,* 100 *N.J. Super* 130 (App. Div. 1968). *Quick v. Old Bridge Township Board of Education*, 96 *N.J.A.R.2d* (EDU) 116, 118, *affirmed*, (Commissioner of Education, October 30, 1995).

The School Ethics Act (Act) became effective April 15, 1992, some fourteen years after the effective date of the indemnity law. The purpose of the law is to ensure and preserve public confidence in the local school board. Thus, the Act set forth specific standards of conduct. Additionally, the Act provides for a disciplinary mechanism to ensure uniform standard among all local BOEs. Accordingly, *N.J.S.A.* 18A:12-29 provides for the filing of a complaint and for a hearing thereon either by the School Ethics Commission or at the Office of Administrative Law, upon a finding of probable cause. The causes of action for filing a complaint are set forth in *N.J.S.A.* 18A:12-24 and are directly related to acts or omissions as a school board member.

In *Errington v. Mansfield Tp. Bd. of Ed., supra,* 100 *N.J. Super* 130, the court held that the purpose of *N.J.S.A.* 18A:12-20 is to make manifest the implied power of boards of education to provide for the legal defense of a member of the board who is sued individually for some action taken by him in furtherance of his prescribed duties. Those duties are prescribed by statute, by the rules and regulations of the board itself and of those who supervise its activities, and by resolutions of the board authorizing specific action to be taken. *Errington*, 100 *N.J. Super* at 137-138.

I **FIND** that respondent was duly engaged in Board activity when he cast his vote. I further **FIND** that as a result of his vote an ethics complaint was filed against him. I **FIND** no discernible difference between the defense of an ethics complaint and a civil matter for the purposes of recognizing legal fees pursuant to the indemnity statute. Both arise out of and during the course of one's duties as a member of the local Board of education. I, therefore, **CONCLUDE** that the respondent is entitled to be reimbursed for the legal expenses incurred as a result of defending a charge that he violated the school ethics law when he voted on an expenditure matter. As was held in *Errington*, when the board members, in a proper meeting duly assembled, vote upon a resolution relating to the expenditures of the board's funds, their act in doing so "arises out of and in the course of the performance of their duties" as members of the board. *Errington*, *supra*, 100 *N.J. Super* at 137.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/20/96
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

8/26/96
DATE

DNR
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 26 1996
DATE

Barbara A Harner
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 12117-95

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GERARDO FERNANDEZ, JR.,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner cannot agree with the conclusion of the Administrative Law Judge (ALJ), that the Board is obligated to reimburse the within respondent for legal expenses he incurred in defending charges that he violated the School Ethics Act, *N.J.S.A.* 18A:12-21. Rather, the Commissioner concludes that, in accordance with the standards set forth in *N.J.S.A.* 18A:12-20 and in light of existing case law, such respondent is not entitled to reimbursement. Initially, the Commissioner notes that the express language of *N.J.S.A.* 18A:12-20 clearly specifies

> Whenever *a civil or a criminal action* has been or shall be brought against any person for any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses,

> together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom.***(emphasis added)

The Commissioner must specifically reject the ALJ's finding that "***[there is] no discernible difference between the defense of an ethics complaint and a civil matter for the purposes of recognizing legal fees pursuant to the indemnity statute.***" (Initial Decision at p. 4) Although, as noted in the initial decision, the issue of a board's responsibility under this particular statute, within the context of the circumstances existing herein, has not previously been specifically addressed, it is clear from prior State Board and Appellate Division decisions with respect to similar statutes, *i.e., N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1, which, together, provide for indemnification of school employees in civil and criminal matters, that there is no authority for extension of any of the education law indemnification statutes to a situation such as that involved in this case. As noted by the State Board in *Rose Drabich v. Board of Education of the Township of Hillsborough, Somerset County,* decided by the State Board August 4, 1993, wherein petitioner was seeking indemnification, pursuant to *N.J.S.A.* 18A:16-6.1, for a motor vehicle violation received after her involvement in an automobile accident while driving students, contending that such charge was quasi-criminal in nature, "***the intent of the statutory framework involved here was to provide legal help under limited circumstances and ***there is no indication of any Legislative intent to include the kind of circumstances presented by this case.***" (Slip Opinion at p. 4) More specifically, in *In the Matter of the Tenure Hearing of David C. Borrelli, Waterford Township Board of Education,* 96 *N.J.A.R.* 2d (EDU) 163 where respondent sought, among other relief, legal fees for successfully defending tenure charges lodged against him, the Appellate Division stated

> ***N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1, respectively, address reimbursement for civil actions and for criminal charges. There is no provision in the law for reimbursement for defending in an administrative *** proceeding. ***Absent a legislative mandate incorporating administrative proceedings into the statute, a reimbursement award is inappropriate.*** (at 166)

As such, the Commissioner finds and determines that unless and until the Legislature acts to enlarge the scope of indemnification under these statutes, this respondent, and similarly situated individuals, can claim no entitlement for expenses incurred in their defense of administrative charges.

Accordingly, the Commissioner reverses the decision of the ALJ and, instead, finds that the Board is under no obligation to reimburse the within respondent for his expenses incurred in defending School Ethics charges lodged against him.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 10, 1996
DATE OF MAILING OCTOBER 11, 1996

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(451-96)

451-96

A.S., on behalf of minor, A.S. AND N.S. AND R.F.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioning mother and grandparents alleged minor child, A.S., was wrongfully denied a free public education in the District. ALJ dismissed petition for failure to appear. Commissioner remanded matter in the interest of fundamental fairness as petitioners attested they were unaware of hearing date.

ALJ concluded that petitioners did not carry their burden of proof that A.S. is not residing with her grandparents solely for the purpose of receiving a free public education in the District. ALJ found there was no hardship and the mother was able to provide for A.S. ALJ found that petitioners were liable to the Board for prorated tuition for the period from December 1, 1995 through June 1996 and for 48 days in 1996-97 school year for a total amount due of $8,575. Petitioners were ordered to pay the amount due to the District.

Commissioner reversed the initial decision of the ALJ, finding that, notwithstanding the temporary nature of the living arrangement (A.S. lived with her grandparents while her mother, an entertainer, traveled), and irrespective of any deficiencies which may exist in petitioners' affidavits, A.S. was deemed to have been entitled to a free public education in the District until she returned to living with her mother in Maplewood.

MAY 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11166-96
AGENCY DKT. NO. 465-12/95
(EDU 1103-96 ON REMAND)

A.S. ON BEHALF OF MINOR A.S., N.S. AND R.F.S.,

Petitioners,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

No appearance by or for A.S.

N.S., *pro se* and for R.F.S., his wife (grandparents of minor, A.S.)

Sidney A. Sayovitz, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: March 31, 1997 Decided: April 9, 1997

BEFORE **EDITH KLINGER**, ALJ:

On December 8, 1995, petitioners, A.S., on behalf of her minor daughter, A.S., N.S. and R.F.S., filed a Petition with the Commissioner of Education seeking to require the Board of Education of the South Orange and Maplewood School District (Board) to provide the child, A.S., a free public school education in the district. The Board

admitted A.S. as a pupil in the district pending the outcome of the appeal and filed a counterclaim against petitioners seeking payment of tuition for A.S. from the date of her admission into the school system.

On December 27, 1994, the Board filed its answer and on January 10, 1996, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was scheduled for hearing on August 13, 1996 and notice was sent to the parties at the address provided. Petitioners failed to respond to any of respondent's requests for discovery and did not appear on the scheduled hearing date.

The Board presented its evidence on its counterclaim and, on August 22, 1996, an Initial Decision was issued under OAL Dkt. No. EDU 1103-96. Following receipt of this decision, N.S. and R.F.S. wrote to the Commissioner of Education insisting that they did not receive notice of the hearing. On October 23, 1996, the Commissioner remanded the matter to OAL where it was rescheduled for hearing on March 31, 1997 under its present docket number.

At the hearing, N.S. and R.F.S, the child's grandparents, were present. A.S., the child's mother, did not appear and stated in a telephone call and a faxed message that she did not receive notice of the hearing. It is documented in the case record that A.S. was notified in a letter from the undersigned, dated December 18, 1996, that the hearing was scheduled for March 31, 1997. This letter was sent to her by both regular and certified mail at the address which she provided to this office on November 15, 1996. A.S. claimed the certified letter at the post office on December 20, 1996, and a copy of the receipt, signed by her, is in the record. The copy of the letter sent to her by regular mail was never returned. On December 6, 1996, a Notice of Plenary Hearing, stating that the hearing was to be held on March 31, 1996, was mailed to A.S., at the address she provided, by William G. Speziale, Deputy Clerk of the OAL. Based upon the above, I **FIND** that A.S. was served with notice of the scheduled hearing and failed to appear.

On March 25, 1997, the Board moved for relief because it never received answers to the interrogatories it served upon petitioners. The interrogatories were served upon N.S. and R.F.S. by regular and certified mail. The certified letter was returned unclaimed, but the copy sent by regular mail was not returned. At hearing, N.S. explained that he is a bishop who travels a great deal to establish his new church and does not always open his mail. Petitioners were allowed to testify at hearing but were not permitted to introduce any documents which were requested in discovery but not provided to the Board. Petitioners never provided the Board with discovery before the August 13, 1996 hearing in this matter either.

Dr. Jacqueline Cusack, Assistant Superintendent of Schools for the District, testified on behalf of the Board. She was the administrator responsible for the oversight of the registration process through July 1, 1996.

In December 1995, Cusack received affidavits of domicile from N.S., R.F.S. and A.S.. Based upon these affidavits, the Board was not required to provide a free education for the child, A.S. Her grandparents, N.S. and R.F.S., resided in South Orange, within the District, but her mother did not. The grandparents stated in their affidavit that they did not plan to claim the child as a dependent on their next tax return. The mother said that she did not claim the child as her dependent and did not plan to. Neither claimed that she had to live with her grandparents because her mother could not support her. A.S., the mother, stated that she planned to be traveling because she was trying to start a singing career and her daughter would live with her parents while she was gone.

At the end of 1995 or early in 1996, the District thought that A.S. was not traveling but had returned to New Jersey. Joan Melillo, the District Registrar, was notified by Columbia High School in South Orange that the school received an inquiry from a caseworker for the Union County Department of Human Services about the child, A.S. The caseworker wanted to know the child's address and guardian. This

was followed by a written request for this information on May 15, 1996, at the insistence of the school. It appears that Arlene S., whom N.S. identified as his daughter-in-law and the child's aunt, had applied for Aid to Families with Dependent Children (AFDC) for the child, A.S., in Union County and stated on her application that A.S. lived with her in Rahway.

The District concluded, possibly erroneously, that the child's mother lived in Rahway and had applied for AFDC for her daughter. Nevertheless, the District had good reason to doubt the domicile and residence of the child.

N.S. and R.F.S. claim that they took in their granddaughter because she had nowhere else to live. They stated that they did not have a permanent address for their daughter and had no contact with her. They then admitted that she called her daughter occasionally but said she never told them where she was. N.S. said they supported the child until her mother moved back to Maplewood in June 1996 and took her daughter to live with her. He had no idea who paid for the child's health care while she lived in his house. A.S. did not provide any proof that her daughter lived with her in the District until after November 8, 1996. She had attended school for forty-eight days of the 1996-97 school year through that date.

I **FIND** that there is no evidence that N.S. and R.F.S. took their granddaughter into their home because there was hardship and her mother was unable to provide for her. N.S. testified that the child lived with them because her mother was traveling and she had nowhere else to go. The inquiry from the Union County welfare agency was caused by the application of the aunt, Arlene S., not the mother, A.S., for public assistance. There is nothing in the record to determine the ability of A.S. to support her daughter and A.S. chose not to appear at hearing.

N.J.S.A. 18A:38-1b provides that a child over five and less than twenty years of age is entitled to a free public education from a school district, if the child "is kept in the home of another person domiciled within the school district and is supported by such

APPENDIX

Witnesses

For Petitioner:

N.S.

For Respondent:

Dr. Jacqueline Cusack

Joan Melillo

Exhibits

J-1 Address Change Form

J-2 Letter to A.S., dated December 18, 1996, with attached return receipt

J-3 Notice of Plenary Hearing

J-4 Fax from A.S., March 31, 1997

P-1 Inquiry, County of Union, Department of Human Services

OAL DKT. NOS. EDU 11166-96 and EDU 1103-96 (ON REMAND)
AGENCY DKT. NO. 465-12/95

A.S., on behalf of minor, A.S. AND N.S. AND R.F.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record, the Commissioner determines to reverse the initial decision of the Administrative Law Judge (ALJ), for the reasons set forth below.

The record is clear that A.S. was sent to live with her grandparents, *not* for the sole purpose of attending school in the District, but because her mother, an entertainer, was expected to be out of the state, and perhaps the country, for a period of 12 to 18 months. (Petition of Appeal at p. 1) Moreover, the mother attested in her affidavit of November 30, 1995 that she would not be earning a salary during that time. (Certification, August 6, 1996, Exhibit A at p. 3) The grandparents of A.S. affirmed in their joint affidavit of November 30, 1995 that they

intended to assume all personal and financial obligations for the child, and would not be receiving any payments or contributions on behalf of the child. (*Id.* at pp. 3, 4) However, they straightforwardly affirmed that they expected A.S. to move out of their home on December 1, 1996. (*Id.* at p. 3) N.S. (grandfather) testified that he and his wife supported A.S. until her mother moved to Maplewood in June of 1996; thereafter, A.S. returned to living with her mother. (Initial Decision at p. 4)*

The record supports the conclusion, therefore, that A.S. had no reasonable possibility of attending school while her mother was traveling, were it not for the living arrangement with her grandparents. The grandparents testified that the child's mother did not provide them with a permanent address, did not contact them, and called A.S. only occasionally, but did not tell them where she was. (Initial Decision at p. 4) That the pertinent residency statute could be read to expect a child such as A.S. to either interrupt her education, or, at best, to move from school to school during the period of her mother's itinerancy is simply an untenable interpretation.

> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not have been as contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the non-parent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child.*** *Gunderson v. Board of Education of the City of Brigantine*, 95 *N.J.A.R.* 2*d* (EDU) 39, 42.

Under these circumstances, to abrogate A.S.'s entitlement to have attended school in the Board's District would be tantamount to denying her the right to a free public education.

* The father of A.S. is apparently not in the picture and does not contribute to her support.

Thus, the Commissioner finds that, notwithstanding the temporary nature of the living arrangement, and irrespective of any deficiencies which may exist in the affidavits provided by petitioners to the Board, A.S.'s mother was not capable, due to circumstances which constitute family hardship, of supporting her daughter. A.S. is deemed to have been entitled to attend school in the Board's District, free of charge, from December 1995 until November 1996, when she apparently returned to living with her mother in Maplewood.

Accordingly, the initial decision of the ALJ is reversed, as set forth herein. The counterclaim by the Board is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 29, 1997
DATE OF MAILING MAY 29, 1997

452-96

452-96 SEC

IN THE MATTER OF CYNTHIA A. SCALA,	:	
BASS RIVER BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BURLINGTON COUNTY.	:	DECISION
	:	

OCTOBER 10, 1996

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
CYNTHIA A. SCALA	:	
BASS RIVER BOARD OF EDUCATION	:	**RESOLUTION**

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. authorizes the School Ethics Commission to recommend removal of any board member for failure to attend the board member training sessions required by N.J.S.A. 18A:12-33 and N.J.A.C. 6:3-9.4; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Ms, Scala was elected to the school board in April 1995 and

WHEREAS, the New Jersey School Boards Association (NJSBA)advises prospective school board members of the training requirement in the "candidate kit" and advises new board members of the requirement in a letter congratulating them on their achievement; and

WHEREAS, the NJSBA mails correspondence in December to all new board members who have failed to register for or attend board member training and did mail such correspondence to this board member on December 15, 1995, advising that they have only three more programs to attend without being in violation of the Act; and

WHEREAS, at the request of the School Ethics Commission, the New Jersey School Boards Association published a notice entitled, "Last Chance to Meet Training Requirements" in the February 23, 1996 edition of *School Board Notes* advising that the March 16, 1996, session was the last that board members elected or appointed before June 1995 could attend without penalty; and

WHEREAS, the New Jersey School Boards Association conducted eight training sessions on the following dates:

June 2-4, 1995
June 16-18, 1995
September 8-10, 1995
September 22-24, 1995
October 24, 1995
January 6, 1996
January 20, 1996
March 16, 1996; and

WHEREAS, the New Jersey School Boards Association continuously published the dates and locations of the training sessions and indicated that training was a state mandate; and

WHEREAS, the last training session to fulfill the requirements was March 16, 1996, yet the Commission allowed the June 1996 sessions to fulfill the requirement without setting precedent for future violations; and

WHEREAS, the above-captioned board member failed to attend training for well over the one-year allowed; and

WHEREAS, the School Ethics Commission issued an Order on April 25, 1996, directing the board member to Show Cause why he or she had not attended training up until that time; and

WHEREAS, the School Ethics Commission considered the board member's reply to the Order, but found same to be insufficient in light of the aforementioned notices and opportunities to attend training; and

WHEREAS, by letter dated June 4, 1996, in accordance with N.J.A.C. 6:3-9.3(i), the Commission notified said board member of the opportunity to appear before the Commission, be represented by counsel, and present witnesses on his or her behalf; and

WHEREAS, said board member chose not to appear, and

WHEREAS, the School Ethics Commissions finds that the failure to attend board member training from April 1995 to June 1996, constitutes a clear violation of N.J.S.A. 18A: 12-33 and warrants removal from the board,

NOW THEREFORE IT IS RESOLVED that the School Ethics Commission finds that despite adequate opportunities, the above-named board member has failed to attend the training program as required by N.J.S.A. 18A:12-33 and thus violated that provision. However, the board member has raised concerns to indicate that removal from the board would be too harsh a penalty in light of the circumstances. Therefore, the Commission recommends to the Commissioner of Education that said board member be suspended from office until such time that she completes training. The Commission further recommends to the Commissioner that a copy of his decision removing the board member be transmitted to the board secretary of the district in which said board member serves and the county superintendent for the district.

Paul Garbarini, Chairman
School Ethics Commission

Date: June 18, 1996

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on June 18, 1996.

Lisa James-Beavers
Executive Director

(otscvar3.doc)

IN THE MATTER OF CYNTHIA A. SCALA, :

BASS RIVER BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

BURLINGTON COUNTY. : DECISION

:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member for her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on April 23, 1996, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member responded to the Order to Show Cause by letter, dated May 15, 1996, explaining to the Commission that her child's chronic illness keeps her from traveling to or attending the mandated training classes and that she had planned to attend a one-day training seminar in Atlantic City, scheduled in October, but that "it will occur after [her] one year anniversary date of being a Board Member," which the Commission found unpersuasive; and

Whereas, the Commission voted on June 18, 1996, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on June 20, 1996, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named Board member chose not to submit comments with respect to the Commission's recommended penalty for the Commissioner's consideration; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and finds that based on the Board member's demonstrated reasons for delay and her assertion that she planned to take the course in October, removal is not warranted at this point; however, some penalty is warranted in view of her insufficiently explicated delay in meeting statutory requirements; now therefore

IT IS ORDERED that the above-named Board member shall not be removed from office, subject to her attendance at an upcoming training session but, rather, is suspended from office for a period of two months, or until such time as training is obtained, whichever is longer, to commence as of the date of the Board's receipt of this decision.

COMMISSIONER OF EDUCATION

OCTOBER 10, 1996

DATE OF MAILING OCTOBER 11, 1996

453-96

453-96

R.N., on behalf of minor, S.A.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning stepfather, R.N., challenged Board's residency determination concerning his stepdaughter, S.A.H. Even though he and S.A.H.'s mother were separated and S.A.H. lived with her mother, petitioner said that S.A.H. considered his home another residence for her and, thus, she was entitled to a free public education in Lawnside.

ALJ found that petitioner had not shown that S.A.H. was a domiciliary of Lawnside. The ALJ directed the Board to pursue an appropriate action before the Superior Court for the recovery of the tuition funds due it.

Commissioner concurred with the determination of the ALJ that S.A.H. was not a domiciliary of Lawnside. Commissioner, however, modified the decision only to the extent necessary to direct that petitioner be assessed with tuition due, as required by *N.J.S.A.* 18A:38-1 *et seq.*

OCTOBER 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY JUDGMENT

OAL DKT. NO. EDU 4457-96

AGENCY DKT. NO. 128-4/96

R.N., ON BEHALF OF MINOR S.A.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,

Respondent.

R.N., petitioner, pro se

Harvey C. Johnson, Esq., for respondent

Record Closed: July 8, 1996 Decided: August 29, 1996

BEFORE **KATHRYN A. CLARK**, ALJ:

R.N., on behalf of a minor child, S.A.H., has filed a petition claiming that S.A.H. is entitled to a free public education from the schooled district of Lawnside, pursuant to N.J.S.A. 18A:38-1.

In his petitioner, R.N. states that S.A.H. is a student at Haddon Heights High School, and that she, along with her (S.A.H's) mother, B.N., live at 20 B. Terrace in Stratford, New Jersey. R.N. also states that he lives apart from his wife and S.A.H., but that his residence in Lawnside remains S.A.H.'s residence as well. R.N. argues that "residence" and "domicile" are synonymous, citing a California case, Cooper v. Cooper, 269 Cal. App. 2d 6, 74 Cal. Rptr. 439, 441.

S.A.H.'s mother, B.N., submitted a notarized statement in which she states that she and her daughter reside at 20 B. Terrace in Stratford, New Jersey. In her statement, B.N. admits that R.N. did not adopt S.A.H., and that S.A.H. is R.N.'s step-daughter. B.N. also says that while she and R.N. were together, R.N. provided for S.A.H. Now, B.N. says that S.A.H. "has keys to his (R.N.'s) house. She goes there whenever she wants, she eats, watches television, and picks up her mail there. R.N. still cares for her and treats her as before. She can come to him for finances, advice or just to talk. His home is still her home."

Lawnside Board of Education has moved for Summary Decision, under N.J.A.C. 1:1-12.5, which provides that summary decision may be rendered when there is no genuine issue of material fact, and when the moving party is entitled to prevail as a matter of law.

The relevant statute, N.J.S.A. 18A:38-1, states that public schools shall be free to all domiciliaries of the school district, and also to any child who is "kept in the home of another person domiciled within the school district and (who) is supported by such other person gratis as if (she) were such other person's own child." Further, a showing is required that the domiciliary intends to keep and support the child without cost to the parent for a longer time than merely throughout the school term.

There seems to be no dispute in this matter that S.A.H. lives with her mother, B.N., in Stratford, which is not in the Lawnside School District. R.N. has admitted to this, in his petitioner. B.N. also states this in her submission.

The argument presented by R.N. that "residence" and "domicile" are synonymous is not supported by New Jersey law as it pertains to school districts. One may have many residences,

but only one domicile. It is not asserted by R.N. that S.A.H. considers his home to be her domicile, but merely another residence, a place where she is free to come and go.

The above-cited statute, at N.J.S.A. 18A:38-1(b), allows for the education in district of a child who is kept in the home of another who is a domiciliary of the school district, and who is supported by that domicilary, as if that child were the domiciliary of the school district's own child.

However, no evidence was presented by R.N. that he is "keeping" S.A.H., or is supporting her. R.N. does not claim that his providing the principal financial support for S.A.H. that he provides the majority of her food and clothes, or that he deducts her as a dependent on his tax returns. No evidence was presented by R.N. that S.A.H. even has a room of her own in his home, or that she sleeps overnight there regularly. The kinds of support and guidance provided by R.N. to his separated wife's daughter are commendable, but are not equivalent to "keeping" her in his home or to "supporting" her.

The relevant standard of review on a motion for summary decision is that the decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b).

When a motion for summary decision is filed the "adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). If the adverse party fails to meet this burden, "a summary decision, if appropriate, shall be entered." Ibid.

In this matter, there is not a genuine issue as to any material fact. S.A.H. is clearly not a domiciliary of Lawnside. Even if R.N. is right that his home in Lawnside is S.A.H.'s residence as well, this would not entitle her to a free public education from Lawnside School District. R.N. makes no claim of, and therefore has not shown that, S.A.H. is "being kept" by him, or in other words, is living with and is being supported by him.

I **FIND** and **CONCLUDE** that S.A.H. is not domiciled in Lawnside. I further **FIND** and CONCLUDE that S.A.H. is not living with or supported by a domiciliary of Lawnside, as if she were that domiciliary's own child. I **FIND** and **CONCLUDE** that respondent is entitled to prevail as a matter of law.

Respondent may now pursue an appropriate action before the Superior Court for the recovery of the tuition funds due to it.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 29, 1996
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

8/30/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 05 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

ej

OAL DKT. NO. EDU 4457-96

R.N., on behalf of minor, S.A.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and the reply thereto were filed pursuant to *N.J.A.C.* 1:1-18.4.

The Board takes exception only to the Administrative Law Judge's (ALJ) failure to assess R.N. with tuition, in that the enabling statute, *N.J.S.A.* 18A:38-1 *et seq.,* mandates that, where the evidence in a residency dispute does not support the claim of petitioner, the petitioner shall be assessed tuition for the student, prorated to the time of the student's ineligible attendance in the schools in the district.

Petitioner essentially argues that he and his wife share custody of S.A.H., and are jointly responsible for her care and well-being. Petitioner affirms that removal of S.A.H from Haddon Heights High School would be devastating to her and detrimental to her future.

Upon a careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the ALJ and modifies the initial decision only to the extent necessary to direct that petitioner be assessed with tuition due, as required by *N.J.S.A.* 18A:38-1 *et seq.* Accordingly, the initial decision of the ALJ is so modified; the Petition of Appeal is dismissed and petitioner is hereby directed to pay the Board tuition for S.A.H., prorated to the time of her ineligible attendance in the Haddon Heights School District, the receiving District to the Board of Education of the Borough of Lawnside.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] In accordance with *N.J.S.A.* 18A:38-1 *et seq.*, tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance.

OCTOBER 15, 1996
DATE OF MAILING OCTOBER 16, 1996

453-96

EDU #4457-96
C # 453-96
SB # 84-96

R.N., on behalf of minor, S.A.H.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 15, 1996

For the Petitioner-Appellant, R.N., pro se

For the Respondent-Respondent, Harvey C. Johnson, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 7, 1997

Date of mailing MAY 09 1997

454-96

454-96

INDUSTRIAL ROOF MAINTENANCE CORPORATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON/VOORHEES REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY AND ROOFCO, INC.,	:	DECISION
RESPONDENTS.	:	
	:	

OCTOBER 15, 1996

OAL DKT. NO. EDU 959-96
AGENCY DKT. NO. 67-2/96

INDUSTRIAL ROOF MAINTENANCE CORPORATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON/VOORHEES REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY AND ROOFCO, INC.,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1996
DATE OF MAILING OCTOBER 16, 1996

458-96

458-96

J.P., on behalf of her minor child, S.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning grandparent contested Board's determination that minor child, S.P., was not domiciled in the District and, thus, was not entitled to a free public education there.

In light of testimony of witnesses and evidence in the record, the ALJ concluded that S.P. was domiciled in Green Brook during the 1995-96 school year and was entitled to be educated by the Board *gratis*. Petitioner did show by a preponderance of credible evidence that S.P. was domiciled with her. Petitioner obtained guardianship of S.P. and, although S.P. spent time freely with her mother and her mother did provide some support, S.P.'s domicile was with petitioner. ALJ denied the Board's claim for tuition.

Commissioner adopted findings and determination in initial decision as his own.

OCTOBER 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12864-95

AGENCY DKT. NO. 471-12/95

J.P. ON BEHALF OF MINOR CHILD,

S.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF GREEN BROOK,

SOMERSET COUNTY,

Respondent.

Diane K. Smith, Esq., on behalf of petitioner J.P. (Somerset-Sussex Legal Services, attorneys)

Ellen Marie Walsh, Esq., on behalf of respondent Green Brook Board of Education (Fogarty & Hara, attorneys)

Francine A. Gargano, Esq., on behalf of intervenor S.D., mother of S.P.

Record Closed: June 13, 1996 Decided: August 26, 1996

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of respondent's determination that S.P. is not domiciled in the district and thus not entitled to a free public education. *N.J.S.A.* 18A:38-1. Petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. During the pendency of proceedings respondent has continued to provide S.P. with a free education, but has counterclaimed against petitioner and S.D., mother of S.P., for tuition reimbursement. A hearing was conducted on May 14, 1996, and the last briefs were received on June 13, 1996, after which the record closed. An order of extension is in effect.

Certain facts are undisputed. S.P. is sixteen years old and completed eleventh grade in the 1995/96 school year at Watchung Hills Regional High School. Respondent sends its students to Watchung Hills at an annual cost of $10,285 per student. Petitioner is S.P.'s maternal grandmother and she has resided in her own home at 15 K. Drive in Green Brook for the last forty-four years. Her husband, grandson and great-grandson live with her. Petitioner derives her income from Social Security benefits (R-24). S.D. is petitioner's daughter and S.P.'s mother. S.D. and S.P. came to live with petitioner when S.P. was two years old. The extended family lived together at the Green Brook residence until September 1991, when S.D. married and moved to an apartment in Piscataway. S.P. has attended respondent's schools since first grade.

Petitioner became S.P.'s legal guardian on August 1, 1995 (P-1). On January 15, 1996, S.P. had a child. For approximately six weeks before the birth and for six weeks thereafter S.P. was tutored at the Green Brook address by a number of teachers. The Somerset County Board of Social Services lists her at this address (P-7; P-8), and this is where Muhlenberg Regional Medical Center contacted her in connection with her prenatal care (P-9). A number of neighbors provided letters saying that S.P. lives at the Green Brook residence (P-2 through P-6); this is also where she receives mail (P-21).

Petitioner testified that S.P. has lived with her continuously since she was a baby. S.P. does spend time at her mother's Piscataway residence – on weekends, on Mondays when her mother is off from work, and during the summer when she goes back and forth between the two homes. Her mother generally takes her to the doctor and other appointments. Petitioner testified

that she provides support for S.P., although she could not give specifics, other than to say that she gives her lunch money. During S.P.'s pregnancy, her home tutors generally called petitioner to schedule visits. Petitioner testified that she was aware that an investigator from the school was staking out the house from time to time.

S.D. testified that her daughter and husband do not get along, and she felt it would be better if S.P. lived with petitioner. Additionally, S.D. said she worked two different jobs, and S.P. needed more supervision than she could provide. S.D. testified that she has a good relationship with S.P. and sees her frequently; S.P. generally stays at her apartment in Piscataway on weekends. She drives S.P. to appointments and contributes funds to her support. While S.P. was pregnant, S.D. often picked her up at the Green Brook residence and drove her to school. S.D. testified that she has claimed S.P. as a dependent for federal income tax purposes in years past, but not last year; the tax forms were not provided. S.D. testified that she has been aware of respondent's concerns for a few years, and knows that her mother's house has been under surveillance.

S.P. testified that she lives with her grandmother, grandfather, son and cousin. When her mother married five years ago S.P. decided to stay with her grandmother; she does not care for her stepfather. Nevertheless, she sees her mother daily and stays with her on weekends in Piscataway. In the fall of 1995, either her mother or her former boyfriend drove her to and from school, because the bus ride is bumpy. Since the birth of her baby she is more likely to take the bus to school.

Dr. Jeffrey Klein is the superintendent in respondent's district. He began to suspect that S.P. was no longer living in district when she was in eighth grade. When S.P. entered high school in the 1993/94 school year he received an anonymous telephone complaint from a resident concerned about this. He authorized a stakeout which confirmed his suspicions; a default judgment was obtained for tuition reimbursement. During the 1994/95 school year surveillance continued, but no further action was taken. In August 1995 petitioner became S.P.'s legal guardian, and respondent admitted her reluctantly.

In October 1995 Dr. Klein was contacted by C.D., the mother of the boy who was seeing S.P. at the time. She said that she always picked her son up at the Piscataway apartment, and this is where S.P. lived (R-7). Dr. Klein authorized a stakeout of the Green Brook premises through October and November 1995; no surveillance was undertaken in Piscataway. On October 24, 1995, at approximately 2:40 p.m. Dr. Klein was driving in his car and happened to observe S.D., S.P., and a young man in another vehicle. He followed them to the Green Brook address, where everyone entered the house. After ten minutes they came out with their book bags and belongings and drove to S.D.'s Piscataway residence. They did not exit that house before 3:45 p.m., when Dr. Klein left, and their car was still there when he passed by the residence at 5:00 p.m. R-6.

Francis J. Sills is a vice principal at Watchung Hills Regional High School. She testified that she had dealings with S.D. regarding S.P. on two occasions during the 1995/96 school year. S.D. inquired about the procedure for home instruction during S.P.'s pregnancy, and in the week prior to hearing came in to discuss a restraining order she was seeking against S.P.'s former boyfriend.

A series of records were presented through Ms. Sills. An absence excuse dated April 30, 1996, is signed by S.D. (R-11). A letter to S.P.'s teachers shows that S.D.'s name was given as the contact for purposes of home instruction during S.P.'s pregnancy, and the Green Brook address was given as her residence (R-13). A guidance department form (R-14), a medical emergency form (R-15), and a report card (R-16) list S.D. as S.P.'s parent/guardian and the Green Brook address as the home address. A health record lists the mother's first name and petitioner's surname as the responsible person, and the Green Brook residence as home (R-19). Ms. Sills acknowledged that this information is generally taken from registration files and may be dated. She indicated that the high school has never sent mail to the Piscataway address.

Ms. Sills has spoken with petitioner once; she telephoned the Green Brook address to give notice that S.P.'s medical excuse involving pregnancy was ending. She followed up the conversation with a letter (R-22). One home instructor, Martin Weber, informed Ms. Sills that he did not believe S.P. was living at the Green Brook address. Sometimes she was not there when he arrived and would appear after petitioner made a phone call.

Robert Debbie is a police officer in Plainfield and also acts as the attendance officer in Green Brook. He conducted a surveillance at the Green Brook premises on four dates in October 1995 and followed up three more times in November 1995 (R-3; R-4). In the 1995/96 school year, classes started at 7:40 a.m. and the school bus stopped on S.P.'s street at about 7:05 a.m.; it is about a twenty-minute trip from there to school. He arrived at the Green Brook address at approximately 6:45 a.m., stayed to see whether S.P. got on the bus, and left at about 7:15 a.m. He did not see S.P. on any of these occasions, yet she was in school on all but one of the days. Cross-examination revealed that Mr. Debbie was at the Green Brook residence on four days in the weeks prior to hearing, although he did not bring the records of this surveillance with him. He saw S.P. get on the bus on two of those days, she was absent from school on one of the days, and on the other day she was in school but did not get on the bus. He saw her get off the bus in the afternoon.

S.P. was recalled to say that C.D. had thrown her son out of the house in the week prior to Dr. Klein's conversation with her; C.D. did not much care for S.P.

This is the substance of the record.

Petitioner must show by a preponderance of the credible evidence that S.P. was domiciled in Green Brook during the 1995/96 school year, *N.J.S.A.* 18A:38-1(a). This has been done. Domicile is "home," and all relevant indicia must be weighed to determine which place of residence fits that characterization. *In re Unamie*, 255 *N.J. Super.* 362, 374-78 (Law. Div. 1991). It is undisputed that S.P. lived in Green Brook with her mother and grandparents from the time she was two until her mother married and moved to Piscataway in September 1991. Petitioner, S.D. and S.P. testified credibly that Green Brook remains S.P.'s permanent home. In August 1995 petitioner became S.P.'s guardian, thereby acquiring the powers and responsibilities of a parent for her supervision and education. *N.J.S.A.* 3B:12-52. To obtain guardianship from the Somerset County Surrogate, petitioner had to establish that S.P. was domiciled in that County, *R.* 4:81-1(c); Piscataway is in Middlesex County. While this is not dispositive, *D.W. v. Greater Egg Harbor Regional Board of Education*, 95 *N.J.A.R.*2d (EDU) 225, it is a significant factor. S.P. receives mail in Green Brook, neighbors say she lives there, and this is where social services

agencies send her entitlements. When S.P. was pregnant, home instruction was provided in Green Brook. Finally, this is where her infant son resides.

There are some contrary indications. Respondent observed the Green Brook premises on seven scattered dates during the fall of 1995. S.P. did not get on the school bus, yet she was in school on six of these days, and respondent infers that she embarked from Piscataway. S.P. and S.D. explained that during her pregnancy, S.P. got a ride to and from school and did not take the bus; she may have been picked up before Mr. Debbie began his surveillance at 6:45 a.m., or after he left at 7:15 a.m. This explication is not unreasonable, and there is some support for it in the most recent stakeout data showing that S.P. does now use the school bus; respondent was not planning to present this information. Moreover, no surveillance was ever conducted at the Piscataway residence.

Watchung Hills Regional High School lists S.D. as the contact person regarding S.P., but Ms. Sills acknowledged that some of these records are dated. This is apparent from the fact that they continue to show S.D. as residing in Green Brook, though it is undisputed that she has not lived there for five years. In any case S.D. acknowledges continued involvement in her daughter's life.

S.P. spends weekends in Piscataway and sees her mother freely. This could lend support to respondent's assertions, but on the face of it need mean no more than that mother and daughter have maintained an ongoing relationship despite separate domiciles.

Respondent suggests that petitioner cannot be supporting S.P., and points to her limited income from Social Security. It argues that such support is required under *N.J.S.A.* 18A:38-1(b)(1). Our case is not governed by this subsection. *N.J.S.A* 18A:38-1(b)(1) applies to students living with persons other than a parent or legal guardian. In such circumstances, the student is not in his/her permanent home, and a series of criteria have been developed to assure that such arrangements are not merely a subterfuge to gain entry into a preferred district. In our case petitioner is S.P.'s legal guardian, and the question is S.P.'s domicile under *N.J.S.A.* 18A:38-1(a). Support is a factor, but only as one indication of domicile. The record reveals that S.D. is also a

person of moderate means (R-23), and she acknowledges contributing to S.P.'s maintenance. This support is not inconsistent with domicile in Green Brook.

The hearsay comments of C.D., the mother of the boy whom S.P. was dating during her pregnancy, are clearly interested and of limited weight. Dr. Klein's sleuthing also added little substance.

Respondent's proofs give it some reason for suspicion, but there are substantial and tangible indicia of domicile in Green Brook, and little that points to domicile in Piscataway.

Based on the foregoing, I conclude that S.P. was domiciled in Green Brook during the 1995/96 school year and was entitled to be educated by respondent gratis. Respondent's tuition claim is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/26/96
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

8/28/96
DATE

DNA
DEPARTMENT OF EDUCATION

AUG 30 1996
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

LIST OF WITNESSES

For Petitioner:

J.P.
S.P.
S.D.

For Respondent:

Jeffrey Klein
Frances J. Sills
Robert Debbie

LIST OF EXHIBITS

For Petitioner:

P-1 Guardian Certificate
P-2 Letter from McAllisters
P-3 Letter from Kathy Alaggio
P-4 Letter from Patricia Eberhardt
P-5 Letter from Suzanne Young
P-6 Letter from Heiberg
P-7 Medicaid Eligibility Card
P-8 Letter to S.P. from Somerset County Board of Social Services
P-9 Envelope from Muhlenberg Regional Medical Center, Inc.
P-10 Letter from Francine A. Gargano, Esq.
P-11 Envelopes from Board of Education to S.P.
P-12 Affidavit of Temporary Residency
P-13 Nonresident Affidavit
P-14 Letter to Board of Education from Francine A. Gargano, dated September 9, 1994
P-15 Letter to Francine A. Gargano from Ellen Marie Walsh, dated September 19, 1994
P-16 Letter to Francine A. Gargano from Ellen Marie Walsh, dated September 28, 1994
P-17 Letter to Rodney T. Hara from Francine A. Gargano, dated November 18, 1994
P-18 Letter to Rodney T. Hara from Francine A. Gargano, dated August 7, 1995
P-19 Letter to S.D. from Jeffrey Klein, dated August 14, 1995
P-20 Letter to Ellen from Francine A. Gargano, dated September 14, 1994
P-21 Nine envelopes for S.P. with Green Brook address

For Respondent:

R-1 Letter to J.P. from Jeffrey Klein, dated November 13, 1995
R-2 Certified extract from minutes of Green Brook Board of Education Meeting

R-3 Memorandum to Dr. Klein from Robert Debbie, dated November 20, 1995
R-4 Memorandum to Dr. Klein from Robert Debbie, dated October 31, 1995
R-5 Not Admitted
R-6 Investigation Report of Pupil Attendance/Residence
R-7 Memorandum to Dr. Stasi from Kathy Van Der Stad
R-8 Memorandum to Green Brook Board of Education from Central Jersey Detective Agency, dated March 20, 1995
R-9 Memorandum to Green Brook Board of Education from Central Jersey Detective Agency, dated February 9, 1995
R-10 Memorandum to Green Brook Board of Education from Central Jersey Detective Agency, undated
R-11 Handwritten note from S.D., dated April 30, 1996
R-12 Not Admitted
R-13 Letter from Fran Sills, dated December 18, 1995
R-14 Emergency information for S.P.
R-15 Emergency information for S.P.
R-16 Student Record
R-17 Not Admitted
R-18 Not Admitted
R-19 Health Record
R-20 Not Admitted
R-21 Not Admitted
R-22 Letter to S.D. from Frances J. Sills, dated March 5, 1996
R-23 Copy of Information Subpoena
R-24 Copy of Information Subpoena
R-25 Letter to Ellen Marie Walsh from Diane K. Smith, dated January 26, 1996
R-26 Investigation Report of Pupil Attendance/Residence
R-27 Investigation Report of Pupil Attendance/Residence
R-28 Investigation Report of Pupil Attendance/Residence

J.P., on behalf of her minor child, S.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by the Board and petitioner in accordance with *N.J.A.C.* 1:1-18.4.

The Board disagrees with the findings and conclusions of the ALJ that petitioner was domiciled within its School District and, therefore, entitled to a free public education. (Board's Exceptions at p. 1) The Board asserts that the ALJ failed to consider evidence showing that S.P. was not properly residing in Green Brook and that petitioner otherwise failed to meet her burden of proving that she obtained guardianship of S.P. It then cites examples of such evidence including testimony that S.P.'s mother admitted to providing support for S.P. and that S.P. was claimed on her mother's past tax returns. (*Id.* at pp. 1-2) In that this evidence and arguments were fully and fairly considered by the ALJ, they will not be addressed herein. The Board further notes that for legitimate reasons the Commissioner normally considers evidence of

support being provided when determining domicile. (*Id.* at pp. 2-3) Despite the above, the Board avers that the ALJ places very little importance on the support of S.P. and that "his reliance on other evidence is misplaced." (*Id.*) The Board disputes the ALJ's finding that because S.P. spends weekends with her mother and sees her mother freely means only that mother and daughter maintain a relationship despite separate domiciles. In regard to this finding, the Board asks rhetorically, "then what is the point of transferring guardianship to the grandmother?" (*Id.* at p. 4)

In response, petitioner avers that the Board ignores the critical difference between a case in which the relative has guardianship and a case in which the relative has only custody. She further contends that

> ***the Board ignores the undisputed fact that J.P. provides for all of S.P.'s shelter and utilities and most of her food. S.P.'s occasional contribution can not overcome the cost of S.P.'s essential basic needs, all of which are met by J.P. (Petitioner's Exceptions at p. 1)

Petitioner contends that in its exceptions the Board repeats only evidence favorable to its position and ignores the overwhelming evidence that S.P. is domiciled in Green Brook and that the Board is speculative in its exceptions. Petitioner asserts that the ALJ did not rely solely on the establishment of guardianship by S.P.'s grandmother, but on all of the evidence before him, assessing credibility and weighing testimony and exhibits. (*Id.* at p. 2)

Upon a careful and independent review, the Commissioner concurs with the findings of the ALJ that S.P. is domiciled with her grandmother, J.P., and is entitled to a free public education in the respondent School District. It is further observed that in reaching this decision, the Commissioner had no cause to question the ALJ's assessment of petitioner's

credibility as such assessment is not belied by the record. It is further noted that challenges to the findings made by an administrative law judge regarding the weight accorded to proffered testimony require the party to supply the agency head with the relevant and necessary portions of the hearing transcript. See *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987).

Lastly, the Commissioner must emphasize that a parent, simply in maintaining a relationship with a child, is not establishing on a *prima facie* basis that the child is domiciled with that parent. Such a holding could dissuade parents who are otherwise unable to care for their children from maintaining contact with their children, a result which is both contrary to sound public policy and neither required nor intended by *N.J.S.A.* 18A:38-1. Rather, as noted in the initial decision, many factors are reviewed in a proper determination of domicile and, in this case, the Commissioner concurs with the ALJ that S.P. is domiciled with her grandmother, J.P.

Accordingly, for the reasons expressed therein, the ALJ's determination, finding S.P. entitled to a free public education and denying respondent's claim for tuition, is affirmed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1996

DATE OF MAILING OCTOBER 16, 1996

459-96

459-96

SHIRLEY ERVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 15, 1996

OAL DKT. NO. EDU 3565-96
AGENCY DKT. NO. 13-1/96

SHIRLEY ERVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on September 19, 1996, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1996
DATE OF MAILING OCTOBER 16, 1996

462-96

462-96

V.H., on behalf of minor, J.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, V.H., alleged her minor great grandchild, J.T., was wrongfully denied admission to school due to a residency dispute.

ALJ concluded J.T. was placed with his great grandmother in Quinton for the sole purpose of attending the Quinton School in school years 1994-95 and 1995-96. ALJ found that during that period J.T.'s parents resided in Salem and J.T. was supported by his father. Thus, J.T.'s parents and guardians were assessed tuition owed to the Board in the sum of $12,474.

Commissioner affirmed in part, reversed in part the initial decision. Commissioner found that J.T. was not entitled to a free public education in the District prior to the date when his parents granted legal custody to V.H. In accordance with the requirements set forth in N.J.S.A. 18A:39-1b(1), V.H. had to be assessed tuition for the particular period when J.T. was not eligible to attend school in the District. However, as of November 28, 1995, J.T. was entitled to a free public education in Quinton as the Board did not dispute that V.H. was a domiciliary of Quinton when she became his legal guardian as of said date. Petitioner was directed to pay the Board tuition for J.T., prorated from the start of the 1994-95 school year until November 27, 1995.

OCTOBER 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 804-96

AGENCY REF. NO. 50-2/96

V.H. ON BEHALF OF MINOR, J.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY,

Respondent.

No appearance by or for V.H. or on behalf of minor J.T.

Gary D. Wodlinger, Esq., for respondent, (Lipman, Antonelli, Batt, Dunlap & Wodlinger, attorneys)

Record Closed: August 9, 1996 Decided: August 27, 1996

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner filed a complaint alleging that the minor student, J.T., was wrongfully denied admission to the Quinton School. The Board of Education (BOE) filed a petition seeking assessment for the student's period of ineligible attendance per N.J.A.C. 38.1. The matter was

transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The BOE conducted a hearing and determined that J.T. should be enrolled in the Salem School System and not in the Quinton School System. The child, J.T., resided with his great-grandmother who did not support the child. The child was supported by his father, a resident of Salem. The child was residing with his great-grandmother in Quinton for the sole purpose of attending the Quinton School. The child's father attended the Quinton School and believes it is superior to the Salem School.

The Superintendent of the Quinton School District, Donna Agnew, testified that she had calculated the tuition due to the Quinton BOE for the 1994/95 and the 1995/96 school years when J.T. attended the Quinton Schools and when his parents resided in Salem. She calculated the tuition to be as follows:

1994/95	$6,092
1995/96	6,382

During the years in question J.T. was in the second and third grades at the Quinton School.

I **FIND** and **CONCLUDE** that J.T. was placed with his great-grandmother in Quinton for the sole purpose of attending the Quinton School in 1994/95 and 1995/96.

I **FIND** and **CONCLUDE** that during the 1994/95 and 1995/96 school years, J.T.'s parents resided in Salem and not in Quinton.

I **FIND** and **CONCLUDE** that during the 1994/95 and 1995/96 school years J.T. was supported by his father.

I **ORDER** that J.T.'s parents and guardian be assessed the amount of the 1994/95 and 1995/96 school tuition in the sum of $12,474.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

27 August 96
DATE

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

8/30/96
DATE

DNA
DEPARTMENT OF EDUCATION

SEP 04 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONERS:

NONE

FOR RESPONDENT:

DONNA AGNEW

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

NONE

FOR RESPONDENT:

R-1 TUITION CALCULATIONS 8/7/96 PREPARED BY TEKLA HALLANAN

462-96

EDU #804-96
C #462-96
SB # 82-96

V.H., on behalf of minor, J.T., :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF QUINTON, SALEM COUNTY, :

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, October 15, 1996

For the Petitioner-Respondent, V.H., pro se

For the Respondent-Appellant, Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson (Gary D. Wodlinger, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We add only that there is no evidence of fraud on the part of petitioner in this matter.

May 7, 1997

Date of mailing MAY 09 1997

463-96

463-96 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF E.W.	:	DECISION
_____	:	

OCTOBER 21, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11052-95

AGENCY DKT. NO. DHP 439

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF ELOISE WIGGS

Carleton A. Lewis, Esq., for petitioner
(Essex-Newark Legal Services, attorneys)

New Jersey Department of Education, appearing pursuant to *N.J.A.C.* 1:1-5.6(a)

Record Closed: June 27, 1996 Decided: August 28, 1996

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Eloise Wiggs (appellant or Wiggs), was employed as a school custodian by the Lakeside School and the First Occupational Center of New Jersey. On January 30, 1994, the New Jersey Department of Education (Department) notified appellant that a fingerprint search conducted by the New Jersey State Police and the Federal Bureau of Investigation (FBI) revealed that she was sentenced on October 28,

1982 to 90 days suspended jail time, one-year probation, and ordered to pay a $175 fine for possession of narcotics. Further, on November 29, 1984, she was sentenced to 15 years in a New Jersey state prison, with five years of mandatory time, for robbery. Appellant's record also indicated that she had other non-disqualifying offenses, such as the possession of a weapon, 1973; burglary, 1976, and public order crimes, 1977. Pursuant to *N.J.S.A.* 18A:6-7.1, the disqualifying convictions disqualified appellant from continuing employment with any school or other institution under the supervision of the Department.

Appellant appealed the decision of the Department to disqualify her from continued employment based on the grounds of rehabilitation. By decision dated August 2, 1995, the State Board of Education remanded the matter to the Commissioner of Education for hearing. Thereafter, the matter was transmitted to the Office of Administrative Law (OAL) on September 20, 1995 as a contested case pursuant to *N.J.S.A.* 52:14B-12 to -15 and *N.J.S.A.* 52:14F-1 to -13.

UNDISPUTED FACTS

Appellant does not dispute her criminal record. Thus, I **FIND** the following as **FACT**:

1. On October 28, 1982, appellant was sentenced to 90 days suspended jail time, one-year probation and $175 fine for possession of narcotics.

2. On November 29, 1984, appellant was sentenced to 15 years in a New Jersey state prison.

3. Appellant was convicted of other nondisqualifying offenses, burglary, weapon possession, public order crimes, theft by deception and receiving stolen property. These latter convictions were committed from 1976 through 1991.

SUMMARY OF EVIDENCE

Appellant presented four witnesses in support of her case. Roger Bedford, Senior Parole Officer of the New Jersey Department of Corrections, testified that he has been employed by the Department of Corrections for twenty-seven years and manages the repeat offenders caseload. He was assigned to the appellant's case in September 1992. Appellant's case was classified as in need of intensive supervision.

At that time, appellant was homeless and lived in a shelter for the intrinsic homeless. As a condition of parole, appellant was required to submit to random urinalysis during the first six months of her release. All her tests proved negative. He has observed the appellant advance herself out of homelessness and reunite with her family. In June 1996, appellant completed parole without missing any parole appointments.

Bedford submitted a report on the appellant wherein he gave her an extremely favorable rating (A-1).

Bedford defines rehabilitation as a complete change of heart, mind and attitude from a destructive, non-productive course to a productive community oriented person. In his opinion, Wiggs is rehabilitated.

Ms. Carol Price, Program Supervisor for the Bergen County School District - Special Services, formerly the Principal of the First Occupational Center of Orange (Center), also testified in support of the appellant. Price became acquainted with appellant when she was hired to work at the Center. Wiggs was hired as a grounds keeper and she supervised her work. Wiggs was very reliable and conscientious needed little supervision, and she was always early, left late and was never sick.

Price recalled that there were seventy students at the school some of whom were mentally disabled. Further, many of the students had been a part of the criminal

justice system. The students trusted and valued Wiggs and would talk to her about their problems.

Price believes that Wiggs is not a danger to others. She, too, has absolute trust in Wiggs. She believes that Wiggs was rehabilitated when she came to the Center and thus she wrote a letter to the Department of Education on her behalf.

Hester Wiggs, mother of the appellant, confirmed her daughter's rehabilitation. She is well acquainted with her daughter's past. The appellant is a changed person. Her daughter visits almost daily and the two attend church together. Mrs. Wiggs concludes that her daughter has matured and is a beautiful, disciplined young woman of whom she is very proud.

Diane Melton, sister of the appellant, spoke of Wigg's efforts in mentoring their nephew and her loving relationship with the entire family. Melton recounted her sister's past and has witnessed a profound change in her. The appellant is now a caring individual who follows rules and regulations. She is free of prior bad associations and has displayed a tenacity to do the right thing. She has watched her sister under pressure and she did not break. Since her release from prison, she has not used drugs or committed any subsequent crimes.

Appellant, a high school graduate, spoke of past drug history. In 1982, she was using codeine. In 1983, she was addicted to heroin and committed robberies and other crimes to support her drug habit. She now attends Narcotics Anonymous (NA) three to four times weekly. Appellant also spoke of her employment with the Lakeside School. She was trained at the First Occupational Center for building services, a job which she thoroughly enjoys. Further, appellant states that she enjoys working with the kids. The kids need help and she can identify with many of their problems.

Appellant also works part time as a domestic for one of the teachers at the school. With respect to her past criminal record, the appellant takes full responsibility for her actions and expresses remorse for the victims and its impact on her life. She is

now very involved in Zion Hill Baptist Church. In addition to attending services weekly, she is involved in a myriad of church activities.

In support of the appellant, many letters were sent to the DOE attesting to the appellant's rehabilitation. A few of these letters are summarized as follows:

> I have known Ms. Eloise Wiggs in a professional capacity for the past three years. Ms. Wiggs worked as a custodian at the Lakeside School, a division of the First Occupational Center of New Jersey, where I am employed as a school nurse.
>
> I have observed her in the school setting and have always found her to be reliable, trustworthy and very industrious. Ms. Wiggs presented herself with a professional attitude and took great pride in the quality of her work.
>
> Lakeside school is geared to special education students. Ms. Wiggs was always careful to provide a safe, clean environment for them, and served as a positive role model. The students admired her and knew that she cared about their well being.
>
> For the past two years, Ms. Wiggs has occasionally been employed by me as a day worker in my home. My family and I have complete confidence in her and trust her implicitly.
>
> I consider Ms. Wiggs to be a person with excellent moral values and I would not hesitate in recommending her for any position she might seek in the future.
>
> Respectfully,
> Susan J. Lafer, June 13, 1996.
>
> * * * *
>
> I am writing to attest to the character of Ms. Eloise Wiggs. I became acquainted with Ms. Wiggs as an employee of the Lakeside School. I observed her to be a person who was very thorough and efficient in her assigned responsibilities. More importantly, she was very concerned about the welfare of the students and made certain that their environment was kept clean and safe. She displayed a great degree of caring

for the students and staff and was often invited to join in school activities.

Our school is one which teaches special education students life and job skills. Ms. Wiggs was an excellent role model and would not hesitate to shoe them the proper way to do things. She understood the students and they though of her as a friend, as did the entire staff. I would not hesitate to recommend her for any position and consider her to be a trustworthy, honest and caring individual.

Sincerely,
Rebecca S. Ross, M.Ed.

* * * *

I have been Ms. Wiggs parole officer since her release from the Correctional Institution for Women, on 9/8/92. On that date she was released to the street homeless with only $150.00 in her pocket and with limited skills educationally or practically developed with which to seek meaningful employment.

Placed into a city shelter system from which few men emerge without emotional scars, she managed to survive free of alcohol and drug abuse, secured her own employment and training at the Occupational Center of Essex County in Orange, N.J. and through the auspices of the agency was placed into the position she now holds. I have seen her grow from a woman without hope or a future into a confident, self assured, reliable and productive contributor to the community.

It is my opinion that subjecting Ms. Wiggs to a loss of her present job would set her back developmentally and would, considering how far she has come, be an insurmountable injustice on the part of the system.

Therefore, should there be anything your agency can do to prevent her loss of position and allow her to continue within her present employment, I as her parole officer would appreciate it.

Respectfully,
By: R. Roger Bedford,
Sr. Parole Officer, DO #9

* * * *

I am writing on behalf of Eloise Wiggs who is a Building Service Worker at our Lakeside Avenue School.

Eloise has been a model employee since coming to the First Occupational Center. She is honest, hard working, and sets a good example for the other workers. Eloise has taken advantage of our training program . . . she has progressed to become a staff person.

Eloise will have all the support systems she will need to continue her rehabilitation into society. Please do not allow this precious lady to go back to what was a disastrous period in her life, but to continue along life's highway as a productive and reformed citizen.

As the Community Resource Trainer, I will continue to work with Ms. Wiggs in any way possible to introduce her to resources available.

Very truly yours,
Reginald M. Reid,
Community Resource Trainer

* * * *

It has been my pleasure to work with Eloise Wiggs this school year. Being the maintenance person at the school, Eloise has demonstrated competence, professionalism, and congeniality to both staff and students.

Eloise completes her responsibilities on time. She also has taken the initiative and suggested ways to keep the school safer and more comfortable. Eloise has also proven to be very flexible. This is a necessary quality when dealing with special students. She will drop her "normal" routine immediately when a special cleaning situation arises. This is quite helpful in keeping a classroom running smoothly.

Eloise has also demonstrated congeniality to both the staff and students. . . . She has taken an interest in the students and they enjoy interacting with her. Eloise is a good role model for the students and demonstrates proper work habits and behaviors.

Eloise Wiggs is an asset to the Lakeside School.

Sincerely,
Catherine Thyne,
Multiple Handicap Teacher

* * * *

This letter is to certify that Ms. Wiggs has been a participant with the Vocational Rehabilitation Program since 1/11/93. The purpose of vocational rehabilitation is to render individuals "Whole Person."

Ms. Wiggs has been provided with an Individualized Vocational Rehabilitation since becoming employed, she has developed into a fine worker whose motivation and determination are especially commendable.

As a Vocational Rehabilitation Counselor, I strongly urge you to give Ms. Wiggs a chance to maintain her employment. . . . She will be an asset to the New Jersey Department of Education as she is a qualified vocationally rehabilitated individual.

Sincerely,
Anne Williams,
Sr. Rehabilitation Counselor

ISSUE

The issue is whether the appellant has demonstrated by clear and convincing evidence that she is rehabilitated.

DISCUSSION AND CONCLUSION

N.J.A.C. 18A:6-7.1 prohibits the employment by the Department of Education and Boards of Education of persons who have been convicted of certain crimes and offenses. However, if the individual has affirmatively demonstrated to the Commissioner clear and convincing evidence of his or her rehabilitation, the individual shall not be disqualified from employment. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered.

1. The nature and responsibility of the position in which the convicted individual would hold;

2. The nature and seriousness of the offense;

3. The circumstances under which the offense occurred;

4. The date of the offense;

5. The age of the individual when the offense was committed;

6. Whether the offense was an isolated or repeated incident;

7. Any social condition which may have contributed to the offense;

8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, participation in correctional work release programs, or the recommendations of person who have had the individual under their supervision.

Appellant seeks a position as a school custodian. It has been held that:

> A school janitor occupies a position of trust and responsibility necessitating high standards or dependability and morality. Its function far exceeds opening and closing the school house and keeping it clean and tidy. The safety and welfare of the children may depend on the proper discharge of his duties.
>
> *[In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 178.]

At the Lakeside School, appellant was recognized as a role model for the troubled students. Thus, she will serve as more than a custodian.

There is no doubt that the appellant's past criminal history is enough to disqualify her. However, the letters and the testimonies presented herein speak of a capable, competent and dedicated hard working woman. Indeed, the witnesses herein, Price, Melton, and Bedford, took time from their jobs to come to the hearing to testify on appellant's behalf. All of the witnesses openly displayed their love and hope for the appellant. I am persuaded that each of them has the utmost faith in the appellant and truly believe that she is rehabilitated.

Appellant was incarcerated for her crimes and has paid her debt to society. There is no reason to seek further retribution. In this instance, the criminal justice system has worked. It has exacted retribution and achieved rehabilitation. The last disqualifying offense was committed in 1984. It is true that the appellant slipped in 1991 but this nondisqualifying offense was committed prior to her receiving intensive supervision from the Parole Board and her participation in from Narcotics Anonymous. I am satisfied that the appellant's past criminal activity was driven by her addiction to drugs. I am further persuaded that the 1991 criminal conviction was her last criminal act.

In conclusion, I **FIND** that the appellant has demonstrated that she is rehabilitated. Her weekly participation in NA, completion of job training for building maintenance, her efforts to be independent by acquiring an apartment and a car, all point to a changed life. I **FIND** that the appellant is an engaged productive member of society. This is also evidenced by her active participation with the children of Lakeside who like her have a troubled history.

Based on the whole of the record, I **CONCLUDE** that appellant has affirmatively demonstrated her rehabilitation by clear and convincing evidence within the meaning of *N.J.S.A.* 18A:6-7.1(e).

ORDER

It is hereby **ORDERED** that the Department's action to disqualify appellant from employment with the Lakeside School and First Occupational Center is **REVERSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/25/96
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

Barbara A Harned

SEP 15 1996

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses

For Appellant:

Roger Bedford

Carol Price

Hester Wiggs

Diane Melton

Eloise Wiggs

Exhibits

A-1 Termination Summary

A-2 Letter dated June 13, 1996.

A-3 Letter from Rebecca S. Ross

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF E.W.	:	DECISION
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner cannot concur with the findings and conclusions of the Administrative Law Judge (ALJ) that the within appellant has demonstrated rehabilitation by clear and convincing evidence in accordance with *N.J.S.A.* 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws. Rather, in examining the evidence presented in the record and at the hearing against the statutory factors which must be considered, the Commissioner is unable to find appellant qualified for school employment at this time and, therefore, reverses the initial decision.

In reaching this determination, the Commissioner of Education is mindful of his obligation to review appeals of disqualification from school employment to determine whether an appellant has affirmatively demonstrated rehabilitation by clear and convincing evidence. The burden of proving rehabilitation is, therefore, on the appellant.

Initially, it must be noted that appellant has the following disqualifying offenses on record: Possession of Narcotics on October 27, 1982, for which she was sentenced on October 28, 1982 to 90 days suspended jail time, one year probation, and ordered to pay a $175 fine; Robbery on February 15, 1983, for which she was sentenced on November 29, 1984 to 15 years in New Jersey State Prison, to serve a mandatory time of five years and ordered to pay a $25 penalty. Appellant's record further reveals nondisqualifying offenses including Possession of a Weapon in 1973, Burglary in 1976, Public Order crimes in 1977, Theft by Deception in 1984, and Receiving Stolen Property on February 13, 1991, for which she was convicted and sentenced to three years confinement.

In the initial decision, the ALJ justified appellant's recent nondisqualifying offense in stating that she

> slipped in 1991 but this nondisqualifying offense was committed prior to her receiving intensive supervision from the Parole Board and her participation in*** Narcotics Anonymous. I am satisfied that the appellant's past criminal activity was driven by her addiction to drugs.*** (Initial Decision at p. 10)

Notwithstanding that appellant may be making commendable progress toward rehabilitation, the Commissioner is not persuaded that sufficient time has passed without incident since the date of appellant's 1991 offense to demonstrate rehabilitation by clear and convincing evidence,* especially since appellant was only released from probation in June 1996. The Commissioner also finds it particularly disturbing that appellant's offenses are not, in fact, isolated but, instead, reflect a lengthy pattern of criminal behavior. Additionally, the Commissioner is continually mindful of his responsibility to ensure that the students in this state

* This nondisqualifying offense is relevant in the instant matter in that it belies appellant's claim of rehabilitation since her last disqualifying offense in 1984.

are provided with environments which are safe and drug free. See *Larry Hall v. New Jersey State Department of Education*, 91 *N.J.A.R.* 2d (EDU) 46, 47.

With respect to the nature and responsibility of the position appellant wishes to occupy, the Commissioner has consistently been mindful that a custodial position affords an individual significant and otherwise unsupervised access to children, a consideration which must not be minimized when examining rehabilitation pursuant to *N.J.S.A.* 18A:6-7.1. *In the Matter of the Disqualification from School Employment of Gregory Campbell*, decided by the Commissioner on January 30, 1996, affirmed by the State Board of Education on July 10, 1996. That appellant has assumed a direct role in working with troubled children through her work and as a part-time domestic for one of the teachers, as noted in the initial decision, underscores the Commissioner's concerns in this regard. (Initial Decision at p. 4)

Based on the above considerations, the Commissioner cannot be persuaded, as he must by law, that appellant has, at this time, demonstrated rehabilitation by clear and convincing evidence. This decision does not, however, preclude her from later seeking such a determination, after passage of sufficient time to demonstrate that she has removed herself from all criminal activity.

Accordingly, for the reasons expressed herein, the Commissioner reverses the initial decision of the OAL and sustains appellant's disqualification from school employment.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 21, 1996
DATE OF MAILING OCTOBER 22, 1996

468-96

468-96 B

BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $181,457 made by governing body following voter rejection of proposed budget on April 16, 1996.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the District, Commissioner determined to restore $75,625 for a total General Fund tax levy of $3,926,717 for 1996-97 school year.

BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner: Steven S. Glickman, Esq. (Ruderman & Glickman, P.C.)
For the Respondent: Thomas S. Ferguson, Esq.

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 12, 1996, through the filing of a Petition of Appeal by the Lopatcong Board of Education (Board), seeking restoration of reductions to the school budget made by the Township Council of the Township of Lopatcong (Council) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election on April 16, 1996.

At that election, the voters rejected a public question proposing a General Fund tax levy of $4,032,549 for the 1996-97 school year. The 1996-97 budget submitted to the voters included an approved Commissioner's cap waiver of $458,296, deemed necessary due to increased tuition costs to sending districts.[1] On May 14, 1996, following consultation with the

[1] This amount reflects the Cap Waiver Panel's reallocation of $11,897.

Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of $3,851,092 as sufficient to provide for a thorough and efficient system of education (T & E) in the District. This amount represented a reduction of $181,457 from the tax levy proposed by the Board, and was effectuated through cuts in nine separate line items[2], for the reasons given in Exhibit A, attached to the implementing Council resolution. The Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Council	
General Fund	$ 4,032,549	General Fund	$ 3,851,092

Amount of Reduction by Council		Amount of Reduction in Dispute	
General Fund	$ 181,457	General Fund	$ 181,457

An answer to the Board's petition was filed by the Council on June 27, 1996. On July 19, 1996 and July 17, 1996, respectively, the parties filed position statements pursuant to *N.J.A.C.* 6:24-7.8, followed by responsive statements on July 25, 1996 and July 26, 1996, and final summations on August 5, 1996 and July 30, 1996.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated March 13, 1996, and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial

[2] Although cuts were actually effectuated in nine separate line items, for purposes of setting forth the parties' arguments, the decision herein identifies 11 line items "in dispute," *infra.*

report, the latter for the purpose of identifying whether the Board underestimated in its 1996-97 budget the amount of anticipated undesignated surplus.

Upon filing of the parties' final summations as noted above, the record of the appeal was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such T & E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T & E. *Board of Education of East Brunswick Council v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township*, 116 *N.J.* 305 (1989). With respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and unable to be derived from further allocation within the base budget. *Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County,* State Board decision July 7, 1993; *Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County, and*

In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, State Board Decision July 6, 1994.

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

GENERAL ARGUMENTS OF THE PARTIES

As a general argument, the Board notes that its philosophy has always been to develop a zero-based budget each year, starting from scratch and raising taxes only when necessary, and to give back to the taxpayers in the form of tax cuts and/or the utilization of free balance in order to avoid the necessary tax increases. Consequently, no new programs or large equipment have been added.

The Board argues that while the Council asserts, *infra*, that the student/faculty ratio in the District is 11.6:1, compared to the state's average of the number 14.2:1, the statistic is misleading and has been misinterpreted. In reality, the Board continues, the "regular education" class sizes range from a low of 18 students to a high of 27 students. The Board explains that the student/faculty ratio is reduced pursuant to the mandated reduced number of students in special education classes. Excluding self-contained special education classes and "special" teachers, there are, according to the Board, 22.5 homeroom teachers and homerooms. There are no classrooms other than mandatory special education classes containing 11 students; rather, the Board notes the average class size is 23.6 students, as calculated by dividing the number of regular education students (531) by the 22.5 full-time educators.

Moreover, as to the Council's allegation that the estimated surplus for 1996-97 is $128,305, said figure was the projection when the budget was prepared and finalized in February of 1996. However, the Board argues, due to unanticipated expenditures and transfers, the

recently completed audit on July 15, 1996, indicates that the Board has $13,268.79 in surplus or free-balance. The Board maintains that it has appropriated considerable amounts of surplus toward each year's budget in an effort to reduce and/or modify tax increases.

Further, the Board argues that the Council's assertions, *infra*, are based upon the premise that the Board's teaching staff are employed full-time but are actually working part-time, inasmuch as the Council finds that full-time teaching staff members can assume job functions performed presently by other staff members. Such is not the case, according to the Board. The Board maintains that all teaching staff members are working to capacity and cannot assume additional job duties without reducing or eliminating other job functions they presently perform.

The Board further affirms that, aside from the inaccuracies in the Council's assertions, there are many factors the Council legitimately cannot consider due to the ever-changing nature of the District. For example, during the summer of 1996, five new special education students were either recently classified or transferred into the District. Based upon this influx, the Board notes that it will be required to pay the Warren County Special Services School District an additional $38,624 and the Franklin Township Pre-School an additional $8,750, both of which are unanticipated expenses and must be factored into the budget. Thus, as a general argument, the Board contends that failure to restore these budget cuts will hamper, if not prohibit, it from maintaining T & E, and will have a significant detrimental impact upon the students of the District.

It is the position of the Township of Lopatcong Mayor and Town Council that the proposed budget cuts will not jeopardize the provision of T & E to the students of the Lopatcong School District, nor did the Lopatcong School Board demonstrate to the Council that the items were essential to T & E. It is the Council's position that the Board has failed to provide any data

or specific criteria regarding how the cuts will detrimentally affect the educational needs of the School District.

The Council argues that the Board sought to increase the tax levy by $695,927 ($458,296 due to tuition increases and $237,631 general increases). This is a 21 percent increase in the school budget, 14 percent from tuition increases and 7 percent in general increases. Whereas, the 1994-95 school budget increased only 4 percent and the 1995-96 budget only 6.5 percent, the Council observes that the school budget has increased $1,021,638 since the 1993-94 school year, concluding that the 21 percent increase of the school budget in one year and the over $1 million increase in the last three years will create a hardship on the taxpayers of Lopatcong. While 14 percent of the increase could not be altered since it was due to an unanticipated tuition increase, it was necessary to look at the school budget with careful scrutiny of the educational needs of the District. In so doing, the Council contends it made the reductions it felt could be made without adversely affecting the educational needs of the District.

The Council further attests that, prior to the school budget being put to the voters, although defeated by a 5-3 vote by the school board, the Board itself considered cutting $181,457 for the school budget in the following areas: Teacher Salaries for K-8 and speech ($143,940); Other Purchased Services ($2,500); Support Service Salaries ($5,270); Employee Benefits ($19,847); General Supplies ($8,000); and Media/Library Supplies ($1,900). Thus, the Council reasons that the amount of the reductions made by the Council are no greater than those initially proposed and agreed with by at least some of the members of the Board.

The Council further avers that its reductions do not in any way affect the vital functions of the educational system. It notes that the reductions made were implemented with due consideration of the needs of the School District. The Council instructs that the

student/faculty ratio at Lopatcong School is 11.6:1, compared to the state average of 14.2:1. This ratio, according to the Council, is not in jeopardy. Moreover, the Council points out that the complexity of the student population has not increased. According to the 1994-95 New Jersey School Report Card, the Lopatcong Elementary School has surpassed District Factor Grouping and state averages for Reading, Mathematics and Writing for 1993-94 and 1994-95. Accordingly, these programs have not, nor will they be, affected by any budgetary cuts. The Council contends that this is also in keeping with Governor Whitman's recommendation that these fundamentals be stressed in current education. The Council maintains that it did not reduce any of the school's educational programs when making its school budget reductions; it merely reallocated staff.

Additionally, the Council argues that the Board has been left with adequate discretion through the General Fund surplus balance which it may utilize to deal with any problems which may arise. The estimated surplus for the 1995-96 school year is $278,305 with $128,305 estimated surplus available for the beginning of the 1996-97 school year. The Council observes that there has been an abundance of surplus in the General Fund over the last few years.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Numbers 1 - 3

Line No.	Account No	Description	Amount Budgeted	Amount Cut
02520	11-120-100-101	Grades 1-5 Salaries of Teachers	$ 770,010	$11,920
02530	11-130-100-101	Grades 6-8 Salaries of Teachers	$ 591,036	$ 7,151
02510	11-110-100-101	Preschool/K Salaries of Teachers	$ 97,963	$ 2,384
		Amount dedicated to position(s) in dispute	$ 50,785	$21,455

The Board acknowledges that it presently employs one full-time vocal teacher and one instrumental teacher. The Council seeks to reduce the full-time music teacher's position to a half-time position. The Board indicates that although the Council argues that in addition to the full-time duties of the vocal teacher, said individual can also assume the teaching of basic music and music appreciation, in order for this to be accomplished, one must assume that the vocal teacher is *not* presently performing on a full-time basis. However, the Board notes that the vocal teacher currently works on a full-time basis performing the following functions: teaching formal music classes to all students in grade K-8 (559 students); conducting 5th/6th grade chorus (58 students); conducting 7th/8th grade chorus (48 students); preparing for a "kinder concert" with grades K-2; presenting a Holiday Concert involving both choruses; presenting a Spring Concert with grades 3 and 4; presenting a Spring Choral Concert in conjunction with the band concert; preparing students for a PTA Founders Day program; and implementing a music keyboard program.

The Board further notes that the responsibilities performed by the instrumental music teacher on a full-time basis are as follows: giving individual and small group instruction; conducting a junior band comprised of 32-35 students (5th/6th grades); conducting a senior band comprised of 75-80 students (6th through 8th grades); conducting a stage band comprised of 35 students; conducting a woodwind ensemble comprised of 20 students; conducting a Holiday Band Concert in conjunction with the vocal teacher; conducting a Spring Band Concert in conjunction with the vocal teacher; and preparing bands for marching in the Halloween Parade. Thus, the Board reasons that the job functions performed by the instrumental teacher can only be performed on a full-time basis, and the present job functions of the vocal teacher similarly require full-time employment, thereby precluding the teaching of basic music and music

appreciation as recommended by the Council. Moreover, the Board argues that the recent Core Curriculum Content Standards emphasizes visual and performing arts. Without a full-time instrumental music teacher, the Board insists that it will be forced to reduce programs provided to its students in contravention of the Core Curriculum Content Standards, and its responsibility to provide T & E. The Board claims that it is the desire of the residents and the parents of students within Lopatcong Council, that the music program, which includes exceptionally strong support for the band, be maintained. In order to do so, the Board must maintain a full-time instrumental teacher.

As to the Council's reasoning for the reduction, *infra*, the Board notes that the Council cited to districts totally incomparable to the Board, in that Alpha, Pohatcong and Greenwich have student populations between one-half and two-thirds the size of the Board's student population. Moreover, the Board notes that Great Meadows School District is a K-6 district, while Lopatcong is a K-8 district, necessitating a greater workload. Additionally, the Board notes the inaccuracy of the Council's assertion, *infra*, that there are only 115 students who take instrumental lessons and its conclusion that the numbers cited by the Board are duplicative. Lastly, the Board contends that the Council inaccurately states that the sole responsibility of the instrumental music teacher is the teaching of individual instruments and band. The actual job duties, according to the Board, are stated, *supra*. Thus, the Board reasons, if this position was reduced to a part-time position, programs such as the woodwind ensemble, junior band and stage band would most likely be eliminated.

The Council observes that school's current music program consists of a regular music class conducted by a full-time chorus teacher and an instrumental music class conducted by a full-time teacher. It is the Council's position that the instrumental music program requires a

part-time rather than a full-time teacher. The program currently involves between one-half hour to two hours per week of instruction, usually given as a group instruction, as well as one 45-minute session for all instrumental students for band rehearsal. The Council further notes that it is not uncommon in the local county school districts with similar student populations, such as Alpha, Pohatcong, Great Meadows, and Greenwich, for the instrumental music needs of the student body to be met by one part-time instructor.

Moreover, the Council argues that the vocal teacher is already performing a portion of the duties listed by the Board, teaching formal music to all students in grades K-8 and implementing a music keyboard program. Therefore, the Council reasons, the sole responsibility of the instrumental music teacher is the teaching of individual instruments and band. Despite the Board's listing of individual duties of the instrumental music teacher, the Council argues that she actually teaches instruments to the students which culminates in the performance of the songs learned in a Spring Concert, Holiday Concert and Halloween Parade. Also, contrary to the numbers provided by the Board, the Council avers, there are only 115 students who take instrumental lessons, and concludes, therefore, that the numbers cited by the Board must include duplications. The Council further contends that the Board fails to state how this reduction will adversely impact programs in contravention of Core Curriculum Content Standards or how it will prevent the Board from providing T & E. The Council concludes that the Board has failed to state any specifics regarding how this program will be adversely affected, electing to rely generally on the assertion that without full-time instruction it will be forced to reduce the programs and its responsibility to provide T & E.

Upon careful review, the Commissioner finds that the Board has not demonstrated that the Council's reduction will necessarily thwart its ability to offer T & E, particularly since

the Council, in reducing these line items, has considered the size and composition of the District and how the proposed half-time music instructor's remaining functions may be fairly blended with those of the full-time vocal teacher. Accordingly, the Commissioner determines to sustain the reduction of $21,455.

Disputed Line-Item Number 4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06850	11-000-222-100	Salaries/School Library	$49,185	$32,710

Recognizing that the Council seeks to eliminate the position of school librarian, the Board notes that the librarian performs the following services: conducting two Book Fairs per year to help raise money to increase the book and library supplies accounts; controlling distribution use and maintenance of all audio-visual equipment; maintaining item control of all ordered media and arranging for cataloging and appropriate distribution of same; coordinating use of films and videos from the Warren County Audio-Visual Commission; scheduling the use of all audio-visual media in the District; and maintaining an interlibrary loan agreement with area libraries. Additionally, the librarian manages parent volunteers when they are available. The Board notes, however, that such volunteers are not reliable on a regular basis due to other work-related and family commitments and/or obligations. In 1995-96, approximately 20 parents signed up to volunteer, but only three were available on any consistent basis. The volunteer work force is not adequate to replace the school librarian.

The Board argues that *if* the sole responsibility of the librarian were to catalog and reshelve library materials, then the Council could possibly be correct that the job functions could be performed by "parental volunteers" who are not certified librarians. However, as the Board contends, the librarian is a teaching librarian who teaches library skills as per the Board's

prescribed curriculum. Contrary to the Council's contention, the Board asserts that these skills cannot be taught by regular classroom teachers. As to the Council's argument that the teaching of library skills can be performed by the current grade school teachers in conjunction with a possible field trip to the local library for some instruction there by the local librarian, the Board asserts that, in order to reduce expenditures, it has eliminated all field trips from 1996-97, with the exception of the field trip to the Weller Health Center in Easton, Pennsylvania, since the PTA pays the admission fees to the Center.

Further, the Board notes that since the school librarian has certification as a school librarian and as an elementary teacher, she is utilized as either a reading teacher or a math teacher, rather than hiring additional staff when necessary. For example, in the 1995-96 school year, the librarian had one 7th or 8th grade reading class per day. In 1996-97, the Board posits that she may be responsible for a 4th or 5th grade math class each day, in addition to teaching library skills to K-6 grades and general library duties.

Finally, the Board argues that the Council's assertion that library skills could be taught by classroom teachers ignores the fact that if classroom teachers are required to teach library skills, they would, by necessity, be required to reduce the time spent on each skill area now taught, or would have to reduce the number of skill areas taught at the present time. The Board warrants that time cannot be taken by a classroom teacher for library skill instruction without reducing the time needed for another discipline. Without a school librarian, the Board concludes that it will be unable to provide its students with the library skills and media center necessary to provide T & E.

It is the position of the Council that the elimination of the full-time librarian position would not adversely affect the provision of T & E, given the student population and

available alternatives. The Council argues that the teaching of basic library skills can be adequately performed by the current grade school teachers in conjunction with a possible "field trip" to the local *free* library for some instruction there by the local librarian, such as the Phillipsburg Public Library. It notes that in many of the comparable school districts, the schools do not maintain a full-time certified librarian but, rather, have a noncertified librarian aide who teaches library science under the supervision of the regular classroom teacher. The Council contends that the main use of the library on an elementary school level is for the purpose of book reports and possible short term papers/reports, and that said projects are performed under the direct supervision of the classroom teacher. Clearly, the Council reasons, a certified teacher is qualified to assist students in selections and basic research of library materials.

Additionally, the Council asserts that the other responsibilities of the school librarian can be more than adequately performed by parental volunteers, as has been done in the past. For many years now, the Council notes, parental volunteers have cataloged and reshelved the books at the library and this program has been very successful. In addition, monitoring of the library during student use can be performed under teacher supervision in conjunction with parental volunteers. These changes to the library, according to the Council, will not interfere with the students' access or utilization of library facilities.

The Council contends that the Board fails to provide any specifics as to why a certified teacher does not have the requisite ability to teach basic library skills to his/her elementary students, especially the lower grades. The Council asserts that it has never stated the "sole" responsibility of the librarian was to reshelve or catalog materials, although the Council attests that the Board concedes that this part of her functions can be performed by parental volunteers. As to the remaining functions which the Board lists as comprising the librarian's

duties, such functions involve more of an oversight of providing films, audio-visual equipment, etc., as requested by teachers and staff. Surely, the Council claims, the signing in and out of equipment and requests can be made by each individual teacher. Also, maintenance of the interlibrary loan agreement can be just as easily performed by an administrator.

The Council further points out that the Board has failed to state that the librarian teaches a class in library skills but, rather, seems to indicate she merely assists students in the library. In addition, the Council contends that the Board fails to provide any specific information as to how or why having classroom teachers offer these skills will adversely impact other instruction. This is especially questionable given the fact that only grades 1-3 receive any formal type of instruction, with the other grades merely making use of the library as they would any other library.

Upon review, the Commissioner finds the Board has not demonstrated that the Council's elimination of the full-time school librarian's position will necessarily hinder its ability to offer its students in this K-8 elementary District the library skills and learning opportunities which they need. In that the Board's primary argument for retaining a full-time school librarian is that she teaches library skills, and inasmuch as the Council has reasonably demonstrated that such teaching functions can be assumed by classroom teachers, while other job responsibilities may be assumed by either aides, part-time staff or parental volunteers, as appropriate, the Commissioner declines to restore the reduction in this account. Accordingly, the Commissioner determines to sustain the reduction of $32,710.

Disputed Line-Item Number 5

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07010	11-000-240-103	Salary/Assistant Principal	$ 64,000	$ 64,000

The Council seeks to eliminate the position of assistant principal and assign the duties to the Chief School Administrator (CSA), or other administrators. The Board notes that while the Council alleges that the duties of the assistant principal may be performed by the CSA without affecting school administration, and that some of the assistant principal's duties may also be redistributed to other school staff/teachers, the Council fails to indicate what duties can be "redelegated" to which employees. Here, the Board asserts that the CSA and "other school staff/teachers" presently function in a full-time capacity and do not have the time to perform these other functions.

The Board observes that, in addition to representing the CSA when he is out of the District, and being responsible for the development and implementation of all class schedules, the assistant principal also holds the positions of affirmative action officer, liaison for drug and alcohol prevention and the Right to Know officer, functions which are traditionally performed by other employees/administrative staff in other school districts. In addition to these job functions, the assistant principal performs the following duties: developing, implementing and maintaining standards of conduct for all students; monitoring two of the four lunch periods; approving and arranging all field trips, assemblies, extracurricular activities and other similar student activities; arranging and coordinating all activities involving use of the school facility; assisting the CSA with the supervision and observation of all certified staff; developing and maintaining an appropriate transportation system; acting as attendance officer; coordinating the yearly tabulation of books, equipment and supply orders and recommending yearly purchases of same; acting as

coordinator of local and state testing programs; assisting the CSA in the development of grants and with the preparation of the application for Improving America's Schools Act; and coordinating the Free/Reduced Lunch Program. Thus, the Board concludes that, contrary to the Council's contention, the Board requires a full-time assistant principal in order to provide T & E.

The Board argues that the Council has misconstrued and misunderstood the position of assistant principal, narrowing the time needed for the position's functions, alleging that this position is unnecessary and can be filled by other personnel. Here, the Board emphasizes that all other school personnel are maximizing time and effort in the performance of their own job functions. Other school personnel do not have the luxury, the Board warrants, to assume the significant additional responsibilities presently performed by the assistant principal.

For example, at the present time, the assistant principal resigned effective June 28, 1996, and the CSA is performing both assistant principal and CSA functions in an effort to meet many rapidly approaching deadlines. The School Business Official/Board Secretary is already inundated with preparation for the annual audit and upcoming School Comprehensive Audit and Financial Report, not including daily responsibilities of bills, correspondence, etc. Input sheets for payroll for the upcoming school year must be updated with adjustments, deductions, etc. Therefore, the Board argues that it is clear that neither the CSA, Board Secretary, or other school personnel are available to absorb the job duties and functions presently performed by the assistant principal.

Responding to the Council's arguments, *infra,* the Board denies that it has acknowledged that the job functions of the assistant principal can be performed by other teaching staff members. The Board indicates that the Council minimizes the responsibilities of this position. For example, in monitoring two of the four lunch periods, the assistant principal

oversees approximately 120 students at each lunch period, with the assistance of only one cafeteria aide. With respect to his/her duty as the attendance officer, not only is the assistant principal responsible for the 558 elementary students, but is also responsible for the 240 high school students sent to the Phillipsburg High School on a tuition basis. In the 1995-96 school year, the assistant principal, on at least 15 occasions, was required to go to a student's house to bring the student to school.

The Council notes that the Lopatcong School District consists of one elementary school, including grades K-8, with 537 students projected for the 1995-96 school year. The school has one CSA/Principal who now performs the duties of the principal and one assistant principal. The main functions of the assistant principal are to develop and maintain a transportation schedule for busing, monitor the lunchrooms and discipline the students.

The Council maintains that the assistant principal's duties can be redistributed among other administrative personnel, teachers and parent volunteers. The principal's duties are not so diverse, argues the Council, that he/she cannot assume some of the duties of the assistant principal. The monitoring of the lunch room and bus arrival/departures can be undertaken by parental volunteers or teacher's aides, or current teachers. The scheduling of buses is not so unique a duty that it cannot be delegated to any one of the other personnel or staff. During the principal's absences, his duties can be fulfilled by an existing teacher, as is done in some other school districts.

The Council further contends that the District does not have the need for a full-time disciplinarian. Noting that there are only 547 K-8 grade students, the Council asserts that the culture of the school is not so diversified as to have problems regarding language or cultural bias. Here, the Council points out that English is the main language of all the students;

the school is situated in a rural/agricultural District; and the District does not have its own high school.

According to the Council, many of the duties of administrative principal and assistant principal can be easily incorporated into one office. The basic duty of the assistant principal is to assist the principal in fulfilling his duties. Many of his other functions can be subsumed within the principal's job description or assigned to other administrative personnel, since they are basically record keeping or basic administrative functions: developing and maintaining standards of conduct for students; approving and arranging field trips, assemblies, extracurricular activities, etc.; arranging and coordinating activities involving use of the school; developing and maintaining a transportation system for students; acting as attendance officer; conducting two fire drills per month; coordinating yearly equipment and supply orders; requisitioning supplies and equipment, conducting inventories, maintaining records and checking receipts.

The Council notes that the principal is already responsible for most of these functions: making budgetary recommendations to the Board; preparing specifications for educational materials put out for bid; approving and forwarding all invoices and vouchers to the Board; supervising classroom instruction; making recommendations to the Board regarding transportation; and maintaining records regarding enrollment, personnel, etc. Moreover, the Council points out that the following functions performed by the assistant principal are functions also subsumed within the principal's job description: providing information to the principal on budgetary items; assisting in supervision of teachers and education process; attending sessions of the Board of Education; and representing the school at public meetings.

The Council contends that while *N.J.A.C.* 6:8-8.2(b) requires each school be assigned a nonteaching principal, it does not require each school to be assigned an assistant principal, thereby acknowledging that all the necessary administrative functions of a school can be adequately performed by one administrator.

Further, while the Board argues that discipline accounts for "a portion of each school day," it fails to give any particulars regarding the extent of the problem or the portion of the day consumed by this activity. In addition, the Council points out that while the Board states there are currently 559 students, the actual enrollment for 1995-96 was 547 and the projection by the 1996-97 school year was 537. Moreover, the Board fails to provide any support for its cited enrollment population, and particularly for its projection that the 1996-97 school year would see such a decline in kindergarten enrollment that one-half-day session could be eliminated.

Upon review, the Commissioner observes that the Board has sufficiently demonstrated that the job responsibilities of the assistant principal cannot reasonably be assumed by existing personnel. Noting the Board's attachment to its Petition of Appeal of a listing of staff members in the District, and considering the District's structure, its thin complement of administrators, and its relatively low administrative costs, the Commissioner finds that, absent the assistant principal's position, he is not persuaded that the District's critical supervisory, administrative and curricular functions will continue uninterrupted, so as to enable the District to maintain T & E. Accordingly, the Commissioner determines to restore the Council's reduction of $64,000.

Disputed Line-Item Numbers 6, 7

Line No.	Account No	Description	Amount Budgeted	Amount Cut
02520	11-120-100-101	Grades 1-5 Salaries of Teachers	$ 770,010	$ 4,089
02530	11-130-100-101	Grades 6-8 Salaries of Teachers	$ 591,036	$ 12,267
		Amount dedicated to position in dispute	$ 16,356	$16,356

The Board notes that the Council seeks to reallocate the duties associated with the gifted and talented (G & T) program to a current teacher whose position is being reduced. In so doing, the Board argues that the Council presumes that the program, which is currently performed by a part-time teacher, *could be* performed during one morning period by one kindergarten teacher. However, the Board contends that the job requirements go well beyond those presumed by the Council.

The Board observes that the G & T program teacher is required to perform the following duties: maintaining a long-standing multifaceted program; working in conjunction with all Phillipsburg cluster schools in a six-district Mind Flares Program; conducting an Annual Convocation serving 200-300 students from area schools; participating in annual "Mind-Flare-Offs" question-and-answer competition; arranging and chaperoning several field trips with Phillipsburg cluster schools to a location or activity in conjunction with the annual G & T theme; working with area gifted program staff to develop a theme, activities, field trips, exhibitions and Convocation; preparing students for participation in County and State Mind Flare Convocations; and meeting with students on a regular basis and providing academic challenges, as well as preparing for various cluster theme activities.

The Board notes that in an attempt to provide a G & T program, the position of G & T teacher grew from a one-day per week position to a full-time position. In the 1993-94 school year, the Board reduced this position to a four-day per week position for the 1993-94 and 1994-95 school years. For the 1995-96 school year, the Board further reduced this position to a half-time position in an effort to keep taxes down, while at the same time providing a quality program.

Additionally, the Board contends that the Council minimizes the impact of the elimination of the G & T teacher position. During the 1995-96 school year, 4th-8th students were involved in the program. Due to fiscal constraints and the need to utilize this teacher's services in other areas, during the 1996-97 school year, only 5th-8th grade students will be involved in the program. Involvement in the program may be reduced further because the proposed G & T teacher, who is also a half-time kindergarten teacher, will be expected to do some basic skills instruction.

Further, the Board notes that unexpectedly, it is anticipating the resignation of a 6th grade teacher. At this point in time, the Board does not anticipate hiring additional staff, which will then necessitate the current half-time G & T teacher becoming a full-time 6th grade teacher. Thus, the Board concludes that without the present G & T program staffing, it would be unable to continue to provide this program in a thorough and efficient manner.

The Council argues that it in no way seeks to eliminate the G & T program, but merely seeks to eliminate the G & T teacher, and to reassign those duties to an existing teacher whose duties are being reduced due to declining enrollment.[3] In this regard, it asserts that there

[3] The Council projects a decline in kindergarten enrollment to only require three half-day sessions rather than four. Therefore, the Council reasons, one kindergarten teacher will have one morning period free to dedicate to these students by assuming the duties of the G & T teacher.

are currently only 38 of 547 students (7 percent) in the program, thereby not requiring a full-time teacher. The needs of these students can be more than adequately met by a part-time instructor. The current program meets twice per week for 45-minute sessions. This is a pull-out program in which students are removed from a regular class on a rotating basis to participate. Various grade levels are combined for this program. The students work independently under teacher supervision. The basic duties of the program teacher are guidance and motivation. The basic theme of the program is selected in advance by the Mind Flares program in which six area schools participate.

Further, notwithstanding the list of functions cited by the Board as comprising the functions of the G & T teacher, the Council asserts that it fails to state that those functions listed are currently being performed on a part-time basis and will continue to be provided on a part-time basis. Therefore, the position which is currently part-time will continue to be a part-time position. Nor, the Council continues, does the Board state why the function of the G & T teacher cannot be reallocated to another teacher currently on staff. The Board provides no reason as to why or how these functions cannot be reallocated as prescribed by respondent.

In reply to the Board's arguments, the Council states that the Board has acknowledged the anticipated conversion of the current G & T teacher from a part-time teacher of this program to a full-time 6th grade teacher for the 1996-97 school year due to the anticipated resignation of the current 6th grade teacher. Therefore, the Council reasons that the Board's decision will leave the G & T teacher position vacant. The Board has stated it does not anticipate hiring additional staff. Under the Council's decision, a current full-time teacher who it was anticipated to be needed only on a part-time basis due to declining kindergarten enrollment, will be able to continue on a full-time basis. (Part-time kindergarten and part-time G & T program)

Even more importantly, according to the Council, the Council's decision will fill the now anticipated vacancy in the program without adversely affecting that program in any way. Thus, the Council concludes that its decision will fill this vacancy in a rational and economic manner with no impact on the program.

Upon careful review, the Commissioner finds that the Board has not established that the Council's reduction will jeopardize the existing program or the Board's ability to provide T & E, particularly in view of the fact that the G & T program serves a relatively small student population and is currently maintained on a part-time basis. Accordingly, the Commissioner sustains the reduction of $16,356.

Disputed Line-Item Number 8

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07100	11-000-260-100	Op. & Maintenance Salaries	$ 102,950	$ 15,413

Recognizing that the Council seeks to reduce one custodian position to a half-time position, and to assign the duties to the remaining two custodians, the Board notes that it has already reduced its custodial staff; effective in the 1992-93 school year, it was forced to reduce the custodial staff from 3.5 full-time custodians to three custodians due to budgetary constraints. This reduced custodial staff is responsible for the Lopatcong School, which encompasses 55,000 square feet of building space, including an all purpose room, library and gymnasium which seats 350 people. Additionally, the Board notes that there are a total of 38 instructional areas plus four child study team offices and five central administration offices. According to the Board, the custodians are responsible for cutting and trimming 16 acres of grass and, during the winter, for snow removal from four parking lots and adjoining access roads in driveways. In reply to the Council's argument, *infra*, the Board notes that the Township does not do all the snowplowing,

but only opens up both lanes of the school's driveways. A custodian in a school pick-up truck equipped with a plow does the parking lots and walkways as evidenced by the fact that the District paid $1,321.21 in overtime to its custodians for snow removal during 1995-96, not counting what was plowed during the course of a regular work day. This dollar figure does not include monies expended on a private contractor that petitioner called in for snow removal beyond the capability of its equipment. The head custodian also performs maintenance on another school owned by the District and rented to a special education private school. Additionally, contrary to the Councils' assertions, *infra*, the resident custodian is only responsible for cleaning. The head custodian is responsible for replacing light ballasts, plumbing and carpentry.

The Board illustrates that its custodial team is understaffed by noting a recent survey of comparably sized districts in and around Warren County. While the Council attempts to discredit the survey created and updated on a yearly basis by the Warren County School Administrators and School Business Officials for comparative purposes, as well as for negotiations, the Board observes that the Council has provided no documentation that the references to the survey are inaccurate. Thus, the Board concludes that it will not be able to maintain its facilities in proper condition with a further reduction in custodial staff.

The Council argues that the reduction of the custodial staff from three full-time custodians to two full-time custodians and one part-time custodian will in no way adversely affect the students of the Lopatcong School District. The Council observes that the school building currently consists of 55,000 square feet or 31 classrooms. The grounds are 16.1 acres of land or 700,446.6 square feet. It is the position of the Council that the health and safety needs of the school can be adequately met with this change. Those duties no longer performed by the now

part-time custodian can be adequately taken up by the two remaining full-time custodians. Each remaining full-time custodian will be responsible for only an additional 3,667 square feet of building space and an additional acre of grounds. The Council notes that it was also mindful that no capital improvements have been made to the school, as well as the fact that all snowplowing is provided by the Township. Given these facts, it was the Council's conclusion that the reduction of the position would not adversely affect the students of the School District.

In reply to the Board's arguments, the Council indicates that the prior reduction of custodial staff occurred in the summer of 1993 as the result of action by the Board regarding the retirement of one of the custodians; the decision did not involve action by the Council. As to the Board's argument that the head custodian "performs maintenance" on another school leased to a private special education school by the Board, the Council notes that the leased property is comprised of approximately six rooms and the tenant employs a custodian to care for the facility. The head custodian's only function, according to the Council, is that of procuring repairs to the rental property as the landlord Board's agent, as needed. He is not the resident custodian for the property.

As to the survey cited by the Board, the Council observes that the Board fails to attach the actual survey, or to provide information as to who conducted the survey, the condition and overall age of the buildings surveyed, and further fails to note whether the survey included a complete listing of all area schools and how much land also comprises the included school districts. Additionally, the Council asserts that although the Board seems to place importance on the survey, the statistics did not appear to have influenced its decision in 1993 to reduce its custodial staff. Clearly, the Council reasons, the Board's prior decision indicates it does not find

a stringent adherence to a particular regional custodial/square foot ratio necessary or indicative of providing T & E.

Upon review, the Commissioner finds the Board has not established the necessity for additional funds for a regularly employed, third full-time custodian in order to maintain the physical plant, as needed for the provision of T & E. Accordingly, the Commissioner determines to sustain the reduction of $15,413.

Disputed Line-Item Numbers 9, 10

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07420	11-000-290-290	Other Employee Benefits	$ 431,500	$26,846
07370	11-000-290-220	Social Security Contributions	$ 22,000	$ 1,179

While the Board does not argue with the Council's contention that a reduction in personnel will result in employee benefit savings, it contends that such a reduction in personnel would inhibit, if not prohibit, petitioner's ability to provide T & E.

It is the Council's position that the reduction in staff contained in its reductions of the school budget will necessarily result in a comparable reduction in employee benefits.

Upon review, the Commissioner determined to restore 29 percent of the money budgeted for benefits since one full-time position out of the 3.5 full-time and part-time positions in question was determined to be necessary for T & E and it was not possible to determine precisely how much of each line item reflects each position. The Commissioner sustained a 71 percent cut to each account, however, since 2.5 of the 3.5 positions were not determined to be necessary. Accordingly, the Commissioner directs that $7,785 be restored to line-item number 7420 and sustains a cut of $19,061. Also, it is directed that $342 be restored to line-item number 7370 and a cut of $837 is sustained.

Disputed Line-Item Number 11

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02680	11-190-100-610	Reg. Prog/Gen'l Supplies	$ 66,810	$ 3,498

The Council seeks to reduce the above-noted account by $3,498. The Board argues that, contrary to the Council's contention, it has provided the Council with any and all requested details regarding the actual expenditures covered by this account. Noting that "General Supplies" covers several areas, the Board points out that there was no increase in this line item projected from the 1995-96 to the 1996-97 school year budget. The areas covered and the funds budgeted are General Office & School Supplies ($26,000); Classroom Workbooks; ($20,000); Art Supplies ($1,800); Science Supplies ($1,500); Music Supplies ($800); Physical Education Supplies ($600); Copier Paper ($6,000); Masters/Ink for Risograph ($3,000); Computer Supplies ($500); Teacher Classroom Allowance ($1,610); Miscellaneous Instructional Equipment ($3,000); Miscellaneous Noninstructional Equipment ($0); and Miscellaneous Supplies ($2000), for a total of $66,810.

The Board notes that one of the goals of the District is to review each curriculum area every five years, if possible. Within the past two years, the Board reviewed the Social Studies Curriculum, and the Curriculum Committee recommended enhancing its existing curriculum with maps and globes by replacing all outdated maps, etc., in all classrooms (Kindergarten through 8th grade). Thus, supplies are necessary to update maps and globes, since the configuration of many countries, i.e., the breakup of the Soviet Union, change in countries in Africa, etc., create the need for this purchase, which approximates $3,000. The remaining $2,000

is for miscellaneous items which need to be purchased during the school year. It is impossible, the Board asserts, to specify these necessities prior to the need for purchasing these items arising.

If the Board is to comply with the Core Curriculum Content Standards, as adopted by the State Department of Education, it argues that it cannot maintain the status quo with outdated materials, but must improve and update curriculum areas through updating materials used within each curriculum areas as necessary. Without restoration of these budget cuts, the Board concludes that its ability to comply with the Core Curriculum Content Standards will be difficult, if not impossible. The Council, the Board argues, has acted in an arbitrary and capricious manner, reducing its budget to the point where it will be severely hampered, if not prohibited, from providing its students with T & E.

The Council argues that the District's spending on general supplies and textbooks has exceeded the 2 percent state average over the last several years. These increases, the Council continues, have not been comparative to the general increase in student populations. In 1994-95 with only an additional six students, the District budget was increased $14,039. Of that substantial increase, the Board spent all but $297. The next year, 1995-96, however, with an increase in student population of 42 students, the District budgeted $3,964 less for this item.

The Council contends that it seeks a reduction of only $3,498, which will not jeopardize the students' right to T & E. This is a 12 percent increase from the 1993-94 figure or an increase of approximately $12.02 per student. Moreover, the Council argues that the Board has not justified the need for maintaining current spending levels as essential to T & E, given the declining budget requests in this appropriation over the last two years. The Council notes that the Board provides no details with respect to what "Miscellaneous Instructional Equipment" and "Miscellaneous Supplies" comprising $5,000 of the item budgeted entails, especially in light of

the other specific items listed. Despite the Board's opinion to the contrary, the Council warrants, at least part of the Board determined this item could be reduced by $8,000 without an adverse impact. The Council contends that the Board fails to address or refute this point. This reduced figure of $63,312, the Council argues, is more consistent with the percentage increase in general supply spending commensurate with the percentage increase in student population since the 1993-94 school year.

Upon careful review, the Commissioner finds that the Board has duly demonstrated its need to hold its costs at the proposed level, recognizing that the costs are the same as those budgeted for 1995-96, and that neither state average increases nor student enrollment will necessarily serve as the sole indicator of need for new educational supplies. Accordingly, the Commissioner determines to restore the reduction of $3,498. Further, it is noted that the District has included items in its support of the budgeted appropriations in account number 11-190-100-610 that should have correctly been budgeted elsewhere. General office supplies would be properly budgeted under the applicable support function, and supplies for the duplication of instructional materials would be properly budgeted in account number 11-000-240-600. Thus, the Commissioner directs the Board to reclassify all miscoded appropriations to the proper accounts.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of $278,305 and allocated $150,000 as revenue, leaving $128,305 as undesignated unreserved surplus.

The Board's annual financial report filed pursuant to *N.J.S.A.* 18A:17-10 (June 30 Board secretary's report) reveals that its surplus projection was overestimated. Based on the

above, the Commissioner determines that no additional surplus revenues are available to fund restorations directed herein, subject to verification through the Board's 1996-97 annual year-end audit report.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Council's line-item reductions to appropriations and/or increases to revenue in surplus accounts as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with *N.J.A.C.* 6:20-2A.11(b)3.

Description	Account Number	Sustained	Restored
Music Teacher:		$ 21,455	- 0 -
• Grades 1-5 Salaries of Teacher	11-120-100-101		
• Grades 6-8 Salaries of Teachers	11-130-100-101		
• Preschool/K. Salaries of Teachers	11-110-100-101		
Salary/School Library	11-000-222-100	$ 32,710	- 0-
Salary/Assistant Principal	11-000-240-103		$ 64,000
Gifted & Talented Teacher		$ 16,356	- 0-
• Grades 1-5 Salaries of Teachers	11-120-100-101		
• Grades 6-8 Salaries of Teachers	11-130-100-101		
Operation & Maintenance Salaries	11-000-260-100	$ 15,413	- 0-
Employee Benefits			
• Other Employee Benefits	11-000-290-290	$ 19,061	$ 7,785
• Social Security Contribution	11-000-290-220	$ 837	$ 342
Reg. Prog/Gen'l Supplies	11-190-100-610	_____	$ 3,498
TOTAL LINE-ITEM DETERMINATIONS:		$ 105,832	$ 75,625

Tax Levy Certified by Governing Body	$3,851,092
Restoration of Reductions	$ 75,625
Amount of Restoration Funded by Surplus	- 0 -
Total Tax Levy for 1996-97	$3,926,717

Accordingly, the Warren County Board of Taxation is directed to make the necessary adjustments, as set forth above, subject to verification of surplus amounts through the year-end audit, to reflect a total of $3,926,717 to be raised in tax levy for General Fund purposes of the Lopatcong Board of Education for the 1996-97 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 17, 1996
DATE OF MAILING OCTOBER 18, 1996

469-96

469-96

IN THE MATTER OF THE TENURE	:	
HEARING OF ANNA POULOS, BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION OF THE BOROUGH	:	DECISION
OF FARMINGDALE, MONMOUTH	:	
COUNTY.	:	
	:	

OCTOBER 21, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12504-95

AGENCY DKT. NO. 415-10/95

BOARD OF EDUCATION OF THE BOROUGH OF FARMINGDALE,

Petitioner,

v.

ANNA POULOS,

Respondent.

James T. Hundley, Esq., for petitioner (Hundley, Parry & Hopkins, attorneys)

Stephen B. Hunter, Esq., for respondent (Klausner & Hunter, attorneys)

Record Closed: August 6, 1996 Decided: September 3, 1996

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the Borough of Farmingdale (BOE) brings tenure charges against respondent Anna Poulos, a teacher in the BOE's school system. Respondent has been absent from her teaching duties for substantial periods of time. For the past two school years, respondent has been absent almost every school day, and the BOE alleges that that she is incapable of performing her duties in the forseeable future. On these bases, the BOE submits that

the respondent has exhibited "chronic absenteeism," "incapacity" and/or "conduct unbecoming a teacher," such that she must be dismissed from employment with the BOE N.J.S.A. 18A:6-10.

Respondent points out that her absences resulted, in part, from compensable injuries, and she alleges that she is now physically able to return to her teaching duties. On these bases, respondent submits she may not be dismissed.

PROCEDURAL HISTORY

On October 19, 1995, the BOE's tenure charges, etc., were filed with the Department of Education. N.J.S.A. 18A:6-9. On November 22, 1995, the respondent's answer to the tenure charges was filed with the Department. The Department transmitted the matter to the Office of Administrative Law where, on December 7, 1995, it was filed as a contested case. N.J.S.A. 18A:6-11, N.J.S.A. 52:14B-2(b). On January 23, 1996, I sent out a scheduling order. On June 19, 1996, the BOE's papers in support of its motion for summary decision were filed. On July 5, 1996, the respondent's papers in opposition to the BOE's motion were filed. On August 6, 1996, the parties' additional exhibits were filed and the motion was the subject of a conference among the attorneys and me.

FINDINGS OF FACT

On March 1, 1986, respondent began employment as a teacher in the BOE's school system; thereafter, she attained tenure and her employment continued. N.J.S.A. 18A:28-5.

During the 1985-86 school year (after March 1, 1986), respondent had 2 sick days and 2 personal days. During the 1986-87 school year, respondent had 15 sick days and 4 personal days. During the 1987-88 school year, respondent had 2 sick days and 4 personal days. During the 1988-89 school year, respondent had 10 sick days and 4 personal days. During the 1989-90 school year, respondent had 12.5 sick days and 3 personal days. During the 1990-91 school year, respondent had 19.5 sick days and 3 personal days. During the 1991-92 school year, respondent had 14 sick days and 3 personal days. During the 1992-93 school year, respondent had 17 sick

days and 5.5 personal days. During the 1993-94 school year, up to February 16, 1994, respondent had 5 sick days and 1 personal day. P-1.

On February 16, 1994, i.e., during the 1993-94 school year, respondent reported to the school system that, on that day, while walking in the school parking lot, she slipped on ice, twisted her body and fell, injuring her right knee and right wrist. P-2. Thereafter, respondent did not return to her duties.

In the September 1, 1994 note of Anand Swaroop, M.D., who treated respondent; he wrote that respondent was unable to return to work until January 15, 1995. On September 1, 1994, respondent wrote to the school system, enclosing a copy of Dr. Swaroop's note, and notified the school system that, prior to her return to work, a re-evaluation of her physical ability would take place. P-3.

Based upon respondent's September 1, 1994 letter, on September 21, 1994, the BOE passed a resolution extending respondent's disability leave to January 15, 1995. P-4.

By letter dated January 4, 1995, Joseph G. Torrone, superintendent of the school system, notified respondent of the following: She should notify him of her status. If she was unable to work, she should submit a physician's note setting forth the physician's opinion in that regard. If she was able to work, she should submit a physician's note setting forth the physician's opinion that she could assume her full teaching responsibilities. This information was immediately necessary for the school system to plan for a smooth transition or to make substitute arrangements. P-5; N.J.S.A. 18A:30-4.

On January 3, 1995, Dr. Swaroop had written that respondent remained under his care and that she was unable to work until further notice and, on January 5, 1995, the respondent sent a copy of this note to the superintendent. P-6.

By letter dated January 31, 1995, Selective Insurance, the BOE's workers' compensation insurance company, notified respondent of the following: According to Dr. Jeffrey C. Pollock's

January 27, 1995 report, she had reached maximum benefit from medical care and no further treatment was required. She should be able to return to work. Workers' compensation temporary disability was paid up to February 5, 1995. After February 7, 1995, Selective Insurance would authorize no further medical care. P-7.

By letter dated February 9, 1995, respondent notified the superintendent that "as of February 17, 1995 and thereafter, [she would] not be using any of [her] sick leave during this time of disability." P-8.

On March 15, 1995, the BOE passed a motion requiring that, pursuant to N.J.S.A. 18A:16-2, respondent undergo a physical examination by the BOE's physician. P-9. By letter dated March 16, 1995, the superintendent notified respondent of the following:

> 1. You will receive payment for your accumulated sick leave days; ten accumulated and twelve days for the current (1994-95 school year) and will receive no further sick leave benefits after your twenty-two days of sick leave have expired.
>
> 2. The [BOE] and I have concerns about your continued absences and its effect on the educational program in the special education class. The [BOE] has retained the services of a long-term substitute to cover your teaching duties during your absence. Thus far, two different substitutes have been utilized and a third will be necessary effective later this month.
>
> 3. The [BOE] is requesting that you file a physician's certificate with the [BOE] Secretary pursuant to the provisions of N.J.S.A. 18A:30-4. This certificate must set forth a diagnosis, prognosis, and an anticipated date you will return to your full teaching duties.
>
> 4. At the March 15 [BOE] meeting, a resolution pursuant to the provisions of N.J.S.A. 18A:16-2 was adopted requiring you to undergo a physical examination by a [BOE]-appointed physician. You will be notified by March 30, 1995 as to the name of the physician. You will have thirty days in which to complete the examination and submit this report within forty-five days of March 30. The [BOE] will bear the cost of this examination.
>
> [P-10.]

In the superintendent's March 30, 1995 letter, he notified respondent of the following: In view of Selective Insurance's letter of January 31, 1995, a copy of which the BOE had received, the BOE no longer required her to undergo the physical examination. The superintendent was still awaiting a physician's certificate setting forth a diagnosis, prognosis and anticipated return-to-work date. A check for eight days of accumulated sick leave time was enclosed, and the remaining balance would be sent on April 15, 1995. P-11.

In the superintendent's April 13, 1995 letter, he notified respondent of the following:

> Enclosed is a check for fourteen days of accumulated sick leave time. Please be advised, you have exhausted all your accumulated sick leave days and will receive no further payment from the [BOE].
>
> In my March 16, 1995 letter and again in my March 30, 1995 letter I requested a physician's certificate setting forth a diagnosis, prognosis and an anticipated date you will return to your full teaching duties. As of this date, I have not received this information. Please submit this to me no later than April 28, 1995.
>
> The [BOE] and I remain concerned about your health. We have deep concerns regarding your continued absences and their effect on the children in the special education class.
>
> Please be advised that the arrangements have been made with Dr. John deJong, M.D., of Howell Township for you to receive a complete physical examination. The doctor has requested any medical reports available be sent to him or faxed prior to this examination. Please schedule this exam as soon as possible, preferably before April 28, 1995.
>
> [P-12.]

In Dr. Swaroop's April 14, 1995 note, he wrote the following: Respondent was under his care. Her diagnosis was herniated disc. He was "presently unable to give a return to work status or a prognosis." Respondent was scheduled for an appointment on April 25, 1995, at which time he would "discuss the possibility of the [respondent] receiving a myelogram." P-13.

On May 2, 1995, respondent was examined by Dr. deJong. In Dr. deJong's letter of that date, he wrote the following: Respondent alleged that, since her February 16, 1994 fall and injury to her back, she has had "constant back pain with radiation down her left leg and foot. She stated that her left foot has become numb." Dr. Swaroop had advised respondent that psychological treatment may benefit her relative to her "depression." Respondent alleged that she was taking medication to sleep and that she had "congestive heart failure three years ago." Respondent alleged that she had difficulty walking, bending and sleeping. A Jersey Shore Medical Center November 16, 1994 CT myelogram did not support the diagnosis of lumbosacral disc herniation. Respondent was thirty-five years old and obese: she was 70½ inches tall and her weight exceeded Dr. deJong's office scale's 360-pound capacity. Given respondent's "entirely subjective" symptomotology (complaints of low back pain with left leg radiation), an electromyography (EMG) was necessary for evaluation of her ability to return to her job. P-14.

In Selective Insurance's May 5, 1995 letter, it notified respondent of its offer of 10% permanent disability for residuals of her February 16, 1994 injury in settlement of her workers' compensation claim. P-15.

In the superintendent's May 18, 1995 letter, he notified respondent that arrangements had been made for Bruce Coplin, M.D., to administer an EMG for her and he notified her of the following:

> As you are aware, from a previous conversation we had on the phone, you are not on any approved leave of absence from the [BOE]. In fact you have not requested any leave since your previous leave expired on January 15, 1995. It has become impossible to plan a permanent solution to the substitute situation since your January 5, 1995 letter stated that you were, " . . . advised to stay out of work until further notice." This letter contained a note from Dr. Swaroop stating "Patient is under Dr.'s care and will be unable to work until further notice."
>
> As always, the [BOE] and I are concerned about your health and your ability to return to your full teaching responsibilities.
>
> [P-16.]

In Dr. Coplin's June 1, 1995 letter, he notified Dr. deJong that he had performed the EMG and that he determined that the findings were consistent with a normal study and there was no electrophysiologic evidence of a lumbosacral radiculopathy. P-17.

In Dr. deJong's June 5, 1995 letter to the superintendent, he notified him that, based upon Dr. Coplin's EMG study, respondent was able to return to work. P-18.

In the BOE's attorney's June 8, 1995 letter, he notified respondent of the following: Since February 16, 1994, she had been continually absent from her teaching duties. Her sick leave benefits under N.J.S.A. 18A:30-2.1 had terminated on February 16, 1995. She had used all of her annual and accumulated sick leave. The BOE's last payment to her of salary or sick leave benefits was made on April 13, 1995. She had not requested and the BOE had not granted extended sick leave. Despite the superintendent's request, she had failed to supply a physician's certificate setting forth her diagnosis, prognosis and anticipated return-to-work date. In view of Dr. deJong's report that she was medically able to return to work and the detrimental effect of her continued absence, the BOE required that, within 30 days of the date of the letter, she submit (1) medical reports, records and documentation verifying the necessity of her continued absence and (2) an anticipated return-to-work date. If she failed to submit these items, the BOE would consider filing "tenure charges." P-19; see N.J.S.A.18A:6-11.

Respondent returned a copy of the BOE's attorney's June 8, 1995 letter, on which she had handwritten that on April 14, 1995, she had submitted the physician's certificate. P-20.

During the 1994-95 school year, respondent was continuously absent. P-1.

In respondent's attorney's July 6, 1995 letter, he notified the BOE's attorney that Dr. Swaroop had diagnosed a herniated disc and that the "minimal treatment she ha[d] received to date ha[d] done nothing to alleviate the pain and discomfort." Despite that diagnosis, it was "still not totally clear as to what problem [respondent] suffers from," and a return-to-work date could not be given. P-21.

In the BOE's attorney's July 17, 1995 letter to respondent's attorney, he reviewed the history of respondent's absences, etc. He wrote that, after February 16, 1995, the BOE paid respondent for 22 days of annual and accumulated sick leave, the last payment being on April 13, 1995, and stated that, since April 13, 1995, she had received no salary, sick leave benefits or other compensation from the BOE. He reviewed the BOE's request for a physician's certificate, etc., and Dr. deJong's determination that she could return to work. He wrote that, during the 1994-95 school year, four substitute teachers had been employed to cover respondent's special education (NI) class; to properly implement the special education program, it was necessary to have a full-time teacher for that class for the 1995-96 school year; and the BOE intended to retain a full-time teacher for the 1995-96 school year, no later than August 1, 1995. Consequently, respondent was to "immediately" inform the BOE and the superintendent of whether she would return to her teaching duties. Further, if she did not return, pursuant to the teachers' contract, she could apply for an unpaid extended sick leave. P-22.

In respondent's attorney's July 25, 1995 letter, he notified the BOE's attorney that he had reviewed respondent's options with her and that, on July 26, 1995, she would see her physician to determine her prognosis for returning to her teaching duties. P-23.

In the BOE's attorney's July 25 and August 9, 1995 letters, he notified respondent's attorney of the following: Because respondent did not apply for extended sick leave, pursuant to N.J.S.A. 18A:30-1 et seq., the sick days had been taken from her "sick leave bank." The BOE continued to believe that, for the 1995-96 school year, the special education program needs could only be met by employment of a full-time teacher. Respondent should consider an unpaid leave of absence for the 1995-96 school year. P-24; P-25.

With the BOE's attorney's August 16, 1995 letter to respondent's attorney, as authorized by BOE resolution during its August 16, 1995 meeting, he forwarded a proposed agreement between the respondent and the BOE whereby the respondent would receive an unpaid leave. P-26; P-27; P-28.

On August 28, 1995, at 10:00 p.m., respondent notified the superintendent's secretary by telephone that she intended to return to her teaching duties on September 5, 1995, for the 1995-96 school year. And, by the BOE's attorney's August 28, 1995 letter, he notified respondent's attorney of the telephone call and asked for respondent's position. P-29.

In respondent's attorney's August 29, 1995 letter, he notified the BOE's attorney that, the week before, respondent's physician informed her that she was able to return to her teaching duties. P-30.

In the BOE's attorney's August 31, 1995 letter to respondent's attorney, he recited that he had previously notified him that the BOE had approved a contract for a teacher to replace respondent for the 1995-96 school year, and that respondent's "last minute decision to return to her teaching duties ha[d] caused a great deal of difficulty for the [BOE]." Further, as respondent had notified the superintendent that she had physical restrictions on her ability to stand, sit, conduct class out-of-doors and climb stairs, prior to the beginning of school on September 5, 1995, she should submit medical documentation relative to such restrictions. P-31.

On August 31, 1995, the BOE adopted a resolution rescinding its (above-described) August 16, 1995 resolution and directed the superintendent to offer respondent a one-year contract. P-40. By the superintendent's letter of that date, he forwarded to respondent a contract and her schedule for the 1995-96 school year. P-32; P-33.

In the BOE's attorney's September 1, 1995 letter, he notified respondent's attorney that respondent had failed to submit medical documentation concerning any restrictions on her ability to perform her teaching duties. P-34.

On September 5, 1995, respondent telephoned the superintendent and reported the following: She had fallen at home and injured her ankle. She had two physician's notes; one said that she could return to work and one said that she had suffered a sprained ankle and that she was unable to work for five days. She felt she was unable to return to work (on September 5, 6, 7 and 8) and she would not work. She hoped to return to work on September 11, 1995. P-1.

In the superintendent's September 6, 1995 letter to respondent, he confirmed her September 5, 1995 telephoned report and requested that she send the physicians' notes as soon as possible. P-35.

In respondent's attorney's September 6, 1995 letter to the BOE's attorney, he wrote the following: Due to respondent's "back problems," she was not able to climb stairs, lift or carry heavy objects or walk long distances, and she was "concerned that she [might] not be able to perform the basic skills position given her physical limitations." P-36. With the letter was a copy of the above-described physician's note that said that she was unable to return to work for five days. P-38.

In the superintendent's September 7, 1995 letter to respondent, he recounted her past "excessive absenteeism" from her teaching duties; her "failure to provide the [BOE] with timely notice of the date of [her] return to [her] teaching duties" for the 1995-96 school year; and her continuous absence during the 1995-96 school year. He notified respondent that her absence had "draw[n] into question [her] continued employment" with the BOE, that the BOE would consider its "options" in that regard, and that she could submit to the BOE any information in that regard. P-39.

In the superintendent's September 8, 1995 letter, he notified respondent that she should report to Dr. deJong for an examination relative to whether she was able to perform her teaching duties, and that, until the BOE received such a report, she could not return to work. P-41.

In the superintendent's September 12, 1995 letter, he notified respondent of the following: Dr. deJong had determined that, due to her right ankle injury and her resulting pain, he could not perform the tests necessary to evaluate her ability to return to work. Dr. deJong had applied an air cast brace to her, and determined that she should not return to work for two weeks. Her absence would be charged against her sick leave time. In two weeks, Dr. deJong wanted to examine her again for her ability to return to her teaching duties. P-42.

In the BOE's attorney's letter of September 13, 1995, he notified respondent's attorney of the following: On September 12, 1995, respondent had appeared at Dr. deJong's office, but due to the condition of her foot, an examination could not be performed. Dr. deJong advised her that, due to the condition of her foot, she should remain out of work for two additional weeks. Respondent should notify the superintendent when her foot improved to the point that Dr. deJong could examine her, and he would then examine her. Respondent's September 5, 6, 7 and 8, 1995 absences would be charged against her sick leave; absences of September 11 and 12, 1995, would not be charged against her sick leave; and absences after September 12, 1995, would be charged against her sick leave. P-43.

On September 22, 1995, the tenure charges were signed by the superintendent, and on September 22, 1995, the tenure charges and statement of evidence were personally served on respondent. The BOE considered the charges during its meeting of October 11, 1995, and a majority voted that there was probable cause to credit the evidence in support of the charges and that the charges were sufficient to warrant dismissal or reduction in salary. Also during that meeting, the BOE, as documented in its "Amended Certificate of Determination," voted not to suspend respondent, and on October 17, 1995, the Amended Certificate of Determination was personally served on the respondent. On October 19, 1995, the tenure charges, etc., were filed with the Department.

In the superintendent's September 22, 1995 letter to respondent, he confirmed that, although tenure charges had been served on her, she still was required to keep her September 26, 1995 appointment with Dr. deJong. P-44.

With the superintendent's September 22, 1995 interoffice memorandum to respondent, he forwarded to her "an updated version of [her] teaching schedule should the physician limit [her] utilization of stairs." P-45.

In the superintendent's September 26, 1995 letter to respondent, he confirmed the following: She had been examined by Dr. deJong and she would not be returning to her teaching duties for several weeks. Dr. deJong recommended a magnetic resonance imaging (MRI) be

performed, and it was scheduled for September 28, 1995. She had three sick days remaining and the BOE would pay her for "three days (through September 29). After these days [were] paid, [she would] not be receiving any further compensation from the district." P-46.

In the superintendent's October 3, 1995 letter to respondent, he notified her that the MRI of her right ankle was "negative," and that Dr. deJong had authorized her return to work effective October 4, 1995, with no restrictions. He also notified her that, in an effort to have her return to work immediately, he had revised her schedule, so that she could remain on one floor, i.e., without climbing stairs, and that, when possible, i.e., when stair climbing was not necessary, she would be used as a substitute. He also recited that Dr. Glastein's August 28, 1995 certification showed that she was able to return to work on September 5, 1995, but with "no stair climbing - no heavy lifting." The superintendent noted that Dr. Glastein's certification "set no time frame for the limitations," and he asked that information about respondent's anticipated period of restriction be sent to him. Copies of the letter, certification and MRI report were enclosed with the superintendent's letter. P-47.

On October 12, 1995, respondent returned to her teaching duties. However, on that day, at 1:40 p.m., she contacted the superintendent (by intercom) and, upset and crying, told him that she was "emotionally and physically unable to stay for the rest of the day." The superintendent asked respondent to speak with the school nurse, to assure that she would be safe driving home, and by about 2:15 p.m., respondent had calmed down and left. P-49; P-50.

In the superintendent's October 20, 1995 letter to respondent, he notified her that, despite his October 3, 1995 letter requesting information relative to Dr. Glastein's (August 28, 1995) limitations on her return to work, she had failed to provide such information. He also offered copies of the MRI and EMG reports if Dr. Glastein needed them in that regard. P-51.

In a letter to the superintendent dated October 30, 1995, Harris N. Bram, M.D., stated that he had been treating respondent for several months; she has chronic left sciatica; and, to help "maintain" her, "stair climbing should be eliminated and ambulation between classes should be

kept to a minimum." P-53. With respondent's attorney's November 8, 1995 letter to the BOE's attorney, he enclosed a copy of Dr. Bram's letter. P-52.

On November 13, 1995, at a school exit door, respondent tripped, lost her balance and caught herself, pulling her left leg and buttocks and causing her pain in her left back and difficulty walking. P-54.

Respondent has not worked since November 13, 1995. P-1.

In respondent's attorney's November 17, 1995 letter to the BOE's attorney, he requested that she not be assigned a schedule that required climbing stairs. P-55.

On November 22, 1995, the respondent's answer to the tenure charges was filed with the Department.

Following left knee arthroscopy, on May 31, 1996, Michael Cunningham, M.D., reported his impressions as follows: "1. Status post left knee arthroscopy with partial lateral menisectomy and debridement of chondralmalacia patella grade III. 2. Possible mild neuropraxia secondary to positioning in surgery." He recommended that respondent begin a "[p]hysical therapy program and remain out of work and follow up in three weeks for reevaluation." P-57.

In an undated form, Dr. Cunningham wrote that, in "Sept. of 96," respondent could "return to regular duty." R-1.

For the 1996-97 school year, the BOE and the teacher hired by the BOE in August 1995 to replace respondent in the special education NI class have entered into a contract for full-time teaching duties. P-59.

CONCLUSIONS OF LAW

To aid in establishment of a "thorough and efficient free public school system," the Legislature established tenure for teaching staff members. N.J. Const. art. VIII, §IV, ¶1; N.J.S.A. 18A:10-1; N.J.S.A. 18A:28-5.

More particularly, such tenure is intended to ensure the presence of a competent and efficient teaching staff by preventing boards of education from abusing their superior bargaining powers in contract negotiations and by preventing dismissal for unfounded, flimsy or political reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982); Greenway v. Camden Bd. of Educ., 129 N.J.L. 46, 49 (Sup. Ct. 1942), aff'd, 129 N.J.L. 461 (E. & A. 1943); Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215 (App. Div. 1949); Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944). However, while a board of education has a responsibility to a teacher who is ill, its superseding responsibility is to provide the constitutionally mandated educational services to students in the school system. See In re Tenure Hearing of Green, 1991 S.L.D. 1103.

Continuity of instruction and regular contact between an assigned teacher and her students are vital to the public school education process. Conversely, a teacher's frequent absence from her students is disruptive to the learning process and results in a loss of instruction which may not be entirely regained even by extra effort when the teacher returns. And, where a tenured teacher's chronic or excessive absenteeism interferes with the school system's ability to provide the constitutionally mandated educational services, the teacher may be dismissed. In re Tenure Hearing of Reilly, 1977 S.L.D. 403, 414, where a teacher's absences ranged from 5 to 149 days a year over a ten-year period and she was dismissed.

N.J.S.A. 18A:6-10 states:

> No person shall be dismissed or reduced in compensation,
>
> > (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

> (b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.
>
> Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.
>
> [Emphasis added.]

Chronic and excessive absenteeism is not necessarily the result of willful conduct by the teacher and may occur although the teacher's absence was caused by illness and although the teacher had been granted leaves of absence. In re Tenure Hearing of Kacprowicz, 93 N.J.A.R.2d (EDU) 147; State-Operated Sch. Dist. of Jersey City v. Pellecchio, 92 N.J.A.R.2d (EDU) 267; In re Tenure Hearing of White, 92 N.J.A.R.2d (EDU) 157.

The determination of the point at which absenteeism is chronic or excessive is within the discretion of the board of education and, consistent with N.J.S.A. 18A:6-9, subject to review by the Commissioner. Pellecchio, supra, 92 N.J.A.R.2d (EDU) at 270, citing In re Tenure Hearing of Sheets, 1980 S.L.D. 1536, rev'g 1979 S.L.D. 790.

The facts here are summarized as follows: For substantial periods of time, respondent has been incapable of performing her teaching duties and she has been absent from her teaching duties. Beginning with the respondent's first full school year of employment in the BOE's school system (the 1986-87 school year), she has averaged 54 absences (sick, personal and workers'

compensation days) per year. During the three most recent (1993-94, 1994-95 and 1995-96) school years, respondent averaged 142 absences (sick, personal and workers' compensation days) per year. During the most recent (1995-96) school year, respondent was absent 152 days. Consequently, numerous times, the BOE requested that respondent submit her physician's opinion relative to her absence and whether and when she could resume her teaching duties. See, e.g., P-5; P-10; P-11; P-12; P-19; P-51. For substantial periods, respondent did not submit the requested opinion. Consequently also, the BOE was forced to use numerous substitute teachers to perform respondent's teaching duties. P-10; P-22. The BOE notified respondent that, given the unknown duration of her disability, it was "impossible [for the BOE] to plan a permanent solution to the substitute situation" (P-16); her absence adversely affected her students; and the BOE was considering tenure charges. P-12; P-19; P-39; P-22. These tenure charges were brought in September 1995. P-44. (Respondent's contention that, as of September 1996, she will be able to "return to regular duty" need not been determined here. R-1.)

For several years, the respondent's incapacity and absences prevented the regular contact with her students and continuity of instruction which are necessary for the public school education process and her incapacity and absences interfered with (or made "impossible") the BOE's planning for the constitutionally mandated educational services. P-16; P-31; see Reilly, supra, 1977 S.L.D. at 414. I agree with the BOE's determination that respondent's absenteeism was chronic and excessive. See Pellecchio, supra, 92 N.J.A.R.2d (EDU) at 270. That respondent's absenteeism was, in part, caused by compensable injuries is not a defense to these tenure charges. Kacprowicz, supra, 93 N.J.A.R.2d (EDU) 147; Pellecchio, supra, 92 N.J.A.R.2d (EDU) 267; White, supra, 92 N.J.A.R.2d (EDU) 157. Compare Nagy v. Bergen County Util. Auth., 93 N.J.A.R.2d (CSV) 773, aff'd, No. A-1559-93T5 (App. Div. July 8, 1994), where a pending workers' compensation claim did not prevent removal of a civil service employee for cause, including the cause of "inability to perform duties." Given respondent's chronic and excessive absenteeism, the BOE's claim for her dismissal is appropriate.

A teacher's chronic absenteeism may also constitute "incapacity," "conduct unbecoming" and "just cause" for which dismissal pursuant to N.J.S.A. 18A:6-10 is warranted. Trenton Bd. of

Educ. v. Williamson, OAL Dkt. No. EDU 7335-85 (April 14), aff'd, Comm'r of Educ. (May 28, 1986). However, the "conduct unbecoming" charge here is merged with the "incapacity" charge.

ORDER

I **ORDER** the respondent **DISMISSED** from her teaching position.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 3, 1996
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 10 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioner:

P-1 Records of absenteeism for respondent from March 1, 1986, to September 20, 1995

P-2 Occupational Injury or Illness Report, dated February 16, 1994

P-3 Respondent's letter, dated September 1, 1994; Dr. Anand Swaroop's note, dated September 1, 1994

P-4 BOE excerpt of minutes of September 21, 1994

P-5 Superintendent's letter, dated January 4, 1995

P-6 Respondent's letter, dated January 5, 1995; Dr. Anand Swaroop's note, dated January 3, 1995

P-7 Selective Insurance letter, dated January 31, 1995

P-8 Respondent's letter, dated February 9, 1995

P-9 BOE excerpt of minutes of March 15, 1995

P-10 Superintendent's letter, dated March 16, 1995

P-11 Superintendent's letter, dated March 30, 1995

P-12 Superintendent's letter, dated April 13, 1995

P-13 Dr. Anand Swaroop's letter, dated April 14, 1995

P-14 Breakaway/John H. deJong, M.D.'s letter, dated May 2, 1995

P-15 Selective Insurance letter, dated May 5, 1995

P-16 Superintendent's letter, dated May 18, 1995

P-17 Bruce M. Coplin, M.D.'s letter, dated June 1, 1995

P-18 Breakaway/John H. deJong, M.D.'s letter, dated June 5, 1995

P-19 BOE's attorney's letter, dated June 8, 1995

P-20 Respondent's notes on BOE's attorney's letter, dated June 8, 1995

P-21 Respondent's attorney's letter, dated July 6, 1995

P-22 BOE's attorney's letter, dated July 17, 1995

P-23 Respondent's attorney's letter, dated July 25, 1995

P-24 BOE's attorney's letter, dated July 25, 1995

P-25 BOE's attorney's letter, dated August 9, 1995

P-26 BOE's attorney's letter, dated August 16, 1995

P-27 "AGREEMENT, UNPAID LEAVE OF ABSENCE," signed August 16, 1995, by BOE president only

P-28 BOE excerpt of minutes of August 16, 1995

P-29 BOE's attorney's letter, dated August 28, 1995

P-30 Respondent's attorney's letter, dated August 29, 1995

P-31 BOE's attorney's letter, dated August 31, 1995

P-32 Superintendent's letter, dated August 31, 1995

P-33 Proposed teaching schedule

P-34 BOE's attorney's letter, dated September 1, 1995

P-35 Superintendent's letter, dated September 6, 1995

P-36 Respondent's attorney's letter, dated September 6, 1995

P-37 Monmouth Medical Center, record of treatment, etc., re "Contusion/Sprain"

P-38 Shore Orthopaedic Group/Dr. Cary D. Glastein's note, dated August 29, 1995; Monmouth Medical Center physician's note, dated September 4, 1995

P-39 Superintendent's letter, dated September 7, 1995

P-40 BOE excerpt of minutes of August 31, 1995

P-41 Superintendent's letter, dated September 8, 1995

P-42 Superintendent's letter, dated September 12, 1995

P-43 BOE's attorney's letter, dated September 13, 1995

P-44 Superintendent's letter, dated September 22, 1995

P-45 Superintendent's interoffice memorandum to respondent, dated September 22, 1995, with teaching schedule

P-46 Business Administrator/Board Secretary's letter, dated September 26, 1995

P-47 Superintendent's letter, dated October 3, 1995; Breakaway/Dr. John H. deJong's letter, dated June 5, 1995; Monmouth Diagnostic Imaging/Dr. Zelig Weinstein's letter, dated September 28, 1995; Shore Orthopaedic Group/Dr. Cary D. Glastein's certification, dated August 28, 1995

P-48 Superintendent's letter, dated October 6, 1995; list of "16 sick days" by respondent

P-49 Superintendent's letter, dated October 13, 1995

P-50 Respondent's letter, dated October 13, 1995

P-51 Superintendent's letter, dated October 20, 1995; superintendent's letter, dated September 8, 1995; respondent's attorney's letter, dated September 6, 1995; Shore Orthopaedic Group/Dr. Cary D. Glastein's certification, dated August 28, 1995; Monmouth Medical Center physician's certification, dated September 4, 1995; Monmouth Medical Center record of "contusion/sprain"; teaching schedule

P-52 Respondent's attorney's letter, dated November 8, 1995

P-53 Dr. Harris N. Bram's letter, dated October 30, 1995

P-54 Occupational Injury or Illness Report, dated November 13, 1995

P-55 Respondent's attorney's letter, dated November 17, 1995.

P-56 Respondent's attorney's letter, dated June 7, 1996

P-57 ANI Orthopaedic/Dr. Michael J. Cunningham's report, dated May 31, 1996

P-58 "Statement of Evidence" verified by superintendent Joseph G. Torrone (verifying exhibits P-1 through P-43)

P-59 "Affidavit in Support of Petitioner's Motion for Summary Judgment" by superintendent Joseph G. Torrone (verifying exhibits P-45 through P-57)

For Respondent:

R-1 Shore Rehabilitative Services/therapist Ellen Flashburg's letter, dated July 1, 1996; Dr. Michael J. Cunningham's note, undated

OAL DKT. NO. EDU 12504-95

IN THE MATTER OF THE TENURE	:	
HEARING OF ANNA POULOS, BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION OF THE BOROUGH	:	DECISION
OF FARMINGDALE, MONMOUTH	:	
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent initially registers outrage toward an initial decision, rendered without an evidentiary hearing, which failed to consider or to respond to her legal arguments, and which "***exclusively relied upon the number of days [she] was absent*** during the prior three years ***" to determine that she should be dismissed from her tenured position. (Respondent's Exceptions at pp. 2, 3) Moreover, respondent notes that, contrary to the ALJ's finding that she has not taught in the District since November 13, 1995, she has, after recent surgery, rehabilitated herself to the extent that she has resumed her place as a teaching staff member in the Board's District. (*Id.* at p. 2) Respondent incorporates by reference her brief in opposition to the Board's Motion for Summary Judgment.

Respondent primarily excepts to the ALJ's granting of the Board's Motion for Summary Judgment without allowing an evidentiary hearing for arguments. The cases cited by the Board, respondent avers, actually support her contention that she is entitled to an evidentiary hearing. Respondent reviews the case law advanced by the Board and observes that the decisions rendered in those tenure matters followed evidentiary hearings. In particular, respondent cites *In the Matter of the Tenure Hearing of Lena White*, 1991 *S.L.D.* 940, which provides guidance for the evaluation of chronic absenteeism and physical incapacity issues presented to the Commissioner of Education in tenure proceedings:

> In each case the necessary focus is not merely the number of days of absence but a consideration of the nature of the absences themselves. Beyond that the particular circumstances must be looked into. The inquiry, however, does not stop there. It is necessary to also assess the impact that the absences have had on the continuity of instruction during the period of time in which the absences occurred. There also logically must be some form of warning given to the employee that his or her superiors were dissatisfied with the pattern of absences which has come forward.*** (Respondent's Exceptions at p. 5, citing *White, supra,* at 955)

Respondent reasons that the ALJ could not possibly have considered the particular circumstances of her absences and their impact, if any, on the continuity of instruction during the relevant period. She avers that, in contrast to the cases cited by the Board, she has historically received excellent evaluations regarding her classroom performance. Moreover, she argues that the Board has not proffered any evidence to show that there were concerns about her classroom performance, or that she had been warned that her absences, which almost exclusively related to two service-connected injuries, were sufficient to warrant any form of disciplinary action. (Respondent's Brief at p. 15) Further, respondent claims that the Board failed to show that there

was, in fact, a disruption in the continuity of education for her students, in that the Board appears to have secured the services of a capable substitute teacher during respondent's absence. (*Id.*)

Respondent next excepts to the ALJ's failure to acknowledge that past decisions concerning physical incapacity matters have analyzed the affected teaching staff members' ability to resume work as of the date of the holding of the tenure charge hearings as a critical component of the tenure charge process. (Respondent's Exceptions at p. 6) Here, respondent notes that prior decisions have established that respondents in such tenure charge cases, where charges were sustained, were "***unable to prove that their physical/psychiatric related problems had been remediated to an extent that their prognosis was positive in the future for satisfactory attendance as teaching staff members." (*Id.*) By contrast, respondent affirms that she was approved to return to work in the 1995-96 school year and now performs her duties in her usual, exemplary and professional manner. (*Id.* at p. 7)

Respondent's third exception asserts that the ALJ erred in concluding that the mere number of days of absence were dispositive in tenure charge proceedings dealing with physical incapacity and further erred by refusing to consider the nature of the absences themselves and their effect, if any, on the continuity of instruction. (*Id.*) Respondent notes that the initial decision

> makes reference to one or two statements contained within Board generated documents, that *** were not subject to cross examination, regarding the issue of continuity of education during one of the years at issue and apparently concludes that the Board of Education established uncontrovertedly that there was a disruption in the continuity of education of [her] students. (*Id.* at p. 8)

Thus, respondent reasons that she was deprived of the opportunity to challenge the Board's contentions there were serious problems with the continuity of education during the time at issue.

Respondent additionally excepts to the ALJ's failure to respond to her legal arguments set forth in her aforementioned brief which contend that the certification of tenure charges herein were proscribed by *N.J.S.A.* 34:15-39.1 and *N.J.S.A.* 34:15-39.2, as interpreted by the New Jersey Supreme Court, and further failed to respond to her arguments that the certification of tenure charges against her violated the New Jersey Law Against Discrimination (LAD). (*Id.* at p. 9) Here, respondent contends that it appears that the Board's tenure charges are specifically directed at her worker's compensation benefit claims during the past three years. Respondent cites *Lally v. Copygraphics,* 173 *N.J. Super.* 162 (App. Div. 1980), aff'd 85 *N.J.* 668 (1981) to advance the proposition that retaliation is prohibited by the New Jersey Worker's Compensation Act, and to further comment that the remedies set forth in the Act are not exclusive. (Respondent's Brief at p. 23)

As to her discrimination claim, respondent argues that the LAD "has been extended to protect persons perceived or believed to be suffering from handicaps, whether or not the medical conditions from which they suffered, in fact, continue to handicap them.***" (Respondent's Brief at p. 25) Respondent notes that the ALJ has concluded, without factual support, that she was incapable of performing her duties "in the foreseeable future," while acknowledging that "the only medical documentation submitted to the Board of Education contemporaneously with the start of the 1996-97 school year unequivocally cleared Respondent for a return to work ***." (Respondent's Exceptions at p. 10) Respondent claims that the Board's action is in contravention of the LAD, in that the Board seeks to terminate her on the basis of a medically undocumented perception that she will not be able to return to work. (Respondent's Brief at p. 26) Yet, respondent points out, she already has returned to work.

Thus, respondent requests that the initial decision be reversed and remanded to the OAL for an evidentiary hearing. Respondent further requests that, if remanded, this matter be heard by another ALJ, in that "***Judge Tassini has obviously prejudged this case from the beginning starting with his suggestion to the Board of Education that a Summary Judgment Motion be filed during the course of a telephone pre-hearing conference.***" (Respondent's Exceptions at pp. 12, 13)

Upon careful and independent review of the record in this matter, the Commissioner finds that, inasmuch as the ALJ does not appear to have considered the arguments and claims advanced by respondent, notwithstanding that said arguments were fully briefed before him, this matter should be remanded for further proceedings as necessary to resolve the issues raised by respondent which were not considered herein. Further, if respondent maintains that the ALJ, who initially reviewed this matter, should not conduct further proceedings, she may so move before the ALJ, pursuant to *N.J.A.C.* 1:1-14.12.

Accordingly, the recommended order of the ALJ dismissing respondent from her tenured position is reversed for the reasons expressed herein. This matter is remanded to the OAL for further proceedings, consistent with the above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 21, 1996
DATE OF MAILING OCTOBER 22, 1996

471-96

471-96

V.M. and N.M., on behalf of their minor children, A.M. and A.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 21, 1996

could have been asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or state constitutional or civil rights claims, and specifically release the other party from any claims arising out of or related to these claims.

3. Petitioner will pay to the Respondent Board $897.80, which represents an amount equal to two weeks' tuition for Petitioner's two children, A.M. and A.M.

4. The pupils, A.M. and A.M., will be permitted to continue to attend District schools so long as they satisfy the statutory criteria set forth in N.J.S.A. 18A:38-1, et seq.

5. As a result of the foregoing, Petitioner hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

For Petitioner

Nestor L. Olesnycky, Esq.

For Respondent

Joanne L. Butler, Esq.

Dated: September 5, 1996

F:\APPS\SSOLDATA\WPJLB\176435.1

OAL DKT. NO. EDU 3563-96

V.M. and N.M., on behalf of their minor children, A.M. and A.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 21, 1996
DATE OF MAILING OCTOBER 22, 1996

472-96

472-96

LEONARD A. FEITELL AND LINDA FEITELL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 21, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1227-96

LEONARD A. FEITELL and LINDA J. FEITELL,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY,
Respondent.

Arthur C. Hopkins, Esq., for petitioners

David A. Wallace, Esq., for respondent

Record Closed: September 12, 1996 Decided: September 17, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 18, 1996 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. This matter was scheduled for hearings on August 27, 28 and 29, 1996. The parties informed the undersigned that they reached a settlement agreement and requested an adjournment of the hearings. On September 12, 1996, the parties submitted a settlement agreement and the record closed.

The parties entered into a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this settlement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

September 17, 1996
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

9/24/96
DATE

N/A
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 24 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

DAVID A. WALLACE, ESQ.
942 Route 517
P.O. Box 741
Hackettstown, NJ 07840
(908) 850-4494
Attorney for Respondent

SEP 12 11 25 AM '96

LEONARD A. FEITELL and LINDA J. FEITELL,	: STATE OF NEW JERSEY : OFFICE OF ADMINISTRATIVE LAW : OAL DOCKET NO.: EDUOS 01227-96N : AGENCY REF. NO.: 468-12/95
Petitioners,	:
vs.	:
GREEN TOWNSHIP BOARD OF EDUCATION,	: STIPULATION OF SETTLEMENT
Respondent.	:

The parties to this proceeding have voluntarily resolved all disputed matters and enter into this Stipulation of Settlement containing the following settlement terms:

1. Respondent has agreed, in conjunction with its new bus company, to establish a bus stop on Henry Road effective as of the commencement of the 1996-97 school year. In establishing this bus stop, respondent will make its best efforts to locate the stop as close to petitioners' driveway as is permissible under the Policies and Procedures for Pupil Transportation promulgated by the New Jersey State Department of Education.

2. The parties expressly recognize that respondent's willingness and ability to establish the bus stop in question results from the conflicting expert reports received

LAW OFFICES
DAVID A. WALLACE
942 ROUTE 517
P.O. BOX 741
HACKETTSTOWN, NJ 07840
(908) 850-4494

by the parties and the litigation uncertainty created thereby; and the new bus company's willingness to establish this bus stop and to alter the previously scheduled bus route to accommodate same, at no additional cost to respondent, something which could not have been achieved when this dispute arose and indeed not until the new bus company recently took over respondent's transportation contract.

3. The parties expressly agree that nothing in this settlement agreement shall be construed as altering or waiving either party's legal or factual positions, as constituting an admission that either party's positions are correct, or as establishing a precedent as to same or similar situations that may arise in the future.

4. Each party hereby expressly releases the other party as to any and all matters in controversy between them or any claims, arising at any time up to the date of this Stipulation of Settlement, including but not limited to attorneys fees, costs of litigation, and monetary damages.

5. Both parties have reviewed this Stipulation of Settlement with their attorneys, and represent that they fully understand the meaning of its provisions and their legal implications and enter into same knowingly and voluntarily. Both parties expressly represent that they enter into this Stipulation of Settlement freely and without fraud, undue influence or duress, and that they consider this agreement to be fair and reasonable.

6. Both parties have authorized their attorneys to sign this Stipulation of

Settlement on their behalf, as permitted by N.J.A.C. 1:1-19.1 (a) 1. Both parties recognize that this Stipulation of Settlement will not become final and effective until the Administrative Law Judge issues an initial decision incorporating the full settlement terms and approving the settlement, and the initial decision becomes final in accordance with the Administrative Procedure Act.

LEONARD A. FEITELL and
LINDA J. FEITELL

By: _____ Dated: 9/5/96
Arthur C. Hopkins, Jr., Esq.
Attorney

GREEN TOWNSHIP BOARD
OF EDUCATION

By: _____ Dated: 9/6/96
David A. Wallace, Esq.
Attorney

2c

OAL DKT. NO. EDU 1227-96

LEONARD A. FEITELL AND LINDA FEITELL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the terms of the settlement appear to already have been effectuated through respondent's establishment of a bus stop on Henry Road, effective at the start of the 1996-97 school year, and admonishes the parties that settlements of controverted matters are of no force or effect and may not be implemented absent the Commissioner's approval, pursuant to *N.J.A.C.* 1:1-19.1

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 21, 1996
DATE OF MAILING OCTOBER 22, 1996

476-96

476-96

BETSY KIDD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning guidance counselor appealed denial of her salary increment for unsatisfactory performance during the 1993-94 school year.

ALJ noted it was clear from all the testimony that petitioner was not performing her duties properly or promptly. Thus, ALJ affirmed the Board's withholding action, finding that petitioner failed to establish by a preponderance of credible evidence that the Board acted unreasonably in withholding her increment.

Commissioner adopted initial decision as his own. Petition was dismissed.

OCTOBER 28, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2153-95

AGENCY REF. NO. 444-11/94

BETSY KIDD,

Petitioner,

v.

BOARD OF EDUCATION OF THE PENNS GROVE - CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,

Respondent.

Richard Morris, Esq., for petitioner, (Richard Morris & Associates, attorneys)

John E. Bergh, Esq., for respondent

Record Closed: July 29, 1996 Decided: September 10, 1996

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Betsy Kidd, appealed from the denial of an increment for the reason given by the respondent BOE that her performance during the 1993-94 school year was consistently poor. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a

contested case, pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15, the act creating the OAL, N.J.S.A. 52:14F-1 to -13 and the regulation governing the withholding of salary increments. N.J.A.C. 6:24-4.1. The record remained open for an additional period of time due to petitioner's attorney's resignation from the bar after the plenary hearing was completed. Kidd did not elect to obtain new counsel.

In contested matters involving a school board's withholding of an increment, the burden of persuasion is on the teacher who must prove by a preponderance of the credible evidence that the Board's action in withholding the increment was unreasonable. Harrity v. Keansburg BOE, 94 N.J.A.R. 2d. (EDU) 376. Nevertheless, in the interest of justice and judicial economy the BOE was directed to proceed first with the introduction of evidence in this matter. N.J.A.C. 1:1-14.6(l). The evidence produced by the Board was compelling.

Judith Bossa, Director of Special Services, identified Betsy Kidd as a Guidance Counselor. She worked with Kidd and supervised her. Bossa was a member of the Child Study Team since 1988. She became Director in 1993. She testified that Kidd did not adequately complete referral forms for special services. For instance, on a referral form for one D.R. born 10/30/80, Kidd did not provide the mother's and father's work phone numbers. Kidd also turned in sloppy work in that she would cut and paste rather than submit neatly typed referral forms.

In addition, according to Bossa, Kidd appeared not to know procedures for obtaining referrals which had been established and in place before Bossa was employed. Kidd had been at the school at least a year prior to Bossa's employment. Bossa also said that Kidd failed to obtain parents signatures on forms required for intervention and was unfamiliar with confidentiality requirements.

Roy Webb, the principal at Kidd's school testified. He showed copies of poorly typed referral forms prepared by Kidd. Kidd asked that the typist not be reprimanded. When Webb requested that Kidd have certain forms typed, she refused to do so.

Webb offered samples of Kidd's paperwork. Some examples listed the wrong teachers, others listed the wrong room numbers.

Webb recalled a parents night in which Kidd left early without telling him, although she denies that she failed to tell him she was leaving. Webb also commented on Kidd's professionalism. She was occasionally given to outbursts in which she raised her voice.

Webb said that the quality of Kidd's work was such that they actually eliminated some forms in order to assist her in getting her job done.

Kidd complained to Webb that the allocation of work between her and another guidance counselor was unfair. Kidd testified at the hearing that she performed the vast majority of referrals for the Child Study Team. Webb reviewed the number of referrals assigned. Kidd performed eleven referrals during the school year, her colleague performed ten.

Webb also noted that Kidd permitted too many students at one time in her office. He especially criticized her for discussing failing grades with one student while others were present in her office. He received a complaint from a student that this had occurred.

Webb also received complaints from teachers that Kidd did not reply to their referrals for student information. He had complaints from parents that Kidd did not return telephone calls.

Webb reported that Kidd did not advise him that a student complained of "improper touching" to her. When he confronted her with the information that a student had complained, she said she "seemed to recall such an incident."

Richard Egrie is a reading teacher at the Middle School. He is a negotiations consultant, and works for the New Jersey Education Association (NJEA). He assists persons with grievances and arbitration. He was asked by Kidd to assist her in her relationship with the Administration. He attended a meeting with her. He observed tension and noted that Kidd felt as though she was "under siege." He also noted that she felt gender harassment. He presumes that the

Administration was correct in its criticism but he noted that members of the Administration were "angry." He said the Administration did not encourage Kidd when she did perform well.

Betsy Kidd testified that her work as a guidance counselor included counseling students, parent conferences, parent/teachers liaison, group counseling, progress reports and many additional duties. Kidd is an attractive, well dressed, middle-aged woman and obviously intelligent. She formerly worked for Judge Higginbotham. She evoked sympathy, however, because she was vague, sometimes appeared confused; even disoriented. She insisted that she performed the lions share of referrals to the Child Study Team, at least 80% of them. The records, however, clearly indicate that of the 21 referrals done in 1993-94, she did eleven and her colleague did ten.

She recalled the "touching" incident; said a female student was "getting even" with her boyfriend and that the complaint was "groundless." First she said she did not know she had to report every such incident to her principal. Later she said that she did know she had to report any such incidents.

She complained about Webb and said that he demeaned her and that she felt herself to be in a hostile, threatening atmosphere. She complained that the Administration changed procedures without anyone telling her. She said that she perceived "something was going on." She gave a long, involved rambling explanation about how she administered tests in the cafeteria. She said she went to see Richard Egrie because she "needed help." She said all she ever wanted were "clear and vivid copies." When confronted with errors on particular forms during cross-examination she said "it is so difficult to remember." She did remember that the Administration had a birthday party for someone and she wasn't invited. On another occasion she recalled going to a meeting and finding that everyone was eating Chinese food. Her feelings were hurt that no one had told her they would be eating take out.

In rebuttal Webb explained that he did not change procedures during the school year and in fact, he merely copied forms from old files of his predecessor to use for referral and retentions.

He recalled the birthday party. He said it was a surprise birthday party for him. He did not know about it in advance. He said staff often sent out for Chinese food.

It was clear from all the testimony that Kidd was not performing her duties properly or promptly. It was also clear that Kidd suffers from confusion. There was no attempt to explain her confusion by her or anyone else. Perhaps she is unaware that she is confused. She utterly failed to establish by a preponderance of the credible evidence that the Board's action in withholding her increment in 1993-94 was unreasonable. Her demeanor and vagueness at the hearing confirmed that the Board's action was correct.

I **AFFIRM** the action of the Board which withheld petitioner's increment for the 1993-94 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 10, 1996
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

9/13/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 17 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

BETSY KIDD

RICHARD EGRIE

FOR RESPONDENT:

JUDY BOSSA

ROY WEBB

DOCUMENTS IN EVIDENCE

FOR PETITIONER

P-1 LOAN OF MATERIAL MEMO WEBB TO KIDD 4/27/94

FOR RESPONDENT:

R-1 MEMO THOMAS TO BOSSA 12/3/93

R-2 COPY OF COURSE CHANGE REQUEST

R-3 WEBB TO FINCH 12/10/93

R-4 NOT IN EVIDENCE

R-5 MEMO: THOMAS TO KIDD, 12/17/93

R-6 BOSSA TO KIDD

R-7 MEMO: BOSSA TO KIDD

R-8 WEBB TO KIDD 2/17/94

R-9 WEBB TO KIDD 3/15/94

R-10 NOT IN EVIDENCE

R-11 P. R. LETTER, WEBB TO KIDD 3/15/94

R-12 WEBB TO EGRIE, 3/16/94

R-13 WEBB TO EGRIE, 3/18/94

R-14 KIDD TO WEBB, 3/28/94

R-15 NOT IN EVIDENCE

R-16 MEMO: KIDD TO WEBB 4/13/94, RE: G.M.

R-17 KIDD TO WEBB 4/18/94

R-18 WEBB TO KIDD 4/27/94

R-19 BOSSA TO KIDD 4/28/94

R-20 SUMMARY OF DISCUSSION 5/11/94 WEBB TO KIDD, RE: DETENTION OF STUDENTS

R-21 WEBB TO KIDD 5/12/94

R-22 KIDD TO BOSSA 5/13/94

R-23 WEBB TO KIDD 5/17/94

R-24 KIDD TO BOSSA RE: G.M.

R-25 MEMO: WEBB TO KIDD 5/26/94 OBSERVATION

R-26 KIDD PIP 6/6/94

R-27 LETTER BENDER TO KIDD 6/9/94

R-28 ANNUAL WRITTEN PERFORMANCE REPORT

R-29 RECOMMENDATION WITHHOLDING INCREMENT

R-30 A DIFFERENT D.R. WITH MISSING INFORMATION

R-31 JOB DESCRIPTION

R-32 NUMBER OF REFERRALS FOR THAT YEAR (21)

BETSY KIDD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the Board's denial of petitioner's increment was not improper.

It is well-settled that actions concerning increment withholding may not be upset unless they can be demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960) and *Harrity, supra.* Further, the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera* at 297. The Commissioner concurs that, based on the record before him, the District's decision to withhold petitioner's increment did not exceed

the reasonable use of the District's broad discretionary authority. Moreover, the Commissioner concurs that petitioner has not met her burden of establishing otherwise.

Accordingly, for the reasons articulated therein and further explicated above, the Commissioner adopts the initial decision of the OAL and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 28, 1996
DATE OF MAILING OCTOBER 29, 1996

477-96

477-96

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC	:	DECISION
COUNTY.	:	
	:	

OCTOBER 28, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL DECISION
DISMISSAL
OAL DKT. NO. EDU 4712-95
AGENCY DKT. NO. 111-4/95

ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

Viji Sargis, petitioner, *pro se*

Louis M. Flora, Esq., for respondent School District of the City of Paterson

Record Closed: August 22, 1996 Decided: September 17, 1996

This is a transcript of the administrative law judge's oral decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE: **ELINOR R. REINER**, ALJ:

PROCEDURAL HISTORY

On or about April 24, 1995, petitioner Viji Sargis filed a petition of appeal with the Commissioner of Education, requesting an inquiry into alleged violations of statutorily prescribed election procedures in the annual school election held in the School District of the City of Paterson. The matter was transmitted to the Office of Administrative Law (OAL) on May 10, 1995, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The case was assigned to the undersigned judge

on June 2, 1995, and a telephone prehearing conference was scheduled for July 6, 1995. That date was subsequently adjourned, and the telephone prehearing conference was held on August 22, 1995, at which time the issues were isolated. The issues, as stated in the prehearing order, are whether there were any improprieties and/or violations of law in the conduct of the school election held in the School District of the City of Paterson, Passaic County, on April 18, 1995, and, if so, what is the appropriate relief. Respondent was to file its answer to the petition on or before August 31, 1995. Respondent filed its answer to the petition on September 5, 1995. The parties were required to propound interrogatories and request the production of documents on or before September 29, 1995. Those interrogatories were to be answered on or before October 27, 1995. By letter dated August 31, 1995, enclosing a corrected copy of the prehearing order, the OAL notified the parties that the hearing was scheduled for March 22 and 29, and April 1 and 2, 1996

As stated above, the case was scheduled to be heard beginning March 22, 1996, at which point there was a pending motion filed by respondent in regard to the Commissioner's jurisdiction of this matter. Various cases pending before the OAL entailed the same jurisdictional issue. They were consolidated for determination by Chief Judge and Director Barbara Harned, who ruled that the Office of Administrative Law did in fact have jurisdiction over these cases. As a result, this matter was rescheduled for today's date. There is a motion, however, that is pending by respondent, the School District of the City of Paterson, and that motion originally related to the jurisdictional issue which has since been determined by Judge Harned. Still open, however, are the issues of mootness and dismissal of the claim due to petitioner's failure to provide discovery.

DISCUSSION

I have considered respondent's motion to dismiss on the grounds of mootness and failure to provide discovery, in addition to failure to respond to the motions and orders of this tribunal. Having done so, I am inclined to grant respondent's motion to

dismiss on the basis of failure to provide discovery. Let me begin by saying that in regard to the issue of mootness, I am not now inclined to dismiss on that basis. Petitioner has alleged a number of improprieties which really have at this point in time not been addressed. It may be that petitioner's allegations are out of time, it may be that they are moot, it may be that if the facts were known there would be a proper motion for summary decision filed. At this point in time, I am not inclined to grant respondent's motion to dismiss on the basis of mootness, because I do not think that I have enough facts at this juncture to make that determination.

However, I do have enough facts before me to conclude that the appropriate sanction regarding failure to answer discovery is to dismiss this matter. Let me refer you to *N.J.A.C.* 1:1-10.1(a), which sets forth the purpose and function of discovery: "The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary." In the instant case, had petitioner provided discovery, perhaps respondent could have made a more appropriate motion in regard to petitioner's claim. This could not be done because petitioner did not answer respondent's discovery request.

N.J.A.C. 1:1-10.1(b) indicates that it is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. If one looks at *N.J.A.C.* 1:1-10.2, any party may notify another party to provide discovery by one or more of the following methods: 1. written interrogatories; 2. production of documents or things; 3. (not relevant here) permission to enter upon land or other property for inspection or other purposes; and 4. requests for admissions, which were in fact requested here. Depositions can also be utilized under certain circumstances. But, of import here is *N.J.A.C.* 1:1-10.4, which provides that the parties in any contested case shall commence immediately to exchange information voluntarily, to seek access as provided by law to public documents and to exhaust other informal means of obtaining discoverable material. The parties shall

immediately serve discovery requests and notices and make discovery motions. No later than fifteen days from receipt of a notice requesting discovery, the receiving party shall provide the requested information, material or access or offer a schedule for reasonable compliance with the notice; or, in the case of a notice requesting admissions, each matter therein shall be admitted unless within the fifteen days the receiving party answers, admits or denies the request or objects to it pursuant to *N.J.A.C.* 1:1-10.4(d). Subsection (d) states that a party who wishes to object to a discovery notice shall place a telephone conference call to the judge and the other parties within ten days from receipt of the notice. A party who wishes to compel a response to a discovery notice shall place a telephone conference call to the judge and the other parties within ten days of the notice due date. A party who wishes to object to a discovery response shall place a telephone call to the judge and the other parties within ten days of receiving the response. If a party fails without good reason to place a timely telephone call, the judge may deny that party's objection or decline to compel the discovery. The parties shall complete all discovery no later than five days before the first scheduled evidentiary hearing or by such date ordered by the judge at the prehearing conference.

In the instant case, it is clear to me, and petitioner admits, that she in fact received respondent's discovery request. Whether that discovery request came on September 29 or on September 30, she has had the discovery request since on or about September 29, 1995, and has failed in almost one year to comply with that discovery request. We have had numerous conferences. There was a scheduled hearing date in March 1996, at which petitioner appeared, and still petitioner has failed to answer those interrogatories. In addition, a motion was filed by respondent seeking sanctions. Even after that motion was filed, and even at my request by telephone call of July 29 to respond to that motion, there has never been a response to respondent's set of interrogatories. In fact, there has never really been a real response to the motion from petitioner as to why she failed to answer those interrogatories. Petitioner says in the hearing today, "I failed to answer interrogatories because he already has the information." It is not petitioner's choice to proceed in that manner. I understand that petitioner is *pro se*. However, petitioner is able to cite numerous statutes, which she

feels that respondent has not complied with and which establish improprieties. She has to then comply with the rules of this tribunal, and she has in fact failed to do that. Applicable as a result is *N.J.A.C.* 1:1-10.5, the sanctions provision, which provides that by motion of a party or on his or her own motion, the judge may impose sanctions pursuant to *N.J.A.C.* 1:1-14.14 for failure to comply with the requirements of this subchapter. Before imposing sanctions the judge shall provide an opportunity to be heard.

If one looks at *N.J.A.C.* 1:1-14.14, it indicates that (a) for unreasonable failure to comply with any order of the judge or with any requirements of this chapter, the judge may: 1. Dismiss or grant the motion or application; 2. Suppress a defense or claim; 3. Exclude evidence; 4. Order costs or reasonable expenses; or 5. Take other appropriate case-related action. In this case, I am going to dismiss the petition for failure to comply with discovery. The discovery was supposed to be completed by petitioner by October 27, 1995. It has not been completed to date. There has been no reasonable response by petitioner as to why that has not been accomplished and, as a result, I do not believe that I have any recourse but to grant respondent's motion. So, I will ask respondent to prepare an order under the five-day rule. This decision will be incorporated into a written decision dismissing petitioner's claim.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended oral decision

was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

I, Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision as edited by the ALJ for form but not substance, rendered in the above matter on August 22, 1996.

DATE — ANNA M. LEGGETT

DATE — **ELINOR R. REINER**, ALJ

Receipt Acknowledged:

September 20, 1996
DATE — DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 24 1996
DATE — OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 4712-95

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the initial decision was mailed to the parties on September 24, 1996, and the exceptions were not filed until October 10, 1996. Accordingly, petitioner's exceptions are not considered herein.

Upon careful and independent review of the record in this matter, the Commissioner finds that this matter must be remanded to the OAL, having been decided upon the necessity to impose sanctions against petitioner for failure to comply with discovery requirements set forth at *N.J.A.C.* 1:1-10.4. The Commissioner recognizes he is not the agency head for purposes of review of sanctions imposed pursuant to *N.J.A.C.* 1:1-14.14 (*Laufgas v. Barnegat Twp. Board of Education*, 1988 *S.L.D.* 1905) and, thus, the findings and recommendations of the ALJ must be forwarded to the Director of OAL for review, in accordance with *N.J.A.C.* 1:1-3.2(c)4. Upon completion of such review, the Commissioner requests that this matter be returned to this agency for such further proceedings as are necessary to bring it to closure.

Accordingly, the instant matter is remanded to the OAL for the reasons stated above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 28, 1996

DATE OF MAILING OCTOBER 29, 1996

478-96

478-96

IN THE MATTER OF THE TENURE :

HEARING OF MICHELE SHUART, :

BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION

BOROUGH OF ELMWOOD PARK, : DECISION

BERGEN COUNTY. :

_____:

SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct against special education teacher for allegedly engaging in inappropriate conversation and touching with students.

ALJ found that the Board failed to prove the charges of unbecoming conduct by a preponderance of credible evidence. Moreover, in light of the testimony of the Board's witnesses, which testimony the ALJ found irrational, inconsistent or contradictory, the ALJ dismissed the tenure charges and ordered the Board to reinstate respondent with compensation.

Commissioner concurred with the conclusion of the ALJ that the Board did not meet its burden of proof with regard to the charges against respondent. Commissioner found no basis in the record to overturn the credibility assessments of the ALJ who observed the witnesses firsthand. In addition, the Commissioner concluded that the paucity of factual evidence in support of the charges necessitated their dismissal. Commissioner dismissed the tenure charges and directed that respondent be reinstated to her position and credited with all salary and emoluments due her.

NOVEMBER 1, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7290-94
AGENCY DKT. NO. 255-6/94

IN THE MATTER OF THE TENURE HEARING OF MICHELE SHUART, SCHOOL DISTRICT OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY

Patricia L. Ratner, Esq., attorney for petitioner (Wills, O'Neill & Mellk, attorneys)

Glenn T. Leonard, Esq., attorney for respondent (Matthew P. DeMaria, Esq., attorney)

Record Closed: July 18, 1996 Decided: September 11, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioner, School District of the Borough of Elmwood Park, Bergen County (the District), filed tenure charges against respondent, Michele Shuart (Mrs. Shuart). The District seeks to dismiss Mrs. Shuart from her position as a tenured special education teacher on charges of unbecoming conduct.

PROCEDURAL HISTORY

On May 11, 1994, the District filed tenure charges against Mrs. Shuart. On June 21, 1994, the District suspended Mrs. Shuart without pay. On June 22, 1994, the District issued a Certificate of Determination to certify the charges to the Commissioner of Education and it filed a Statement of Charges and Statement of Evidence. On June 27, 1994, Mrs. Shuart filed an Answer. On July 28, 1994, the Department of Education transferred this matter to the Office of Administrative Law for a hearing.

On December 16, 1994, the parties entered into a Consent Order for Reinstatement of Pay. On November 13, 1995, Mrs. Shuart filed a Notice of Motion to Take Oral Depositions. On November 30, 1995, the undersigned entered an Order denying that motion. On December 22, 1995, Mrs. Shuart filed a Notice of Motion for Dismissal of Tenure Charges for failure to serve answers to interrogatories. On December 26, 1995, the undersigned entered an Order denying that motion and compelling the District to serve answers to interrogatories. On January 25, 1996, Mrs. Shuart filed a Notice of Motion for Dismissal of Tenure Charges Or, Alternatively, For Sanctions Including Counsel Fees. The undersigned denied that motion.

The undersigned held a hearing on March 4, 5 and 6, 1996. Prior to the start of the hearing, counsel for Mrs. Shuart moved for the sequestration of witnesses. The undersigned granted that motion and sequestered the witnesses.

The record closed on July 18, 1996, after the submission of all post-hearing Briefs.

THE CHARGES AGAINST MRS. SHUART

The District accuses Mrs. Shuart of engaging in unbecoming conduct with 3 students, A.E., J.N. and R.C. The District filed 15 Charges against Mrs. Shuart alleging as follows:

Charge #1: She entered into and encouraged sexually provocative conversations with A.E.;

Charge #2: She used sexually provocative language with A.E.;

Charge #3: She permitted A.E. and J.N. to inappropriately massage or otherwise come in physical contact with parts of her body, including her back, shoulders and upper chest area;

Charge #4: She inappropriately permitted R.C. to massage her back, upper shoulders and breasts on different occasions;

Charge #5: She inappropriately encouraged R.C. to kiss her on the lips;

Charge #6: She inappropriately permitted R.C. to grab and rub her buttocks;

Charge #7: She inappropriately encouraged and permitted R.C. to perform digital vaginal penetration;

Charge #8: She inappropriately grabbed and touched and/or rubbed R.C.'s groin area and/or penis;

Charge #9: She inappropriately sat on R.C.'s lap

Charge #10: She inappropriately sat on A.E.'s lap;

Charge #11: She inappropriately grabbed and rubbed A.E.'s groin area and/or penis;

Charge #12: She inappropriately, and on several occasions, massaged A.E.'s inner thigh;

Charge #13: She inappropriately grabbed and rubbed A.E.'s buttocks;

Charge #14: She inappropriately fondled R.C.'s penis with her foot; and

Charge #15: She inappropriately allowed J.N. to massage her back, upper shoulders and neck.

At the close of the District's case, Mrs. Shuart's counsel moved to dismiss the Charges relating to R.C. because the District had not produced any evidence whatsoever to support those charges. The District's attorney admitted that the District presented no proofs with respect to these Charges. The undersigned granted the motion as to Charges #4, 5, 6, 7, 9 and 15 and dismissed those charges. These charges are very serious. The District accused Mrs. Shuart of inappropriately: (1) permitting R.C. to massage her back, upper shoulders and breasts on different occasions; (2) encouraged R.C. to kiss her on the lips; (3) permitted R.C. to grab and rub her buttocks; (4) encouraged and permitted R.C. to perform digital vaginal penetration; (5) grabbed and touched and/or rubbed R.C.'s groin area and/or penis; and (6) sat on R.C.'s lap. If Mrs. Shuart engaged in this very serious conduct, as the District alleged, it is incomprehensible to the undersigned that the District would present absolutely no evidence whatsoever to prove it.

Mrs. Shuart also moved at the close of the District's case to dismiss the charges relating to J.N. The District accused Mrs. Shuart of inappropriately allowing J.N. to massage or otherwise come in physical contact with parts of her body, including her back, shoulders and upper chest area. At the hearing, J.N. explained that on one occasion, Mrs. Shuart was in pain due to a pinched nerve in her neck. J.N.'s mother, who suffers from Lupus, also would get a pinched nerve in her neck and J.N. knew how to massage such pinched nerves. He offered to do so for Mrs. Shuart on that one occasion. Based upon this evidence, the undersigned granted Mrs. Shuart's motion and dismissed Charge #15 and part of Charge #3.

The only Charges remaining against Mrs. Shuart for determination are Charge #1 (that she entered into and encouraged sexually provocative conversations with A.E.), Charge #2 (that she used sexually provocative language with A.E.), part of Charge #3 (that she permitted A.E. to inappropriately massage or otherwise come in physical contact with parts of her body), Charge #8 (that she inappropriately grabbed and/or rubbed R.C.'s groin area and/or penis), Charge #10 (that she inappropriately sat on A.E.'s lap), Charge #11 (that she inappropriately grabbed and rubbed A.E.'s groin area and/or penis), Charge #12 (that she inappropriately and on several occasions,

massaged A.E.'s inner thigh), Charge #13 (that she inappropriately grabbed and rubbed A.E.'s buttocks) and Charge #14 (that she inappropriately fondled R.C.'s penis with her foot).

STIPULATED FACTS

The parties stipulated the following which I **FIND** as **FACTS** in this case:

1. The District hired Mrs. Shuart on June 9, 1981, effective August 1, 1981.

2. Mrs. Shuart is a tenured teacher of Special Education.

3. Mrs. Shuart obtained tenure on September 1, 1984.

4. The District filed a Statement of Charges against Mrs. Shuart on May 11, 1994.

5. The District suspended Mrs. Shuart without pay on June 21, 1994.

6. The District certified the charges against Mrs. Shuart on June 22,1994.

DISCUSSION OF OTHER TESTIMONY AND EVIDENCE

Mrs. Shuart graduated from Felician College in May 1981 with a Bachelor of Arts Degree. She majored in Special Education. She is a certified Elementary School Teacher and a certified Teacher of the Handicapped. When Mrs. Shuart began her employment with the District in August 1981, the District assigned her to the Gilbert Avenue School where she taught students who were classified as emotionally disturbed. Mrs. Shuart taught at the Gilbert Avenue School until 1986. While there, she received many satisfactory evaluations. The District never disciplined her for any reason and never withheld her increment. She also had good interactions with the Gilbert Avenue students and their parents. She received tenure on September 1, 1984.

In 1986, the District transferred Mrs. Shuart to the Elmwood Park Memorial Junior/Senior High School. She taught English, Language Arts, Science, Math and Social Studies to special education students in a self-contained classroom. The District initially assigned Mrs. Shuart to Classroom 113. In the 1990-91 school year, the District assigned Mrs. Shuart to Classroom 100. She referred to this classroom as the "fishbowl" because it was located in a heavily traveled area. The administration offices were nearby, there was a bathroom next door and there was a public telephone directly across from the door of this classroom. People constantly walked past and stopped into the classroom, including students, administrators, Child Study Team members and parents.

For the 1991-92 school year, the District again assigned Mrs. Shuart to Classroom 100. This time, however, she had to share the classroom with a Resource Room teacher, Jeffrey Walensky (Mr. Walensky). To offset her area from Mr. Walensky's area, Mrs. Shuart placed a five foot blackboard in the middle of the classroom. Upon entering, Mr. Walensky's desk and students were located to the right of the blackboard and Mrs. Shuart's desk and students were located to the left of the blackboard.

Although Mrs. Shuart and Mr. Walensky initially got along with each other, within a short period of time problems arouse between them. Mr. Walensky's students distracted Mrs. Shuart's students because Mr. Walensky did not teach his students. He would sit at his desk and not engage in any lesson plan. His students would get loud and Mrs. Shuart would have to go over to his side of the classroom and ask his students to be quiet.

Placing the blackboard in the middle of the classroom did not prove adequate. Mrs. Shuart testified that the distractions from Mr. Walensky's students were unbearable, the noise was constant and Mr. Walensky provided no discipline. She stated, in pertinent part:

> [W]e'd get spitballs, rubber bands, paper clips flying over to our side. Students on his [Mr. Walensky's] side...they would walk away from his side to come onto my side and try to sit in with my class to learn. They complained [to] me. Mr. Walensky did nothing. He just sat at his desk, he read books, he was doing personal things at his desk. He just would not get up...He sat at his desk. So the noise level, because he didn't do anything for

> discipline, created -- it was a war zone. It was very loud and the things being thrown over was very unbearable.

Mrs. Shuart complained about Mr. Walensky to several administrators, including the Director of Special Services, Mr. Garfole, and the Assistant Principal, Joe Castiglia (Mr. Castiglia). The District did not produce Mr. Garfole or Mr. Castiglia to contradict any of the testimony presented on Mrs. Shuart's behalf in this matter. The District also did not indicate that these people were unavailable to testify at the hearing. The Principal, Thomas Fedor (Mr. Fedor), testified on behalf of Mrs. Shuart. He testified that he had received no complaints about Mrs. Shuart and that he had no disciplinary problems with her or problems with her teaching style. He also testified that all of her evaluations were satisfactory.

In response to Mrs. Shuart's complaints, the District installed a divider in the classroom sometime in the beginning of January 1993. The divider did not reach the ceiling, nor did it extend from one end of the classroom to the other. It was about four to five feet from the front door and about two to three feet from the back wall. Mrs. Shuart could still see Mr. Walensky's desk when she sat at her desk on her side of the classroom and she and her students could still hear Mr. Walensky and his students. The divider did not alleviate the problems between Mrs. Shuart and Mr. Walensky and the problems worsened.

According to Mrs. Shuart, Mr. Walensky did not teach his students. As she described:

> Mr. Walensky in my opinion did never teach any of his students. He would allow them just to sit around either at their desks or this round table on this photograph here. There was never any learning going on. I tried my hardest to quiet them. A lot of times Mr. Walensky wouldn't even be in the room when the bell rang, he wouldn't even be at his post. Be out somewhere, in the bathroom or in the hallway. I would have to allow his students to come in because we were told by administrators never to allow the students to stay out in the hallway while the teacher's not in his or her room. So I brought them in and I said sit at your seats and please get to work. If you have something to do, something to catch up on, do it. Mr. Walensky would walk in after the second bell rang, he would just go right to his desk and not engage in any lesson plan. I started teaching my lesson and then noise level became so unbearable that I had to stop many a time in the middle of my

> lesson to kindly go over to his side, talk to him to say, please quiet down or at least can I say it to the children. Quiet down, we're trying to learn on this side. My kids were getting so frustrated. My students sat there. They'd have a pen or a pencil in their hand. They'd knock it down and go like this, I can't hear, I can't learn.

In addition, Mr. Walensky showed his students war movies that had nothing to do with his lesson plan. He also allowed his students to eat in the classroom despite the fact that he knew that the District did not permit eating in classrooms. Mr. Walensky even had pizza, Blimpy's and other food delivered to the classroom through the back window.

In late October or early November 1991, A.E. became a student in Mr. Walensky's class. It was after this that the relationship between Mrs. Shuart and Mr. Walensky seriously deteriorated. A.E. was one of the captains of the football team and he was on the wrestling team. Although the relationship between A.E. and Mr. Walensky began as a teacher/student relationship, they soon became much more friendly and Mr. Walensky would attend A.E.'s football games and wrestling matches. According to Mrs. Shuart, A.E. and Mr. Walensky eventually became "buddy-buddies." A.E. was everything to Mr. Walensky and he would not pay attention to his other students when A.E. was around. Mrs. Shuart overheard Mr. Walensky and A.E. discuss sexual things and she saw Mr. Walensky allow A.E. to look at a book that contained pictures of naked women with large breasts. She also overheard them talk about gambling.

A.E. also was sexually provocative toward Mrs. Shuart. He commented about her chest and buttocks and he told her that she looked sexy. He also told her that he wanted to go out with her and that his penis was bigger than her husband's penis. Mrs. Shuart told A.E. to get away from her and to go back to his side of the classroom. On one occasion, A.E. went behind Mrs. Shuart's desk and starting touching her. Mrs. Shuart pushed him away and accidentally hit him in his crotch area. Mrs. Shuart went to Mr. Walensky about her problems with A.E. and asked him to talk to and control A.E. Mr. Walensky did nothing. Mrs. Shuart also reported A.E.'s and Mr. Walensky's behavior to Mr. Castiglia and Mr. Garfole, but they did nothing as well. This testimony is undisputed.

Mrs. Shuart also testified that A.E. would roam the hallways and walk in and out of the classroom. Every time A.E. would walk into the classroom, he would call her names such as "fat whale," "Shamu," "fat cow," "asshole" or "bitch." He also frequently used the "F" word. Mr. Walensky did nothing to stop A.E. from doing this. Mrs. Shuart also observed A.E. around female students. She testified that:

> He was always touchy-feely. He put his arm around them from behind. And they'd be like, A., get away from me. Hey, what's the matter, don't you like me today? Feel my muscles. Come on, come on, I want to date you. You know. And then he would, you know remark to -- about their chest and try to grab them, their buttocks and stuff all the time in the hallways. It was disgusting.

Things came to a head between Mrs. Shuart and Mr. Walensky after the District notified Mr. Walensky that it was not renewing his contract for the next school year. A.E. found out about it and blamed Mrs. Shuart. One day, A.E. wanted to use a VCR to watch a boxing video with Mr. Walensky. Mrs. Shuart would not permit him to do so. Mrs. Shuart described, in pertinent part:

> So the next thing I heard [A.E.] say out blatantly: Who the fuck does she think she is? This is not her machine. I'm going to my buddy Persi and reporting her. With that he got so hostile and he ran out of the room. And I believe he went towards the way of Mr. Persi's office. Mr. Walensky did nothing. He just sat at his desk...I went up to Mr. Walensky's desk and I asked him, why are you allowing [A.E.] to do this? You know he is an uncontrollable person. You have to discipline him. He looked at me in the blankest stare...and he said to me, I want to see how much [A.E.] hated you...

Mrs. Shuart reported this incident to Mr. Castiglia. She also met with Mr. Garfole to discuss her problems with Mr. Walensky and A.E. Mrs. Shuart also complained to other teachers about the situation with A.E. and Mr. Walensky. The District presented no evidence to contradict this testimony.

One of the District's witnesses, J.N., corroborated Mrs. Shuart's testimony about Mr. Walensky and her problems with him. It must be remembered that the witnesses in this case were

sequestered. J.N. was a student in Mr. Walensky's class during the time the problems occurred. He testified that Mr. Walensky's class was not a good learning experience and that he did not learn anything in Mr. Walensky's class. He also testified that Mr. Walensky did not have control of the class and that Mr. Walensky would sometimes leave the class and go use the pay phone that was located across from the classroom. J.N also testified that Mr. Walensky did not teach his class and that sometimes J.N. taught the class and made entries into Mr. Walensky's plan book.

J.N. also testified that he had one period in Mrs. Shuart's class and that during that class, Mr. Walensky's students would be loud and obnoxious, making it hard for him to concentrate. J.N. also testified that he thought that Mr. Walensky and A.E. had a friendship outside of school because they would talk about things that they had done over the weekend. J.N. also testified that when A.E. was in the room, he and Mr. Walensky would "both go like a tag team against -- against her [Mrs. Shuart]" and they would call her a "fat whale" and "Shamu." It was clear to J.N. that Mr. Walensky and A.E. did not like Mrs. Shuart. In fact, J.N. heard A.E. say to Mrs. Shuart, "[I]'ll have your job. I'm going to go talk to my buddy, Mr. Persi [the Superintendent]."

With respect to A.E., J.N. testified that A.E. "is not a person that you'd trust for information." A.E. frequently talked about sex and he acted sexual toward girls. According to J.N., A.E. would touch girls and "He would grab their ass." He also heard A.E. talk to Mrs. Shuart about his body parts and say to her, "My penis is probably bigger than your husband's." Mrs. Shuart responded, "A.E. you're a disgusting little pig." J.N never observed Mrs. Shuart being friendly with A.E. in a sexual or improper way.

Another witness, L.R., corroborated J.N.'s and Mrs. Shuart's testimony. L.R. was a student in Mrs. Shuart's class at the time of the alleged incidents. She noticed that Mrs. Shuart and Mr. Walensky did not get along very well. and that they argued all the time. According to L.R., Mrs. Shuart "always has to discipline his [Mr. Walensky's] students because he obviously doesn't discipline -- he doesn't take care of his class." Mr. Walensky would allow students to come in late and he would allow them to leave without permission. Mr. Walensky's class was unorganized and very loud and he would allow J.N. to teach the class. According to L.R.:

> He [Mr. Walensky] would let people sit in his classroom, his side, talking aloud. He would make -- the students would be throwing -- fly objects across the room. It would be on our side. And doesn't do anything. So Mrs. Shuart would always have to respond, tell them to stop throwing things, start behaving, lower your voices or we're taking a test or really noise. They're really noisy. So she would tell them to like quiet down, we're taking a test.

At one point, L.R. heard Mrs. Shuart tell Mr. Walensky to start controlling his class. Mr. Walensky responded by getting mad and hitting a file cabinet. L.R. also testified that Mr. Walensky "looked like he was jealous" of Mrs. Shuart because students would talk to her and ask her for help.

L.R. also testified that Mr. Walensky was very friendly with A.E. She observed them in the hallway "arm in arm, you know, like a buddy." She testified that "They would talk about these weird conversations like sex or dirty laundry and girls and just -- something you wouldn't talk in school. Something that has nothing to do with school." Mr. Walensky also brought in a book that had a picture on its cover of a naked woman with two full-sized breasts. She saw Mr. Walensky hold up the book when students were in the classroom.

L.R. also testified that Mr. Walensky had a refrigerator and a coffee or tea pot on his side of the classroom. She also observed him doing his bills and reading catalogs during class. She also observed an incident between Mrs. Shuart, A.E. and Mr. Walensky where Mrs. Shuart would not permit A.E. to use a VCR to watch a boxing tape. According to L.R., "[A.]E. got very nasty with her and says, "Who the fuck do you think you are? This is not your fucking VCR." And he goes, "I'm going to my buddy, Mr. Persi and reporting this." L.R. further testified:

> [M]r. Walensky was just sitting there doing nothing. So Mrs. Shuart says who do you think you are letting a student yell to a teacher about a T.V. and a VCR, you should have no student yelling at anybody and swearing at anybody for something that's not your property. The next time you should discipline your student. And he told Mrs. Shuart that "I just wanted to see how much A.E. hated you."

L.R. also observed A.E.'s behavior toward Mrs. Shuart and Mrs. Shuart's behavior toward A.E. A.E. would sometimes grab Mrs. Shuart around the neck and she would push him

off. She heard A.E. say to Mrs. Shuart, "[O]h Mrs. Shuart, I want to massage you, I love you." She also heard A.E. give Mrs. Shuart compliments about her breasts and Mrs. Shuart got mad and responded, "[Y]ou keep this up, A.E., I'm reporting you...get out of my side of the room, I don't want to see you, you're a pig." L.R. also never saw Mrs. Shuart encourage A.E. to come over to her side of the classroom or call A.E. to her side of the classroom and ask for a massage. She also heard Mrs. Shuart ask Mr. Walensky not to let A.E. come over to her side of the room, but Mr. Walensky did not listen. L.R. also never saw A.E. put his hands on Mrs. Shuart or saw Mrs. Shuart rub A.E.'s crotch area or thigh. She also never saw Mrs. Shuart do anything sexually inappropriate with a student and she saw Mrs. Shuart treat students as any professional teacher would.

With respect to A.E., L.R testified that "he's a pervert." He would say to girls "oh, your tits looks good today, want to feel my muscles, I want you." He also would touch girls and "the girls would push him off, they would say get away from me, I don't want to be touched by you." According to L.R.:

> He [A.E.] always had a dirty mouth. He would always swear a lot, like bitch. He would call the -- sometimes he would call them bitch, fuck you, up yours.
>
> He [A.E.] would be very loud and he would distract the class. He always walked in and out. Like he walks in and goes, hi, Mr. Walensky and meanwhile we're doing our work and she [Mrs. Shuart] was teaching.

L.R. also testified that A.E. treated teachers disrespectfully, especially Mrs. Shuart. L.R. stated:

> He [A.E.] would swear to them. He swear to the teachers he didn't like. Like there was this one incident that he would call Mrs. Shuart a fat cow.
>
> He called her a fat cow. Like I said, she had two nice full-sized breasts. A bitch. Fat whale. Fat whale.

According to L.R., Mr. Walensky never told A.E. not to talk to a teacher that way. In addition, L.R. testified that Mr. Walensky called her "sweet cakes, sugar lips, sexy" and that made her feel uncomfortable. She reported Mr. Walensky's conduct to Mr. Garfole. Again, it must be noted that the District never produced Mr. Garfole to testify at the hearing to dispute L.R.'s testimony.

L.R. also heard A.E. tell three of his buddies "that everything about Mrs. Shuart was a lie, it was just -- he was trying to get Mrs. Shuart fired and Mr. Walensky put him up to this." She also heard A.E. tell sexual type stories about other people and she described him as follows:

> [H]e's a pig because he would read books, sexual books, tasteless pictures, he's very flirtatious. He would talk sexually towards the female students. And he would treat them inappropriate. He talks -- he -- disrespects the teachers he doesn't like. He would call Mrs. Shuart bad names like bitch and fat cow, a whore. He's very -- he thinks he's a macho man. He's very conceited. He thinks he's like God's gift. He thinks he's better looking than anybody else. He would tell the girls to feel his muscles. He would tell the girls your tits look good today. He would make the girls feel very uncomfortable.

Finally, L.R. testified that on a few occasions, she saw Mr. Walensky have pizza delivered through the window of the room for himself and his students. She also admitted that she did not like A.E. and Mr. Walensky. Despite her dislike, she insisted that everything she said about them was the truth and that she would not lie about anybody.

Two teachers also testified, Dawn Sova (Ms. Sova) and Marlene Matsko (Ms. Matsko). Ms. Sova testified that she saw A.E. annoying girls in the hallway and being aggressive in touching them. A.E. would grab their buttocks, stomachs and sides and she would tell him to stop. A.E. stood out from other students in terms of his use of obscenities and his sexual groping type of behavior.

Ms. Sova also testified about an incident involving A.E. and 2 other students. Ms. Sova and 2 teachers were monitoring in-school suspension. Mr. Walensky also was present at the time. A.E. began to use profane language and she told him to stop. Ms. Sova then explained, in pertinent part:

> [F]inally, I think D.L. pulled a rubber finger out of his pocket. It was a rubber finger on a key chain and A.E. took it and said it was a great time to make use of it and he first raised it in the air as if it was his middle finger...Then he took it and started to stroke D.L. on the side of the face with it. Then he started to stroke his groin with it as if he were stroking his groin, right across his -- you know, his pants,...A.E. kept on playing with it, stroked around his buttocks a bit, around the front as if he were touching himself with a rubber finger...The other two teachers may have less strong stomachs than I do or maybe they just couldn't take it as -- you know, because one ran out of the room crying. She couldn't stand it any more. The other ran out to comfort her. Mr. Walensky sat in the corner and kept his head down.

Ms. Sova and the other teachers reported this incident. As a result, A.E. received an immediate suspension. Despite the suspension, A.E. remained in school. This concerned Ms. Sova because A.E.'s behavior was very erratic, he would fly off the handle and he was difficult to control. Ms. Sova also stated that A.E. was treated differently than other students.

Ms. Matsko testified about an incident she had with A.E. in the hallway. She described it, in pertinent part, as follows:

> [I]'ve had three babies in the past five years, so I guess I got a reputation for making babies, and he came up to me and said that I should have waited, he would have given me a baby. And in all the years, as well as I've known the students, that's been the most brazen remark. And I even told him that that was very inappropriate and I had reported it to Special Services. On occasion he would whistle at me or whatever and I told him that that made me feel very uncomfortable.

Ms. Matsko also testified that she observed A.E. stand in the hallway and "make grunts and groans and moans and physical and sexual gestures" to female students. She also heard him make graphic comments to some female students and she observed him walking around with a tape recorder and asking students to say graphic things into it. She further testified that A.E. was not intimidated by a teacher's presence and he liked attention.

Mrs. Shuart also spoke to Ms. Matsko about an incident between her, A.E. and Mr. Walensky. Mrs. Shuart stated to her that A.E. went on Mrs. Shuart's side of the classroom and she asked him to go back to Mr. Walensky's side. Mrs. Shuart was very upset because A.E. had yelled a profanity and Mr. Walensky found it humorous.

Ms. Matsko also testified that in all of her years of teaching she never heard of any sexual misconduct or inappropriateness by Mrs. Shuart toward students. She testified, in pertinent part, that:

> [I]'ve been there eighteen years and I knew [Mrs. Shuart] ever since she was there and that's what I found so surprising, why would things come out of the blue when she had had several students before that and I'm proud to say that I had a very, very close relationship with the kids and very often I hear things where the kids might not feel comfortable telling someone else.

Mr. Walensky, A.E., J.N. and P.F. testified on behalf of the District. The undersigned had an opportunity to closely observe all of these witnesses during their testimony. With respect to Mr. Walensky, the undersigned observed that during his testimony many of his answers were evasive and he clearly was uncomfortable and reluctant in giving his answers. The District may argue that Mr. Walensky acted this way because he was testifying under subpoena. Having had the opportunity to closely observe Mr. Walensky, however, the undersigned has determined that it was much more than that. Mr. Walensky was evasive, uncomfortable and reluctant because he simply was not telling the truth. This clearly is evidenced by the testimony of other witnesses, including the District's witnesses, who contradicted much of Mr. Walensky's testimony.

For example, the District did not permit refrigerators in the classrooms. Mr. Walensky testified that there was a refrigerator in the classroom but that it was located on Mrs. Shuart's side of the classroom, not on his side. The District's witnesses, A.E., J.N. and P.F. all testified that the refrigerator actually was on Mr. Walensky's side of the classroom. Although having a refrigerator in the classroom may appear to be a very insignificant issue in this matter, it is such a minor issue that lying about it raises doubt about the veracity of the remainder of Mr. Walensky's testimony.

Mr. Walensky also denied having brought any pornographic materials into the classroom, including the book with the picture of naked women with large breasts. A.E. testified, however, that Mr. Walensky did bring that book into the classroom and showed it to A.E. and to the other male students in the classroom. J.N. testified that he saw a deck of pornographic cards on Mr. Walensky's desk. Mr. Walensky also denied having called Mrs. Shuart a "fat cow," "fat whale," "fat bitch" and "Shamu." A.E. and J.N. testified that Mr. Walensky called Mrs. Shuart these names in front of other students. Mr. Walensky further denied having food delivered through the back window of the classroom. A.E. and J.N. testified that Mr. Walensky had food delivered through the back window.

In addition, Mr. Walensky claimed that he reported Mrs. Shuart's conduct to Mr. Garfole, but that Mr. Garfole would not listen to him. He also claimed that the day before the District dismissed him, A.E. gave him a tape recording of Mrs. Shuart that allegedly proved Mrs. Shuart's misconduct toward A.E. The witnesses kept mentioning this tape recording at the hearing, but the District did not produce it. If this tape recording actually proved the serious allegations against Mrs. Shuart, the District should have produced it.

The District's own witnesses contradicted much of Mr. Walensky's testimony. Due to these contradictions and due to Mr. Walensky's demeanor on the witness stand, it is impossible for the undersigned to believe any of his testimony. In addition, there was no testimony whatsoever from Mr. Garfole, Mr. Persi or any teacher or administrator from the District to corroborate any of Mr. Walensky's testimony. The District also did not produce the alleged tape recording. In view of the allegations made against Mrs. Shuart in this case, it is incomprehensible to the undersigned that the District did not produce such evidence. I, therefore, **FIND**, that Mr. Walensky's testimony is not credible.

A.E. testified that Mrs. Shuart would call him over to her side of the classroom and ask him to massage her. He would massage her on her side of the classroom while she was sitting at her desk. He massaged her shoulders and shoulder blades. After he massaged her, Mrs. Shuart would take his hands and pull them down to the tops of her breasts. A.E. also testified that Mrs. Shuart would pinch his buttocks or crotch area and that she touched his crotch area several times. Mrs. Shuart also would sit on his lap, rub his thigh with her left hand and grab his penis and

testicles. There were other people in the classroom at the time, including Mrs. Shuart's students and Mr. Walensky, who saw what was happening. The District produced none of those students to testify at the hearing.

A.E. also testified that he and Mrs. Shuart talked about going to a hotel. She also would make comments about his body and said that he "had a good bulge." With respect to the tape recording of Mrs. Shuart, A.E. testified that he made the tape to have proof of what was going on in the classroom. He played the tape for Mr. Walensky. Mr. Walensky was upset about the tape recording because Mr. Walensky's voice was on it and because it sounded like a party was going on in the classroom. Curiously, A.E. did not say that Mr. Walensky was upset about the tape recording because it proved Mrs. Shuart's alleged conduct. A.E. also did not say that he no longer had the tape recording. Again, it is incomprehensible that the District made no attempt to produce it at the hearing if, in fact, it proved the allegations against Mrs. Shuart.

With respect to the incident described by Ms. Sova, A.E. denied using profanity towards the teachers. He also denied being suspended for that incident. A.E. admitted that the hallway in front of the classroom was a busy place and that other students and teachers would come into the classroom. Contrary to Mr. Walensky's testimony, A.E. also stated that J.N. taught Mr. Walensky's class once and that Mr. Walensky's students, including A.E., threw spitballs over the divider.

A.E. also admitted that he might have said to Mrs. Shuart that he was going to tell Mr. Persi what was happening. Contrary to Mr. Walensky's testimony, A.E. also stated that Mr. Walensky told him that Mrs. Shuart had it in for Mr. Walensky, she was trying to get him fired and she had complained to Mr. Garfole about him. A.E. also saw the problems between Mrs. Shuart and Mr. Walensky and he knew about a month before he made the allegations about Mrs. Shuart that Mr. Walensky would not be coming back the next year.

A.E. also admitted that Mr. Persi threatened that if he did not tell what was going on, he would take A.E. to Court and they would call the Division of Youth and Family Service. A.E. later fled from New Jersey to avoid testifying before a Grand Jury. He came back to New Jersey after his mother told him that the criminal case against Mrs. Shuart was not going any further.

P.F. testified that Mrs. Shuart would call A.E. over to her side of the classroom and ask him to massage her. Contrary to A.E.'s testimony, P.F. testified that the massages took place towards the center of the room by the door where all of them could see, that sometimes Mrs. Shuart was standing and that A.E. would massage her back and shoulders and sometimes she would pull down his hands to her breasts. On one occasion, he and most of the class observed Mrs. Shuart rub A.E.'s penis until he was erect. A.E. never mentioned this in his testimony. Mrs. Shuart also knocked on A.E.'s penis with a closed fist and said, "You're not a boy, you're a man." P.F. also testified that he heard A.E. and Mrs. Shuart having sexually oriented discussions. Mrs. Shuart would ask A.E. to sit on her lap and she would feel his chest. This always happened in the middle of the classroom and sometimes on her side. Again, A.E. never mentioned this in his testimony.

DISCUSSION AND CONCLUSION

The District charges Mrs. Shuart with unbecoming conduct. The District bears the burden of proving the charges of unbecoming conduct by a preponderance of the credible evidence. *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 12 (App. Div. 1974). In determining whether this standard of proof has been met, the credibility of the witnesses must be weighed. Credibility contemplates an overall assessment of a witness's story in light of its rationality, internal consistency and manner in which it hangs together with other evidence. *In the Matter of Schulman,* 92 *N.J.A.R.* 2d (BDS) 16, 27, citing *Carbo v. United States,* 314 *F. 2d* 718 (9th Cir. 1963). The term has been defined as testimony that must proceed from the mouth of the credible witness and must be such as our common experience, knowledge and common observation can accept as probable under the circumstances.

Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. *In the Matter of the Tenure Hearing of Boyd,* 93 *N.J.A.R. 2d* (EDU) 445, 451, citing *In Re Perrone*, 5 *N.J.* 514 (1950). The finder of fact may accept or reject, in whole or in part, the testimony of any witness. *Id.* at 452, citing *Application of Howard Sav. Bank,* 143 *N.J.Super.* 1 (App. Div. 1976).

In this matter, the District's case against Mrs. Shuart is based primarily upon the testimony of Mr. Walensky, A.E. and P.F. The undersigned already has found Mr. Walensky's testimony not credible. In evaluating the testimony of A.E. and P.F., it is clear to the undersigned that their testimony also is not credible. Their testimony is irrational and inconsistent and it is contradicted by each other's testimony and/or by other evidence presented at the hearing. In fact, A.E.'s testimony is so unbelievable that it is understandable why he fled from New Jersey to avoid testifying before a Grand Jury.

The undersigned also looked very closely at the testimony of the witnesses who had no personal interest in this litigation, including those witnesses produced by the District. Those witnesses corroborated Mrs. Shuart's testimony. They also painted a true picture of Mr. Walensky as an incompetent teacher and of A.E. as a student whom the District allowed to get away with improper conduct, including improper sexual behavior toward Mrs. Shuart and toward other female teachers and students. The only thing the District did, despite Mrs. Shuart's numerous complaints, was install a divider in the classroom. It never disciplined A.E. for his conduct toward Mrs. Shuart and it did nothing to prevent his improper behavior toward her.

In addition, as mentioned previously, the District could have and should have produced other evidence to prove the allegations against Mrs. Shuart. Their failure to do so leads the undersigned to conclude that witnesses, such as Mr. Persi, Mr. Garfole and other administrators whose names were mentioned throughout the hearing, could not corroborate the evidence presented by the District or they had evidence favorable to Mrs. Shuart. Again, with such serious charges, the District should have done everything possible to prove the allegations against Mrs. Shuart. If the charges had any merit to begin with, this should have been done.

Finally, Mrs. Shuart had a spotless record in the District. She never had a poor evaluation and the District never disciplined her for any reason. She was an exemplary teacher with no record of any improper conduct whatsoever. She also taught in a classroom that indisputably was a "fishbowl." Given the nature and location of this classroom, it is impossible to believe that Mrs. Shuart could have engaged in the conduct the District alleges she engaged in.

For all of the reasons set forth herein, I **FIND** and **CONCLUDE** that Mrs. Shuart did not engage in unbecoming conduct.

ORDER

I, therefore, **ORDER** that the tenure charges filed against Mrs. Shuart be and hereby are **DISMISSED.** I further **ORDER** the District to reinstate Mrs. Shuart to her teaching position and to pay her any and all benefits to which she would have been entitled if the District had not suspended her without pay, including, but not limited to, any and all back pay.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the Judge and to the other parties.

Sept. 11, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

Sept. 17, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 17 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

Michele Shuart, petitioner

Joan Perrapato

Dawn B. Sova

Marlene Matsko

Thomas E. Fedor

L.R.

For Respondent:

Jeffrey K. Walensky

J. N.

A.E.

P.F.

Exhibits

C-1	Memo, dated October 18, 1991, from Eileen Glowski to Donna
C-2	Letter, dated April 14, 1993, from Thomas E. Fedor to Marissa Murgolo
C-3	Letter, dated October 2, 1985, from V.A. Farese to John M. Santini
C-4	A.E.'s Cumulative Student File
S-1	Photograph of Room Divider
S-4	Statement of A.E., dated April 27, 1993
S-5	Statement of P.F., dated September 8, 1993
S-6	Letter, dated April 15, 1993 from Patricia Castelli, Dawn Sova and Sally Tor to Thomas Fedor
S-8	Michele Shuart's Personnel File
S-9	Photograph of Classroom with view of Jeffrey Walensky's desk

S-11	Photograph of Classroom with view of Michele Shuart's desk
S-12	Michele Shuart's Log of Ongoing Problems
S-13	Michele Shuart's Log of Ongoing Problems
S-14	Letter from L.R.'s parents, dated March 27, 1984
S-15	Letter, dated March 27, 1994, from Paul C. Scillia to S. Calafiore
EP-1	Drawing of Classroom

OAL DKT. NO. EDU 7290-94

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHELE SHUART,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF ELMWOOD PARK,	:	DECISION
BERGEN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and replies thereto of respondent were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

The Board excepts to the credibility determinations of the Administrative Law Judge (ALJ), averring that such determinations are not supported by the record and are based upon factual inaccuracies. In this connection it argues that the ALJ accepts respondent's testimony as true, notwithstanding numerous conflicts in testimony among respondent and the witnesses testifying on her behalf, while, at the same time, "***the greater [consistency] ***of the three sequestered witnesses on behalf of the District is not even discussed by the ALJ.***" (Board's Exceptions at p.1) The Board points out as being significant in this matter that despite respondent's testimony that she repeatedly reported the conduct of A.E. to administrators who failed to act on her reports, respondent never contacted A.E.'s parents; she never sent him to the principal; and she never put any of her alleged reports to administrators in writing. It, therefore,

contends that "***[t]he lack of one writing of this nature and any disciplinary sanctions by respondent is sufficient to discredit all respondent's testimony that she reported to anyone." (*Id.* at p. 3)

The Board further asserts that the ALJ crossed the line between judge and advocate and "***otherwise exhibited an intemperate demeanor in this action indicative of having prejudged its conclusion***. (Id. at p. 6) As examples of this contention, the Board offers selected transcript citations where it avers: the judge questioned witnesses in a manner which was only appropriate for respondent's counsel; she argued with petitioner's attorney; she frustrated the cross-examination of Witness Dawn Sova by petitioner's counsel; she improperly allowed the production of A.E.'s pupil records, over the objection of petitioner's counsel, without a court order; she drew generic conclusions about A.E.'s classification and drew several improper conclusions about classified students; and she improperly sought to rehabilitate respondent's witness. The Board argues that, as a result of this obvious error, the Commissioner must make an independent determination on all the charges and the credibility of all of the witnesses.

In response, respondent contends that the Board's assertions with respect to the ALJ's credibility determinations are without foundation. Respondent advances that her June 18, 1996 brief and July 9, 1996 letter responding to the Board's submission to the ALJ, set forth specific transcript references clearly "demonstrating the lack of credibility of the [Board's] witnesses." (Respondent's Reply Exceptions at p. 1) She further maintains that the Board's contentions that the ALJ in this matter exhibited bias or advocacy and displayed an intemperate demeanor are similarly misplaced and are, in actuality, "***merely attempts to bolster the general argument that credibility findings in the Court's decision are not supported by the

record.***" (*Id.* at p. 2) Respondent argues that "[a] review of the transcript puts into focus the very apparent weakness of all [of petitioner's] Exceptions." (*Id.* at p. 5) Respondent urges that her unblemished record in the District and the total lack of evidence to support the Board's charges require the Commissioner to adopt the decision of the ALJ.

Upon a careful and independent review of the record in this matter, which included the transcripts of the three days of hearings, the Commissioner agrees with the conclusion of the ALJ that the within Board has not met its burden of proof with regard to the instant charges against respondent. Although this matter turns to a great extent on the credibility of witnesses and the weighing of evidence, the Commissioner is satisfied, based on the record as a whole, that the ALJ considered all testimony and weighed it according to the credibility of the witnesses and the plausibility of its content. The Commissioner finds no basis in the record for overturning the credibility assessments of the ALJ who, in addition to hearing all of the proffered testimony, had the benefit of observing the witnesses firsthand. As such, the Commissioner concurs that the Board has failed to establish by a preponderance of the credible evidence that respondent has engaged in unbecoming conduct, and the Board's exception arguments to the contrary are found to be without merit. With respect to the Board's protestation that the within ALJ crossed the line between judge and advocate and "***otherwise exhibited an intemperate demeanor in this action indicative of having prejudged its conclusion***" (Board's Exceptions at p. 6), the Commissioner finds and determines that a comprehensive reading of the hearing transcripts clearly belies such an assertion.*

The Commissioner initially emphasizes that he is assiduous in his belief that educators, by virtue of the unique position they occupy, must be held to an enhanced standard of

* Regarding the Board's exception argument that the records of A.E. were inadmissible in the within matter, the Commissioner finds that the ALJ's authority to access these records and the limited purpose for which such records were utilized were succinctly addressed by the ALJ in hearing transcripts. (See Tr. 2 (3/5/96) at pp. 112-117.)

behavior and must continually realize that they serve as role models to students and the community. When it is established that these individuals have failed to fulfill their obligations and violated the public trust, it is imperative, to assure the continued confidence of the students and the community in the state's educational system, that they be subject to appropriate penalty for their behavior. While fully mindful of the importance of these considerations, the Commissioner is also cognizant that teaching staff members should not be placed in the position of having to defend themselves against unwarranted charges. In the instant matter, the Commissioner observes that the Board brought 15 extremely serious charges of misconduct against respondent, while the totality of factual evidence it advanced in support of these charges was woefully deficient. As aptly stated by the ALJ:

> ***the District's case against Mrs. Shuart is based primarily upon the testimony of Mr. Walensky, A.E. and P.F. The undersigned already has found Mr. Walensky's testimony not credible. In evaluating the testimony of A.E. and P.F., it is clear to the undersigned that their testimony also is not credible. Their testimony is irrational and inconsistent and it is contradicted by each other's testimony and/or by other evidence presented at the hearing. In fact, A.E.'s testimony is so unbelievable that it is understandable why he fled from New Jersey to avoid testifying before a Grand Jury.
>
> The undersigned also looked very closely at the testimony of the witnesses who had no personal interest in this litigation, including those witnesses produced by the District. Those witnesses corroborated Mrs. Shuart's testimony. They also painted a true picture of Mr. Walensky as an incompetent teacher and of A.E. as a student whom the District allowed to get away with improper conduct, including improper sexual behavior toward Mrs. Shuart and toward other female teachers and students. The only thing the District did, despite Mrs. Shuart's numerous complaints, was install a divider in the classroom. It never disciplined A.E. for his conduct toward Mrs. Shuart and it did nothing to prevent his improper behavior toward her.
>
> In addition, as mentioned previously, the District could have and should have produced other evidence to prove the allegations against Mrs. Shuart. Their failure to do so leads the undersigned to

> conclude that witnesses, such as Mr. Persi, Mr. Garfole and other administrators whose names were mentioned throughout the hearing, could not corroborate the evidence presented by the District or they had evidence favorable to Mrs. Shuart. Again, with such serious charges, the District should have done everything possible to prove the allegations against Mrs. Shuart. If the charges had any merit to begin with, this should have been done. (Initial Decision at p. 19)

Moreover, the Commissioner finds it particularly troubling that the Board, by its own admission, presented no evidence whatsoever to substantiate six of the 15 charges it had advanced. As such, the Commissioner finds and concludes that the paucity of factual evidence in support of the charges in this matter necessitates their dismissal.

In light of this legally mandated result, the Commissioner is compelled to remind this Board that prior to instituting tenure charges against a teaching staff member, a board, which must maintain the public trust and is accountable for the judicious use of public funds in the conduct of its activities, must be cognizant of, and pragmatic with respect to, the cost and consequences of advancing such charges in the face of insufficient evidence available to support them.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein. The within tenure charges are hereby dismissed and the Commissioner directs that respondent be reinstated to her position and credited with all salary and emoluments due her as a result of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 1, 1996
DATE OF MAILING NOVEMBER 1, 1996

478-96

EDU #7290-94
C # 478-96
SB # 87-96

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHELE SHUART,	:	
BOARD OF EDUCATION OF THE	:	STATE BOARD OF EDUCATION
BOROUGH OF ELMWOOD PARK,	:	DECISION
BERGEN COUNTY.	:	

Decided by the Commissioner of Education, November 1, 1996

For the Petitioner-Appellant, Glenn T. Leonard, Esq.

For the Respondent-Respondent, Wills, O'Neill & Mellk (Patricia L. Ratner, Esq., of Counsel)

After a thorough review of the record, including the transcripts of the hearings held in the Office of Administrative Law in this matter, we affirm the decision of the Commissioner of Education for the reasons expressed therein. We fully agree with the Administrative Law Judge and the Commissioner that the Elmwood Park Board has failed to meet its burden of demonstrating the truthfulness of the tenure charges certified against respondent by a preponderance of the credible evidence.

Moreover, in view of our concurrence with the Commissioner's finding that the testimony presented against respondent by Jeffrey K. Walensky, a teaching staff member formerly employed by the Elmwood Park Board, was not credible, and given the serious allegations made against Walensky during the hearing, including testimony

3/5/97

that he had shown a pornographic magazine to students in class, we direct that this matter be forwarded to the State Board of Examiners for any action against Walensky it deems appropriate pursuant to N.J.A.C. 6:11-3.6. See Arthur Hansen v. Board of Education of the Township of Nutley, decided by the State Board, March 7, 1990, request for reconsideration denied, May 2, 1990.[1]

March 5, 1997

Date of mailing MAR 0 7 1997

[1] We note that N.J.A.C. 6:11-3.6(c) provides that the State Board of Examiners may issue an order to show cause on its own initiative where it has reason to believe that grounds for revocation or suspension of a teaching certificate exist.

483-96

483-96 SEC

IN THE MATTER OF	:	
EDWARD VANDERBECK, OAKLAND	:	COMMISSIONER OF EDUCATION
TOWNSHIP BOARD OF EDUCATION,	:	DECISION
BERGEN COUNTY.	:	
	:	

November 6, 1996

IN THE MATTER OF	:	
EDWARD VANDERBECK, OAKLAND	:	COMMISSIONER OF EDUCATION
TOWNSHIP BOARD OF EDUCATION,	:	DECISION
BERGEN COUNTY.	:	
	:	

Upon a Motion for Reconsideration filed before the Commissioner of Education on October 11, 1996, this matter again comes before the Commissioner in order that he may review the comments offered on behalf of Mr. Vanderbeck in response to the School Ethics Commission's recommendation that he be reprimanded for having violated the School Ethics Act. Although such comments were received outside the 13-day submission period provided by the Commission, in light of his counsel's certification that the lateness was "[d]ue to an error in [his] office ***" rather than any oversight on the part of Mr. Vanderbeck (Sayovitz Certification at pp. 1, 2), and mindful that it may be "contrary to the interests of justice" to deprive Mr. Vanderbeck of the opportunity to consider the arguments submitted on his behalf "***because the law firm inadvertently failed to fulfill its responsibilities toward him," *Arthur Krupp v. Board of Education of the Union County Regional High School District No. 1, Union County*, 1991 *S.L.D.* 2568, 2569, the Commissioner granted the Motion for Reconsideration.

In that a good portion of the comments submitted on behalf of Mr. Vanderbeck recapitulate the material facts and argue against a finding that, under the particular circumstances of this matter, no violation of the Act should be found, the Commissioner, once again

underscores that he is without jurisdiction to review the factual findings and conclusions of law of the Commission. Rather, where a violation is found, the Commissioner may only review the Commission's recommended penalty and "***shall then act on the commission's recommendation regarding the sanction." *N.J.S.A.* 18A:12-29c. Accordingly, comments as to the Commission's recommended sanction are reviewed below.

Mr. Vanderbeck argues that, in the event a violation of the School Ethics Act is found, the imposition of any penalty upon him is excessive, in that the violation is *de minimus*. (Vanderbeck's Comment at p. 5) Here, Mr. Vanderbeck urges the Commissioner to note that his "single action" was a statement made after negotiations were completed. (*Id.*) The statement, continues Mr. Vanderbeck, was made against the interest of his spouse and he gained nothing. Moreover, the statement "***was made in clear view of the public, guaranteeing that no undue influence could be achieved or perceived." (*Id.*) Mr. Vanderbeck reasons that "[t]he Commission's dismissal of the allegations that he attempted to influence the negotiation process is clear evidence of the Commission's own determination that [his] public action was immaterial.***" (*Id.*)

Mr. Vanderbeck further argues that it is unreasonable to impose a sanction upon him, since the Commission, if it wishes to announce a new, more stringent rule, must do so prospectively. (*Id.* at p. 6) Mr. Vanderbeck warrants that

> ***it has been established in earlier decisions of the School Ethics Commission, the Commissioner, and our courts, that when a rule of law is initially announced, it must be applied prospectively. Interested parties must be given sufficient notice of new rules and should not be unfairly punished by retroactive application.*** (*Id.*)

Thus, Mr. Vanderbeck maintains that he "should not be punished for failing to anticipate more stringent interpretations of the Act." (*Id.*)

Upon careful and independent review, the Commissioner finds Mr. Vanderbeck's arguments as to the Commission's recommended sanction to be unpersuasive. Inasmuch as Mr. Vanderbeck admitted in testimony before the School Ethics Commission that he participated in the discussion of the collective bargaining agreement prior to the vote on the agreement (Commission's Decision of September 30, 1996, at p. 2), and in view of the Commission's published advisories relative to a board member's participation in negotiations where an immediate family member is a member of the local bargaining unit, as well as the broad language of the prohibiting statute (*N.J.S.A.* 18A:12-24c), the Commissioner accepts the Commission's recommendation that a reprimand is an appropriate sanction in this matter. Moreover, Mr. Vanderbeck's assertion that he was without notice of "the rule" applied by the Commission is belied by the record, notwithstanding that he may have been uncertain of the precise scope of the prohibitions set forth by the Commission.

IT IS HEREBY ORDERED that Edward Vanderbeck be reprimanded as a school official to have violated the School Ethics Act.

COMMISSIONER OF EDUCATION

November 6, 1996
Date of Mailing, November 7, 1996

487-96

487-96

GLEN ROCK EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 12, 1996

OAL DKT. NO. EDU 1228-96
AGENCY DKT. NO. 474-12/95

GLEN ROCK EDUCATION ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

488-96

488-96

MARY FERGUSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 12, 1996

OAL DKT. NO. EDU 8926-95
AGENCY DKT. NO. 357-9/95

MARY FERGUSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

489-96

MARILYN HOLLAND,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 12, 1996

OAL DKT. NO. EDU 8102-95
AGENCY DKT. NO. 171-5/95

MARILYN HOLLAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

491-96

491-96

IN THE MATTER OF THE TENURE HEARING	:	
OF DOROTHY THEOBALD, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP OF	:	DECISION
HOLMDEL, MONMOUTH COUNTY.	:	
	:	

NOVEMBER 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING CASE
OAL DKT. NO. EDU 06477-96S
AGENCY DKT. NO. 198-5/96

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,

Petitioner,

v.

DOROTHY THEOBALD,

Respondent.

Martin M. Barger, Esq., for petitioner (Reussille, Mausner, Carotenuto, Barger and Steel, attorneys)

Stephen E. Klausner, Esq., for respondent (Klausner and Hunter, attorneys)

Record Closed: September 16, 1996 Decided: September 24, 1996

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from charges brought by the petitioner, Holmdel Township Board of Education, against respondent Dorothy Theobald, on May 1, 1996, resulting in her suspension without pay during the pendency of the matter before the Commissioner of Education. The matter transmitted to and received by the Office of Administrative Law ("OAL") on July 23, 1996, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On August 12, 1996, the respondent submitted her resignation as a teacher for the Holmdel Township Board of Education, and the petitioner accepted her resignation at its regular meeting of August 21, 1996, effective immediately.

I **CONCLUDE** that because respondent has resigned as a teacher for the Holmdel Township Board of Education and, therefore, abandoned her tenure, this matter shall be **DISMISSED**, subject to the Board of Education's compliance with *N.J.A.C.* 6:11-3.5.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 24, 1996
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

9/27/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 1 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

IN THE MATTER OF THE TENURE HEARING	:	
OF DOROTHY THEOBALD, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE TOWNSHIP OF	:	DECISION
HOLMDEL, MONMOUTH COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed.

Upon a careful and independent review of the record in this matter, the Commissioner determines to adopt the initial decision of the Administrative Law Judge (ALJ) dismissing the within tenure matter, inasmuch as respondent has resigned her position as a teacher at the Holmdel Township School District and has, therefore, abandoned her tenure acquired with the Board.

The Commissioner is mindful that the within tenure charges for unbecoming conduct and insubordination certified by the Board were brought pursuant to respondent's absence from the District and her attendance at the National Hockey Festival in California in November 1995 for three days, without prior administrative approval. (Board's Statement of Evidence at p. 1) The charges were further certified pursuant to respondent's participation as a coach in an Easter Field Hockey Tournament in the Netherlands from April 2, 1996 through April 11, 1996, notwithstanding that the administration denied her request for unpaid leave, by creating a "medical crisis" which ostensibly required a two-to-three-week recovery period during that time in April 1996. (*Id.* at p. 4)

By affidavit prepared on or about May 17, 1996, respondent replied that the former incident, in November 1995, was a "miscommunication" between herself and district administrators.

(Theobald Affidavit at p. 3) Respondent did not deny that she traveled to England on April 1, 1996 and did eventually participate in the Netherlands Tournament as a coach. (*Id.* at p. 8) Respondent acknowledged that she understood that she would have to abide by the administration's denial of her request for unpaid leave to be used in April 1996 to attend the tournament in the Netherlands. Nevertheless, she wished to be actively involved in such tournaments. (*Id.* at p. 5) She affirmed that she had been under a physician's care for months regarding knee problems and her condition worsened to the extent that an orthopedic surgeon strongly recommended in March 1996 that she immediately have surgery which would coincide, in part, with the Easter break. (*Id.* at p. 6) Inasmuch as respondent's physician provided clearance for her to travel abroad, with restrictions, but did not provide her with immediate clearance to return to work as a physical education teacher, respondent participated as a coach in the tournament in the Netherlands.

By letter, dated August 12, 1996, to the Superintendent of Schools, respondent resigned as teacher for the Board. The Board accepted the resignation, to be effective immediately, at its August 21, 1996 meeting.

Accordingly, in that respondent has unilaterally resigned prior to conclusion of tenure proceedings, the Commissioner adopts the recommendation of the ALJ that this matter be dismissed. The Commissioner underscores that such dismissal is subject to the Board's compliance with *N.J.A.C.* 6:11-3.5, which requires, upon the resignation of a teaching staff member accused of unbecoming conduct prior to the conclusion of the tenure proceedings, that the chief school administrator notify the State Board of Examiners of the alleged conduct, and that the district cooperate should the Board elect to take action against the staff member's certificate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

492-96

492-96

R.J., on behalf of minor daughter, A.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2668-96

AGENCY DKT. NO. 56-2/96

R.J., ON BEHALF OF MINOR DAUGHTER, A.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT,

Respondent.

No appearance by or for R.J., petitioner

Thomas M. Keeley-Cain, Esq., for intervenor B.J.

Robert E. Birsner, Esq., for respondent (Maressa, Goldstein, Birsner, Patterson, Drinkwater & Oddo, attorneys)

Record Closed: September 19, 1996 Decided: September 24, 1996

BEFORE **BRUCE R. CAMPBELL,** ALJ:

This matter was opened on February 13, 1996, when R.J., petitioner, filed a petition of appeal with the Commissioner of Education challenging a decision of the Lower Camden County Regional District Board of Education to exclude from attendance A.B., minor daughter of R.J.

On March 18, 1996, the Director of the Bureau of Controversies and Disputes wrote to R.J. and the Board's counsel stating, among other things,

> [I]t appears that Petitioner has admittedly continued to retain guardianship and support her child who resides in Sicklerville, notwithstanding that Petitioner resides in Philadelphia. Therefore, the Petitioner will be given the opportunity to submit to the Commissioner written arguments as to why this matter should not be dismissed for failure on the face of the petition to warrant entitlement under N.J.S.A. 18A:38-1.
>
> Consequently, we ask that Petitioner submit a response to this letter within ten (10) days of its receipt and that the Board file any reply submission it wishes to make within five (5) days of receipt of Petitioner's submission.

At about the same time, Thomas M. Keeley-Cain, Esq., filed papers on behalf of B.J., mother of R.J. and grandmother of A.B. B.J. is the person with whom A.B. resides. In support of her request to intervene, B.J. provided a certification by R.J. signed but not sworn, a copy of a residential lease for premises on H. Boulevard in Winslow Township and a sworn statement of her own in support of her motion to intervene.

On March 15, 1996, the Board filed an answer to the petition and a notice of motion for summary judgment with attached exhibits.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

A telephone prehearing conference was arranged, but R.J. could not be reached. On May 17, 1996, I conferred with Robert E. Birsner, Esq., counsel for the Regional School Board and Thomas M. Keeley-Cain, Esq., representing B.J. By letter dated May 20, 1996, I advised counsel that the matter was set down for hearing on Thursday, September 19, 1996; that B.J.'s motion for leave to participate was granted and that the Board's motion to dismiss would be held in abeyance until September 19, 1996. On the same day, I wrote to R.J. at two different

addresses advising that the matter would be heard on September 19, 1996. In addition, R.J. was directed to advise my chambers of her present address and telephone number promptly. There is no record of her doing so. R.J. was also advised that she could represent herself at hearing or could be represented by an attorney admitted to practice in New Jersey. If she engaged an attorney, the attorney was advised to file her or his appearance promptly. The hearing would not be delayed if R.J. hired counsel late. R.J. was also advised of the Board's motion to dismiss her case and that the motion would not be decided before hearing on September 19, 1996. However, R.J. was warned that failure to appear on September 19, 1996, could lead to the Board's motion being granted. Finally, R.J. was advised that B.J. was granted leave to participate in the case but that B.J.'s participation did not affect in anyway R.J.'s responsibility to appear and to present her case.

On September 19, 1996, counsel for the participant and counsel for the Board appeared. Three persons also appeared who were prepared to testify for the Board. The participant's counsel represented that R.J. or B.J. or both had telephoned his office that morning at approximately 9 a.m. to ask for directions to the OAL facility.

With the kind indulgence of counsel, I waited until 10:30 a.m. before opening the record. It is OAL policy to wait thirty minutes beyond a stated hearing time before taking dispositive action. Because of the important interest present in this case, I relaxed and enlarged the waiting time.

Upon opening of the record, the Board's counsel made a brief argument in support of his motion. He pointed to letters from the Department of Education and this judge advising the petitioner of her responsibilities if she wished to proceed. In a letter written by R.J., she admits financial support of A.B. Although the Board is unable to ascertain a per diem per pupil cost at this time, it seeks back tuition from R.J.

No one spoke in opposition to the motion.

DETERMINATION

The Petition

Inasmuch as R.J. made no effort to contact the judge until the time and date of scheduled hearing despite the fact that she had adequate notice, I **FIND** that R.J. has been dilatory in prosecuting her appeal and unresponsive to communications from the Department of Education and this judge. Accordingly, I **CONCLUDE** that R.J. has abandoned prosecution of her petition and has failed to show good cause why that failure should be excused.

The petition of appeal is **DISMISSED**. It is so **ORDERED**.

Tuition Reimbursement

The respondent Board asserts that the petitioner was advised of its decision to exclude A.B. from school on January 23, 1996. The Board did not receive a petition of appeal from the petitioner, but by letter dated February 22, 1996, received a copy of the letter petition from the New Jersey Department of Education. On March 11, 1996, the Board filed an answer through counsel. At the same time, the Board cross claimed for tuition in the amount of $16,588, less a per diem for the remaining school days in the 1995-96 school year subsequent to the exclusion of A.B. *N.J.S.A.* 18A:38-1(b)2.

When the Department of Education determined that R.J.'s letter constituted a petition of appeal, *N.J.S.A.* 18A:38-1 came into play. The statute provides, among other things, that no child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. The Board complied and A.B. was not excluded while this matter pended.

The statute also provides that the Commissioner shall assess the parent or guardian tuition for the pupil pro rated to the time of the pupil's ineligible attendance in the schools of the district if, in the Commissioner's judgment, the evidence does not support the parent's or guardian's

claim. The tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

The dismissal of this petition had the same effect as if testimonial and other evidence were taken and, after making findings of fact and conclusions of law, the judge ruled for the Board. Therefore, the Board is entitled to assert its claim for tuition reimbursement.

During its presentation on September 19, 1996, the Board represented that it has been unable to ascertain the applicable per diem pupil cost at this time. In order to protect its interests herein, the Board shall file with the Commissioner of Education a certification of back tuition based on the best estimate it currently has of per diem pupil costs in the applicable school years. It may then amend that certification when final data are available. I do not retain jurisdiction over this issue. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

24 SEPTEMBER 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

9/25/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1996
DATE

Barbara A Farmer
OFFICE OF ADMINISTRATIVE LAW

ml

R.J., on behalf of minor daughter, A.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions from the parties, nor explanation for nonappearance from petitioner, has been filed.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge for the reasons expressed therein that judgment must be entered against petitioner for failure to prosecute. The Commissioner further finds that, pursuant to *N.J.S.A.* 18A:38-1., A.B. is not entitled to a free public education in the respondent School District.

Accordingly, the initial decision is affirmed and this matter is hereby dismissed. Petitioner is directed to remit to the Board the amount owed for the period of A.B.'s illegal attendance in the public schools of the Lower Camden County Regional School District as calculated pursuant to *N.J.S.A.* 18A:38-1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

493-96

493-96

HUDSON COUNTY TRANSPORT, INC.,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY, ET AL.,	:	DECISION
RESPONDENTS.	:	
	:	

NOVEMBER 12,1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7982-96

AGENCY DKT. NO. 351-8/96

HUDSON COUNTY TRANSPORT, INC.

Petitioner,

v.

EAST ORANGE SCHOOL DISTRICT AND

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Respondents.

Dennis L. McGill, Esq., for petitioner

John H. Watson, Jr., Esq., for respondent

Record Closed: September 10, 1996 Decided: September 23, 1996

BEFORE **LINDA BAER**, ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on August 21, 1996 for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A plenary hearing was scheduled for August 27, 1996. At that time the parties agreed to settle the matter and prepared a settlement agreement indicating the terms thereof which is attached hereto and fully incorporated herein. The settlement agreement as prepared was subject to a fully executed consent order being attached to and made part of the settlement. The consent order was executed once the approval was received by the Board of Directors of the Essex County Educational Services Commission as agent for the Board of Education for the City of East Orange, Essex County.

The settlement agreement and consent order having been fully executed I have reviewed this record and terms of the settlement and **FIND**:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby **CONCLUDED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

4. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving the parties.

5. Both parties waive the right to file exceptions and cross exceptions.

6. A fully executed Consent Order will be attached to and made part of this settlement.

7. This agreement will only become effective when it is approved by the **BOARD OF DIRECTORS ESSEX COUNTY EDUCATION SERVICES COMMISSION as Agent for BOARD OF EDUCATION OF THE CITY OF EAST ORANGE , ESSEX COUNTY AND THE COMMISSIONER OF EDUCATION**. Any disapproval by the Board or the Commissioner shall not interfere with the rights of either party to pursue the matter further.

8/27/96

Dennis J. Shea Jr.
ATTORNEY FOR PETITIONER

8/27/96

John H. Watson
Atty for ECESC

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Sept 23, 1996
DATE

Linda Baer
LINDA BAER, ALJ

Receipt Acknowledged:

9/27/96
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 27 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mh

DENNIS L. McGILL, ESQ.
6 Chapel Avenue
Jersey City, N.J. 07305
(201)521-1748
Attorney for Petitioner

SEP 10 11 25 AM '96

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
OAL Docket No. 07982-96N

HUDSON COUNTY TRANSPORT, INC., Petitioner, -vs- EAST ORANGE SCHOOL DISTRICT, ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, RUSSELL ACADEMY TRANSPORTATION SERVICES and SILVER BUS LINE, Respondents.	Agency Ref. No. 351-8/96 Civil Action CONSENT ORDER

This matter having been brought before the Court on August 27, 1996, with notice to all Respondents, upon the application of DENNIS L. McGILL, Attorney for the Petitioner, in the presence of JOHN WATSON, JR., Attorney for Respondent ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, as agent for Respondent EAST ORANGE SCHOOL DISTRICT, with no independent appearance on their behalf nor on behalf of Respondents RUSSELL ACADEMY TRANSPORTATION SERVICES and SILVER BUS LINE, and the Court having considered the documents submitted in support of the respective parties positions, including the attached "SETTLEMENT AGREEMENT", executed by the above named attorneys on 8/27/96, and good cause being found in support thereof, it is on this 3RD day of September, 1996,

ORDERED that parties be bound by the attached "SETTLEMENT AGREEMENT" and that the within proceedings be dismissed without prejudice.

LINDA BAER, A.L.J.

Consent as to form and entry:

JOHN H. WATSON, ESQ.

DENNIS L. MCGILL, ESQ.

(29-AUG-96)

3a

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT
OAL DKT. EDU 7982-96

HUDSON COUNTY TRANSPORT, INC.,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE ,
ESSEX COUNTY AND
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION
Respondent.

SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and have prepared this settlement agreement which fully disposes of all issues in controversy between the Petitioner and the Respondent.

1. Petitioner withdraws his appeal and request for a hearing.

2. It is agreed that Respondent Essex County Educational Services Commission Board of Directors will award bus routes for the 1996-1997 school year on August 28, 1996.

3. Resolution III-H, "Motion to award the following transportation routes" awards contested bus routes 700 A, B, C, D, H, and L to petitioner.

HUDSON COUNTY TRANSPORT, INC.,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY, ET AL.,	:	DECISION
RESPONDENTS.	:	
	:	

The record and initial decision incorporating a joint Stipulation of Settlement and Consent Order rendered by the Office of Administrative Law (OAL) have been reviewed.

The Commissioner is unable to accept the written settlement agreement in its present form in that the language of such agreement, on its face, (Term 7) reveals that the settlement may not have been approved by the Board. Such language, making settlement contingent upon approval by the Board while expressly reserving the rights of both parties to pursue the matter further in the event of Board disapproval, reveals that the settlement is not "fully dispositive of all issues in controversy" as required under *N.J.A.C.* 1:1-19.1(b). In that the Commissioner's approval would render this agreement a final decision pursuant to *N.J.A.C.* 1:1-19.1(c)2, the Commissioner finds that accord to its terms by all necessary entities must be accomplished prior to the Commissioner's approval of the settlement.

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate action in light of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

493-96

81-98
(493-96)

HUDSON COUNTY TRANSPORT, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

FEBRUARY 23, 199 8

OAL DKT. NO. EDU 11552-96 (EDU 7982-96 On Remand)
AGENCY DKT. NO. 351-8/96

HUDSON COUNTY TRANSPORT, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

FEBRUARY 23, 1998
DATE OF MAILING FEBRUARY 23, 1998

494-96

494-96

ROBERT SEYFARTH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner challenged the Board's actions placing him on mandatory paid administrative leave and transferring him from a high school principalship to a middle school principalship.

In light of testimony of witnesses and evidence in the record, the ALJ found that the Board did not act arbitrarily, capriciously or in bad faith in placing petitioner on mandatory leave. The Board had acted because of an accumulation of too many negative situations in the high school. Moreover, the Board had the absolute right to transfer petitioner to another principalship as long as it did not reduce his salary or do so in bad faith. Moreover, when a board acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. ALJ concluded that the Board had not acted arbitrarily, capriciously or in bad faith in transferring him.

Citing *Williams,* Commissioner concurred with the findings and conclusions of the ALJ that the Board's actions were not arbitrary, capricious or unreasonable. Commissioner found neither the Board nor its superintendent acted contrary to lawful authority in transferring petitioner to the middle school. Petition was dismissed.

NOVEMBER 15, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5970-95

AGENCY DKT. NO. 175-5/95

ROBERT SEYFARTH,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,

Respondent.

Richard J. Kaplow, Esq., attorney for petitioner

David B. Rubin, Esq., attorney for respondent

Record Closed: September 4, 1996 Decided: September 25, 1996

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioner, Robert Seyfarth (Mr. Seyfarth), challenges the action of respondent, Board of Education of the Township of Cranford, Union County (the Board), on May 8, 1995, placing him on mandatory paid administrative leave. He also challenges that Board's action on August 1, 1995, transferring him from the position of Principal of Cranford High School (the High School)

to the position of Principal of Orange Middle School (the Middle School). Mr. Seyfarth requests that the Board's actions be reversed, set aside and vacated.

PROCEDURAL HISTORY

On May 8, 1995, that Board placed Mr. Seyfarth on mandatory paid administrative leave. On May 22, 1995, Mr. Seyfarth filed a Petition of Appeal and a request for emergent relief. On June 9, 1995, the Department of Education transmitted this matter to the Office of Administrative Law. June 13, 1995, the undersigned entered an Order denying emergent relief. On February 7, 1996, the Commissioner of Education adopted that Order.

On August 14, 1995, Mr. Seyfarth filed a Notice of Motion For Leave to Amend Petition. The undersigned entered an Order on September 6, 1995, granting that motion. The undersigned held a hearing on October 31, 1995, November 15 and 17, 1995, January 30, 1996, March 8, 1996, and May 7 and 30, 1996. The record closed on September 4, 1996, after the submission of all post-hearing Briefs.

STIPULATED FACTS

The parties stipulated the following which I **FIND** as **FACTS** in this case:

1. The Board transferred Mr. Seyfarth from Principal of the High School to Principal of the Middle School, effective August 1, 1995.

2. Mr. Seyfarth's base salary remained the same.

3. Mr. Seyfarth held the position of Principal of the High School for over 20 years.

4. Mr. Seyfarth is now the Principal of the Middle School that is a kindergarten through 8th grade school.

5. No criminal, administrative or civil charges of any type have been brought against Mr. Seyfarth as a result of the criminal matter involving Jeanette Nixon (Mrs. Nixon).

6. When Mr. Seyfarth returned to work in August 1995, he found on his desk a memorandum drafted by Board President, Steven Montovano (Mr. Montovano). Mr. Montovano had hand delivered that memorandum to each Board member along with a copy of a press release prepared by Board Attorney Anthony P. Sciarrillo, Esq. (Board Attorney Sciarrillo).

7. Added to the hearing record as Exhibit C-1 are true and accurate transcripts of proceedings before the Honorable Edward W. Beglin, Jr., on March 17 and 24, 1995, in *Cranford Board of Education v. Jeanette Flora Nixon*, bearing Docket No. UNN-L-1610-95 in the Superior Court of New Jersey, Union County. These transcripts are introduced solely as evidence that the proceedings occurred, and not for the purpose of proving the truth or falsity of any of the underlying allegations in that matter.

DISCUSSION OF OTHER EVIDENCE AND TESTIMONY

The Cranford School District (the District) is a kindergarten through 12th grade, Type II school district located in Union County, New Jersey. Mr. Seyfarth served as Assistant Principal of the High School from December 1973 to July 1974, as Acting Principal from July 1974 to October 1974 and as Principal from October 1974 to August 1, 1995.

From 1977 to 1992, Mr. Seyfarth received evaluations from Superintendent Robert Paul (Dr. Paul). Mr. Seyfarth described his relationship with Dr. Paul as "interesting." According to Mr. Seyfarth, he and Dr. Paul "used to go at it a lot." They were two very strong personalities and Dr. Paul challenged his thinking. Dr. Paul also made Mr. Seyfarth do his homework and they frequently engaged in "verbal gymnastics."

There is little doubt that Dr. Paul viewed Mr. Seyfarth as an outstanding administrator. It is clear, however, that Dr. Paul had many problems with Mr. Seyfarth's intimidating administrative style. Mr. Seyfarth reacted to adverse situations by losing control, by yelling and screaming and by threatening to take legal action. In an evaluation in 1988, Dr. Paul wrote:

> **Administrative Style:** This is perhaps the most serious area of concern. As I have told you countless times in the past, I expect the high school principal to be an educational and administrative statesman. I do not expect him to fly off the handle, to yell at or intimidate people, to threaten people with legal action, and to do all the things I have so consistently found you doing over the years.

As a result of this evaluation, the Board voted to withhold Mr. Seyfarth's increment for the coming school year. A subsequent Board later restored the withheld increment.

Witnesses who testified at the hearing echoed Dr. Paul's comments about Mr. Seyfarth's intimidating administrative style. Of great significance to the undersigned was the testimony of 3 outstanding High School teachers and the testimony of Hanna Kit Ellenbogen, Esq. (Ms. Ellenbogen), from the Education Law Center, Inc. One of the teachers, Eileen Dachnowicz (Ms. Dachnowicz), has taught English at the High School for 17 years. In 1993, the Board awarded her its first "Cranford Teacher of the Year Award." She has received 3 national endowments to go to Harvard, Cornell and Oxford. She also received the Princeton University Citation for Teaching Excellence, a Rand Foundation citation for improving teaching and a Rutger's University citation for influencing young women. Several of her students have won the national competition for the National Endowment of Younger Scholars. The teachers are Richard Phillips (Mr. Phillips), who has taught Business Education at the High School for 17 years, and Diane D. Connelly (Ms. Connelly), who has taught Mathematics at the High School for 17 years. These witnesses were very impressive and forthright. They had nothing to gain, everything to lose and no ax to grind with Mr. Seyfarth. Along with Ms. Ellenbogen, they corroborated much of the testimony of Superintendent Emalene Fargnoli-Renna, Ed.D. (Dr. Renna).

Prior to 1993, a Faculty Advisory Committee (FAC) had been active at the High School. The FAC's purpose was to settle issues in the High School in a harmonious way and to keep lines

of communication open between the faculty and the administration. Its members consisted of faculty members who had been at the High School for a long time and of Mr. Seyfarth and the Vice-Principals. It ceased to be active because the faculty members saw that Mr. Seyfarth's attitude toward it and his combative manner toward the faculty members on it precluded the FAC from accomplishing anything. Ms. Connelly described the FAC as a "waste of time. It wasn't serving any purpose. There was no movement." As Ms. Dachnowicz described, in pertinent part:

> [M]r. Seyfarth was highly combative, so that the person who presented the concern got yelled at, and the concern was vetoed. As a result, everybody else clammed up. In essence, it was an intimidating tone, and people really didn't want to belong to the FAC.

As Mr. Phillips described, in pertinent part:

> [W]e would go to these meetings and they would literally become screaming matches. We would bring up problems and nothing was ever accomplished, so it was literally like beating your head against the wall. [Mr. Seyfarth] would become very agitated and he would just take over the meeting, and he would not really let anyone speak, or the person would be put down to such an extent that no one else wanted to speak.

In the Spring of 1993, the faculty had an interest in reactivating the FAC because of serious problems occurring at the High School at the time. For example, there was a serious discipline crisis. The faculty felt that the administration of discipline was not as effective or efficient as it should be. The Vice-Principals, Frederick D'Antoni (Mr. D'Antoni) and Joan C. Wilde (Ms. Wilde), were not following the student code of conduct and they engaged in selective and "paper" discipline. There also were problems with teacher confidentiality and credibility. The administration openly discussed teachers and asked them what they had done to precipitate a disciplinary problem. Teacher morale also was very low. Teachers felt powerless and they had no way to communicate with the administration about their concerns.

Dr. Renna became the new Superintendent effective July 1, 1993. Dr. Renna endorsed synergy and change. She did not agree with a top-down management structure and she intended to implement her own policies and the Board's desire for a more open climate and more

progressive educational improvements. She also intended to focus her energies immediately on changing and strengthening the middle school concept in the District. In the fall of 1993, Dr. Renna advised all administrators, including Mr. Seyfarth, of her plans to implement systemic change in the District. Mr. Seyfarth testified that he knew at the time that personnel changes might be a part of that process. In fact, during her first year as Superintendent, Dr. Renna made many personnel changes.

Prior to the time Dr. Renna became Superintendent, certain faculty members had met with her to discuss reactivating the FAC. Dr. Renna was very open and very receptive to change and she has a shared decision-making style. Mr. Seyfarth, on the other hand, has an authoritarian style. He alone made decisions and the faculty had to follow them. He regarded suggestions as criticism. As a result, he reacted to suggestions in a hostile manner. Dr. Renna knew of Mr. Seyfarth's authoritarian style, but she believed that he would work with her to make changes at the High School in accordance with her philosophies.

The FAC was reactivated in June 1993. In the fall of 1993, the FAC decided to conduct a poll of the various departments in the High School to determine what concerns the teachers had. The FAC found that the teachers who responded were very concerned about the lack of morale, the feeling of powerlessness, the lack of communication with the administration, the discipline problems and the facilities and staff development.

As a result of the poll, the FAC decided to conduct a survey of the entire faculty and staff. The FAC prepared a questionnaire and submitted it to the administration. It then distributed the questionnaire to 109 faculty and staff members. The FAC received 88 responses. Those who responded overwhelmingly substantiated the problems at the High School and the concerns expressed by the teachers previously polled by the FAC. A total of 87% of those responding agreed that teacher morale was a major concern. Other areas of significant concern were the administration's pattern of undermining teachers' authority in student disciplinary matters and the lack of staff professional development programming. In December 1993, Mr. Phillips submitted the survey results to Mr. Seyfarth. Mr. Phillips described Mr. Seyfarth's response as follows, in pertinent part:

> [I] handed him the results and I told him what they were. He proceeded to put them on the table and...he lost his temper completely. And he told me that as far as he was concerned, the survey was invalid...And he also indicated that this was a survey compiled specifically to make him look bad. I responded that the...purpose of the survey was to bring matters to light so that we could both, administration and staff, work on these problems to try to resolve them. And he did not perceive it in this way. He took it as a personal affront and that we had done this specifically to make him look bad. He was standing up. His voice became very loud. He turned red, and he did not stop literally screaming at me the entire time I was there.

In addition, at the first FAC meeting following Mr. Seyfarth's receipt of the survey results, he yelled at Ms. Dachnowicz for several minutes. He called her unprofessional and irresponsible. He also accused the FAC of being a force intended to drive disunity.

The FAC also submitted the survey results to Dr. Renna. She viewed the results as a "bombshell" that took her "majorly aback." Dr. Renna is a strong proponent of professional development. Prior to receiving the results of the survey, she had arranged for a professional consultant to work with all staff to avoid top-down management. In light of the survey results, she implemented additional programming to help administrators implement her shared decision-making policy and to address the problems identified in the survey. She also spoke to Mr. Seyfarth and offered him her assistance in helping to resolve the problems identified in the survey.

The survey results were not the only indication of the serious problems at the High School and of Mr. Seyfarth's confrontational and intimidating style. There were a number of special education students at the High School who had been suspended or threatened with being placed in the Cranford Alternative Program. In the fall of 1993, Ms. Ellenbogen contacted Dr. Renna about this pattern of violating the procedural rights of these special education students.

Also in the fall of 1993, a group of parents asked to have their children opt out of a sex education class that they found objectionable. Mr. Seyfarth would not permit this unless the students agreed to take physical education during that period. When the parents would not agree, Mr. Seyfarth became angry and threatened to go to Court. Dr. Renna contacted the County

Superintendent to see whether the parents had the right to opt their children out of the sex education class. The County Superintendent advised Dr. Renna that the parents had the legal right to do this. The County Superintendent also advised Dr. Renna that Mr. Seyfarth had threatened legal action on more than one occasion instead of trying to amicably resolve issues. Dr. Renna concluded from this incident that when parents disagreed with him, Mr. Seyfarth became confrontational and did not have the ability to resolve matters out of Court. It was Dr. Renna's reputation and style and it was the Board's policy to resolve as many problems as possible out of Court, especially problems with parents.

In December 1993, the Board engaged George Mako (Mr. Mako) from New Choices Educational Services to serve as interim Director of Special Services. During the spring of 1994, Mr. Mako had numerous conversations with Dr. Renna about the distrust he saw between the faculty and the administration at the High School. He also reported to Dr. Renna that the teachers at the High School were afraid to express their concerns for fear of retribution from Mr. Seyfarth.

In June 1994, a professional development needs assessment survey revealed continuing problems similar to those expressed in the 1993 FAC survey. By this time, Dr. Renna began to have doubts as to whether her shared decision-making, non-confrontational and non-litigious style ever would come to fruition at the High School under Mr. Seyfarth's leadership. She continued, however, to remain positive and she wanted to give Mr. Seyfarth time to improve. She did so despite the fact that the Board was aware of the problems at the High School and that it was impatient and wanted her to take immediate reorganization action there.

Ms. Dachnowicz met with Dr. Renna in July 1994. She advised Dr. Renna that the High School was in chaos in terms of discipline. She also advised Dr. Renna that something had to be done because the High School had a faculty that was afraid of the Principal and intimidated by him, and it had a student body that was not afraid of anything. Dr. Renna stated to Ms. Dachnowicz that she was very concerned with the situation at the High School.

Also in July 1994, Ms. Ellenbogen sent a letter to Dr. Renna complaining about violations of students' rights by the High School administration. Ms. Ellenbogen detailed a series of serious

allegations concerning the way the High School administration handled student discipline. The most serious of these allegations was a pattern of suspending special education students without prior notice to the Child Study Team and without any inquiry into whether the student's disability was the primary cause of the behavior. Ms. Ellenbogen sent a copy of the letter to Mr. Seyfarth.

Mr. Seyfarth never contacted Dr. Renna about Ms. Ellenbogen's letter. Dr. Renna, therefore, took the initiative and scheduled a meeting with Mr. Seyfarth, Mr. D'Antoni and Board Attorney Sciarrillo to discuss the contents of the letter. At that meeting, Mr. Seyfarth was angry over the allegations. He insisted that there was no validity to the allegations because he did not have the names of the students who made the allegations. Regardless of who made the allegations, Dr. Renna wanted the matter reviewed and corrected if any problems were found to exist.

For obvious reasons, Dr. Renna had to focus her attention on improvements at the High School during the 1994-95 school year. There had been no change in Mr. Seyfarth's administrative style and teacher morale was still very low. Dr. Renna's plans to improve conditions at the High School were preempted in the late fall of 1994 by a crisis in the District's Business Office involving Mrs. Nixon, the School Business Administrator. The District charged Mrs. Nixon with inept performance and unprofessional conduct and suspended her. As a result, Dr. Renna had to take over the operation of the Buisness Office. She later discovered evidence of criminal embezzlement by Mrs. Nixon. She turned the information over to the United States Attorney for further investigation.

In February 1995, the Board had its annual goal-setting meeting to establish priorities for the 1995-96 school year. Prior to that meeting, Board members completed an anonymous needs assessment survey. The survey revealed concerns the Board had about the High School administration and about Mr. Seyfarth's reluctance to change. At the meeting, the Board discussed what needed to be done at the High School and it unanimously approved 5 specific goals for the 1995-96 school year. The Board's main priority was to provide the best educational opportunities in order to maximize success for all High School students, to promote a learning environment at the High School that values differences and fosters respect for all individuals and to provide complete curriculum articulation and coordination throughout the District.

The investigation of Mrs. Nixon revealed that she and Mr. Seyfarth had a joint bank account at a local bank. On March 15, 1995, the FBI executed a search warrant at Mr. Seyfarth's High School office and his home. At a Board meeting that evening, the Board authorized Board Attorney Sciarrillo to commence civil proceedings in the Superior Court of New Jersey to recoup the District's funds. Also at that meeting, 2 Board members suggested placing Mr. Seyfarth on administrative leave. Dr. Renna disagreed and the Board took no action at that time.

On March 17, 1995, Board Attorney Sciarrillo applied to the Superior Court to freeze Mrs. Nixon's assets and the joint bank account. The Court granted the application. On that same day, Thomas Denny, a Board member, telephoned Dr. Renna and inquired whether she thought that placing Mr. Seyfarth on administrative leave and putting someone else in the High School would be a move that would build public confidence. Dr. Renna responded that she did not think that an administrative leave would be necessary and that they could continue educationally without it.

The Superior Court proceedings would no doubt attract media attention. As such, Board Attorney Sciarrillo prepared a press release regarding the Nixon matter and the FBI's search of Mr. Seyfarth's office. The object of the press release was to issue a single statement on behalf of the District. Dr. Renna did not completely agree with the Board's decision to issue a press release. She was not involved in its preparation and she did not see it until it had been disseminated to the press. On March 21, 1995, an article about the Superior Court proceedings appeared in the Star Ledger.

Mr. Seyfarth did not contact Dr. Renna to discuss the joint bank account. Instead, he contacted some Board members. On March 20, 1995, Dr. Renna asked Mr. Seyfarth to meet with her. She described the meeting as follows, in pertinent part:

> [H]e came in and...he said angrily to me, "Am I being accused of anything?" And I...responded, "No."...And he then seemed angry to me...his face was red and he...slapped his hands between themselves and said, "Because I am guilty of no wrongdoing and will take whatever action I need to take." And I assured him that I wasn't making any allegations, but that what we were dealing with

> was an awkward situation because...there's potential here for public scandal and with the principal as the educational leader of the school, we need to handle this appropriately. I really did not want to discuss the particulars...and told him, I was shocked at what had occurred and didn't feel comfortable discussing anything more, that the primary goal was delivery of educational -- to the students and tried to keep it as calm and as non-adversarial as I could.

According to Ms. Dachnowicz, the publicity about the joint bank account caused a furor at the High School. Nevertheless, the Board took no action against Mr. Seyfarth because Dr. Renna wanted to maintain the *status quo*. She had hoped that the District could get through the remainder of the school year without any further problems at the High School. Dr. Renna's hopes were short-lived. On April 13, 1995, the Education Law Center wrote to Dr. Renna that it had joined forces with the Rutgers Constitutional Litigation Clinic (the Rutgers Clinic) to address the continuing problems at the High School. It also advised Dr. Renna that they would request an investigation by the United States Office of Civil Rights. The Rutgers Clinic also wrote to Dr. Renna on April 21, 1995, complaining that High School staff routinely denied parents access to their children's records in violation of state and federal law.

The Board met on April 24, 1995, and discussed the concerns raised by the Education Law Center and by the Rutgers Clinic. The Board instructed Board Attorney Sciarrillo to submit a written account of the District's activities. Before he could submit the account, on April 26, 1995, the Rutgers Clinic wrote to Dr. Renna complaining that the faculty and administration at the High School had prohibited students from talking about the FBI investigation of Mr. Seyfarth and that the students had been threatened with defamation lawsuits if they violated this prohibition.

The Rutgers Clinic sent a copy of this letter to Mr. Seyfarth. Dr. Renna waited a few days for Mr. Seyfarth to contact her about the letter, but he did not do so. When Mr. Seyfarth did not respond, Dr. Renna called the Rutgers Clinic and spoke to an attorney. The attorney advised Dr. Renna that the Rutgers Clinic planned to take legal action against the Board if the problems were not addressed. The attorney also advised Dr. Renna that someone improperly called her and requested the names of the students who had complained to the Rutgers Clinic.

Dr. Renna finally spoke to Mr. Seyfarth and told him that they had to discuss and address the letter from the Rutgers Clinic. She described that conversation as follows, in pertinent part:

> [H]e became angry and said none of this is true. And if they want to take...legal action, let them; and the [Mr. Seyfarth] will subpoena the information on all of the students who made these claims and we'll discuss it further in court.

Mr. Seyfarth flatly refused to take any action whatsoever to address the situation and his tone of voice was angry and offensive. After that conversation, Dr. Renna felt that there had been an accumulation of a number of situations sufficient to warrant her recommending to the Board that it place Mr. Seyfarth on administrative leave. It was "the straw that broke the camel's back." Dr. Renna viewed the administrative leave not as a disciplinary matter, but "as a calming down period to get through the school year and not be with additional litigation on our hands from Rutgers at that point." As Dr. Renna stated:

> [I]t [the Rutgers Clinic letter dated April 26, 1995] was the straw that broke the camel's back. I had been dealing with the controversy. I had hoped that Mr. Seyfarth would have been more cooperative and we could have worked together in it. And I had used that as an example of having to hear the reasons for the bank account by a board member and having to call him in the office, but I had been, during a very tumultuous time in the district, trying to keep things functioning as calmly as I could, addressing complaints from parents, from teachers, from the mayor of the community. And by the time [the Rutgers Clinic letter] came and saying to Mr. Seyfarth, what are we going to do about this, I would have hoped Mr. Seyfarth somewhere in that would have come to me and said, is there a way we can handle this short of subpoenaing the records and therefore making it, in my estimation, inevitable that we would be in court again.

The Board placed Mr. Seyfarth on mandatory paid administrative leave on May 8, 1995. In mid-May 1995, the Board engaged Mr. Mako to serve as interim High School Principal. In June 1995, Mr. Mako reported to Dr. Renna that there was a lack of improvement at the High School since the time he was there in 1994. Mr. Mako expressed to Dr. Renna his concerns about the discipline procedures, about the lack of professional development and about teaching

strategies. He advised Dr. Renna that if she had any intention of making any improvements at the High School, she must change its structure. Dr. Renna responded to him, in pertinent part:

> [I]'ve been here two years. In the two years that I have been here, there was a Covey leadership training, there was Dr. Anthony Scanella's ongoing training with the administrators, there was a full year of professional development council with recommendations for change, there was Doug Brown that did monthly meetings with the administrators recommending a different perspective of how to do this. Do you see any signs of that? And he laughed at me and he said, based on what [he] observed in the last two months, [he] saw no evidence that any of these things ever occurred...

Mr. Mako also became aware of Mr. Seyfarth's authoritative and intimidating management style. He told Dr. Renna about the apprehension and fear that he saw, about the untrusting atmosphere, about how Mr. D'Antoni and Ms. Wilde appeared to follow Mr. Seyfarth's directives and about the lack of decision-making power of the Supervisors or the Director of Guidance. It was his impression that "the staff was accustomed to being told what to do and ordered and directed and not to be a part of the shared decision-making process within the high school." Mr. Mako also told Dr. Renna that the staff was surprised to see the openness under which he functioned. Staff members ongoingly came to him and told him how much better it was at the High School since he was there.

Mr. Mako concluded that a change in Principals should be made at the High School at that time because it would be less disruptive to the District to do so while there was an interim High School Principal. He looked at various people in the District and saw that Michael Blasucci (Mr. Blasucci) had a secondary background and had served for a number of years as Vice-Principal at the High School. He recommended that Mr. Seyfarth be transferred to the elementary program and that Mr. Blasucci be transferred to the High School. He also recommended that Gary Sorrentino (Mr. Sorrentino) be transferred to the High School to deal with the discipline issues because Mr. D'Antoni and Ms. Wilde were not effective in dealing with disciplinary problems.

In June 1995, matters had not improved. The Rutgers Clinic sent another letter to Dr. Renna on June 16, 1995, complaining of an illegal strip search of a High School student in the

spring of 1994. In addition, by the end of June, a needs assessment survey distributed to the High School staff in the spring showed no meaningful change in the staff's attitude since the 1993 FAC survey. By the end of July 1995, Dr. Renna decided to make a number of administrative changes in the District, including, but not limited to, transferring Mr. Blasucci to the High School and transferring Mr. Seyfarth to the Middle School.

Dr. Renna requested a special Board meeting for August 1, 1995 to discuss the administrative changes and to discuss terminating Mr. Seyfarth's administrative leave. The week before that meeting, she attempted to contact all of the Board members by telephone to advise them of the subject of the special meeting. She was unable to contact all Board members. She also did not distribute a written report of her recommendations because she was concerned about confidentiality. The Board held the special meeting on August 1, 1995. Dr. Renna presented her recommendations for administrative changes to the Board. The Board voted 7 to 2 to approve Dr. Renna's recommendations. It also voted 9 to 0 to terminate Mr. Seyfarth's administrative leave effective August 2, 1995.

It is at this point that a controversy arose about whether or not the Board's attorney had advised Mr. Seyfarth's attorney that Dr. Renna would recommend to the Board transferring Mr. Seyfarth to the Middle School. The undersigned had scheduled a hearing for July 26 and 28, 1995. Prior to the hearing, the Board's attorney advised the undersigned that Dr. Renna would recommend that the Board terminate Mr. Seyfarth's administrative leave at the August 1, 1995 meeting. The Board's attorney, however, mentioned nothing about the transfer. The undersigned marked the matter settled only to later learn about the transfer. The undersigned was concerned about having canceled the hearing date when, in fact, the matter had not settled. The undersigned also expressed great displeasure at not having been informed that Dr. Renna would recommend Mr. Seyfarth's transfer. The undersigned came to realize at the hearing, however, that the failure to be so informed was due to the inadvertence of the Board's attorney and not to any improper behavior of Dr. Renna. The evidence presented at the hearing showed clearly that Dr. Renna always had planned to make personnel changes in the District, and Mr. Seyfarth knew it. The undersigned does not agree that Dr. Renna secretly planned Mr. Seyfarth's transfer.

The transfer of Mr. Blasucci and other administrative changes at the High School have supported Dr. Renna's recommendations. Ms. Dachnowicz testified that conditions have improved tremendously at the High School since Mr. Blasucci has been there. The FAC has been able to resolve issues that had been ignored for 17 years. The FAC also distributed the same questionnaire that it had distributed in 1993 and the results were diametrically opposite. Teacher morale had greatly improved and teachers had more input. As Ms. Dachnowicz stated, in pertinent part:

> [Mr. Blasucci] listens. He listens attentively to the concerns of the faculty. He listens to the students, too. If there is an issue, he's ready to work on it. I think, perhaps, and I didn't mention this, Mr. Blasucci is willing to change, and we found that the primary difficulty with Mr. Seyfarth was that he was not just resistant to change, but hostile to change.

Ms. Connelly also testified that there have been many positive changes since Mr. Blasucci's arrival. There was an increase in teacher enthusiasm and volunteerism. In fact, so many teachers had volunteered to serve on a certain committee that some had to be turned away. Mr. Phillips testified that there is now an open and cooperative working atmosphere at the High School.

DISCUSSION AND CONCLUSION

Mr. Seyfarth alleges that the Board's action in placing him on mandatory administrative leave with pay was arbitrary, capricious and in bad faith. He argues that the discovery of his name on a joint bank account with Mrs. Nixon did not negatively interfere with the educational process either at the High School or within the District. He claims that he was frustrated and angry about the speculation and rumors generated by the discovery of the joint bank account. He also argues that he was punished for his angry insistence upon his denial of any wrongdoing with respect to the Nixon matter and for his vow to use litigation to disclose whether there were any specifics behind the allegations made by the Rutgers Clinic. He further argues that Dr. Renna acted impulsively in recommending the administrative leave after she spoke to him in May 1995, about the letter from the Rutgers Clinic.

It is clear from the evidence in this case that Mr. Seyfarth was an autocrat at the High School and the High School was his kingdom. No one dared to question his authority and decisions. To do so would subject one to Mr. Seyfarth's wrath. Three long-time, respected teachers all testified that Mr. Seyfarth intimidated teachers, he yelled at them and he often lost his temper. They also testified that Mr. Seyfarth was an authoritarian and that he was not at all receptive to change. In addition, both Dr. Paul and Dr. Renna acknowledged that Mr. Seyfarth flew off the handle, he yelled at and intimidated people and he threatened legal action against those who disagreed with him. Mr. Seyfarth absolutely did not tolerate any challenge to his authority, including any challenge by Dr. Renna. Under the circumstances existing at the time at the High School, including the Nixon matter, this was no way for an administrator to act.

Dr. Renna had more than ample reason to recommend to the Board that it place Mr. Seyfarth on mandatory administrative leave with pay. The Board had more than ample reason to take such action. Mrs. Nixon had been accused of embezzling a substantial amount of money from the District. The FBI discovered her name on a joint bank account with Mr. Seyfarth. The FBI obviously saw a reason to investigate Mr. Seyfarth because it obtained a search warrant and searched his office and home on March 15, 1996. According to Ms. Dachnowicz, this caused a furor in the High School. Instead of contacting Dr. Renna to discuss the matter, Dr. Renna had to call Mr. Seyfarth to her office. Once there, instead of having a calm and reasoned discussion, Mr. Seyfarth reacted angrily and threatened legal action. He improperly excuses his conduct by claiming that he reacted in "frustration." Had he been more cooperative, however, he could have alleviated that frustration and amicably resolved the matter. Instead, he made matters worse by his combative conduct.

In addition, Mr. Seyfarth reacted similarly when Dr. Renna tried to discuss with him the allegations contained in the letters from the Rutgers Clinic. Instead of calmly discussing the matter, Mr. Seyfarth became angry and offensive, he flatly refused to take any action whatsoever and he threatened litigation. Dr. Renna did not want any further litigation and she wanted to calm matters down and get through the school year. It clearly was a last resort by Dr. Renna to recommend to the Board that it place Mr. Seyfarth on mandatory administrative leave with pay. Dr. Renna was forced to do so after it was clear to her that her attempts to calmly and amicably

resolve the matter with Mr. Seyfarth never would be successful and that Mr. Seyfarth never would cooperate.

Dr. Renna also was more than generous in waiting the amount of time that she did before recommending the mandatory administrative leave with pay. She did not act impulsively and she gave Mr. Seyfarth every opportunity to discuss matters with her and to reach an amicable solution. Clearly, she made the recommendation because of an accumulation of too many negative situations and because she wanted to calm matters down to avoid further litigation. The undersigned is convinced by the evidence presented in this case that Dr. Renna and the Board did the right thing at the time. By reason of the foregoing, I **FIND** and **CONCLUDE** that the Board did not act arbitrarily, capriciously or in bad faith in placing Mr. Seyfarth on mandatory paid administrative leave.

Mr. Seyfarth also alleges that the Board acted arbitrarily, capriciously and in bad faith in transferring him to the Middle School. He argues that the Board attempted to create the appearance, after the fact, of some kind of performance issue as the basis for Mr. Seyfarth's transfer. He also argues that prior to the discovery of the joint bank account, Dr. Renna never seriously considered transferring him, she never discussed it with the Board and she gave him positive evaluations that contained no criticism of his performance. He further argues that the transfer was a vendetta by the Board because it was frustrated at its inability to prove that he was involved in Mrs. Nixon's embezzlement.

The Board alone has the authority to manage the District in any way it deems necessary to promote the overall goal of providing its students with a thorough and efficient education. There is no requirement that a board must obtain community input or consent before it acts on any matter within its authority. As stated in *Kenny v. Board of Education of Montclair*, 1938 *S.L.D.* 647; *aff'd* State Board of Education, 649, 653:

> The school law vests the management of the public schools in each district in the local boards of education and unless they violate the law or act in bad faith, the exercise of their discretion in the performance of duties imposed upon them is not subject to interference or reversal.

When a board acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 322 (App. Div. 1965). In addition, a board has the authority to transfer a principal to another principalship as long as there is no reduction in salary. No disciplinary grounds or pre-transfer due process are required. A board may base the transfer solely upon its determination that an individual school may benefit by such a transfer. *Thelma Bradley v. Board of Education of the Borough of Freehold*, 1976 *S.L.D.* 590, 600.

In this case, the Board was not taking disciplinary action against Mr. Seyfarth. It merely voted 7 to 2 to transfer him to the principalship of another school. It does not matter whether or not Mr. Seyfarth was a good or bad administrator or whether or not he did anything wrong. The Board has the absolute right to transfer Mr. Seyfarth to another principalship as long as it did not reduce his salary or do so in bad faith. There is no evidence that the Board reduced Mr. Seyfarth's salary.

The evidence also shows that the Board acted in good faith in transferring Mr. Seyfarth. The Board also based its decision to transfer Mr. Seyfarth on its and Dr. Renna's determination that the transfer would benefit the High School. Although Mr. Seyfarth sees it otherwise, the evidence shows clearly that were serious problems at the High School while he was Principal. Teacher morale was very low, teachers felt powerless, there was a lack of communication with the administration, there were serious discipline problems and there were threats of litigation against the District stemming from incidents at the High School. The evidence also shows clearly that Dr. Renna took many steps to improve things at the High School and she gave Mr. Seyfarth every opportunity to change. Her efforts were thwarted by Mr. Seyfarth's absolute refusal to cooperate and his combative attitude. Clearly, it was time for a change at the High School. The change was made and the evidence shows that the High School has benefited greatly by that change.

By reason of the foregoing, I **FIND** and **CONCLUDE** that the Board did not act arbitrarily, capriciously or in bad faith in transferring Mr. Seyfarth to the Middle School.

ORDER

I, therefore, **ORDER** that Mr. Seyfarth's Amended Petition be and hereby is **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the Judge and to the other parties.

Sept. 25, 1996
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

OCT 1 1996
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

10.1.96
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

Frederick D'Antoni

Thomas N. Denny

George J. Jorn

Robert Seyfarth, petitioner

Edna Silvey

Joan C. Wilde

For Respondent:

Eileen Dachnowicz

Shirley Ann Daniels

Diane D. Connelly

George Mako

Cynthia S. Myers

Richard Phillips

Emalene Fargnoli-Renna, Ed.D.

Rita Seay-Veca

Exhibits

C-1	Transcript of Proceedings before the Honorable Edward W. Beglin, Jr.
P-1	Letter, dated April 26, 1995, from the Rutgers Clinic to Dr. Renna
P-2	Minutes of Board Meeting on August 1, 1995
P-3	Memorandum, dated November 24, 1993, from Mr. Seyfarth to Dr. Renna
P-4	Evaluation, dated April 13, 1992
P-5	Evaluation, dated April 28, 1993
P-6	Evaluation, dated June 28, 1994

P-7	Evaluation, dated July 1, 1995
P-8	Order Vacating Restraints
P-9	Press Release
P-9A	Memo about Press Release
P-10	(Not admitted into evidence)
P-11	(Not admitted into evidence)
P-12	Memorandum, dated October 20, 1993, from Mr. Seyfarth to Dr. Renna
P-13	Memorandum, dated July 14, 1995, from Mr. D'Antoni to Mr. Mako
P-14	Memorandum, dated July 14, 1995, from Mr. D'Antoni to Mr. Mako
P-15	Memorandum, dated July 13, 1995, from Mr. D'Antoni to Mr. Mako
P-16	The Board's Answers to Mr. Seyfarth's Interrogatories
P-16A	The Board's Amended Answers to Interrogatories
P-17	Letter, dated August 29, 1995, from Dr. Renna to Mr. Seyfarth
P-18	A Guide to Cranford High School 1994-95
P-19	A Guide to Cranford High School 1995-96
P-20	Student Conduct Code 1994-1995
P-21	Student Conduct Code 1995-1996
P-22	Class Cutting Policy
P-23	Letter, dated June 8, 1993, from Mr. Seyfarth to Mr. D'Antoni
P-24	FAC Meeting Minutes, dated February 1, 1995
P-25	Memorandum, dated March 13, 1995, from Dr. Renna to personnel
P-26	Resolution, dated March 27, 1995
P-27	New Jersey School Report Card, 1994-95
R-1	Summary of District Administrative Reorganization
R-2	Letter, dated April 13, 1995, from Education Law Center, Inc. to Dr. Renna
R-3	School Newspaper Article
R-4	Letter, dated July 19, 1994, from Education Law Center to Dr. Renna
R-5	Letter, dated April 27, 1995, from Board Attorney Sciarrillo to Ms. Ellenbogen
R-6	Letter, dated May 3, 1995, from Board Attorney Sciarrillo to Dr. Renna
R-7	Mr. Seyfarth's Evaluations
R-8	Evaluation, dated May 3, 1984

R-9	Evaluation, dated May 23, 1984
R-10	Evaluation, dated June 2, 1986
R-11	Evaluation, dated May 25, 1988
R-12	Evaluation, dated August 18, 1988
R-13	Evaluation, dated May 3, 1989
R-14	(Not admitted into evidence)
R-15	Letter, dated April 21, 1995, from the Rutgers Clinic to Dr. Renna
R-16	Star Ledger Article
R-17	Chronicle Article
R-18	Certification of Steven Montovano
R-19	Letter, dated August 28, 1995, from Mr. Mako to Dr. Renna
R-19A	Letter, dated August 25, 1995, from Mr. Mako to Dr. Renna
R-20	FAC 1993 Survey
R-21	Letter, dated January 24, 1992, from Mr. Seyfarth to Mildred Price
R-22	Dr. Renna's Personal Mission Statement
R-23	Memorandum, June 27, 1994, from Dr. Renna to the Board
R-24	Dr. Renna's Annual Review
R-25	Memorandum, dated March 13, 1995, from Dr. Renna to Personnel
R-26	Resolution, dated March 27, 1995
R-27	Plan of Action for 1995/96
R-28	Goal Setting Meeting of February 23, 1995
R-29	Letter, dated June 16, 1995, from the Rutgers Clinic to Dr. Renna
R-30	1995 Needs Assessment Survey

ROBERT SEYFARTH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, including hearing transcripts, and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner generally excepts to the initial decision that he received outstanding evaluations as high school principal, thereby contending that the Administrative Law Judge (ALJ) failed to consider and weigh all of the proofs to support his claims. (Petitioner's Exceptions at p. 2) He cites portions of the hearing transcript to support these statements. He further objects to the Board's "after-the-fact attempts" to create a performance issue to justify its punitive actions against petitioner where he claims none previously existed. (Petitioner's Exceptions at pp. 3-10) Petitioner further avers that he received virtually no notice that a transfer was going to take place, and that the Board's determination to transfer him was not a product of reasonable deliberation by the Board of Education based upon competent and credible information. As such, its determinations were arbitrary, capricious and unreasonable and were not taken in good faith. (*Id.* at p. 23) Lastly, petitioner analogizes the present case to *Thomas* v. *Board of Education of Morris Township*, 89 *N.J. Super.* 327 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966), wherein it was held that a board's determination to rescind a superintendent's contract constituted an arbitrary and capricious action in that the minority board members and the public were denied any meaningful advance opportunity to learn about, consider and deliberate

regarding the action approved by the majority. He avers that the similarities between the two cases are "virtually indistinguishable" and lists reasons to demonstrate that the present case provides "an even more compelling picture of an abuse of the power and authority of the Board of Education." (Petitioner's Exceptions at pp. 26-28) Thus, petitioner argues that the Board's transfer must be set aside.

In its reply, the Board asserts that the ALJ's initial decision was proper and should be affirmed. (Reply Exceptions at p. 1) The Board avers that with the passage of the *Rotondo* bill, *N.J.S.A.* 18A:27-4.1(a), effective June 19, 1995, the superintendent is the primary decisionmaker for appointments, transfers or removal of staff and, thus, when a transfer of a professional staff member is challenged before the Commissioner, the focus of the inquiry is on the superintendent's recommendation. (Reply Exceptions at pp. 1-2) The Board further avers that following a seven-day hearing, the ALJ had ample opportunity to assess credibility and concluded that the superintendent's recommendations were reasonable and necessary. *(Id.)* The Board next asserts that petitioner's exceptions studiously avoid mention of other testimony in the record contradicting petitioner's version of the facts. The Board continues stating, "[e]ven those excerpts relied on by petitioner are misparaphrased or otherwise taken out of context.***" *(Id.)* Further, the Board reminds the Commissioner that "where the testimony is directly in conflict [the ALJ's] credibility findings are entitled to great weight.***" (*Id.* at 3) The Board then purports to document the evidence in the record which supports the ALJ's findings that the superintendent's recommendation was made in good faith.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the Board's actions, as proven, were not arbitrary, capricious, unreasonable or an abuse of discretion and adopts the initial decision for the reasons expressed therein. The Commissioner finds that, for reasons well established on record, the superintendent recommended petitioner's transfer in his capacity as chief school administrator and that the Board duly approved such transfer in accordance with *N.J.S.A* 18A:27-4.1(a). Therefore, the Commissioner concurs with the ALJ's conclusion that petitioner's claim fails in that a local board's action is entitled to a presumption of correctness. *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960).

In so ruling, the Commissioner finds no reason to disturb the credibility determinations of the ALJ. He is satisfied that the transcripts, when reviewed in their full

context, reasonably support such findings. See *In re Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987).

The Commissioner is constrained to note, however, that even taking as true the statement in petitioner's exceptions that petitioner received outstanding evaluations as principal, neither the Board nor its superintendent acted contrary to lawful authority in transferring petitioner to the middle school. The law does not consider a transfer from the position of high school principal to the position of principal at another school within the school district invalid under the tenure statutes as long as the salary is not reduced, in that such is a proper transfer to a position of equivalent rank. *Williams v. Plainfield Bd. of Ed.*, 176 *N.J. Super.* 154 (App. Div. 1980). In the *Williams* case, *supra*, the Appellate Division upheld the transfer of a high school principal to the position of elementary school principal despite her contention that her salary expectancy would be less as an elementary school principal than it would be as a high school principal. The *Williams* court rejected the notion that denial of an increment was, in effect, a reduction in salary in violation of that teacher's tenure rights holding that future increases in salary, or salary expectation, is not an appropriate factor to be considered when determining the validity of a transfer since tenured employees have no vested right in any future increases in salary.[1] Thus, the Board acted within its authority to make administrative changes among its district personnel.

Moreover, the Commissioner is not persuaded that the circumstances in *Thomas*, *supra,* lend support to petitioner's claim that the Board acted in an arbitrary, capricious or unreasonable manner or abused its discretion reaching its transfer decision. In *Thomas*, the State Board and Appellate Division conclusion that the Board acted in an arbitrary manner was based on the fact that the majority bloc determined to rescind a contract which was

> ***a drastic modification of a policy decision which had been previously made by the board after the most careful and deliberate consideration.*** (89 *N.J. Super.* at 334)

The effect of this action was to cut short a superintendent's probationary period, in order to give him an extended contract that would secure him tenure. In contrast, in the present matter, there was no contractual matter at issue nor evidence that the Board had made a previous thoughtful determination not to transfer petitioner. Rather, the Board acted to approve the superintendent's

[1] See also, *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960). (Board held that tenure is a status, a protection, not a contract and does not afford all of the same rights to salary increases.)

recommendation upon her exercise of managerial discretion to determine appropriate staff assignments for the school system. Moreover, the actions by the Board in the *Thomas* case would now be disallowed under the 1991 revisions to the laws regarding employment of superintendents by boards of education. *N.J.S.A.* 18A:17-15.[2]

Accordingly, the Commissioner affirms the initial decision of the ALJ and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] See also *West Village Civic Club, Inc. v. Bd. of Ed. of the Township of Manchester and Joel P. Oppenheim, Superintendent of Schools,* 95 *N.J.A.R.* 2d (EDU) 115 which specifically holds that a board may not contract with a superintendent and then, prior to the expiration of the contract, modify the agreement to effectively extend the term of employment beyond five years. Rather, as stated in *Graham v. Bd. of Ed. of the Town of Kearny,* "any contractual changes made before the completion of a current appointment which effectively extends the superintendent's 'existing term' of appointment beyond five years violates the school laws.***" 95 *N.J.A.R.* 2d (EDU) 510, 517.

NOVEMBER 15, 1996
DATE OF MAILING NOVEMBER 15, 1996

494-96

EDU #5970-95
C # 494-96
SB # 90-96

ROBERT SEYFARTH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 15, 1996

For the Petitioner-Appellant, Richard J. Kaplow, Esq.

For the Respondent-Respondent, David B. Rubin, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We agree that petitioner has failed to demonstrate that the Cranford Board acted improperly in reassigning him from his high school principalship to a principal's position in a middle school.

May 7, 1997

Date of mailing MAY 09 1997

495-96

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IN THE MATTER OF THE :

DISQUALIFICATION FROM : COMMISSIONER OF EDUCATION

SCHOOL EMPLOYMENT OF M.S.: DECISION

_____:

NOVEMBER 18, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11045-95
AGENCY DKT. NO. DHP 428

MICHAEL SANTUCCI,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

George L. Schneider, Esq., for petitioner (Lorber, Schneider, Nuzzi, Bilinkas & Mason, attorneys)

No appearance by or on behalf of respondent

Record Closed: August 13, 1996 Decided: September 27, 1996

BEFORE **ELINOR R. REINER**, ALJ:

PROCEDURAL HISTORY

On February 3, 1994, petitioner, Michael Santucci, was notified by the New Jersey Department of Education that due to his criminal conviction, he was disqualified from continued employment in his teaching position in any school or other institution

under the supervision of the Department of Education. He was given thirty days to appeal the decision by filing a petition with the Commissioner of Education based on grounds of either rehabilitation or mistake in his criminal record. By letter dated March 1, 1994, petitioner appealed to the Commissioner of Education alleging rehabilitation. By letter dated January 30, 1995, Deputy Commissioner Richard A. DiPatri notified petitioner of his determination that petitioner was not qualified for employment as a teacher. DiPatri indicated that insufficient time had transpired since petitioner's conviction to demonstrate clear and convincing evidence of rehabilitation.

Apparently, on or about June 5, 1995, petitioner was served with an Order to Show Cause from the State Board of Examiners of New Jersey as to "why his New Jersey teaching certificate should not be revoked." By letter dated June 14, 1995, to the State Board of Examiners, petitioner's attorney requested a hearing to establish petitioner's rehabilitation pursuant to *N.J.S.A.* 18A:6-7.3.

By letter dated July 20, 1995, petitioner was advised by the Director, State Board of Examiners, that his formal request for a hearing to establish rehabilitation was properly an appeal of the Commissioner's final determination and was required to be directed to the State Board of Education, not the State Board of Examiners. He was advised that since the proceeding for revocation is based on the disqualifying charges, he should request that the State Board of Examiners hold his Order to Show Cause in abeyance until completion of the appeal of the Commissioner's determination. Apparently, by letter dated September 18, 1995, the stay of that revocation was confirmed by the State Board of Examiners.

By letter dated August 1, 1995, petitioner filed an appeal to the Department of Education, Bureau of Controversies and Disputes, to establish his rehabilitation pursuant to *N.J.S.A.* 18A:6-7.3. On September 20, 1995, this matter was transmitted to the Office of Administrative Law (OAL) by the Department of Education, Bureau of Controversies and Disputes, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the

undersigned judge on October 13, 1995, and a hearing was scheduled for June 6, 1996, at the OAL in Newark. Petitioner's attorney requested an adjournment of that hearing date, and the matter was rescheduled for hearing on August 6 and 7, 1996, at the OAL. The matter was heard on August 6, 1996, before the undersigned judge. Witnesses who testified are listed in the attached appendix. The record closed on August 13, 1996, after receipt of petitioner's brief.

TESTIMONY

Peter Abbaleo, a veteran of twenty-seven years in the Essex County Probation Department, was Mr. Santucci's probation officer. His duties are to supervise and monitor individuals in the community. Initially, he saw Santucci every week for four weeks. He later saw him a minimum of once per month. Abbaleo said that he had no problems with Mr. Santucci. He considered him to be an outstanding father and husband and noted that Santucci's children had a good rapport with him. Although Santucci had a two-year probationary term, Abbaleo determined to discharge him at the end of one year. Only about 5 percent of Abbaleo's parolees are released that soon. Santucci had no new offenses, had reported as required, was hard-working, and Abbaleo had not heard anything negative about him.

Andrew Hudson, a funeral director, testified that his family lived across the street from Santucci's family for thirty-four years. He has interacted with Santucci socially and knows Santucci's wife and children. He testified to the "very good" reputation Santucci enjoys in the Newark and Nutley communities. (He heard of Santucci's reputation in church.) He observed the type of father Santucci is and noted that he is "instrumental" in helping his widowed sister raise her children.

Andrew Hunton, an electrical engineer, has known Santucci since 1990. He was Santucci's son's cub scout leader and they serve on church committees together. He grew to know Santucci's children, and had contact with Santucci approximately once a week before and after cub scout meetings. Santucci is a good father and has a close

family. His children are well-mannered and look up to him. Santucci is willing to lend a hand by serving on church committees.

Jeanette Armstrong has known Santucci for twenty years and has had contact with him over the last five years. She sees him socially, and also was his coworker at the Essex County Division of Welfare, where she is a social worker. She described Santucci as helpful, responsible and caring. Armstrong is a widow, and Santucci has always been there for her. He is a hard worker, a committed husband, and an excellent father.

Father Albert Malgeri is a Catholic priest and a parochial vicar (associate pastor) at the Holy Family Church in Nutley. He has known Santucci for two years. He met Santucci at mass, which Santucci attends every weekend. He described Santucci as a friendly, outgoing person, a good father, and a good Catholic man. He noted that Santucci "helps out" with church projects and activities. Santucci's four children attend Good Shepherd Academy, and Santucci teaches his children respect.

Victoria Michaels has been a secondary school administrator for twenty-five years at Barringer High School, where petitioner teaches,. She is a third-floor administrator involved in scheduling. She has known Santucci for over two years and oversees what he does. She sees him every period of every day. Michaels pointed out that Santucci is not a tenured teacher. She described him as respectful, polite and a "wonderful role model." The students realize that he is firm and wants them to learn. He smiles, pats them on the back and does not have discipline problems. She described how he appropriately handled a fight in the corridor by separating the students, putting one of them in the office and speaking to him. The elective course he is teaching, "Law in Action," is over-enrolled because Santucci is the teacher. She is "proud of him as a teacher." Michaels noted that Santucci says that his "hobby" is his family.

Anthony Tortorello is a social studies department chairman at Barringer High School. He has known Santucci since January 1995 and is Santucci's immediate supervisor. He sees Santucci interact with students every day. Santucci relates well, and Tortorello has never had to discuss anything with him. He is professional and expeditious. Santucci has an excellent relationship with his colleagues, and Tortorello has never heard an unkind word about him. His relationship with the parents is also excellent. Tortorello described Santucci as "a credit to Barringer." Of import, he stated that he has never seen Santucci angry or out of control.

Leonard Minatee is a retired detective of the arson squad of the Newark Fire Department, where he was employed for twenty-five years. He has known Santucci for fifteen years and has seen him in the last five years. He met Santucci when Santucci was in the bus business. Santucci is always concerned about the neighborhood and the kids. He brought them toys from home. Minatee met Santucci's family and became close to them. He contended that one could not meet a finer man than Santucci. Referring to the bus business, he indicated that Santucci was the owner of the regular route line. He ran the school operation. Minatee did not observe any difficulties between Santucci and the employees or customers. He always received praise and was well-liked. In fact, he hired employees to give them a chance.

Next to testify was Nicholas Liotti, a police officer with the Orange Police Department. Employed by the Department for twenty-two years, he is currently a detective sergeant. Liotti knew Santucci when Santucci was a police officer, and they worked together for eight years in a radio car. When Liotti was a new police officer, Santucci guided and helped him. Over the last six years, they maintained on-and-off telephone contact. He knew Santucci when he was single, and he now knows Santucci's family. He is aware that Santucci and his wife have a good relationship, and that Santucci has a nice relationship with his children. He noted that Santucci supervised twelve to fifteen police officers and had no difficulties as a police officer. He always supported his men and they looked up to him. He was well-liked and acted reasonably and responsibly.

Ralph Taliercio, a police captain with the Orange Police Department for twenty-five years, has known Santucci since his first day on the job. He supervised Santucci. He described Santucci as eager, energetic, willing to please, flexible, caring, firm, professional and dignified. He responds well, maintains control and is cognizant of his acts. He observed Santucci's interactions as a supervisor. Santucci motivated people and helped them if they needed it. Taliercio used Santucci to break in sergeants. Santucci interacted well in the community and handled crises professionally. A single parent of two daughters, Taliercio is "very cautious" about whom his young daughters associate with. He brings his younger daughter to socialize with Santucci's family. He noted that the neighborhood children spend lots of time in Santucci's yard playing basketball or in the pool. Both of his daughters would like to have Santucci as a teacher.

Santucci testified on his own behalf. He indicated that he has lived in Nutley, New Jersey, with his wife and four children, ages fourteen, thirteen, eleven and nine, since December 1979. He attends Holy Family Church in Nutley. For the last two years, he has been employed as a history teacher.

Santucci explained the particular facts and circumstances of the criminal offense. On November 3, 1989, his car was stolen. Some time after his car was stolen, his brother called him and advised him that he had seen the car in Verona, approximately eight blocks away. He went to the scene and observed a black male, thirty to thirty-five years old, in street clothes attempting to start his car and pull away. He noted that the key was in the ignition, the ignition was broken and the car was starting to roll. He opened the door of the car and the individual turned to him. The individual had a gun in his belt. Believing that the individual was going for his gun, and concerned about his life, Santucci hit him once on the left side of his head. He recalled that the individual became angry and that the situation was interrupted almost immediately by police officers who converged on him and handcuffed and arrested him. The individual who was in Santucci's car was an undercover police officer.

At the time of the incident, Santucci was operating a bus business. He lost a contract, and in March 1990 he lost the business. He lost everything and his family suffered. From January 1990 to December 1994, he worked in Union City part time, teaching adult education, history and law. He began teaching in Newark full time in December 1994. Santucci teaches five senior history classes. He participated in Law Day, and received bronze and silver medals. Of import, he indicated that he is comfortable with his situation and believes that he has finally found his niche. He testified to the personal satisfaction he receives from his work and his "immense love" of the teaching profession.

Joyce Santucci, Michael Santucci's wife and the mother of their four children, works part time for a doctor and as a waitress for a catering business. She testified that Santucci is calm, loves his job as a teacher, and attempts to show their children "how good they have it." She observed that students seek him out and, in fact, have come to their house. She described Michael Santucci as complacent, and noted that he gets involved in projects. He likes his job, which has had a positive effect on their children. Of import, she indicated that Santucci has always been calm. On the day of the incident, she was the one who was "hopped up." Since he does not get out of control, their children go to him if they have a problem. Even their children's friends love him.

FINDINGS OF FACT

I found the testimony adduced at the hearing and set forth above to be credible, consistent, overwhelming and worthy of belief. There has been no opposition to it or any evidence submitted which is at variance with it. That being so, I adopt the testimony set forth above as my **Findings of Fact** in this matter.

DISCUSSION

N.J.S.A. 18A:6-7.1(c) provides that a person is to be disqualified from employment as a teaching staff member if that person has a criminal history which includes a conviction for a crime or offense involving use of force upon a person, such as aggravated assault. The same statute provides that an individual shall not be disqualified from employment or service as a teacher on the basis of such a conviction if the individual demonstrates clear and convincing evidence of his or her rehabilitation. *N.J.S.A.* 18A:6-7.1(e).

In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered.

1. The nature and responsibility of the position which the convicted individual would hold;
2. The nature and seriousness of the offense;
3. The circumstances under which the offense occurred;
4. The date of the offense;
5. The age of the individual when the offense was committed;
6. Whether the offense was an isolated or repeated incident;
7. Any social conditions which may have contributed to the offense;
8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

[*N.J.S.A.* 18A:6-7.1(e).]

In determining whether Santucci has demonstrated rehabilitation, I have considered the above-noted relevant factors.

1. The nature and responsibility of the position which the convicted individual would hold

Santucci seeks to continue to serve as a teacher in the Newark public schools. Since this requires dealing with children, there is no doubt that it is necessary for one in this position to act appropriately and reasonably. It requires good moral character, a proper attitude, integrity, responsibility for one's actions, and the ability to act in a rational and controlled manner. Having considered the testimony of the witnesses in this light, I am of the opinion that Santucci possesses the characteristics and personality traits requisite to a teacher. The responsibilities of a teacher were recognized by Victoria Michaels and Anthony Tortorello, who have both supervised Santucci in school on a daily basis for the past two years. They both declared that Santucci has proven himself to have the character, attitude, aptitude, integrity and demeanor necessary to accept and carry out his responsibilities as a teacher in an exemplary manner. They have both clearly and convincingly declared that Santucci has proven he has earned the privilege of being a school teacher and is entirely suitable to maintain his teaching certificate. I am in agreement that Santucci's character, attitude, aptitude, and demeanor are consistent with the nature and responsibilities of the position. Moreover, I am convinced that Santucci has the ability to maintain himself in a calm and controlled manner, and thus possesses the required self-control to function appropriately as a teacher.

2. The nature and seriousness of the offense

In an effort to evaluate this criterion, I have considered the unique facts and circumstances attendant to the crime to which Santucci pled guilty. I am of the view that the circumstances mitigate the seriousness of the offense. Santucci clearly made a mistake, but his judgment was obviously affected by his belief that he was in danger by an individual that had stolen his car. Santucci's conduct was a result of fear and

emotional stress under circumstances which were not created by him. He may have reacted poorly to the situation, but he was reacting to an extraordinary event.

As pointed out by petitioner, this criminal act was a single, isolated, spontaneous act. Apparently, the "victim" was not seriously injured. Moreover, it is observed that Santucci received the minimum sentence of no incarceration and two years' probation after a full evaluation of the case, including a pre-sentence investigation report. Further, the probation officer was impressed with Santucci; he determined that termination of probation after one year, warranted in only 5 percent of his cases, was appropriate here. In sum, the nature and seriousness of the offense support Santucci's "rehabilitation."

3. The circumstances under which the offense occurred

As discussed above, the offense occurred under circumstances which were not caused or created by Santucci. He stumbled upon a police undercover sting operation which involved a police officer playing the role of a car thief. In Santucci's mind, he was catching a thief and stopping a crime in progress. In fact, he was attempting to save an important possession of his, his car. He clearly considered himself to be a victim of criminal conduct. When he observed the individual in his car with a gun, he became concerned that he might be injured himself. As a result, he acted quickly and spontaneously and perhaps with not enough thought. Unbeknownst to him, he assaulted a police officer. As pointed out by Santucci, at that time and under those circumstances, he believed he was acting reasonably. He saw the gun in the belt of the "car thief" and reacted to protect himself.

Santucci's conduct demonstrates not a pattern of behavior but an aberration, a departure from the normal or typical. It is not likely that such conduct will be repeated in this form or any other form, as it is not likely that the circumstances under which the offense was committed will be repeated. Santucci has paid a severe price for this momentary lapse of self-control. As pointed out by Santucci's witnesses, Santucci is a

man of good character and integrity. He is calm and exhibits self-restraint. The circumstances of the offense thus support "rehabilitation."

4. The date of the offense

The offense occurred in 1989. The evidence clearly and convincingly shows that in the almost seven years since the incident, Santucci has acted as a law-abiding and socially and professionally productive person. There have been no other incidents. On the contrary, the testimony establishes Santucci's positive contributions to his family, his school, his church, and his community. He has a strong commitment to those aspects of his life, and an excellent reputation in the community. Clearly, enough time has passed since the incident to support rehabilitation.

5. The age of the individual when the offense was committed

Santucci is presently middle-aged. He was not a youngster when the offense was committed. His age does not serve as a relevant factor to substantiate or refute rehabilitation.

6. Whether the offense was an isolated or repeated incident

On June 22, 1984, Santucci pled guilty to a disorderly person's offense, possession of fireworks. He received a $125 fine. This offense and the 1989 offense discussed above are the only offenses on Santucci's record. Quite clearly, the 1989 offense is unrelated to the 1984 disorderly person's offense. Moreover, it is clear that the 1989 offense was an isolated incident of very brief duration. There is no indication, either from Santucci's record or his behavior since the incident, that this type of incident has been or will be repeated.

7. Any social conditions which may have contributed to the offense

As pointed out by Santucci, social conditions certainly contributed to his offense. I take judicial notice of the fact that there is criminal activity in the community, and that law enforcement personnel are required to utilize certain tactics to combat this criminal activity. *N.J.S.A.* 52:14B-10(b). I am also aware of the impact on the citizens who have to deal with such criminal activity in their community on an ongoing basis and the anger and fear which such criminal activity can engender. The sting operation utilized here, albeit necessary to combat criminal activity, caused Santucci to be involved in a situation which was not of his making and which he could not have known about. The criminal activity in the community made Santucci feel that he was a "victim," and perhaps caused him to respond in the manner that he did.

8. Evidence of rehabilitation

I am persuaded by the testimony of the witnesses that Santucci exhibits good conduct in the community, has successfully participated in a probationary program, and has achieved the recommendation of persons who have supervised him. The evidence of rehabilitation is overwhelming and impressive. Santucci has the confidence of the community that he is rehabilitated, and has functioned in the community in that manner.

I am persuaded that Santucci has shown clear and convincing evidence of his rehabilitation pursuant to *N.J.S.A.* 18A:6-7.1(e). I am confident that Santucci is sufficiently rehabilitated to qualify him for employment as a teacher.

CONCLUSION

I **CONCLUDE** that Santucci has demonstrated clear and convincing evidence of rehabilitation pursuant to *N.J.S.A.* 18A:6-7.1(e).

It is hereby **ORDERED** that petitioner's appeal is **GRANTED** and that Michael Santucci is not disqualified from employment as a teacher.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 4 1996

DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Witnesses

Peter Abbaleo

Andrew Hudson

Andrew Hunton

Jeanette Armstrong

Father Albert Malgeri

Victoria Michaels

Anthony Tortorello

Leonard Minatee

Nicholas Liotti

Ralph Taliercio

Michael Santucci

Joyce Santucci

OAL DKT. NO. EDU 11045-95

IN THE MATTER OF THE :

DISQUALIFICATION FROM : COMMISSIONER OF EDUCATION

SCHOOL EMPLOYMENT OF M.S.: DECISION

_____:

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, and having accepted the credibility determinations of the ALJ, the Commissioner determines to affirm the initial decision of the ALJ, in that petitioner, having been provided the opportunity to supplement the record of his prior disqualification proceeding, has adduced evidence sufficient to meet the standard set forth at *N.J.S.A.* 18A:6-7.1 *et seq.,* rendering him eligible for school employment as a teacher.

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1996
DATE OF MAILING NOVEMBER 18, 1996

496-96

ROBERT SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former Manager of Data Processing, contended his termination by the Board was in violation of statute and Board policy.

ALJ found that since all of petitioner's rights with respect to his employment by the Board were set forth in his written contract of employment, the dispute between the parties to the contract was not a controversy over which the Commissioner had jurisdiction. Thus, the ALJ concluded that the Board was entitled to an order granting summary decision dismissing the petition for lack of jurisdiction.

Commissioner concurred with the ALJ that this matter was contractually based. While the law is clear that a school board may enter into contractual agreements, it is clear that the Commissioner will not rule on the enforceability of a contract especially where, as herein, the interpretation of the contract was the primary issue at hand and not merely implicated in a question of the school laws. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 2725-96

AGENCY DKT. NO. 92-3/96

ROBERT SMITH,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

Respondent.

Norman G. Matlock, Esq., for petitioner

James P. Granello, Esq., for respondent

Record Closed: August 27, 1996 Decided: October 8, 1996

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on March 12, 1996 when Robert Smith (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order that the actions of the Board of Education of the Township of Willingboro (hereinafter respondent) terminating his employment as Manager of Data Processing without affording him a hearing violated Board policy, N.J.S.A. 18A:6-10, and petitioner's contractual rights. The petition sought reinstatement with back pay and benefits. An answer on behalf of respondent was filed on March 21, 1996 and

on April 10, 1996 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted by telephone conference call on July 11, 1996 at which time it was determined that respondent would submit a motion for summary decision. Respondent's motion and supporting papers were received on July 17, 1996. Petitioner's brief in opposition to respondent's motion was received on August 23, 1996 and a letter memorandum in reply was received from respondent on August 27, 1996, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a disposition of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

On June 27, 1995, petitioner entered into his seventeenth annual contract of employment with respondent. Pursuant to the terms of the contract, petitioner agreed to perform the duties of "Manager-Data Processing" from July 1, 1995 through June 30, 1996, for an annual salary of $61,505. The contract further provided in pertinent part:

. . . .

> 3. The Board reserves the right to dismiss The Employee and to terminate this contract upon two weeks written notice if it is not satisfied with The Employee's performance of duties or personal deportment while on the job. The Board shall likewise have the option of paying said Employee a sum equivalent to two weeks salary and dismissal immediately.
>
> . . . .
>
> 5. It is understood by The Employee that this contract is for a fixed term as stated herein and the execution of subsequent contracts will not confer any additional benefits or employment security except as may be provided in said contract documents.
>
> . . . .

On December 4, 1995, petitioner was notified by his immediate supervisor, Wayne W. Thomas, School Business Administrator, that his employment was terminated effective immediately. Petitioner requested the opportunity to appear before the Board of Education; this request was denied and on December 18, 1995, respondent voted to terminate petitioner's employment.

Respondent's Policy No. 4117.54 entitled, "Suspension and Dismissal of Professional Staff Members" contains two subsections; the first is entitled "Tenure Teacher" and the second is entitled "Non-Tenure Teachers." The policy concludes:

> REQUEST FOR APPEARANCE BEFORE BOARD OF TEACHING STAFF MEMBER NOT RE-EMPLOYED
>
> Any teacher whose contract has not be renewed must make a written request for a statement of reasons within 15 calendar days after receipt of notice of non-reemployment. Subsequently, the Board must present that statement of reasons within 30 calendar days after receipt of the teacher's formal request.
>
> The teacher, having received the statement of reasons, must submit a written request for a formal hearing within 10 calendar days after said receipt. The Board will thereafter schedule that formal hearing within 30 calendar days from the teacher's receipt of the requested statement of reason.

Petitioner asserts that he is a professional staff member within the contemplation of this policy; however, petitioner acknowledges that he does not hold any certificate issued by the State Board of Examiners nor does his position title require that he hold such a certificate.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was recently modified in Brill v. Guardian Life Insurance Company of America, and KRA Insurance Agency, Inc., 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for

determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exits a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, there is no dispute concerning any issue of material fact. Petitioner disputes the underlying reason for his termination from employment. That dispute, however, is not a fact material to a determination of the within matter because the basis for respondent's motion for summary decision, inter alia, is the Commissioner's lack of jurisdiction over contract disputes. Accordingly, I **CONCLUDE** this matter is ripe for summary decision.

Respondent first argues that even if the Commissioner does have jurisdiction over the within matter, the petition of appeal should be dismissed as untimely pursuant to N.J.A.C. 6:24-1.2(c) which requires the petition to be filed no later than 90 days after "receipt of the notice of a

final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing." Respondent asserts that the 90-day period of limitations should begin to run from December 4, 1995, when petitioner was advised by his direct supervisor that his employment was terminated. However, it is clear that respondent did not vote to terminate petitioner's employment contract until December 18, 1995. The contract specifically provides that notice of termination is to be in writing and that it must come from respondent. Accordingly, I **CONCLUDE** that the period of limitations did not begin to run until December 18, 1996, and therefore N.J.A.C. 6:24-1.2(c) provides no basis for dismissing the petition of appeal herein.

In the petition of appeal, petitioner claims that he was entitled to a hearing pursuant to N.J.S.A. 18A:6-10. That statute, however, governs dismissal and reduction in compensation of persons under tenure in public school systems. Since tenure is a statutory status and not a contractual one, petitioner must base his claims in this matter upon specific statutory provisions. Not all school board employees are protected by statutory job security. The education act makes specific provisions for tenure of teachers and other employees holding certificates issued by the State Board of Examiners (N.J.S.A. 18A:28-5 and 6); secretaries, assistant secretaries, business administrators, business managers,* secretarial and clerical employees (N.J.S.A. 18A:17-2); janitorial employees (N.J.S.A. 18A:17-3); and attendance officers (N.J.S.A. 18A:38-33). Currently no statutory provision provides tenure for managers of data processing. Accordingly, since petitioner neither had tenure nor is tenure-eligible in the district, N.J.S.A. 18A:6-10 and the provisions which follow cannot provide any basis for the Commissioner's jurisdiction to hear the within matter. Likewise, petitioner's assertions that respondent violated its own Board policy by refusing to give him a hearing are without merit. The policy provisions, quoted hereinabove, apply only to teaching staff members, i.e., those holding a position which requires the employee to hold a certificate issued by the State Board of Examiners. N.J.S.A. 18A:26-2; 18A:27-2; 18A:28-5.

* Only Type I school districts are authorized to employ business managers. See, N.J.S.A. 18A:17-25 and N.J.S.A. 18A:9-2.

All of petitioner's rights with respect to his employment by respondent are set forth in his written contract of employment. N.J.S.A. 18A:6-9 provides that "the Commissioner shall have jurisdiction to hear and determine all controversies and disputes arising under the school laws. . . ." A dispute between parties to a contract who simply happen to be a school board and an employee does not present a controversy over which the Commissioner has jurisdiction. Sally v. Board of Education of the City of Newark, 1984 S.L.D. 1714. Such matters do not require the educational expertise of the Commissioner and are properly brought in a court of competent jurisdiction. Accordingly, based upon the foregoing, I **CONCLUDE** that respondent is entitled to an order granting summary decision dismissing the petition of appeal herein for lack of jurisdiction.

Petitioner also cites N.J.S.A. 18A:27-4.1 which requires that the removal of a non-certificated employee such as petitioner be recommended by the superintendent and be accomplished by a recorded roll call majority vote of the full Board. Petitioner offers no evidence or affidavit that this procedure was not followed, however. To defeat a motion for summary decision, an opponent must by responding affidavit set forth specific facts showing the existence of genuine facts which require a hearing. N.J.A.C. 1:1-12.5(b). Petitioner has offered no such facts with respect to respondent's vote or the superintendent's recommendation, and accordingly, summary decision is appropriate.

For all the foregoing reasons, respondent's motion for summary decision is hereby granted and the petition of appeal is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 8, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10/8/96
DATE

DNA
DEPARTMENT OF EDUCATION

OCT 10 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

ROBERT SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that this matter is contractually based. While the law is clear that a school board may enter into contractual agreements, *Remedial Educ. & Diag. Serv. v. Essex County Educ. Serv.*, 191 *N.J. Super.* 524, 527 (App. Div. 1983), it is also clear that the Commissioner will not rule on the enforceability of a contract especially where, as here, the interpretation of the contract is the primary issue at hand and not merely implicated in a question of the school laws. *Cherry Hill v. Board of Education of the Borough of Haddonfield,* decided by the Commissioner on September 23, 1996. See also *Picogna v. Board of Education of the Township of Cherry Hill,* 249 *N.J. Super.* 332 (App. Div. 1991)

Accordingly, the Commissioner concurs with the ALJ's determination for the reasons expressed therein and as further explicated herein, and hereby orders that the within Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

497-96

497-96

DIANE CARNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6959-93

AGENCY DKT. 237-6/93

DIANE CARNEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner, (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Gary D. Wodlinger, Esq., for respondent, (Lipman, Antonelli, Batt, Dunlap Wodlinger & Gilson, attorneys)

Record Closed: October 2, 1996 Decided: October 8, 1996

BEFORE **EDGAR R. HOLMES,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 26, 1993, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

10/8/96
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

10/11/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 15 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

LIPMAN, ANTONELLI, BATT, DUNLAP,
WODLINGER & GILSON
110 N. Sixth Street
P.O. Box 280
Vineland, New Jersey 08360 (609)692-8000

DIANE CARNEY, Petitioner VS. QUINTON TOWNSHIP BOARD OF EDUCATION Respondents.	:	OFFICE OF ADMINISTRATIVE LAW AGENCY DOCKET #EDUOR 06959-93S STIPULATION OF SETTLEMENT AND DISMISSAL

THIS MATTER having been opened before the Office of Administrative Law, by way of petition having been filed by the Petitioner, Diane Carney, by her attorney, Richard Friedman, Esquire of the Law Firm of Zazzali, Zazzali, Fagella & Nowak, seeking an Order of the Commissioner of Education, directing the Respondent, the Quinton Township Board of Education, to recognize Petitioner's alleged tenure and seniority rights to a full time position under her physical education endorsement and elementary endorsement; and with the Respondent, Quinton Township Board of Education being represented by Gary D. Wodlinger, Esquire of the Law Firm of Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson; and with the case having been placed on the inactive list by way of Order entered by the Honorable Edgar R. Holmes, A.L.J., on March 1, 1995, awaiting the disposition of the Johnstone and Francie cases, then pending in the Appellate Division, and with those cases having been decided and resolved by the Appellate Division in a fashion which resolved the issues presently before the Office of Administrative Law;

LAW OFFICES
LIPMAN, ANTONELLI, BATT, DUNLAP,
WODLINGER & GILSON
A PROFESSIONAL CORPORATION
VINELAND, NEW JERSEY 08360

Administrative Law;

THE PARTIES DO HEREBY STIPULATE AND AGREE that the petition filed by the Petitioner, Diane Carney, shall and is hereby dismissed with prejudice, provided that the dismissal of the petition shall not limit or restrict Petitioner's right to file any new petitions if her position is abolished or reduced. By agreeing to this Stipulation of Settlement, Petitioner is not waiving any claim to any future vacancies that she might be entitled to by law.

HON. EDGAR R. HOLMES, A.L.J.

I hereby consent to the form
and entry of the within
Stipulation of Settlement
and Dismissal.

DIANE CARNEY, Petitioner

RICHARD FRIEDMAN, ESQUIRE
Attorney for Petitioner

QUINTON TOWNSHIP BOARD OF
EDUCATION, Respondent

GARY D. WODLINGER, ESQUIRE
Attorney for Respondent

LAW OFFICES
LIPMAN, ANTONELLI, BATT, DUNLAP,
WODLINGER & GILSON
A PROFESSIONAL CORPORATION
VINELAND, NEW JERSEY 08360

OAL DKT. NO. EDU 6959-93

DIANE CARNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF QUINTON, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 25, 1996
DATE OF MAILING NOVEMBER 25, 1996

498-96

JUNO DELANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 25, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1999-94
AGENCY DKT. NO. 17-2/94

JUNO DELANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, Council, George & Dortch, attorneys)

Richard A. Friedman, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: October 16, 1996 Decided: October 17, 1996

BEFORE **BRUCE R. CAMPBELL,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 2, 1994 for a hearing pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

Negotiations between the parties began almost immediately.

The parties have agreed to settle this matter and have prepared the attached stipulation icating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The settlement comports with the sound public policy favoring settlements.

I CONCLUDE that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings by concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

17 OCTOBER 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

OCT. 21, 1996
DATE

DEPARTMENT OF EDUCATION

OCT 22 1996
DATE

Mailed to Parties:
Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

/cat

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

JUNO DELANO, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, Respondent.	: BEFORE THE OFFICE OF ADMINISTRATIVE LAW : : OAL DOCKET NO. EDUOA-01999-94S : : STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT

The parties to this matter hereby agree that the within matter shall be deemed settled and withdrawn subject to the following terms:

1. The parties agree that the time, expense, and risks of litigation for each of them warrants this settlement, that it is in the best interests of both parties, and that it represents a fair and just resolution of the parties' claims, defenses, and interests.

2. The parties recognize that this settlement agreement must be approved by the Commissioner of Education, and that if this settlement agreement is not approved by him, the petition shall be remanded to the Administrative Law Judge for further proceedings, and that neither party, in such event, shall be deemed to have

waived any of their claims or defenses.

3. Respondent shall pay a lump sum of $9,500.00 to Petitioner, which shall constitute the payment for and satisfy her claims for salary payments due for both of the accidents which are asserted in the petition of appeal. Said payment shall be paid within thirty (30) days of approval of this settlement agreement by the Commissioner of Education.

4. Each party shall bear its own costs, fees, and expenses, and Petitioner waives all claims against Respondent for penalties and for interest.

5. The parties agree that because Petitioner is no longer employed by Respondent, Respondent shall take no deductions from said payment. However, Petitioner shall be responsible for payment of any deductions or taxes which any State or Federal agency may be entitled to, but Petitioner shall not be responsible for any payments which any such agency asserts is the responsibility of the Respondent, and such payments shall be the Respondent's responsibility.

6. Both parties consent to the terms of this agreement, and both parties represent that they have consulted with their respective counsel.

Dated: 9/3/96

By: _____
Richard A. Friedman, Esq.
ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Dated: 9/19/96

Juno L. Delano
Juno Delano, Petitioner

Dated: 10/4/96

By: Thomas Sumners
Thomas Sumners, Jr., Esq.
SUMNERS, COUNCIL, GEORGE & DORTCH
Attorneys for Respondent

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 1999-94

JUNO DELANO,	:	
PETITIONER.	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 25, 1996
DATE OF MAILING NOVEMBER 25, 1996

499-96

499-96 E

M.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

NOVEMBER 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION
FOR EMERGENT RELIEF, ETC.
OAL DKT. NO. EDU 8914-96
AGENCY DKT. NO. #503-10/96

M.K.,

Petitioner,

v.

BOARD OF EDUCATION
OF THE BOROUGH OF OAKLYN,

Respondents.

Dale W. Keith, Esq., for petitioner (Grimes et al., attorneys)

William D. Hogan, Esq., for respondent (Davis, Reberkenny & Abramowitz, attorneys)

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case concerns placement of a J.K., a 9th grade student, who with M.K., his mother, resides in the Borough of Oaklyn.

Respondent Board of Education of the Borough of Oaklyn (OBOE) operates a K through 9th grade school system. After the 9th grade, pursuant to a sending/receiving agreement between

the OBOE and the Board of Education of the Borough of Collingswood (CBOE), Oaklyn students continue in 10th, 11th and 12th grades in the CBOE's high school, for which the OBOE pays tuition.

During the 1995-96 school year, J.K. was a 9th grade student in the OBOE's school system. J.K failed five of his subjects and the OBOE school system notified him that he would be retained in his grade. J-1. However, without authorization from the OBOE, the OBOE's school system principal represented to M.K. that, for the 1996-97 school year, J.K. would be placed in a 9th grade in the CBOE's school system (for which there would be liability for tuition.) J-2. J.K. began the 1996-97 school year in the CBOE's 9th grade and, in October 1996, the CBOE sent to the OBOE documentation showing that tuition was owed for J.K. The OBOE then learned that J.K. was in the CBOE school system and it notified M.K. that J.K. should return to the OBOE's 9th grade. OBOE-1.

M.K. alleges that J.K. was stigmatized in the OBOE's school system; he needs the "fresh start" that placement in the CBOE's school system will provide; and withdrawal from the CBOE's school system and placement in the OBOE's school system will disrupt J.K.'s education. M.K. claims that J.K. should be permitted to continue in the CBOE's school system and she moves for an order to that effect until a final decision can be issued in this case. N.J.A.C. 1:1-12.6.

The OBOE opposes the motion for reasons, including the following: The OBOE points out that the above-described representation by the principal was contrary to the sending/receiving agreement and unauthorized. The OBOE denies that its school system treated J.K. unfairly and/or stigmatized him. The OBOE alleges that, even in the CBOE's school system, J.K. has performed poorly and that, because the school year is young, withdrawal and return to the OBOE's school system will not irreparably harm J.K. N.J.A.C. 1:1-12.6(f)2. Further, the OBOE submits, given the potential liability for tuition for the incorrect placement of J.K. and the interests of the Oaklyn taxpayers (who may be liable for such tuition resulting from continuing placement in the CBOE's school system), an emergent order should not be entered continuing the incorrect placement. Further, the OBOE also submits, the CBOE is a necessary party which must have notice and an opportunity to be heard before any relief, including the moved-for emergent relief may be ordered. N.J.A.C. 1:1-1.3(a), R. 4:6-2(f).

PROCEDURAL HISTORY

On October 23, 1996, M.K., pro se, filed a verified petition with the Department of Education and, on October 24, 1996, the OBOE's answer was filed. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on October 24, 1996, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On October 29, 1996, in the OAL in Trenton (Hamilton Township), petitioner's attorney entered his appearance and the motion was heard. There was no record that the CBOE, which would have a claim for tuition for J.K.'s attendance in its school system, was notified of the case or that it had an opportunity to appear and represent its interests in the subject matter. N.J.A.C. 1:1-1.3(a), R. 4:6-2(f).

FINDINGS OF FACT

The OBOE operates a K through 9th grade school system. After the 9th grade, pursuant to a sending/receiving agreement between the OBOE and the CBOE, Oaklyn students continue in 10th, 11th and 12th grades in the CBOE's high school, for which the OBOE pays tuition.

M.K. is the mother of J.K., whose date of birth is October 8, 1980, and they reside in the Borough of Oaklyn where, beginning with the 1986-87 school year, J.K. was a student in the OBOE's school system.

Records maintained by the OBOE show the following: In the 1986-87 school year, when J.K. was in kindergarten; in the 1987-88, when he was in 1st grade; in the 1988-89 school year, when he was in the 2nd grade; in the 1989-90 school year, when he was in the 3rd grade; and in the 1990-91 school year, when he was in the 4th grade, his grades were very good. In the 1991-92 school year, when J.K. was in the 5th grade and in the 1992-93 school year when he was in the 6th grade, his grades fell to about average. In the 1993-94 school year, when J.K. was in the 7th grade and, in the 1994-95 school year, when he was in the 8th grade, his grades fell further and he failed some subjects. In the 1995-96 school year, when J.K. was in the 9th grade, his grades fell further; he failed more subjects; and he failed to attain sufficient points to advance to the 10th

grade. J-1. (Apparently, J.K.'s parents have experienced marital difficulties and this may have contributed to his declining grades.)

In a letter, dated June 17, 1996, James J. Sanders, principal of the OBOE's school system, notified M.K. that J.K. had the "option" of attending summer school to make up classes so that "hopefully, in the future, [he would] be able to graduate with [his] class if [he] continued to make up credits" and, without authorization from the OBOE, he represented to M.K. that, for the 1996-97 school year, J.K. would be "placed in a 9th grade homeroom" in the CBOE's school system. J-2.

M.K. felt that J.K.'s declining grades had given him a poor reputation in the OBOE's school system and that a "fresh start" in the CBOE's school system would allow him to perform well and, relying on Mr. Sanders' letter, for the 1996-97 school year, J.K. enrolled in the CBOE's 9th grade.

J.K. began the 1996-97 school year in the CBOE's 9th grade and, in October 1996, the CBOE sent to the OBOE documentation showing that tuition was owed for J.K. OBOE-2. The OBOE then learned that J.K. was in the CBOE school system and it notified M.K. that J.K. should return to the OBOE's 9th grade. OBOE-1.

M.K. testified that she believed that J.K. was performing fairly well in the CBOE's school system. However, the OBOE's superintendent received a report from the CBOE school system that J.K. is again performing poorly in some subjects. That is to say, there is an issue of fact relative to whether J.K.'s performance in the CBOE school system has been substantially better than it was in the OBOE school system.

Certainly, the withdrawal of J.K. from the CBOE's school system and his return to and placement in the OBOE's school system will result in some disruption to his education. However, the petitioner has not proven that "irreparable harm will probably result" from the withdrawal, etc. This is an issue of fact that could not be resolved in the hearing on this motion. N.J.A.C. 1:1-12.6(f)2. The school year is young and, with special attention by the school system staff of the

OBOE (whose principal's letter caused J.K.'s placement in the CBOE's school system), the disruption can probably be minimized.

In any event, at this time, the "likelihood" is that J.K.'s placement in the CBOE's school system was contrary to the sending/receiving agreement between the OBOE and the CBOE and unauthorized by the OBOE. N.J.A.C. 1:1-12.6(f)3.

CONCLUSIONS OF LAW

Standards for the granting of a motion for emergent relief are well-established. See N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-134 (1982).

Consistent with the "Findings of Fact," the petitioner has not, in the record made during the hearing on the motion, proven that "irreparable harm will probably result" from J.K.'s withdrawal from the CBOE's school system and return and placement in the OBOE's school system. N.J.A.C. 1:1-12.6(f)2.

The "likelihood" is that J.K.'s placement in the CBOE's school system was contrary to the sending/receiving agreement between the OBOE and the CBOE and unauthorized by the OBOE, so that it would be unfair to the OBOE and the taxpayers of the Borough of Oaklyn to order that J.K. continue in the CBOE's school system, given the claim for tuition that will result from such an order. N.J.A.C. 1:1-12.6(f)3.

Additionally, the CBOE has a claim for tuition for J.K.'s attendance in its school system. However, apparently, the CBOE was not notified of this case and had no opportunity to appear and represent its interests. It appears that the OBOE's principal's letter principal's caused J.K.'s placement in the CBOE's school system, so that the OBOE and not M.K. should be liable for J.K.'s attendance up to October 1996 (when the OBOE notified M.K. that J.K. should be returned to the OBOE's school system.) For any attendance after October 1996, the CBOE may claim tuition from the OBOE and/or M.K. and the CBOE should have notice and an opportunity to appear and represent its interests. Also, in a real-world sense, if the petitioner's motion were granted and an order were entered continuing J.K. in the CBOE's school system and if M.K. were

to be held liable for tuition for that period of time, the CBOE might have difficulty collecting payment on its claim for tuition. All of these circumstances require the conclusion that the CBOE is a necessary party who must have notice and an opportunity to be heard before any relief, including the moved-for emergent relief may be ordered. N.J.A.C. 1:1-1.3(a), R. 4:6-2(f).

Finally, if the petitioner is confident in her case, she might enter into an agreement with the CBOE whereby, in consideration for her payment of tuition, J.K. could continue in the CBOE's school system.

Given the above, the petitioner fails to satisfy the above-cited standards and the motion for emergent relief may not granted. N.J.A.C. 1:1-12.6(f)3.

ORDER

Consistent with the above, **I DENY** the motion for emergent relief.

I **ORDER** the following: (1) By November 15, 1996, M.K. will file in the OAL a motion to amend her petition to include the CBOE as a party (with a proposed amended petition) or she will file other evidence of notice to the CBOE of this case and its opportunity to appear and be heard. (2) By November 29, 1996, the parties may serve discovery requests. (3) By December 31, 1996, the parties will serve answers to the discovery requests. (4) A telephone conference to discuss the progress of the case and hearing dates will be set. (5) Most importantly, M.K. and the OBOE staff will meet and plan an education program to help J.K. end his declining grades and to provide an appropriate education for him. In this regard they should consider whether J.K. requires special attention from the OBOE's school system staff to assure an orderly return to that school system and they should consider whether J.K. requires classification, etc. See, e.g., N.J.A.C. 6:28-3.5(d)5.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Oct 30, 1996
DATE

JOHN R. TASSINI, ALJ

EXHIBITS

Joint:

J-1 Pupil Report Card, 1995-96, for J.K., grade 9

J-2 Letter from Oaklyn Public School Principal James J. Sanders, dated June 17, 1996

Petitioner's:

P-1 Portion of CBOE Program of Studies 1996-97

Respondent Oaklyn Board of Education's:

OBOE-1 Letter from Oaklyn Public School Superintendent C. Edwin Smith, III, dated October 17, 1996

OBOE-2 Student Schedule, 1996/97, Collingswood High School, J.K.

OBOE-3 Collingswood High School report on J.K.'s progress in certain courses

OAL DKT. NO. EDU 8914-96

M.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter, including the audio-cassette tape of the hearing, conducted on October 29, 1996, at the Office of Administrative Law (OAL), and the Order of the ALJ have been reviewed. Upon such review, and in consideration of the standard for granting emergent relief as established by *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), the Commissioner determines to affirm the ALJ's Order denying petitioner's request for emergent relief in this matter, in that petitioner has failed to meet the requisite standard.

Accordingly, petitioner's Motion for Emergent Relief is denied for the reasons expressed in the recommended Order, and the matter on the merits will proceed at the OAL, consistent with the recommendations of the ALJ.

IT IS ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

501-96

501-96

A.B. AND P.B., on behalf of minor child, S.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

PETITIONER,

V.

A.B. AND P.B., on behalf of minor child, S.M.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 12, 1996

OAL DKT. NO. EDU 6587-95
AGENCY DKT. NO. 169-5/95

A.B. AND P.B., on behalf of minor child, S.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

PETITIONER,

V.

A.B. AND P.B., on behalf of minor child, S.M.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1996
DATE OF MAILING NOVEMBER 12, 1996

502-96

502-96

JERRY BERNSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11050-95

AGENCY DKT. NO. 291-7/95

JERRY BERNSTEIN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Eugene G. Liss, Esq., for petitioner

Gregory T. Johnson, Esq., for respondent

Record Closed: October 4, 1996 Decided: October 4, 1996

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law for hearing on September 20, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached settlement agreement indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Oct. 4, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

10/8/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT - 9 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

OCT 4 11 31 AM '95

GREGORY G. JOHNSON, ESQ.
17 Academy Street, Suite 208
Newark, New Jersey 07102
(201) 642-0001
Attorney for Newark Public Schools

JERRY BERNSTEIN *Petitioner,* *vs.* **STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK** *Respondent.*	**BEFORE THE COMMISSIONER OF EDUCATION** **OFFICE OF ADMINISTRATIVE LAW** **Agency Ref. No. 291-7/95** **OAL Docket No. EDUOR 11050-95N** **AGREEMENT**

The parties, State Operated School District of the City of Newark (hereinafter the "District" or "respondent") and Jerry Bernstein (hereinafter "Petitioner") wish to resolve the differences between them. It is hereby stipulated and agreed as follows:

1. On May 2, 1995, the former board of education voted to withhold the petitioner's salary increment for the 1995-96 school year for unsatisfactory performance pursuant to *N.J.S.A.* 18A:29-14.

2. On July 21, 1995, the Petitioner filed a Petition of Appeal with the Commissioner of Education contesting the action to withhold his salary increment as arbitrary, capricious and unreasonable, and therefore void.

3. On or about September 8, 1995, the District filed an Answer with the Commissioner defending the increment denial.

4. The District agrees to restore Petitioner's salary increment prospectively for the 1996-97 academic school year, effective July 1, 1997. The Petitioner will be placed on the appropriate step/level as prescribed by the Collective Bargaining Agreement with the Newark Teacher's Union.

5. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other, known and unknown, arising out of the action captioned *Jerry Bernstein v. State-Operated School District of the City of Newark*, docketed at OAL Docket No. EDUOR 11050-95N, Agency Reference No. 291-7/95.

6. All parties agree that nothing in this Agreement shall constitute an admission of wrong-doing by any party. This Agreement shall not create any rights as to any employee, now or in the future, except Petitioner.

7. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

8. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by their respective parties to sign this Agreement and bind their principals to its terms.

9. In the event that the District is prevented from, unable, or unwilling to fulfill the terms of this Agreement, for any reason, the parties will be returned to the status quo existing prior to the execution of the Agreement.

10. This Agreement shall become final upon approval by the State District Superintendent and Commissioner of Education.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

FOR THE EMPLOYEE

Jerry Bernstein

JERRY BERNSTEIN

WITNESS

Eugene G. Liss

EUGENE G. LISS, ESQ.
Attorney for Mr. Bernstein

Dated: Oct 1, 1996

FOR THE STATE-OPERATED SCHOOL DISTRICT OF NEWARK

Beverly L. Hall

DR. BEVERLY L. HALL

WITNESS

Gregory G. Johnson

GREGORY G. JOHNSON, ESQ.

Dated: Oct. 1, 1996

OAL DKT. NO. EDU 11050-95

JERRY BERNSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

503-96

503-96

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

NOVEMBER 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3010-96

AGENCY DKT. NO. 49-2/96

STEPHEN YANNOTTI,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF IRVINGTON,

Respondent.

Stephen Yannotti, petitioner, *pro se*

Stephen Edelstein, Esq., respondent
(Schwartz, Simon, Edelstein, Celso, & Kessler, attorneys)

Record Closed: September 20, 1996 Decided: October 11,1996

BEFORE **DIANA C. SUKOVICH**, ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

On or about February 8, 1996, petitioner filed a petition with the State Department of Education (Department) contesting the results of a special election to the Board of Education of the Town of Irvington (respondent), an election in which he was a candidate. The Department transmitted the matter to the Office of Administrative Law (OAL) on March 5, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

On April 4, 1996, The Honorable Barbara A. Harned, Director and Chief ALJ of the OAL, issued an order consolidating this matter with others pending before the Department, solely regarding the issue of whether the Commissioner of the Department (Commissioner) has jurisdiction to determine the cases. A hearing in the current matter previously scheduled for April 30, 1996 was adjourned, pending a resolution of the issue of jurisdiction.

On June 11, 1996, Judge Harned issued an order, determining that the Commissioner has jurisdiction over the current matter, as well as the other pending matters which were consolidated. A hearing in the current case was scheduled for August 2, 1996.

A telephone conference was conducted on August 1, 1996, at which time petitioner stated that he intended to withdraw his petition. The scheduled hearing was therefore adjourned.

By letter dated August 19, 1996, referencing the prior telephone conference, this judge requested that petitioner file a letter of withdrawal or advise if he had changed his plans in that respect. Petitioner did not respond, and by letter dated September 10, 1996, I advised petitioner that if he did not respond within ten days, a decision dismissing his petition would issue. Petitioner did not respond to the latter letter, and the record is deemed to have closed on September 20, 1996.

FINDING AND CONCLUSION

Based on the above procedural history, I **FIND** that petitioner has failed to prosecute his petition in the current matter and **CONCLUDE** that his petition should be dismissed with prejudice.

ORDER

It is hereby **ORDERED** that the petition filed by petitioner with the Department on or about February 8, 1996 be and is hereby **DISMISSED**, with prejudice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 17, 1996
DATE

DIANA C. SUKOVICH, ALJ

10/21/96
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 21 1996
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

njf

OAL DKT. NO. EDU 3010-96

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF IRVINGTON,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge that this matter is properly dismissed for failure to prosecute. Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and the within petition is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

508-96

508-96

CORDELL REINHARDT,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
CORDELL REINHARDT,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

In consolidated matters, petitioner alleged Board violated his tenure and seniority rights by failing to appoint him Supervisor of Extra-Curricular Activities for the 1994-95 school year and transferring him to an instructional position. Petitioner charged age discrimination and unlawful retaliation for filing his first petition.

ALJ concluded the Board did not discriminate against petitioner on the basis of age. ALJ concluded the Board wished to appoint persons at lower salaries. ALJ did find that following petitioner's claims, he did suffer an adverse employment action. ALJ concluded petitioner was entitled to assignment to one of the Supervisor of Extra-Curricular Activities positions commencing with the 1994-95 school year. The Board was ordered to place petitioner in one of those positions immediately and to pay him back pay and benefits based upon a salary of $74,500.

Commissioner concurred with ALJ's findings that petitioner was a tenured employee in a tenured position who was wrongfully not assigned to a supervisory position to which he was entitled by tenure right, which wrongful assignment was in retaliation for petitioner's filing an appeal of prior Board actions. Commissioner ordered petitioner placed in one of the Board's positions of Supervisor of Extra-Curricular Activities with compensation.

NOVEMBER 18, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

CONSOLIDATED CASES

CORDELL REINHARDT,

Petitioner,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent,

and

CORDELL REINHARDT,

Petitioner,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

OAL DKT. NO. EDU 11556-94
AGENCY DKT. NO. 387-9/94

OAL DKT. NO. EDU 11971-94
AGENCY DKT. NO. 441-10/94

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

Malachi J. Kenney, Esq., for respondent (Kenney and Gross, attorneys)

Record Closed: May 20, 1996 Decided: October 3, 1996*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

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* Extensions of time for issuing the initial decision were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

The first of these consolidated matters commenced on September 22, 1994, when Cordell Reinhardt (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education alleging that the Board of Education of the Freehold Regional High School District (hereinafter respondent) had violated his tenure rights by failing to appoint him to the position supervisor of extra-curricular activities. Petitioner also alleged that respondent's actions constituted unlawful discrimination on the basis of age in violation of N.J.S.A. 18A:28-10. The petition sought an order requiring respondent to appoint him to the position and to compensate him for back pay and benefits. An answer was filed on behalf of respondent on November 1, 1994 and on November 30, 1994, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. The case was assigned OAL Docket No. EDU 11556-94. Petitioner filed a second petition of appeal on October 31, 1994, in which he reiterated the same allegations concerning respondent's failure to appoint him to a vacancy which had occurred in the position and added the assertion that respondent's failure to appoint him to the vacancy was the result of unlawful retaliation for filing the first petition of appeal. An answer to the second petition was filed on behalf of respondent on December 6, 1994 and on December 13, 1994 the Commissioner transmitted the matter to the Office of Administrative Law where it was assigned OAL Docket No. EDU 11971-94.

A prehearing conference was conducted in both matters on February 16, 1995. The prehearing order which was issued as a result thereof on February 24, 1995 consolidated the two cases for hearing at the request of the parties and set forth the following as issues for determination:

1. Did petitioner have tenure/seniority rights which would entitle him to the position supervisor of extra-curricular activities for the 1994-95 school year?

2. Did respondent's actions transferring petitioner to an instructional position violate N.J.S.A. 18A:6-10?

3. Were respondent's actions unlawfully motivated by age discrimination in violation of N.J.S.A. 18A:28-10?

4. Was respondent's refusal to appoint petitioner to a vacant supervisor's position in October 1994 unlawful reprisal?

5. If the answer to any of the foregoing questions is yes, what are the appropriate remedies?

Hearing dates were scheduled for April 10, 11, 13, May 10, June 8 and 9, 1996, at the Trenton office of the Office of Administrative Law. The April dates were adjourned at petitioner's request. The hearing commenced on May 10, continued on May 12, 24, June 8, 9, August 2, 3, 4, September 7, 15 and concluded on November 1, 1995. Following the close of testimony the record remained open for the receipt of written submissions. A brief on behalf of petitioner was filed on March 8, 1996. Respondent's post-hearing brief was filed on March 13, 1996. Petitioner filed a reply brief on April 19, 1996 and respondent's reply brief was received on May 20, 1996, whereupon the record closed.

FINDINGS OF FACT

Most of the facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner was first employed by respondent for the 1970-71 school year as a teacher of social studies assigned to Marlboro High School. At that time and continuing until 1977 a single Athletic Director was responsible for athletic activities in all of the schools within respondent's district. In 1977, the Athletic Director, Harold Schank, retired and five new positions were created, one for each high school building in the district. These positions were posted and advertised as Building Supervisor of Athletics. The job description, which was developed for these new positions, listed the following qualifications:

1. Bachelor's Degree required, graduate degree or credits desired, but not mandated.

2. Valid teacher certification required.

3. Supervisor or Administrative certification preferred, but not mandated.

4. Five years successful teaching experience, including some coaching experience.

The full job description, P-2 in evidence, is attached hereto and made a part hereof as if set forth herein at length. The following individuals were hired by respondent as Building Athletic Supervisors commencing in September 1977:

Cal Dean Wilson	-	Freehold Borough High School
Frank Petrulla	-	Howell High School
Bernard Goldwater	-	Freehold Township High School
Richard Kane	-	Manalapan High School
Richard Skehan	-	Marlboro High School

Each of these initial appointees held full-time teaching and/or academic supervisory positions in the district. Mr. Petrulla, Mr. Goldwater and Mr. Skehan were health and physical education subject area supervisors and Mr. Wilson and Mr. Kane had full-time teaching responsibilities. In accordance with the posting of the position, departmental supervisors who were appointed to the Building Athletic Supervisor position were required to continue teaching one period; other teaching staff members were required to continue teaching three periods or two teaching periods with one assigned duty.

For a brief period of time following their appointments, these Building Athletic Supervisors (who were frequently and commonly still referred to as Building Athletic Directors) performed and prepared formal written evaluations pursuant to paragraph number two of their job description, which provides:

2. Directs, coordinates and evaluates the work of all staff members employed as coaches or assistant coaches in the athletic program, and makes appropriate recommendations to the high school principal for their continued reemployment or termination.

In or about 1979, however, the Freehold Township Education Association filed a grievance concerning these evaluations because Mr. Wilson and Mr. Kane did not possess proper supervisory certification, i.e., neither held any certificate or endorsement which would permit them to perform evaluations of teaching staff members. Thereafter, then superintendent of schools, H. Victor Crespy, made a determination that none of the five supervisors would prepare formal written evaluations. During the years which followed and up to 1994-95, none of the Building Athletic Supervisors performed formal written evaluations for submission to the administration, although Mr. Goldwater did prepare some written evaluations which he gave to the coaches for the coaches' benefit, and on one occasion petitioner prepared and submitted a formal written evaluation of the athletic trainer who was not a certificated teaching staff member. Although Mr. Kane earned a masters degree and received a supervisor's endorsement in 1980, Mr. Wilson never did either.

At its regular meeting on June 21, 1982, respondent adopted a resolution providing that the Athletic Supervisor in each building should receive one additional release period for athletic work, and, accordingly when petitioner was appointed to the position Building Athletic Supervisor at the Marlboro High School commencing with the 1982-83 school year, he should have been responsible for two teaching periods in addition to his duties and functions as the Athletic Supervisor. It was petitioner's recollection, however, that during the 1982-83 school year he taught three periods a day and that in succeeding school years he taught one period per day until the 1985-86 school year. Although respondent had not adopted any further formal resolution further reducing the teaching load of Building Athletic Supervisors, Superintendent Crespy had made a determination to assign fewer teaching responsibilities, and commencing with the 1986-87 school year, petitioner and the other Athletic Supervisors were assigned no teaching duties. From 1986-87 until the conclusion of the 1993-94 school year, petitioner functioned as a full-time Building Athletic Supervisor. He performed each of the duties set forth in the job

description, P-2 in evidence, attached. His formal performance evaluations which were performed by his supervisor, the school principal, were prepared on forms developed for evaluation of supervisory staff. The evaluations were uniformly favorable. Respondent's "Fall reports" to the County Superintendent concerning certification of staff members, at least those for 1992-93 and 1993-94, listed petitioner as a full-time Supervisor of Athletics, coded 0310 under the supervisors category rather than code 0426 (non-supervisory coordinator of athletics) listed under the none-supervisory coordinators category. The Preliminary Listing of 1990/91 Certificated Staff, which was offered by respondent as exhibit R-8 in evidence, also shows job code 0310.* Petitioner's compensation each year was calculated on the basis of his appropriate step on the teacher's salary guide plus a stipend as Athletic Director plus a separately-approved fee schedule for summer employment (for two to four weeks depending upon the year) and site supervision fees which were individual payments based upon individual athletic activities supervised during the year. Of these several compensation components, only the teachers guide salary (or supervisors guide for the subject area supervisors) was reported to the Teachers Pension and Annuity Fund as creditable for pension purposes.

Respondent issued separate appointment letters to petitioner and the other Building Athletic Supervisors each year. Respondent also issued separate annual appointment letters to each for his teaching or subject area supervisory appointment. Separate letters were also sent concerning summer employment each year. At all times relevant to these proceedings petitioner has held an instructional certificate with a social studies endorsement and an administrative certificate with a supervisor's endorsement issued by the State Board of Examiners.

On July 6, 1993, respondent posted a notice of vacancy in a position entitled Building Athletic Director. This position had become vacant upon the death of Mr. Wilson, the Building Athletic Supervisor at the Freehold Borough High School. The job description for the posting listed the following qualifications:

1. Master's Degree required.

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* R-8 also shows job code 0310 for Mr. Wilson.

2. Valid teacher certification required.

3. Supervisor or Administrative certification required.

4. Five years successful teaching experience, including some coaching experience.

5. Such alternative to the above as may be determined by the Superintendent of Schools.

The performance responsibilities remained the same as those listed on the 1978 description with the addition of an eighteenth item, "Performs any other duties as determined by the superintendent or his designee." At the time respondent appointed Richard Allen to fill this position, Mr. Allen possessed neither a masters degree nor an administrative certificate. His administrative certificate with a supervisor endorsement indicates that it was issued by the Board of Examiners in July 1994. Nevertheless, he functioned for the entire 1993-4 school year as a Building Athletic Director (or Building Athletic Supervisor as the position had been redesignated by the Board in 1977.) Those Building Athletic Supervisors who were not also subject area supervisors remained members of the Freehold Regional Education Association; they were not included as members in the Freehold Regional Supervisors Association. Neither Association negotiated compensation for the position Building Athletic Supervisor, however.

By memorandum dated June 2, 1994, respondent's superintendent of schools, Daniel McGuire, provided to the Board members for proposed action by the Board the following Monday evening a resolution eliminating the position of Building Athletic Supervisor/Director and creating the position of Supervisor of Extra-curricular Activities. The memorandum also enclosed the job description for the newly created position, and further provided in pertinent part:

> In executive session we will review with you the salary range for the new position of Supervisor of Extra-Curricular Activities which will be considerably below the current range.

The resolution, which was adopted by respondent as its regular meeting on June 6, 1994, provided:

> WHEREAS, the enactment of N.J.S.A. 34:13A-23 has imposed on local school districts the need to develop and maintain documentary record concerning the work performance of teachers holding athletic or other extracurricular assignments; and
>
> WHEREAS, the enactment of N.J.S.A. 18A:26-2.1 has further indicated desirability that those serving as supervisor of athletic programs, under whatever title, be qualified as supervisors pursuant to the rules and regulations of the New Jersey State Department of Education; and
>
> WHEREAS, the position of building supervisor of athletics currently employed in the school district is not adequate, in terms of minimum job qualifications, designated responsibilities and requirements created by these legislative enactments; and
>
> WHEREAS, the scope of the required increase in supervisory workload is such that it cannot be adequately managed by other current administrative and supervisory staff;
>
> NOW THEREFORE BE IT RESOLVED by the Board of Education of the Freehold Regional High School District that the five (5) part-time positions of building supervisor of athletics be and herewith are abolished effective June 30, 1994; and
>
> BE IT FURTHER RESOLVED that five (5) new positions entitled Supervisor of Extracurricular Activities be and herewith are established effective July 1, 1994, with the employment qualifications and job responsibilities for said positions to be accordance with the job description established for the job title which is on file in the Office of the Superintendent of Schools in accordance with Board Policy #4117, Section III; and
>
> BE IT FURTHER RESOLVED that the Superintendent of Schools be and herewith is authorized and directed to take all necessary and appropriate steps to seek qualified candidates for these newly established positions.

On June 7, 1994, respondent posted the notice of vacancy in the position titles Supervisor of Extra-Curricular Activities. The job description for the posting listed the following qualifications:

1. Master's Degree required.
2. Supervisor's certification required.
3. Valid teacher certification required.
4. Five years successful teaching experience, including coaching experience.
5. Such alternatives to the above as may be determined by the superintendent of schools.

A full copy of the job description for Supervisor of Extra-Curricular Activities is attached hereto and made a part hereof as if set forth herein at length. There were approximately fifty applicants. Petitioner was one of twelve finalists interviewed for the position by a selection committee established by the Superintendent. At the time of the interview, petitioner was fifty-four years old. Interviewees were rated by each of the five committee members based on their responses to questions and their performance at the interviews in eight specific categories. The rating scale was one to five, with five being the highest and, accordingly, the highest total rating could be forty. Petitioner's ratings were 29, 26, 35, 37 and 32, making his average 31.8, placing him seventh out of the twelve applicants. Mr. Goldwater, who at the time was fifty-nine years old, received an overall score which placed him in the top four interviewees; however, he declined the position when he was advised that there was no guarantee that he would continue to be assigned to Freehold Township High School where his two sons played sports. Mr. Petrulla, who was fifty-three years old, declined to apply for the position. Nine of these twelve finalists were reinterviewed by the Superintendent, Dr. McGuire, and an Assistant Superintendent, Dr. Emmerman, and the final selection was made independently by Dr. McGuire. Those he selected were the same individuals who had been rated the highest by the committee. Mr. Kane, who was fifty-one years old and Richard Allen (thirty-four years old) were appointed to the newly created positions along with Ronald Sutter (age thirty-seven) Linda Rocco (age thirty-nine) and Rebecca White-Johnson (age fifty-one). Ms. White-Johnson was appointed to the position based upon

respondent's determination that she had acquired tenure as a supervisor in the district which entitled her as a matter of law to appointment to this position when her own position in the central office was abolished. Petitioner received a letter from respondent stating only that the Board had selected another candidate for the position at issue "whose credentials and abilities are closer to fitting our needs."

Respondent established a salary range for the new position from $62,000 to $74,000. Mr. Kane's salary in the new position was set at $74,500 (a slight increase over his previous compensation) and the others received between $62,000 and $65,000. Mr. Goldwater and Mr. Petrulla had been earning in excess of $80,000 per year, and petitioner's compensation for 1993-94 had been approximately $74,000.

When Ms. White-Johnson resigned from the position in mid-September 1994, respondent posted the vacancy and conducted a second round of interviews. The same interview score form was utilized during September 1994 interviews; however, the printed questions which were utilized by the interviewors were different. The committee still had five members although only two had been on the earlier selection committee. Petitioner received scores of 27, 28, 24, 24 and 28, making his average score 26.2 and placing him in a tie for fourth place of the seven applicants. Linda Jewell (age forty-four) who received the highest average score was appointed to the position. If the list from the June 1994 interviews had been utilized, only one person would have been ranked ahead of petitioner, and that person had already accepted and started a full-time position in another district for 1994-95. During the 1994-95 school year petitioner was reassigned as a teacher of social studies and received a salary of $59,940. This concludes the uncontested facts.

The areas of factual dispute are two; the first relates to witness credibility on the issues of age discrimination and reprisal. The other relates primarily to conclusions to be drawn from the facts rather than to the facts themselves. There was also an extensive amount of testimony concerning the minute details of petitioner's performance of each of the responsibilities set forth in his job description, P-2 attached hereto. It is clear, however, that petitioner and the other

Building Athletic Supervisors performed each and every one of the job responsibilities in the description, including, "Evaluat(ing) the work of all staff members employed as coaches or assistant coaches in the athletic program and mak(ing) appropriate recommendations to the high school principal for their continued employment or termination." As set forth in the uncontested facts above, these evaluations were not formal written evaluations, but rather were the results of the Building Athletic Supervisor's observations and were then reported as impressions to the building principals.

Several witnesses testified relevant to the issue of whether a supervisor's endorsement was "required" for the position Building Athletic Supervisor. Richard Kane testified that Dr. Crespy had advised him in 1977 that he would be appointing him Building Athletic Supervisor, but that he expected Mr. Kane to obtain both a masters degree and a supervisor's endorsement before the 1980-81 school year. Mr. Kane was unaware whether Superintendent Crespy had given the same instructions to Mr. Wilson. He did indicate that on numerous occasions he and Mr. Wilson discussed the possibility of Mr. Wilson's enrolling in a masters program to obtain a supervisor's endorsement. Mr. Wilson frequently indicated that he would be doing so "next fall;" however, as Mr. Wilson continued to say that over the years without enrolling in a masters program, the other Building Athletic Supervisors concluded that it was never going to happen, Mr. Kane testified.

Walter J. Zuber, former Assistant Superintendent for Personnel, now retired, testified that in his opinion the 1993 job description for "Building Athletic Director" did not change the qualifications for Building Athletic Supervisor even though the language in the job descriptions differed because item number five in the 1993 description, "such alternative to the above as may be determined by the superintendent of schools," gave the superintendent the discretion to waive the requirement for a supervisor's endorsement. He also testified that he had been primarily responsible for preparing the language in P-2 in evidence, the 1978 job description, and that the language was written the way it was because Mr. Wilson and Mr. Kane did not have supervisory endorsements.

With respect to this issue, I **FIND** that the appropriate certification for the performance responsibilities set forth in the 1978 job description was an administrative certificate with a supervisor's endorsement or some other endorsement which would permit the holder of the position to perform all of the duties set forth in the description, specifically, the descriptions which state that the holder "supervises: all coaches, equipment manager, officials, game personnel and student workers assigned to the athletic department" and "directs, coordinates and evaluates the work of all staff members . . . " In order to evaluate the work of teaching staff members as that word is generally used in the Education Regulations and in Board policy, i.e., a certain number of formal written evaluations depending upon the teaching staff members status, a teaching staff member must possess an administrative certificate with one of the specified endorsements.

As a practical matter and in actuality the supervisor's endorsement was required of each of the Building Athletic Supervisors by Dr. Crespy with the exception of Mr. Wilson. Mr. Kane was a candid, sincere and credible witness. I **FIND** that Dr. Crespy required him to obtain his masters degree and supervisor's endorsement within a period of three years of his initial appointment to the position. Whether Dr. Crespy also required this of Mr. Wilson is not known; what is known is that Mr. Wilson never acquired the supervisor's endorsement or began a masters program to work toward obtaining the endorsement. Nevertheless, for whatever reason, Mr. Wilson was permitted to continue in the position Building Athletic Supervisor performing all of the job responsibilities the same as the other properly certificated holders of the position. In fact, the properly certficated holders of the position were not permitted to perform the formal written evaluations which otherwise would have been required out of deference to Mr. Wilson who could not perform that function. Whether this deference to Mr. Wilson was because of his age (exhibit R-8 in evidence indicates he was born in 1938) his years of service, his ill health, his personal popularity or perhaps some affirmative action goal (R-8 in evidence indicates Mr. Wilson's race as Black) cannot be determined on the basis of the record in this matter. The reason for this de facto grandfathering of Mr. Wilson with respect to the supervisor endorsement requirement is not relevant to any issue in this matter, however. I **FIND** that the supervisor endorsement was in fact required to perform the duties of the position.

Also apparently in dispute was whether the position Building Athletic Supervisor was a full-time position. Why this issue is in dispute is not exactly clear; it is undisputed that from 1986-87 forward, Mr. Kane, Mr. Wilson and petitioner all devoted their full-time efforts to the performance responsibilities of the Building Athletic Supervisor. None of these individuals was assigned any teaching duties. During the same period of time, Mr. Goldwater and Mr. Petrulla performed all of the same performance responsibilities; in addition, however, they were responsible for performing whatever job duties were included in the position title Supervisor of Health and Physical Education. That fact, however, did not make petitioner a part-time Building Athletic Supervisor. What duties were assigned to department supervisors and the amount of time performance of those duties consumed cannot be determined from this record. The legitimate conclusion is that Mr. Goldwater and Mr. Petrulla had more work to do than Building Athletic Supervisors who were not also subject matter supervisors. That is undoubtedly why they were paid more.

As noted in the uncontested facts set forth hereinabove, the Fall Report to the county superintendent of schools submitted by respondent described petitioner as a full-time supervisor of athletics. The fact that the full-time nature of the duties for a period of seven years may not have been made apparent to the Board of Education as evidenced by the language in their June 6, 1994 resolution abolishing the "part-time position" does not change the full-time nature of the performance responsibilities. Also irrelevant is the fact that Dr. Emmerman thought that the duties of Building Athletic Directors were part-time and would constitute only a small portion of the duties of the newly created Supervisor of Extra-Curricular Activities. Obviously, Dr. Emmerman was misinformed about the full-time nature of the position and what percentage the position's duties would represent in the new position (Mr. Kane testified that most of his time in the new position is still occupied with supervising athletic activities and this is also apparent from a comparative review of the two job descriptions, P-2 and P-4 in evidence, attached). Dr. Emmerman was further misinformed about the position title (she thought that there was no position entitled Building Athletic Supervisor) and the specific performance responsibilities, e.g., the responsibility to "evaluate the work of all staff members employed as coaches, etc." Furthermore, even if the duties of Building Athletic Supervisor had been part-time in the sense

that some periods of teaching duty were required, such a situation would not prevent the acquiring of tenure in a supervisory position; respondent certainly acknowledges that subject area supervisors are tenured supervisors in the district and their job duties require some teaching periods. With respect to this issue, based upon all of the foregoing, I **FIND** that the position Building Athletic Supervisor was a full-time position.

I do not find, however, that Dr. Emmerman's misunderstandings concerning petitioner's job duties and the job duties of the other Building Athletic Supervisors reflect negatively upon her credibility with respect to her testimony concerning instructions given to members of the committee to interview applicants for Supervisor of Extra-Curricular Activities or with respect to her testimony concerning her own personal knowledge of when petitioner filed the first petition of appeal in these matters. Dr. Emmerman's testimonial demeanor was that of a candid, sincere and credible witness. She certainly appeared certain that there was no such position as Building Athletic Supervisor and that the position of Athletic Director was only a part-time position. Clearly, she was incorrect about both of these issues, something which could easily be determined from a review of the record in this matter and therefore would have been a very foolish thing to purposefully misrepresent. I **FIND** that Dr. Emmerman testified truthfully when she indicated that neither she nor, to her knowledge, any of the other committee members had been given instructions to favor younger candidates. I **FURTHER FIND** that she testified truthfully when she stated that she had first learned of petitioner's filing of petition of a appeal with the Commissioner in the Spring of 1995, just before the hearings in these consolidated matters began. Her explanation that at the time the petition had first been filed in September of 1994, she had been involved in intensive litigation involving the expulsion of a student and had missed a number of Board meetings was a very plausible explanation for why an assistant superintendent of schools would have been unaware of newly filed litigation.

The testimony of Harold J. Wasser, the current Assistant Superintendent in charge of personnel who replaced Mr. Zuber, was not so clearly forthright on either of these issues, however. The testimonial demeanor of Mr. Wasser was that of a witness who was more concerned with providing an answer that would further respondent's position than with simply

reporting the facts. His answers were frequently evasive, inconsistent or confusing, even in response to the questions asked by respondent's own attorney. For example, the following series of questions and answers on direct examination relates to his functions as chairperson of the interview committee which conducted the interviews of candidates for the position Supervisor of Extra-Curricular Activities in June 1994:

Q Okay. And after Dr. McGuire and Dr. Emmerman completed their interviews with those candidates, did Dr. McGuire have any further discussion with you prior to making recommendations to the board for appointment?

A Dr. McGuire asked me for the ranking of the committee, based on the scores that the individual received on the rating sheets.

Q Let me back up a moment. Didn't you give Dr. McGuire the rankings before he held those interviews?

A I don't recall the date which I gave him that.

Q Well, was it before or -- you said just now that after his interviews, he asked you for the rankings.

A It --

Q Didn't you give them to him before?

A It could have been close to the time when he was going to see the people. I don't recall the exact date.

Q Mr. -- Mr. Wasser --

A Uh-huh.

Q -- the question is, did you give Dr. McGuire your committee's rankings of the candidates before he conducted his interviews of after?

A I -- I gave him a sheet, I believe the memo was before he met with Dr. Emmerman and each of those individuals.

Q Okay. So, he had your rankings?

A Uh-huh.

Q But then after the interview, he again -- after his interviews, he again asked you about the rankings?

A He asked me about the ranking.

His testimony about selecting younger, lower paid applicants was also evasive:

Q And there was a determination, was there not, on the part of Dr. McGuire that individuals performing the duties of building athletic supervisors plus additional duties would be getting less than what they were receiving as building athletic supervisors. Is that correct?

A No, it's not correct.

Q. Did you speak with Dr. McGuire as to what was meant by his statement that the salary range for the new position of supervisor of extra curricular activities would be considerably below the current range?

A I -- I presented to Dr. McGuire, as I told you earlier, that I looked at the teacher's guide, the top of the teachers' guide, the supervisors guide, and what people were currently making and what people were making in that area. So I had a range in mind that I discussed with the Superintendent.

Q No.

THE COURT: That wasn't the question though. He wanted to know if Dr. McGuire had discussed with you what he meant by --

THE WITNESS: No.

THE COURT: -- considerably below the current range.

THE WITNESS: No. No, he didn't.

Q Did you ask him any questions once you received a copy of --

A No.

Q -- this letter?

A No

Q Did you receive a copy of this June 2, 1994, piece of correspondence? After all, it's addressed to Board members.

A I would have gotten that with the Board agenda on the Friday before.

Q You would have received it?

A Right.

Q Isn't it true that Mr. Kane, in fact, received a salary adjustment above what he was making as a building athletic supervisor when he was appointed to the supervisor of extra curricular activities position? Or did he receive the same salary?

A I believe it was very -- very similar. I don't think it was a significant --

Q Did he receive less?

A I --

MR. KENNEY: Mr. Hunter, I'll stipulate that it was a bit higher.

MR. HUNTER: It was a bit higher?

THE WITNESS: A bit higher.

Q Then how would Dr. McGuire know prior to the receipt of any resumes from anyone, prior to the interviewing process, that the salary range for the new position would be considerably below the current range?

A I can only make an assumption. But he knew two or three of the people were making in the 80's, 80 -- $80,000 or more.

Q Who were those two or three people?

A Mr. Goldwater; Mr. Petrulla, former AD. I don't -- Mr. Reinhardt's was in the higher -- I believe in the70's, mid-70's.

Q And he already knew as of June 2, 1994, that they weren't going to accept those positions or would not be offered those positions. Isn't that true? He was getting rid of all of the older supervisors of athletics. Correct?

A I don't -- what do you mean getting rid of all the older -- no. There was one --

Q Well, he makes the statement, the range --

A Right.

Q -- would be considerably less. He must have known that he could not unilaterally reduce the salaries of supervisors in the District.

A My interpretation of that statement, considerably less, was that there were people making in the 80's, this position was not going to pay in the 80's. That's what I interpret that to mean.

Also totally incredible was Mr. Wasser's testimony that he did not regard the Building Athletic Supervisor position to be a full-time position. Mr. Wasser had direct contact with the holders of the position and was fully aware of the fact that they had no teaching duties. In the following series of questions and answers on cross-examination by petitioner's counsel, Mr. Wasser could not explain why he would categorize the position as being part-time in his dealings with respondent:

Q Isn't it true, Mr. Wasser, that the Board of Education was always advised that the Supervisor of Athletics or Building Athletic Director positions were only part-time stipend positions?

A The positions in the Board agenda each met -- met each April, were appointments for a teacher, for Mr. Reinhardt, and for Mr. Kane and for Mr. Wilson at that time and for the other two gentlemen, Mr. Goldwater and for Mr. Petrulla, they were under the area of Building Department Supervisor for Phys Ed and Health.

MR. HUNTER: Your Honor, --

THE WITNESS: That was the position.

MR. HUNTER: -- could you please direct Mr. Wasser to answer the question? I believe it was a very simple question.

THE COURT: You have to listen to the question that's asked and only answer the question that's asked.

THE WITNESS: Okay.

Could you repeat the question?

BY MR. HUNTER:

Q Isn't it true, Mr. Wasser, that the Board of Education was only advised that the Building Athletic Director or Building Athletic Supervisor position was a part-time stipend position?

A The Athletic Supervisor position was appointed as an honoraria position.

I don't --

THE COURT: Yes. He wants to know whether it's true that the Board was only advised that it was a part-time stipended position.

THE WITNESS: I believe so, yes.

BY MR. HUNTER:

Q Was the Board of Education, during this time period the Building Athletic Supervisor position existed, advised that these individuals were teaching staff members employed within the district with instructional responsibilities?

A Three were teachers, two were supervisors, department supervisors.

Q Was the Board of Education -- ask the question again -- advised that the Building Athletic Supervisors were teaching staff members with instructional responsibilities?

A I don't know if they were told that specifically, with instructional responsibilities.

Q Isn't it true that no Building Athletic Supervisor had had instructional responsibilities within the Freehold Regional High School District since the 1986-87 school year?

A I believe when I started in the district they did not have instructional teaching responsibilities.

On August 3, 1995, when respondent's attorney questioned Mr. Wasser concerning his knowledge regarding the petition of appeal in the within matters, he claimed to be unaware of the September 22, 1994 filing of the first petition of appeal as of the time he was involved in conducting interviews on September 28, 1994 to fill the vacancy in the position created by the resignation of Ms. White-Johnson:

Q Mr. Wasser, as you know, the proceeding -- the -- which gave rise to the hearing that we're in today was initiated by a petition of appeal filed by Mr. Reinhardt. That petition of appeal was filed before the selection for the vacancy created by Ms. White-Johnson's resignation was filled. Were you aware of the fact that Mr. Reinhardt had filed a petition of appeal against the board at the time you conducted your interviews and gave your ratings and compiled other people's ratings, as well?

A No. I was not.

Q Did you become aware of Mr. Reinhardt's petition of appeal at some point in that process?

A Yes. I did.

Q When did you become aware of it?

A I had nothing in writing, because Mr. Zuber was still handling the personnel work.

Q Yeah.

A And there -- I heard, I believe, after the interviews that there was a possibility that Mr. Reinhardt was going to sue the board of education.

Q Okay. Who did you hear that from?

A In discussions with Mr. Zuber and the superintendent.

Q Okay. Were those discussions held in the context of your committee's recommendation for filling the vacancy?

A Yes.

Q Tell me what occurred. And who was the -- who was the -- this discussion with?

A With Dr. McGuire and Mr. -- and I believe Mr. Zuber was there.

Q All right. Tell me about the discussion.

A The discussion was related to that if Mr. Reinhardt received the position that was now vacated by Mrs. Johnson, that then we would not go into court and there would not be any law suit, if we gave him the position.

Q Okay. Were you aware that the law suit had already been filed?

A Not at that point, no.

Q Okay. And was this after you had completed your ratings --

A Yes.

Q Okay. Did this -- did Dr. McGuire ask you to modify your ratings to put Mr. Reinhardt at the top?

A Absolutely not.

When he testified on cross-examination on November 1, 1995, however, he stated that he did know that a petition of appeal had been filed by petitioner when he conducted the second round of interviews concerning the vacancy left in the position by Ms. White-Johnson's resignation. Based upon all of the foregoing, I **FIND** that Mr. Wasser was aware when he conducted the second set of interviews on September 28, 1994, that petitioner had filed a petition of appeal with the Commissioner of Education the week before. I **FURTHER FIND** that Mr. Wasser was aware at the times he conducted both sets of interviews that the goal in selecting persons to fill the new positions was to reduce the costs to respondent for salaries paid from those previously paid to holders of the title Building Athletic Supervisor.

APPLICABLE LAW AND DISCUSSION

Petitioner asserts that he had tenure in the position Building Athletic Supervisor, that when respondent acted to abolish the position and to replace it with the position Supervisor of Extra-Curricular Activities, he had tenure rights to the new position and that, therefore, when respondent transferred him for the 1994-95 school year to the position teacher of social studies and reduced his compensation from approximately $74,000 per year to $59,940 , it violated his tenure rights. Respondent concedes that if petitioner held tenure in the position Building Athletic Supervisor, then he was entitled to appointment to the newly created position of Supervisor of Extra-Curricular Activities by reason of his tenure rights. It is respondent's position that petitioner never acquired tenure in any supervisory position, however, because: 1) no supervisory certificate was required of the position; 2) petitioner did not, in fact, perform supervisory duties; and 3) the position was a part-time extra-curricular position for which tenure could not be acquired.

Tenure is a legislative status, not a contractual one, and in order to be protected by the status, a teaching staff member must have met the precise conditions articulated in the statute. In order to acquire tenure in any position in the public schools in any district, the teaching staff member must be a citizen of the United States (N.J.S.A. 18A:28-3), must hold an appropriate certificate for the position, issued by the State Board of Examiners, in full force and effect (N.J.S.A. 18A:28-4) and, pursuant to N.J.S.A. 18A:28-5, must hold employment in the district for:

> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years.

Prior to amendment in 1962, the tenure statute set forth only four tenure eligible positions: teacher, principal, assistant superintendent, and superintendent, and no rights of tenure attached to any gradation within any one of those designations. See, Lascari v. Board of Education of Borough of Lodi, 36 N.J. Super. 426 (App. Div. 1955), wherein is was held that the position of vice principal had no tenure, and, therefore, where the teacher, after serving as vice-principal, was transferred to regular teaching duties without loss of salary, he was not deprived of his tenure status which was merely that of a teacher. This was specifically changed by the 1962 amendment to the statute which provided in pertinent part:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses. . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners . . . shall be under tenure during good behavior and efficiency and they shall

> not be dismissed or reduced in compensation. . . . (Emphasis added.)*

That tenure is acquired in a particular position is made clear by the effect of N.J.S.A. 18A:28-6, which was also part of the 1962 amendment, and provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purposes; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

I have found as a matter of fact hereinabove that the position Building Athletic Supervisor required an administrative certificate with a supervisor endorsement as the appropriate certificate

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* Further amendments were made to this statute in 1991 but are not relevant to a determination of the issues herein.

to hold the position. This conclusion is further supported by language in the Legislative Statement appended to N.J.S.A. 18A:26-2.1, adopted in 1991, with an effective date of July 1, 1994, which requires all candidates for appointment to positions as "director of athletics" in any public secondary school to possess a supervisor's endorsement:

> This bill requires that newly employed high school directors of athletics must possess a supervisory certificate issued by the State Board of Examiners. This requirement would come into effect beginning with the third school year following the bill's enactment. Currently employed directors of athletics would be exempt from the new requirement.
>
> Athletics have become an increasingly significant component of the educational program in every school in the State. With the expanding emphasis on athletics has come a multidimensional expansion in the supervisory responsibilities and duties of athletic directors. These supervisory responsibilities include recruiting, selecting and evaluating coaches and trainers, ordering equipment, maintaining inventories, establishing crowd control and safety, reviewing eligibility, providing transportation and scheduling comprehensive physical examinations.

Petitioner's position as Building Athletic Supervisor included all the duties mentioned in the Senate Committee Statement; it was clearly a supervisory position. "Supervisor" is defined at N.J.A.C. 6:11-9.3(c), as "any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel."* The duties are spelled out in P-2 in evidence in language that even uses the word "supervises." Petitioner was evaluated by his supervisors on forms designed to evaluate supervisors because that form, not the teacher evaluation form, was most appropriate for his job duties. Petitioner performed all of the duties except the one he was not permitted to perform - preparing formal written evaluations. The fact that he did not perform that duty, however, does not require a conclusion that he was not

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* All coaches are required to hold a certificate issued by the State Board of Examiners, N.J.A.C. 6:29-3.3, so those whom petitioner supervised are legitimately designated as instructional personnel. In Smith v. Jersey City Bd. of Ed., 1980 S.L.D. 1079; aff'd 1981 S.L.D. 1486, cited by respondent, those whom Smith supervised were not certificated instructional personnel and therefore Smith was not a "supervisor."

a supervisor. In Euell v. Bd. of Ed. of the Princeton Regional School District, 1978 S.L.D. 666, 669, the hearing examiner, whose decision the Commissioner adopted as his own, explained:

> Thus, is can be seen from the record and the testimony that petitioner performed some of the duties of an assistant principal except that she did not evaluate teachers during the 1972-73 school year and during May and June 1973. She became eligible for a principal's certificate as of May 19, 1973 and thereafter could have conducted teacher evaluations if so required. Although a certificate as a principal, supervisor or school administrator is required for any person evaluating a teacher's performance or supervising instruction, the holder of such a certificate is not always required to evaluate teachers as a condition to his/her administrative position. It is common knowledge that some school systems have assistant principals who act only as school disciplinarians and do not evaluate teachers and supervise instruction, although they may do so, if required.

Reiterating the well established principle that the duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure, the Commissioner concluded that Ms. Euell had acquired tenure as an assistant principal. The fact that she had not performed the formal evaluations she was qualified to perform did not preclude the determination.

In the present matter, petitioner held the appropriate certificate for the position and he held the position more than long enough to satisfy the statutory requirements for tenure. The fact that respondent issued a separate appointment letter every year is irrelevant; respondent also continued to issue a separate appointment letter for a teaching position each year to staff members who obviously had tenure in the position teacher! Nor is it relevant how respondent chose to characterize the components of petitioner's compensation package for pension purposes. Creditable salary for pension purposes is an issue for determination by the Board of Trustees of the Teachers' Pension and Annuity Fund and has nothing to do with tenure. See Siri v. Board of Trustees, 262 N.J. Super. 147 (App. Div. 1993). Finally, Mr. Wilson's tenure or non-tenure status in the same position title may not affect petitioner's status. The fact that Mr. Wilson could not have obtained tenure in the position because he did not have the appropriate certificate has

nothing to do with petitioner's tenure claim. Also relevant to the finding that petitioner is a tenured supervisor is the Commissioner's recent decision in Connor v. Bd. of Ed. of the Township of Cinnaminson, EDU 11973-94, decided July 18, 1996. The facts in that case were remarkably similar to those in the present matter, although the Board's legal theory of the case differed. In Connor the Board admitted that the petitioner (whose title had been "Athletic Director" before the position was "abolished" and replaced by the position "Director of Athletics and Activities") was a tenured supervisor.

Accordingly, the inescapable conclusion is that pursuant to N.J.S.A. 18A:28-6(b), petitioner held tenure in the position Building Athletic Supervisor commencing with the beginning of the academic year following two full years in the position.

Petitioner also claims that respondent's actions violated N.J.S.A. 18A:28-10 which provides:

> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board. (Emphasis added)

In evaluating petitioner's age discrimination claims the place to start is to refer to the New Jersey Law Against Discrimination (N.J.S.A. 10:5-12(a)) which, in pertinent part, makes it an unlawful employment practice, or unlawful discrimination:

> For an employer, because of the . . . age . . . of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The Federal Age Discrimination in Employment Act (ADEA) 29 U.S.C.A. §621 et seq. also prohibits employers from treating employees differently because of their age.

In the recent New Jersey Appellate Division decision Kelly vs. Bally's Grand, Inc., 285 N.J. Super. 422 (1995), the Appellate Division held as follows concerning the applicable standards regarding age discrimination claims brought under New Jersey State statutes:

> As in other employment discrimination claims arising under the LAD, a multi-step testing procedure, involving burden shifting, is to be applied to plaintiff's claim that she was passed over for promotion on the basis of her age. See Waldron vs. S.L. Industries, Inc., 849 F.Supp. 996, 1000 (D.N.J. 1994).
>
> In Erickson vs. Marsh & McLennan, 117 N.J. 539, 550, 569 A.2d 793 (1990), our Supreme Court explained the initial analysis for LAD claims, as follows: plaintiff must demonstrate that he or she: (1) belongs to a protected class; (2) applied and was qualified for the position for which the employer was seeking applicants; (3) was rejected despite adequate qualifications; and (4) after rejection, the position remained open and the employer continued to seek applications for persons of plaintiff's qualifications. Ibid, (quoting Andersen vs. Exxon Company, 89 N.J. 483, 492, 446 A.2d 486 (1982). Of course, these factors provide only a general framework and must be modified where appropriate. Clowes vs. Terminix International, Inc., 109 N.J. 575, 597, 538 A.2d 794 (1988).
>
> The Federal Courts have articulated a specific test with regard to age discrimination, which is helpful in analyzing plaintiff's case:
>
> > [T]he plaintiff must prove by a preponderance of evidence that he was (1) a member of a protected class (here [or she], persons aged forty to seventy), (2) qualified for the position, (3) . . . not selected for [the] position, and (4) passed over in favor of a candidate sufficiently younger to permit an inference of age discrimination. [Waldron vs. S.L. Industries, supra, 849 F.Supp. at 1001].
>
> Once plaintiff has passed the above four part test, and has thereby established a prima facie case, discrimination is presumed on the part of the employer, and the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. Ibid; see also McDonnell Douglas vs. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 1973); St. Mary's

> Honor Center vs. Hicks, ----U.S.----, 113 S.Ct. 2742, 125 L.Ed.2d 407 1993). If the employer articulates a legitimate reason for its employment decision, the burden again shifts to the plaintiff to show that the employer's articulated reason was not the true motivating reason, but was merely a pretext to mask the discrimination. Ibid.

Once a discrimination complaint proceeds to the stage where a respondent has articulated its asserted legitimate non-discriminatory reason for the employment action, as is the case here, "whether the plaintiff really [did make out a prima facie case] is no longer relevant." U.S. Postal Service Bd. of Govs. v. Aikens, 75 L.Ed.2d 403, 410 (1983). The task of the finder of fact at this point is to "decide which party's explanation of the employer's motivation it believes." Id. at 411. The complainant always retains the burden to persuade by a preponderance of the evidence that intentional unlawful age discrimination has occurred.

In the present matter, respondent has offered a number of reasons for its failure to appoint petitioner to the new position, including the one set forth in the letter to him that other candidates better satisfied respondent's needs, that qualified women were selected under affirmative action goals, that administrators were unhappy with petitioner's performance because of a couple of specific incidents outside the scope of his formal written evaluations, etc. Petitioner asserts, and the evidence in this matter confirms, that respondent's real motivation was to save money. Petitioner calls the sentence in the June 2, 1994 memorandum from Dr. McGuire to the Board members "a smoking gun." Clearly the "reasons" articulated in the June 6, 1994 resolution did not require that the position Building Athletic Supervisor be abolished and replaced. I **CONCLUDE** that respondent wished to appoint persons to these positions who would accept a lower salary than the compensation paid to Building Athletic Supervisors during 1993-94. Discrimination on the basis of high salary, however, does not equate with age discrimination. Although it may be true that older employees are more frequently the higher paid employees and therefore a policy of removing higher paid employees would have a disparate impact on the class of older employees, several courts have held that disparate impact claims are not cognizable under the ADEA. See Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996); EEOC v. Francis W.

Parker School, 41 F.3d 1073 (7th Cir. 1994), cert. denied, --- U.S.----, 115 S.Ct. 2577, 132 L.Ed.2d 828 (1995); Martincic v. Urban Redevelopment Authority of Pittsburgh, 844 F.Supp. 1073 (W.D.Pa. 1994). See also DiBiase v. SmithKline Beecham Corporation, 48 F.3d 719, 732-34 (3d Cir.) (statement of Judge Greenberg) (stating that "it is doubtful that traditional disparate impact theory is a viable theory under the ADEA"). Plaintiffs in age discrimination cases must therefore prove intentional disparate treatment on the basis of age. The Court in Hazen Paper Company v. Biggins, 507 U.S. 604, 123 L.Ed.2d 388 (1993) explained:

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. Id. at 610.

In Sperling v. Hoffmann-LaRoche, Inc., 924 F.Supp. 1346 (D.N.J. 1996), Judge Ackerman further explained:

> In Hazen Paper, the Supreme Court emphasized that when an employer's decision is entirely motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes is not present. See id. This is the case even where the motivating factor is correlated with age. For example, pension status is typically correlated with age. However, if an employer fires an employee solely because the employee's pension is about to vest, the employer does not violate the ADEA, even if older employees are more likely to be close to having their pensions vest than younger employees. See id. at 609-13, 113 S.Ct. at 1706-07. This is because [t]he prohibited stereotype ("Older employees are likely to be . . .") would not have figured in this decision, and the attendant stigma would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee--that he indeed is "close to vesting."
>
> Id. at 612, 113 S.Ct. at 1707. In other words, "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to

> say that a decision based on years of service is necessarily 'age-based.'" Id.

Several courts have noted that high salary is similar to years of service in that while, on average, those workers with the highest salaries are older workers, high salary and age are nonetheless analytically distinct, and therefore, termination decisions based on the employee's level of compensation are not violative of the ADEA. Thomure v. Phillips Furniture Company, 30 F.3d 1020, 1024 (8th Cir. 1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1993). Based upon the foregoing, although I am persuaded that respondent's real reason for the actions herein was to save money, I **CONCLUDE** that respondent did not discriminate against petitioner on the basis of age.

The final issue for consideration is whether respondent retaliated against petitioner after he filed his petition of appeal in the within matter by failing to appoint him to the vacancy which occurred when Ms. White-Johnson resigned. The Law Against Discrimination prohibits acts of reprisal against a person because he or she has opposed any practice or act forbidden under the LAD, or because he or she has filed a complaint, testified or assisted in any proceedings under the LAD. N.J.S.A. 10:5-12d.; Velantzas v. Colgate Palmolive Co., 109 N.J. 189, 192 (1988). To establish a prima facie claim of unlawful reprisal, a complainant must demonstrate that (1) she engaged in a protected activity that was known by the alleged retaliator; (2) she thereafter suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse action. See Jamison v. Rockaway Tp. Bd. of Educ., 242 N.J. Super. 436, 445 (App. Div. 1990); see also Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989), cert. den. 493 U.S. 1023 (1990); Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir. 1984). The third element--the causal link--is often inferred from a close proximity in time between the protected activity and the adverse employment action. See, e.g., Weiss v. Parker Hannifan Corp., 747 F.Supp. 1118 [57 FEP Cases 216, 226] (D.N.J. 1990); Mandia v. ARCO Chemicals Co., 618 F.Supp. 1248 (W.D.Pa. 1985).

A respondent can rebut a prima facie case by articulating a legitimate, nonretaliatory reason for the action in question. The complainant is then entitled to demonstrate by a preponderance of the evidence that the articulated reason is pretextual in nature and that the employer's action was motivated by a discriminatory intent. If the complainant meets this burden, a presumption exists that the adverse employment action resulted from improper retaliatory intent. To rebut this presumption, the respondent must prove by a preponderance of the evidence that he or she would have taken the adverse action regardless of retaliatory intent. See Jamison, supra, 242 N.J. Super. at 445-46.

In this matter it is undisputable that petitioner engaged in a protected activity that was known by the alleged retaliators; namely, he asserted that they had discriminated against him on the basis of his age. It is also undisputable that shortly thereafter he suffered an adverse employment action: respondent conducted a second round of interviews for the vacant position and awarded the position to someone else. Respondent has not explained why it conducted a second round of interviews and simply did not use the list from the previous set of interviews which had occurred less than two months before at the end of the academic year. Since the determination to conduct a second round of interviews and ultimately to award the position to another applicant was Dr. McGuire's and Dr. McGuire did not testify to explain his reasons for awarding the position to someone else, respondent is left with the adverse inference which the finder of fact may draw in an administrative proceeding such as this one where a respondent chooses not to testify. State Department of Law and Public Safety v. Merlino, 216 N.J. Super. 579, 587-588 (App. Div. 1987), aff'd 109 N.J. 134 (1988); Wild v. Roman, 91 N.J. Super. 410 (App. Div. 1966). Perhaps Dr. McGuire simply did not like petitioner and would not have appointed him to the position under any circumstances. Since Dr. McGuire did not testify, however, we do not know that, and I **CONCLUDE** from his unexplained non-production that his testimony would have been unfavorable to respondent's case; i.e., that he was annoyed by petitioner's allegations of age discrimination and acted accordingly.

For all of the foregoing reasons, I **CONCLUDE** that petitioner was entitled to assignment to one of the Supervisor of Extra-Curricular Activities positions commencing with the 1994-95

school year. Respondent is hereby **ORDERED** to place petitioner in one of those positions immediately, and to pay petitioner back pay and benefits based upon a salary of $74,500, the same salary which was assigned to Mr. Kane who also had previously held the position Building Athletic Supervisor.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 3, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10/3/96
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 7 1996
DATE

Barbara A. Kennedy
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

For petitioner:

P-1 Senate Bill No. 2343 which is codified at N.J.S.A. 18A:26-2.1 relating to the need for newly employed high school directors of athletics to possess supervisory certification issued by the State Board of Examiners.

P-2 1978 job description for building athletic supervisor (3 pages)

P-3 July 6, 1993 memorandum from Walter Zuber, Assistant Superintendent for Personnel which attaches, in pertinent part, a building athletic director job description for the 1993-94 school year (4 pages)

P-4 June 7, 1994 memorandum from Walter Zuber to members of the professional staff attaching, in part, the supervisor of extra-curricular activities job description (4 pages)

P-5 June 16, 1994 letter from petitioner to Walter Zuber with an attached resume from petitioner (this is with regard to petitioner's application for the position of supervisor of extra-curricular activities) (4 pages)

P-6 Certification issued to petitioner of designation of certified athletic administrator, dated December 13, 1992

P-7 Secondary school principal certificate issued to petitioner, dated January 1968

P-8 Supervisor certificate issued to petitioner, dated May 1972

P-9 Official Certified Clinician Certificate issued to petitioner, dated April 13, 1988

P-13 A copy of Board of Education Rules and regulations dealing with employee evaluations (8 pages)

P-14 June 1, 1994 memorandum from Walter Zuber to petitioner

P-15 June 7, 1994 memorandum from Walter Zuber to members of the professional staff

P-16 June 9, 1994 memorandum from Walter Zuber to petitioner

P-17 October 4, 1994 letter from James Wasser, Assistant to the Superintendent, to petitioner

P-18 A portion of the June 6, 1994 agenda of the Freehold Regional High School Board of Education regarding the abolition of positions and establishment of new positions (2 pages)

P-19 Minutes of Board of Education meeting of July 18, 1994 (33 pages)

P-20 Packet of materials from Dr. Fred Young as Deputy Superintendent to district and building department supervisors relating to pre-school orientation programs offered during the 1991-92, 1992-94 school years (6 pages)

P-21 Packet of agenda regarding new staff meetings held during September 1989; September 1990; September 1991 and September 1992 (8 pages)

P-22 Packet of materials disseminated by petitioner to coaches prior to the start of the respective coach's seasons including an agenda regarding meeting preparation, materials regarding coaches' handbook, materials entitled "coaches' guidelines", materials relating to emergency medical procedures and sports physicals, materials relating to score cards and materials relating to the completion of coaches' data sheets (11 pages)

P-23 Packet of "blank evaluation forms" regarding evaluations of district supervisors and evaluation forms utilized for teaching staff members (10 pages)

P-24 Copies of all evaluations and/or observations and professional improvement plans prepared of petitioner while he was functioning as building athletic supervisor within the Freehold Regional High School district at the Marlboro High School (26 pages)

P-25 Packet of evaluations conducted by the former athletic supervisor, Dick Skehan, of fall sport coaches during the 1977-78 school year, dated November 1, 1997 (7 pages)

P-26 A copy of the final athletic trainer evaluation prepared by evaluator petitioner regarding athletic trainer Mark Bramble, dated March 25, 1992 (2 pages)

P-27 Job description for athletic trainer, dated July 1988 (3 pages)

P-28 A copy of memorandum entitled "Marlboro Athletic Medicine Student Trainer Program" (3 pages)

P-29 Packet of additional materials disseminated to coaches within the district by petitioner consisting of documents relating to:

> academic eligibility of athletes at Marlboro High School, varsity letter requirements, athletic/ academic probation, athletic contest workers, end of the season wrap-up materials, end of year sign out materials, cancellation of contests notification report, alumni liability at the school, materials relating to rules and regulations with regard to the use and possession and/or distribution of illegal or harmful chemical substances by students (35 pages)

P-30 Teacher/supervisory end of the year checkout lists (2 pages)

P-31 Document from Robert Kanaby, Executive Director of the New Jersey State Interscholastic Athletic Association, to athletic directors, dated June 25, 1992

P-33 Materials relating to athletic stipends or honoraria provided to district personnel (15 pages)

P-34 A faculty roster (1990-1991) for Marlboro High School personnel (2 pages)

P-35 A packet of materials relating to capital improvement projects that resulted in the execution, in part, of purchase orders by petitioner (22 pages)

P-36 Materials prepared by petitioner regarding responsibilities of maintenance employees concerning their responsibilities for various playing fields within the Freehold Regional High School District utilized by Marlboro High School athletes (4 pages)

P-37 A packet of materials relating to equipment accountability materials disseminated to all coaches by petitioner (17 pages)

P-38 A packet of materials consisting of an "application and agreement for use of facilities" forms signed by petitioner regarding the use of Marlboro Township facilities by Marlboro Township athletes (5 pages)

P-39 A packet of materials that represents budgetary materials prepared by petitioner during the spring of the 1993-94 school year for the fall sports offered within the district during the 1994-95 school year (82 pages)

P-40 A packet of invoices/vouchers authorizing payment for services rendered by staff within the district during the 1993-94 school year signed by petitioner (108 pages)

P-41 A packet of materials relating to requisition game fees consisting of various requisition forms for the 1993-94 school year signed by petitioner (68 pages)

P-42 A packet of purchase orders for the 1991-92 school year executed by petitioner (31 pages)

P-43 A packet of materials consisting of purchase orders executed by petitioner for the 1992-93 school year (16 pages)

P-44 A packet of materials concerning pay warrants authorizing payment for services rendered signed by petitioner for the spring sports season 1993-94 (102 pages)

P-46 Questions for supervisor of extra-curricular activities

P-47 Summary rating sheets for supervisor of extra-curricular activities, Wednesday, September 28, 1994

P-48 Dr. Emmerman's rating of petitioner, 9/28/94

P-49 Dr. Emmerman's rating of L.J., 9/28/94

P-50 Fall Report of certificated staff status, 1993-94 (19 pages)

P-51 Fall Report of certificated staff status, 1992-93 (10 pages)

P-53 List of questions for supervisor of extra-curricular activities (June interviews)

P-54 Composite ratings supervisor of extra-curricular activities interviews June 27 and 28, 1994 (18 pages)

P-55 Administrative certificate issued to Richard W. Allen with supervisor endorsement, 7/94, recorded in Monmouth County Superintendent's office, 8/31/95

For respondent:

R-1 Letter from Walter J. Zuber, Assistant Superintendent to petitioner, dated November 16, 1982 and other appointment letters to petitioner up to present time (34 pages)

R-2 Petitioner's teacher evaluations 1982 through 1986 (15 pages)

R-3 Collective bargaining agreement, July 1, 1991 through June 30, 1994, pages 36 and 37 (2 pages)

R-5 Various board minutes and resolutions (62 pages)

R-7 Memorandum from Dan McGuire to Board members, dated June 2, 1994

R-8 Preliminary Listing of 1990/91 Certificated staff (2 pages)

EXHIBITS FOR IDENTIFICATION ONLY

P-10 A copy of the November 1994 edition of the "Leadership for student activities magazine" (which was sent to petitioner in light of his active enrollment or involvement as part of the national association of student activity advisors nationally)

P-11 Official application for the New Jersey Athletic Director of the year award for 1993-94 regarding petitioner with attached materials

P-12 Assorted letters of commendation issued to petitioner regarding his involvement in various capacities as the athletic supervisor in Marlboro High School

P-32 Memorandum disseminated to all coaches by petitioner relating to heat illnesses

P-45 Collective bargaining agreement

P-52 N.J.S.A. 34:13A-23

R-4 Part of administrative code N.J.A.C. 6:3-4.1

R-6 File folder containing various exhibits

R-9 Preliminary listing of 1990/91 Certificated staff (same as R-8)

WITNESSES

For petitioner:

Cordell W. (Rap) Reinhardt
Bernard J. Goldwater
Harvey L. Casey, Ed. D.
Richard J. Kane

For respondent:

Patricia Emmerman, Ed. D.
Harold J. Wasser
Walter J. Zuber
John J. Tague
Anthony F. Giordano
Giovanni (Jay) Lagomarsino
Matthew C. Herman, Ed. D.

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT

DIVISION OF PERSONNEL

MEMO TO: Members of the Professional Staff

FROM: Walter J. Zuber, Assistant Superintendent

SUBJECT: Building Supervisor of Athletics for 1977-1978*

DATE: January 18, 1978

* *

POST IN TWO (2) PROMINENT PLACES

We wish to inform members of the professional staff that a vacancy exists for Building Supervisor of Athletics for 1977-1978.

Five (5) years successful teaching experience including some coaching experience.

Honorarium: $1632.00

(If successful candidate is not a departmental supervisor, his/her schedule will consist of 3 teaching periods or 2 teaching and one assigned duty (non-paying). If successful candidate is presently a departmental supervisor, his/her schedule shall include one teaching period.)

Interested staff members should return the completed application form to their building principals by no later than Wednesday, January 25, 1978. If an application form was completed in response to the original notice, a duplicate is unnecessary. A letter expressing intent will suffice. Every attempt will be made to inform staff of appointments as soon as possible.

* This position was originally advertised on May 18, 1977 and a job description developed (attached).

WE ARE AN EQUAL OPPORTUNITY EMPLOYER

WJZ/eff

P-2 Ed

FMK

43

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT 1978

JOB DESCRIPTION

TITLE: Building Athletic Supervisor

QUALIFICATIONS:

1. Bachelor's Degree required, graduate degree or credits desired, but not mandated.

2. Valid teacher certification required.

3. Supervisor or Administrative certification preferred, but not mandated.

4. Five years successful teaching experience, including some coaching experience.

LINE OF AUTHORITY:

Reports directly to the building high school principal for the operation of that school's athletic program. Acts as an advisory to the Central Administration concerning the total athletic program.

SUPERVISES:

All coaches, equipment manager, officials, game personnel and student workers assigned to the Athletic Department.

JOB GOAL:

To provide each enrolled student of secondary school age an opportunity to participate in an extracurricular athletic activity that will foster physical skills, a sense of worth and competence, a knowledge and understanding of the pleasures of sport, and the principles of fair play.

PERFORMANCE RESPONSIBILITIES:

Directs the athletic program of the high school including but not limited to the following:

1. Plans, budgets, implements and evaluates all interscholastic and intramural athletic programs for that school.

2. Directs, coordinates and evaluates the work of all staff members employed as coaches or assistant coaches in the athletic program, and makes appropriate recommendations to the high school principal for their continued reemployment or termination.

Prepares and processes through the high school budget, yearly budget requests and necessary requisitions and/or purchase orders for the supplies and equipment necessary for the athletic program.

4. Assumes the responsibility for the organization and scheduling of all intramural and interscholastic athletic events, and maintains a file of all signed contracts with other school districts.

5. With the concurrence of the principal, hires and supervises officials, policemen, physicians and any other approved positions for the conduct of athletic contests.

6. Supervises the cleaning, storage and care of assigned athletic equipment.

7. Arranges all details of visiting teams' needs.

8. Arranges for transportation, through proper channels, for athletic contests that are played at away sites.

9. Developes and places into operation appropriate building rules and regulations concerning the conduct athletic activities.

10. Maintains a program of publicity and press releases concerning the athletic programs.

11. Provides and maintains, as directed, complete athletic records for high school sports, including eligibility,insurance coverage, medical examinations and awards in conformance with N.J.S.I.A.A. and the Shore Conference.

12. Advises the Central Administration in matters concerning the athletic program as it relates to the coordination of interscholastic athletic contests, fields, officials, contracts and arrangements.

13. Develops and assists in the drafts of specifications for bids for athletic supplies and equipment.

14. Arranges the practice schedules of teams for the utilization of fields and gymnasiums.

15. Plans and organizes recognition programs for athletes, including pep rallies, as directed.

16. Represents his school at athletic meetings when assigned.

17. Holds professional meetings with members of the Athletic Department.

TERMS OF EMPLOYMENT:

1. Ten month position

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT

MEMORANDUM

DATE: June 7, 1994

TO: Members of the Professional Staff

FROM: Walter J. Zuber, Assistant Superintendent/Personnel

RE: Notice of Vacancy - Supervisor of Extracurricular Activities

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PLEASE POST IN (2) TWO PROMINENT PLACES

Please be advised that a vacancy exists for a Supervisor of Extracurricular Activities in each of the five high schools in the Freehold Regional High School District effective July 1, 1994, or as soon thereafter as available. A job description for the position is attached. The responsibilities of this position frequently require an afternoon/evening schedule.

Staff members can express their interest by forwarding a resume and proper credentials to the Personnel Office by June 22, 1994.

WE ARE AN EQUAL OPPORTUNITY EMPLOYER

Attachment

P-4

TITLE: SUPERVISOR OF EXTRACURRICULAR ACTIVITIES

QUALIFICATIONS:

1. Master's Degree required.
2. Supervisor's certification required.
3. Valid teacher certification required.
4. Five years successful teaching experience, including coaching experience.
5. Such alternatives to the above as may be determined by the superintendent of schools.

REPORTS TO: Reports directly to the high school principal for the operation of that school's extracurricular activities. Acts as an advisor to the central administration concerning all extracurricular activities.

SUPERVISES: All club advisors, coaches, equipment manager, athletic trainer, officials, game personnel and student workers assigned to extracurricular activities.

PERFORMANCE RESPONSIBILITIES:

Directs all extracurricular activities of the high school including but not limited to the following:

1. Plans, budgets, implements and evaluates all extracurricular, interscholastic and intramural athletic activities for that school.
2. Directs, coordinates and evaluates the work of all staff members employed as club advisors, coaches or assistant coaches and athletic trainer, and makes appropriate recommendations to the high school principal for their continue reemployment or termination.
3. Observes and evaluates all staff members employed as club advisors, coaches or assistant coaches and athletic trainer and makes appropriate recommendations to the high school principal for their continued reemployment or termination. The annual summary evaluation shall be prepared with the concurrence of the high school principal and shall be signed by both the supervisor and the principal. The evaluation shall contain recommendations for the renewal or termination of the individual's employment and for the granting or withholding of the individual's increment.

4. Prepares and processes through the high school budget, yearly budget requests and necessary requisitions and/or purchase orders for the services, supplies and equipment necessary for all extracurricular activities.

5. Assumes the responsibility for the organizatior and scheduling of all extracurricular, intramural and interscholastic athletic activities and maintains a file of all signed contracts with other school districts.

6. With the concurrence of the high school principal, selects and supervises officials, police, and any other approved positions for extracurricular events and athletic contests.

7. Supervises the cleaning, storage and care of athletic uniforms, equipment and supplies for all extracurricular activities.

8. Arranges for transportation, through proper channels, for extracurricular events and athletic contests and coordinates all trip requests for the high school.

9. Assumes responsibility for the implementation of appropriate building rules and regulations concerning extracurricular activities.

10. Provides overall supervision for all "home" athletic and extracurricular events unless assigned an away school activity by the high school principal.

11. Monitors publicity and press releases concernin all extracurricular activities.

12. Provides and maintains, as directed, complete athletic records for high school sports, including eligibility, insurance coverage, medical examinations, and awards in conformance with N.J.S.I.A.A. and the Shore Conference.

13. Advises the central administration in matters concerning extracurricular activities as they relate to coordination of interscholastic athletic contests, extracurricular events, fields and facilities, officials, contracts and arrangements.

14. Develops and assists in the specifications for bids for athletic and extracurricular supplies and equipment.

15. Plans and organizes recognition programs for extracurricular activities.

16. Conducts professional meetings and inservice programs for staff members supervising extracurricular activities.

17. Performs any other duties as determined by the superintendent of schools or his designee.

TERMS OF EMPLOYMENT: Twelve month position.

EVALUATION: According to state statutes, administrative code, and Board policies.

CORDELL REINHARDT,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
CORDELL REINHARDT,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. In that respondent's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4, such exceptions, and the reply exceptions (which include cross-exceptions) submitted thereto, are not accepted herein.[1] Additionally, respondent's motion to supplement the

[1] Respondent's attorney initially requested an extension until October 28, 1996 within which to file exceptions attesting that a significant mail delay caused him to receive the initial decision only days before exceptions were due in this office. Respondent was granted only a three-day extension until October 25, 1996, to equal the amount of time respondent apparently lost. Exceptions were subsequently filed by respondent's attorney on October 29, 1996. In that such filing occurred four days after our initial extension deadline (and a day later than initially requested by respondent) the Commissioner finds them untimely filed. This is so despite the attorney's contention that the filing

record with the collective bargaining agreement, filed on the same date as its exceptions, is denied in that respondent was accorded a full opportunity to provide such information at hearing and did not avail itself of such opportunity.[2] In so ruling, the Commissioner is constrained to note that admission of such agreement would not be determinative to the ultimate conclusion of this matter.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) for the reasons expressed therein. The Commissioner accepts the ALJ's findings that petitioner was a tenured employee, in a tenured position; and in that the Commissioner finds no reason to disturb the credibility determinations of the ALJ based on the total record presented, the Commissioner further finds petitioner was wrongfully not assigned to a position to which he was entitled by tenure right, and that such wrongful assignment was in retaliation for petitioner's action in filing an appeal of prior Board actions. See *In re Morrison,* 216 *N.J. Super.* 143 (App. Div. 1987).

Accordingly, the Commissioner adopts the initial decision of the OAL and orders that petitioner be placed in one of respondent's Supervisor of Extra-Curricular Activities positions, and that he be awarded back pay and benefits to the 1994-1995 school year based upon a salary of $74,500.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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was delayed until such time due to his sinus and upper respiratory infection and as no request for extension was made, or granted, prior to October 25, 1996, as required by regulation.

[2] Respondent avers that he only provided extracts from the collective bargaining agreement before Judge Duncan because in prior cases the judge indicated that she preferred not to receive bulky documents into evidence when only extracts were relevant. The Commissioner finds, in that it was respondent's responsibility to provide all relevant extracts or the entire agreement if relevant at hearing, that opportunity has passed.

NOVEMBER 18, 1996
DATE OF MAILING NOVEMBER 18, 1996

509-96

147-98 R
(396-97R)
(509-96)

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN HOVINGTON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION ON REMAND
OF CAMDEN, CAMDEN COUNTY.	:	
_____	:	

MARCH 30, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6675-97
(EDU 4318-95 & 225-96 (consolidated, remanded)
AGENCY DKT. NO. 66-3/95 484-12/95
(6-3/95 & 484-12/95, remanded)

BOARD OF EDUCATION
OF THE CITY OF CAMDEN,
CAMDEN COUNTY,
Petitioner,
v.
JOHN HOVINGTON,
Respondent.

Karen A. Murray, Esq., for petitioner (Murray, Murray and Corrigan, attorneys)

Anthony J. Zarrillo, Esq., for respondent (Zarrillo and Zappacosta, attorneys)

Record Closed: January 29, 1998 Decided: February 9, 1998

BEFORE **JEFF S. MASIN**, ALJ:

This matter involves an aspect of prior administrative litigation between the Camden Board of Education and its former employee, John Hovington. Mr. Hovington, a teaching staff member in the 1980's, was indicted and subsequently suspended in 1988. He remained suspended during the pendency of three criminal trials on the same set of charges, and, after finally being acquitted in the third of the trials, was then charged with tenure violations. After an extensive hearing before this judge, he was found to have committed tenure violations and removed from his tenured position. The Commissioner of Education and the State Board of Education have affirmed the determination stripping Hovington of his tenure and removing him from his teaching

position. However, the State Board remanded the proceedings to the Commissioner so that he could resolve Hovington's claims for indemnification of the costs of the legal defense of the criminal charges and for back pay for the period prior to the Commissioner's tenure decision. These claims had been asserted during the prior administrative process and in a Superior Court proceeding. The Commissioner chose to send the case back to the Office of Administrative Law to determine the issues and this judge was assigned to the matter. The parties entered into a Stipulation of Facts and filed briefs and reply briefs, the last of which was received on January 29, at which time the record was closed.

For the reasons set forth below, I **CONCLUDE** that Mr. Hovington is not entitled to receive back pay for the period during which he was suspended pending the disposition of the criminal indictment, from November 28, 1988, until the acquittal on his third criminal trial in September, 1994. Additionally, he is not entitled to receive indemnification for the attorneys' fees and costs associated with the criminal trials.

The Stipulated Facts reveal that Mr. Hovington was indicted by the Camden County Grand Jury on November 16, 1988, for two counts of aggravated sexual assault, in violation of *N.J.S.A.* 2C:14-2 (a)(2)(b), and one count of endangering the welfare of a child, in violation of *N.J.S.A.* 2C:24-4. At that time he was a tenured teacher and earned $28,678. The criminal charges alleged that he had been involved in sexual activity with P.B., who at the time of the alleged sexual activity was both a minor and a student/athlete at Woodrow Wilson High in Camden, where Hovington both taught and served as a track coach.

Mr. Hovington was tried on the indictment in October 1990. He was acquitted of the endangering a minor, but convicted of aggravated sexual assault. This conviction was reversed by the Appellate Division in December 1992. The Court remanded the case to the trial court for retrial. The Camden Board then denied Mr. Hovington's demand to be reinstated and refused to lift his suspension or resume his pay. He was again tried in January 1994 and the jury was unable to reach a verdict. Subsequently, he was tried a third time in September 1994 and this time the jury acquitted him of all charges. His October 1994 request for immediate reinstatement, back pay and reimbursement for his legal fees in connection with his defense of the criminal cases was refused by the Board. On March 28, 1995, the Board certified tenure charges to the

Commissioner, asserting that Hovington had committed offenses requiring action against his tenure, namely, that he had maintained an improper relationship with P.B., including sexual activity, as originally charged in the criminal indictment. A hearing on these charges was held before this judge in 1996. On December 18, 1995, during that ongoing hearing, the Board certified additional tenure charges to the Commissioner, this time concerning an alleged improper relationship and sexual activity with another of Hovington's student/athletes, A.T. The Board also voted to initiate another 120-day suspension of pay following the filing of this second set of charges, relying again upon the statute. The Commissioner transferred this second tenure charge to OAL and the hearings on this tenure charge was consolidated with the initial set of tenure charges.

In the end, I concluded that Mr. Hovington had in fact engaged in inappropriate sexual relationships with both P.B. and A.T. and that his conduct grossly violated the standards of proper conduct for a teacher, thus requiring that he be stripped of his tenure and dismissed. As noted, this decision has been affirmed on review by the Commissioner and the State Board.

On August 22, 1995, Mr. Hovington filed a complaint in lieu of prerogative writ in the Superior Court against the Board, seeking to recover back pay. The Board moved to dismiss the complaint, and on October 27, 1995, Judge E. Stevenson Fluharty, J.S.C., ordered the Board to resume payment of Hovington's salary as of the lapse of 120 days following the filing of the tenure charge. However, on December 26, 1995, the Appellate Division granted the Board's motion for leave to appeal and summarily transferred the issues to the Commissioner of Education. Prior to the Appellate Division's Order, in November 1995, the Board paid a gross amount of fifty-thousand ($50,000) back wages, an amount subject to standard and ordinary deductions. The Board also agreed to hold an additional fifty-thousand ($50,000) in escrow, in view of the dispute over the amount of back pay entitlement.

Mr. Hovington contends that he is entitled to receive his full pay, including all increments to which he would have been entitled if he had not been suspended, for the period from the date of his original suspension until the date of the Commissioner's Final Decision, with the exception of the statutory period of 120 days following the certification of the tenure charges in the P.B. matter. This claim is based upon an interpretation of statutory and case law, for there is

concededly no statute which mandates that a teacher be paid for a period when he or she has been suspended pursuant to the Board's statutory authority to suspend pending the disposition of an indictment. *N.J.S.A.* 18A:6-8.3. In essence, counsel for Mr. Hovington argues that since no school teacher may be dismissed or reduced in salary until the Board has certified charges to the Commissioner and then successfully proven them to the Commissioner's satisfaction, any loss of pay for periods prior to the Commissioner's ruling, other than for the statutory 120 days, would amount to a premature and illegal reduction in pay. Support for this proposition is drawn from *Romanowski v. Board of Education of Jersey City*, 89 *N.J. Super.* 38 (App. Div. 1965). In *Romanowski*, a tenured employee was indicted for malfeasance in office. Five separate indictments were returned and he was tried on one of these and convicted. The conviction was later overturned. A second indictment was tried and Romanowski was acquitted. The Board then suspended him, citing the remaining three indictments. No written charges had yet been filed with the Commissioner. Unlike the present, at the time of the *Romanowski* case there was no authority for a suspension upon indictment, except where written charges had been brought against the tenured employee before the Commissioner. The Court found an inherent power to suspend for a criminal act, but said that if Romanowski were acquitted, he would be "entitled to compensation for the period of his temporary suspension." *Id.* at 41.

Other cases which have considered claims for back pay for periods of suspension pending the disposition of criminal indictments have relied upon equity as the basis for recovery. *Beatty v. Newton Board of Education*, 1991 *S.L.D.* 1001 ("fundamental fairness"); *Griffin v. Paterson Board of Education*, 93 *N.J.A.R.* 2d 822 (Dept. of Education). Thus, the determination of whether Mr. Hovington can recover the pay for the period he was suspended while under indictment, including any increments during that period, requires an examination of the facts relevant to his case to determine whether the equities lie with him. I **CONCLUDE** that they do not.

In neither *Beatty* nor *Griffin* did the respective Boards of Education pursue tenure charges to completion prior to the determination of the claim for pay withheld during the suspension imposed during the pendency of the criminal indictments, each of which had resulted in an acquittal. Thus, in judging the equities of the claimants in each of those cases, the Commissioner was presented with an employee who had never been proven to have engaged in inappropriate

conduct, either to the satisfaction of the criminal proof standard of beyond a reasonable doubt or to the civil/administrative standard of preponderance of the evidence. Beatty and Griffin thus were apparently innocent persons, who had suffered a loss of pay while successfully defending themselves against what, at the time of the Commissioner's decision on the back pay claims, were presumptively unsupported and unproven allegations. Here, Mr. Hovington stands in an entirely different position. While the ultimate outcome of the criminal proceedings was an acquittal, and the charges were thus not proven beyond a reasonable doubt, they were amply proven in the tenure hearing, and in fact, a new allegation, never part of the criminal process, was also proven. Therefore, Hovington's position as a supplicant seeking equity from the Commissioner is far different than the presumptively innocent claimants in *Beatty* and *Griffin.* "Fundamental fairness," the touchstone of the Commissioner's reasoning in *Beatty,* hardly demands that this Board be required to pay this petitioner for six years in which he did not work for the Board, when in fact he was guilty of serious tenure violations committed before his suspension. If anything, "fundamental fairness" to the citizens and taxpayers of the City of Camden demands that he not be paid where he so flagrantly violated his trust as a professional educator.

One issue raised here is the delay in the Board's bringing any tenure charges from 1988 until after the final disposition of the indictment at the last of the three trials. It is true that had the Board brought tenure charges at the time of the indictment, or even after the first trial, which until the result was overturned had resulted in a conviction on the charge of aggravated sexual assault, the tenure charges could have been tried long ago. Had Hovington prevailed at that time on the tenure charges, then he would presumably still have been without pay while the criminal appeal and subsequent trials proceeded. When finally acquitted, he would have stood "innocent" of all criminal and administrative charges, and the equities would then surely favor that he receive the back pay. On the other hand, an "early" tenure hearing might well have resulted in a decision adverse to Hovington, just as the later tenure hearing did, and then, after his ultimate acquittal of the criminal charges, he would have stood as he does now, criminally free of guilt, but administratively proven as a sexual predator of students, long ago stripped of tenure. His removal would have cut off any right to be paid by the Board. His equity position would be no better than it is now, after a "late" tenure process.

As regards the $50,000 back pay payment made in November 1995, Hovington contends that the Board "acknowledged his right to back pay" as early as November 8, 1994, and then went on to pay him, thus calling into serious question the Board's present concern about its being forced to waste taxpayer money if it is required to pay Hovington any additional back pay. However, while the Board may have determined to pay Hovington some money prior to the conclusion of the tenure hearings, it is clear that there is no statutory compulsion under the law for the Board to do so. Its choice to make a partial payment (which it does not seek to recover) does not require it to make any additional payments, that is, so long as the equities do not otherwise support payment, as they did in *Beatty* and *Griffin*. They do not, and no additional back pay need be paid.

Finally, Hovington complains that the Board had no right to impose a 120-day suspension of his pay after the December 1995 filing of the tenure charges in the A.T. matter. He contends that the Board had, in essence, used up its allowable 120-day period when it filed the P.B. charges and suspended his pay for 120 days thereafter.

I am inclined to agree that in the context of this case, the use of a second 120-day suspension of pay was inappropriate. While the law allows a board to suspend pay for 120 days following the filing of tenure charges, here the second set of charges involving A.T. were filed only after I ruled that if the Board intended to present evidence in the P.B. case concerning sexual improprieties with A.T., (as it had attempted to do during the hearing) it would have to file tenure charges regarding the same. The Board did so, but as all of these charges were really a part of the ongoing probe into whether Hovington had engaged in such affairs with students in the 1980's, and the second charges were actually an adjunct of the hearing process already begun on the P.B. case, it would be unfair to allow the Board to deprive Hovington of the 120 days of pay which he was otherwise legally entitled to receive since the P.B. allegations had not been resolved within 120 days. Here, the equities favor Hovington, and while a strict reading of the law seems to allow seriatim charges and pay suspensions for separate 120 day periods, such a reading seems to be contrary to the spirit of the legislative determination to require that Boards resume pay after 120 days. Therefore the Board shall pay Hovington for the 120 days for which his pay was suspended subsequent to the filing of the December 1995 tenure charges.

COUNSEL FEES

Hovington's request for counsel fees is based upon *N.J.S.A.* 18A:16-6.1.

> Should any criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

This statute is related back to *N.J.S.A.* 18A:16-6, which provides

> Whenever any civil action has been or shall be brought against any person holding any office . . . , under the jurisdiction of any board of education . . . , for any act or omission arising out of and in the course of the performance of the duties of such office . . . , the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; . . . .

In a recent decision the New Jersey Supreme Court considered this statute. In *Bower v. Board of Education of East Orange*, 149 *N.J.* 416 (1997), a kindergarten teacher appealed the denial by the State Board of Education of his claim for attorneys fees and costs resulting from criminal charges that he had sexually abused children in the bathroom attached to his classroom. The criminal charges had been dismissed after the State was unable to proceed at trial of a first indictment and a second indictment for the same charges was dismissed with prejudice. The parties agreed that he had thus met the second prong of the test under *N.J.S.A.* 18A:16-6, as he had received a final disposition in his favor. The question was then whether he met the first prong, that is that the charges of aggravated sexual assault and endangering the welfare of children were based upon "acts or omissions arising out of and in the course of the performance of the duties of such office." The Court noted that all agreed that indemnification could not be denied simply on the basis that if proven the criminal acts were surely beyond the scope of the teacher's assigned duties. The Court ultimately concluded that as no charges had been proven, and there was no administrative record since the Board of Education had not instituted tenure charges, all that could be determined was that Bower had performed actions which were

appropriate to his duties as a kindergarten teacher. Therefore, reimbursement was proper. However, the Court noted that

> (H)ad the local board seen fit to institute such dismissal proceedings, we assume that any evidence adduced at the hearing addressing these charges would have been material to the proceeding instituted by Bower for indemnification of his legal expenses . . . We detect from the record before us a sense of frustration on the part of the State Board, stemming no doubt from its concern that the allegations . . . although unproved, may have been true, in which event indemnification surely would be inappropriate.
> [*Id.* at 433]

While it is true that the Court's comments as to the materiality of evidence from a dismissal hearing were dicta, as no such hearing occurred in the *Bower* case, nevertheless, the Court's comment is a strong signal that if the Board can prove that the conduct alleged in the criminal indictment or other criminal proceeding did in fact occur and that it constituted a basis for dismissal, that "indemnification surely would be inappropriate." In the present action, the scenario envisioned by the Supreme Court actually occurred. While Hovington ultimately achieved the required favorable outcome of the criminal proceedings, his misconduct with the female student who was the subject of the allegations in the criminal case was proven in the tenure hearing. As opposed to the situation in *Bower*, where the Supreme Court noted that there was "no contradictory evidence in the record in the administrative proceeding" and therefore the only assumption could be that Bower committed "no acts other than to perform duties as a kindergarten teacher," the record here amply demonstrates that Hovington committed improper acts of a sexual nature with student/athletes who were minors, that these took place outside of the school, that they were, some or all, not actions which occurred in association with or in the course of duties and responsibilities of a teacher or coach, and that therefore any indemnification would be "surely. . . inappropriate."

CONCLUSION AND ORDER

For the reasons expressed, IT IS **HEREBY ORDERED** that the claims for back pay and indemnification are **DISMISSED**, with the exception of the claim for back pay for the 120-day period following the filing of the second set of tenure charges in December 1995. Counsel shall

confer and determine the exact amount of this back pay, subject to appropriate mitigation, and shall advise the Commissioner within 15 days of this initial decision if there is a dispute as to the amount to be paid to Mr. Hovington.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 9, 1998
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

2/11/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 13 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Joint Stipulations, John Hovington and Camden Board of Education, with attached Exhibit A: Agreements Between the Camden Board of Education and the Camden Education Association (Teachers' Unit), dated July 1, 1987 through June 30, 1990, July 1, 1990 through June 30, 1993, July 1, 1993 through June 30, 1996, and July 1, 1996 through June 30, 1999. Exhibit B: September 29, 1994, itemized professional services rendered by the firm of Zarrillo and Zappacosta to Mr. John Hovington

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

FROM BRIEF OF RESPONDENT:

Exhibit A Letter dated 11/8/94 from Karen A. Murray to Anthony J. Zarillo

Exhibit B Letter dated 11/8/95 from Karen A. Murray to Anthony J. Zarillo

Exhibit C Transcript of Testimony of 11/1/95 hearing before Hon. Jeff S. Masin, *Camden Bd. of Ed. v. John Hovington*, OAL DKT. NO. EDU 4318-95S, pages 160-168

Certification dated 11/11/96 of Anthony Zarillo with attached Exhibits:

Exhibit A Letter dated 11/29/88 from Arnold W. Webster, Ph.D., to John Hovington

Exhibit B Letter dated 1/11/93 from Karen Murray to Anthony Zarillo

Exhibit C Letter dated 10/13/94 from Anthony Zarillo to Dr. Roy J. Dawson, Jr.

Exhibit D Letter dated 11/8/94 from Karen Murray to Anthony Zarillo

Exhibit E Complaint in Lieu of Prerogative Writ and for Damages, Superior Court, Law Division, Camden County, Dkt. No. L 7011 95

Exhibit F Letter dated 11/8/95 from Karen Murray to Anthony Zarillo

Exhibit G Letter dated 4/17/95 from Anthony Zarillo to Roy J. Dawson, Jr., Ed.D.

Exhibit H Order on Motion for Leave to Appeal, dated 12/19/95, Superior Court, Appellate Division, Dkt. No. AM-000336-95T3

Exhibit I Order of Consolidation, dated 4/26/96, *In the Matter of the Tenure Hearing of John Hovington, Bd. of Ed. of the City of Camden, Camden Co.*, OAL DKT. NOS. EDU 04318-95 & 00225-96

Exhibit J September 29, 1994, itemized professional services rendered by the firm of Zarrillo and Zappacosta to Mr. John Hovington

FROM BRIEF IN SUPPORT OF RESPONDENT'S MOTION:

Exhibit A Transcript of Testimony of 11/1/95 hearing before Hon. Jeff S. Masin, *Camden Bd. of Ed. v. John* Hovington, OAL DKT. NO. EDU 4318-95S, pages 160-168

FROM REPLY BRIEF OF RESPONDENT:

Exhibit A Notice of Motion dated 11/11/96, *Camden Bd. of Ed. v. John Hovington,* OAL DKT. NOS. EDU 04318-95S & EDU 00225-96S

Exhibit B Decision of the State Board of Education, dated 4/2/97, *In the Matter of the Tenure Hearing of John Hovington, Bd. of Ed. of the City of Camden, Camden Co.*, OAL DKT. NOS. EDU 4318-95 & 225-96 (consolidated)

OAL DKT. NOS. EDU 6675-97, EDU 4318-95 and EDU 225-96
(CONSOLIDATED, ON REMAND)
AGENCY DKT. NOS. 66-3/95 and 484-12/95

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN HOVINGTON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION ON REMAND
OF CAMDEN, CAMDEN COUNTY.	:	
_____	:	

This dispute was initially heard before the Office of Administrative Law (OAL) and by decision dated October 2, 1996, wherein the Administrative Law Judge (ALJ) recommended that respondent be dismissed from his tenured position as a teacher in that the tenure charges alleging unbecoming conduct were proven by the Board and sufficient to warrant his termination from employment pursuant to *N.J.S.A.* 18A:6-10 and 11. The Commissioner, by decision dated November 18, 1996, affirmed the initial decision. The State Board of Education, by decision dated April 2, 1997, remanded this matter directing the Commissioner to set aside his decision on the merits of the tenure charges and remand this matter for consideration of respondent's exceptions, which had been previously deemed untimely, in determining those charges. (State Board Decision, Slip Opinion at p. 2) Respondent's exceptions were duly considered and the Commissioner's determination was reached to affirm the initial decision of the ALJ with regard to the tenure charges, dismissing respondent from his teaching position in the Camden public school district. The matter was then transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6, for action against respondent's certificate as appropriate.

The State Board, also on April 2, 1997, determined that the transfer to the Commissioner from Superior Court, Appellate Division, of a Complaint in Lieu of Prerogative Writ, on December 19, 1995, was sufficiently filed for the Commissioner's consideration. (State Board Decision, Slip Opinion, Footnote 1 on page 2) Further, in that there was no indication in

the record that the Commissioner took any action to determine the issues raised in the Complaint in Lieu of Prerogative Writ in Superior Court, Law Division, in August 1995, in which respondent sought indemnification and back pay from the Board, the State Board requested that the Commissioner undertake further proceedings and render a final determination on those particular claims. (State Board Decision, Slip Opinion at pp. 2-3) Thus, the Complaint was transmitted to the OAL and the instant decision follows the Commissioner's receipt thereof.

The record of this matter, transcripts of the hearing, and the initial decision of the OAL have been reviewed. Respondent's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. However, by letter dated March 5, 1998, and received in this office on March 16, 1998, respondent's attorney filed a letter with the Commissioner stating that

> based on a resolution of the above-captioned matter between my client, John Hovington, and the Camden City Board of Education, I hereby withdraw the exceptions as were filed on my client's behalf on February 26, 1998.

Consequently, in that the only issue before the Commissioner herein pertains to the amount of back pay and indemnification owed to respondent, and in that respondent has expressly withdrawn any objection to entry of the order of the ALJ, the Commissioner finds no need to reach to the substantive merits of respondent's claims.

Accordingly, the order of the ALJ is entered as the final decision in this matter for the reasons expressed herein.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

MARCH 30, 1998
DATE OF MAILING MARCH 30, 1998

509-96

509-96

IN THE MATTER OF THE TENURE :

HEARING OF JOHN HOVINGTON, : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY : DECISION

OF CAMDEN, CAMDEN COUNTY. :

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent teacher and coach for allegedly engaging in an inappropriate sexual relationship with minor student P.B. A second set of charges alleged respondent engaged in inappropriate touching of student A.T.

Having considered testimony of witnesses and the evidence in the record, the ALJ concluded respondent's actions with A.T. did not warrant dismissal of respondent from his position. ALJ, however, concluded respondent's relationship with P.B. did warrant his removal of his tenure as he grossly violated his obligations as an educator.

Citing *In re Morrison*, the Commissioner found no basis to challenge the ALJ's credibility determinations and resultant conclusions. In light of *In re Fulcomer, In re Beam, In re Tordo, In re Mantone and In re Galla,* the Commissioner concurred with the ALJ that respondent's behavior constituted unbecoming conduct and that removal was the appropriate penalty. Commissioner dismissed respondent as of the date of this decision and ordered matter transmitted to State Board of Examiners for further appropriate action.

NOVEMBER 18, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 4318-95S &
225-96S (Consolidated)
AGENCY DKT. NOS. 66-3/95 & 484-12/95

BOARD OF EDUCATION OF THE CITY OF CAMDEN (CAMDEN COUNTY),
Petitioner,
v.
JOHN HOVINGTON,
Respondent.

Karen A. Murray, Esq., for petitioner (Murray, Murray & Corrigan, attorneys)

Anthony J. Zarrillo, Jr., Esq., for respondent (Zarrillo & Zappacosta, attorneys)

Record Closed: September 4, 1996 Decided: October 2 , 1996

BEFORE **JEFF S. MASIN**, ALJ:

The City of Camden Board of Education (hereinafter "petitioner" or "Board"), certified tenure charges to the Commissioner of Education against respondent John Hovington, on or about March 30, 1995. Mr. Hovington served as a teacher and coach in the District during the 1970's and 80's. The charges contained in the certification alleged that Mr. Hovington had engaged in conduct unbecoming a teacher because during the years from 1985-88 he first propositioned P.B., then a 15-year-old high school student and member of the track team which Mr. Hovington coached, and then engaged in consensual sexual relations with her while she was

still a student and a minor, and also because he improperly touched P.B. in the vaginal area, "while purportedly treating an injury."

The allegations regarding Mr. Hovington's alleged consensual sexual relationship with P.B. first became a matter of public knowledge in the spring of 1988, when P.B. was a senior at Woodrow Wilson High School in Camden. At the time, Mr. Hovington was employed by the Board as a physical education and health instructor in that school, and he also served as the woman's track coach. Ms. B. had been a member of the woman's track team for her last three years of high school. Mr. Hovington was indicted on criminal charges of aggravated sexual assault in 1988, and thereafter he was tried before a jury on three separate occasions. His first trial resulted in his conviction, but this verdict was overturned on appeal in 1992 and remanded. In a subsequent trial held in January 1994, the jury deadlocked. A final criminal trial was held in October 1994, and the jury returned a not guilty verdict. (P-6 in evidence).

Hovington was originally suspended without pay by the Camden Board of Education on November 28, 1988, and he remained suspended from his employment pending the outcome of the criminal charges. After the October 1994 verdict, the Board for the first time certified tenure charges relating to the alleged relationship with P.B. The Commissioner of Education transferred the contested case to the Office of Administrative Law ("OAL") on April 28, 1995. A prehearing conference was held on June 7, 1995, and a prehearing order was issued on June 8, 1995. Hearings began on November 1, 1995, and continued on November 2, 1995, January 10 and 11, March 7, 13, 14, April 15, 16, 22, 30, May 8, June 13, 19 and 25, 1996.[1] During the early stages of the hearing, the Board presented the testimony of a former student of Mr. Hovington's at Woodrow Wilson, A.M., known during her school years and in this decision as A.T., and often referred to in the record as "Gwen," who testified regarding her knowledge of the allegations of a sexual relationship between P.B. and the respondent. However, on December 21, 1995, the Board filed a new set of tenure charges against Mr. Hovington, alleging that while a teacher and coach at Woodrow Wilson during the years 1980 to 1988, he had engaged in conduct

[1] A number of scheduled hearing dates were adjourned at counsel's request due to illness or unavailability of witnesses, and weather-related problems during the winter of 1995-96 also affected the scheduled hearing dates. Further, the addition of charges and the contentious nature of the relationship between counsel throughout this hearing have played a part in the drawn out nature of the proceedings. Finally, the heavy trial calendars of counsel and the judge have necessitated delay.

unbecoming a teacher by having engaged in sexually explicit conversations with female students and kissing and/or touching "various female track students in a sexual and inappropriate manner for a teacher and a coach. . . ." These charges were supported by Ms. A.T.'s affidavit. When the Commissioner transferred this second set of charges to the OAL, they were consolidated with the charges relating to P.B. The Board agreed that while the second set of charges referred to "various females," in fact the only allegations which it was prepared to present were those made by A.T. The continued hearing has since included additional testimony by A.T.

The final witnesses testified on July 3, 1996. Thereafter, counsel received final transcripts and filed closing summations. The record closed on September 4, 1996.

EVIDENCE

P.B. was born on August 2, 1970. She is currently employed by a Camden County public agency. She is a graduate of Rutgers University, with a Bachelor's Degree in Social Work. She attended the University of Maryland for her first year of college, and finished her college career at Rutgers in Camden, graduating in May 1994. She was a student at Woodrow Wilson High in Camden from September 1984, until June 1988. She was a very good student, was enrolled in the school's Gifted and Talented Program for all four years, and made the Honor Roll. In addition, she was a superior athlete, winning a state championship in track and participating in other sports as well. According to Ms. B., while a student at the high school she was very outgoing, popular, and well-liked. While at first she was "passive" in regard to dating, by the time she reached her senior year she had changed, had an "attitude," and was able to "express herself differently." She received money from her mother and/or grandmother for food and clothing, and was not without funds to eat lunch out while attending school.

Ms. B. first met John Hovington during basketball season of her freshman year. Ms. B. recalled that she would see Hovington around the gym during basketball practice. He was the coach of the indoor track team at the time, and testimony revealed that the team practiced inside the school most of the time. He spoke to her about the possibility of her participating in outdoor track, which was a spring sport.

During her freshman year, Ms. B. was dating M.B., a senior. She did not consider him to be her "boyfriend," because she did not believe that he considered her to be his girlfriend. She believes that they had "less than 3 dates." Nevertheless, they may have had intercourse. On several occasions, she and Hovington spoke about M.B., and he told her that M.B. was not "good for her," because he was a senior and probably had other girlfriends. However, Hovington did not ask her to stop seeing Mr. B.

Ms. B. joined the outdoor track team during the spring of her freshman year. She and Hovington had further conversations of a personal nature. He talked to her about birth control pills, and encouraged her to use them. This conversation was "probably" in regard to her relationship with Mr. B. She recalled that she also spoke to Hovington about a yeast infection from which she suffered during the track season.

During this freshman track season, Mr. Hovington did make physical contact with Ms. B. This occurred as part of the massaging and stretching activities which were a part of the track team's routine. Hovington instructed all of the team members about stretching techniques. Often athletes were themselves teamed up for this activity, but if an athlete was injured then Hovington would be "involved." As she recalled, massage was only used where there was an injury, such as she had in the latter part of the track season when she injured her quadriceps muscle. When Mr. Hovington massaged her during her freshman track season, she felt "uncomfortable." On at least one occasion that she "definitely" recalls, he touched her vaginal area as he massaged her with his fingers. She did not do anything when this occurred. He was explaining how the various muscles were connected. She does not remember whether she told anyone about this incident.

Ms. B. explained that Mr. Hovington was very personable, extremely easy to talk to, and was a father figure to some of the females. Each of the other former student/athletes who also testified in this proceeding confirmed this. He was both a coach, and to some of the witnesses a health teacher. The girls found it quite easy to talk to him, and it is evident from the testimony that some of them, including Ms. B, shared personal matters with him.

Ms. B. said that Mr. Hovington did not provide her with any money for lunch or buy her any clothing during her freshman year. She had no contact with him during the summer after that school year ended.

During her sophomore year Ms. B. participated in tennis, basketball and outdoor track. During the tennis season, Coach Hovington, who was not associated with the tennis program, came to some of the tennis practices. Ms. B. could not recall the number of these that he appeared at, but thought perhaps "a few." He also attended "5 or less" of the tennis meets, but she could not recall if any which he attended were held away from the school ("away meets"). During the basketball season, he would be around the gym. According to the witness, at this point in time she and Hovington were "friends." Their conversation was "general" in nature. However, the relationship began to change. During the fall of her sophomore year, he began to make comments about her body. He noticed that she shaved her legs and complimented her on how nice she looked. One day as he was in a car with her driving her home from either a practice or a meet, he asked her if she shaved her pubic area, and lifted the top part of her shorts. When he did this, she did "absolutely nothing," as she did not know how to react. She was "surprised," and took the matter as more like a "joke or whatever." He made it "light, not serious." Nothing else happened that day.

Probably in the fall season of her sophomore year, Ms. B. and Mr. Hovington were in his car as he took her home from what she thinks was probably a basketball practice, , Mr. Hovington put his finger into her vagina.. They spoke about his personal life and about his girlfriend Tina, who incidentally is now his wife and was a witness in this hearing. He made a comment to B., saying "so don't try to take me in your house and ravish me." He seemed interested in having some "contact relationship" with B. Eventually, Hovington asked her if they could be "special friends." He said that he wanted to put his penis there and put her "in warm water and things like that." He never defined what he meant by their being "special friends," but he did say that they would each have to understand the other "being with someone else." Once he made the proposition about being "special friends," he persisted and made advances. She kept asking him why he wanted "this," as he already had an attractive woman. He told her that it did not matter how attractive the woman was, but how he felt when he was with her. She understood that "special friends" involved sex and eventually she said "yes." Either near the end of tennis

season, but more likely during the early portion of the basketball season, they began to kiss and caress. Usually this occurred in his car when he would drive her home from practice or a game, which he would occasionally do, sometimes also taking her friend C. C. On other occasions the basketball coach would drive her and other team members home. (Testimony showed that the general practice of driving students home after practice, especially in the dark late fall and winter months, was not at all unusual.) P. was always the last student dropped off because of where her home was located in relationship to the school and the homes of the others in the car. At that time of the year it was already dark and she and Hovington would park in different locations about three blocks from her home, which was located under the Camden side of the Benjamin Franklin Bridge.

Ms. B. recalled that the first instance of intercourse with Mr. Hovington took place after an indoor track meet held at Widener University. She went to the meet as a spectator at Hovington's invitation, traveling to the meet on the bus with the indoor track team. She returned on the bus, and then sometime after midnight he drove her and others home. He dropped the others off and then parked two blocks from P.'s house. They then had consensual vaginal intercourse in the back seat of the car, which, as she explained on cross-examination, they had climbed back into rather than exit from the car and then reenter. P. claimed that Mr. Hovington had initiated this encounter. At that time Ms. B. was taking birth control pills which she had obtained from Planned Parenthood after Hovington had spoken to her about getting on the pill, and he had told her that they had to wait to have intercourse until she had been on the pill for 30 days. She could not recall how long they remained in the car, but she arrived home after 1:00 A.M. On cross-examination, she described the encounter as "very brief," recalling that someone bumped or banged on the side of the car and this caused them to stop, climb back to the front, and drive to her home, where she exited the vehicle and he left.

Ms. B. told C. C. about the sexual encounter the next day, writing her a note to advise her. She and Hovington continued to have intercourse during the remainder of sophomore year, at least more than five times, although she was not sure whether more than ten times. She recalled one time which occurred at Hovington's house before a boy's basketball playoff game. This was the first time that she was at his house, which she described as a one-bedroom, one-floor apartment with a small entry foyer. The trip to his house was prearranged, although she was not

sure now whether they had planned to have sex. After girl's basketball practice ended that day, she and Hovington met his son, J., and his father, Mr. K. J., who B. thought was probably in junior high school at the time, got into Hovington's car and sat in the back. She sat up front with Hovington, who drove them to the apartment. J. sat on a couch in the living room, watching television. Hovington entered the bedroom, and then he called her to come in and join him. They eventually had intercourse on the bed, on which a towel had been placed. Hovington initiated the sex, which lasted for ten to fifteen minutes. They were not in the bedroom for a very long time, and when she emerged after showering, J. was still watching TV. She was not certain if Hovington also showered, but after he came out of the bedroom they went to McDonald's Restaurant and to the basketball game. Hovington then drove her home with J. in the car.

While she could not recall precisely which track awards or meets she had won during her sophomore year, Ms. B. did remember that she had won something, and that Mr. Hovington bought her long and short tights, and maybe some other items. He also began to give C. C. and her small amounts of money, two or three dollars at a time, if they were going to lunch, and if he asked her to buy him cookies, she would keep the change.

Ms. B. testified that during a summer after her sophomore year (but not necessarily the summer immediately following the sophomore year), Mr. Hovington drove a charter bus route to Atlantic City for the summer. She would meet him and spend time with him after he would return from Atlantic City. On at least one occasion that she recalled he picked her up on the way to the bus storage lot and they drove to either Echelon or Voorhees, where he had parked his car. They were "intimate" on the bus, although she did not remember if they had intercourse on that occasion. He then parked the bus in its assigned lot and drove her home in his car. On another occasion during her senior year they had intercourse on a bus that he had driven to either Great Adventure or King's Dominion (which is located in Virginia) on a school sponsored trip. After all the students and accompanying staff where dropped off, he drove the bus to wherever the charter vehicle had to be delivered and they then had intercourse in the bus. By this time it was dark outside.

The sexual relationship continued through Ms. B.'s junior year at Wilson. She recalled being in his apartment on several occasions; once, he showed her pictures of the trip he and Tina

had taken to Maui, and on another occasion, Tina had gone to New York to a funeral. He never introduced her to Tina, although as will be detailed below they did eventually meet. She did meet his sister B., who lived upstairs from Hovington and who once came home with a friend at the same time that P. and Mr. Hovington were emerging from his apartment. He introduced her to his sister at that time.

The witness recalled that she and Hovington had intercourse in his hotel room when she, several other teammates who had qualified, and Hovington traveled to North Jersey for a State championship track meet held in Plainfield. The girls sat in the hall for a while talking and he invited her into his room.

According to the witness, she continued to discuss her relationship with Hovington with C. C. throughout its existence. In fact, C. once covered for her when she stayed for a night at his sister B.'s apartment during her senior year, an episode which will be detailed below. At some time or another she also told A.T., who was also a track star and who was two years ahead of her in school, about Hovington and the incident when he placed his finger in her vagina. She continued to talk to Hovington on her private phone line, calling him at his apartment at least once a week, often on Saturdays. She was aware that Tina did not always live in the apartment. She testified that at the time she considered that she and Hovington were "close friends, bonded" and that they "cared about each other," although she was not sure if she loved him, or if he ever said how he felt about her. She added that at least once he did say that he loved her, and he often said that things would be "better" once she turned eighteen, as they would not have to hide and be secretive. Only in her senior year did she "get up the courage" to tell him that she did not want him to bring her home right away when they were together. Otherwise, she was generally not very "vocal" in the relationship, and felt "uncomfortable."

Coach Hovington attended several of the away basketball games during her time on the basketball team. On one occasion she suffered a leg cramp during a game, and Hovington, who was not associated with the basketball program, nevertheless came out of the stands and attempted to treat the cramp. The basketball coach at the time was Cary Savage, who was present at the game.

Ms. B. discussed her relationship with Mr. Hovington with Cary Savage and with Karan Phillips, another teacher/coach, but could not remember whether this happened during her junior or senior year. Savage was another person to whom she and others felt close and in whom they could confide. She told him that she was having sex with Hovington. She explained that saying this to Savage served as a "release" for her; he was "someone she could talk to who would listen to what she had to say." He was "surprised," "concerned." She asked that he keep the information in confidence. She also told Phillips, during a conversation which occurred during her senior year outside near the track bleachers or on the back steps of the school. Again, she was seeking a "release," but was not asking for advice. Phillips suggested that P. should tape record conversations with Hovington as a way to get proof, but Ms. B. did not agree with this and did not do so. During her senior year P. also related information about the relationship to Charles Iepson, a teacher and coach at Wilson in whom she felt she could confide. Iepson told her that he had previously asked Hovington if he was involved with her and Hovington had denied that he was. P. also told Carol Ellerbee about the relationship, but believes that this occurred sometime after she had started college. Ellerbee was the basketball coach at Rutgers Camden while P. was a student at that school.

By her senior year the relationship with Hovington had begun to affect B.'s life. She "felt emotionally attached" and "began to question a lot of things." She played tennis, but did not play basketball. Instead she participated in indoor track, which Hovington had encouraged her to switch to although she insisted at the hearing that the decision to switch was hers. This resulted in a conflict with Mr. Savage, who she said had made comments about her mother during the summer basketball league. She did not recall having had any specific discussion about her relationship with Hovington at that time, but felt that Savage may have had some hint about it.

During her junior year Hovington purchased a school jacket exclusively for her, and also bought her a warmup suit, an outfit for the homecoming pageant and a tape recorder to use for dance practice for the pageant. During the fall of her senior year she visited Lafayette College and the University of Maryland. Hovington took her to and from the train station, and he gave her $100 to buy some things when she went to Maryland. He also gave her money during senior year so that she could purchase something for her grandmother for Christmas, to purchase two

bathing suits around the time of the senior class trip, a gym bag, and also spending money. He also continued to give her money for an occasional lunch.

Ms. B. testified that during the spring of her junior year there had been some conversation about whether the relationship would continue after she graduated. During her senior year, Hovington told her that he loved her. As noted earlier, B. testified that during her senior year she became more open in regard to initiating attempts to get Hovington to spend more time with her. On one occasion during the football season, probably in October 1987, when she tried to initiate conversation about this and he could not stay, she took it very personally. At the time, she was also having problems with her relationship with her mother, who had gone to the South for a lengthy period during B.'s high school years, both to deal with a substance abuse problem and to care for B.'s great-grandmother. P. felt that she did not matter, that she was "insignificant." She questioned what had been happening to her over the past three years, felt that she was not in control of her life and had no "say so" in the Hovington relationship. As a result of these factors, B. resolved to attempt suicide. She took muscle relaxants which had been prescribed for a neighbor. However, after she spoke with friends on the telephone and they noticed a change in her demeanor, she was taken to Cooper Hospital. While in the hospital that night, she was visited by C. C. and other friends. She was released later that evening. The next day she went to school with Ms. C. They went to the lower gym to eat something which they had purchased at a store, and on the way there they saw Hovington. He said something to her and she fell forward. He took her into the health office and spoke to C. He then took B. to the lower gym and put her in the boy's locker room lounge. While she cannot recall the specifics, he apparently had learned of her suicide attempt from C., and he kept her in the office for the day and then arranged for her to stay the night at his sister's apartment. Hovington picked her up on the street corner near her house after school and after a visit to Rancocas Valley Hospital to see Hovington's then hospitalized mother they went to his apartment complex. P. stayed with his sister in her apartment. It was all very "hush, hush," and an arrangement was worked out so that C. would cover for her and say that P. was staying at C.'s house. P. had not asked anyone for a place to stay, and she was not sure why Hovington made these arrangements.

The next morning, Hovington's sister left for work, and Tina called and invited P. down to Hovington's apartment for breakfast. While reluctant to go "because of the situation," she

eventually went. She chose not to stay another night. Hovington drove her back to her home, and they may have had intercourse on the way back, but she cannot recall.

The sexual relationship continued even after the suicide attempt. However, in the Spring when she had occasion to see Tina at an outdoor track practice and saw Hovington kiss her, which was the first time that P. had seen him be "physical" with another woman, she was disturbed. She spoke to Hovington on the telephone later that evening, with several hang ups and follow up calls occurring. After this incident, P. questioned herself as to how he could say that he loved her if he had another person in his life. The relationship was now more than an infatuation, but something she "had really become involved in . . . ." It was "taking more from me emotionally." She "wanted more from him, and I wasn't so easily ready to settle for whatever was given." The next day she went to the office of Dean of Students Epps and asked to use the phone. She asked to call Sgt. (or Det.) Murray of the Camden Police Department Juvenile Bureau, whose name she claimed to have known from a prior telephone call (which she believed occurred during her sophomore year) which her mother at first told her she had received from someone who had told her mother that she and P. had to come to the police department to speak to Murray about a report concerning some girls who "wanted to jump" P., but which her mother later told her was in reference to someone having said "that he (Hovington) was forcing me to have intercourse with him." (While not exactly certain of the timing, P. testified that she had met with Murray and denied the allegation). Dean Epps got the officer on the phone. Epps asked P. if the call was in reference to Hovington, but she did not respond verbally. An appointment was arranged with Murray, but she never met with him.

In May someone contacted DYFS, although at the time she did not know who. Hovington told her that the DYFS person was going to contact her, as he explained that Dean Epps had been speaking in a bar about Hovington's relationship with her and saying that he was finally going to get Hovington. Hovington told her that she did not have to say anything to DYFS. When Ms. B. met with Mr. Martini of DYFS in her mother's presence, she told him that Hovington was just a coach to her, or words to that effect. When he asked if they had sexual relations, she denied that they had and also denied that she had told Mr. Epps that they had. She did not want the relationship to end, and Hovington had told her that she did not have to tell DYFS anything.

Sometime near the end of May in her senior year, she was called to school principal Herbert Factor's office and asked if the rumors about her having a relationship with Hovington were true. She acknowledged that they were, and Factor said that he would not say anything, but that Hovington could no longer drive her home.

After the DYFS meeting there was at least one additional occasion on which she had intercourse with Mr. Hovington. This occurred in June before her graduation when he took her to the Woodbine Inn for a South Jersey Track Banquet and they then went to Camden County Park in Cherry Hill and had intercourse on a picnic table sometime around midnight.

Towards the end of her senior year, Ms. B. had a confrontation with Hovington and Tina at his apartment. This actually occurred after graduation, sometime in late June. Two days after graduation, she was to have met Hovington who was to be driving the bus. The meeting did not take place. She tried to call him, got his answering machine, and then went to his apartment. They had a conversation in which he spoke of her losing interest in him when she went to college and how he had to keep Tina because he did not want to start over. This conversation occurred on the apartment steps, and Tina was inside. He asked Ms. B. to leave, and she did not want to do that. He went inside, and she knocked on the door. Tina answered and invited her inside. He asked what was going on and P. said that he should tell Tina. He then told Tina that P. was "madly in love with me." He looked up at the ceiling and said that he did not love P. As P. prepared to leave, Tina asked how long this had been going on. P. was trying to regain her composure, and having exited the apartment, she drove off "a bit." Hovington then approached the car and told P. that he did love her, but that he could not say so in front of Tina, "because she was a grown woman." P. said that she was going to "tell the truth," and he replied that she was not being fair. She departed, and later they then had a long telephone conversation in which he complained that she was not being fair and spoke of how he had assisted her. She did not see him after this incident until the first criminal trial.

A.T., who is now married, attended Virginia State and then Delaware State College. She is currently employed as an accountant for a federal agency in New Jersey. Initially, she testified as a Board witness in support of Ms. B.'s allegations. In that regard, she testified that she was a

student at Woodrow Wilson High from 1982 through 1986, thus she was two years ahead of Ms. B., whom she knew from their association on the women's track team during Ms. T.'s last two years of school. Ms. T. was a highly successful athlete, state champion in the indoor 55-meter hurdles, during her senior year. Mr. Hovington served as her coach for all four years. According to Ms. T., Mr. Hovington paid "special attention" to her during the years 1983 through 1985 because she was a star. He often drove her and other track team members home, as there were no school buses at that hour. He bought her "things," such as a "regular" jacket and other clothing, and he also arranged for the team to receive jackets reflecting the honors which it won. He sometimes gave her money to get food at track meets. She did not know if he did this for other athletes as well. Sometimes they went out to eat after practice.

Ms. T. recalled that during the track season, while athletes would often stretch each other, Hovington would also stretch some of the athletes. In fact "he stretched everyone on the team who needed to be stretched." In addition, he would massage some of the women's legs, using a lubricating and heating substance known as a balm. When he massaged her, she would be lying on her stomach. Sometime in her junior year, or perhaps during the indoor season of her senior year, he started the massage on the lower portion of her buttocks, or as she later clarified, in mid-buttocks. She was "offended," and her expression conveyed this to him. He explained that the hamstring muscle was located in this area, showing her a book on muscles. He did not touch her buttocks again.

Ms. B. called Ms. T. sometime during the winter of either T.'s junior or senior year and told her about B.'s relationship with Hovington. B. explained that that same day he had driven B. home and they had parked behind the Rutgers campus, where he touched B.'s thigh and then her vagina, pointing out the "parts" of the vagina and inserting his finger into it and then making a remark about pulling up his pants before he did "something I don't want to do." When B. spoke to Ms. T. she sounded upset and asked "what she should do." T. told her tell her mother or grandmother, but B did not want to do this. She never discussed the matter with B. again.

After Ms. T. completed her testimony in November 1995, the Board filed the additional tenure charge which alleged that Mr. Hovington had been involved in improper conduct with Ms. T. She was then recalled to the stand by the Board on April 15, 1996. She testified about an

incident when she was engaged in spring track practice and had occasion to mention in front of Mr. Hovington and other male and female members of the team that she was not wearing a bra. (She could not recall the context for this discussion). He responded that she "didn't have much, just put tape on your rosebuds." When Hovington responded in this fashion, Ms. T. said nothing. She was unable to recall during which school year this incident occurred. She explained that it was common to wear a bra during track practice. She often wore her regular bra, but there was a support bra that could be worn. The fact that she even mentioned the fact that she was not wearing a bra was not unusual for her, for she talked about a "lot of things." A lot of the girls confided in Hovington, some saw him as a "father" or "mother" figure.

On another occasion during her junior year she went to see Coach Hovington in his office after she had won the state indoor hurdles championship. He was sitting on his desk and she was standing. He said that she was his first champion and proceeded to kiss her on the mouth while he held her cheeks in his hands. She left the room after he kissed her. She was upset and shocked. She told her friend B.L. about what had happened immediately after it occurred, but told no one else. Describing the incident on cross-examination, Ms. T. explained that when it happened, Hovington "hugged" her towards him. The kiss on the mouth was what bothered her. It was "momentary" and all occurred in a split second.

Referring to the massage incident which was the subject of her November testimony, Ms. T. explained that it occurred after the kissing incident, during the senior year indoor season. She had suffered from a continuing hamstring injury since her sophomore year. On cross-examination she noted that at the time of the massaging of her buttocks, Hovington had responded to her "look" by showing her a book which he had in his trunk and which he used to try to explain the location of the hamstring, but she was "upset" and "did not even hear what he was saying." She could not recall whether she had ever gone to the Temple Sports Clinic for her hamstring injury, or whether she went there only for her broken collarbone and dislocated shoulder. She does not recall that Hovington told her that the doctors or other personnel at the Sports Clinic had told him how to deal with the hamstring injury.

In addition to the incidents described above, the witness related that during high school she had a boyfriend for three years. She had had a sexual relationship with this boy, John, and

Hovington knew that because she had made "comments." He also knew that she was taking birth control pills, as she did not consider this information a particularly private matter and had probably told him. She learned during her senior year that John was seeing another girl on the track team. This fact was apparently well known, and one day when Hovington was taking her to the Meet of Champions somewhere in North Jersey, he told her that "You don't need a boyfriend, I'll be your boyfriend." He said that if he wanted "to take her to a motel, no one could say a thing." She was 18 at this time. The "motel" comment "did not come out of the blue," but instead was made in some "context." She recalled that she had at some time prior to that day mentioned to Hovington that she and a "male friend" had "been to the Hilton." As for the comment, she "laughed it off as a joke," believing that he was trying to console her and aware that Hovington "could joke around with her." Ms. T. was "friendly" with Hovington during high school, bringing him her school problems and discussing her grades with him. He "did a lot" for the girls on the team. He kidded around a lot, and was often joking. In fact, she testified that at that time, as a teenager, she "took everything as a joke," and was a selfish stubborn "star." She saw Hovington only as a coach, to whom she went for guidance about colleges, when to get letters for the schools, grades, etc. Even when she testified in the criminal case, she appeared because she felt "she had to be there," but "now" she "had gone back and looked at her clippings and felt that" she "had to be truthful."

Queried further as to the circumstances of her having brought her complaints about Hovington's conduct to the attention of Board representatives, the witness claimed that prior to the November testimony she told Ms. Salcedo-Alonzo, an attorney associated with Ms. Murray's firm which represents the Board, about the hotel comment, the comment regarding her breasts and the massage issue. She had not mentioned the kiss, as she didn't bother to think about it and was "nonchalant," until after she testified.

After high school Ms. T. kept in touch with Hovington. She sent him postcards, called him on occasion, and had nothing against him.

Mary Carol Ellerbee, a health and physical education teacher for many years at Woodrow Wilson, and a coach of girl's softball and in the mid-1980's an assistant coach for Mr. Hovington for one year, related that on one occasion she observed Hovington and P.B. together at the

Cherry Hill Mall, and she also noted that he attended "more than one" away girls basketball game when she was coaching that sport and P. was a player. She saw Hovington leave the games with P. "more than once." The away contests were attended by "hardly any" Wilson fans. He also attended home games. On one occasion, which she believed happened during P.'s sophomore year, P. suffered a leg cramp during a game, and Hovington, who was not in any way associated with the team, but was present in the stands, came onto the floor and proceeded to massage P.'s leg. He "beat" the team coaches to the floor. He had no business doing this, and was "totally out of line," but Ellerbee was "too shocked to say anything to" him. Others have on occasion come on to the floor to call a paramedic when someone is injured, but she never saw anyone do so and also be a "hands on" participant. She conceded that it was not unusual for coaches to attend the games of other teams besides those that they coached, and she herself had been to dozens of football games.

In addition to this information, the witness explained that she had seen P. come by the health office and Hovington would give her money, but Ellerbee did not know how much or why. This was something which Ellerbee never did, and P. never asked her for any.

Commenting upon warm up drills and stretching, the witness said that while she did not often use her hands on students to stretch them, Hovington would do so if he was partnered with a female athlete during the stretching time, and he helped them to stretch their groin area and major muscles. She did express some concern about comments by girls regarding their being uncomfortable about him touching them in the groin or thigh area, which she herself felt was "inappropriate, especially when she doesn't have on sweats, she has on the short shorts . . ." She related that unless there was a cramp, massage of the buttocks was not the way to stretch. Commenting upon her experience with the basketball team, Ms. Ellerbee noted that Coach Cary Savage preferred that he not touch or massage the female athletes, and when a massage was appropriate, as it often was, he preferred that she perform it. She did see Savage put his arm around female athletes after a great play or some similar event. This was done to "show approval."

At one time when Ms. Ellerbee was the assistant basketball coach she had a relationship with Hovington. During this time she saw a note from Planned Parenthood which he had. She

was aware that he "helped" girls to get on birth control, which she felt was the responsibility of parents and not of teachers and coaches. However, when she was recalled to the stand, this time as a witness for Hovington, Ellerbee related that while she did not encourage students to use birth control, she was aware of some students who were sexually active and she would suggest to them the use of the condom as a protection against sexually transmitted diseases ("STDs"). She would provide information if students asked "outside of class" about where to go for birth control..

The witness served as Hovington's assistant track coach for one year. They were not working well together as coaches because he would not let her feel as if she were a part of the program. Although she testified that it was her decision not to continue as his assistant, he "played a role" in her no longer doing so. (He testified that she had no experience and was not prepared for the job.) She was apparently not happy in this role, and acknowledged that although she "believed" the complaints made regarding his touching of girls, she said nothing to anyone about them, as she just wanted to finish the season and "get off coaching with Hovington." As a result, she told athletes that they were mistaken about the touching, even though she did not believe that this was the case. All in all, she did not "think that it was a big enough issue to bring to Hovington and knowing what his response would be."

Carey Lawrence Savage, a math teacher at Woodrow Wilson, has taught there for fourteen years. He was the boys and girls tennis coach in 1983-84 through 1985-86 and the head girls basketball coach from 1983 through 1992, with a year off in 1989-90. He coached P. B. in both sports. She participated in tennis in her freshman and sophomore years and in basketball in her first three years in school. She did not play in her senior year.

Savage described Hovington as "cocky and arrogant," "underhanded," "subversive" "not a friend," but instead an "adversary." This particular description arose from occasions where Hovington had attempted to lure Savage's athletes, including P.B., to his own teams. Savage felt that Hovington was "trying to build himself up at my expense." Hovington was "always bad mouthing" Savage's program and Savage himself. He heard that Hovington was "ridiculing" him. This "pissed me off a lot," yet he believed that the conduct was a form of insecurity on Hovington's part. Since Savage knew "where it was coming from," he could deal with it, and despite these expressed views of Hovington, Savage insisted that it was not true that he did not

like Hovington very much. Yet, he related that he did speak to Hovington about his conduct regarding Savage and his teams and got "angry" when he believed that Hovington had opened Savage's mail. They "almost came to blows."

During her freshman year, Savage would on occasion observe P. talking to Mr. Hovington, and Hovington sometimes would "show up" during basketball practice, where he would talk to P. and others on the team. This continued during her sophomore year. Savage would see Hovington every day with the indoor track team and Hovington would sometimes stop to talk, more often to P. than to others. Throughout the four years, Hovington appeared at quite a few away games. No other coaches attended as many away games as Hovington did. Sometimes he offered to take P. and her friend C.C. to their homes after games. He recalled the "cramp" incident which Ms. Ellerbee related, and this was the only time that Savage saw this type of occurrence.

Toward the end of her junior year, or as he later said, sometime during the latter part of the basketball season which ended in March, Ms. B. came to Coach Savage and related that she was having sexual relations with Mr. Hovington. He cannot recall who initiated this conversation, but at the time, although she was normally cheery and outgoing, he told her that she seemed "bothered." He characterized her as "an emotional person" who "would go up and down," but not more emotional than the other members of the team. He had noticed that her performance was being affected, she seemed "withdrawn," and she tended to "internalize when her expectations were not being met." He wanted to know why. She was, in his words, "disturbed," as "things were not going the way she had planned." She related that the relations had been going on for a "period of time," but he could not recall whether she said that it was for three years. She related that Hovington had said something to the effect that they would get married after she turned eighteen. This conversation with Ms. B. lasted for five to ten minutes.

Thereafter, they "talked about it from time to time." They talked about involvement by the Division of Youth and Family Services ("DYFS") and about a few others knowing what was happening. Some of these conversations may have taken place after her junior year. Toward the middle of her senior year they started to talk again, and Hovington would usually come up in the discussion. He'd ask what was going on, and she would relate that "it was having problems."

According to Savage, he never spoke to Hovington about any of this and never told anyone else. Although he claims to have moved from initial shock to ultimate belief in P.'s claims, he did not report the matter to the school administration, as he felt that this "would not be in the best interest of the student." Although he testified that B. asked him to keep the matter of her relationship with Hovington "a secret," he discussed the matter with Ms. Ellerbee and with Karan Phillips, another teacher/coach.

Mr. Savage explained that as a teacher and coach relating to students and student/athletes, it was not his "interest" to be involved with matters that were not "school related." However, if a student came to him with a non-academic or non-athletic problem, he would be concerned and would respond, giving advice "where appropriate," that is, where he subjectively "felt that he could be effective," helping the student. This was appropriate for a teacher in 1984-88 and was "part of the nature of teaching." At that time teachers were more willing to "go the extra mile for kids," but today they are far more cautious.

Savage confirmed Ms. Ellerbee's testimony that he did not touch his female athletes in order to stretch them. He acknowledged that on occasion he gave students lunch money if they were in need of it, as did other coaches. This was an acceptable practice, the "decent thing to do." The amount of money was small and the frequency not enough to be of concern.

C.S.J., formerly C.C., a friend of Ms. B.'s since third grade and a graduate of Woodrow Wilson High and Rowan College, was an athlete and a talented student. The two were "like sisters," but since graduation from college they have had "more disagreements."

Ms C. recalled that she had seen Mr. Hovington massage Ms. B. at track practice, although he never massaged Ms. C. Ms. B. had a hamstring injury during her freshman year.

Ms. C. recalled an incident which she remembered as having occurred during freshman year when she and Ms. B. were having lunch in the Den, a restaurant located near school. Mr. Hovington came up and said, "P., did you do that yet?" C. inquired of B. as to what he was talking about and B. replied that he had encouraged her to get on birth control. C. herself never heard Hovington actually tell B. to get birth control, but this is what B. reported to her. At the

time Ms. B. was dating a senior, M.B. At some point, C. was aware that B. was having sex with M.B., but she now recollects that this was sometime after B.'s freshman year. Ms. C. was then dating someone as well, but Hovington never mentioned birth control to her, nor did she ever hear him do so to other students. At some point in time which she cannot now pinpoint, Ms. C. accompanied Ms. B. to Planned Parenthood, where Ms. B. obtained birth control pills.

In addition to this incident, Ms. C. testified that Ms. B. had told her during freshman year that Mr. Hovington had told her that he wanted them to have a "special friendship," which meant that they would "have their own lives, but also have lives together." She also related that B. told her that on one occasion, Hovington had asked her if she shaved her legs and pubic hair and pulled at her pants "to see." B. told C. that she was "embarrassed" to tell this to her. C. also recalled that during freshman year, B. did not tell her that she had any sexual relations with Hovington, but there was a mention of a massage which touched the inner leg and pubic area. She also related that during the summer after their freshman year, Hovington was driving a bus and would come near B.'s house, which was located just below the Ben Franklin Bridge. B. did not mention anything about any sexual activity occurring during these visits.

The first time that B. related to C. that she had had sexual intercourse with Mr. Hovington was during sophomore year, when one day during second semester they were in English class and had a substitute teacher. Ms. C. and Ms. B. were exchanging notes in class and C. related a personal matter. In response, B. wrote that she and Hovington had slept together in his car behind B.'s house. According to C., she learned that the two had regular sex in the back of the car. The girls then discussed these events at lunch and C. described her friend as "shocked, excited, happy." B. reported that she was on birth control. She also had told A.T. about this incident before revealing it to Ms. C. After this event, B. continued to tell C. that they were having relations on school holidays or breaks and when Mr. Hovington's girlfriend had to work. Ms. C. "covered" for B. on occasion, as B. would tell her grandmother that she was at C.'s house when in fact she was with Hovington.

C. noted that Hovington would drive B., and only B., to away track meets. He also would ask her if she needed money when he would see her in the school hallways. She actually observed money pass from him to B. This happened "more than ten times," and she never saw him do this

with other students. During the junior and senior years, Hovington bought B. a jacket, a pink leotard for a dance she was involved in for a school event and a radio to play the music on, and gave her money for the class trip.

The reports of sexual activity continued during the junior year, and by this time, "all knew about it," including teachers who B. told.

The witness related her knowledge regarding Ms. B.'s suicide attempt. At the time, she "knew" that it happened because of B.'s concerns regarding the Hovington relationship and "other problems," but at this time she cannot recall what these other matters might have been. She knew that B.'s mother had been out of the house at some point, but did not know exactly why, and is not sure if she was living in the home at the time of the suicide attempt. As for her feelings about Hovington, Ms. C. believed that P. thought that she was in love with Hovington, but as C. saw the situation, B. was under age, and Hovington was manipulating her and taking control of her life. B. was in love, and C. could not tell her that the relationship was not going to work out. However, C. further explained that at the time she herself believed that Hovington was a good coach, a good person, and although she knew that the sexual relationship was wrong and that after the suicide attempt he should have halted the relationship, she, that is, C. was young and did not know how to deal with it. As far as C. knew, Hovington did not know that C. was aware that he and B. were involved.

C. maintained contact with Hovington after graduation.

Karan Phillips, a teacher of Health and Physical Education at Wilson during the years in which Ms. B. was a student, explained that sex education conducted as a part of the Health course did include some discussion of birth control, but no detailed instructions as to the use of the contraceptives. No instructions were ever given that the students should be instructed to use birth control.

Ms. Phillips attended track meets held at the school and also went to relay meets which were held at other schools. She recalled that she had observed Hovington massaging a cramp, which in and of itself was not unusual, or something which she herself had not done, except that

she noted that he was rubbing P.B. too close to the private area. The student was on her stomach, and Hovington was rubbing the quadriceps, but doing so very high "above the quads," which seemed unusual to her. The following Monday she spoke to the athletic director, Mr. McColghan, and mentioned that she had noted this unusual rubdown. McColghan responded, "You haven't seen nothing, I've seen other positions." He laughed and walked away. She did not know if his response was in reference to Hovington and Ms. B. On cross-examination, the witness agreed that the hamstring muscle extends under the gluteus maximus and that she has had experience with athletes who have suffered cramps high up in the hamstring. However, the "rubbing" that she witnessed was more "inside" the thigh, perhaps an inch from the vaginal area, although she did not see any contact with the vaginal area itself.

During P.'s senior year, Phillips noticed that P.'s personality had changed. She kept to herself, and did not appear as happy as she had been in the past. Phillips spoke to her about this, and B. confided that she was involved in a sexual relationship with Hovington. She explained that she had looked upon him as a father figure and that the relationship had become sexual during her sophomore year, the first incident occurring in his car. She said that she loved him and that he had spoken of marriage when she graduated. P. was not sure if she wanted to press charges against Hovington, and Phillips suggested that P. should tell someone other than herself if she wanted to do something. Phillips suggested that P. tape an "episode" if she was going to make the relationship public. After this discussion, Ms. Phillips thought about what she had learned, knew it was improper and illegal conduct, but did not know what to do and never determined to handle this information. However, a day or two later Hovington and B. were called to the school office, and she understands that DYFS was contacted. When this happened, P. came to Phillips and asked her if she had told anyone, which Phillips had not.

The Board produced William Michael Wright, Jr., presently employed at Camden High School where he has served as the coach for indoor and outdoor track and cross-country for seven years, who qualified as an expert witness. Mr. Wright testified concerning the reasons for, nature of and management of stretching and massaging. He opined that it was not appropriate to stretch a hamstring while the athlete was laying on her stomach. The proper procedures for stretching do not require that any touching of the vaginal or buttocks area occur.

Massaging, which is performed with a balm which is "hot," is in his view really a psychological aide more than a physical one. Many athletes believe it to be helpful. Wright performs all of the massaging for his athletes. If one is massaging a hamstring, the proper technique is to place the thumbs at the insertion point of the muscle in the leg at the back of the knee and work the thumbs upward to the bottom of the athlete's shorts, at the line of the glutei, but he stops one to one and a half inches below the shorts. There is no reason to massage the buttocks. He has used this procedure with females. This same technique is used for the quads, from the front of the leg, and no vaginal contact is involved here either. Wright does not go as far up as the origin point of the hamstring, which is located underneath the gluteus. If he did, then no doubt he would have a full grasp of the gluteal and have his hand up to the pubic area. As a result, and for his own protection, it is his policy not to go "anywhere near" the origin point. However, it is possible to have an injury and pain at the origin point and he has seen a few injuries high up on the hamstring.

Muscle cramps occur frequently, the majority in the hamstrings. The treatment requires an immediate stretch of the affected muscle. The affected athlete could do this by herself, but cramps can at times be very painful and it is hard to say how successful this might be. A buddy will therefore usually assist the injured athlete. Wright has not seen any cramps in the buttocks, but this can occur.

Mr. Wright detailed the expenditures that he has personally undertaken over the years for items of equipment, clothing, an assistant coach (he paid someone $500.00), support services, etc., which he has provided for his teams beyond the limited funds available from the school budget for such items. Rewards are used as incentives for the athletes. These might include Twizzlers for a personal best performance, movies for the team, parties at his home, spaghetti dinners, coupons for hoagies, etc. He has spent an average of $1,500 a year of his own money for these purposes, including gas, hotels, shoes, etc. However, he has not bought presents of personal clothing, but he did give his first student athlete $100 at graduation and he has provided athletes with spending money for trips to colleges. Part of all of this effort is to motivate the athletes, and the witness agreed that motivation is more of an art than a science and that there are different approaches to achieve motivation. The use of different methods is necessary and is

dependent upon the time and circumstance. It is often said that it is harder to coach females than males, but he does not believe this to be true.

Students often come to Wright to discuss all sorts of problems and concerns, such as family, money, disciplines and restrictions, "anything that you can read in the papers." Any issues that come up with his athletes regarding contraception are passed on to his new female assistant coach. Once, a female told him that she was "on the pill" and was nauseous. He told her about his personal feeling regarding the pill and spoke to the department chair about its affects.

RESPONDENT'S WITNESSES

The respondent presented K. D., a student and athlete at Woodrow Wilson from 1982 to 1986, who was coached by Mr. Hovington and has remained in contact with him ever since, describing him as a "personal friend." She is now a manager for a security company and does some track coaching at Wilson. She had no father at home during her high school years, and Mr. Hovington served as a father figure to her and to many of the other girls. She spoke to him about personal and family problems and he helped her with a "whole lot of things," as he did for "everyone" on the team, many of whom also "brought their problems to him. He gave answers "as best as he could." In addition, the witness related that a "whole lot of girls" had crushes on Hovington.

D. was an outstanding, champion athlete. She received rubdowns from Hovington and she saw him give rubdowns to others as well. "Most of the time" he used balm, which was messy, gritty, smelly and burned, and which he did not like to apply, but did. She suffered a hamstring injury during her senior year cross-country season, which injury ran from the bottom of her buttocks down her leg. He applied the balm from the "bottom of (her) buttocks." As she recalled, he "always explained himself," because sometimes athletes had to go home and have someone else help with the injury. In doing this he would sometimes show the whole team the musculature and discuss the need to stretch or massage.

Ms. D. recalled that the team would take a bus to away meets, and sometimes Hovington drove the bus. When the team won the state sectional title, he personally purchased jackets for

the team members, as the Board would only purchase jackets for state champions. He also bought her and others sneakers, sweats and T-shirts, as the Board did not "give much, so coaches did." He gave her money, "a couple of dollars," "whenever she asked if he had it." He gave money to others, and the team would sometimes ask for him to treat them, which he would do. He once transported D. to a scholarship awards ceremony in North Jersey held by the Masons which her father could not take her to because he was already at the meeting. He never said anything inappropriate to her and she felt comfortable with him.

Ms. D. was a teammate of Ms. B. for Ms. D.'s last two years at Wilson. They were friends, as were all the members of the track team. However, they have not spoken for some years now, and are no longer friends, because B. ended the relationship and, as D. put it, D. was "sitting here in this seat (the witness chair) against her word." She remembered that B. told her about problems at home with her mother, and also told her during D.'s junior year, which was B.'s freshman year, that Hovington liked B. and wanted to have a "relationship" with her, which she took to mean a romantic one. This was when D. was involved in indoor track and B. with basketball. This continued during the next year, D.'s senior, with B. reporting that he was interested in her, she in him and that they were in fact having a relationship, but D. "never saw it." She later clarified this testimony, indicating that the report of an actual relationship was given to D. when she was already in college, which would have been sometime during B.'s last two years of high school. According to the witness, when B. first reported this interest, on more than one occasion, D. told her that she should tell her parent, but B. said that she could not. D. did not know whether to believe the story.

Ms. D. denied that she ever heard the coach refer to anyone's breasts as "rosebuds," and appeared quite sincere when she said that had she ever heard that comment, she would have remembered it.

Mr. Hovington's sister, Belinda Vivian Smith, who is a registered nurse, testified that she recalled the incident when P.B. stayed in her apartment after she had taken pills, as Belinda was told by her brother. He said that the principal had recommended that he find some place where B. could gather herself. They picked P. up on a street corner in Camden and then went to the hospital to visit with their mother.

Tina Louise Hovington, the respondent's wife since November 1988, and his girlfriend and housemate during various times relevant to this case, testified that she has known her husband for eleven or twelve years. She estimated that when Belinda and she resided with him in the Millbridge Apartments in Clementon during some of the time when P. was in high school that she, Tina, was actually in the apartment 90% of the time, and was there 100% of the time after Belinda moved upstairs to her own apartment. She was sometimes in the car with John when he would drive athletes home from practice, because on occasion if her car was not working she would borrow his and come to pick him up after practice. Amongst those whom she saw during these trips were A.T., C.J. and P.B. She knew that he would give students money if they were selling candy at school, and he would call colleges for both male and female students, drive them to the SAT tests, help them complete college applications, etc.

Mrs. Hovington also understood that P. came to Belinda's apartment after the suicide attempt to "get a different environment" and "get herself together." She listened through the mail slot as John and P. spoke the day after graduation when P. appeared at the apartment. John then told Tina that P. thought that he was in love with P. P. left and then came back, telling John that he should tell Tina who he loved, to which he replied that he "loved Tina and I've been telling you that." P. then threatened to tell DYFS. When P. finally left, Tina asked John what was going on and he said that P. was in love with him, and that it was not true that he had any relationship with P. Mrs. Hovington described herself as a "nosy" person, who listened in on calls that John would receive from students because of her "nosiness," not out of any "concern" regarding John.

J. M. J., Mr. Hovington's son, is now 23 years old. He attends Rutgers University. In the mid-1980's he met P.B., whom he knew to be one of the athletes his father coached. In fact, he explained that his father held her up as a role model, in that she was an honor student and a very successful athlete. He recalled attending a basketball playoff game with her and his father which was held in the evening at a neutral site at the Washington Township High School in Gloucester County. Mr. J. did not reside with his father and that afternoon J.'s grandfather brought him to the school so that he could meet his father. After his father concluded indoor track practice, they drove some students to their homes. P.B. was in the car. The three then proceeded directly to Hovington's apartment, where both his father and Ms. B. had to shower and change out of their

sweats. J. sat in the living room of the small one-bedroom residence, watching television. Either his dad or Ms. B. went into the bedroom and showered in the bathroom first while the other remained in his view, and then they switched. The bedroom door was fifteen feet from where he sat in the living room. He cannot recall whether he spoke with Ms. B. during the time that he and she were alone in that room while his father showered. According to Mr. J., his father and Ms. B. were never together in the bedroom, one was always in his sight throughout the whole time that the three of them were in the apartment prior to departing for the basketball game. At the game, Ms. B. sat apart from them. After the game they dropped her off at her home and returned to Mr. Hovington's apartment, where J. then spent the weekend.

On cross-examination Mr. J. said that they had probably arrived at his father's apartment at some time between 6:00 and 6:30 P.M. and that the basketball game was at either 7:00 or 7:30 P.M. He estimated that they were at the apartment for 30-45 minutes and left between 6:45 and 7:00 P.M. He estimated that each took six minutes to shower and change. However, in his 1990 testimony in the first criminal trial, he said that they were in the apartment for about an hour. The trip from the apartment to the game took 20-30 minutes and he recalled arriving at the gym at about 7:15 P.M., when the teams were warming up.

John W. Hovington holds a Bachelor of Science in Education from Temple and started as a teacher in the Camden school district in September 1973. After teaching at the Hatch Middle School for seven or eight years he transferred to Woodrow Wilson in 1981. He taught health and physical education and was the head coach for indoor track for boys and girls and spring girls track in his first year at the school. He took a college level course in coaching. He also attended track and field coaching clinics. These addressed performance, training, diet and injuries. He also received information from doctors and trainers at the Temple Sports Medicine Clinic regarding injuries, prevention and treatment.

Hovington would demonstrate stretching techniques to the athletes and assist them with these procedures. It was important to control the amount of force applied, and it was possible for students to injure another athlete if they applied the force improperly while stretching them. He used books and other visual aids to illustrate the mechanics involved and to help his athletes to be knowledgeable.

At one time or another Hovington had an assistant coach, either Carol Smeltzer or Carol Ellerbee. The track program had no trainer and the coaches would deal with injuries which occurred in meets or practices.

The indoor track team practiced in the school's lower gym, when possible in the main gym and the hallways. The boys and girls basketball teams practiced in the main gym and it was necessary to walk through this gym to go to practice. It was not at all unusual for Hovington and/or his athletes to stop and watch the basketball players practicing or playing a game and he sometimes had to look in the gym in order to find some of his personnel.

Many of the students at Wilson were economically and/or socially deprived. Hovington gave money to students on occasion, for lunch, for a lost book at graduation time, or for sneakers that an athlete needed but could not afford. He also purchased tights for the females so that they could keep warm, although he cannot recall if he ever did so for P.B. In the case of the tights, he would ask the students for $10 and if they claimed that they did not have the money, he would probably buy the tights himself. He did these things for both boys and girls and was not reimbursed. No rule or regulation existed which said that he could not purchase these items for students or athletes. Many of the athletes did not work, and this was his way of saying "thank you." They were told that if they became state champions he would buy them sneakers. He arranged to have a local businessman pay for the purchase of jackets for his state sectional championship team, as the Board would only do so if they won the state championship itself. He was never told that this was an invalid or prohibited form of motivation. He knew that the basketball coach at Wilson purchased sneakers for members of his team. He had booster cards made up for the students to sell to cover the cost of rooms for the trips to state championship meets. He did give P.B. perhaps $10 or $15 when she paid a visit to a college, as he asked her if she had any money for non-track-related clothing.

The respondent acknowledged that star athletes such as P.B. and A.T. were given more attention, as were other stars and participants in certain events, such as the high jump.

Students often came to Mr. Hovington to discuss their problems, and P.B. often did this. He claimed that in his first year as a coach he lost 50% of his squad to pregnancy, and as a result of this experience he spoke to other coaches and administrators about the issue. He discussed birth control with athletes outside of the health and family life courses. Board policy placed limitations upon the nature and extent of the discussions which could take place in these classes regarding this topic. He told the athletes that if they were "playing the game they had to play by the rules," referring to the dangers of sexually transmitted diseases (STDs) and pregnancy.

One of the athletes Hovington coached was M.B., who talked in the locker room about having sexual relations with P.B. As a result of M.B.'s discussions, Hovington spoke to P.B. and told her that if she was sexually active that she had to protect herself or she would not finish the school year because she would get pregnant. He specifically referred to birth control. Ms. B. did not actually acknowledge the sexual activity, but she did appear to have heard about the pill. He never took her, or anyone else, to Planned Parenthood or anywhere else so that she could obtain birth control pills, but he did tell students where it was located.

Hovington, who during the period of concern in this case lived in Gloucester Township, explained that after practice in the late fall and winter it was dark and the students could not use bus passes after a certain hour. He often drove P. and other students home. The students usually sat in the back of the car. Because of the distance which she lived from the school as compared to others he drove, P.B was usually the last student dropped off. For a couple of years he also regularly drove Coach Charles Iepson home during track and basketball season, as Iepson's wife, who was a city police officer, often had their car. Hovington, who is 6 feet tall and weighed about 220 pounds, drove a white, two-door Toyota Celica GTS. He claimed that he could not easily get into the rear seat of the car. (He also related that while he had been in the back seat with his daughter when she was one year old, there was not room in the back for him and another teenager or adult).

The respondent said that he always tried to keep the atmosphere surrounding his athletes loose, and as such he would often joke around with them. They had a tendency to get very nervous and tight before meets and he would try to keep them relaxed. Several of his athletes

continued to contact him after they graduated, and several cards, postcards and other correspondence received by him were presented in evidence.

A.T. ran track for Hovington for four years. He joked with her, gave her money and bought her sneakers when she won the state title. He may have purchased tights for her. He denied that he ever made any comment about her breasts, but agreed that he did make comments regarding undergarments to students, explaining that at the beginning of the track season he would tell the boys that they had to wear jockstraps for safety and to avoid embarrassment. Girls were told that they needed to wear sports bras, which provided more support for the breasts. He does not recall any individual conversation with A.T. about this subject, or any "rosebud" comment, or any remark about Dolly Parton, nor ever trying to embarrass A.T. in front of any other athletes. It was not uncommon for both male and female athletes to make their comments about their or one another's body parts, such as the size of breasts or buttocks.

A.T. suffered a pulled hamstring at some time, which Mr. Hovington believed might have been February of her senior year. Mr. Hovington used balm and wrapped A.T.'s leg. As for massages, these were essentially performed for their psychological effect upon the athletes, who believed that they were effective. He would use balm as a lubricant, which had a pungent odor and which burned and would irritate the eyes if he rubbed them before thoroughly cleaning his hands and also would irritate the genitalia if any came too close thereto, as happened if he went to the bathroom after using it and not completely removing it by thorough washing. He doesn't know if he ever got any of the balm on or near the vaginal area of any athlete. He denied that he ever touched the vaginal area of either of the complaining witnesses. As for massaging A.T.'s buttocks, this supposed event did "not ring a bell" with him, but he did recall using an anatomy book to show her what her injury was and how it was treated. He "usually" did this if he was treating an injury. He told her how far up the injury went, where the hamstring was attached, but this did not occur in response to her being upset about anything, and she never communicated to him that she was upset about either any comment that he made or the way in which he touched her. He never grabbed her, never kissed her on the lips or pulled her towards him. However, he did hug her at track meets. He never told her to tape her breasts and he never told her that he could take her to a motel when she became 18 years old. He "absolutely" denied ever making any sexually explicit comments to her.

As for P.B., Hovington said that after observing her, he saw by the end of freshman year that she had promise as a track performer. At the time, his concentration was on others, such as A.T. and K.D. By her junior year he was concentrating more on P.B., spending more time with her as far as her events were concerned. He would see her in the hallways at school during each of her four years, and she first approached him regarding personal matters during either her freshman or sophomore year. He heard comments from her about her grandfather being drunk, and she came to him about a vaginal discharge, which in itself was not very unusual for girls on the team. They would discuss pregnancy, vaginal warts, periods; boys would talk openly about girls and sexual activity. Probably during her sophomore year, he learned about P.'s difficulties with her mother, who was sometimes very quiet and sometimes very loud. P. said that her mother was "high," using cocaine. Somewhere in this time period her mother left home, supposedly going to the South to care for a relative, and she was in and out of the home for a lengthy period of time. P. also talked about her boyfriends. Hovington felt that she related to him as a "father" or "big brother," seeking advice and information on how to pursue boys she liked.

Referring to the suicide attempt during P.'s senior year, Hovington related that he saw P. and C.C. walking down the hall in school the morning after the event, which he first learned about that morning. C. advised him that P. had attempted suicide by taking muscle relaxants, and he was "shocked" by this. He spoke with school principal Herbert Factor, and the principal suggested that she needed to get out of the "environment" for a day or two so that she could "get herself together." Hovington knew that P.'s mother was not around and that she was not getting along with her well. Her aunts and uncles all lived in the same house with P. He told P. to go to the sofa in the back office in the gym, and she remained out of her classes that day. He denied that the doors could be locked. He thinks that after classes ended P. went home. He had told her what Factor had suggested, and later on that day Hovington and his sister picked P. up at the street corner near her house. His mother and grandmother were coincidentally hospitalized at the time, and the three went to visit them at Rancocas Valley Hospital before going to his apartment complex, where P. stayed for the night in his sister's apartment.

Asked about his recollections of P. attending any winter indoor track meets in which she was not herself a participant, the witness said that these were always held on a Friday night or

Saturday and never during the week. He did remember that probably in her junior year she had attended such a meet, traveling on the team bus to the meet after she asked if she could and he saw no problem with such a request. On the way back to school after the meet, the bus driver would drop students at major intersections or at their homes. This is the only instance that he can recall where she attended such a meet. He denied that any sexual activity occurred after this or any other such meet held at Widener. As for her claim that they had sex in the car within blocks of her house, she lived one block off the Rutgers campus, and he had observed that the area was patrolled by police officers from Camden City, Rutgers, Riverfront State Prison, Delaware River Port Authority ("DRPA") and also by RCA/GE security personnel. He once told her that she lived in the safest neighborhood in the city.

Hovington explained the circumstances of the trips to Central and North Jersey for championship meets. His assistant coaches would also attend these meets. He roomed with Coach David Cade, the boy's track coach. The students were assigned four to a room. He denied ever having sex with P. on any of these occasions. As for the summer bus driver job which he had, he worked for Greyhound out of New York City until March 1987, also working some weekends. He then drove for Frank's Bus Service, out of Lindenwold. He drove all over the East Coast. He denied any meetings with P. during the summer, or any sex in the buses. He never had sex with her in his apartment at any time, never propositioned her for sex, never told her not to "ravish" him, never inserted his finger in or even touched her vagina and specifically denied that any sexual activity occurred on the occasion when he took her and his son J. to the playoff basketball game. In this instance, P. had asked if she could have a ride to the game, claiming that she did not have money for the ticket for the student bus. He agreed to drive her, and after practice the three went to his apartment. He showered, and having showed her where the bathroom was and provided her with a washcloth and towel, he exited the bedroom and she then presumably showered. She had clothes in a bag, the same ones she had worn to school that day, and she put these on to go to the game. No sexual activity of any kind occurred. They were not together out of J.'s sight. All told, they were in the apartment for 30-45 minutes. He thinks that they had stopped at a McDonald's Restaurant. P. sat apart from Hovington and his son at the game and then they drove her to her home.

Hovington denied that he attended P.'s away basketball games, as they conflicted with his indoor track activities. However, since it was on his way home, it was possible that he might have stopped by to view away games held at Highland High School. He did attend home games. He observed other coaches from other sports at these games. One time P. sustained a cramp in her calf and he went onto the floor and massaged it, as it happened right in front of him and Coach Savage just "stood there." Hovington saw nothing unusual about his conduct, explaining that when he saw her go down with the cramp, he "just reacted."

In regards to the incident at his apartment after graduation, Hovington testified that in June 1988, P. drove to his apartment, rang the bell, and when he went to the door and asked her "what's up," she said that she wanted to get something straight. She "wanted to know if you love me or not." He told her that while he did not love her, that "he cared for you a lot." He explained to Tina that P. thought that he was in love with her. P. never said anything about sex. A couple of weeks before this episode, P. had told him that she would be graduating soon, that she really cared for him, that she had more feelings for him than simply as a coach, and that she wanted something more than a student-coach relationship. In his view she wanted a "romantic" relationship, and this was "absolutely" the first time that she had raised this. He told her that while he cared for her, he didn't see her "that way," and there could never be anything more than that for several reasons, such as the age difference. Additionally, at that point he told her that stories that she had previously heard about him and her mother having had a sexual relationship, stories the truth of which he had previously denied to her, were in fact true. (He explained at the hearing that he dated her mother once in the Spring of 1985, after she called him. They had sex on this one date). In response to this revelation P. said that she was going to "get" him. He just looked at her, may have wished her good luck for graduation, and "just walked away." Shortly after this, in May of 1988, he was contacted by school authorities regarding P. He was aware that DYFS came to the school, and he was called to Mr. Factor's office. Mr. Martini of DYFS asked him if he was having an affair with P., which Hovington denied in Factor's presence. At the time, he was not aware what transpired between Martini and P. He later learned that she had denied that there was any relationship. However, Mr. Factor told him not to drive any students home any more, and he did not do so thereafter. Hovington told P. that "this was ridiculous," he didn't need the aggravation. She said that she believed Dean Epps had contacted DYFS.

On cross-examination Hovington explained in regard to his claim of significant losses from the track team due to pregnancy that he did lose one indoor track member. In addition, A.T. had told him in 1985-86 that she was pregnant and had nevertheless completed the track season. He does not know whether she was in fact pregnant. Before she told him of her pregnancy she had come to him and discussed her involvement in sexual activities. He told her to abstain or find a way to prevent STDs or pregnancy. One evening sometime after this discussion she called him in regard to nausea which she was experiencing when she took the pill. He told her to see a doctor.

M. B. and other boys came to him to discuss birth control. M. told him that he thought that he had gotten someone pregnant, and Hovington spoke to him about responsibilities and that if he was sexually active, he needed to worry about STDs and pregnancy. When he learned that M. was having regular sexual activity with P.B., he may have approached her and spoken about her reputation, the need to abstain or to protect herself if she chose not to abstain. He was "very protective" of his girls, and he once approached M. and told him that he was a "junk yard dog, sniffing skirt tails." When he asked M. if he was having sex with P., the boy acknowledged that he was. However, despite his concern, Hovington denied that he ever approached P. in C.C.'s presence in an off-campus lunch spot to inquire about whether P. was as yet on birth control.

Hovington denied purchasing a tape recorder or a Homecoming outfit for P., or bathing suits for her senior trip. He did give her some money so that she could get her grandmother something for Christmas. He knew and respected this lady, and when he asked P. what she was giving her for the holiday and P. said that she had no money for a gift for her, he provided somewhere between $10 and $20, but not $50.

Several character witnesses testified on behalf of the respondent. These included Dr. Marie Antoinette English, a professor of psychology at Camden County College, who has known Mr. Hovington for 22 years as a friend, educator and teacher. Hovington used to teach at the same school as her husband, who now teaches at Camden High School. She has socialized with him perhaps twice a year, usually at athletic functions. She described his reputation in the educational community for honesty and integrity as "extremely honorable." He is known as a sincere, dedicated teacher, who goes out of his way to help.

Dr. Arnold W. Webster, the current Mayor of the City of Camden and the former Superintendent of its school system for eight years and Assistant Superintendent for 14 years before holding the Superintendency, knows Mr. Hovington through his professional position in the school district and through their mutual interest in sports. However, they have not socialized in any other fashion. Webster had no direct professional contact with Hovington, but did appear as a character witness for him in the criminal proceedings and wrote a letter on his behalf to the judge. (R13).

Reverend Calvin Ronald Woods, pastor of St. John's United Methodist Church in Berlin, New Jersey and a clergyman for thirty-one years, has known the respondent for eight or nine years. He met and counseled with Tina and John before their marriage. Hovington is involved in the Church's men's group, the gospel choir and serves on its administrative counsel. His reputation for honesty and truthfulness is such that others respect and look up to him. Reverend Woods, who first learned of the criminal indictment about four or five years ago, has the same personal opinion of Mr. Hovington.

Herbert M. Factor, employed by the Board of Education for 35 years and currently the principal of Broadway School, was the principal at Wilson High from December 1986, until June 1994. As he recalled the incident with DYFS and P. B., he was called to report to some location in the school building where he found a distraught P., "crying hysterically," incoherent" and "refusing to speak about what was upsetting her." The Dean of Students, Mr. Epps, said that P. was saying "certain things" and Factor, who claimed that he only heard that she was having problems and concerns, and that there was some problem about jealousy between P. and her mother regarding some relationship which the student felt her mother had with Hovington which upset the student, and who does not recall if Mr. Epps raised any concerns of a sexual nature, decided that it was necessary to get an outside agency involved, so he contacted DYFS. She never told Factor that she was in a sexual relationship with Hovington. After the DYFS visit, P. came to see him, but he does not recall telling her that he would not get involved, but he might have said this, explaining to her that DYFS was now in the picture. As for Mr. Martini, Factor cannot recall if the gentleman asked him whether she said that she was involved sexually. He is not aware what P. told Martini. No administrative action resulted from this DYFS visit. Factor only learned of the sexual allegations when the criminal charges were brought. He had not heard

any rumors, for if he had he would have investigated their source. He does not remember Ms. Ellerbee ever mentioning any "questionable" rubdown, or she or Cary Savage ever telling him about an alleged sexual relationship between P. and Hovington.

Factor recalled that there was a time in 1986-87 when he was aware that Mr. Hovington and the girl's basketball coach were "competing" for P.'s participation on their teams. He never received any complaints about Hovington's conduct with Ms. B. He does not recall that Hovington ever told him about any suicide attempt on P.'s part. He also said that he did not know that Hovington was driving P. home and does not think that he ever told him to stop this practice.

Deborah DeRemigi Iepson, now an employee of the Audubon Board of Education, was a teacher and track and field coach at Wilson who has known the respondent since 1986. She described herself as not a social friend of Hovington, but Charles Iepson, her husband since May 1994, was and remains a social friend of the respondent. As a coach, Mrs. Iepson dealt with injuries, touching both male and female athletes when doing so. She has massaged males who suffered severe muscle cramps, even touching both men and woman in the groin area, which can get very tight. It is possible that she has touched the pubic area in some of these instances.

In rebuttal, the Board presented Patricia E. Cook, now the principal of Wilson High, and the assistant principal of that school from the summer of 1983 until September of 1985. While it is possible that Hovington spoke to her about his female athletes talking about their problems at home, she denied that Hovington ever spoke to her about birth control, as he claimed he did in regard to his supposed concerns about the risk of pregnancy and the loss of his athletes. She "absolutely" recalls no such conversation, or giving any advice to him about getting the girls to use birth control. This was a subject which she would not have discussed had it come up, and she would remember if it had. She would have referred anyone who raised the topic to the school nurse or the principal.

James R. Epps, now an administrative assistant at Pine Street Middle School, but formerly the Dean of Students at Wilson where he was responsible for the school climate, discipline and attendance, recalled that sometime in April-May 1988, P. B. came to see him. She was upset, and

this was not usual for her. He questioned her about this. She was not incoherent, and did not refuse to talk. She had confided to friends about her "personal situation" (Epp's term) with Hovington and he asked her about it. She confirmed that there was a personal relationship, although he isn't sure that "sexual relationship" was used. They spoke and then Epps went to Principal Factor, telling him what she had said and asking him what he intended to do. Epps denied that he told Factor anything about P. speaking of jealousy, a problem with her mother, or her home life. Factor felt that DYFS should be involved.

Lieutenant Herbert Foltz of the Camden Police Department and Captain Guy Michael Still of the Rutgers University Police Department, who is assigned to the Camden Campus, each testified regarding patrol patterns and levels of criminal activity in the area of the campus and the surrounding neighborhood in the mid-1980's. Lt. Foltz, who was assigned to the police tactical unit at the time, worked alone in a motorized patrol. He described the area, which covered ten square blocks located on the North side of Camden and included within the patrol area the Camden side of the Ben Franklin Bridge property, as predominantly residential, except near the river where there was mainly business property. The area was "quiet," gave him "few problems," and was "extremely quiet" during the winter. In addition to his tactical patrol unit, there was a regular patrol officer on duty in the area as well, who he would see perhaps three to five times during a typical patrol over a five hour period. However, it was not at all unusual for the tactical patrol car, and often even the regular patrol officer as well, to be pulled out of the area to attend to other more pressing police business in other parts of the city. In fact, Foltz claimed that there was "never" an evening in four years when he was not pulled out of the patrol area at least once during his shift, for periods that ran from "minutes" to "hours." There was also limited patrol of the area by the Delaware River Port Authority Police. The Rutgers Police patrolled part of his tactical patrol area, but not as far as Point Street where P.B. lived. RCA transported its security personnel around its properties in a van, which may have had overhead lights.

Captain Small described the areas of patrol for the Rutgers Police and said that the area of Point Street and the Bridge property was part of Zone 3, which he described as "pretty much of a safe area," "basically quiet." He agreed that his officers would check suspicious vehicles.

DISCUSSION AND ANALYSIS

Laches Defense

The present matter involves a series of charges which involve events over a decade old. Unlike cases where allegations are first made many years after the alleged incidents, at least as respects the claims presented by P.B., the claims surfaced in 1988, within only a few years of the alleged commencement and only shortly after what P.B. claims to have been the last episode in that alleged sexual relationship. Thus, while it is true that the Board's tenure charges are of quite recent vintage, the long running saga surrounding the nature of the friendship between P.B. and John Hovington is not new.

Laches is an equitable defense which is premised upon the concept that a party may lose its right to assert its otherwise possibly valid legal position if it has been guilty of

> neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right. *Atlantic City v. Civil Service Commission*, 3 *N.J. Super*. 57, 60 (App. Div. 1949)

The delay in the institution of tenure charges for events now at least eight years old is, in this case, entirely understandable and by no means fatal, and laches is not an available defense to these charges. Extremely serious criminal charges were pending against Mr. Hovington as early as 1988, and as noted, the criminal process here has been complex and lengthy. Suspension pending the discharge of criminal charges lies within the Board's discretion. Conviction on the criminal charges would have in all likelihood obviated the need to pursue a tenure charge, as forfeiture of the teaching position could well have been automatic since the allegations of a sexual liaison with a minor student certainly involved activities which touched upon the duties of the public employment. *N.J.S.A.* 2C:51-2. Throughout the period of the ongoing criminal process Mr. Hovington has had every reason to fully prepare for defense against the allegations of sexual activity with Ms. B., prior grand jury presentations and criminal trials have preserved testimony,

and no evidence has been presented which would suggest that the delay in the institution of tenure charges has acted to deprive the respondent of evidence, witnesses, etc. Since it is essentially conceded that a final result in the criminal process which included a criminal conviction based upon the existence of a sexual relationship, or even upon a sexual encounter, with P.B., would have without doubt resulted in a subsequent loss of tenure, the failure of the Board to immediately file a tenure charge in 1988 or thereafter can hardly be said to have led the respondent to believe that the Board was not intending to file such charges. Under these circumstances, there is no neglect, no unexplained delay and no basis whatsoever for invoking the equitable doctrine of laches to prevent the Board from pursuing these tenure charges.

The Charges Involving P.B.

As the parties correctly state, the determination of this case is entirely dependent upon a determination of the credibility of witnesses. Further, the evidence does not include any claim that anyone other than the alleged participants witnessed actual sexual encounters. The witnesses other than P.B. and Mr. Hovington can only report hearsay, general observations and the like, but the real proof that the relationship either was sexual or was not must ultimately be drawn from the testimony of the two primary witnesses themselves.

The test applicable to the evidence in this civil administrative proceeding is whether the charges have been proven by a preponderance of the credible evidence. It is important to keep this is mind, as the three previous attempts by public authorities to prove that Hovington had a sexual relationship with a minor were subject to the much more demanding test of proof beyond a reasonable doubt which is applicable to criminal charges. Here, reasonable doubts may exist after all of the evidence is analyzed, and yet the charges may be deemed proven. The difference in the test to which the evidence is subjected reflects the difference between the serious consequences of a loss of tenure and the even more serious and potentially devastating consequences of a criminal conviction for a crime of moral turpitude.

The evidence strongly supports certain general conclusions about the general nature of the relationship of Coach Hovington and his female athletes. In general, many of them viewed the coach as a father figure, or perhaps as an older brother, and they confided in him about school

matters, personal health issues, family life, relationships, etc. The record suggests that at least some, or perhaps even many, of these woman did not have a male presence in their homes, and perhaps this led to the reliance upon an obviously willing and apparently sympathetic listener in Coach Hovington. Whatever may be felt about the nature of the subjects which the women chose to discuss with this adult male, in and of itself the close nature of the friendships and the confidential communication on topics relating to the important, and the then seemingly important, aspects of their lives with their coach is not all that troublesome. Indeed, even where the conversations may have entered the emotional area of birth control, it is very understandable that these teenagers were concerned about their emerging sexuality, their relationships and the dangers inherent in them, and it would be surprising if Mr. Hovington, who like any good coach, worked daily and tirelessly with his athletes, was immune from caring about the health and well being of his charges, who, it must be noted, clearly were often quiet anxious to talk openly about what to many adults would seem to be very private matters. That the conversations may have touched upon the use of birth control and the available methods is not so shocking, but more important, this case is not about whether Mr. Hovington should have allowed himself to refer to birth control issues in his conversations with student/athletes in the mid-1980's, or whether he should have avoided conversations about other personal matters with his charges. Instead, this case is about what, if anything, he said to P.B. on the subject of birth control, and whether his motivation for any comments and advice was self-serving in nature. Whatever the proprieties may have been in regard to his suggesting that P.B. use birth control if she was sleeping with M.B., or anyone else, the only relevant issue here is whether he intended to foster his chances at his own sexual relationship with her and protect his own interests by inducing her to use protection. Similarly, the propriety of driving students home after practice or games, or the provision to them of small amounts of money for lunch, a lost book, etc., or the buying for them of a pair of tights, etc., or even the provision of some cash for pocket money during a college visit, is not a relevant issue in this case, except where such events are shown to have been performed for self-serving reasons related to the attempt to foster and to continue an illicit relationship. There is ample proof in the record that each of these activities were regular events involving this and other coaches and teachers, the Board's expert coach detailed his own personal expenditures for team and individuals, and while Mr. Hovington may have been a more generous giver, a softer touch, or may have built up his own ego by providing for his charges, such considerations are not of any import here unless they add to the picture of a predatory adult.

P.B.'s story is one of a growing relationship between herself and the coach of the track team she joins as a freshman, a growing insistence on his part that she use birth control, an initial sexual contact in his car one evening, an initial act of intercourse in the back seat of the car on a city street late one night, an ongoing and frequent series of sexual encounters during her sophomore, junior and senior years, with sex occurring in cars, in hotels, on picnic tables, in his apartment, etc., even with his son present in the same apartment. While all of this goes on, her feelings for him grow stronger, and he leads her on with talk of what will be after she comes of age. It all culminates in her senior year, during which she experiences feelings of loneliness and lack of control in her life and in the Hovington relationship, attempts suicide, continues her sexual relationship, and finally suffers the twin blows of learning that her lover has slept with her own mother and then of his rejection of her at the very doorway of his house when he proclaims to his live-in girlfriend, "in P.'s face," that while P. is all confused about their friendship, he is not, and whatever P. thinks, he is only in love with Tina. Both sides have analyzed the details of this story, seeking in it either telling inconsistencies and outright lies, or elements of sincerity and confirmation.

In defending against Ms. B.'s claims, the respondent has generally denied that he ever, in any manner, engaged in any form of sexual contact with Ms. B. He simply says that whatever she says about the details of the assorted sexual incidents she has described is pure fantasy, whatever she may have told friends and school officials, teachers and coaches during her high school years or thereafter are merely the musings and creations of a warped imagination, perhaps the result of a "crush" gone mad, that she was a child deprived of love and comfort at home who in some strange way sought in mind and/or action to establish a close bond, indeed even more than that, with a caring, concerned and ultimately victimized adult. As for the few specific incidents which she has described, whatever truth there is to the general circumstances which surrounded these events, the stories of sexual abandon are lies, pure and simple.

In general, the defense places reliance upon what it sees as the unbelievability of certain of P.'s claims as the key to a more general condemnation of her story as unworthy of belief. For

instance, the idea that intercourse occurred while his 13-year-old son sat in the living room of the small, one-bedroom apartment between the time that the three arrived from school until they left for the playoff game is seen as an incredible tale. Yet, the testimony makes it clear that J.'s perception of the time that the events in the apartment took may be questioned; he was after all only 13 years old at the time, and the simple application of logic to these events, which is the respondent's basis for challenging Ms. B's description, may not be a very good yardstick for measuring truth when sex is involved. Unfortunately, common experience demonstrates that the fear of discovery, the lack of "time," the close proximity of others, the risk of ultimate shame and punishment, etc., do not always dissuade people from engaging is sexual activity, whether illicit or otherwise, and there are no "rules" which dictate the length of sexual intercourse, the noise involved in the encounter, or the attention to extraneous activity of a 13-year-old watching television. While "logic" may well dictate that even if Hovington were intimately involved with Ms. B. that he avoid relations with her on this occasion, human experience does not compel the conclusion that, in the face of desire and even with less than optimum opportunity, logic must necessarily have overcome desire.

Much the same can be said in regards to other suggestions by the respondent that the facts, or logic and common sense, dictate the conclusion that P. lied. Would Hovington have been able to climb to the back of the car and engage in intercourse with her, despite his size and purported physical ailments? Would he do so on the streets of Camden, despite the possibility of discovery by the several police agencies and security forces on patrol in the area? Would he continue any relationship after the school authorities and DYFS had been alerted? Would he even get involved with P. in the first place, considering the grave risk that such an event could pose to his career and to his relationship with Tina? The respondent poses these questions and argues that analysis of the record necessitates a negative response to each and thus a conclusion that the Board has failed to prove its case. While it is surely true that an argument can be made that the logic and common sense of the situation argues against these things occurring, the possibility that sexual desire and whatever feelings of love or other motivating factors may have accompanied it overcame constraints of caution, discomfort and logic cannot be simply dismissed. As counsel for the Board correctly points out, when it comes to sexual relations, humans can be very inventive, and as common experience shows, very willing to indulge regardless of the difficulties and risks presented. That Hovington slept with P.'s mother while dating Tina, even if only once, does not

prove that he was evil or that he was prone to sexual risk taking, but it does suggest that his relationship with Tina was not in his mind necessarily a barrier to other sexual experience. That the Camden police and other such organizations patrolled the area where P. lived certainly does not prove that a willing and desirous couple would not indulge their passions on occasion. (Indeed the evidence suggests that the patrols were not as pervasive as Hovington would have led us to believe). As for his physical condition, while no medical evidence supports his contentions of injury, no one suggests that he did not have some injuries, aches and pains, but it might take a lot to cause him to refrain from the chance at sex with Ms. B., and while the idea of his climbing into the back seat is perhaps amusing, given the desire and the goal it cannot be discounted. In short, while consideration of the several questions recited above might well raise some reasonable doubt in the mind of a fact finder about the likelihood that Ms. B.'s allegations are true, none of them stands as anything near an insurmountable barrier to the truth of her statements, especially when that truth must be measured against the preponderance, rather than against the reasonable doubt standard.

One of the interesting aspects of this entire situation is that whether any of P.'s claims of a sexual relationship were true, they were nevertheless claims which she openly made from early on in her high school career, first to friends and then to others who might be, or should perhaps have been, authority figures. They are not claims first made after her graduation, first spoken to anyone after her "rejection" at Hovington's hand in June, or even in May, of her senior year. Of course, not all of the witnesses are in agreement as to what they were told, if anything, or exactly when. As for the teachers and administrators, their testimony must be carefully scrutinized, for in some cases if it is determined that they were in fact aware of the claims that a relationship existed, it is possible to be very concerned about the way in which they reacted to the news that a teacher and coach was sexually involved with a minor student. Of course, merely because an adult is told by a student that the student is sexually active with another adult does not mean that the listener must or will believe the claim. If a teacher or administrator simply dismissed the statements out of hand as the wild imaginings and fantasies, or the spiteful accusations, of an immature minor, then perhaps the adult has little, if any, obligation to report the claims to those in a position to determine the truth of the claims or to bring the information to the proper legal authorities. But if the listener is willing to entertain the thought that the claim may be true, the listener, if a professional in the educational community, cannot simply ignore the matter and must instead

advise those in authority of what they have been told. Here, Mr. Savage, who acknowledged that he was told by P. of the sexual nature of her relationship with Hovington, claimed that he did not know what to do or did not want to get involved, and this presented him with an understandable dilemma perhaps, but in the end he appears to have resolved to do nothing. His explanation does not suggest that he did not believe P., merely that he was unwilling to act on what he heard. As for Charles Iepson, P. claimed to have told him of the sex, and he told her that, having heard rumors, he had once asked Hovington about them and received a denial from him. Iepson himself denied in testimony that P. ever told him anything about the sex, and denied having posed any such question to Hovington. Yet, while he stated that he would have remembered such a conversation with P. and would have been obliged to report the information, his present motive for denying the conversations cannot be overlooked. Honest and sincere persons such as Mr. Savage and Ms. Phillips openly acknowledged that they were unsure about what to do in spite of being told, and clearly concerns for their colleague and/or friend affected their judgment, as perhaps any lingering doubts as to the truthfulness of P.'s claims may have. It is certainly possible, even understandable, that Mr. Iepson was also troubled and confused about the revelation that his friend was involved in an alleged illicit, albeit apparently consensual, sexual relationship with a mid-teenage minor, and that as a result he did nothing. That he is not honest enough today to acknowledge that he too was told and hesitated to act upon the information is certainly regrettable. As for P.'s claim that she told Iepson, the likelihood that she did not testify truthfully as to this fact is reduced by the fact that her claims to have told other teachers, such as Savage and Phillips, and later Ms. Ellerbee, were generally confirmed by them. Why she would have added Iepson to the list of those she told if it were not true is not clear.

As for Herbert Factor, he denied the conversation about P.'s suicide attempt or having told Hovington to get her out of the "environment." He also denied that he was aware of the sexual nature of the relationship or the reasons for Ms. P.'s "hysterical" condition at the time that he was alerted by Dean Epps to her having a problem, except that it was something about "jealousy" and her home situation. Epps recalled that he told Factor what she had said about the "personal" nature of the Hovington relationship, but he could not recall that she mentioned a sexual component. Nevertheless, Epps clearly refuted Factor's testimony, claiming quite effectively that he told Factor about a "personal" relationship with serious implications and denying that the problem was home based. That Factor called in DYFS is perhaps the best

evidence that whatever he now claims to recall, at the time he knew that something very serious and of a highly questionable character might be involved, for he did not take the matter to an in-school committee, but instead to DYFS, a very serious action indeed. Factor appears to have attempted to downplay his knowledge and his role in regards to both the suicide information and the events just prior to the DYFS referral, but his testimony was not particularly impressive. In fact, he even denied that he told Mr. Hovington to stop driving students home, while Hovington specifically recalled this direction being given by the Principal. Overall., Mr. Factor's testimony is not deserving of much credence.

Another issue is Ms. B.'s denial to DYFS investigator Martini of a sexual relationship with Mr. Hovington. That she denied the crucial element of sex in the relationship with Hovington is important information, but by no means does it prove that at that time she was truthful about the subject. Conversely, that she may have lied to Martini does not lead to the inevitable conclusion that her subsequent testimony of the existence of the sexual component in both this and the criminal trials was false. She clearly had strong feelings for Hovington at the time that she was brought before Martini, she did not request that DYFS become involved, she was not a "voluntary" witness before him, she did not wish to end the relationship, the final confrontations, including the revelation as to the prior sexual contact with her mother, had not yet occurred, and it is therefore not at all surprising that she denied that she and the coach were sex partners. That she later said that they were, after the matters had become public, after she perceived that he had lied to her and spurned her, after her unrealistic perceptions were shattered and after the criminal charges were brought, does not mean that her later claims were false. Freed from the need to "defend" Hovington and "protect" the relationship to which she still clung, she was able to truthfully describe the full nature of the voluntary, albeit improper, relationship.

Ultimately, determination of the charges involving P.B. resolves to a decision about the truthfulness of the "complainant." Given the clear and uncontradicted evidence that she told people, beginning in her sophomore year, that she was sexually involved with Hovington, it must be asked whether these comments were merely figments of her overactive imagination. I think not. I see no evidence here which would support the conclusion that beginning in her second year of high school, Ms. B. was actively fantasizing a sexual relationship, that she was "boasting" of a non-existent physical connection, that she was creating, and even telling others, of a series of

events which had no basis in reality. It is certainly true that teenagers have been known to tell peers of sexual events which did not really happen, but the evidence here does not convincingly lead to the conclusion that this was what motivated Ms. B. to report that she and Hovington were lovers. Further, whatever her motivations were for telling her friends, and later teachers, that she and the respondent were sexual partners, it surely was not spite, hatred or because he had shunned her advances, for he himself does not relate that she came on to him until very late in her senior year, and neither he nor she relates that he told her of the relationship with her mother until then either. Thus, if in her sophomore, junior and most of her senior year she was telling others of the relationship, it must have been either because it was happening, or because she was creating the story out of her desires and fantasies.

While Mr. Hovington has denied that any of these untoward events occurred, the totality of the evidence, including an assessment of his own credibility, demonstrates otherwise. While Mr. Hovington certainly was a concerned coach who gave much to his athletes, I am convinced and **FIND** that at least in this child's case, he crossed the line, he took advantage of her trust, he converted a friendship which might have well served her during her high school years into an improper relationship. That she was a willing partner in this, that she cared for him, that the sex was consensual, is all ultimately irrelevant. While perhaps to some Ms. B. may appear less than innocent, and it is certainly unfortunate that Mr. Hovington's career has been destroyed by this incident, as a teacher and coach, as well as a supposedly responsible adult, John Hovington had a great responsibility toward the athletes and students in his charge. In Ms. B.'s case, I **FIND** that he perverted that trust, he took what could have been a wholesome coach/athlete relationship and allowed it to become something very different, something which she, in her immaturity and perhaps in her ultimate loneliness, surely felt that she desired, but which he had to know was wrong. Based upon the record here **I CONCLUDE** that he committed the tenure offenses charged in the first and the third allegations of the Statement of Charges and that removal of his tenure is an appropriate and fully warranted sanction for this clear gross violation of his obligations as an educator.

Charge Two in the Statement of Charges alleges that Mr. Hovington was guilty of misconduct in that he touched Ms. B. in an improper manner when he touched her vaginal area.

This charge apparently relates to the purported contact which is said to have occurred during a massage. While the disposition of the charges contained in Charges One and Three relating to the proposition for and actual sexual relations with Ms. B. are dispositive of the issue of Mr. Hovington's tenure, and the question of whether he inappropriately touched her vagina is as a practical matter subsumed by the finding that he went far beyond that level of contact and had full sexual intercourse with the minor student, it should nevertheless be noted that as regards the massage during which the contact is alleged to have occurred, it does not appear that Mr. Hovington was, at that time, seeking either to gratify himself or Ms. B. sexually I **FIND** that contact did occur, but I **FIND** that it was inadvertent. This is not to say that the massage was properly limited in scope, but simply that the vaginal contact, which of course was outside the clothing, was not the result of a deliberate act on his part which can be viewed as being a proper subject for discipline, at least if the removal of tenure is sought for this incident in isolation. However, given the conclusions stated above, the second charge is not a significant factor in this decision.

The Charges Involving A.T.

Similar to the second Charge concerning Hovington and P.B., the disposition of the allegations contained in the second Statement of Charges relating to A.T. (as later agreed by the Board), becomes irrelevant to the final outcome of this case, as the removal of tenure is the inevitable result of the determination that this respondent was involved in sexual relations with a minor student. However, it is appropriate to state the conclusions in regard to A.T.'s claims.

Once again, Mr. Hovington is charged with inappropriately touching a portion of a female's anatomy, here, Ms. T.'s buttocks, once again while he was massaging this track athlete. From the evidence, I **FIND** that he did massage the lower portion of her buttocks while he massaged her leg to treat her hamstring injury. While she was uncomfortable with the contact when it reached her buttocks, and told him so, and he responded by attempting to illustrate the reason for massaging the buttocks, I do not believe that he was attempting to obtain any sexual gratification, nor was he attempting to provoke a sexual response from Ms. T. I **FIND**, as the

expert witness said, that his massage of the lower buttock to treat this injury was unnecessary and inappropriate, but the question here is really whether the inappropriately located massage is a proper subject for discipline which would impact upon Mr. Hovington's tenure. It is not easy, even in light of the findings regarding his sexual misconduct with Ms. B., to ascribe nefarious motives to this isolated incident of a massage too high up on the anatomy. In isolation such an event might call for some form of education to assure that the coach fully understood the necessary and proper limits of massage therapy, and perhaps a warning or other limited sanction to assure that the coach fully understood the need to avoid any touch which might bring understandable discomfort to the athletes. Whether high school coaches should be barred from massaging athletes of the opposite sex, or for that matter any athletes, is not a proper subject for this hearing. Simply put, as to the touching of Ms. T.'s buttocks, I **CONCLUDE** that a written warning would suffice and that tenure should not be affected by this incident.

The incident involving the purported kiss in the office after Ms. T's state championship performance is much more disturbing. While it is not uncommon for coaches to hug an athlete or to pat them on the back for an effort, a mouth kiss of a high school age minor by an adult coach, accompanied by a holding of the recipient's cheeks, can never be an appropriate gesture of support, encouragement, or recognition. As I **FIND** that Mr. Hovington did kiss Ms. T. as she described, I **CONCLUDE** that this incident would be a proper subject for some level of discipline. Would it support removal of tenure if it stood by itself? Once again, I believe that if the incident were viewed in isolation, it would be an excessive level of discipline to remove the tenure of an otherwise good teacher for one kiss given in an unfortunate show of appreciation for the outstanding achievement of a student/athlete whom the teacher/coach had been so involved in instructing. Here, in light of the devastating effect on tenure of the sexual relationship with Ms. B., the level of discipline appropriate for the kiss of Ms. T. pales in comparison. The "rosebud" comment, which I **FIND** was made in front of others, was I **FIND,** a joking response to Ms. T. and was unfortunately, in keeping with the kind of anatomical and "underclothing" "humor" and "comments" which the coach explained often occurred amongst the athletes, at least some of which he entered in a light-hearted fashion. Clearly he should not have said this, his conduct in saying this was simply not in accord with professional standards, and discipline is appropriate. When combined with the "kiss" incident, these would call into question whether a coach should

be retained in the coaching position. As for the tenure, I believe that if these existed by themselves, a withholding of an increment would be appropriate. Removal of tenure for these two isolated incidents, occurring under the circumstances in which I find they did, would, I believe, be excessive punishment.

CONCLUSION

For the reasons stated, I **CONCLUDE** that John Hovington's tenure as a teacher must be revoked. It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 2, 1996
DATE

Jeff S. Masin
JEFF S. MASIN, ALJ

Receipt Acknowledged:

10/4/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 7 1996
DATE

Barbara A. Kornak
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Letter dated July 31, 1973, from Charles Smerin to John Hovington

P-2 Certification and minutes of a Board of Education of the City of Camden meeting held on November 28, 1988

P-3 Letter dated November 29, 1988, from Arnold Webster to John Hovington

P-4 Letter dated December 16, 1992, from Anthony Zarrillo, Jr., to Dr. Arnold Webster

P-5 Letter dated January 11, 1993, from Karen A. Murray to Anthony J. Zarrillo, Jr.

P-6 N.J. Superior Court, Camden County, Law Division - Criminal, record of acquittal, signed 9/27/94

P-7 Letter dated October 13, 1994, from Anthony Zarrillo, Jr., to Dr. Roy J. Dawson, Jr.

P-8 Letter dated October 20, 1994, from Karen A. Murray to Anthony J. Zarrillo, Jr.

P-9 Letter dated November 8, 1994, from Karen A. Murray to Anthony J. Zarrillo, Jr.,

P-10 Letter dated November 9, 1994, from Roy J. Dawson, Jr., to John Hovington

P-11 Letter dated February 6, 1995, from Roy J. Dawson, Jr., to John Hovington

P-12 Letter dated February 10, 1995, from Leon Freeman to Anthony J. Zarrillo, Jr., with attachments

P-13 Letter dated February 14, 1995, from Anthony J. Zarrillo, Jr., to Roy J. Dawson, Jr., with attachments

P-14 Letter dated February 27, 1995, from Karen A. Murray to Anthony J. Zarrillo, Jr.

P-15 Resume of William M. Wright, Jr., 4 pages

P-16 Not in evidence

FOR THE RESPONDENT:

R-1 Not in evidence

R-2 Not in evidence

R-3 Greeting card with six signatures

R-4 Postcard addressed to Mr. J. Hovington from G. and D. postmarked August 29, 1988

R-5 Affidavit of P.B., dated January 26, 1995

R-6 Photograph of white automobile

R-7 Letter dated August 1, 1988, from J.B. & P.B.

R-8 Hand-drawn diagram of apartment

R-9 Photograph of John Hovington in automobile

R-10 "Thank you" card with handwritten note to "Daffy"

R-11 "Thank you" card with handwritten note to "Coach" from P.

R-12 "Thank you" card with handwritten note to Johnny Hovington from P.

R-13 Letter dated November 26, 1990, from Arnold W. Webster to Hon. John B. Mariano

R-14 Portion of transcript of trial before Hon. John B. Mariano, J.S.C. and a Jury on October 10 and 11, 1990

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN HOVINGTON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF CAMDEN, CAMDEN COUNTY.	:	
	:	

The record of this matter, transcripts of the hearing, and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were filed on an untimely basis and, therefore, such exceptions and the replies submitted thereto, are not considered herein.[1]

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that respondent's actions, as proven, constitute unbecoming conduct for the reasons expressed therein. In so ruling, the Commissioner is satisfied that the ALJ considered all testimony and weighed its content according to the credibility of the witnesses. Thus, he finds no basis to challenge the ALJ's credibility determinations and resultant conclusions with respect to the charges against respondent. See *In re Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987).

With regard to evaluation/determination of the appropriate penalty to be imposed in this matter, the Commissioner concurs with the ALJ that the tenure charges, as proven, are sufficient

[1] Respondent's exceptions, due on October 21, 1996, were received in the Office of the Commissioner on October 22, 1996. In that there was no indication by respondent that they were faxed or proof that they were otherwise filed on October 21, 1996, they may not be considered pursuant to *N.J.A.C.* 1:1-18.4(a). Additionally, a motion on related issues was filed on November 12, 1996. However, in that this motion was filed only six calendar days prior to the due date of the within decision, leaving insufficient time for the Board's reply and careful consideration by the Commissioner, the motion is being addressed in a separate letter decision.

to warrant respondent's termination from employment pursuant to *N.J.S.A.* 18A:6-10 and 11. In reaching such determination, the Commissioner is aware that he is required to consider the totality of respondent's record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation, or aggravation and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 1962 *S.L.D* 160, 162, remanded State Board of Education 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 225, reversed and remanded 93 *N.J. Super.* 404 (App. Div. 1967), decided by the Commissioner 1967 *S.L.D.* 215, aff'd N.J. Superior Court 220.

The Commissioner has stated that "[b]eing a teacher requires*** a consistently intense dedication to civility and respect***" (*In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, Middlesex County,* 1973 *S.L.D.* 157, 163), and that teachers "***must exhibit a high degree of exemplary behavior" (*In re Tyler*, 13 *N.J.A.R.* 297, 308 (1991). This is so in that

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils.*** *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, 98.*

In the present matter, there is no question that respondent's behavior constituted unbecoming conduct based on the finding that he had sexual contact with a student on a repetitive basis. As such, removal is the appropriate penalty in that respondent "misused his authority and clearly betrayed the trust of his students, his school district, and his community."[2] See *In the Matter*

[2] The ALJ also finds that respondent inappropriately massaged and kissed another student. The Commissioner need not consider the ALJ's conclusion that alone such incidents might not warrant removal in that, when taken as part of the present record, there is no question that removal is the appropriate sanction for this respondent.

of the Tenure Hearing of Robert Mantone, State-operated School District of the City of Jersey City, Hudson County, 93 *N.J.A.R.* 2d (EDU)322, 326, aff'd State Board 789.[3]

The Commissioner, in the past, has not hesitated to remove a teacher for similar behavior. In *In the Matter of the Tenure Hearing of Charlotte Galla, School District of the Township of Irvington, Essex County,* decided by the Commissioner August 5, 1996, "***a tenured teacher with many years of experience, engaged in a pattern of improper interaction and sexual contact over several years with a minor student whose interest she was mandated to safeguard.***" (Slip Opinion at p. 16) Consequently, the teacher was removed from her position. In rendering that decision, the Commissioner issued the following statement which, based on the totality of this respondent's behavior as proven, is no less applicable today:

> ***Teachers are expected to exercise exemplary restraint and mature self-control. Consequently, it is appropriate to sanction teachers who behave with impropriety or the appearance of impropriety. Indeed, the Commissioner has not hesitated to dismiss an employee whose behavior involved sexually intimate contact with a student.*** (*Galla* Slip Opinion at p. 15)

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein. Respondent is hereby dismissed from his teaching position in the Camden School District as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6, for further action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] Teacher dismissed after a finding that he had sent love notes to students.

509-96

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(509-96)

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN HOVINGTON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION ON REMAND
OF CAMDEN, CAMDEN COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent teacher and coach for allegedly engaging in inappropriate sexual relationship or touching with minor students. Citing *In re Fulcomer, In re Beam, In re Tordo, In re Mantone and In re Galla,* the Commissioner concurred with the ALJ's conclusion that respondent's actions with student P.B. constituted unbecoming conduct and warranted removal of his tenured employment as a teacher. State Board remanded matter to the Commissioner for consideration of respondent's exceptions, which Commissioner had found to be untimely filed, and to determine issues relating to back pay and indemnification raised in a Complaint in Lieu of Prerogative Writ (Complaint) filed in Superior Court, Law Division, in August 1995 and later transferred to the Commissioner.

On remand, the Commissioner found nothing in respondent's exceptions that would warrant the Commissioner to reverse his prior determination with regard to the finding that respondent's actions, as proven, constituted unbecoming conduct for the reasons expressed in the initial decision of the Office of Administrative Law (OAL), as further explicated in the Commissioner's prior decision. Commissioner affirmed his previous decision finding that the Board did prove its tenure charges and that the doctrine of laches did not apply herein. Commissioner further concurred with the ALJ that the tenure charges, as proven, were sufficient to warrant respondent's termination from employment. Commissioner remanded the matter to the OAL for further proceedings on the issues raised in the Complaint, and, in that the pleadings before the Court were not a part of the within record, the parties were directed to reconstruct such record. Additionally, the matter was transmitted to the State Board of Examiners for further appropriate action as a result of the Commissioner's determination on the tenure charges.

AUGUST 5, 1997

OAL DKT. NOS. EDU 4318-95S & 225-96S (CONSOLIDATED)
AGENCY DKT. NOS. 66-3/95 & 484-12/95

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN HOVINGTON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION ON REMAND
OF CAMDEN, CAMDEN COUNTY.	:	
	:	

This dispute was heard before the Office of Administrative Law (OAL) and by decision dated October 2, 1996, the Administrative Law Judge (ALJ) recommended that respondent be dismissed from his tenured position as a teacher, finding that the tenure charges of unbecoming conduct proven by the Board were sufficient to warrant respondent's termination from employment pursuant to *N.J.S.A.* 18A:6-10 and 11. The Commissioner, by decision dated November 18, 1996, affirmed the initial decision. The State Board of Education, by decision dated April 2, 1997, remanded the matter, determining:

> to set aside the Commissioner's decision on the merits of the tenure charges and to remand this matter to the Commissioner for consideration of respondent's exceptions in determining those charges. (State Board Decision, Slip Opinion at p. 2)

Additionally, in that the Commissioner had not determined the issues raised in a Complaint in Lieu of Prerogative Writ in Superior Court, Law Division in August 1995, in which respondent sought indemnification and back pay from the Board, the State Board directed that the Commissioner undertake further proceedings and issue a final determination on those claims. (State Board Decision, Slip Opinion at pp. 2-3)

In considering this matter in accordance with the State Board's directive, the Commissioner has reviewed the record, including transcripts of the hearing, and the initial decision of the Office of Administrative Law, as well as respondent's exceptions and the Board's replies.

Respondent sets forth a list of exceptions which generally deny that he committed the offenses as charged. Therein, he avers that he should not have been removed from his position as a teacher, that he should not have an increment withheld, and that the equitable doctrine of laches should apply to bar the Board from filing tenure charges seven years after it became aware of the allegations which formed the basis for the tenure charges. (Respondent's Exceptions at p. 1)

Respondent then sets forth specific arguments to support each exception. With regard to the allegations of sexual intercourse, he contends that P.B. was not specific in nature as to the location and dates of these encounters. (Respondent's Exceptions, Exhibit A, at p. 1) He notes that there is testimony in the record that directly disputes the claims of P.B. Respondent then offers a general denial of P.B.'s accusations and presents arguments questioning the credibility of P.B.'s testimony concerning certain alleged sexual encounters. (Respondent's Exceptions, Exhibit A, at pp. 1-10) He urges the Commissioner to reject all of P.B.'s claims if he finds any of these specific incidents to refute her testimony, pursuant to the doctrine of "false in one, false in all."

Respondent next generally denies improperly touching P.B. and A.T., questioning the credibility of both witnesses. (*Id.* at p. 13)

Lastly, respondent contends that the ALJ erroneously concluded that the doctrine of laches does not apply herein in that the Board officials have known of these allegations since 1988. (*Id.* at pp. 13-14)

In reply, the Board argues that respondent's exceptions were untimely and otherwise improperly filed in that they do not conform to the specifications set forth in *N.J.A.C.*:1-18.4 *et. seq.* As to the contention that the credibility of the Board's witnesses was questionable, the Board notes that it is not the role of the reviewing body to draw inferences and conclusions, or to resolve conflicts therein. Rather, citing *Nesmith v. Walsh Trucking Co.*, 247 *N.J. Super.* 360, 365 (App. Div. 1989), the Board contends that the Commissioner must give deference to the trial judge's view of the intangibles such as witness credibility, demeanor and the "feel of the case." (Board's Exceptions at p. 5)

With respect to the remaining issues, the Board asserts that the ALJ's initial decision was correct and should be adopted in its entirety. (*Id.* at p. 9)

Initially, the Commissioner finds that he need not reach to the issue of timeliness of respondent's exceptions, based on the State Board's decision directing that such exceptions be considered. [1]

Moreover, upon careful review and in consideration of the State Board's directive, the Commissioner finds nothing in the parties' exceptions that would warrant the Commissioner to reverse his prior determination with regard to the finding that respondent's actions, as proven, constitute unbecoming conduct for the reasons expressed in the initial decision of the OAL, as further explicated in the Commissioner's prior decision. Therefore, in reiterating his satisfaction that the ALJ considered all testimony and weighed its content according to the credibility of the witnesses and evidence in the record, and in finding no basis to challenge the ALJ's findings and resultant conclusions, the Commissioner affirms his previous decision finding that the Board proved its tenure charges against respondent and that the doctrine of laches does not apply herein. *In the Matter of Raymond Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987). The Commissioner further concurs with the ALJ that the tenure charges, as proven, are sufficient to warrant respondent's termination from employment pursuant to *N.J.S.A.* 18A:6-10 and 11. *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D* 160, 162, remanded State Board of Education, 1963 *S.L.D.* 251, decided by the Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 225, reversed and remanded 93 *N.J. Super.* 404 (App. Div. 1967), decided by the Commissioner 1967 *S.L.D.* 215, aff'd N.J. Superior Court 220; *In the Matter of the Tenure Hearing of Robert Mantone, 93 N.J.A.R. 2d* (EDU)322, aff'd State Board 789; and *In the Matter of the Tenure Hearing of Robert H. Beam*, 1973 *S.L.D.* 157, 163.

Finally, consistent with the State Board's directive with regard to the Complaint in Lieu of Prerogative Writ, transferred from the Appellate Division to the Commissioner on December 19, 1995, this matter shall be remanded to the OAL for further proceedings solely with respect to the issues raised in that Complaint. The Commissioner herein notes that, notwithstanding respondent's provision of a transfer order from the Court, no pleadings were ever forwarded to this agency by the Court, nor did respondent provide them directly, either as

[1] The Commissioner had, in his prior decision, found these exceptions to be untimely filed. Respondent subsequently produced a receipt from the Department of Education mail room evidencing that his exceptions were received there on October 21, 1996, notwithstanding the October 22, 1996 date stamp on the face of the document. Given that this receipt was not a part of the record before the Commissioner when he found the exceptions untimely, respondent was invited by letter dated November 22, 1996, to file a motion for reconsideration so that such exceptions might be duly considered. Respondent elected not to file such a motion but chose, instead, to appeal the Commissioner's rejection of his exceptions directly to the State Board.

filed in Court or in the form of a petition of appeal. Accordingly, such pleadings are not a part of the within record and the parties are directed to reconstruct them so that further proceedings may ensue at OAL in accordance with the State Board's decision. [2]

Accordingly, as in the Commissioner's prior decision, the initial decision of the ALJ is affirmed with regard to the tenure charges and respondent is hereby dismissed from his teaching position in the Camden Public School District as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6, for action against respondent's certificate as it deems appropriate. The issues raised in the Complaint in Lieu of Prerogative Writ are remanded to the OAL for further proceedings in accordance with the direction of the State Board of Education decision dated April 2, 1997.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] The Commissioner additionally notes that failure to consider the matters included in the Prerogative Writ was not raised in respondent's exceptions, nor was it brought to the Commissioner as an issue until the filing of a motion six calendar days before the statutory due date of the final Commissioner's decision. The Commissioner found the motion to be inappropriately filed at that time, and, by letter dated November 19, 1996, denied its consideration in the context of the present proceeding, instead inviting submission of a new petition.

AUGUST 5, 1997
DATE OF MAILING AUGUST 5, 1997

509-96

EDU #4318-95S and #225-96S (consolidated)
C # 509-96
SB # 94-96

IN THE MATTER OF THE TENURE :
HEARING OF JOHN HOVINGTON, : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
CITY OF CAMDEN, CAMDEN COUNTY. :

Decided by the Commissioner of Education, November 18, 1996

For the Petitioner-Respondent, Murray, Murray & Corrigan (Karen A. Murray, Esq., of Counsel)

For the Respondent-Appellant, Zarrillo & Sappacosta (Anthony J. Zarrillo, Jr., Esq., of Counsel)

John Hovington (hereinafter "respondent"), a tenured teaching staff member, has filed an appeal to the State Board from a decision of the Commissioner of Education dismissing him from his tenured employment with the Board of Education of the City of Camden (hereinafter "Board") for unbecoming conduct. Respondent contends that the Commissioner erred in determining that his exceptions to the initial decision had not been filed in a timely manner, and also in failing to consider his claims for indemnification and back pay. Respondent reserved argument on the merits of the tenure charges until the Commissioner properly considered his exceptions.

The Board has filed a motion to strike those portions of respondent's appeal brief in which he claims entitlement to indemnification and back pay, arguing that such issues were not considered during the proceedings below.

4/2/97

After a careful review of the record, we remand this matter to the Commissioner for further proceedings consistent with our decision herein.

We find initially that respondent's exceptions to the initial decision were filed with the Commissioner in a timely manner. A delivery receipt from the filing service utilized by respondent clearly indicates that his exceptions were accepted by a mailroom representative of the Department of Education at 3:50 p.m. on October 21, contrary to the Commissioner's assertion that the exceptions were not received until October 22. Given such information, we grant respondent's request to set aside the Commissioner's decision on the merits of the tenure charges and to remand this matter to the Commissioner for consideration of respondent's exceptions in determining those charges.

The record further indicates that respondent had filed a Complaint in Lieu of Prerogative Writ in Superior Court, Law Division in August 1995, in which he sought indemnification and back pay from the Board. On December 19, 1995, the Appellate Division entered an order summarily transferring that case to the Commissioner. Despite such order, however, there is no indication in the record that the Commissioner took any action to determine the issues raised in that Complaint or to transmit it to the Office of Administrative Law as a contested case.[1] In that respondent's claims to indemnification and back pay were not litigated below, we are also compelled to

[1] We note that respondent filed a motion with the Commissioner on November 12, 1996 requesting reimbursement and back pay. The Acting Commissioner responded by indicating that the motion was filed too late during the course of these proceedings and that respondent would have to file a separate petition of appeal raising such claims. However, given the Court's order of December 19, 1995 transferring the Complaint in Lieu of Prerogative Writ to the Commissioner, the Commissioner should have acted on the claims contained therein without the necessity of respondent filing another petition.

remand this matter to the Commissioner for further proceedings and a final determination on those particular claims.

In summary, we remand this matter to the Commissioner for consideration of respondent's exceptions in determining the merits of the tenure charges certified against him, and for further proceedings and a final determination on respondent's claims to indemnification and back pay. In view of our decision to remand this matter, we find it unnecessary to address the Board's motion to strike those sections of respondent's appeal brief raising the indemnification and back pay claims.

We do not retain jurisdiction.

April 2, 1997

Date of mailing APR 02 1997

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510-96 E

C. S., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

NOVEMBER 18, 1996

95 OCT 30 AM 9:01

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING APPLICATION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 08778-96S

AGENCY DKT. NO. 467-10/96

C.S. ON BEHALF OF MINOR, K.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

Respondent.

BEFORE **JEFF S. MASIN, ALJ**:

C.S., on behalf of her minor daughter, K.S. ("petitioner') having made an application to the Commissioner of Education for emergent relief requiring the Board of Education of the Township of Piscataway, Middlesex County ("respondent"), to reinstate K.S. to the eighth grade at the Quibbletown Middle School in the Piscataway Township Public Schools, and the matter having been transmitted to the Office of Administrative Law, as a contested case, and the petitioner having failed to establish a reasonable likelihood of success on the merits and having failed to establish that there is a likelihood of immediate and irreparable harm, and for the reasons set forth in the oral decision rendered by this judge on October 28, 1996, which are incorporated herein;

It is **ORDERED** on this 29th day of October, 1996, that the application for emergent relief is **DENIED**. The matter will be scheduled for plenary hearing.

[redacted]

COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but not later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

10/29/96
DATE

JEFF S. MASIN, ALJ

mjm

C. S., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this matter, including the audiotape of proceedings before the Administrative Law Judge (ALJ), and the initial decision on Motion for Emergent Relief of the Office of Administrative Law have been reviewed. Upon such review, the Commissioner concurs with the findings and conclusion of the ALJ denying emergent relief as petitioner has failed to meet the standards for such relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, petitioner's Motion for Emergent Relief is denied for the reasons expressed by the ALJ, and this matter shall proceed, consistent with the recommendation of the ALJ, to a plenary hearing on its merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1996
DATE OF MAILING NOVEMBER 18, 1996

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EILEEN PERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 18, 1996

OAL DKT. NO. EDU 6879-96
AGENCY DKT. NO. 299-7/96

EILEEN PERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1996
DATE OF MAILING NOVEMBER 18, 1996

512-96

512-96

N.M., on behalf of his minor daughter, C.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 22, 1996

OAL DKT. NO. EDU 12865-95
AGENCY DKT. NO. 429-11/95

N.M., on behalf of his minor daughter, C.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

514-96

514-96

IN THE MATTER OF THE TENURE :

HEARING OF WILLIAM KOLLER, :

BOARD OF EDUCATION OF THE SHORE : COMMISSIONER OF EDUCATION

REGIONAL HIGH SCHOOL DISTRICT, : DECISION

MONMOUTH COUNTY. :

:

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent high school teacher for allegedly consuming alcohol on school grounds.

ALJ concluded that the Board did prove that respondent consumed alcohol on school grounds. However, the ALJ concluded that forfeiture of tenure for this single incident was not warranted and would violate the protections afforded by the Law Against Discrimination to handicapped persons. But the incident was serious enough to justify disciplinary action. ALJ ordered respondent to forfeit any right to repayment of the 120 days' pay withheld pursuant to *N.J.S.A.* 18A:6-14.

Commissioner adopted findings and determination in initial decision with modification. In light of the seriousness of the incident, the Commissioner determined that respondent should not only forfeit his right to repayment of the 120 days' pay withheld, but should also forfeit his right to his upcoming salary increment, if any. Commissioner cautioned against placing any significance on the fact that respondent's students were evidently unaware of the incident. Rather the Commissioner's determination relied upon respondent's demonstration that he was addressing his alcohol addiction problem. Commissioner, therefore, directed that respondent, in conjunction with the Board's Employee Assistance Program (EAP), develop a plan for the maintenance of his recovery efforts, to be regularly monitored by the EAP in accordance with established District policies.

November 15, 1996

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 801-96

AGENCY DKT. NO. #32-1/96

IN THE MATTER OF THE TENURE HEARING OF WILLIAM KOLLER, BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY

Dennis Collins, Esq., for Charging Party

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: July 1, 1996 Decided: September 30, 1996

BEFORE **BARBARA A. HARNED,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 26, 1996, the Shore Regional Board of Education, County of Monmouth (Board) certified charges against respondent William Koller, a tenured teacher, with the Commissioner of Education (Commissioner). The Board charges conduct unbecoming a teaching staff member and seeks removal of respondent from his tenured position. On February 13, 1996, respondent filed an Answer to the Tenure Charges. On February 29, 1996, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on April 9, 1996, at which time

hearing dates of July 1, 2 and 3, 1996 were established. The hearing commenced and concluded on July 1, 1996 and the record closed on that date.[1]

FACTUAL DISCUSSION AND FINDINGS

Unless otherwise noted, the following testimony is undisputed and I adopt such undisputed testimony as **FINDINGS OF FACT**. Disputed facts are noted followed by findings as to those disputed facts. Respondent, William Koller, received his Bachelor's degree with a major in English and a minor in History from St. Peter's College in 1970. In 1973 he received his Master's degree in Literature from Seton Hall University. In September, 1970 he commenced employment with the Shore Regional High School District (Shore Regional) as an American and English Literature teacher. During his twenty five years of employment with the District he has also taught history, drama and theater arts. During the 1970's he team taught history to a class of emotionally disturbed students. In addition, he has coached the debating team and assisted with school play productions.

Dr. Daniel Sorkowitz, who testified for the Board, has been employed at Shore Regional for thirty years and has known William Koller for twenty six years. Dr. Sorkowitz is the Assistant Principal of Shore Regional and the Supervisor of the English Department. He has been Mr. Koller's immediate supervisor since 1986. Dr. Sorkowitz described Mr. Koller as a "gifted English teacher" and one who had been "a wonderful teacher until a few years ago." In the past few years, Mr. Koller's performance suffered as his attendance became poor. He took twenty sick days during the 1994/95 academic year and thirteen sick days between September and December, 1995. While Mr. Koller's performance suffered some deterioration, a classroom observation report prepared by Dr. Sorkowitz on September 28, 1995 was primarily positive and reported, *inter alia,* that Mr. Koller "conducted an effective discussion on the critical attributes of Romanticism, related current learning to previous learning, asked focused, probing questions, led students through an interesting explication of the poem, and made a reading and writing assignment that required students to practice new learning." (R-1). During his teaching career at Shore Regional, Mr. Koller never had an increment withheld and never had tenure charges filed against him until the instant matter.

[1] An Order of Extension within which to render this Initial Decision until September 30, 1996 was entered.

Mr. Koller admits to being an alcoholic with a history of alcohol dependency starting at age 16. (R-3, page 5). When he drinks, it is usually either a pint of vodka or wine (R-3, page 5). In the winter of 1992, he sought and received help through the Employee Assistance Program. He also joined Alcoholics Anonymous (AA) and found a sponsor. He was sober for seventeen months but had a relapse in early 1994. He returned to AA thereafter and was sober again until his birthday on November 10, 1995. Mr. Koller had been very depressed because he and his estranged wife were engaged in a bitter custody battle and as a result he had had no contact with his four sons since August, 1995. In the fall of 1995 he sought medical help and was under a physician's care for hypertension, depression and insomnia. His doctor prescribed Toprol once a day for his hypertension; Zoloft twice a day for his depression and Restoril one hour before going to bed for his insomnia.

On November 10, 1995, Mr. Koller was particularly depressed because he spent his birthday alone and had no contact with his sons. He relapsed on November 10, 1995; had two weeks of sobriety thereafter and relapsed again in late November. At that time he was admitted to the Jersey Shore Medical Center for what Mr. Koller described as medical reasons involving nausea, stomach pains and dehydration. Mr. Koller denied he was admitted for detoxification and while the Board seems to suggest that was the reason for the admission, no medical records were entered into evidence as to this admission. In the absence of any evidence to the contrary, **I FIND** that Mr. Koller's hospital admission in late November, 1995 was not for purposes of detoxification. Following his second relapse in late November, 1995, Mr. Koller continued to drink through December, 1995. Mr. Koller testified that he had no problems at school during this time period until December 22, 1995 and the Board did not present any evidence of a problem other than attendance. While Mr. Koller did not dispute Dr. Sorkowitz' testimony that he had been out sick for thirteen days between September and December 1995, the Board did not charge Mr. Koller with excessive absenteeism and therefore testimony as to his absences, while useful for background purposes, is irrelevant to the tenure charge at issue.

During the evening of December 21, 1995, Mr. Koller attended a holiday party in Ocean Township. He drank alcoholic beverages, including wine, champagne and mixed drinks, from 9 p.m. until 2:30 or 3:00 a.m. The following morning he was responsible for providing a holiday breakfast for the Shore Regional teachers as part of his duties as Treasurer of the Shore Regional Education

Association. Before school that morning, he went to a bakery, a doughnut shop and a convenience store to pick up the breakfast items and arrived at school at 6 a.m. to set up the cafeteria. It was a very hectic morning for him and he was very tired.

On December 22, 1995, the first two periods of the school day, from 7:40 a.m. to 9:17 a.m., were free periods for Mr. Koller. He then taught a History class and an English honors class during periods three and four from 9:21 a.m. to 10:53 a.m. He was in the cafeteria between 10:53 a.m. and 11:23 a.m. on lunch duty. Dr. Sorkowitz was also on lunch duty and spoke with Mr. Koller who had a normal demeanor at that time. Dr. Sorkowitz observed nothing unusual about Mr. Koller during the lunch duty and did not smell any alcohol on Mr. Koller at that time. Mr. Koller did tell Dr. Sorkowitz that he was very tired and that it had been a hectic morning.

Following lunch duty, Mr. Koller taught two History classes during periods six and seven from 11:27 a.m. to 12:11 p.m. One of these classes is freshman history, his most stressful class. The students that day were very boisterous. The following period, from 12:15 to 12:59, was a free period for Mr. Koller. Mr. Koller testified that at 12:15 he went to the staff bathroom. He did not remember whether he had taken his morning dose of Zoloft and so he took two doses. He then went to the staff room. At 12:45 he went up to his classroom. He was starting to feel very queasy with sweaty palms; tunnel vision and headache, so he went to the nurse's office for a Tylenol. When she was not in the office, he returned to his classroom.

The Board presented a very different picture of Mr. Koller's demeanor and appearance following his free period. Dr. Robert Stemplinger is the Supervisor of Special Education and Child Study at Shore Regional. He has known Mr. Koller since 1974 but has little daily interaction with him beyond chatting in the hallway. On December 22, 1995, Dr. Stemplinger saw Mr. Koller in the school corridor around 12:50 p.m. The corridor is about ten feet wide with lockers on one side and cinderblocks on the other. Dr. Stemplinger was returning to his office when he saw Mr. Koller walking toward him. He said hello to Mr. Koller and asked how he was doing. He received no response from Mr. Koller who just walked past him. Dr. Stemplinger thought this was strange and turned around to watch Mr. Koller. He observed Mr. Koller cross diagonally across the corridor; bump into the wall and cross diagonally again. Dr. Stemplinger then called Mr. Koller's supervisor,

Dr. Sorkowitz, and told him that something was wrong with Mr. Koller and that he was staggering in the hall.

Dr. Sorkowitz corroborated that Dr. Stemplinger had called him at approximately 1 p.m. and told him that Mr. Koller was staggering in the hall. Mr. Koller was scheduled to teach a United States history class from 1:03 to 1:45 p.m. Dr. Sorkowitz then went into the hall by the library and saw Mr. Koller at the door of his classroom talking to the school librarian and nurse. Dr. Sorkowitz did not see any students in the hallway at the time. Mr. Koller then walked away from his classroom with the librarian and nurse and towards the nurse's office. The principal, Mr. Schanppauf, met Dr. Sorkowitz in the hall and asked him to prepare a report. According, Dr. Sorkowitz went to the nurse's office.

When Dr. Sorkowitz entered the nurse's office, he observed Mr. Koller speaking loudly with the school librarian and using exaggerated gestures. The school nurse told Dr. Sorkowitz she was concerned and was going to call Jersey Shore Medical Center. Dr. Sorkowitz was aware of Mr. Koller's November admission to Jersey Shore and went to his office to obtain the date of admission and the name of a counselor Mr. Koller had seen during that admission. When he returned to the nurse's office he gave the information to the nurse who then called Jersey Shore. Dr. Sorkowitz then starting speaking with Mr. Koller to try to convince him to go with the first aid squad to the emergency room. Mr. Koller was speaking loudly and gesturing wildly. He appeared distraught and smelled of alcohol. Dr. Sorkowitz thought Mr. Koller was very drunk. Mr. Koller spoke to Dr. Sorkowitz of his marital and custody problems and said he wanted to kill himself because he could not stand the pain. Dr. Sorkowitz tried to console Mr. Koller and told him he was a gifted teacher. When asked on cross examination if he was intoxicated on December 22, 1995, Mr. Koller responded that "clinically, perhaps" he was intoxicated, and that intervention was probably called for but that he felt he was capable of teaching his last two classes.

The first aid squad arrived at the school at 2:45 p.m. Dr. Sorkowitz asked the squad to wait until the students were dismissed before coming to the school. Mr. Koller walked to the ambulance and was taken to the Medical Center. A substitute teacher taught Mr. Koller's ninth and tenth period

classes. Mr. Koller was treated in the Medical Center emergency room and was discharged the following morning (CP-1).

Richard Saferstein, Ph.D., was qualified as an expert in the analysis of alcohol in the blood and testified on behalf of the Board. Dr. Saferstein was the Chief Forensic Scientist for the New Jersey State Police from 1970 until 1991 when he retired. He now serves as a Forensic Science Consultant and teaches at two colleges and a law school in Delaware. Dr. Saferstein reviewed the medical records of Mr. Koller's December 22, 1995 admission to Jersey Shore Medical Center. Mr. Koller's serum alcohol level concentration at 6:31 p.m. was 0.268% (CP-1, 13th page). Dr. Saferstein explained that whole blood alcohol concentration is another method of reporting blood alcohol and that a serum alcohol level concentration of 0.268% converts to a whole blood alcohol concentration of 0.23%. Dr. Saferstein further testified that .015% of alcohol burns off from the blood every hour. Applying a process called extrapolation which basically adds .015% to the blood alcohol level for each elapsed hour, Dr. Saferstein determined that Mr. Koller's blood alcohol level at 1 p.m. would have been 0.31%. According to Dr. Saferstein, a person with a 0.31% blood alcohol level is highly to severely intoxicated. Such an individual would be highly impaired and would have great problems with physical and muscular coordination as well as suffer a deterioration in judgment. Dr. Saferstein reached his conclusions within a reasonable degree of medical certainty. Respondent attempted to challenge the validity of Dr. Saferstein's conclusions because he testified he is not familiar with Zoloft medication and did not know Mr. Koller's weight. Respondent, however, did not present any expert testimony as to the potential effect, if any, of Zoloft or his weight, on the conclusion reached by Dr. Saferstein that his blood alcohol concentration level was .31% as of 1 p.m. on December 22, 1995. Accordingly, **I FIND** that Mr. Koller's blood alcohol concentration as of 1 p.m. on December 22, 1995 was .31% and that as a result, he was severely intoxicated. Furthermore, I reject respondent's contention that the alcohol in his blood was due to his drinking of the previous night and that his condition at 1 p.m. on December 22, 1995 was caused solely by the ingesttion of two doses of Zoloft. I base this finding rejection on Dr. Sorkowitz' credible testimony that respondent did not smell of alcohol during lunch duty and exhibited a normal demeanor while he did smell of alcohol at 1 p.m. after his free period. In addition, respondent presented no medical testimony that the ingestion of two

doses of Zoloft would cause the type of behavior described by Dr. Sorkowitz.[2] Accordingly, **I FIND** that respondent consumed alcohol between 12:15 and 12:59 p.m. on December 22, 1995 while on school grounds.

While at Jersey Shore Medical Center on December 22 and 23, 1995, Mr. Koller asked about treatment programs and decided to enter a program given by the Carrier Clinic. He was evaluated at Carrier on December 23, 1995 during a three hour session. It was determined that inpatient treatment was not clinically indicated and that he would enroll in a partial hospitalization program (PHP) held in Toms River. While in the PHP, Mr. Koller spent 9 a.m. to 4 p.m. on Mondays through Saturdays in treatment at the clinic. Evenings and Sundays, he was released to a "safe house" which in his case was his mother's home. Mr. Koller successfully completed the PHP on January 16, 1996 (R-2). He then enrolled in and completed a ten-week Phase II program called Outpatient Addictive Treatment Services (OATS) which met Monday to Friday from 6 to 9:30 p.m. This program consisted of a group process with classes in coping and the pharmacology of addiction. The OATS program also requires that patients become part of a twelve step program such as Alcoholics Anonymous (AA). At the time of hearing, Mr. Koller was planning on enrolling in a Phase III Carrier Clinic program which meets one night a week from 6 to 8 p.m. This program was scheduled to start sometime in July, 1996 and Mr. Koller testified he would attend the program "for the foreseeable future." Mr. Koller also rejoined AA, has a sponsor and two home groups where he attends from seven to ten meetings a week. If Mr. Koller returned full-time to teaching, he intends to continue in the Phase III program one night a week as well as attend at least four AA meetings a week.

The parties stipulated that Mary Kilgannon, PHP Coordinator for Carrier Clinic, would have testified as to Mr. Koller's successful efforts at rehabilitation (see R-3). She further would have testified that in order for Mr. Koller to remain successful, he must attend an addictive behavior program once a week and continue going to AA.

[2] I note that Dr. Sorkowitz testified that on January 2, 1996, the first day back to school after the holiday recess, he went to Mr. Koller's classroom and observed the school librarian remove an almost empty bottle of vodka from Mr. Koller's locker. Respondent objected to this testimony and without any other evidence as to how long the bottle was there or whether any one else could have placed the bottle in the locker, I find the testimony unreliable and therefore will not base any findings on such testimony.

LEGAL DISCUSSION

N.J.S.A. 18A:6-10 provides that no person under tenure in the public school system "shall be dismissed or reduced in compensation . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause." The conduct of respondent described above is serious, certainly unprofessional and does amount to conduct unbecoming. However, for the following reasons I do not recommend forfeiture of his tenured position. Respondent has been charged with one incident in a career spanning twenty-five years of "gifted" teaching. As noted by the Appellate Division, "[a]lthough such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances." *In re: Fulconer,* 93 *N.J. Super.* 404, 421 (App. Div. 1967). In addition to the singularity of the tenure charge, I am persuaded by the fact that the Board presented no evidence that any students saw Mr. Koller in this condition or were aware in any way of the situation.

Moreover, **I CONCLUDE** that forfeiture of tenure under these circumstances would violate the protections afforded by the Law Against Discrimination (LAD) to handicapped persons. In similar circumstances the State Board of Education has held tenure charges of excessive absenteeism caused by alcoholism could not be sustained under the LAD when a teacher demonstrated that she was "successfully addressing the underlying cause of her past absenteeism and that she is able to return to work." *In the Matter of the Tenure Hearing of Dorothy Howard, State-Operated School District of the City of Jersey City, Hudson County,* 93 *N.J.A.R. 2d* 788, 789 (EDU), aff'd 95 *N.J.A.R.* 2d 301 (EDU) (App. Div. 1995). While the Board contends that *Howard* does not apply to this case because the case is not about alcoholism but rather respondent getting drunk during school hours, I do not find that argument persuasive. The underlying cause of respondent's drunkenness was alcoholism and as in *Howard* he has demonstrated that he is addressing his problem and intends to continue in his successful program of recovery.

While not sufficient to support forfeiture of tenure, the charge against respondent is serious enough to justify disciplinary action. Pursuant to *N.J.S.A.* 18A:6-14, respondent was not paid for 120

days while this proceeding was pending. In light of the seriousness of his actions on December 22, 1995, **I ORDER** that respondent forfeit any right to repayment of the 120 days' pay withheld.

ORDER

Based on the foregoing, **I ORDER** that the respondent be continued in his tenure status as an employee of the Shore Regional High School District and that he forfeit 120 days' pay already withheld.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/30/96
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

10/1/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 3 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ms

DOCUMENTS IN EVIDENCE

For Charging Party:

CP-1 Medical Records of William Koller relating to admission to Jersey Shore Medical Center on December 22, 1996 (15 pages)

For Respondent:

R-1 Shore Regional High School District Classroom Observation Report of William Koller, dated September 28, 1995

R-2 Certificate presented to William Koller by Carrier Center, dated January 16, 1996

R-3 Records of William Koller treatment at Carrier Center (45 pages)

WITNESSES

For Charging Party:

Richard Saferstein, Ph.D.

Dr. Robert Stemplinger

Dr. Daniel Sorkowitz

For Respondent:

William Koller

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM KOLLER,	:	
BOARD OF EDUCATION OF THE SHORE	:	COMMISSIONER OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, which did not include a transcript of the hearing at the OAL, the Commissioner determines to affirm the initial decision of the ALJ, with modification. The Commissioner concurs that respondent is guilty of conduct unbecoming a tenured teaching staff member in that he consumed alcohol on school grounds and in the course of the school day on December 22, 1995. (Initial Decision at p. 7) The Commissioner further agrees that, under the particular circumstances herein, and in regard for what has apparently been, until now, a lengthy and successful career without discipline, as well as in consideration of the limitations of the Law Against Discrimination, respondent should not forfeit his position as a tenured teacher on the basis of the single incident established herein.

However, the Commissioner determines that it is nevertheless appropriate that respondent should not only forfeit his right to repayment of the 120 days' pay withheld pursuant to *N.J.S.A.* 18A:6-14, but should also forfeit his right to his upcoming salary increment, if any.

In this regard, while the Commissioner finds some consolation in the fact that respondent's students were evidently unaware of the situation which occurred on December 22, 1995, he nonetheless cautions against placing any significance on that fact with respect to the penalty to be imposed on respondent as a result of this incident. For example, in *In the Matter of the Tenure Hearing of Sondra Yaniello, Board of Education of the City of Millville, Cumberland County*, 95 *N.J.A.R.* 2d (EDU) 262, the Commissioner explicitly rejected the significance placed by the ALJ on the fact that students were not exposed to respondent's addictive behavior, as well as the fact that respondent voluntarily reported her use of an illegal substance to the district, while seeking assistance from a treatment facility. There, the Commissioner noted that "***[s]uch rationale would permit repeated use of an illegal substance, provided the employee did not allow students to be exposed to such use, and provided [that], following every 'slip,' the employee voluntarily reported the action and sought assistance." (*Yaniello, supra,* at 271) Further, the Commissioner notes that his determination relies upon respondent's demonstration that he is currently addressing his alcohol addiction problem and that he intends to continue in his program of recovery. (Initial Decision at p. 8) For this reason, the Commissioner herein directs that respondent, in conjunction with the Board's Employee Assistance Program (EAP), develop a plan for the maintenance of his recovery efforts, to be regularly monitored by the EAP in accordance with established District policies.

Accordingly, the initial decision of the ALJ is affirmed in part, and modified as stated. The Board is hereby ordered to reinstate respondent, subject to the terms outlined above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 15, 1996
Date of mailing, November 18, 1996

518-96

518-96 E

DAVID KENDALL AND
SUSANA JENSEN-KENDALL,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE
BOROUGH OF HAWTHORNE,
PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 22, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING APPLICATION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 11204-96
AGENCY DKT. NO. 507-10/96

DAVID KENDALL and SUSANA JENSEN-KENDALL,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,
Respondent.

David Kendall, *pro se*, for petitioners

Ellen Walsh, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: October 30, 1996 Decided: October 31, 1996

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter arises out of a dispute between petitioners and the respondent Board of Education as the result of a petition filed with the Department on October 25, 1996. In conjunction with that petition was an application for emergent relief pursuant to *N.J.A.C.* 6:24-1.5. The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The application for emergent relief was set down for October 30, 1996 at 1:30 p.m. at the OAL, 185 Washington Street, Newark, New Jersey. At that time oral argument was heard as to the question of emergent relief regarding busing of petitioner's son who, for the purposes of oral argument only, is conceded to fall within the two-mile designation.

Having reviewed the documents submitted and having listened to oral argument in this matter I **FIND** the following:

1. Petitioner has failed to demonstrate a reasonable likelihood of success on the merits in this case.

2. Petitioner has not made the requisite showing of irreparable harm.

3. There has been no showing of unreasonable expense or substantial inconvenience rising to the level cognizable in this matter.

4. I further **FIND** that for the purposes of this motion no material facts were in dispute.

As a result of the above, petitioner's application for emergent relief in obtaining busing for his son is **DENIED** for the reasons stated on the record on October 30, 1996.

10/30/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

am

DAVID KENDALL AND SUSANA JENSEN-KENDALL,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the audiotape of emergent proceedings by the Administrative Law Judge (ALJ), and the Initial Decision on Motion for Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

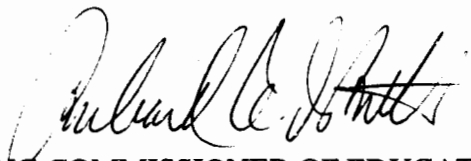
Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ denying emergent relief as petitioners failed to meet the standards for such relief as set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) and *N.J.A.C.* 1:1-12.6, *R.* 4:52-1.

Further, upon review of the facts and arguments presented in the petition and answer, and in reviewing both parties' arguments as to petitioners' likelihood of success on the merits, it is plain from the existing record and arguments presented at the emergent hearing that the Board advanced several reasonable grounds upon which it denied petitioners' request to carve

an exception in its policy and bus G.J. to and from school for safety reasons although he lives less than two miles from school. Thus, the Commissioner finds that petitioners cannot demonstrate that the decision arrived at by the Board was arbitrary, capricious or unreasonable as is required by law in order for it to be reversed, so that no purpose would be served by further proceedings in this matter.

Accordingly, the ALJ's determination to deny emergent relief is adopted for the reasons expressed therein, and the Petition of Appeal is hereby dismissed. Consistent with this holding, the Commissioner directs that the file of this matter be returned to the agency by OAL in accordance with *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

519-96

519-96 SEC

IN THE MATTER OF ARTHUR HOOPER,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

NOVEMBER 22, 1996

SCHOOL ETHICS COMMISSION	:	
	:	
v.	:	96 SEP 26 P 2:33
	:	
Arthur Hooper	:	**RESOLUTION**
Newark Board of Education	:	
Essex County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was created to ensure and preserve public confidence and set specific standards to guide the conduct of school officials; and

WHEREAS, in furthering the purpose of the Act, the Legislature required that each school official annually file a disclosure statement indicating income received, relatives employed by the district, fees and honorarium, gifts, and business organizations in which he or she has an interest; and

WHEREAS, the Act requires that such statements be filed on or before April 30 of each year or within 30 days of election or appointment; and

WHEREAS, the School Ethics Act became effective on April 15, 1992; and

WHEREAS, the Legislature charged the School Ethics Commission with the responsibility of enforcing the Act; and

WHEREAS, the Commission forwarded financial disclosure forms to the county superintendents for distribution to the school officials in each district; and

WHEREAS, on July 29, 1996, the Commission sent Orders to Show Cause to all school officials who were required to, but had not yet filed disclosure statements; and

WHEREAS, by September 24, 1996, Arthur Hooper had not filed a response to the Order; and

WHEREAS, Arthur Hooper received the Order, but still has not filed a disclosure statement as required by the Act;

NOW THEREFORE BE IT RESOLVED that the Commission finds Arthur Hooper to be in violation of N.J.S.A. 18A:12-26 of the School Ethics Act and further finds that the appropriate penalty for such a violation is removal; and

BE IT FURTHER RESOLVED that the Commission hereby recommends that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini 9/25

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: 9/24/96

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on September 24, 1996.

Lisa James-Beavers

Lisa James-Beavers
Executive Director

PCG/LJB/ktc(96fdsres.doc)

IN THE MATTER OF ARTHUR HOOPER,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26 on or before April 30 of each year, or within 30 days of election or appointment; and

Whereas, the School Ethics Commission sent ample notice to the above-named school official of his failure to file an annual financial disclosure statement; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on July 29, 1996, the Commission issued an Order to Show Cause why the school official should not be removed for such failure; and

Whereas, the above-named school official filed no response to such Order; and

Whereas, the Commission voted on September 24, 1996, to recommend removal of the above-named school official for failure to file an annual financial disclosure statement in

violation of state statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on September 25, 1996, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named school official filed no response or comments to the Commissioner regarding this sanction; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendation of the Commission; now therefore

IT IS ORDERED that the above-named school official is removed from office as of the date of this decision.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

520-96

520-96 SEC

IN THE MATTER OF LORRAINE MARTIN,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

NOVEMBER 22, 1996

SCHOOL ETHICS COMMISSION	:	
	:	
v.	:	
	:	
Lorraine Martin	:	**RESOLUTION**
Newark Board of Education	:	
Essex County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was created to ensure and preserve public confidence and set specific standards to guide the conduct of school officials; and

WHEREAS, in furthering the purpose of the Act, the Legislature required that each school official annually file a disclosure statement indicating income received, relatives employed by the district, fees and honorarium, gifts, and business organizations in which he or she has an interest; and

WHEREAS, the Act requires that such statements be filed on or before April 30 of each year or within 30 days of election or appointment; and

WHEREAS, the School Ethics Act became effective on April 15, 1992; and

WHEREAS, the Legislature charged the School Ethics Commission with the responsibility of enforcing the Act; and

WHEREAS, the Commission forwarded financial disclosure forms to the county superintendents for distribution to the school officials in each district; and

WHEREAS, on July 29, 1996, the Commission sent Orders to Show Cause to all school officials who were required to, but had not yet filed disclosure statements; and

WHEREAS, by September 24, 1996, Lorraine Martin had not filed a response to the Order; and

WHEREAS, Lorraine Martin received the Order, but still has not filed a disclosure statement as required by the Act;

NOW THEREFORE BE IT RESOLVED that the Commission finds Lorraine Martin to be in violation of N.J.S.A. 18A:12-26 of the School Ethics Act and further finds that the appropriate penalty for such a violation is removal; and

BE IT FURTHER RESOLVED that the Commission hereby recommends that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: 9/24/96

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on September 24, 1996.

Lisa James-Beavers
Executive Director

PCG/LJB/ktc(96fdsres.doc)

IN THE MATTER OF LORRAINE MARTIN,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26 on or before April 30 of each year, or within 30 days of election or appointment; and

Whereas, the School Ethics Commission sent ample notice to the above-named school official of her failure to file an annual financial disclosure statement; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on July 29, 1996, the Commission issued an Order to Show Cause why the school official should not be removed for such failure; and

Whereas, the above-named school official filed no response to such Order; and

Whereas, the Commission voted on September 24, 1996, to recommend removal of the above-named school official for failure to file an annual financial disclosure statement in violation of state statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on September 25, 1996, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named school official filed no response or comments to the Commissioner regarding this sanction; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendation of the Commission; now therefore

IT IS ORDERED that the above-named school official is removed from office as of the date of this decision.

COMMISSIONER OF EDUCATION

521-96

521-96 SEC

IN THE MATTER OF ALBERT WILLIAMS, III,	:	
TRENTON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MERCER COUNTY.	:	DECISION
	:	

NOVEMBER 22, 1996

SCHOOL ETHICS COMMISSION	:	
	:	
v.	:	
	:	
Albert Williams, III	:	**RESOLUTION**
Trenton Board of Education	:	
Mercer County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was created to ensure and preserve public confidence and set specific standards to guide the conduct of school officials; and

WHEREAS, in furthering the purpose of the Act, the Legislature required that each school official annually file a disclosure statement indicating income received, relatives employed by the district, fees and honorarium, gifts, and business organizations in which he or she has an interest; and

WHEREAS, the Act requires that such statements be filed on or before April 30 of each year or within 30 days of election or appointment; and

WHEREAS, the School Ethics Act became effective on April 15, 1992; and

WHEREAS, the Legislature charged the School Ethics Commission with the responsibility of enforcing the Act; and

WHEREAS, the Commission forwarded financial disclosure forms to the county superintendents for distribution to the school officials in each district; and

WHEREAS, on July 29, 1996, the Commission sent Orders to Show Cause to all school officials who were required to, but had not yet filed disclosure statements; and

WHEREAS, by September 24, 1996, Albert Williams, III had not filed a response to the Order; and

WHEREAS, Albert Williams, III received the Order, but still has not filed a disclosure statement as required by the Act;

NOW THEREFORE BE IT RESOLVED that the Commission finds Albert Williams, III to be in violation of N.J.S.A. 18A:12-26 of the School Ethics Act and further finds that the appropriate penalty for such a violation is removal; and

BE IT FURTHER RESOLVED that the Commission hereby recommends that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini/LJB

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: 9/24/96

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on September 24, 1996.

Lisa James-Beavers

Lisa James-Beavers
Executive Director

PCG/LJB/ktc(96fdsres.doc)

IN THE MATTER OF ALBERT WILLIAMS, III,	:	
TRENTON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MERCER COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26 on or before April 30 of each year, or within 30 days of election or appointment; and

Whereas, the School Ethics Commission sent ample notice to the above-named school official of his failure to file an annual financial disclosure statement; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on July 29, 1996, the Commission issued an Order to Show Cause why the school official should not be removed for such failure which was sent via regular and certified mail and received by Mr. Williams on August 3, 1996; and

Whereas, the above-named school official failed to respond to such Order; and

Whereas, the Commission voted on September 24, 1996, to recommend removal of the above-named school official for failure to file an annual financial disclosure statement in violation of state statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on September 25, 1996, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named school official failed to respond to the Commissioner regarding this sanction; and

Whereas, on October 29, 1996, the Mercer County Superintendent of Schools advised that the above-named school official filed his financial disclosure form on October 2, 1996, with an explanation of its lateness; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, declines to adopt the Commission's recommendation that removal is warranted, in light of the school official's subsequent filing of the requisite form. Nevertheless, the Commissioner must admonish this school official for his failure to timely and correctly file the requisite financial disclosure form, in that such delay resulted in the within proceeding, which entailed needless expenditure of time and administrative and adjudicative resources by local, county, and state education officials; now therefore

IT IS ORDERED that the above-named school official is suspended from office for a period of three days, without pay, as of the date of the Board's receipt of this decision.

Acting COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

522-96

522-96 SEC

IN THE MATTER OF ROSALIND BUSH, :

STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE CITY OF NEWARK, ESSEX : DECISION

COUNTY. :

_____:

NOVEMBER 22, 1996

SCHOOL ETHICS COMMISSION	:	
	:	
v.	:	
	:	
Rosalind Bush	:	**RESOLUTION**
Newark Board of Education	:	
Essex County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was created to ensure and preserve public confidence and set specific standards to guide the conduct of school officials; and

WHEREAS, in furthering the purpose of the Act, the Legislature required that each school official annually file a disclosure statement indicating income received, relatives employed by the district, fees and honorarium, gifts, and business organizations in which he or she has an interest; and

WHEREAS, the Act requires that such statements be filed on or before April 30 of each year or within 30 days of election or appointment; and

WHEREAS, the School Ethics Act became effective on April 15, 1992; and

WHEREAS, the Legislature charged the School Ethics Commission with the responsibility of enforcing the Act; and

WHEREAS, the Commission forwarded financial disclosure forms to the county superintendents for distribution to the school officials in each district; and

WHEREAS, on July 29, 1996, the Commission sent Orders to Show Cause to all school officials who were required to, but had not yet filed disclosure statements; and

WHEREAS, by September 24, 1996, Rosalind Bush had not filed a response to the Order; and

WHEREAS, Rosalind Bush received the Order, but still has not filed a disclosure statement as required by the Act;

NOW THEREFORE BE IT RESOLVED that the Commission finds Rosalind Bush to be in violation of N.J.S.A. 18A:12-26 of the School Ethics Act and further finds that the appropriate penalty for such a violation is removal; and

BE IT FURTHER RESOLVED that the Commission hereby recommends that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: 9/24/96

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on September 24, 1996.

Lisa James-Beavers
Executive Director

PCG/LJB/ktc(96fdsres.doc)

IN THE MATTER OF ROSALIND BUSH,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26 on or before April 30 of each year, or within 30 days of election or appointment; and

Whereas, the School Ethics Commission sent ample notice to the above-named school official of her failure to file an annual financial disclosure statement; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on July 29, 1996, the Commission issued an Order to Show Cause why the school official should not be removed for such failure; and

Whereas, the above-named school official filed no response to such Order; and

Whereas, the Commission voted on September 24, 1996, to recommend removal of the above-named school official for failure to file an annual financial disclosure statement in violation of state statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on September 25, 1996, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named school official filed no response or comments to the Commissioner regarding this sanction; and

Whereas, on November 4, 1996, the Essex County Superintendent of Schools advised that the above-named school official filed her financial disclosure form with the county office on September 25, 1996; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, declines to adopt the Commission's recommendation that removal is warranted, in light of the school official's subsequent filing of the requisite form. Nevertheless, the Commissioner must admonish this school official for her failure to timely file the requisite financial disclosure form, in that such delay resulted in the within proceeding, which entailed needless expenditure of time and administrative and adjudicative resources by local, county, and state education officials; now therefore

IT IS ORDERED that the above-named school official is suspended from office for a period of three days, without pay, as of the date of the Board's receipt of this decision.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

523-96

523-96

VIRGINIA GITTELMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENT,	:	
AND	:	
WILLIAM DE FEO,	:	
INTERVENOR.	:	

SYNOPSIS

Petitioner sought, *inter alia*, reassignment to the position of Assistant Superintendent for Instructional Services with all back pay and emoluments owed, averring that the Board violated her tenure and seniority rights. Appellate Court remanded matter so that a determination could be made as to whether the "respondent's (Board's) assistant superintendency for instructional services" was "the local equivalent of the regulatory assistant superintendency of curriculum and instruction to which petitioner has a tenure entitlement by reason of *N.J.A.C.* 6:11-9.3(b)." Board contended recent amendment to *N.J.S.A.* 18A:28-5 significantly affected the rights of the parties, said amendment was passed specifically in response to Appellate Division's decision in *Nelson*.

ALJ concluded that petitioner could not be tenured in the assistant superintendency in the District, as she had not served the requisite time in that separately tenurable position, in accordance with the requirements established in *N.J.S.A.* 18A:28-5. ALJ canceled the scheduled evidential hearing and dismissed the contested case.

Commissioner concurred that petitioner could not be tenured as the Assistant Superintendent for Instructional Services in the District. Matter was dismissed.

NOVEMBER 21, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06248-96S
(EDU 6156-90 Remanded)
AGENCY DKT. NO. 209-6/90

VIRGINIA GITTELMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent,
and
WILLIAM DEFEO,
Intervenor.

Robert M. Schwartz, Esq., for petitioner

Cherie L. Maxwell, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein and Gross, attorneys)

Jerry N. Driban, Esq., for Intervenor

Record Closed: September 16, 1996 Decided: October 3, 1996

BEFORE **JEFF S. MASIN**, ALJ:

This matter comes before the Office of Administrative Law following an Appellate Division remand to the State Board of Education of a prior contested case determination which the court determined required further proceedings, *Gittleman v. Board of Education of the Township of Hamilton, Mercer County*, A-3659-93T5, Unreported Decision of Appellate Division, Decided January 2, 1996. The lengthy procedural history of the matter need not be

repeated in full here, as the appellate decision amply describes it. The Court remanded so that a determination could be made as to whether the "respondent's (Board's) assistant superintendency for instructional services" was "the local equivalent of the regulatory assistant superintendency of curriculum and instruction to which petitioner has a tenure entitlement by reason of *N.J.A.C.* 6:11-9.3(b)." It also asked "if so, what is the appropriate remedy in the extant circumstances?" and what effect, if any, did the petitioner's resignation from the District on September 1, 1993, have upon her rights?

Following a prehearing conference, the respondent Board of Education filed a brief, arguing that a recent amendment to *N.J.S.A.* 18A:28-5 significantly affected the rights of the parties; indeed, the Board argues that the statute as it currently reads following its amendment by *P.L.* 1996, *c.* 58, resolves the case in favor of the Board and eliminates the necessity for evidential hearings. The amendment was passed specifically in response to the Appellate Decision's unpublished opinion in *Nelson v. Old Bridge Board of Education*, A-6441-94T5, which was decided on April 29, 1996, subsequent to the court's decision in this matter. As will be detailed, the Board of Education contends that the *Gittleman* court relied upon the same analysis and precedents which were at the heart of the *Nelson* decision in determining that Dr. Gittelman had any tenure claim to the assistant superintendency and that the Legislature's action in effectively overruling the *Nelson* opinion has effectively overruled the *Gittleman* decision, for its theoretical support is no longer valid. The Board argues that the amendment was clearly intended to have retroactive effect, and that the petitioner's claim to any tenure as an assistant superintendent must therefore be resolved against her. The intervenor supports the Board's analysis.

The petitioner's brief contends that her tenure rights were effectively fixed by the appeals court decision. While claiming that the *Nelson* case is distinguishable from her case and that therefore the amendment is not properly applied against her, Dr. Gittelman also contends that the later amendment to the statute cannot be applied retroactively to defeat her rights, both because the amendment was not meant to have retroactive effect, and even if it were, because application to her case would result in a manifest injustice.

THE APPELLATE DECISIONS IN *GITTLEMAN* AND *NELSON*

Gittleman

In order to analyze the legal positions of the parties, it is necessary to understand exactly what the Appellate Division's decision determined. In its opinion, the court recognized that the State Board of Education had determined that Dr. Gittelman "was entitled to tenure protection as a principal." While the State Board had declined to consider her argument that as such she had tenure protection as Assistant Superintendent for Instructional Services, the appellate court determined that, as the result of the amendment to *N.J.A.C.* 6:11-9.3(b), which included the position of "assistant superintendent for curriculum and instruction among the positions that a principal's endorsement qualifies one to hold," Dr. Gittelman "as of October 15, 1990 . . . was qualified to hold the position of assistant superintendent for curriculum and instruction. . . ." Slip Opinion, at Page 9. The Court then held that she "had tenure in that position" under the law as determined in *Dennery v. Board of Education, Passaic Regional High School*, 131 *N.J.* 626, 634 (1993), which held that "[a]n educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate [,]," and that, pursuant to *Ellicott v. Board of Education, Tp. of Frankford*, 251 *N.J. Super.* 342, 349 (App. Div. 1991), this tenured status was achieved "regardless of whether one has actually served in the area." *Id.*

Nelson

In *Nelson, supra.*, a teacher who had an administrative certificate with both principal and supervisory endorsements and was tenured as the department chairperson of the Industrial Arts Department and had never served in a position under his principal endorsement, sought the position of elementary school principal and claimed that he had a priority to that position over a non-tenured appointee. The appellate court, relying upon its understanding of *Dennery, supra.*, determined that tenure gained in a position held pursuant to an endorsement under an administrative certificate extended to all other positions one was qualified to hold under that certificate, even those for which a different endorsement was required. The court rejected arguments by the respondents, who contended that based upon "the longstanding administrative

practice of granting tenure only with respect to the specific position or endorsement noted in the statute" that transfer of tenure earned under one endorsement to a "separately tenurable" position enumerated in *N.J.S.A.* 18A:28-5 was not permitted, holding that the statute "does not make any distinction between positions in terms of "separate tenurability . . . ."

The Legislative Response to *Nelson*

Acting in response to the *Nelson* decision, Assemblyman John Rocco introduced a bill on June 10, 1996, which specifically stated that the Legislature was acting because of a need to clarify *N.J.S.A.* 18A:28-5 following the interpretation of that statute announced by the *Nelson* court. The statute, as amended by this legislation which was approved on June 28, 1996, now reads,

> 1. (New section) The Legislature finds and declares that, due to the interpretation of *N.J.S.A.* 18A:28-5 by the Appellate Division in the case of Nelson . . . a clarification of that statute is necessary in order to continue the traditional practice of providing that tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statutorily required period of time in that position.
>
> 2. N.J.S. 18A:28-5 is amended to read as follows:
>
> 18A:28-5. The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, . . . shall be under tenure during good behavior and efficiency . . . .
>
> (a)
>
> (b)
>
> (c)
>
> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position . . . and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to *N.J.S.* 18A:28-6 in a position in which the individual actually served.

> 3. This act shall take effect immediately and shall apply to all individuals who have acquired tenure pursuant to *N.J.S.* 18A:28-5 or any prior statute.

In this amended legislation, the Legislature made it clear that it understood that each of the specifically enumerated administrative or supervisory positions, that is, teacher, principal, assistant superintendent, etc., carried its own tenure, and that merely because one achieved tenure by service of the requisite length in any one of the enumerated positions, one did not thereby gain tenure in any of the other specifically enumerated positions in which the individual had not served for the requisite time.

The Effect of the Amendment Upon Dr. Gittelman's Claim

In its decision in *Gittleman*, the court concluded that Dr. Gittelman was entitled to tenure as an assistant superintendent for curriculum and instruction because she had tenure as a principal, a position which, like that of an assistant superintendent, fell within the administrative certificate. Both the position of principal and the position of assistant superintendent are specifically enumerated positions in the amended version of *N.J.S.A.* 18A:28-5. Thus, on its face, it would appear that application of the amendment to this case would prevent a holding that Dr. Gittelman's tenured status as a principal could be extended to provide her with tenure as an assistant superintendent, a position in which she never served, except for a brief service as an acting assistant superintendent in 1983-84. Since the Appellate Division did not hold that she had tenured status as an assistant superintendent arising independently from her tenure as a principal, it would appear that, if applied here, the amended legislation would in effect overrule the court's holding that Dr. Gittelman had any tenured status as an assistant superintendent for curriculum and instruction.

Is *Nelson* distinguishable?

Dr. Gittelman contends that the statutory change does not affect her case because the facts in *Nelson* were different from those involved in her case, and the amendment simply does not apply to the reasoning which motivated the *Gittleman* court's decision. In *Nelson* the petitioner held principal and supervisory endorsements to his administrative certificate. He had never served

as a principal. He sought appointment to the position of elementary school principal, but the post was given to a non-tenured person. Nelson sought to transfer the tenure rights which he acquired as a department chair under the "supervisor" endorsement to the principalship, which required a different endorsement, that of "principal," based upon the fact that both endorsements fell under the same "administrative" certificate. In contrast to this Dr. Gittelman says that she does not seek to transfer her tenure right to a position requiring a different endorsement, for the same "principal" endorsement is required for both the director's position which she held and the assistant superintendent for curriculum and instruction position which she seeks.

Dr. Gittelman argues that from the very outset of the original case she has claimed that her tenure, which the State Board determined was achieved as a principal, actually accrued in "the then unrecognized title of Director of Elementary Education" which "had to be made to fit into the most similar 'recognized' title which she asserted was the title of Assistant Superintendent . . . ." However, while the Appellate Division agreed that this had always been her claim, what the court actually held was that she was a certified principal who had achieved tenure in *that* position (as the State Board had held). Since she could serve as an assistant superintendent under the "principal" endorsement pursuant to the amended version of *N.J.A.C.* 6:11-9.3(b) which had become effective before the prehearing conference held on November 16, 1990, under the *Dennery* concept of "tenure in all positions under the certificate," coupled with the *Ellicott* concept of "tenure without actual service in the position," she was therefore also a tenured assistant superintendent. The court did not separately find that she was tenured as an assistant superintendent because she had served in that position for the requisite time.

The recent amendment makes it abundantly clear that tenure achieved in one of the several enumerated positions provides tenure in that position only. This appears to directly respond to the *Nelson* court's statement that "*N.J.S.A.* 18A:28-5 does not make any distinctions between positions in terms of "separate tenurability, ..." Under the amended statute, Dr. Gittelman, having achieved tenure in the enumerated position of "principal," could not by that acquisition also achieve tenure in another of the separately enumerated positions, that of "assistant superintendent." The difference in the facts of *Nelson* and *Gittleman* is of no moment. The amendment addresses itself specifically to the facts in Dr. Gittelman's case, just as it does to those in Mr. Nelson's case.

Retroactivity

The amendment to *N.J.S.A.* 18A:28-5 is, by its terms, to be effective immediately. As such, a simple application of the law as it exists as of the time of this decision ("the time of decision" rule) would compel the conclusion that the petitioner could not be tenured as an assistant superintendent since she had not served in such capacity for the requisite time. This decision would carry out the clear legislative command to treat each of the separately enumerated positions separately when determining tenure status. However, counsel for the petitioner contends that application of the amendment to this case is improper, arguing that the "immediate" language simply signifies that the amendment is not to be accorded retroactive effect, but only prospective application, and that application of the amendment to this case would be an unconstitutional interference with vested rights and a manifest injustice, as this long-standing dispute has been the subject of adjudication which has fixed the petitioner's rights. *Twiss v. State of New Jersey, et al.*, 124 *N.J.* 461, 467 (1991).

Courts generally favor prospective application of statutes. *Phillips v. Curiale*, 128 *N.J.* 608, 615 (1992). But it is clear from the very wording of the new section of the statute that the Legislature saw this amendment as a curative enactment, meant to reverse an errant court decision which it believed had improperly strayed from the "traditional practice." Here, the Legislature was not making new law, but was instead merely reaffirming the law as it was meant to be applied, and as the Legislature found that it had traditionally been applied. Thus the "immediate" language simply signifies that there is to be no delay in the implementation of the corrective impact of the statute. It does not suggest that the application is be prospective only.

As for whether retroactive application would interfere with "vested rights," or be "manifestly unjust," it must be remembered that the court only determined that Dr. Gittelman's service as a tenured principal had given her the right to be tenured as an assistant superintendent for curriculum and instruction, but the court did not determine whether the position of assistant superintendent for instructional service which exists in the district is the equivalent of the regulatory position. Whether the district actually has an assistant superintendency which matches the position which the court said she qualified for is the very subject of the remand. Dr.

Gittelman's "right" to tenure on a specific, existing assistant superintendency in the District is not yet fixed. As such, to apply the law which the Legislature has now reaffirmed by its clarification of the statute does not work any manifest injustice. It simply assures that the correct interpretation of the law is applied to the petitioner. There is as yet no judgment, or final administrative adjudication, which holds that Dr. Gittelman is the tenured assistant superintendent for curriculum and instruction in this District, or that she is the tenured holder of an actual position in the District which sufficiently matches this recognized regulatory position such that it is proper to accord anyone tenure in the existing position. The appellate ruling merely says that if the position does exist, then she is the person with tenure rights to it. If the existing position does not adequately match the post which the court said that she had a tenure right to, she has nothing. She has an expectation, but as of yet, nothing more. There is no manifest injustice in applying the existing law, which merely is the law as the Legislature has declared it always has been, to this case.

CONCLUSION

For the reasons stated, I **CONCLUDE** that the petitioner cannot be tenured as the assistant superintendent for curriculum and instruction in the Hamilton School District, as she has not served the requisite time in that separately tenurable position, in accordance with the requirements established in *N.J.S.A.* 18A:28-5. The scheduled evidential hearing is therefore canceled and the contested case is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 1996
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

10/7/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 8 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

VIRGINIA GITTELMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION ON REMAND
RESPONDENT,	:	
AND	:	
WILLIAM DE FEO,	:	
INTERVENOR.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed, as was the reply of intervenor, pursuant to *N.J.A.C.* 1:1-18.4. The Board failed to comply with the regulations for requesting an extension of time in which to file replies, pursuant to *N.J.A.C.* 1:1-18.8. Therefore, its reply is considered untimely and is not considered herein.

After presenting a complete review of the procedural history in this matter, petitioner argues that the ALJ erroneously permitted relitigation of the issues, in that the Appellate Court's decision that she had tenure as an assistant superintendent was a final determination on the merits of her claim. Petitioner asserts

> ***the Court said that [she] "possessed a tenure entitlement to the position of assistant superintendent for curriculum and instruction." That does not mean as Judge Masin found that [she] had a right to be tenured as an assistant superintendent. It means that she was tenured as an assistant superintendent. It does not mean as Judge Masin found that [she] merely had an "expectation" to be tenured as an assistant superintendent.*** The Court did not issue an advisory opinion concluding that [she] was tenured as an assistant superintendent. It issued a final determination on the merits of [her] claim which is not subject to being overruled retroactively by the Legislature, and certainly not subject to being overruled by a court of lower jurisdiction. ***
>
> ***Having achieved tenure in the regulatory assistant superintendent title, the Court said that before it could determine if this meant that [she] and not [Dr.] DeFeo should have been the District's assistant, the Commissioner would have to determine if the two assistant superintendent titles - the one in the regulation and the one in the District - were equivalent. If they were, then [she] was entitled to the position because as of the April 1990 or May 1991 reorganization she was tenured as an assistant superintendent and [Dr.] DeFeo was not. (Petitioner's Exceptions at pp. 7, 8)

In this regard, petitioner maintains that the only aspect of the case which remained to be decided was the remedy to be afforded her. (*Id.* at p. 8)

Petitioner's second and third exceptions are essentially the same arguments as those raised before the ALJ. Petitioner again contends that the *Nelson* amendment should be given only prospective effect (*id.* at p. 9) and that this matter is distinguishable from *Nelson, supra.* (*Id.* at p. 10) In that the Commissioner finds such arguments were fully and fairly considered by the ALJ, they are not summarized herein.

Finally, petitioner argues that this matter should be stayed, inasmuch as the Board has made application before the Appellate Court to have the time for reconsideration of this case extended. (*Id.* at p. 12) Petitioner notes that, after receiving the initial decision from the OAL,

she has decided to join in the application, as reconsideration may clarify the Appellate Court's prior ruling and avert "further complications in this case." (*Id.* at pp. 12, 13)

Thus, petitioner concludes that the initial decision of the ALJ should be reversed. In the alternative, she urges the Commissioner to stay this matter until the Appellate Court decides the Board's application to extend the time to reopen this matter. (*Id.*)

In reply, intervenor avers that the initial decision of the ALJ was well-reasoned and should be adopted as the final decision in this matter. (Intervenor's Reply at p. 6) In this regard, intervenor asserts that Judge Masin's decision to deny petitioner's tenure claim was within the scope of the instant remand in that

> ***nowhere in the Appellate Division's decision does it state that Petitioner has a tenure entitlement to the position of Assistant Superintendent for Instructional Services in Respondent's district. The Appellate Division found only that Petitioner *may* have a tenure entitlement to that position. This issue was left unresolved pending the instant remand. (emphasis in text) (*Id.* at p. 8)

Moreover, intervenor argues that petitioner conveniently neglects to mention both the Appellate Division's order on remand to consider the "[extant] circumstances" in resolving this matter *(id.),* together with the State Board's direction to the Commissioner, on remand, to resolve this case "'***in conformity with the Appellate Division's remand, *as well as the applicable law.*'" (emphasis in text) (*Id.* at p. 9)

Secondly, intervenor argues that, contrary to petitioner's assertions, it was proper for the amendments to *N.J.S.A.* 18A:28-5 to be applied retroactively to this matter. (*Id.* at p. 11) Noting that the Commissioner has already applied the *Nelson* amendment retroactively in the matter entitled *White v. Bd. of Education of the Twp. of Bloomfield et al.*, Commissioner decision No. 299-96 (July 12, 1996), thus, preventing a tenured supervisor from claiming rights to a

principal's position in which he never served *(id.)*, intervenor rejects petitioner's contention that a retroactive application amounts to changing the "ground rules" governing this dispute. (*Id.* at p. 12) Rather, intervenor maintains that the statutory amendment

> makes it clear that contrary to Petitioner's assertion, *during the entire pendency of this litigation*, the Legislature intended that tenure be acquired in specifically enumerated positions, only if an individual has served for the requisite statutorily required period in that position. It is well established that courts are not free to disregard legislative intent. *Phillips v. Curiale*, 128 *N.J.* 608 (1992). (emphasis in text) (*Id.* at p. 13)

Intervenor next argues that any differences between the instant matter and the *Nelson* decision are insignificant and have no bearing on the outcome of this case. (*Id.* at p. 16) Intervenor notes that while there are factual differences, the "real import" of the two cases is that the Appellate Division twice "***ignored the well-established concept of 'separately tenurable' positions ***." (*Id.* at p. 17) Intervenor further points out that petitioner attained tenure as a principal, a separately tenurable position, and seeks tenure in an assistant superintendency, which is also a separately tenurable position. Thus, for petitioner to argue that *Nelson* is distinguishable is without merit. (*Id.* at p. 18)

Finally, intervenor argues that petitioner's request to stay this matter is moot because the Appellate Division has already ruled on the Board's application for reconsideration. (*Id.* at p. 20) Intervenor observes that on September 20, 1996, before the ALJ rendered an initial decision in this matter, the Board filed an application for reconsideration. However, by Court Order dated October 17, 1996, the Board's motion for reconsideration was denied. (*Id.*) Thus, intervenor concludes that petitioner's argument is moot and her request to stay this matter must be denied.

Upon careful and independent review of the record in this matter, the Commissioner affirms the conclusion of the ALJ that petitioner does not hold tenure as the Assistant Superintendent of Instructional Services in respondent's District. In so affirming, the Commissioner notes that to the extent the ALJ may have rendered findings which contradict petitioner's view of the scope of the Appellate Court's remand, the Commissioner herein determines it unnecessary to reach such findings, for the reasons set forth below.

Even assuming, *arguendo*, that this matter *had* progressed in accordance with petitioner's preference and that, on remand, the ALJ conducted a factual analysis, finding that the District's assistant superintendency for instructional services *was* the local equivalent of the regulatory assistant superintendency for curriculum and instruction, the Commissioner, nevertheless, concludes that such a determination by the ALJ would not alter his view that the amendments to *N.J.S.A.* 18A:28-5 must be applied retroactively in this matter.

The Commissioner recognizes that statutes are not generally given retroactive effect "'***unless such an intention is manifested by the Legislature in clear terms.' ***The purpose of this rule is to give people fair notice of the law that they are expected to follow.***" (citations omitted) *D.C. v. F.R.*, 286 *N.J. Super.* 589, 603 (App. Div. 1996) Three exceptions to the general rule, however, have been articulated by the New Jersey Supreme Court:

> First, a statute should be applied retroactively where the Legislature has either explicitly or implicitly expressed such an intent. *** Second, statutes said to be "ameliorative" or "curative" may be applied retroactively. *** Third, the expectations of the parties may warrant retroactive application of a statute. (*Id.* at 604, citations omitted)

The Commissioner finds that the Legislature sufficiently expressed its intent that the amendments to *N.J.S.A.* 18A:28-5 were to be retroactive. The statute indicates that it "***

shall take effect immediately and shall apply to all individuals who *have acquired tenure* pursuant to *N.J.S.A.* 18A:28-5 or any prior statute." (emphasis added) (*P.L.* 1996, *c.* 58,) Further, the Legislative findings demonstrate that the unequivocal intent of the *Nelson* statutory amendment was to *clarify N.J.S.A.* 18A:28-5, so as to maintain the traditional practice of providing that tenure is acquired in one of the specifically enumerated positions *only if* the individual has served for the statutorily required period of time. As the ALJ apply noted, the enactment was designed to be curative in nature. (Initial Decision at p. 7) "Under this exception the new statute is intended simply to explain and to clarify the existing law rather than to change the meaning of the original law. Looked at in that light, no retroactive application is necessary because the meaning of the original statute has always been the same." *Carnegie Bank v. Shalleck*, 256 *N.J. Super.* 23, 40 (App. Div. 1992), citing *Kendall v. Snedeker*, 219 *N.J. Super.* 283, 287, 530 *A. 2d* 334 (App. Div. 1987). Here, the *Nelson* amendment neither expands nor restricts the tenure rights which an employee possessed by virtue of *N.J.S.A.* 18A:28-5 in its original form; it merely clarifies the original body of rights.

Finally, the Commissioner recognizes that a statute may not be subject to retroactive application if such application would result in "manifest injustice" to the parties. *Gibbons v. Gibbons*, 86 *N.J.* 515, 523 (1981). Again, assuming, *arguendo*, that petitioner's right to the District's assistant superintendency for instructional services was found to be a fixed right prior to the Commissioner's review, such a conclusion obviously constitutes a clear departure from the traditional application of tenure laws. As such, the Commissioner cannot be persuaded that the consequences of petitioner's reliance, if any, upon such an aberrant result could possibly

be "***so deleterious and irrevocable that it would be unfair to apply the statute retroactively.***" *Gibbons* at 523, 524.

Accordingly, the Commissioner affirms the ALJ's conclusion that petitioner cannot be tenured as the Assistant Superintendent for Instructional Services in the Hamilton Township School District, "***as she has not served the requisite time in that separately tenurable position, in accordance with the requirements established in *N.J.S.A.* 18A:28-5.***" (Initial Decision at p. 8) This matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 21, 1996
DATE OF MAILING NOVEMBER 22, 1996

525-96

525-96 SEC

IN THE MATTER OF LOIS BRIDGE,	:	
PROSPECT PARK BOARD OF	:	COMMISSIONER OF EDUCATION
OF EDUCATION, PASSAIC COUNTY.	:	DECISION
	:	

November 22, 1996

IN THE MATTER OF LOIS BRIDGE, :

PROSPECT PARK BOARD OF : COMMISSIONER OF EDUCATION

OF EDUCATION, PASSAIC COUNTY. : DECISION

:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26 on or before April 30 of each year, or within 30 days of election or appointment; and

Whereas, the School Ethics Commission sent ample notice to the above-named school official of her failure to file an annual financial disclosure statement; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on July 29, 1996 the Commission issued an Order to Show Cause why the school official should not be removed for such failure; and

Whereas, the above-named school official filed no response to such Order; and

Whereas, the Commission voted on September 24, 1996, to recommend removal of the above-named school official for failure to file an annual financial disclosure statement in violation of state statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on September 25, 1996, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named school official filed no response or comments to the Commissioner regarding this sanction; and

Whereas, on October 30, 1996, the Passaic County Superintendent of Schools advised that the above-named school official filed her financial disclosure form on September 26, 1996; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, declines to adopt the Commission's recommendation that removal is warranted, in light of the school official's subsequent filing of the requisite form. Nevertheless, the Commissioner must admonish this school official for her failure to timely file the requisite financial disclosure form, in that such delay resulted in the within proceeding, which entailed needless expenditure of time and administrative and adjudicative resources by local, county, and state education officials; now therefore

IT IS ORDERED that the above-named school official is suspended from office for a period of one month, as of the date of the Board's receipt of this decision.

COMMISSIONER OF EDUCATION

November 22, 1996
Date of Mailing, November 22, 1996

526-96

526-96 SEC

IN THE MATTER OF JANICE TAYLOR,	:	
BOARD OF EDUCATION OF THE CITY	:	COMMISSIONER OF EDUCATION
OF CAMDEN, CAMDEN COUNTY.	:	DECISION
_____	:	

NOVEMBER 22, 1996

SCHOOL ETHICS COMMISSION	:	
	:	
v.	:	
	:	
Janice Taylor	:	**RESOLUTION**
Camden City Board of Education	:	
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was created to ensure and preserve public confidence and set specific standards to guide the conduct of school officials; and

WHEREAS, in furthering the purpose of the Act, the Legislature required that each school official annually file a disclosure statement indicating income received, relatives employed by the district, fees and honorarium, gifts, and business organizations in which he or she has an interest; and

WHEREAS, the Act requires that such statements be filed on or before April 30 of each year or within 30 days of election or appointment; and

WHEREAS, the School Ethics Act became effective on April 15, 1992; and

WHEREAS, the Legislature charged the School Ethics Commission with the responsibility of enforcing the Act; and

WHEREAS, the Commission forwarded financial disclosure forms to the county superintendents for distribution to the school officials in each district; and

WHEREAS, on July 29, 1996, the Commission sent Orders to Show Cause to all school officials who were required to, but had not yet filed disclosure statements; and

WHEREAS, Janice Taylor filed a response to the Order indicating that she had filed her statement with the Camden City Board; and

WHEREAS, the County Superintendent's Office has no record of the filing and confirmed that Ms. Taylor did not file the statement with the Camden City Board; and

WHEREAS, Janice Taylor received the Order, but still has not filed a disclosure statement as required by the Act;

NOW THEREFORE BE IT RESOLVED that the Commission finds Janice Taylor to be in violation of N.J.S.A. 18A:12-26 of the School Ethics Act and further finds that the appropriate penalty for such a violation is removal; and

BE IT FURTHER RESOLVED that the Commission hereby recommends that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: 9/24/96

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on September 24, 1996.

Lisa James-Beavers
Executive Director

PCG/LJB/ktc(96fdsres.doc)

IN THE MATTER OF JANICE TAYLOR, :

BOARD OF EDUCATION OF THE CITY : COMMISSIONER OF EDUCATION

OF CAMDEN, CAMDEN COUNTY. : DECISION

:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26 on or before April 30 of each year, or within 30 days of election or appointment; and

Whereas, the School Ethics Commission sent ample notice to the above-named school official of her failure to file an annual financial disclosure statement; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on July 29, 1996, the Commission issued an Order to Show Cause why the school official should not be removed for such failure; and

Whereas, the above-named school official filed a response, dated August 26, 1996, indicating that she had filed her financial disclosure statement with the Board Secretary at the Camden City Board of Education with the expectation that a copy of such statement would, in turn, be forwarded to the Camden County Superintendent's Office; and

Whereas, the Commission voted on September 24, 1996, to recommend removal of the above-named school official for failure to file an annual financial disclosure statement in violation of state statute, noting that the Camden County Superintendent's Office had no record of the filing, and that such office further confirmed that the above-named school official did not file a

the filing, and that such office further confirmed that the above-named school official did not file a statement with the Camden City Board of Education, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter, dated September 25, 1996, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response has been filed with the Commissioner of Education; and

Whereas, on October 31, 1996, the Camden County Superintendent of Schools advised that the above-named school official filed her annual financial disclosure form on October 1, 1996, with an explanation of its lateness; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, declines to adopt the Commission's recommendation that removal is warranted, in light of the school official's subsequent filing of the requisite form. Nevertheless, the Commissioner must admonish this school official for her failure to timely and correctly file the requisite financial disclosure form, in that such delay resulted in the within proceeding which entailed needless expenditure of time and administrative and adjudicative resources by local, county, and state education officials; now therefore

IT IS ORDERED that the above-named school official is suspended from office for a period of two days, without pay, as of the date of the Board's receipt of this decision.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22,1996

527-96

527-96 SEC

IN THE MATTER OF	:	
MARGUERITE FOSTER,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
_____	:	

NOVEMBER 22, 1996

SCHOOL ETHICS COMMISSION	:	
	:	
v.	:	
	:	
Marguerite Forster	:	**RESOLUTION**
Newark Board of Education	:	
Essex County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was created to ensure and preserve public confidence and set specific standards to guide the conduct of school officials; and

WHEREAS, in furthering the purpose of the Act, the Legislature required that each school official annually file a disclosure statement indicating income received, relatives employed by the district, fees and honorarium, gifts, and business organizations in which he or she has an interest; and

WHEREAS, the Act requires that such statements be filed on or before April 30 of each year or within 30 days of election or appointment; and

WHEREAS, the School Ethics Act became effective on April 15, 1992; and

WHEREAS, the Legislature charged the School Ethics Commission with the responsibility of enforcing the Act; and

WHEREAS, the Commission forwarded financial disclosure forms to the county superintendents for distribution to the school officials in each district; and

WHEREAS, on July 29, 1996, the Commission sent Orders to Show Cause to all school officials who were required to, but had not yet filed disclosure statements; and

WHEREAS, by September 24, 1996, Marguerite Forster had not filed a response to the Order; and

WHEREAS, Marguerite Forster received the Order, but still has not filed a disclosure statement as required by the Act;

NOW THEREFORE BE IT RESOLVED that the Commission finds Marguerite Forster to be in violation of N.J.S.A. 18A:12-26 of the School Ethics Act and further finds that the appropriate penalty for such a violation is removal; and

BE IT FURTHER RESOLVED that the Commission hereby recommends that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini/LJB

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: 9/24/96

I certify that the within Resolution was duly adopted by the School Ethics Commission at its Public Meeting on September 24, 1996.

Lisa James-Beavers
Executive Director

PCG/LJB/ktc(96fdsres.doc)

IN THE MATTER OF	:	
MARGUERITE FOSTER,	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26 on or before April 30 of each year, or within 30 days of election or appointment; and

Whereas, the School Ethics Commission sent ample notice to the above-named school official of her failure to file an annual financial disclosure statement; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on July 29, 1996, the Commission issued an Order to Show Cause why the school official should not be removed for such failure; and

Whereas, the above-named school official did not file a response to said Order; and

Whereas, the Commission voted on September 24, 1996, to recommend removal of the above-named school official for failure to file an annual financial disclosure statement in violation of state statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated September 25, 1996, the above-named school official was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, on October 9, 1996, the above-named school official filed comment with the Commissioner, indicating that a copy of her financial statement was submitted to the State-operated School District of the City of Newark and further providing reason for the delay in such filing; and

Whereas, on October 9, 1996, the State-operated School District of the City of Newark confirmed that the above-named school official, indeed, filed her financial disclosure form on September 26, 1996, and that such form was forwarded to the Essex County Superintendent's Office; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and, having done so, declines to adopt the Commission's recommendation that removal is warranted, in light of the school official's subsequent filing of the requisite form. Nevertheless, the Commissioner must admonish this school official for her failure, even under the circumstances described, to timely file the requisite financial disclosure form, in that such delay resulted in the within proceeding, which entailed needless expenditure of time and administrative and adjudicative resources by local, county, and state education officials; now therefore

IT IS ORDERED that the above-named school official is suspended from office for a period of one day, without pay, as of the date of the Board's receipt of this decision.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

528-96

528-96

DOROTHY CARR-LAURENT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 22, 1996

OAL DKT. NO. EDU 11227-95
AGENCY DKT. NO. 359-9/95

DOROTHY CARR-LAURENT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 22, 1996
DATE OF MAILING NOVEMBER 22, 1996

530-96

BOARD OF EDUCATION OF THE TOWNSHIP OF LOGAN, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought to sever its sending-receiving relationship with respondent Board.

ALJ found that the termination of the sending-receiving relationship between petitioner and respondent would not result in any substantial negative racial, educational, or financial impact. Thus, pursuant to *N.J.S.A.* 18A:38-13, the ALJ approved the withdrawal from the relationship.

Commissioner adopted findings and determination in initial decision as his own. Petitioner's application for severance from its sending-receiving relationship was granted with withdrawal being phased out over a four-year period, commencing with the 1997-98 school year beginning September 1997.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4320-95

AGENCY REF. NO. 69-3/95

BOARD OF EDUCATION OF LOGAN, GLOUCESTER COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,

Respondent.

Raymond J. Zane, Esq., for petitioner, (Zane & Lozuke, attorneys)

John J. Matheussen, Esq., for respondent, (Matheussen, Marquess & Morrison, attorneys)

Record Closed: August 30, 1996 Decided: October 8, 1996

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Township of Logan (Logan Board) is in a sending-receiving relationship with the Board of Education of Paulsboro (Paulsboro Board) and the Board of Education of the Kingsway Regional School District to provide educational services to its

pupils in grades nine through twelve. The Logan Board seeks an order from the Commissioner of Education (Commissioner) to terminate its sending-receiving relationship with the Paulsboro Board. The Paulsboro Board objects.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Six days of hearing were held at the Fairfield Township Municipal Court, the Paulsboro Borough Municipal Court, the Bridgeton City Municipal Court and the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey.

BACKGROUND FACTS

The following background facts were adduced from the pleadings, testimony and documents presented into evidence at the hearing and are hereby adopted, in part, as my **FINDINGS of FACT** in this matter.

The Logan Board operates an elementary school district in one physical school plant, grades kindergarten through eight. The school building is located on a 46 acre site and was completed in 1991. Prior to 1991, pupils in kindergarten through grade three attended what was then known as the Bridgeport School in Logan Township while grades four through eight attended school in a leased facility known as the Nehaunsey School located in the township to the north of Logan Township.

Logan Township is located in the northwest corner of Gloucester County, New Jersey. It is bound on the northeast by Greenwich Township, on the southeast by Woolwich Township, on the southwest by Salem County, and on the northwest by the Delaware River. The sending-receiving relationships between the Logan Board, the Paulsboro Board, the Kingsway Board and where the boundary lines determining which school the Logan pupils attended were developed many years ago for reasons that no longer remain clear. Logan Township was, in the not too distant past, primarily agricultural in nature and the families which resided south of Raccoon Creek were, for the most part, farmers. At that time, Logan pupils attended Swedesboro High School, which offered, among other things, an agricultural program. Swedesboro no longer

operates a high school. Its pupils now attend Kingsway Regional High School together with pupils from Logan Township, East Greenwich Township, South Harrison Township and Woolwich Township.

Pupils who live in the area of Logan Township known as Bridgeport attend Paulsboro High School. Bridgeport was once the population center of the township. There are three distinct areas of the township where the pupils attend Kingsway Regional High School. The largest of the three is known as the Bennett tract and represents the shift in population away from Bridgeport. The two other areas of the township where the pupils attend Kingsway appear to be triangles invading the Bridgeport, or Paulsboro sending portion of the school district. The triangles to Kingsway are separated by geographic areas where pupils are sent to Paulsboro.

In the 1994-95 school year, the Logan Board had 274 pupils attending two high schools to which it paid tuition; i.e., 36 pupils attended Paulsboro High School seven miles to the north, and 238 pupils attended Kingsway Regional High School three miles to the east of Logan Township. Pursuant to N.J.S.A. 18A:38-8.2.a.(2) the Logan Board has one representative on the Kingsway Regional Board. However, because Logan, as a sending district, has less than ten percent of the total enrollment of the pupils attending Paulsboro High School, the receiving district, it has no representation on the Paulsboro Board pursuant to N.J.S.A. 18A:38-8.2.a.(1).

In 1960, the population of Logan Township, according to the census, was 1,924 people, in 1980 the census was 3,078 and the 1990 census places the population of Logan Township at 5,147 people. Since 1990, 195 additional building permits have been issued and it is projected within the next five years an additional 340 building permits will be issued. All of the growth that has taken place in housing since 1960, and that which was projected through to the year 2000, is located south of the Raccoon Creek, the area designated as the sending area for Kingsway Regional High School.

The population growth of the municipalities which compose the sending and/or constituent districts to Kingsway Regional High School, excluding Logan Township, are shown as follows:

Years	1960	1980	1990
East Greenwich	2,722	4,144	5,258
South Harrison	974	1,486	1,919
Swedesboro	2,449	2,030	2,024
Woolwich	1,235	1,129	1,459

The Logan Board and the Kingsway Board have engaged in preliminary discussions with respect to permitting Logan to join the Kingsway Regional School District as a constituent school district rather than a sending district. No formal action has been taken by either party to formalized the regionalization process. The Logan Board now seeks to sever its sending-receiving relationship with the Paulsboro Board in order that all of the Logan pupils will attend one high school where the Logan Board will have representation with Kingsway Regional High School in a complete sending-receiving relationship. In order for Logan to accomplish this task, it must meet the statutory provisions of N.J.S.A. 18A:38-13.

The withdrawal from Paulsboro and a change of designation of a high school to Kingsway Regional for the Logan Township pupils is controlled by N.J.S.A. 18A:38-13, which provides as follows:

> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law, shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the

requested change in designation or allocation if no substantial negative impact will result therefrom.

The Logan Board has completed its feasibility study, as required by statute. Donald E. Beineman, Ed.D., former Superintendent of the Camden County Schools, New Jersey Department of Education, conducted the feasibility study and published his work entitle, "A Study of the Feasibility of Withdrawing Logan Township Pupils from Paulsboro High School." The Logan Board relies, in major part, upon Dr. Beineman's report in support for its application to terminate the sending-receiving relationship with the Paulsboro Board.

SUMMARY OF THE PARTIES POSITIONS

EDUCATIONAL IMPLICATIONS

The record demonstrates that there has been an ongoing articulation program between Logan and Kingsway through a Regional Curriculum Planning Committee (RCPC) composed of staff members and administrators from both school districts. A purpose of the RCPC is to offer well sequenced and well ordered courses of study between the two schools to diminish the problems of transition from grade eight at Logan to grade nine at Kingsway. There is no such ongoing program between Logan and Paulsboro. The incident of articulation between Logan and Paulsboro has been informed and infrequent, rather than structured and ongoing.

There are some course offerings which differ between the two high schools. Latin I is offered at the eighth grade level at Logan and a pupil may continue his/her study of Latin at Kingsway. However, Paulsboro does not offer Latin. Kingsway also offers more college level advance placement (AP) courses than Paulsboro. While Paulsboro offers AP calculus, Kingsway offers AP in calculus, English literature, English composition I and II, United States history and physics. Kingsway offers four years of Latin and five years each of Spanish and French, while

Paulsboro offers two years of French and three years of Spanish. Kingsway offers six art courses not available at Paulsboro. Paulsboro, on the other hand offers four years of art with an Art Gifted and Talented program which is not available at Kingsway. Paulsboro offers Advanced Office Technology I and II and Advanced Computer Applications which are not offered by Kingsway.

A comparison of test results shows that the eighth grade pupils from the three school districts performed as follows on the Early Warning Test (EWT). The purpose of the EWT is to identify and provide remediation for eighth grade pupils moving into high school in order that they succeed with all the requirements and graduate from high school. The median scores of the EWT for 1995 are as follows:

School	Reading	Mathematics	Writing	
Logan	157.8	148.8	187.3	
Kingsway	148.4	136.5	156.7	
Paulsboro	136.1	129.8	130.5	(P-11)

The EWT results of percentage of pupils passing:

Logan	100.0	92.2	100.0	
Kingsway	94.9	82.1	87.8	
Paulsboro	88.6	82.6	77.1	(P-12)

The State Board of Education requires that each pupil in the eleventh grade take and pass a High School Proficiency Test (HSPT) in order to graduate. Special education pupils are exempt. The HSPT scores for Kingsway and Paulsboro for the 1992-93 and 1993-94 school year are as follows:

School	Year	Reading	Mathematics	Writing	Percentage Passing
Kingsway	1993	374.4	376.4	370.9	73.6
Paulsboro	1993	355.7	371.9	359.8	70.0

Kingsway	1994	374.5	389.4	355.1	77.4
Paulsboro	1994	351.9	363.5	335.9	63.1 (P-9)

A comparison of the Scholastic Aptitude Test (SAT) between Kingsway and Paulsboro with the New Jersey State average is shown below for 1995.

School	Verbal	Mathematics
Kingsway	422	478
State Average	418	481
Paulsboro	377	442 (P-10)

The percentage of pupils attending four year colleges and universities subsequent to high school graduation is shown for the graduating classes of 1992 through 1995. It also shows the percentage of Logan pupils attending Kingsway and Paulsboro who go on to four year institutions following graduation.

School	1992	1993	1994	1995
Paulsboro Total	20.0	28.0	28.0	34.0
Kingsway Total	38.0	41.0	32.0	42.0
Logan at Paulsboro	16.0	12.5	37.5	17.0
Logan at Kingsway	68.0	53.0	65.0	72.5 (P-20)

Dr. Beineman opines that the EWT demonstrates that Logan is producing a better product as evidenced by the test results. He further opines that all of the above test data reflects sufficient evidence for the Logan Board to petition the Commissioner to provide the opportunity for its pupils to attend Kingsway Regional High School.

The Paulsboro Board counters Dr. Beineman's opinion by first observing that Paulsboro is classified in the District Factor Group (DFG) as an "A" on a scale from "A" to "J." A DFG - "A" is the lowest socio-economic rating for a school district while a "J" school district is the wealthiest. It means, among other things, the school district has a high incident of welfare cases, where the school provides free and reduced price lunches to its pupils. A DFG - "A" designation

is the next closest classification to a special needs school district, i.e., Camden, Newark, among 28 others. It contends that Kingsway Regional High School has a DFG of "D-E."

Paulsboro contends that its pupils compare favorably with Kingsway Regional pupils in its attendance at school. It asserts that DFG - "A" classified schools traditionally have lower pupil attendance than the other classifications. It observes that each high school must maintain a 90 percent attendance for the last three years and the average for the State of New Jersey has been 91.6 percent. The following chart shows the percentage of pupil attendance for Paulsboro High School and Kingsway Regional High School for the school years 1992-93 through 1995-96.

	PAULSBORO DFG "A'"		**KINGSWAY DFG "D-E"**	
	Paulsboro	**State**	**Kingsway**	**State**
1995-96	92.3	91.6	93.0	91.6
1994-95	93.1		93.5	
1993-94	89.6		93.7	
1992-93	91.1		93.7	
Average	91.5		93.5	

(R-9)

Paulsboro contends that its pupil attendance is comparable to Kingsway although they have significantly different DFG's.

In a comparison of the 1995 Iowa Test of Educational Development (Iowa) for all Paulsboro High School pupils and Logan Township pupils attending Paulsboro High School, the mean test scores appear to be similar as demonstrated by the chart below:

TEST	PAULSBORO HIGH SCHOOL	LOGAN TOWNSHIP STUDENTS ATTENDING PAULSBORO H.S.
Mathematics	61.2	62.9
Reading	57.6	55.3
Language	57.6	57.4

(R-8)

The following illustration is a comparison of Paulsboro High School to Kingsway High School and the percentage of pupils who passed the HSPT in grade eleven. It also compares the DFG with the State average for the 1992-93 school year.

	PAULSBORO DFG "A"			KINGSWAY DFG "D-E"		
	Paulsboro	**DFG**	**State**	**Kingsway**	**DFG**	**State**
Mathematics	84.8	47.6	82.4	81.0	86.7	82.4
Reading	80.0	55.0	84.4	86.8	89.0	84.4
Writing	91.3	75.1	92.8	92.4	96.0	92.8

(R-10)

Similarly, the following chart makes the comparison for the school years 1993-94 through 1995-96 of the percentage of the pupils passing the HSPT at the end of grade eleven, excluding pupils exempt from taking the HSPT, i.e., special education, educationally disabled pupils, among others.

	PAULSBORO HIGH SCHOOL			KINGSWAY REGIONAL HIGH SCHOOL		
	1994	1995	1996	1994	1995	1996
Mathematics	98.8	96.4	98.0	93.0	97.5	98.9
Reading	91.7	96.4	98.0	88.0	98.1	98.9
Writing	96.4	87.5	99.0	93.9	100.0	100.0

(R-11)

Paulsboro asserts it serves potentially 120 pupils in courses it offers but not offered to Kingsway pupils, as compared to 23 pupils potentially served at Kingsway with courses not offered to Paulsboro pupils. Every Paulsboro pupil is required to take at least one course in computers but there is no such requirement at Kingsway.

RACIAL IMPLICATIONS

Dr. Beineman's report sets forth the following analysis of the racial impact upon Paulsboro High School in the event Logan pupils withdraw from the sending-receiving relationship.

RACIAL/ETHNIC COMPOSITION OF PAULSBORO HIGH SCHOOL 1994-95*

Category	Number	Percent
White	353	74.32
Black	111	23.37
Hispanic	9	1.89
American Indian/ Alaskan Native	0	0
Asian/Pacific Island	2	.42
Total	475	100.

*Does not include special education pupils

RACIAL/ETHNIC COMPOSITION OF PAULSBORO HIGH SCHOOL WITHOUT LOGAN STUDENTS - 1994-95*

Category	Number	Percent	Percent Change
White	317	72.21	-2.11
Black	111	25.28	+1.91
Hispanic	9	2.05	+0.16
American Indian/ Alaskan Native	0	0	0
Asian/Pacific Island	2	.46	+0.04
Total	439	100.	

*Does not include special education pupils.

(P-7)

Dr. Beineman asserts that if all Logan pupils were withdrawn from Paulsboro High School at the same time, the percentage of black pupils in the high school population would increase by 1.91 percent to a total of 25.28 percent.

Dr. Beineman continues to observe that if one were to project the enrollment of all districts attending Paulsboro High School by moving up each grade level into grades 9-12 while eliminating those students who would be graduate, the following is an approximation of the racial/ethnic make-up of the student population for each of the next four years.

1994-95*

Category	Number	Percent
White	353	74.32
Black	11	23.37
Hispanic	9	1.89
American Indian/ Alaskan Native	0	0
Asian/Pacific Island	2	.42
Total	475	100.

*Does not include special education pupils.

1995-96

Category	Number	Percent
White	376	72.59
Black	127	24.52
Hispanic	12	2.31
American Indian/ Alaskan Native	0	0
Asian/Pacific Island	3	.58
Total	518	100.

1996-97

Category	Number	Percent
White	381	71.48
Black	136	25.52
Hispanic	12	2.25
American Indian/ Alaskan Native	0	0
Asian/Pacific Island	4	.75
Total	533	100.

1997-98

Category	Number	Percent
White	410	70.57
Black	154	26.51
Hispanic	14	2.40
American Indian/ Alaskan Native	0	0
Asian/Pacific Island	3	.52
Total	581	100.

1998-99

Category	Number	Percent
White	398	70.82
Black	153	27.22
Hispanic	11	1.96
American Indian/ Alaskan Native	0	0
Asian/Pacific Island	0	0
Total	562	100.

(P-7)

Dr. Beineman concludes that:

> Over a period of four years, the percentage of black students in Paulsboro High School will change from 23.27% in 1994-95 to approximately 27.22% in 1998-99, or double the percentage increase that would occur if Logan pupils were to withdraw at the end of the current year. This increase will be due largely to the number of black students in grades 5-8 in the Paulsboro schools moving into the high school.
>
> It is evident that the percentage of black students in Paulsboro High School will increase whether or not Logan pupils remain in the school.
>
> (P-7)

Paulsboro also observes that its minority population will increase while the percentage of its white pupil population will decrease. It sets forth a comparison of racial balance between Paulsboro High School and Kingsway Regional High School as of October 15, 1995, in grades nine through twelve:

PERCENTAGE OF STUDENTS BY RACE

KINGSWAY

	White	Black	Other
Status Quo Logan	83.7	12.9	3.4
All Logan Attend Kingsway	84.4	12.1	3.5

Difference	+0.7	-0.8	+0.1

PAULSBORO

	White	Black	Other
Status Quo Logan	69.1	29.1	1.8
All Logan Attend Kingsway	67.0	31.4	1.6
Difference	-2.1	+2.3 (R-16)	-0.2

Paulsboro asserts that it, Greenwich Township and Logan Township could form a regionalized or consolidated school district. In so doing, the Paulsboro High School would enroll a pupil population of approximately 3,000 pupils. There has been no formal feasibility study, however, informally Paulsboro has determined that there is some underutilized building space. It admits that additional building space would be required to meet the expanded demand. It contends, moreover, that such an arrangement would be cost effective and would work economically.

FINANCIAL IMPLICATIONS

Logan asserts that in the event it is permitted to withdraw from the sending-receiving relationship there would be no significant reduction of the Paulsboro High School staff. It asserts that Paulsboro would lose $6,696 per pupil or, a total loss in revenues of $267,840 in tuition. That is, $6,696 times 40 pupils. However, a gradual or staged withdrawal over a four year span of time would lessen the financial impact. The Logan Board applied the estimated tuition of $6,696 for the 1996-97 school year and set forth the following cumulative effect in a four year staged withdrawal and the tax implications for Paulsboro:

1996-97	35 pupils equals $19,505 loss to Paulsboro results in a .82 cents increase in tax rate;
1997-98	23 pupils remaining would result in $69,954 in loss with a 2.06 cent increase in taxes to Paulsboro;
1998-99	12 pupils remaining would be a $114,336 in loss with a 1.98 cent increase increase in taxes;
1999-2000	no pupils remain. $167,400 in loss to Paulsboro with a 2.255 cent net increase in taxes to the sending district.

Logan asserts that its withdrawal from the sending-receiving relationship would result in an increase of 7.41 cents in taxes per $100 valuation for Paulsboro over the four periods of the withdrawal. It observes, moreover, that the Paulsboro current expense budget on June 30, 1992, shows an estimated balance of $559,440. For the 1993-94 budget year the Paulsboro Board appropriated $77,689 to reduce the tax rate which should have left remaining, $481,761. However, at the conclusion of the 1993-94 budget year, Logan asserts that Paulsboro ended with a balance of $2,178,999. It further asserts that the balance from the audited 1994-95 budget was $1,243,076 or, $700,000 more than estimated. A total of $736,034 was applied to reduce the local tax rate.

Logan contends that with such balances there will be no significant fiscal impact on Paulsboro with the withdrawal of 40 Logan pupils over the next four years. In addition, Logan contends, if the withdrawal plan is implemented, Paulsboro would receive an increase in State aid. Logan further asserts that its withdrawal will have no impact on Paulsboro's educational program. Paulsboro will, however, have to make a determination as to whether it will offer courses where the class enrollment may fall below ten pupils.

Paulsboro counters by asserting it will lose $275,000 in regular tuition revenues if Logan is permitted to withdraw, plus an additional loss of $34,000 in special education tuition which was not accounted for in the Logan Board's calculations. It further asserts that the average tuition

cost per Logan pupil is now $6,705, which includes special education pupils, rather than the $6,696 per pupil used by Logan to arrive at its total cost of loss to Paulsboro. The Paulsboro Board will charge the Logan Board $301,729 for tuition for the 1996-97 school year.

The Paulsboro Board disputes Dr. Beineman's calculations with respect to the impact upon its tax rate under a withdrawal of Logan pupils. It contends that the effect would be a 13 cent increase in the tax rate if all the pupils were withdrawn in one year. It asserts that the withdrawal will have an cumulative effect where, at the end of four years, the loss to Paulsboro will be $1,200,000.

Paulsboro Board contends that the $300,000 plus loss of revenues by way of tuition from Logan would be devastating. It asserts that the voters rejected its budget with an increase of .07 cents for the 1995-96 budget year. Again, for the 1996-97 budget year the voters rejected its proposed .04 cent increase.

On cross-examination, Paulsboro revealed that it owed Logan $62,000 in overcharged tuition payments and did not adjust the $301,729 when it calculated its loss of tuition revenue. Now, it asserts, that the loss would be only $240,000 for the first year if the total withdrawal occurred in one year. Therefore, the loss is reduced by 20 percent or by .06 cents for the first year tax rate. Paulsboro further admits that some of the $240,000 loss in tuition from Logan would be made up through increased tuition to Greenwich Township.

The Paulsboro Board further concedes that on June 30, 1995, its 1994-95 budget shows a balance of $1,542,965. The subsequent audit, however, shows a $2,595,049 balance. Its 1996-97 budget reflected an unexpended amount of $1,500,000 rather than the actual $2,500,000. Of the $2,500,000 unexpended funds, $848,120 was applied to its revenue side of the budget to reduce the tax rate for 1995-96. The remaining $1,800,000 is reserved for its subsequent budget.

DISCUSSION AND CONCLUSIONS

The evidence clearly demonstrates that the Logan Township is divided into four unequal parts for the purpose of its long standing sending-receiving relationships with the Paulsboro Board and the Kingsway Regional Board. The facts also show an unequal distribution of Logan pupils between the two high schools. Of the approximately 278 Logan pupils attending grades nine through twelve during the 1994-95 school year, approximately 40 of those pupils attended Paulsboro while the remaining 238 attended Kingsway Regional High School. The percentage of distribution of Logan pupils for 1994-95 was approximately 15 percent attending Paulsboro and 85 percent attending Kingsway Regional High School.

The evidence also demonstrates that, pursuant to N.J.S.A. 18A:38.8-2.a(2), the citizens of Logan Township will maintain a membership on the Kingsway Regional High School Board where it will have legal representation and in-put with regard to the quality of education of its pupils. Logan Township does not qualify for such representation on the Paulsboro Board. Consequently, its considerations for educational programs is limited to its school administration and staff members to persuade the Paulsboro school administration and/or Board to address Logan's educational concerns.

The quality of education offered by the Paulsboro High School is not in question or at issue. The evidence reveals that it offers a diversity of courses and a comprehensive educational program. Kingsway Regional High School, on the other hand, also provides such diversity and comprehension. Kingsway provides the opportunity for Logan pupils to continue their study of Latin from grade eight while Paulsboro does not. Kingsway offers more years of other foreign languages; i.e., five years of Spanish and French while Paulsboro offers two years of French and three years of Spanish. Kingsway also offers more college level AP courses than Paulsboro. Paulsboro offers AP calculus while Kingsway provides AP in calculus, English literature, English composition I and II, United States history and physics. The record shows that there would be no significant impact upon the Paulsboro High School educational program with the withdrawal of the 40 Logan pupils from Paulsboro over a four year withdrawal period. I so **CONCLUDE.**

A significant consideration for the termination of a sending-receiving relationship is "... the effect on the racial composition of the pupil population of each of the districts." N.J.S.A. 18A:38-13. Our courts observe that "... the mandate of N.J.S.A. 18A:38-13 that racial balance is an important consideration in evaluating the potential destabilizing effect on severance. Indeed, that language was engrafted onto the statute specifically to avoid withdrawals for discriminatory purposes which would have the effect of recreating segregated schools systems with their inherent inequality of educational opportunity." Englewood Cliffs v. Englewood, 257 N.J. Super. 413, 464 (App. Div. 1992); appeal granted 130 N.J. 590 (1993); appeal granted 130 N.J. 590 (1993); cert. granted 130 N.J. 600 (1993); aff'd. 132 N.J. 327 (1993); cert. den. 114 S. Ct. 547, 126 L. Ed. 449. There has been no showing in the instant matter that there is any potential racial destabilizing effect upon Paulsboro High School with the gradual withdrawal of the Logan pupils from the sending-receiving relationship. The effect, if any, is minimal and in no manner would have the effect of creating a segregated school system. The percentage of increase in black pupils in the Paulsboro High School over a four year period of withdrawal would be less than four percent.

I **CONCLUDE** that there has been no showing of a negative or significant impact upon the Paulsboro High School educational program with the withdrawal of the Logan pupils. Nor has there been a showing that Logan's application to withdraw from the Paulsboro sending-receiving relationship is for discriminatory purposes. I **CONCLUDE** that the statutory imperative has been met with regard to the effect of the racial composition of the pupil population of each of the school districts and that the withdrawal should be allowed. Englewood Cliffs v. Englewood, supra.

With regard to the financial implications, the record demonstrates that Paulsboro has managed to create substantial unexpended balances over and above Logan's tuition payments during the course of the past few years. Notwithstanding that Paulsboro would lose approximately $267,840 in tuition over the next four years with a gradual withdrawal of the Logan pupils, it has ended with balances of $2,178,999 at the end of the 1993-94 budget year and $1,243,076 for the audited 1994-95 budget year.

Although Paulsboro argues that its loss in tuition revenue is cumulative, it also admits that some part of that loss will be recouped with increase tuition costs to the other sending school districts to its high school. The potential also exists that Paulsboro may be entitled to additional State financial aid. I **CONCLUDE** that while the Paulsboro Board will lose tuition revenues as a consequence of the Logan pupils withdrawal from its high school over a period of four years, the loss is insignificant given the Paulsboro Board's present financial condition. It is also projected that the Paulsboro Board may recoup part of the lost Logan tuition through increased tuition payments from the remaining sending districts as well as increased State financial aid.

Based upon all of the foregoing, I **CONCLUDE** that the Logan Board has establish that no substantial negative impact will result in its gradual withdrawal from its sending-receiving relationship with the Paulsboro Board. I **CONCLUDE,** therefore, that the withdrawal should be approved.

ORDER

Accordingly, it is **ORDERED** that the Logan Township Board withdraw its pupils from the Paulsboro Board's High School, over a four year period, commencing with the 1997-98 school beginning September 1997. Those pupils completing the Logan Board's eighth grade in June 1997 will be assigned to the Kingsway Regional High School rather than the Paulsboro High School. Each succeeding eighth grade class will do likewise until the termination of the sending-receiving relationship with the Paulsboro Board is complete.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8 October 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10/15/96
DATE

N/A
DEPARTMENT OF EDUCATION

OCT 16 1996
DATE

Mailed to Parties:

Barbara A Hennel
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

JOHN R. HERBST

PATRICIA MEILUTA

DONALD E. BEINEMAN

KATHLEEN MINIS

DIANE WARREN

CONSTANCE McCART

FOR RESPONDENT:

ANTONETTE RATH

KATHLEEN STETSER

JOSEPH CONNORS

WALTER QUINT

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 MAP OF LOGAN TOWNSHIP
P-2 BOARD MINUTES
P-3 PUBLIC AFFAIRS INSTITUTE REPORT PP-33-34; P. 74
P-4 REGIONALIZATION FEASIBILITY STUDY - AUGUST 1995
P-5 NJ DOE
P-6 CHILD STUDY PERSONNEL
P-7 A STUDY OF THE FEASIBILITY
P-8 REPORT CARD - PAULSBORO
P-9 HSPT SCORES 1993-94
P-10 SAT SCORES 1995
P-11 EWT MEAN SCORES 1995
P-12 EWT RESULTS % PASSING
P-13 1993-94 BUDGET PAULSBORO
P-14 1994-95 BUDGET PAULSBORO

P-15 NJDOE SURVEY REPORT FOR SCHOOL YEAR 1995-96
P-16 CURRICULUM MATRIX
P-17 MINUTES JANUARY 27, 1993, ARTICULATION MEETING - PAULSBORO
P-18 COMPUTER AVAILABILITY FOR STUDENTS USE
P-19 COURSE AVAILABILITY
P-20 PERCENT OF STUDENTS ATTENDING COLLEGE
P-21 LETTER FROM DOE, MARCH 13, 1996 TO KINGSWAY AND LOGAN
P-22 PAULSBORO 1995-96 BUDGET

FOR RESPONDENT:

R-1 REPORT
R-2 CHART
R-3 NJDOE REPORT JULY 7, 1993
R-4 QUALITY ASSURANCE REPORT
R-5 APRIL 12, 1994, MEMO FROM McCANT RCPC MEETING
R-6 OCTOBER 16, 1995, MEMO FROM McCANT RCPC MEETING
R-7 COMPARISON OF CST PERSONNEL PAULSBORO AND KINGSWAY REGIONAL
R-8 NOT IN EVIDENCE
R-9 COMPARISON OF PAULSBORO HIGH SCHOOL AND KINGSWAY REGIONAL HIGH SCHOOL - ATTENDANCE RECORD
R-10 HSPT COMPARISON OF PAULSBORO-KINGSWAY 1993
R-11 HSPT COMPARISON OF PAULSBORO-KINGSWAY 1994, 1995, 1996
R-12 GRADUATE PLANS - COMPARISON PAULSBORO-KINGSWAY
R-13 COMPARISON OF COURSES
R-14 PAULSBORO HIGH SCHOOL TECHNOLOGY
R-15 KINGSWAY HIGH SCHOOL
R-16 COMPARISON OF RACIAL BALANCE - KINGSWAY-PAULSBORO

OAL DKT. NO. EDU 4320-95

BOARD OF EDUCATION OF THE TOWNSHIP OF LOGAN, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that the termination of the sending-receiving relationship between Logan and Paulsboro will not result in any substantial negative racial, educational, or financial impact. As such, pursuant to *N.J.S.A.* 18A:38-13, severance of the relationship must be granted.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter, for the reasons expressed therein. Logan's application for severance from its sending-receiving relationship with Paulsboro is hereby granted, with withdrawal being phased out over a four-year period, commencing with the 1997-98 school year beginning September 1997.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 29, 1996
DATE OF MAILING NOVEMBER 29, 1996

530-96

EDU #4320-95
C # 530-96
SB # 95-96

BOARD OF EDUCATION OF THE TOWNSHIP OF LOGAN, GLOUCESTER COUNTY,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 29, 1996

Decision on motion by the Commissioner of Education, January 14, 1997

For the Petitioner-Respondent, Zane & Lozuke (Raymond J. Zane, Esq., of Counsel)

For the Respondent-Appellant, Dilworth, Paxson, Kalish & Kauffman (Suzette D. Bonfiglio, Esq., of Counsel)

The Board of Education of the Borough of Paulsboro (hereinafter "Paulsboro") seeks a stay of the Commissioner of Education's decision of November 29, 1996 in this matter. In his decision, the Commissioner concurred with the findings and conclusion of the Administrative Law Judge (ALJ) that termination of the sending-receiving relationship between Paulsboro and the Board of Education of the Township of Logan (hereinafter "Logan") would not result in any substantial negative impact with respect to

4/2/97

the educational and financial implications for the districts involved, or on the quality of education and the racial composition of the affected districts. Accordingly, the Commissioner adopted the ALJ's determination granting severance of the relationship pursuant to N.J.S.A. 18A:38-13. By letter decision dated January 14, 1997, the Commissioner denied Paulsboro's motion for a stay of that decision.

In support of its motion to the State Board, Paulsboro contends that it will suffer irreparable harm as a result of the loss of tuition for the students who will be withdrawn if the decision is not stayed. Paulsboro argues that it will not be able to reduce expenditures to compensate for this loss and will be forced to pass on the increased costs to its taxpayers and its other sending district. It maintains that in addition to a "devastating" financial impact, termination will result in a significant negative impact on the racial composition of its pupil population by increasing the black student population from 29.1% to 31.4%. Additionally, it asserts that because the Commissioner did not have the benefit of the transcripts when he made his decision, he did not consider material facts which weigh against the ALJ's findings. Finally, Paulsboro urges that while it will "face extinction" if the Commissioner's decision is given effect, Logan will not suffer any hardship if the decision is stayed.

Inasmuch as we agree with the Commissioner that Paulsboro's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for stay. In this respect, we stress that pursuant to the Commissioner's decision, withdrawal will occur on a four year phase-out basis commencing with the 1997-98 school year and that while Paulsboro will lose

approximately $267,840 in tuition over the next four years, its audited free balance for 1994-95 was $1,243,076.

S. David Brandt opposed.

April 2, 1997

Date of mailing APR 02 1997

530-96

EDU #4320-95
C # 530-96
SB # 95-96

BOARD OF EDUCATION OF THE TOWNSHIP OF LOGAN, GLOUCESTER COUNTY,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 29, 1996

Decision on motion by the Commissioner of Education, January 14, 1997

Decision on motion by the State Board of Education, April 2, 1997

For the Petitioner-Respondent, Zane & Lozuke (Raymond J. Zane, Esq., of Counsel)

For the Respondent-Appellant, Dilworth, Paxson, Kalish & Kauffman (Suzette D. Bonfiglio, Esq., of Counsel)

On November 29, 1996, the Commissioner of Education issued a decision in which he granted the request of the Board of Education of the Township of Logan to terminate its sending-receiving relationship with the Board of Education of the Borough of Paulsboro (hereinafter "Paulsboro Board").

On December 20, 1996, the Paulsboro Board filed a notice of appeal with the State Board of Education. On December 26, 1996, the briefing schedule was placed in

JAN. 7, 1998

abeyance at the request of the Paulsboro Board pending its receipt of transcripts from the hearing held in the Office of Administrative Law in this matter.[1] The Paulsboro Board was also given until January 6, 1997 to file a substitution of attorney. A substitution of attorney was thereafter filed on December 30, 1996.

On January 24, 1997, the Paulsboro Board filed a motion for a stay of the Commissioner's decision, along with a brief in support of its motion. On April 2, 1997, we denied that motion.

On October 9, 1997, the director of the State Board Appeals Office notified the counsel for the Paulsboro Board that the briefing schedule in its appeal was being re-established "[i]n view of the amount of time that has been provided to you to obtain transcripts...." The Paulsboro Board was given until November 3, 1997 to file a brief in support of its appeal. The Paulsboro Board failed to file a brief by that date. By letter dated November 11, 1997, the counsel for the Paulsboro Board was advised that no appeal brief had been filed and that this matter was therefore being referred to the Legal Committee of the State Board for consideration of its failure to perfect the appeal.

The Paulsboro Board has still failed to file a brief in support of its appeal, more than two months after the extended deadline for such filing. Nor has the Paulsboro Board offered any explanation for its failure to file a brief or requested an additional extension of time for such filing.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the

[1] N.J.A.C. 6:2-1.11(a) provides that "the appellant shall serve and file a brief in support of the appeal within 20 days after the appeal has been filed."

Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

January 7, 1998

Date of mailing JAN 09 1998

531-96

531-96

BARBARA HOLSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, AND CIGNA EMPLOYEE BENEFITS COMPANIES,	:	DECISION
RESPONDENTS.	:	

NOVEMBER 29, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8404-96

AGENCY DKT. NO. 302-7/96

BARBARA HOLSTEIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY; CONNECTICUT GENERAL LIFE INSURANCE COMPANY; AND CIGNA EMPLOYEE BENEFITS COMPANIES,

Respondents.

Richard A. Friedman, Esq., for the petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Geraldine M. Lewis, Esq., for the respondent, Board of Education of the Borough of Shrewsbury (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Eric Christopher Landman, Esq., for the respondents, Connecticut General Life Insurance Company and CIGNA Employee Benefits Companies

Record Closed: October 21, 1996 Decided: October 24, 1996

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the petition filed by the petitioner, Barbara Holstein, asserting that she is entitled to health insurance coverage. The matter was transmitted to the Office of Administrative Law on September 20, 1996, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for a telephone prehearing conference on October 30, 1996. Prior to that date, the parties conferred and agreed to a settlement. The signed stipulation is attached and fully incorporated herein.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1;1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

October 24, 1996
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

10/28/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondents:

None

WITNESSES:

For the Petitioner:

None

For the Respondents:

None

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
Ten James Street
Florham Park, New Jersey 07932
(201) 301-0001
Attorneys for Respondent
Board of Education of the
Borough of Shrewsbury

BARBARA HOLSTEIN, Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, AND CIGNA EMPLOYEE BENEFITS COMPANIES, Respondents.	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REF. NO. 302-7/96 OAL DKT. NO. EDUOR 08404-96S ADMINISTRATIVE ACTION **STIPULATION OF AGREEMENT AND WITHDRAWAL OF PETITION OF APPEAL AS TO THE BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY AND CIGNA EMPLOYEE BENEFITS COMPANY**

WHEREAS, Petitioner, Barbara Holstein (the "Petitioner"), residing at 603 South Edgemere Drive, West Allenhust, New Jersey 07711 and Respondents, the Board of Education of the Borough of Shrewsbury (the "Board"), with its offices located at 20 Obre Place, Shrewsbury, New Jersey 07702; Connecticut General Life Insurance Company, with its offices located at W26 Cigna Companies, Hartford, Connecticut 06152; and CIGNA Employee Benefits Company ("CIGNA), with its offices located at P.O. Box 1551, Wilmington, Delaware 19850 have determined to settle their differences amicably, and therefore, have entered into this Stipulation of Agreement; and

WHEREAS, Petitioner filed a Petition of Appeal before the Commissioner of Education of the State of New Jersey, pursuant to

the authority of the Commissioner to hear and determine controversies and disputes that arise under the school laws (N.J.S.A. 18A:6-9); and

WHEREAS, in consideration for the withdrawal of the claims in the above captioned matter as to the Respondents;

IT IS HEREBY STIPULATED AND AGREED AMONG THE PARTIES;

1. The Board shall enroll Petitioner and her qualifying eligible dependents, under the Board's regular retiree health insurance coverage group plan provided by CIGNA Employee Benefits Company; and

2. CIGNA agrees to the inclusion of Petitioner and her qualifying eligible dependents under the Board's regular retiree health insurance coverage group plan; and

3. Coverage under said health plan shall be effective October 1, 1996; and

4. Petitioner, agrees to bear the full cost of such coverage, which cost shall be at the prevailing group rate applicable to the Board for regular retiree coverage, as determined by CIGNA and pursuant to N.J.S.A. 18A:16-19(a); and

5. Petitioner shall be billed directly by CIGNA, or its representative, and shall bear full responsibility for remitting premium payments to CIGNA, or its representative, to maintain coverage under the plan; and

6. The Board shall have no obligation to fund or administer Petitioner's and her qualifying eligible dependents', continued

enrollment in its regular retiree health insurance coverage group plan provided by CIGNA Employee Benefits Company; and

7. In the event the Board changes its carrier for the provision of regular retiree health insurance coverage, the Board shall include Petitioner and her qualifying eligible dependents as a beneficiary of such coverage under the same terms and conditions as set forth in the herein Agreement, except that the method of Petitioner being billed and remitting payments to the substituting insurance carrier shall be subject to the requirements of said carrier; and

8. Petitioner agrees that if she becomes entitled to health insurance coverage under the State of New Jersey Health Benefits Plan, (the "State Plan"), the Respondents' obligation under the herein Agreement to include Petitioner and her qualifying eligible dependents in the Board's retiree health insurance coverage group plan shall immediately cease upon the effective date of Petitioner's and her qualifying eligible dependents', coverage under the State Plan and the Respondents will have no further responsibility to Petitioner and her qualifying eligible dependents; and

9. In consideration for the aforesaid agreements, Petitioner shall withdraw, with prejudice, all claims she has or may have which arise under the above-captioned Petition; and

10. Petitioner further agrees to forfeit any claim, right, title or interest to any cause of action arising under the facts,

that form the basis of the herein Petition, as known to the parties as of the date of withdrawal of the herein action.

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER

GERALDINE M. LEWIS, ESQ.
Attorney for Respondent,
Board of Education of the
Borough of Shrewsbury

Dated: Sept. 27, 1996

ZAZZALI ZAZZALI FAGELLA & NOWAK

RICHARD A. FRIEDMAN, ESQ.
Attorney for Petitioner,
Barbara Holstein

Dated: 9/30/96

THE LAW OFFICES OF
K. RUTH LARSON

ERIC CHRISTOPHER LANDMAN
Attorney for Respondents
Connecticut General Life
Insurance Company

Dated: 10/11/96

THE LAW OFFICES OF
K. RUTH LARSON

ERIC CHRISTOPHER LANDMAN
Attorney for Respondent
CIGNA Employee Benefits Company

Dated: 10/11/96

yd

OAL DKT NO. EDUOR 08404-96S

ZAZZALI ZAZZALI FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner
Barbara Holstein

BARBARA HOLSTEIN,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	DOCKET NO. 302-7/96
vs.	:	ADMINISTRATIVE ACTION
BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, AND CIGNA EMPLOYEE BENEFITS COMPANIES,	:	**NOTICE OF VOLUNTARY WITHDRAWAL**
Respondents.	:	

TAKE NOTICE, that the herein Petition of Appeal is hereby withdrawn, in its entirety, with prejudice, subject to a Stipulation of Agreement, attached hereto, as to Respondents, Board of Education of the Borough of Shrewsbury, Connecticut General Life Insurance Company and CIGNA Employee Benefits Companies.

By: _____
Richard A. Friedman, Esq.

Dated:

September 26, 1996
JAZ:gml\plead-96\holstein.nvd

OAL DKT. NO. EDU 8404-96

BARBARA HOLSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, AND CIGNA EMPLOYEE BENEFITS COMPANIES,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 29, 1996
DATE OF MAILING NOVEMBER 29, 1996

535-96

535-96

JOANNE CLEFFI-MILLER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, administrator of District's child care program, alleged she acquired tenure in her position and Board had "constructively discharged" her from that employment. Board contended petitioner was ineligible for tenure as she was not serving in a position for which certification was required and she voluntarily resigned from her position.

ALJ concluded petitioner voluntarily resigned from her employment over salary dispute and, thereby, relinquished whatever tenure rights she might have possessed. ALJ granted Board's motion to dismiss the petition.

Commissioner concurred with the ALJ that petitioner failed to establish that her resignation was involuntary or amounted to a "constructive discharge." Petition was dismissed.

December 5, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0838-95
AGENCY DKT. NO. 479-12/94

JOANNE CLEFFI-MILLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH,
Respondent,

Jack L. Wolff, Esq., for petitioner

Aron M. Schwartz, Esq., for respondent
(Vogel, Chait, Schwartz & Collins, attorneys)

Record Closed: January 24, 1996 Decided: October 17, 1996

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a former school employee who resigned from her position with the Randolph Township Board of Education ("Board"). Basically, petitioner alleges that her resignation was involuntary and that she was "constructively discharged" from employment without having been afforded the protections to which she is entitled under the tenure law. In her petition, she seeks reinstatement to her position, together with "all salary and other benefits that were rightfully due her from September 1, 1994 to the

present." The Board contends that petitioner was not serving in a position for which certification was required and, therefore, that she was ineligible for tenure under *N.J.S.A.* 18A:28-5. More importantly, the Board asserts that it is unnecessary to decide the tenure claim because petitioner voluntarily resigned from her position and, therefore, waived whatever tenure rights she might have. Additionally, the Board raises the affirmative defense that the bringing of this action is barred by the applicable period of limitations.

Procedural History

On December 16, 1994, petitioner Joanne Cleffi-Miller filed a verified petition with the Commissioner of Education ("Commissioner") alleging her "wrongful termination" from employment. Respondent filed its answer on January 11, 1995 and an amended answer, adding the affirmative defense of timeliness, on May 19, 1995. Subsequently, on January 24, 1995, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Prior to commencement of the hearing, the Board filed a motion for summary decision, together with supporting certification and brief, on September 13, 1995. Petitioner filed her opposing papers on October 19, 1995. By order entered on October 25, 1995, the OAL denied the summary decision motion because it appeared on the papers "that there are disputed material facts which must be developed at a full hearing[.]" Thereafter, the OAL held two full days of hearing on October 31 and November 1, 1995 and scheduled the matter for a third day of hearing on January 24, 1996. On the second day of hearing, petitioner concluded her proofs and rested her case.

At the outset of the hearing on January 24, 1996, the Board moved for involuntary dismissal of the petition.[1] Meanwhile, on October 24, 1995 the New Jersey Supreme Court had reexamined traditional summary-judgment practice and clarified the conditions under which summary judgment (the judicial counterpart to a summary decision motion in administrative law) should be granted.[2] In *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 523 (1995), the court held that, in determining whether a genuine issue of material fact exists, the motion judge must consider

> . . . whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed fact in favor of the non-moving party. This assessment of the evidence is to be conducted in the same manner as that required under *Rule* 4:37-2(b).

Inevitably, the process involves "a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." *Brill*, at 536. Nonetheless, the judge must avoid "assessing the preponderance or credibility of evidence" and "grant all the favorable inferences to the non-movant." *Id.*

---

[1] New Jersey Uniform Administrative Procedural Rules, *N.J.A.C.* 1:1-1.1 to -21.6, do not specifically provide for the bringing of a motion for involuntary dismissal. However, in the absence of a rule, an administrative law judge "may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with simplicity and procedure, fairness in administration and elimination of unjustifiable expense and delay." *N.J.A.C.* 1:1-1.3(a). R. 4:37-2(b) permits a defendant to move for dismissal at the conclusion of the plaintiff's proofs on the ground that "the plaintiff has shown no right to relief." The standard is quite a mechanical one. "The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." *Dolson v. Anastasia*, 55 *N.J.* 2, 5-6 (1969).

[2] *N.J.A.C.* 1:1-12.5(b) provides that summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law."

Furthermore, the New Jersey Supreme Court in *Brill* directed that the new rule "shall apply to this case and all cases pending in the trial and appellate courts involving unresolved issues concerning summary judgment, including those cases in which summary judgment was denied previously." *Brill,* at 545-546. Accordingly, the opportunity is now presented to reconsider the prior summary judgment ruling under the *Brill* standards, together with the added benefit of having heard all of petitioner's proofs. Under that standard, it must be concluded that a reasonable factfinder could not find in favor of petitioner and, therefore, that the Board is entitled to prevail as a matter of law.

Findings of Fact

Only one witness, Mrs. Cleffi-Miller herself, testified on petitioner's behalf at the hearing and, at this stage of the proceedings, her factual testimony and all reasonable inferences drawn therefrom must be accepted as true. It is unnecessary to dwell on the details, since the outcome turns on whether or not Mrs. Cleffi-Miller voluntarily resigned from her job. Some background facts are necessary, however, to put the case in its proper perspective.

Joanne Cleffi-Miller was employed by the board as an administrator of a highly innovative and effective child care program. While not legally obligated to do so by law, the district offers before and after-school child care services as an accommodation to working parents and others in need of adult supervision for their children. Mrs. Cleffi-Miller had previously worked for the district as a Title I teacher prior to 1980 and was rehired as a "head teacher" or "group leader" of the child-care program in September 1984.[3] Throughout her employment, Ms. Cleffi-Miller held an elementary-teacher certificate, although there is a factual dispute between the parties as to whether such certification was a condition of employment. In or about 1986, petitioner

[3]Depending on their view of whether or not the position could accrue tenure, the parties used different names for her initial job title. Ms. Cleffi-Miller referred to herself as a "head teacher," whereas the Board called her a "group leader."

became the "program coordinator" of the child-care program, a position which involved more administrative and less direct-care duties. She did not, however, hold the type of educational certificate required for an administrative position. Initially, petitioner worked without any written agreement, but during the last three school years (1991-1992, 1992-1993; and 1993-1994) she and the board entered into formal written contracts for successive one-year terms.

It is undisputed that Ms. Cleffi-Miller was a dynamic and dedicated organizer of the district's child care program. She endeavored to make the child-care program "more than just baby-sitting" and sought to arrange structured activities to help children develop "cognitively, emotionally, socially and physically." In her capacity as coordinator, Ms. Cleffi-Miller had responsibility for recruiting and training staff, reviewing activity plans, supervising child-care providers, ordering materials and supplies, and evaluating the effectiveness of the program. Her last evaluation noted approvingly that Ms. Cleffi-Miller "continue[s] to manage the child care staff and curriculum very well" and "works tirelessly to help parents with questions, complaints and suggestions." An active member of school-age child care organizations at the national, state and county levels, she made a name for herself in the field and brought recognition to the district for the quality of its child-care services. When the district's "latch-key" program started in 1984, it was a limited operation furnishing after-school care to some twenty-four children at a single location. Under Ms. Cleffi-Miller's able leadership, the program has "evolved" into an elaborate undertaking at four different schools, serving one-hundred fifty children in the morning and more than one hundred in the afternoon.

At the time that Ms. Cleffi-Miller started in the child-care program, she had been willing to accept low wages of "maybe $6.00 per hour" because she loved the work and "didn't care" how much she was paid. As the complexity of her responsibilities and the amount of time devoted to the task increased, her compensation package also changed. By 1990, the Board was paying her a regular salary, providing health insurance coverage and contributing to her pension. In one year alone, she requested and received a substantial raise which nearly doubled her base salary, from $8,800 in

1990-91 to $16,000 in 1991-92. Her base salary for 1993-94 was $18,000. On top of that, she earned a $3,000 stipend in 1993 for running a full-day "holiday fun" program while school was on vacation.

All of the facts necessary for disposition of this case come from Ms. Cleffi-Miller's own testimony at the hearing. She acknowledges, as she must, that in or about late April 1994 the Board made a written offer to renew her contract for the upcoming 1994-95 school year at a proposed base salary of $18,900. This represented a five percent increase over her base salary in the prior school year. Nevertheless, Ms. Cleffi-Miller rejected the board's contract offer because of her belief that the amount was "unsatisfactory" in light of her greater responsibilities and the time commitment required to perform her duties. Undeniably, the scope of Ms. Cleffi-Miller's job duties was expanding, due partly to her own enthusiasm for her job. Since the school system was planning to incorporate the sixth grade classes into the Middle School, she submitted a proposal to extend the child-care program to that older group of students who were presently without services. In addition, the district had asked her to take over an existing after-school program independently run by the Ironia School Parent Teachers Association.

Ms. Cleffi-Miller genuinely felt that her efforts were unappreciated and that she was being undercompensated for the value of her services. Consequently, she jotted down a series of thoughts for a meeting with her immediate supervisor, Nancy Clancy, on July 6, 1994. In this document, which she handed to her boss at the meeting, Ms. Cleffi-Miller enumerated various reasons why she thought she deserved more money, including her added responsibilities and heavier workload, her ability to take the initiative, her ten-years of experience, and her involvement in child-care organizations. According to Ms. Cleffi-Miller, her supervisor "threw up her hands" and told her she "didn't know where the money was to come from." While she doubts that she mentioned it to her supervisor, Ms. Cleffi-Miller had already decided by July 6, 1994 that she would not sign the proposed contract "unless the salary was adjusted."

Although she was not paid for working over the summer, Ms. Cleffi-Miller usually spent part of her summer preparing for the next school year by interviewing candidates for employment in the child-care program, orienting and training staff and student aides, taking inventory of supplies, and planning future programs. She had begun these activities in July 1994, but was reluctant to continue without a contract. On July 19, 1994, she hand-delivered another note to Nancy Clancy, reminding her that she "still [didn't] have a contract for the coming school year" and outlining the items which still needed to be done to get ready for the fall. Most of the items on the list were matters that Ms. Cleffi-Miller had always handled herself, without much input from her supervisor. Pointing out that she normally would take care of these responsibilities over the summer, Ms. Cleffi-Miller added that she would "generally have a contract by the time my previous one expires." After reiterating that her job was took more time and carried more responsibility than the Board was "currently acknowledging with my salary," she requested "a contract more commensurate with the responsibility of this position[.]" Stressing the importance of "the timely and well-organized operation of these programs," she concluded by saying that she "hope[d] to begin again soon." The clear inference is that Ms. Cleffi-Miller intended to withhold her services until her salary demands were met. Indeed, she testified that her intention was to convey the idea that she "would not continue with [her] usual summer activities unless [she] had signed a contract."

Shortly thereafter, on or about July 20, 1994, Ms. Cleffi-Miller had another conversation with Nancy Clancy about salary concerns and the uncertainties regarding the coming year. Although her supervisor was willing to discuss the possibility of a stipend for extra duties, such as the Middle School and Ironia programs, Ms. Clancy made it clear that the base contractual salary "would stand at $18,900." Moreover, Ms. Clancy only promised "to get back to [her]," but made no firm commitment about additional compensation.

Not hearing anything further from her supervisor, Ms. Cleffi-Miller tendered a written letter of resignation to her supervisor on August 9, 1994. This letter, Ms. Cleffi-Miller explained, was "heart-felt" and "extremely difficult for me to write." She thought

about it for "at least a couple days" and maybe as long as a week. Before submitting the letter, she discussed the pros and cons of resignation with her husband and adult children. Her decision to resign "emerged as a consensus among my family." She also may have mentioned it to a professional colleague and to her mother. Apparently Ms. Cleffi-Miller believed that if she offered her resignation, someone would listen to her and ask, "Why is she making this noise?" Her intent in submitting her resignation was to cause her supervisor and the Board "to take a serious look at my salary and responsibilities." In her own words, she viewed the threat of resignation as a "tactic" to bring about discussion. While she may not have fully considered the possible consequences of her action, there is no evidence that she was under duress or suffered from any mental condition that might impair her judgment.

The tone of her letter of resignation suggests that her decision was not made lightly or on the spur of the moment. It reads, in pertinent part:

> As originally submitted, your contract proposal to me was not acceptable. This was especially so since it did not reflect the increased responsibility with the inclusion of two more programs for September 1994. You had, at first, told me there would be an adjustment in the contract and later changed your mind. After our discussion on the twentieth, you were going to get back to me regarding salary, duties and responsibilities and the Ironia and Middle School programs. Thus far, you have not.
>
> Your failure to discuss this matter further and/or offer a new contract has stirred serious thought and consideration regarding my position. I, therefore, respectfully submit my resignation.

Ms. Cleffi-Miller left the letter on her supervisor's desk and delivered copies to the superintendent of schools and to the residences of all Board members, along with a packet containing copies of various written recommendations dating back as far as March 1993. These job references show that Ms. Cleffi-Miller had been thinking about seeking other employment for a considerable period of time. Initially, Nancy Clancy appeared "outraged" at her sudden resignation, but later that afternoon she told Ms. Cleffi-Miller that it might be better for her to be in charge of her own program someplace else. One or two days later, Nancy Clancy informed Ms. Cleffi-Miller that

the district was advertising for her replacement at a salary of $25,000. However, Ms. Cleffi-Miller did not express any interest in accepting that amount because she "felt rejected" and "was waiting for them to come to me." In her salary negotiations, Ms. Cleffi-Miller had conveyed the impression that she was asking for a minimum salary of $30,000. Since the new school year was fast-approaching, the district had little choice but to search for someone else to manage the child-care program.

On or about August 29, 1994, Ms. Cleffi-Miller held a meeting with schools superintendent Robert Gordon in his office. By that time her successor had already been chosen but not yet appointed by the Board. Ms. Cleffi-Miller, who had requested the meeting, announced to Mr. Gordon that she "wasn't there to grovel for [her] job," but that she "wanted to make him aware of [her] accomplishments." Again, Ms. Cleffi-Miller failed to give any indication of her interest in returning to work. Finally, the Board voted at its regularly-scheduled meeting on September 19, 1994 to accept her resignation. During the intervening one and-a-half months before the Board accepted her resignation, Ms. Cleffi-Miller made no attempt to revoke her resignation.

The defining moment in the hearing came during cross examination of Ms. Cleffi-Miller into her motives for rejecting the Board's reemployment offer. Candidly, Ms. Cleffi-Miller admitted that she would have continued working as program coordinator if she had been offered a salary in the range of $25,000 to $32,000. However much she may have objected to an increase in her work load or to an alleged breakdown in communications with her supervisor, she nevertheless would not have quit if the Board had acceded to her salary demands. Thus, her resignation was not due to intolerable working conditions or harassment on the job. Instead, she resigned merely because of a disagreement with her employer over the amount of her salary.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that, accepting petitioner's proofs as true, a reasonable fact-finder must find that Ms. Cleffi-Miller voluntarily resigned from her employment and, thereby, relinquished whatever tenure rights she might possess.

It is unnecessary to decide the issue of whether or not Ms. Cleffi-Miller actually acquired tenure in her position. Even if Ms. Cleffi-Miller had attained tenure, she nonetheless was entitled to surrender her employment rights. Tenure and reemployment rights may be voluntarily relinquished. *O'Toole v. Forestal*, 211 *N.J. Super.* 394, 402, (App. Div. 1986), *certif. den.* 107 *N.J.* 123 (1987). *Accord, Lange v. Bd. of Educ. of Audubon*, 26 *N.J. Super.* 83, 88 (App. Div. 1953). *See also, Adler v. John Carroll Univ.*, 549 *F. Supp.* 652, 656 (N.D. Ohio 1982), holding that a college teacher who voluntarily resigned from his position was not a victim, but rather "generated his own fate." Ms. Cleffi-Miller's own testimony demonstrates that she clearly understood what she was doing and knowingly delayed signing the proposed contract in order to induce the Board to increase her compensation. Significantly, her ultimate decision to resign was not made impulsively, but came after careful reflection and discussion with her family. When she tendered her resignation less than one month before the start of the new school year, she must have known that the Board would be put in the difficult position of finding a replacement on short notice. *See N.J.S.A.* 18A:28-8, requiring a tenured teaching staff member to give her employer at least sixty-days notice of her intention to relinquish her position.[4]

[4]Likewise, it is unnecessary to rule on the Board's argument that the petition is untimely under *N.J.A.C.* 6:24.1.2(c), which provides that an appeal to the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education[.]" For purposes of this motion, it will be assumed that the limitation period started to run on September 19, 1994, the date on which the Board accepted petitioner's resignation and, therefore, that the petition filed eighty-eight days later on December 16, 1994 is timely.

Endeavoring to avoid the consequences of her voluntary resignation, Ms. Cleffi-Miller argues that the Board's actions amount to a "constructive discharge." Constructive discharge occurs when working conditions become so intolerable that a responsible employee would be forced to resign. Federal courts in the Third Circuit have adopted an "objective test," which focuses on the impact of an employer's action, whether deliberate or not, upon the 'reasonable' employee." *Muench v. Township of Haddon*, 255 *N.J. Super.* 288, 302 (App. Div. 1992). The standard is met when "the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's position would resign." *Schafer v. Pittsburgh Bd. of Educ.*, 903 *F.* 2d 243, 249 (3rd Cir. 1990); *Goss v. Exxon Office Systems Co.*, 747 *F.* 2d 885 (3rd Cir. 1984). Of necessity, the inquiry is highly fact-sensitive. *Levendos v. Stern Entertainment, Inc.*, 860 *F.*2d 747 1227., 1230 (3rd Cir. 1984).

Cases giving rise to the doctrine of constructive discharge are readily distinguishable on their facts. Many of the situations involve violations of state or federal anti-discrimination statutes. In *Muench*, for example, a female police dispatcher was subjected to a pervasive pattern of sexual harassment by a male officer, including making disparaging remarks about her to strangers, belittling her over the police radio, refusing to train her, leaving lip prints on her window and bragging to her of his sexual prowess. Because of her health and the frustration, she had no other choice but to resign. Similarly, in *Goss,* a successful female sales representative had to resign after being given a less lucrative territory because she wanted to have a baby. Ms. Cleffi-Miller may have felt overworked and underpaid, but she makes no credible allegations of discriminatory treatment or demeaning behavior toward her by Board employees.

Another type of constructive-discharge situation involves employees forced to resign in order to avoid the stigma of being fired. Illustratively, in *Kass v. Brown Boveri Corp.*, 199 *N.J. Super* 42 (App. Div. 1985), an employer breached the employment contract by demoting a manager to a lesser job involving nonmanagerial duties. Holding that his forced resignation did not bar the manager's suit for breach of contract,

the Appellate Division declared that he had been "unjustifiably placed in the position of submitting to his discharge, accepting a demotion or resorting to a resignation so that he might obtain employment in the future without the stigma of discharge." *Kass*, at 50. Here, of course, Ms. Cleffi-Miller was in no apparent danger of being demoted or discharged. To the contrary, the Board had offered her a contract for reemployment on more generous terms and was planning on expanding her responsibilities. She resigned due to dissatisfaction with the progress of negotiations over increased compensation for additional duties.

On one occasion, the New Jersey Supreme Court ordered reinstatement of a teacher on general "equitable principles" under the "peculiar circumstances" of the case. *Evaul v. Bd. of Ed. of the City of Camden*, 35 *N.J.* 244, 249 (1961). *Evaul* involved a tenured teacher with twenty-five years of service who spontaneously submitted her resignation after a "heated and acrimonious" meeting with school officials. Unknown to her, the Board accepted her resignation a few hours later at a special meeting that had been previously called for another purpose. Two days later, the teacher attempted to rescind her resignation, but was advised that her resignation had already been accepted. Deciding in the teacher's favor, the Court relied on the "extraordinary" combination of events, including the teacher's "impetuous act" prompted by her distraught condition and the "fortuitous circumstance" that a special meeting of the board was scheduled to be held a few hours after she wrote her resignation. Equally important, the Court noted that the school board had not taken any action in reliance on her resignation. *Evaul*, at 249-250.

Unlike the situation in *Evaul*, Ms. Cleffi-Miller's resignation was not done impulsively, but was a deliberate and calculated choice on her part. She consulted with family members and thought about it over an extended period before deciding to resign. Afterwards, she had at least two meetings with top school administrators where she missed the opportunity to signal her interest in returning to work. In the meantime, the Board substantially changed its position by hiring a replacement to fill her position when the new school year began. In short, Ms. Cleffi-Miller's proofs show that she voluntarily quit her job because she was unhappy with her salary and wanted a bigger

increase. None of the case law, however, stands for the proposition that mere dissatisfaction with one's compensation can support a claim of constructive discharge.[5]

Order

It is **ORDERED** that the Board's motion to dismiss the petition is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

[5]Petitioner contends that she is entitled to a higher salary as a tenured teacher from the date of her initial hire in 1984. The short answer is that her petition seeks reinstatement for wrongful discharge and back pay "from September 19, 1994," but does not clearly set forth a claim for ten years of damages. In any event, her claim for past salary would be barred by the ninety-day rule, *N.J.A.C.* 6:24-1.2(c). *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63 (1990) does not dictate a different result. There the Supreme Court awarded retroactive pay to successful litigants who had established a new rule of law. Its rationale does not extend to a school employee who voluntarily resigned her position because the board refused her request for higher future salary.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 17, 1996
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 21 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Joanne Cleffi-Miller
2. Robert Gordon, former superintendent of schools, Randolph public school district

List of Exhibits

No.	Description
P-1	Copy of answer of the Board of Education of the Township of Randolph, dated January 9, 1995
P-2	Copy of amended answer of the Board of Education of the Township of Randolph, dated May 12, 1995
P-3	Copy of instructional certificate with endorsement as elementary school teacher issued to Joanne Teresa Salinari Cleffi, dated August 4, 1965
P-4	Copy of salary card for 1988-89 to 1993-94
P-5	Copy of employment card, undated
P-6	Copy of professional employment contract, dated June 11, 1991
P-7	Copy of professional employment contract, dated April 15, 1992
P-8	Copy of professional employment contract, dated June 14, 1993

P-9 Copy of letter to Mrs. Winifred Swiss from Helen M. Doran, dated June 22, 1994

P-10 Typewritten copy of note to Nancy [Clancy] from Joanne [Cleffi-Miller], dated July 6, 1994

P-11 Copy of letter to Dear Nan [Clancy] from Joanne Cleffi-Miller, dated July 19, 1994

P-12 Copy of letter to Nancy Clancy from Joanne Cleffi-Miller, dated August 9, 1994

P-13 Copy of letter to Joanne Cleffi-Miller from Robert Gordon, dated September 28, 1994

P-14 Copy of school calendar for December 1992

P-15 Copy of school calendar for December 1993

P-16 Copy of memorandum to Ed Geueke from Nancy J. Clancy, dated August 31, 1992

P-17 Copy of evaluation of Joanne Cleffi-Miller, dated March 23, 1994

P-18 Copy of ASAP newsletter, dated February 1985

P-19 Copy of application for the 1992-1993 Randolph School-Age Child Care Program

P-20 Copy of Advertisement for Coordinator School-Age Child Care Program published in the Star-Ledger on August 14, 1994

R-9. Copy of proposed professional employment contract, dated April 26, 1994

R-15 Copy of letter to Nancy Clancy from Joanne Cleffi-Miller, dated March 29, 1993

R-19 Copy of letter addressed to To Whom it May Concern from Sue DeVito, undated

R-21 Copy of letter addressed To Whom it May Concern from Thomas E. Zsigg, dated May 10, 1993

R-21 Copy of letter addressed To Whom it May Concern from Anne Standridge, dated May 10, 1993

R-22 Copy of letter addressed To Whom it May Concern from Diane E. Cofoni, dated May 14, 1993

R-23 Copy of letter addressed To Whom it May Concern from Elaine Bakke, dated May 18, 1993

R-24 Copy of letter addressed To Whom it May Concern from Gail Ruether, M.A., dated July 20, 1994

R-25 Copy of letter to R. Gordon from Lucia Perniciaro, dated August 17, 1994

R-28 Copy of notice of determination of unemployment compensation claim, dated March 28, 1995

R-35 Id. Copy of advertisement confirmation from the Morristown Daily Record for insert dates of November 17, 18 and 19, 1991, dated November 14, 1991

R-36 Id. Copy of advertisement confirmation from the Morristown Daily Record for insert dates of February 7, 8 and 9, 1993, dated February 3, 1993

R-37 Id. Copy of memorandum dated August 20, 1993 and ad confirmation from the Morristown Daily Record for insert dates of August 19 to August 24, 1993

R-38 Id. Copy of typewritten memo and draft advertisement for the Morristown Daily Record for insert dates of October 24 and October 25, 1993

R-39 Id. Copy of cover memorandum, undated and advertisement confirmation from the Morristown Daily Record for insert dates of January 16 and 17, 1994

R-40 Id. Copy of advertisement confirmation from the Morristown Daily Record for insert dates of June 26, 27 and 28, 1994, dated June 24, 1994

R-44 Id. Copy of participant-employer contact reporting form for the period April 30, 1995 to August 23, 1995

OAL DKT. NO. EDU 0838-95

JOANNE CLEFFI-MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is properly dismissed in that petitioner has failed to establish that her resignation from the Board's school system was involuntary or amounted to a "constructive discharge." Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 5, 1996
Date of Mailing, December 5, 1996

536-96

536-96

ANTHONY PILONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 5, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12120-95
AGENCY DKT. NO. 278-7/95

ANTHONY PILONE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Denise P. Coleman, Esq., for respondent,
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: October 17, 1996 Decided: October 17, 1996

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on November 27, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Oct. 17, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Oct 21, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 21 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 12120-95
AGENCY DKT. NO. 278-7/95

STIPULATION OF SETTLEMENT

ANTHONY PILONE,
Petitioner,
v.
IRVINGTON BD. OF ED.,
Respondent.

The parties agree to resolve the above matter as follows:

1. The Irvington Board of Education agrees to pay to Anthony Pilone pursuant to *N.J.S.A.* 18A:16-6.1 an amount of Eight thousand seven hundred five dollars ($8,705.00). for legal fees incurred in defense of a matter entitled *State v. Pilone,* Summons No. S361944, which arose in the course of Mr. Pilone's duties as principal of Irvington High School.

2. The above payment shall be made by the Board of Education on or before January 31, 1997.

3. The parties agree that the resolution of this matter does not constitute an admission of any wrongdoing by either party.

4. This agreement and the payment by the Board shall constitute the final resolution of this matter and the parties hereby release each other from and against any and all other claims, whether known or unknown, arising from the above-captioned matter, except for the currently pending Workers' Compensation Claim filed by petitioner.

5. This agreement expressly requires approval by the Irvington Board of Education.

6. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

DATED: October 7, 1996

Anthony Pilone, Petitioner

Wayne J. Oppito, Esq.
Attorney for Petitioner

Denise P. Coleman, Esq., for Respondent
(Schwartz, Simon, Edelstein, Celso
& Kessler, attorneys)

OCT 17 '96 02:15PM SCHWARTZ SIMON

SCHWARTZ SIMON
EDELSTEIN CELSO &
KESSLER COUNSELLORS AT LAW
(A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION)

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NICHOLAS CELSO, III
DONALD A. KESSLER
MICHAEL S. RUBIN
JOHN B. MARIANO, JR. †
RAYMOND W. FISHER
BURTON ZITOMER*

GLENN C. GURITZKY*
SCOTT A. ELK †
MIGUEL A. MAZA°
OF COUNSEL

DENISE P. COLEMAN
ANDREW B. BROWN
JEFFREY A. BENNETT †
THOMAS RUSSO
STEPHEN G. DOHERTY*
JOSEPH R. MORANO*
MARK A. TABAKIN
DWAYNE D. WARREN ▫
JOANN L. LYNCH
BRADLEY K. SCLAR
GERALDINE M. LEWIS †
MARC H. ZITOMER*
DONNA HORIGUCHI HARTMAN*
BRUNO K. BRUNINI
KEN IWAMA

* ALSO MEMBER OF NY BAR
† ALSO MEMBER OF PA BAR
° MEMBER OF FL BAR ONLY
▪ ALSO MEMBER OF PR BAR
▫ ALSO MEMBER OF DC BAR

October 17, 1996

VIA FACSIMILE AND REGULAR MAIL
Honorable Ken R. Springer
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **Pilone v. Board of Education of Irvington**
OAL Dkt. No. EDU 12120-95

Dear Judge Springer:

Please be advised that the Irvington Board of Education approved the settlement of the above matter at its October 16, 1996 Board meeting. Please advise if I may be of further assistance.

Very truly yours,

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER

By: _____
Denise P. Coleman

c: Wayne J. Oppito, Esq.

October 17, 1996
No. 566

OAL DKT. NO. EDU 12120-95

ANTHONY PILONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 5, 1996
Date of mailing, December 5, 1996

537-96

537-96

J.C. AND L.C.F., on behalf of minor child, K.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

December 9, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3700-96

AGENCY DKT. NO. 86-3/96

J.C. AND L.C.F. ON BEHALF OF
MINOR CHILD, K.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP
OF UNION, UNION COUNTY,

Respondent.

J.C. and L.C.F., on behalf of minor child K.C., *pro se*

James J. Damato, Esq., for respondent

Record Closed: July 10, 1996 Decided: October 23, 1996

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 9, 1996, for hearing as a contested case pursuant *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. An in-person prehearing was

scheduled for 3:30 p.m. on July 10, 1996, at the OAL in Newark, New Jersey. At that time, settlement discussions were held and a settlement was reached.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement, indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

10/25/96

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 25 1996

DATE

Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

dgi

Stipulation of
Settlement
OAL Docket EDU 3700-96

J.C. + L.C.F. on
behalf of minor
child v. BOE of
Township of Union
Union County

The parties stipulate and
agree as follows:

1. J.C. and L.C.F. agrees to
pay the BOE of Township of Union
("Union") $1,400.00 as tuition
for 1995-96 school year
as follows:
July 19, Aug 12, Sept 12, Oct 11, Nov 12,
Dec 12, 1996 and January 10, February 12,
March 12, April 14, May 12, June 12, 1997
$100 per month -
($50 from L.C.F. and J.C. each)
July 15, 1997 - 200.00
($100 from L.C.F. and J.C. each)

2 Neither the Board of Education
or the petitioners J.C. and L.C.F.
admit any liability with
regards to this matter.

3. If any payment due from one or both of the petitioners is more than 15 days late, the BOE of Union at its discretion may docket this Consent Order in Superior Court as a ~~final~~ judgment against the defaulting party only.

4. The BOE of Union agrees that as of today the minor child K C is domiciled in Union for purposes of N.J.S.A. 18A:38-1(a)

5. This stipulation of settlement is contingent upon the ratification by the Board of Education of Union within 45 days.

~~July~~ 10, 1996 — ~~Linda Cox Fair~~ Linda Cox Fair

July 10, 1996 — ~~Jeffrey Cox~~ Jeffrey Cox

Union Twp Board of Educ

July 11, 1996 — ~~John Jacobs~~ by James Damato

OAL DKT. NO. EDU 3700-96

J.C. AND L.C.F., on behalf of minor child, K.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 9, 1996
Date of Mailing, December 9, 1996

538-96

538-96R

WEST ORANGE SUPPLEMENTAL INSTRUCTORS ASSOCIATION *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

This matter was initiated in 1983 and was the subject of a number of Commissioner and State Board decisions since that time. At issue was a determination of the amount of damages (back pay minus mitigation) due petitioners, reinstated supplemental instructors whose positions had been eliminated during reductions in force in 1983 and who had had greater seniority than teachers retained. By interlocutory decision in August 1995, the Commissioner remanded matter to OAL for fact finding and argument with respect to the correctness of petitioners' contention that their service under their purportedly "void" contract would not have been credited by Newark or East Orange under the collective bargaining agreements in place in those districts during the time periods at issue. Commissioner also remanded for revision of the back pay calculations as necessary.

In March 1996, the State Board reversed the Commissioner and determined that petitioners' supplemental teaching service must be included in their "prior teaching experience" when calculating salary guide credit under the Newark and East Orange teacher contracts. State Board found that petitioners' contention that the group contract, under which they served in West Orange, was invalid to be "immaterial to the outcome of this matter." State Board remanded matter to the Commissioner for determination of damages due petitioners.

On remand, Commissioner determined that with two minor errors noted, the ALJ's initial decision of July 7, 1995 correctly calculated the back salary awards due petitioners. Commissioner directed Board to remit such back pay to petitioners.

December 9, 1996

OAL DKT. NO. EDU 7291-94 (EDU 9597-89 ON REMAND)

WEST ORANGE SUPPLEMENTAL INSTRUCTORS ASSOCIATION *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

For Petitioners, Bernard Star, Esq.
For Respondent, Stephen J. Christiano, Esq.

This matter has come before the Commissioner of Education on remand from the State Board of Education, pursuant to its decision of March 6, 1996. On this date, the State Board reversed the Commissioner's August 22, 1995 interlocutory decision wherein he had determined that, given the nature of arguments advanced in petitioners' exceptions, there was insufficient factual information to allow him to make a determination with respect to the correctness of petitioners' contention that their service under their purportedly "void" contract would not have been credited by Newark or East Orange under the collective bargaining agreements in place in those districts during the time periods at issue herein. The Commissioner, therefore, remanded the matter to the Office of Administrative Law for further fact finding and argument on this question and revision of the back pay calculations as appropriate.

On March 6, 1996, the State Board, in reversing the Commissioner, determined that petitioners' supplemental teaching service must be included in their "prior teaching experience" when calculating salary guide credit under the Newark and East Orange teacher contracts. Further, the State Board found that petitioners' contention that the group contract, which they served under as supplemental teachers in West Orange, was invalid to be "immaterial to the outcome of this matter." (State Board Decision at p. 6) Accordingly, the State Board remanded the matter to the Commissioner for a determination of damages due petitioners "in conformity with our decision of May 4, 1994." (*Id.* at p. 8)

On May 16, 1996, the Director of the Bureau of Controversies and Disputes provided the parties 30 days to submit briefs with respect to their positions on damages due petitioners in this matter, in light of the State Board's decisions of May 4, 1994 and March 6, 1996. The parties were further accorded 10 days from receipt of their adversary's brief for reply submissions. Petitioners' brief and that of the Board were timely filed in accordance with the established timeline. No reply submission was filed by either party.

After a full review of the July 7, 1995 Initial Decision of the Administrative Law Judge (ALJ) in this matter (attached), the State Board's directive of March 6, 1996, and consideration of the arguments of the parties made in their submissions herein, the Commissioner finds and determines that, with two minor errors noted below, the ALJ's initial decision correctly calculated the back salary awards due petitioners. As such, the Commissioner adopts as his own and incorporates by reference herein the discussion and calculations of the ALJ on pages 14-19, as modified below. Consequently, the back salary award due each of the petitioners[1] is as follows:

[1] It is noted that the parties agreed that Constance Afromsky was due $9,148 in back salary. The Board reports that Ms. Afromsky has received payment and has provided the Board with a release. As such, her award will not be herein addressed.

	Back Salary Due
Shirley Blank	$ 11,080
Florence Berk	$ 17,558[2]
Barbara Davis	$ 46,819
Rita Peretz	$ 7,265
Paula Kolin	$ 14,852
Florence Shifman[3]	$ 13,893
Edith Ratner	$ 9,594
Doris Passner	$ 1,750

Accordingly, the Commissioner hereby orders the Board to remit back pay to petitioners, for the periods of time subject to this remand, as itemized herein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

[2] The ALJ's decision (Page 16) erroneously shows a figure of $17,588.

[3] Petitioner Shifman's Newark/East Orange average (Page 18 of the initial decision) should read $137,969 rather than $137,893 as shown.

December 9, 1996
Date of Mailing, December 9, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7291-94
AGENCY DKT. NO. 4693 (State Board)
AGENCY DKT. NO. 357-11/89
(On Remand from OAL Dkt. No. 9597-89)

WEST ORANGE SUPPLEMENTAL INSTRUCTORS ASSOCIATION, *et al.*,
Petitioners
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Bernard Star, Esq., appearing for petitioners

Stephen J. Christiano, Esq., appearing for respondent
(Christiano & Christiano, attorneys)

Record Closed: January 10, 1995[1] Decided: July 7, 1995

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was brought as the result of a decision of the State Board of Education dated May 6, 1994. It was transmitted to the Office of Administrative Law

---

[1] An initial decision was to be filed by February 24, 1995 however an extension was granted for good cause. A second extension was granted at the request of the administrative law judge until May 25, 1995 to complete the initial decision in the instant matter as well as to the complexity of the case and her voluminous caseload. Unfortunately, a third extension of the time limit to complete the initial decision in the instant matter was requested and granted for good cause, due to the voluminous caseload as well as the complexity of the case and the double-booking schedule of the undersigned. This made the new time for the filing of the initial decision July 9, 1995.

(OAL) on July 28, 1994 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

PROCEDURAL HISTORY

The State Board of Education decision begins its own procedural history by saying "Once again, we are confronted with a dispute in this case involving the amount of the damages to which the petitioning supplemental instructors are entitled." See *West Orange Supplemental Instructors et al. v. Board of Education of the Township of West Orange* decided by the Commissioner of Education, January 9, 1991, rev'd and remanded by the State Board of Education April 1, 1992, appeals dismissed, Dkt. No. A-4383-91T2 and No. A-4497-91T2 (App. Div. 1992).

Before getting into the detailed history of the case one must point out that the State Board's observation that we are once again confronted with this dispute is very much like an old song from the Beatles which had a most apropos line "The long and winding road which leads me back to you."

The matter was initiated in 1983 following the New Jersey Supreme Court's decision in *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 62 (1982) that supplemental and remedial teachers were teaching staff members within the meaning of *N.J.S.A.* 18A:1-1 and were, therefore, supplemental instructors whose positions had been eliminated by the Board of Education of the Township of West Orange (hereinafter "Board") during reductions in force ("RIF"). These individuals sought reinstatement along with all compensation and emoluments afforded other teaching staff members. The State Board subsequently directed the Board to reinstate the petitioners "with back pay minus mitigation" in the event that they had greater seniority than any of the staff members who had been retained by the Board. *West Orange Supplemental Instructors Association v. Board of Education of the Township of West Orange, Essex County,*

decided by the State Board, 1987 S.L.D. 2758, aff'd, Dkt. No. A-5792-86T8 (App. Div. 1988), cert. denied, 114 *N.J.* 487 (1989).

Thereafter, on December 14, 1989, thirteen of those supplemental teachers filed the instant petition, alleging that, while the Board had reinstated them for the 1989-90 school year as directed, it had not made any back salary payments since the parties had been unable to agree on the specific amounts by which their damages should have been reduced under mitigation principles.

On January 9, 1991, the Commissioner determined that five of the petitioners had fully mitigated their damages and were entitled to back pay minus mitigation from the date of the RIF's through 1989 when they were reinstated. He found that the remaining eight petitioners had made adequate efforts to secure other employment only during a limited period immediately following their RIF's. He awarded the latter group damages only for those periods of time in which he found that they had exercised proper diligence.

On April 1, 1992, the State Board affirmed in part and reversed in part the decision of the Commissioner. The State Board found that the Commissioner had misapplied the legal principle of mitigation in limiting the petitioners' damages only to those periods in which they had made reasonable efforts to mitigate. The State Board stressed that the failure of any of the petitioners to exercise reasonable diligence to mitigate their damages during a portion of the period following their RIF's did not vitiate their entitlement to be made whole during such periods for their wrongful discharge. Rather, the State Board explained, mitigation principles would apply to those period in which the petitioners had not exercised the required diligence so as to reduce, rather than eliminate, the back pay awards for such period by any amount which petitioners should have been earning in other employment had they made reasonable efforts to secure other employment.

The State Board also modified the Commissioner's determination as to the period of time following the RIF during which petitioner Shirley Blank had properly mitigated her damages. State Board concluded that, under the circumstances, Blank had reasonably lowered her sights in November 1985 when she accepted a part time position in Montclair. They therefore concluded that she had adequately mitigated her damages through June 1987 when such employment terminated rather than November 1985 as found by the Commissioner. The State Board further modified the Commissioner's decision so as to reduce the petitioner Constance Afromsky's damages for the period from August 1987 through September 1, 1989 by that amount which she would have earned had she not voluntarily accepted a reduction by leaving her teaching position in Newark and accepting a position in Florida, rather than by her actual lower earnings in Florida. In all other respects, the Board affirmed the Commissioner's determination of the award entitlements of the petitioners. In accordance with their decision the Board directed that the West Orange Board of Education pay petitioners their salaries which would have been earned in West Orange less the actual earnings during the specific periods following their RIF's in which they had found that the individuals had exercised reasonable diligence in seeking other suitable positions. In addition the State Board remanded to the Commissioner for (1), a determination of the salary petitioner Afromsky would have earned from August 1987 through September 1, 1989 had she not voluntarily accepted a reduction in salary by relocating to Florida, and (2) for a determination of the salaries petitioners Berk, Blank, Davis, Ratner, Passner, Peretz, Kolin and Shifman reasonably should have earned in other employment during those specific periods in which the Board had determined that they had <u>not</u> made reasonable efforts to mitigate, and for a resultant computation of their back pay awards for such periods. The Board's remand was thus strictly limited to the <u>amount</u> of the damage entitlements of nine of the petitioners during those specified periods in which they had found that those individuals had not taken reasonable steps to mitigate their damages. In essence, their awards were to be computed by deducting the amounts it was determined they should have been earning in other positions, had

they made reasonable efforts to secure such employment, from the salaries they would have earned in West Orange had they not been improperly dismissed.

On July 1, 1992, the State Board denied the West Orange Board of Education's motion for a stay of their decision of April 1, 1992 pending determination of the parties' motions for leave to appeal to the Appellate Division, finding that the board of education had failed to meet standards that would entitle it to relief under *Crowe v. Degioia*, 90 *N.J.* 126 (1982).

On August 13, 1992 the Appellate Division denied the Board's motion for a stay of the State Board's decision. The court also denied the parties' cross motions for leave to appeal.

On May 19, 1993 the undersigned computed petitioner Afromsky's damage entitlement for 1987-88 and 1988-89 by reducing her damages by the amount of her actual earnings in Florida. The undersigned computed the awards of the remaining eight petitioners for the periods affected by the remand by reducing their damages by $13,000 per year. In doing so, the undersigned noted that the State Board "seems to have accepted $13,000 as adequate to show due diligence in mitigating damages." Initial Decision on remand, slip op. at 26.

On July 21, 1993 the Commissioner rejected the ALJ's salary computation for all nine of the petitioners affected by the State Board's remand. Citing the express language of that remand, Commissioner found that the undersigned had "erred in applying petitioner Afromsky's Florida earnings as her measure of mitigation for 1987-88 and 1988-89 rather than utilizing the salary she would have earned in Newark had she continued to remain employed there during this period." Commissioner's decision on remand, slip op. at 35. Applying the salary she would have earned in Newark, the Commissioner determined that Afromsky was entitled to back pay in the amount of $10,765 rather than $22,421 determined by the undersigned.

The Commissioner also rejected the undersigned's across the board application of a $13,000 mitigation figure for the remaining eight petitioners. The Commissioner thereupon determined that it was reasonable for one additional petitioner, Florence Berk, to have lowered her sights and had accepted less than comparable employment in March 1985 as a substitute teacher in West Orange. Consequently, the Commissioner determined that Berk had adequately mitigated her damages through September 1, 1989, rather than April 1, 1985 as previously determined by the State Board.

Acknowledging that there was "no 'single perfect' way, in retrospect to establish salaries that individuals should have been earning." *Id.* at 39, the Commissioner determined that the most equitable method of computing back salaries in this instance would be to utilize an average of the salaries of the petitioners which they would have earned in East Orange and Newark, which were large districts close to West Orange and which had a large number of available teaching positions during the relevant periods. The Commissioner also concluded that each of the petitioners would initially have place on the first step of those districts salary scales, reasoning that "it would be absurd to make the assumption that Newark and East Orange would have granted the petitioners' for prior service in establishing their salary levels.' *Id.* at 41.

The Commissioner thereupon made the necessary computations and determined that the petitioners herein were entitled to back salary awards for the time periods at issue on remand in the amounts found on page eight of the State Board of Education decision.

On September 21, 1993, the Commissioner granted the Board's motion for a stay of the decision. The Commissioner found that she could not, in good conscience place the Board in jeopardy by ordering payment of back salaries at that time given that such payments would have reduced the district's surplus account to a precarious level.

She directed the Board to take immediate steps to assure that sufficient funds were available to pay any forthcoming judgment ordered by the State Board on appeal.

The State Board filed the instant appeal from the decision of the Commissioner. The Board argues that the Commissioner went beyond the scope of the remand in concluding that petitioner Berk had adequately mitigated her damages and that the Commissioner erred in computing damages based on the assumption that petitioners initially would have been placed on the applicable first step of the salary guides in Newark and East Orange, resulting in a lesser reduction from their damages. The West Orange Board further contends that, rather than averaging the salaries petitioners could have earned in Newark and East Orange, the petitioners' damage awards should have been reduced by the greater of the salary they would have earned in Newark or East Orange. The West Orange Board also maintained that errors were made by the Commissioner in specific computations of several of the petitioners, including placing petitioner Blank on the bachelors degree level of the Newark and East Orange salary guides when she actually held a bachelors degree plus 32 credits.

Petitioners filed a cross-appeal, arguing, *inter alia*, that the Commissioner erred in rejecting the undersigned's use of the $13,000 as a yearly mitigation figure. In response to the Board's contention that the Commissioner incorrectly placed petitioner Blank on the bachelors degree of the Newark and East Orange salary guides, petitioners point out that the parties had also erroneously stipulated as to the specific salary Blank would have earned in West Orange. Petitioners have also filed a motion for leave to appeal from that portion of the Commissioner's decision of December 21, 1993 denying post judgment interest and a motion to dissolve the stay ordered by the Commissioner in that decision. In addition, they have moved to supplement their motion to dissolve this stay, and have also filed a motion for leave to supplement their appendix on appeal.

Petitioners specifically request supplementation in response to the Board's argument regarding petitioner Blank, contending that the proposed exhibits indicate the correct salary Blank would have earned in West Orange in 19876-88 and 1988-89, as well as the Board's acceptance of such figures. The Commissioner's decision noted that the petitioners improperly appended documents to their supporting brief which were not part of the record in this matter and subsequently requested supplementation. See page 10, State Board decision dated May 6, 1994. The petitioners also sought to supplement the record that the document they claim rebuts the Board's example that one of the petitioners was given credit for her prior teaching experience when she accepted a teaching position in Newark.

As in the State Board's prior decision of April 1, 1992 in this matter, the sole issue before them remained the amount of damages which the petitioners are entitled to receive. The State Board determined after a review of the record that the record was sufficient to permit resolution of the issues involved in this appeal on which petitioners seek supplementation. Therefore, the State Board denied the petitioners' motion to supplement the record on appeal.

Ultimately, the State Board affirmed in part and reversed in part the decision of the Commissioner.

The State Board affirmed the Commissioner's determination as to petitioner Afromsky's damage award. The State Board's remand specifically provided that her damages were to be reduced for the period from August 1987 through September 1, 1989 "by that amount which she would have earned had she not voluntarily accepted a reduction in salary [by leaving her teaching position in Newark and accepting a lower paying position in Florida], rather than by her actual lower earnings in Florida." State Board's decision, slip op. at 11. Thus, the Commissioner was correct in rejecting the undersigned's use of Afromsky's salary in Florida during that period and the State

Board also found the Commissioner's computation of Afromsky's damage entitlement in the amount of $10,755 to be accurate.

The State Board's also concurred that the Commissioner's rejection of the undersigned's across the board application of a $13,000 figure for the remaining petitioners in the case. Noting that the computation for petitioner Blank had properly taken into account her lowered sights by accepting a position that paid her approximately $13,000 in 1986 and expressly predicated on the specific facts and circumstances in the record applicable to petitioner Blank only, and, consequently, cannot be used as a general representation of adequate mitigation. The applicability of the lowered sights principle is dependent upon "the circumstances peculiar to the individual involved." The State Board's determination regarding Blank was not intended in any way as a general endorsement of $13,000 as adequate to show the other petitioners' due diligence in mitigating damages.

In that regard, however, the State Board rejected the Commissioner's belated analysis of the applicability of the lowered sights principle to the petitioners in the case and the Commissioner's resultant determination that petitioner Berk had properly mitigated her damages through September 1, 1989, rather than through April 1, 1985 as determined by the State Board's decision of April 1, 1992. The State Board's decision fully determined the periods following their RIF's during which each of the petitioners had made reasonable efforts to mitigate. According to the State Board what the Commissioner failed to recognize is that mitigation includes the lowered sights principle and that the State Board's final determination on mitigation necessarily included analysis of the lowered sights principle. The State Board found that only petitioner Blank had reasonably lowered her sights and that petitioner Berk had made reasonable efforts to mitigate her damages only for the period from her RIF through April 1, 1985. As a result the State Board directed her damages to be reduced for the period from her RIF through April 1, 1985 by her actual earnings and for the period from April 1, 1985 through September 1, 1989 by the amount she should have been

earning during that time had she made reasonable efforts to mitigate. The State Board's remand was expressly limited to a determination of the salary Berk should have earned during that period and for a resultant computation of her damage award. By addressing the applicability of the lowered sight doctrine to the petitioners herein, the Commissioner exceeded the scope of the State Board's remand and, in doing so, determined issues which were finally decided in the State Board's decision of April ;1, 1992 and, in the case of petitioner Berk, reached a determination in direct contradiction to the State Board's decision.

As to the amounts that the individuals should have been earning elsewhere, petitioners challenge the Commissioner's utilization of the average of the salaries they would have earned in Newark and East Orange in transitory fashion only, captioning a point heading of their supporting brief: "Although the petitioners disagree with the Commissioner of Education in using the salary steps and guides in East Orange and Newark in determining the awards of the petitioners ..., the petitioners herein agree with the Commissioner's placement of the petitioners on the steps set forth by the petitioners in East Orange and Newark, if East Orange and Newark are to be used ..." Brief in support of cross-appeal, at 9. Thereunder, petitioners respond to the Board's argument that the Commissioner incorrectly placed them on the first step of the Newark and East Orange guidelines. Petitioners do not otherwise dispute the Commissioner's use of the average of the salaries they would have earned in Newark and East Orange, offer any justification or further explanation for their "disagreement" for such method, or propose a measure of their earnings that would be more appropriate.

The specific positions the petitioners would have obtained had they taken reasonable steps to secure comparable employment elsewhere cannot be determined with certainty. The Board has, however shown that ample employment opportunities for the petitioners had been available nearby in Newark and East Orange, and petitioners have neither indicated nor demonstrated how the method used by the Commissioner for determining their salaries, i.e., averaging the salaries they would

have earned in Newark and East Orange, was improper or inequitable. Consequently, under the circumstances, while the State Board recognized that the averaging methods employed by the Commissioner did not result in an existing salary figure, the State Board rejected the petitioners' cursory challenge to such a measure of their earnings.

The State Board also rejected the Board's proposal to reduce the petitioners' damages by the greater of the salaries each of the petitioners would have earned in Newark or East Orange. The Board has not demonstrated in which of these two districts the individual petitioners were more likely to obtain jobs had reasonable efforts been made to do so. Thus, perfunctory application of a higher salary would be unjustified based on the record.

The State Board did however agree with the Board that the Commissioner utilized the improper measure in reducing petitioners' damages using salaries they would have earned based on their initial placement on the first step of the salary schedules in Newark and East Orange. Initial placement on a district salary guide is, as pointed out by the State Board's decision, predicated upon the terms of the district's collective negotiations agreement. The Commissioner's reliance upon her conclusion that the West Orange Board did not credit petitioner Segler for prior teaching experience when it subsequently employed her as a resource room teacher is therefore, according to the State Board, misplaced. For purposes of determining salaries would have earned in Newark and East Orange, the express terms of the collective negotiations agreement in those districts are controlling. Upon review of such documents by the State Board they have determined that the petitioners would have been entitled to credit in both of those districts for their prior teaching experience. As a result, the State Board rejected the commissioner's conclusion that petitioners initially would have been placed step of the salary schedules in Newark and East Orange. The State Board therefore reversed her ultimate determination of their damages based upon such placement and the State Board remanded for determination of the steps on which they would have been placed in Newark and East Orange in light

of their prior teaching experience and for a resultant computation of their damages in accordance with the State Board decision.

The parties also have disagreed on the proper placement of petitioner Blank on the salary guides of West Orange, East Orange and Newark during the period at issue. The Board argues that, in light of the parties' stipulation on remand that Blank held a "bachelors degree plus 32 credits," see, stipulation of facts, at 2, the Commissioner incorrectly placed Blank on the bachelors degree level of the Newark and East Orange salary guides for the 1987-88 and 1988-89 school years rather than on the appropriate bachelors degree plus graduate 32 credits level. Petitioner Blank, in turn, asserts that if that particular modification is to be made then it must also be recognized that the stipulation of facts incorrectly established the salary she would have earned in West Orange during those years, basing her specific salary on the bachelors degree level of that district schedule rather than on the district's "B.A. +32" level. The Board does not dispute the existence of such an error in the stipulation but argues that petitioner should be bound by the figures agreed upon therein.

Upon the State Board's review of the record they have found that petitioner Blank is correct in her contention that the stipulation credits her with a bachelors degree plus 32 graduate credits but establishes the specific salary she would have earned in West Orange in 1987-88 and 1988-89 at the amount shown on the bachelors degree level of that district's guide rather than at the higher "B.A. +32" level. Under the circumstances and given such inconsistency in the stipulation of facts that the Board does not dispute that Blank holds a bachelors degree plus 32 credits the State Board has modified, in the interest of justice, the amount Blank would have earned in West Orange to reflect the correct figures; $39,200 in 1987-88 and $41,515 in 1988-89. Exhibit P-3 in evidence. Accordingly in computing petitioner Blank's damage entitlement for 1987-88 and 1988-89, and has directed the use of these figures, in addition to the appropriate salary figures on the Newark and East Orange guides which properly recognize that Blank held a bachelors degree plus 32 credits.

In light of the State Board's determination that the Commissioner incorrectly placed petitioners on the first step if the Newark and East Orange guides, it is unnecessary for the State Board to address the Board's remaining allegations regarding the Commissioner's computations of the specific salaries several other petitioner would have earned in those districts.

The State Board concludes, in summary, that they affirm the Commissioner's determination on the remand as to petitioner Afromsky only and direct payment to her in the amount of $10,765. As to the remaining eight petitioners, the State Board reverses the Commissioner's determination of their damage entitlements and remands to the Commissioner for determination of their awards in accordance with the Board's decision of May 6, 1994.

Lastly the State Board has affirmed the Commissioner's determination to deny the petitioners' request for post-judgment interest for the reasons expressed therein. Beyond that, given the State Board's determination of this matter, they have denied as moot the petitioners' motion to dissolve the stay granted by the Commissioner pending a decision by the State Board.

Subsequently this case was remanded on July 28, 1994 to the OAL. It should be noted that in light of the State Board's decision and attempts to appeal by the parties' this matter was sent to the OAL prior to the July 28, 1994 date. That case was returned to the agency at the request of the Department of Education by way of computer-generated notice of July 11, 1994. The case was returned to the OAL on July 28, 1994 for disposition based upon the remand by the Department of Education and was therefore granted a new docket number and proceeded in the normal course.

After several conferences with the attorneys for both sides no solution was able to be reached as to the amount due each of the petitioners and the parties were

directed on November 14, 1994 to file simultaneous submissions of their calculations by January 10, 1995.

Additionally on December 29, 1994 a letter was received for counsel for one of the petitioners, Constance Afromsky, indicating that she had accepted the West Orange Board of Education's figure of $9,148 and was no longer participating in the case. Accompanying that letter was a computation by counsel for the remaining petitioners.

LEGAL DISCUSSION

In the State Board decision it was necessary to look at the contract language (State Board decision pages 14 and 15) for both Newark and East Orange.

The 1983-85 Newark contract (Exhibit R-2) for teachers relating to credit for previous teaching experience read as follows:

> "Credit on the salary schedule for prior service will be given to all teachers for years of accredited teaching, military, or accredited substitute experience in the Newark public schools according to the following formula:
>
> 1. For credit on a year for year basis for four years of prior service;
> 2. Five years credit for six years of prior service;
> 3. Six years credit for eight years or more of prior service
>
> ***
>
> In crediting previous teaching experience for salary purposes, completion if the full academic year is required for recognition."

For the 1985-88 as well as the 1988-91 Newark contracts (Exhibit R-1), the language on credit for prior teaching experience was amended as follows:

> 1. For credit on a year for year basis for up to ten (10) years of prior service;
>
> ***
>
> Credit pursuant to this agreement shall not be retroactive but rather entitle each teacher to the right to receive credit commencing with the effective date of this agreement.

In dealing with the East Orange teachers contract (Exhibit R-4), on credit for prior teaching, which remained unchanged from 1983 through and including 1989 it states as follows:

> 1. For credit on the current teachers salary guide it shall be given to all new teachers for all verified contracted previous satisfactory teaching experience in a duly accredit public and/or private elementary or secondary school.
>
> 2. Each teacher shall be placed on his proper step on the current teacher salary guides upon verification of all contracted previous satisfactory teaching experience in a duly accredited public and/or private elementary or secondary school by the chief school administrator, or his/her designated representative, of the school(s) or school district(s) in which he/she was previously employed.
>
> 3. To receive edit for one year of teaching experience, the teacher shall have been under contract for at least four months of the school year."

While the petitioners were employed as supplemental teachers by respondent, the petitioners worked under a contract. (See No. 37 of stipulation of facts) which stated that during their employment as supplemental teachers with respondent, petitioners worked under a group contract, not individually. This fact was stipulated to by both parties.

As for the individual supplemental instructors and based upon the remand decision I come to the following conclusions.

1. Teacher Constance Afromsky.

Both parties agree that Afromsky is due $9,148 in back salary. The remaining estimated back salary awards are as follows:

ESTIMATED BACK SALARY AWARDS

Afromsky (B.A.)	87-88	88-89		Total		
West Orange	$34,650	$36,660		$71,310		
Newark	28,678	31,867		60,545		
				$10,765		
				1,616 (unemployment benefits-1983)		
Blank (B.A. +32)						
West Orange	39,200	41,515		80,715		
Newark (Step 11-10 yrs. experience)	31,115	34,983		66,098		
East Orange (20 yrs exp.)	35,416	37,756		73,172		
		Newark/EO avg.		69,635		
		Balance due		11,080		

Berk (B.A. +32)	84-85	85-86	86-87	87-88	88-89	Total
West Orange	9,613	34,555	37,320	39,200	41,515	162,203
Newark (Step 7- 6 yrs. credit)	6,567 (21,890 div. by 10 x 3)	26,925 (convert to Step 11-10 yrs. exp. as per contract)	30,825	38,132	40,832	143,281
East Orange (Step. 17-18 yrs. exp.)	8,661 (28,871 div. by 10 x 3)	31,000	33,175	35,416	37,756	146,008
				Newark/EO avg. =		144,645
				Balance due		17,588

Davis (M.A.)

	83-84	84-85	85-86	86-87	87-88	88-89	Total
West Orange	18,195	32,395	34,930	37,725	39,600	41,915	204,760
Newark (Step 7- 6 yrs. credit)	12,161 (20,268 div. by 10 x 6)	22,545	26,925 (convert to Step 11-10 yrs. exp. as per Contract)	30,825	38,132	40,832	171,420
East Orange (10 yrs. exp. - Step 11)	12,524 (20,874 div. by 10 x 6)	23,786	23,950	25,754	27,690	30,757	144,461
					Newark/EO avg. =		157,941
					Balance due		46,819

Peretz

West Orange	15,900	28,320	30,560	33,000	34,650	---	142,430
Newark (Step 7- 6 yrs. credit)	11,608 (19,346 div. by 10 x 6)	21,594	25,845 (convert to Step 11-10 yrs. exp.)	29,658	36,820	---	125,525
East Orange (Step 18-18 yrs. exp.)	16,343 (27,239 div. by 10 x 6)	28,871	31,000	33,175	35,416	---	144,805
					Newark/EO avg. =		135,165
					Balance due		7,265

Kolin (M.A.)

West Orange		19,437	34,930	37,725	39,600	41,915	173,607
Newark (Step 7- 6 yrs. credit)		13,133 (21,889 div. by 10 x 6)	26,925 (convert to Step 11)	30,825	38,132	40,832	149,847
East Orange (Step 18 - 19.5 yrs. exp.)		18,796 (31,326 div. by 10 x 6)	33,700	36,050	38,017	41,000	167,663
				Newark/EO avg. =			158,755
				Balance due			14,852

Shifman (B.A.)

	84-85	85-86	86-87	87-88	88-89	Total
West Orange	16,992	30,560	33,000	34,650	36,660	151,862
Newark (Step 7- 6 yrs. credit)	12,536 (20,894 div. by 10 x 6)	25,845 (convert to Step 11)	29,658	36,820	39,320	144,179
East Orange (Step 15-14 yrs. exp.)	15,400	25,550	27,474	29,435	33,900	131,759
				Newark/EO avg.		137,893
				Balance due		13,893

Ratner (B.A.)

West Orange	19,824	30,560	33,000	34,650	36,660	154,694
Newark (Step 7- 6 yrs.)	14,626 (20,894 div. by 10 x 7)	25,845 (convert to Step 11)	29,658	36,820	39,320	146,269
East Orange (Step 16-15 yrs. exp.)	18,955 (27,078 div. by 10 x 7)	26,700	28,710	31,810	37,756	143,931
				Newark/EO avg.		145,100
				Balance due		9,594

Passner (B.A.)

West Orange	11,328	30,560	33,000	34,650	36,660	146,198
Newark (Step 7- 6 yrs.)	8,358 (20,894 div. by 10 x 4)	25,845 (Step 11)	29,658	36,820	39,320	140,001
East Orange (Step 17-18 yrs. exp.	11,548 (28,871 div. by 10 x 4)	31,000	33,175	35,416	37,756	148,895
				Newark/EO avg.		144,448
				Balance due		1,750

Having concluded the following to be the total amount for each of the named petitioners in this case I hereby **ORDER** that the amounts listed above be paid to those teachers.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14b-10.

Within thirteen (13) days from the date on which this recommended decision is mailed to the parties, any party may file exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, 8th Floor, CN 500, Trenton, NJ 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/7/95
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

7/11/95
DATE

Receipt Acknowledged:
Hope R Blackburn
DEPARTMENT OF EDUCATION

JUL 13 1995
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

Witnesses

None

Evidence

None (with the exception of evidence in the case below)

539-96

539-96 CORRECTED COPY

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

December 9, 1996

OAL DKT. NO. EDU 10936-94
AGENCY DKT. NO. 192-6/94

CORRECTED COPY

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 9, 1996
Date of Mailing, December 9, 1996

540-96

540-96

IN THE MATTER OF THE TENURE	:	
HEARING OF CARIDAD RIVERA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
NEWARK, ESSEX COUNTY.	:	
_____	:	

December 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 837-95

AGENCY DKT. NO. 465-II/94

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Petitioner,

v.

CARIDAD RIVERA,

Respondent.

Gregory G. Johnson, Esq., for petitioner

Eugene G. Liss, Esq., for respondent

Record Closed: October 3, 1996 Decided: October 11, 1996

BEFORE **DIANA C. SUKOVICH**, ALJ:

On October 7, 1994, petitioner certified tenure charges against respondent, a tenured teacher employed by petitioner. Respondent filed an answer on January 12, 1995. The State Department of Education transmitted the matter to the Office of

Administrative Law on January 24, 1995 for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

Several telephone conferences were conducted, and various hearing dates were adjourned at the requests of the parties. The parties conferred throughout the proceedings, reached a resolution of the matter, and filed an executed Stipulation of Settlement on October 3, 1996, on which date the record was closed. Attached herewith is a copy of the Stipulation.

I have reviewed the record and the terms of settlement and I **FIND** that the parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and that the settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 11, 1996
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

10/28/96
DATE

T.J. Fynn
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 1996
DATE

Barbara A. Hannah
OFFICE OF ADMINISTRATIVE LAW

njf

Oct 3 11 54 AM '95

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
201-642-0001
Attorney for the Newark Public Schools

IN THE MATTER OF THE TENURE HEARING OF CARIDAD RIVERA, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	**BEFORE THE COMMISSIONER OF EDUCATION** **OFFICE OF ADMINISTRATIVE LAW** **Agency Ref. No. 645-11/94** **O.A.L. Docket No.** EDUTH 00837-95N **STIPULATION OF SETTLEMENT**

WHEREAS, the parties, State-Operated School District of the City of Newark ("District"), and Caridad Rivera, a tenured teacher, and residing at 37 Cherry Street, Jersey City, New Jersey 07305, hereby stipulate and agree as follows:

1. Ms. Rivera hereby agrees to immediately resign her tenured teaching position, and relinquish any rights to such position under *N.J.S.A.* 18A:28-5. Attached is a copy of the signed Letter of Resignation (Exhibit "A"). Upon the final approval of the signed Agreement and Letter of Resignation, the District shall and hereby does withdraw the Tenure Charges of Excessive Absenteeism and Incapacity certified on November 22, 1994.

2. The District agrees to compensate Ms. Rivera for the 120 day unpaid suspension previously served in the following manner. Ms. Rivera shall be restored to the payroll retroactively from September 16, 1996 and will receive her salary and benefits as an employee through January 12, 1997. By Order of the Administtrative Law Judge, the District removed Ms. Rivera from the payroll for the period January 18, 1996 to September 16, 1996, upon granting Ms. Rivera a hearing adjournment request. Ms. Rivera will not be required to return to active service. The salary rate to be paid will continue at the same rate paid during the 1995-96 school year, with no increment or increase.

3. As of January 13, 1997, all of Ms. Rivera's employment rights, including, but not limited to salary, insurance coverages, tenure and seniority, will permanently end. Ms. Rivera expressly waives and gives up any right to tenure in the District and agrees never to seek employment with the District in the future. She will not contest the District's action to terminate her employment or otherwise seek reinstatement.

4. The District will not pursue tenure charges against Ms. Rivera as long as this settlement remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the settlement is voided, the District retains the right to file and consider for certification tenure charges against Ms. Rivera, including such charges which have previously been filed by the District against Ms. Rivera.

5. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

6. This Agreement constitutes the full Agreement between the parties.

7. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by the respective parties to sign this Agreement and bind their principals to its terms.

8. By entering this Agreement, each party releases and discharges the other with respect to all claims (except workers compensation) or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now. It specifically includes, without limitation, all claims which Ms. Rivera may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment.

9. This Agreement is subject to approval by the State District Superintendent and Commissioner of Education.

FOR THE EMPLOYEE

Caridad Rivera

Caridad Rivera

Dated: 9/12/96

Eugene G. Liss

Eugene G. Liss, Esq.
Attorney for Ms. Rivera

Dated: September 12 1996

FOR THE STATE-OPERATED SCHOOL DISTRICT OF NEWARK

Beverly L. Hall

Dr. Beverly L. Hall

Dated: 9/19/96

Gregory G. Johnson

Gregory G. Johnson, Esq.

Dated: September 16, 1996

Dated: _____

September 12, 1996

Beverly L. Hall, Ed. D.
State District Superintendent
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102

Dear Dr. Hall:

I hereby resign my tenured teaching position with the State Operated Newark Public Schools effective immediately.

Very truly yours,

Caridad Rivera

Caridad Rivera

STATE OF NEW JERSEY:
COUNTY OF ESSEX :

I CERTIFY that on September 12, 1996, Caridad Rivera personally came before me and acknowledged under oath to my satisfaction that she personally signed, sealed and delivered this document as her act and deed.

Eugene G. Liss
Attorney at Law of New Jersey

OAL DKT. NO. EDU 837-95

IN THE MATTER OF THE TENURE	:	
HEARING OF CARIDAD RIVERA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
NEWARK, ESSEX COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner cannot be satisfied by the present record that the proposed settlement in this matter meets the *Cardonick* standard for settlement of tenure matters *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County,* decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification State Board of Education November 2, 1983, affirmed N.J. Superior Court, Appellate Division, January 30, 1986. The present record contains

no such required explanation. Further, there is no indication that the within teaching staff member was advised of the Commissioner's duty pursuant to *N.J.A.C.* 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. While the Commissioner does not preclude the possibility of settlement in this matter, he must be assured that any settlement is consistent with appropriate standards for setting aside of tenure matters as expressed in *Cardonick, supra.*

Accordingly, the initial decision of the OAL is remanded for revision of the settlement document and expansion of the record consistent with the concerns expressed herein.

IT IS SO ORDERED.

Acting COMMISSIONER OF EDUCATION

December 12, 1996
Date of Mailing, December 12, 1996

5-11-96

541-96

D.S., on behalf of daughter, D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7213-96

AGENCY DKT. NO. 174-5/96

D.S. ON BEHALF OF DAUGHTER, D.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY TROY HILLS, MORRIS COUNTY,

Respondent.

D.S., on behalf of D.C., *pro se*

Marie-Laurence Fabian, Esq., for respondent
(Dillon, Bitar & Luther, attorneys)

Record Closed: October 9, 1996 Decided: October 21, 1996

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on July 1, 1996, for hearing as a contested case pursuant *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for

9:00 a.m. January 3, 1997, at the OAL in Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement, indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Oct 21, 1996
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

10/28/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 31 1996
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

dgi

DILLON, BITAR & LUTHER
53 Maple Avenue
PO Box 398
Morristown, New Jersey 07963-0398
(201) 539-3100

Oct 3 11 02 AM '96

In the Matter of D.S. on Behalf of Daughter D.C.	
v.	SETTLEMENT AGREEMENT
Board of Education of the Township of Parsippany-Troy Hills	OAL Dkt. No. EDU 7213-96

This Settlement Agreement is entered into between Deborah Saro and the Parsippany-Troy Hills Board of Education ("the Board").

WHEREAS, on May 20, 1996 Ms. Saro filed a petition of appeal with the Commissioner of Education challenging disciplinary action taken against her daughter for violations of school rules that resulted in a loss of credit and the need for her daughter to complete a course in summer school prior to graduating from High School; and

WHEREAS, on May 22, 1996 Ms. Saro applied to the Commissioner for emergent relief seeking an order rescinding the Board's decision and allowing her daughter to graduate with her class on June 20, 1996; and

WHEREAS, the Commissioner denied Ms. Saro's request for emergent relief and dismissed her petition of appeal; and

WHEREAS, Ms. Saro appealed to the State Board of Education for an order allowing her daughter to obtain her diploma without the need to complete additional coursework in summer school; and

WHEREAS, the State Board of Education concurred with the Commissioner's decision to deny the request for emergent relief but remanded the matter for a decision regarding the need to complete additional coursework prior to graduation; and

WHEREAS, while this matter was being processed by the Bureau of Controversies and Disputes and the Office of Administrative Law, Ms. Saro's daughter enrolled in summer school and successfully completed the coursework necessary to allow her to receive a diploma, thereby making it unnecessary to seek an order allowing her daughter to graduate without the need to complete additional coursework ; and

WHEREAS, during a Prehearing Conference with the judge assigned to this matter, it was determined that the only relief available to Ms. Saro in this matter would be damages in the amount of the $197.00, representing the amount of tuition she paid for summer school; and

WHEREAS, in light of the relatively small amount of damages at issue, both parties wish to avoid the additional time, delay and expense inherent in the further litigation of this matter;

NOW THEREFORE, the undersigned agree that this matter shall be amicably settled upon the following terms and conditions:

1. For and in consideration of the sum of ONE HUNDRED NINETY-SEVEN DOLLARS ($197.00) to be paid by the Board, Ms. Saro agrees to withdraw the petition filed with the Commissioner of Education and to release the Board from any and all claims arising from or

attributable to the disciplinary action it took against her daughter.

2. Ms. Saro acknowledges and agrees that the aforesaid payment does not in any way constitute an admission by the Board of any wrongdoing relative to the disciplinary action it took against her daughter.

3. As a condition of this agreement, Ms. Saro represents that neither she nor her daughter have, nor will they, in any manner publicize the terms of this agreement to anyone, including former and present students and parents of students in the Parsippany-Troy Hills School District, other than to indicate that the matter has been resolved and the petition withdrawn.

Dated: 9/30/96 Deborah Saro

PARSIPPANY-TROY HILLS BOARD OF EDUCATION

Dated: 9/26/96 By: David Shaffer, Board President

H:\Clients\Misc\Agree.Ag\PTHBOE.007

3C

OAL DKT. NO. EDU 7213-96

D.S., on behalf of daughter, D.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 12, 1996
Date of Mailing, December 12, 1996

544-96

EDU #10080-96
C # 544-96E
SB # 98-96

I.D. AND M.D., on behalf of C.D.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 27, 1996

For the Petitioner-Appellant, New Jersey Protection & Advocacy, Inc. (Joseph M. Ciccone, Esq., of Counsel)

For the Respondent-Respondent, Kenney & Gross (Michael J. Gross, Esq., of Counsel)

This matter was initiated on November 1, 1996 when petitioners, the parents of a 6-year-old who is classified and has an individualized educational program ("IEP"), filed an application for emergent relief with the Department of Education's Office of Special Education Programs ("OSEP"), alleging that the Board of Education of the Township of Hazlet (hereinafter "Board" or "Hazlet Board") had violated the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. Sec. 1415 et seq., and other special education laws. Specifically, petitioners sought emergent relief pursuant to N.J.A.C. 1:6A-12.1, including transportation for their son from their care provider's home to school pursuant to his IEP, an IEP meeting to develop a compensatory education plan, and the

4/2/97

reimbursement for costs incurred as the result of the district's failure to provide appropriate transportation, as well as attorney's fees pursuant to 20 U.S.C. Sec. 1415(e)(4)(B).

As set forth in N.J.A.C. 6:28-2.7, the Office of Special Education Programs transmits applications such as the one involved here to the Office of Administrative Law ("OAL") for an impartial hearing pursuant to N.J.A.C. 1:6A-1.1 et seq. However, in this instance, the Office of Special Education Programs transferred the application instead to the Bureau of Controversies and Disputes for determination by the Commissioner. The matter was then transmitted to OAL as a contested case pursuant to N.J.S.A. 52:14B-2 et seq.

On November 21, 1996, the Administrative Law Judge ("ALJ") issued a determination under the standard established in N.J.A.C. 1:6A-12.1(e), granting the application for emergent relief pending full disposition of the matter through an IDEA due process hearing to be conducted pursuant to N.J.A.C. 1:6A-1 et seq. However, because the matter had been transmitted to OAL by the Bureau of Controversies and Disputes, the ALJ's decision was transmitted to the Commissioner as a recommendation pursuant to N.J.A.C. 1:1-18.1 et seq. for his decision, rather than becoming the final determination as codified in N.J.A.C. 1:6A-1 et seq. and N.J.A.C. 6:28-1 et seq.

The Commissioner rejected the determination which the ALJ had made under the standard articulated in N.J.A.C. 1:6A-12.1(e). Instead, the Commissioner determined that petitioners were not entitled to emergent relief because the application did not meet the standards of Crowe v. De Gioia, 90 N.J. 126 (1982). In doing so, the

Commissioner found that he had jurisdiction over the matter to the extent that petitioners alleged that the Board had acted improperly in not providing transportation for their son from a locale other than that designated in the IEP. At the same time, the Commissioner concluded that he did not have the jurisdiction to decide the merits of the case because the matter involved an IDEA dispute.

Petitioners filed the instant appeal to the State Board. While they have also refiled their substantive claim with OSEP, and it has been transmitted to OAL for decision on the merits pursuant to N.J.A.C. 1:6A-1 et seq., petitioners seek a determination by the State Board that the Commissioner should not have taken jurisdiction over any aspect of this case, but, rather, that OSEP should have transmitted the case to OAL for decision as a special education matter.

The Hazlet Board contends that the appeal is moot since the Commissioner's decision on the emergent relief application did not foreclose them from refiling for relief with OSEP and the underlying matter is being heard at OAL as a special education case.

Petitioners counter that the due process hearing cannot correct the error that was made in this case and that such error is capable of repetition and evading review. Moreover, they stress that their son has not obtained the interim relief they sought since the Commissioner improperly took jurisdiction over the application.

We agree with petitioners that this appeal raises an issue of public interest which may well reoccur but escape review. Hence, we find it falls within an exception to the mootness doctrine. See Zirger v. General Accounting Insurance Company, 144 N.J. 327, 330 (1996).

Review of the substance of appellant's application leaves no question that it should have been transmitted by the Office of Special Education Programs to OAL when it was filed for consideration as a special education matter. Quite simply, because the application facially argues violations of the IDEA and other special education statutes, and specifically requests relief under N.J.A.C. 1:6A-12.1, the application should have been transmitted to OAL pursuant to N.J.A.C. 1:6A-12.1 et seq. for determination under the standard set forth in N.J.A.C. 1:6A-12.1(e), which is applicable to matters such as this.[1] See also 20 U.S.C. Sec. 1415.

Hence, we reverse the Commissioner's determination that he had jurisdiction to review the application for emergent relief in this case, and we set aside his decision denying such relief. However, in that neither the Commissioner nor the State Board of Education has the jurisdiction to review the ALJ's determination that petitioners were entitled to emergent relief under the standards of N.J.A.C. 1:6A-12.1, we dismiss the appeal.

April 2, 1997

Date of mailing APR 02 1997

[1] Under N.J.A.C. 1:6A-12.1(e), an ALJ may order emergency relief in special education matters if he determines that: 1) the applicant has a reasonable probability of ultimately prevailing on the merits, 2) either serious harm will result to a student if relief is not granted or the student's education program will be terminated or interrupted, and 3) the relief requested is narrowly defined to prevent the specific harm and will not cause unreasonable expense and substantial inconvenience. In contrast, the standard under Crowe v. De Gioia, supra, requires an applicant for emergency relief to show 1) irreparable harm, 2) that the legal right underlying the claim is unsettled, 3) a reasonable probability of ultimate success on the merits, and 4) that the harm to the applicant if the relief is not granted outweighs any harm to the other parties.

546-96

546-96

JENNIFER STAGAARD AND AMERICAN FEDERATION OF TEACHERS, LOCAL 3417,	:	
PETITIONERS,	:	
V.	:	
PETER B. CONTINI, ASSISTANT COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, BOARD OF EDUCATION OF THE BOROUGH GARWOOD, BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, AND BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,	:	COMMISSIONER OF EDUCATION DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning teacher and association of the Union County Regional High School District No. 1, scheduled to dissolve as of July 1, 1997, sought declarations that staff who have met or will meet the statutory conditions for acquisition of tenure during the 1996-97 school year will be deemed fully entitled to exercise tenure and seniority rights, rather than be deemed nontenured because employment rights for regional staff were fixed on the date (May 14, 1996) of the dissolution referendum, at which time they had not yet acquired tenure; that the tenure and seniority rights of teachers presently employed by the regional district will extend to all positions in any of the six constituent withdrawing districts, regardless of whether or not available high school positions have been filled; that those withdrawing consistent districts, presently K-8, which will operate high schools upon dissolution of the regional district will be deemed "new districts" within the intent of N.J.S.A. 18A:6-31.3 et seq., so that the provisions of that section will govern employment rights and the terms and conditions of regional district employment will become the terms and conditions of employment for all teachers in the "new" K-12 districts; that, if N.J.S.A. 18A:6-31.4 et seq. is found to be not applicable, then N.J.S.A. 18A:13-64 will ensure retention of prior benefits such as carry over of accumulated sick days and payment on retirement for unused sick days, and in either case, that the law will not permit tenured teachers to be reduced in compensation; and that tenured teachers will be entitled to be paid, as to both actual salary and guide placement, upon employment in any constituent district as if their entire period of employment had been with that district.

Commissioner held that constituent K-12 districts resulting from dissolution do not constitute "new" districts within meaning of N.J.S.A. 18A:6-31.3 et seq., and that statute governing employment rights (N.J.S.A. 18A:13-64) must be read in a manner which honors the employment rights of regional staff without needlessly disrupting the stability and continuity of existing districts. Commissioner held that regional staff members' right to continued employment is fully honored by accommodating them, by preference and seniority, within identified constituent high school positions, with "bumping" into elementary and middle school positions required only where there is no high school position available, and that their right to preserved tenure and seniority is honored by retaining, and being entitled to assert upon subsequent RIF, all prior credit once employed in a constituent district. Commissioner held that date of dissolution election must control fixing of employment rights for purposes of initial assignment, except in cases where an employee will have met the statutory conditions for acquisition of tenure prior to dissolution; in those cases, seniority credit will be reckoned as of the date of the election, but as of the date of tenure acquisition, the employee is entitled to all the protections of tenure in the regional and subsequent constituent district. Finally, Commissioner held that existing constituent contracts will control for regional employees, with the proviso that salaries of tenured regional staff may not be reduced and that all rights of pension, leave and other similar benefits are preserved as required by law.

December 6, 1996

JENNIFER STAGAARD AND AMERICAN FEDERATION OF TEACHERS, LOCAL 3417,	:	
PETITIONERS,	:	
V.	:	
PETER B. CONTINI, ASSISTANT COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, BOARD OF EDUCATION OF THE BOROUGH GARWOOD, BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, AND BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,	:	COMMISSIONER OF EDUCATION DECISION
RESPONDENTS.	:	

For Petitioners, Russell J. Schumacher, Esq. (Rand, Algeier, Tosti & Woodruff)
For Respondent Contini, Michelle Lyn Miller, DAG (Peter Verniero, Attorney General)
For Respondents Berkeley Heights, Kenilworth, Mountainside and Springfield, Vito A. Gagliardi, Jr., Esq. (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen)
For Respondent Clark, Mark S. Tabenkin, Esq. (Kenney & Gross)
For Respondent Garwood, William S. Jeremiah, Esq. (Buttermore, Mullen, Jeremiah & Phillips)
For Respondent Union County Regional District, Lawrence S. Schwartz, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

This matter arises from the impending dissolution of the Union County Regional High School District No. 1 pursuant to N.J.S.A. 18A:13-51 et seq., effective July 1, 1997, and from the ensuing lack of agreement surrounding the employment rights of affected staff

members. The matter was opened before the Commissioner of Education by way of a petition for declaratory judgment and motion for stay filed by petitioners on September 24, 1996 and amended to include an additional count on October 9, 1996. Following receipt of answers and briefs from the various parties, the Commissioner determined, by letter decision dated October 22, 1996, to stay the staff selection process scheduled to begin on November 1, 1996, pending his determination on the within petition.

Petitioners' filings include a total of five counts, which seek the following declarations: That staff who have met or will meet the statutory conditions for acquisition of tenure during the 1996-97 school year will be deemed fully entitled to exercise tenure and seniority rights, rather than be deemed nontenured because employment rights for regional staff were fixed on the date (May 14, 1996) of the dissolution referendum, at which time they had not yet acquired tenure (Count I); that the tenure and seniority rights of teachers presently employed by the regional district will extend to all positions in any of the six constituent withdrawing districts, regardless of whether or not available high school positions have been filled (Count II); that those withdrawing constituent districts, presently K-8, which will operate high schools upon dissolution of the regional district will be deemed "new districts" within the intent of N.J.S.A. 18A:6-31.3 et seq., so that the provisions of that section will govern employment rights and the terms and conditions of regional district employment will become the terms and conditions of employment for all teachers in the "new" K-12 districts (Count III); that, if N.J.S.A. 18A:6-31.4 et seq. is found to be not applicable, then N.J.S.A. 18A:13-64 will ensure retention of prior benefits such as carry over of accumulated sick days and payment on retirement for unused sick days, and in either case, that the law will not permit tenured teachers to be reduced in compensation (Count IV); and that tenured teachers will be entitled to be paid, as to both actual salary and guide placement, upon employment in any constituent district as if their entire period of employment had been with that district (Count V).

PRELIMINARY DETERMINATIONS

Initially, the Commissioner finds that Assistant Commissioner Peter B. Contini is neither a necessary nor an appropriate respondent in these proceedings, for the reasons set forth by the DAG on motion and incorporated by reference herein; thus, Dr. Contini is hereby severed as a respondent in this matter. Further, in the interest of not extending proceedings, the

Commissioner declines to consolidate this matter with the pending petition filed by the Clark Education Association, which shall proceed to decision as a separate matter notwithstanding the Commissioner's recognition that his determinations below will have a bearing on its outcome. Finally, finding it alternatively outside the scope of his jurisdiction or not necessary to resolution of the matters raised in the within request for declaratory judgment, the Commissioner declines to entertain the cross/counter/third party petition filed by the respondent regional district, which sought declarations that 1) the district's financial obligations to its employees end as of the effective date of the dissolution, 2) employees accepting positions with a constituent district are, for pension purposes, not retirees of the regional district and 3) the regional district has no bargaining obligation with any representative of regional or constituent district staff as to successor agreements for its current employees.[1]

DETERMINATIONS ON THE MERITS

In determining the application of the statutes at issue to the particular facts of this matter, consistent with his authority under N.J.A.C. 6:24-2.1 et seq., the Commissioner finds as follows:

Initially, the Commissioner finds that N.J.S.A. 18A:6-31.3 et seq. is not applicable herein. As defined in that act,

> ***"new school district" means a local school district, regional school district, a county vocational school district, a jointure commission, a county special services school district, or an educational services commission.***
>
> In the event that the school district of a municipality or districts in a group of municipalities are abolished and a subsequent district formed, the district subsequently formed shall constitute a new school district under this act and the previously existing school district or districts shall be considered the affected or constituent district under this act. (N.J.S.A. 18A:6-31.3)

[1] On December 2, 1996, a motion for intervention was filed on behalf of the six employee organizations representing teaching staff members currently employed in constituent districts. The Commissioner declines to entertain this motion, as it was filed well beyond the time set for briefing of this matter and subsequent to formulation of the Commissioner's determinations herein. This holding does not, however, preclude such organizations from reasserting their claim to a right of intervention should this matter be appealed to the State Board of Education.

The present situation is not one where "new" districts are being created as the result of one or more districts being abolished and a subsequent district or districts being formed where no prior entity existed, as would occur, for example, in dissolution of an all-purpose regional district; nor is it one where an existing entity is subsumed under, or transformed into, a newly constituted entity, as occurs when a regional district is created. Rather, what confronts us here are constituent districts which already exist as autonomous entities and will continue to exist exactly as presently constituted, but with the expanded purpose of providing, either directly or on a sending basis, K-12 programs rather than K-8. Thus, dissolution of the limited purpose regional district herein will result not in the creation of *new* districts, but in an *expansion of purpose* for existing ones.

Given this view, N.J.S.A. 18A:13-64, which establishes the rights of employees affected by dissolution of a limited purpose district, must be applied in a manner which preserves the continued employment and accrued rights of such staff, but does not result in the wholesale disruption of existing districts. The statute provides:

> All employees of the regional district shall continue in their respective positions in the withdrawing district, or in each of the constituent districts in the event of a dissolution, and all of their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district or in any of the constituent districts in the event of a dissolution.***(N.J.S.A. 18A:13-64)

To interpret the statute in the manner suggested by petitioners, that regional staff members may assert claims to any constituent district position K-12 held by less senior staff, addresses employment rights to the exclusion of competing, but equally legitimate considerations and is, therefore, unreasonable under the circumstances. The statute in question may not reasonably be found to create an open market where all positions in all constituent districts are subject to preferential claim by staff from the dissolving district, as such a finding would create potential chaos, confer extraordinary rights upon regional staff and effectively usurp the managerial prerogative of the constituent boards of education. Rather, the statute must be read to ensure that, for staff affected by the dissolution of their employing district, employment in their

current position ("teacher") will be maintained and all previously accrued tenure and seniority rights will transfer to the district of future assignment.

This end may be accomplished, in effect, by distinguishing between the rights attached to initial assignment and those attached to subsequent tenure/seniority entitlements. Upon dissolution of the regional district, a staff member is entitled to continue in the position of teacher, as it would have existed had the regional district not been dissolved. This does not create an absolute entitlement for a displaced staff member to choose a particular initial assignment, any more than a particular assignment could have been chosen or rejected had employment continued in the regional district and a transfer been lawfully made by the board of education, whether in subject area within the scope of the staff member's certificate or in building assignment. Once the initial assignment has been made and the statutory right to continued employment thus honored, however, the regional staff member becomes an employee of the constituent district, with all periods of regional employment fully credited for tenure and seniority purposes as if the entire term of employment had been with the constituent district, and with the employee subject to transfer within the scope of his or her certificate as are all other teaching staff members.

In the present circumstances, then, the statutory scheme and the competing interests of employees and constituent districts would most reasonably and fairly be balanced by a process that would identify all available teaching positions in the respective constituent high schools, ask regional staff to rank building and subject preferences within the limits of their certification, and fill positions according to ranked preferences with superior seniority as the determining factor where multiple requests are received for a single position; only in those instances where a regional staff member could not be accommodated within his or her certification by any available high school position would there be an entitlement to "bump" less senior or nontenured staff in a constituent district. Upon assignment to and employment by a constituent district, however, regardless of the actual area of assignment, regional staff members would carry with them all accrued tenure and seniority rights, fully assertable in the employing constituent district upon any subsequent reduction in force (RIF). In this manner, regional staff "continue in their respective positions" and retain "all of their rights of tenure, seniority, [etc.]"

as required under the terms of N.J.S.A. 18A:13-64, without needlessly disrupting the stability and continuity of existing constituent districts.

As to the date of fixing the scope of entitlements for affected staff, established precedent is clear that an individual's rights upon abolishment of a position are set as of the date action is taken to bring about the abolition, not upon its effective date. Francey v. Salem Bd. of Ed., 96 N.J.A.R.2d (EDU) 347. By analogy, it is reasonable and appropriate to extend this principle from abolitions resulting from RIF upon vote by a local board of education to abolitions resulting from dissolution of a district upon vote by citizens at the ballot box. As the rule will apply evenly to all affected staff, and to existing staff in those instances (presumably few or none) where the continued employment rights of regional staff cannot be accommodated without "bumping" into current constituent district positions, there is no prejudice to any staff member, nor are the participants in the regional reconfiguration process treated in a manner inconsistent with their local district counterparts during RIF.

An exception to this general rule, however, is required in the case of teaching staff members such as the individually named petitioner herein who will have met the statutory conditions for acquisition of tenure (N.J.S.A. 18A:28-5) subsequent to the date of the dissolution vote but prior to the effective date of the dissolution. In these instances, N.J.S.A. 18A:13-64, prior case law governing fixing of employment rights, and N.J.S.A. 18A:28-5 must be harmonized to permit petitioner and others similarly situated to assert the same right to available positions as is possible for other tenured staff, that is, ranked preference within area(s) of certification, with multiple claims to be resolved by seniority, which must be reckoned in the interest of a level playing field as of the date of the dissolution vote. It must also be read to require that, during the current year and upon employment in a constituent district, petitioner and others similarly situated will be deemed tenured, that is, unable to be dismissed or reduced in salary except in accordance with applicable law and entitled to preference as against nontenured staff, and that all seniority credit earned during their entire period of employment with the regional and constituent districts will be assertable in the event of a subsequent reduction in force.

As to benefits and salary guide placement, given that N.J.S.A. 18A:6-31.4 has been found not to be applicable herein, determination on will turn on N.J.S.A. 18A:13-64, which

requires that pension, leave and other benefits are to be preserved, and on the protections of N.J.S.A. 18A:28-5, which will not permit a reduction in salary for tenured staff members. The Commissioner has previously addressed this issue in the matter of Board of Education of the Central Regional High School District v. Board of Education of Lacey Township et al., Ocean County, 1980 S.L.D. 553. Therein, the Commissioner specifically directed that staff transferring to a withdrawing constituent district from a regional district were to be placed on the salary guide of the constituent district at the step and level appropriate for their years of service in the regional district, that their rights of leave and other similar benefits were to be preserved, and that they were to be accorded all other benefits held by employees of the constituent district. In effectuating this transfer, however, the salary of a tenured teaching staff member may not be reduced; rather, in those instances where the appropriate step and placement would result in a reduction in salary, the affected staff member must be retained at the current salary level until such time as that level would be reached through ordinary guide movement, whereupon the staff member would be placed "on guide" and accorded normal movement thereafter.

Accordingly, the Commissioner dissolves the previously granted stay of the staff selection process resulting from the dissolution of the Union County Regional High School District No. 1, and directs that such process now move forward consistent with the parameters set forth above. The Commissioner emphasizes the importance of this movement taking place as quickly and efficiently as possible, so as to permit continuation of the planning and preparation necessary to effectuate the dissolution on the scheduled date.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 6, 1996
Faxed December 6, 1996
Date of Mailing, December 9, 1996

546-96

C #546-96
SB # 88-96

JENNIFER STAGAARD AND AMERICAN FEDERATION OF TEACHERS, LOCAL 1017,

PETITIONERS-APPELLANTS,

V.

PETER B. CONTINI, ASSISTANT COMMISSIONER , NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, BOARD OF EDUCATION OF THE: BOROUGH OF GARWOOD, BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD AND BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, UNION COUNTY,

RESPONDENTS-CROSS/APPELLANTS.

STATE BOARD OF EDUCATION

DECISION ON MOTIONS

Decided by the Commissioner of Education, December 6, 1996

Decision on motion by the Commissioner of Education, December 10, 1996

For the Petitioners-Appellants, Rand, Algeier, Tosti & Woodruff (Russell J. Schumacher, Esq., of Counsel)

For the Respondents-Cross/Appellants Boards of Education of Berkeley Heights, Kenilworth, Mountainside & Springfield, Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen (Vito A. Gagliardi, Esq., of Counsel)

2/5/97

For the Respondent-Cross/Appellant Board of Education of the Township of Clark, Kenney & Gross (Mark S. Tabenkin, Esq., of Counsel)

For the Respondent-Cross/Appellant Board of Education of the Borough of Garwood, Buttermore, Mullen, Jeremiah & Phillips (William S. Jeremiah, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Union County Regional High School District #1, Schwartz, Simon, Edelstein, Celso & Kessler (Lawrence S. Schwartz, Esq., of Counsel)

For the Intervenors Berkeley Heights Education Association, Clark Education Association, Garwood Teachers Association, Kenilworth Education Association, Mountainside Education Association and the Springfield Education Association, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

This matter was initiated by Jennifer Stagaard, a teacher employed by the Union County Regional High School District No. 1 (hereinafter "regional district"), and the American Federation of Teachers, Local 3417 (hereinafter "AFT"), the collective negotiations representative for teachers employed by the regional district, following approval for the dissolution of the regional school district as provided for by N.J.S.A. 18A:13-51 et seq. Petitioners sought a declaratory judgment from the Commissioner of Education with respect to the employment rights conferred by the education laws on teaching staff members upon dissolution of the regional high school district.

By decision issued on December 6, 1996, the Commissioner rejected the AFT's position that dissolution of the regional school district would result in the creation of new school districts under N.J.S.A. 18A:6-31.3 et seq., finding instead that dissolution would result in an expansion of purpose for the six school districts that had been part of the regional district (hereinafter "constituent districts"). The Commissioner further declared that upon dissolution of the regional district, staff members had a statutory right to

"continue in the position of teacher, as it would have existed had the regional district not been dissolved." Commissioner's Decision at 5. Distinguishing between a teacher's rights in initial assignment and tenure rights, the Commissioner found that regional district staff members would become employees of the constituent districts upon dissolution of the regional district, with all periods of their employment credited for tenure and seniority purposes as if the entire term of their employment had been in the constituent district.

In establishing the operative date for determining the tenure rights of the regional teachers, the Commissioner analogized the situation to one involving district board action to reduce staff under N.J.S.A. 18A:28-9. On this basis, the Commissioner declared that the operative date for determining the scope of entitlements for affected staff would be May 14, 1996, the date on which the voters approved dissolution of the regional district. The Commissioner, however, carved out an exception for teachers who would meet the statutory conditions for tenure acquisition after the date of that referendum but prior to July 1, 1997, the date which the Commissioner had determined would be the effective date for dissolution of the regional district as provided by N.J.S.A. 18A:13-59.

The Commissioner then made the determination that N.J.S.A. 18A:13-64 and statutory tenure protections would govern the salary benefits which must be preserved upon transfer of regional staff to the constituent districts. Accordingly, he found that regional district staff members are to be placed on the salary guide of a constituent district at the step and level appropriate for their years of service in the regional district. In that the salary level of tenured staff may not be reduced, such teaching staff

v. Cohen, 36 N.J. Super. 300, 304 (Law Div. 1955), aff'd, 20 N.J. 451, 454 (1956). Events relating to implementation of the selection process subsequent to the Commissioner's declaration were not before the Commissioner and are therefore not material to our review of the questions addressed by him. N.J.A.C. 6:2-1.9. Further, to permit such supplementation would increase the potential that disputes concerning events subsequent to the Commissioner's declaration would result in undue delay of our final agency decision in this matter.

February 5, 1997

Date of mailing FEB 07 1997

546-96

C #546-96
SB # 88-96

JENNIFER STAGAARD AND AMERICAN FEDERATION OF TEACHERS, LOCAL 1017,

PETITIONERS-APPELLANTS,

V.

PETER B. CONTINI, ASSISTANT COMMISSIONER , NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, BOARD OF EDUCATION OF THE BOROUGH OF GARWOOD, BOARD OF EDUCATION OF THE BOROUGH OF KENILWORTH, BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD AND BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, UNION COUNTY,

RESPONDENTS-CROSS/APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

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Decision on motion by the Commissioner of Education, December 10, 1996

Decision on motions by the State Board of Education, February 5, 1997

For the Petitioners-Appellants, Rand, Algeier, Tosti & Woodruff (Russell J. Schumacher, Esq., of Counsel)

For the Respondents-Cross/Appellants Boards of Education of Berkeley Heights, Kenilworth, Mountainside & Springfield, Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen (Vito A. Gagliardi, Esq., of Counsel)

10/1/97

For the Respondent-Cross/Appellant Board of Education of the Township of Clark, Kenney & Gross (Mark S. Tabenkin, Esq., of Counsel)

For the Respondent-Cross/Appellant Board of Education of the Borough of Garwood, Buttermore, Mullen, Jeremiah & Phillips (William S. Jeremiah, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Union County Regional High School District #1, Schwartz, Simon, Edelstein, Celso & Kessler (Lawrence S. Schwartz, Esq., of Counsel)

For the Intervenors Berkeley Heights Education Association, Clark Education Association, Garwood Teachers Association, Kenilworth Education Association, Mountainside Education Association and the Springfield Education Association, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

This matter was initiated by Jennifer Stagaard, a teacher employed by the Union County Regional High School District No. 1 (hereinafter "regional district"), and the American Federation of Teachers, Local 3417 (hereinafter "AFT"), the collective negotiations representative for teachers employed by the regional district, following approval for the dissolution of the regional school district as provided for by N.J.S.A. 18A:13-51 et seq. Petitioners sought a declaratory judgment from the Commissioner of Education with respect to the employment rights conferred by the education laws on teaching staff members upon dissolution of the regional high school district.

By decision issued on December 6, 1996, the Commissioner rejected the AFT's position that dissolution of the regional school district would result in the creation of new school districts under N.J.S.A. 18A:6-31.3 et seq. Rather, the Commissioner concluded that because the six school districts that had been part of the regional district (hereinafter "constituent districts") would continue to exist as autonomous entities,

although with the expanded purpose of providing programs in grades K-12, they would not constitute new school districts within the meaning of N.J.S.A. 18A:6-31.3 et seq.[1]

The Commissioner further declared that upon dissolution of the regional district, staff members had a statutory right to "continue in the position of teacher, as it would have existed had the regional district not been dissolved." Commissioner's Decision, slip op. at 5. Distinguishing between a teacher's rights in initial assignment and tenure rights, the Commissioner found that regional district staff members would become employees of the constituent districts upon dissolution of the regional district, with all periods of their employment credited for tenure and seniority purposes as if the entire term of their employment had been in the constituent district.

The Commissioner, however, found that the operative date for determining the entitlements of regional staff to continued employment under N.J.S.A. 18A:13-64 should be May 14, 1996, the date of the voter referendum approving the dissolution, rather than June 30, 1997, the date which he had determined would be the effective date for the dissolution pursuant to N.J.S.A. 18A:13-59. In doing so, the Commissioner analogized this situation to one involving district board action to reduce staff under N.J.S.A. 18A:28-9, to which Francey v. Salem Bd. of Ed., decided by the State Board, August 3, 1994, aff'd, 286 N.J. Super. 354 (App. Div. 1996), would be applicable. Under Francey, the scope of the tenure protection to which a tenured teaching staff member is entitled is determined as of the date on which the district board acts to

[1] We note that although only four out of the six districts will operate high schools, the other two districts will be responsible for providing a high school education to their students by such means as establishing a sending-receiving relationship.

abolish his or her position pursuant to N.J.S.A. 18A:28-9, rather than the date on which the reduction in staff is actually effectuated.

The Commissioner then made the determination that N.J.S.A. 18A:13-64 and statutory tenure protections would govern the salary benefits which must be preserved upon transfer of regional staff to the constituent districts. Accordingly, he found that regional district staff members should be placed on the salary guide of a constituent district at the step and level appropriate for their years of service in the regional district. In that the salary level of tenured staff may not be reduced, such teaching staff members would be held at their current salary level in those instances in which proper guide placement would result in a reduction of salary.

The Commissioner then dissolved the stay he had previously granted and directed that the staff selection process move forward within the parameters of the declaratory judgment.

The AFT appealed and the six constituent districts cross-appealed.

By its appeal, the AFT sought to reverse those aspects of the Commissioner's declaration which: 1) interpreted the right to continued employment conferred by N.J.S.A. 18A:13-64 so as to limit the entitlement of a teacher employed by the regional district to claim a K-8 position in a constituent district to those situations in which there is not a vacant position at the high school level for which that teacher is certified, 2) held that the constituent school districts will not constitute "new school districts" under N.J.S.A. 18A:6-31.3, and 3) did not delineate the other "similar benefits" to which regional staff would be entitled under N.J.S.A. 18A:13-64.

In their cross-appeals, the constituent districts objected to that portion of the Commissioner's declaration construing N.J.S.A. 18A:13-64 as requiring them to place the former staff members of the regional district on the appropriate salary guides of the constituent districts at the step and level appropriate for their years of service in the regional district. The constituent districts also challenged that portion of the Commissioner's ruling that might permit former regional staff members to exercise tenure and seniority rights in the constituent districts in those instances in which there is no vacancy at the high school level for which such staff members are certified.

By decision of February 5, 1997, the State Board granted a motion to intervene which had been made by the counsel for the six education associations in the constituent districts (hereinafter "NEA").

The intervening NEA locals contended that the operative date for establishing the tenure and seniority rights of teachers who had been employed by the regional district should be June 30, 1997, the effective date of the dissolution, rather than May 14, 1996, the date of the voter referendum approving the dissolution. In contrast to the AFT, the NEA locals argued that claims to continued employment under N.J.S.A. 18A:13-64 should be restricted initially to the school where the regional staff member's current assignment is located as that school will be constituted in 1997-98. If there is no such position, the staff member could then assert a right to a position at the high school level of the other constituent districts. Tenure and seniority could next be asserted K-8 in the constituent district where such member's current assignment is located, and finally to elementary positions in the other constituent districts.

On June 4, 1997, our Legal Committee issued its report in this matter. That report stressed that the appeal before us was from a declaratory judgment granted by the Commissioner. Because such declaration is intended to afford relief from uncertainty concerning a party's rights, the report also stressed that it could not be used to decide or declare rights upon a state of facts which were future, contingent and uncertain. Cf. N.J. Home Bldrs. Ass'n. v. Civil Rights Div., 81 N.J. Super. 243, 251 (Ch. Div. 1963); Lucky Calendar Co. v. Cohen, 36 N.J. Super. 300, 304 (Law Div. 1955), aff'd, 20 N.J. 451, 454 (1956). Hence, as we concluded in our decision of February 5, 1997, because events relating to implementation of the selection process subsequent to the Commissioner's declaration were not before him, the report did not consider them in reviewing the questions he had addressed. Further, while the supplemental briefs submitted by the parties had eliminated any doubt as to the standing of the employee associations involved here to bring this action and to litigate this matter, the report emphasized that our decision would not preclude subsequent adjudication of individual claims arising from the selection process.

The Legal Committee's report then recommended affirmance of the Commissioner's determinations with certain modifications. However, after the parties filed their exceptions, two opinion letters directed to the Commissioner by the Attorney General's office were brought to our attention. The first had been issued on March 27, 1995. 95-0036. Although that opinion letter was included in the appendix to appellant's brief to the State Board, it had not been part of the record before the Commissioner when he rendered his declaratory judgment. The second was issued on June 18, 1997. 97-0115. Consequently, the Commissioner had not had the benefit of this letter either

when he made his determination. In that these opinion letters might have bearing upon the instant appeal, we reviewed them as we considered the Legal Committee's first report in light of the exceptions filed by the parties. Additionally, we closely examined the legislative history with respect to the pertinent statutes in order to assure that we had arrived at a proper understanding of the Legislature's intent in enacting them.

Our review process resulted in revisions to the Legal Committee's initial report. Those revisions were embodied in a second Legal Committee Report, which was then mailed to the parties.

The AFT filed exceptions to the second report, objecting to the extent that the determination recommended therein was based on the opinion letter from the Attorney General's Office dated June 18, 1997. In addition, the AFT continues to argue that, upon dissolution of the regional district, N.J.S.A. 18A:13-64 confers on the regional employees the right to continue their employment by selecting positions at any grade level in any constituent district on the basis of their tenure status.

We reject those arguments. In so doing, we stress that, while we have reviewed the opinion letters from the Attorney General's Office, our determination in this matter is predicated on the reasons embodied in this decision.

As set forth in our Legal Committee's report, dissolution of a limited purpose regional school district such as that involved here is controlled by N.J.S.A. 18A:13-51 et seq. Under this statutory framework, once the Board of Review has consented to an application for dissolution, see N.J.S.A. 18A:13-56, the county superintendent fixes the date for a special school election at which time the voters of each of the constituent districts decide the question. N.J.S.A. 18A:13-57. If the voters approve the question,

N.J.S.A. 18A:13-59 provides that the dissolution "shall become effective upon a date to be determined by the commissioner of education."

The date which the Commissioner establishes as the effective date for the dissolution pursuant to N.J.S.A. 18A:13-59 determines: 1) the date of expiration of the terms of the members of the regional board, N.J.S.A 18A:13-60; 2) the date on which title and control of school grounds, buildings, and furnishings is to change and on which indebtedness is assumed by the constituent districts, N.J.S.A. 18A:13-61.1; 3) the date on which the division of assets and liabilities occurs, N.J.S.A 18A:13-62; and 4) the date on which those assets and liabilities devolve upon the respective constituent district, N.J.S.A. 18A:13-63. The statute is silent, however, as to the controlling date for the allocation of personnel.

The specific statutory provision at issue in this case is N.J.S.A. 18A:13-64, which establishes the rights of all employees of a regional district in the case of a withdrawal from or dissolution of a regional district. That statute provides in its entirety that:

> All employees of the regional district shall continue in their respective positions in the withdrawing district, or in each of the constituent districts in the event of a dissolution, and all their rights of tenure, seniority, pension, leave of absence and other similar benefits shall be recognized and preserved and any periods of prior employment in the regional district shall count toward the acquisition of tenure to the same extent as if all such employment had been under the withdrawing district or in any of the constituent districts in the event of a dissolution. In the event of a withdrawal, any tenured employee in a school located in the withdrawing district who desires to remain in the employ of the regional district, and whose seniority under existing tenure laws so permits, may apply for and shall be granted a transfer to a position with the regional district for which he is certified which is vacant, held by a tenured employee with less seniority or by an employee without tenure; applications for such transfers shall be made within 45 days of the date of

> the special school election at which the withdrawal was approved.

Review of the legislative history indicates that until 1975, there had been no procedures providing for either withdrawal from or dissolution of a regional district. At that time, the Legislature adopted legislation setting forth the conditions and procedures for a constituent district to withdraw from a limited purpose regional school district. Senate Education Committee Statement to Assembly Bill No. 825 (October 6, 1975). In addition, the legislation provided for the transfer of teachers who preferred to remain in the regional district. Id.

In 1989, Article 13 of Chapter 13, "Regional School Districts," of Title 18A was amended to provide procedures for the withdrawal of a municipality from an all purpose regional district. N.J.S.A. 18A:13-66. Although not directly applicable to the instant case, the Senate Education Committee Statement which accompanied the legislation reflects that this legislative action was intended to provide a procedure "similar to that provided for withdrawal from a limited purpose regional school district" by application of the statutory provisions set forth in N.J.S.A. 18A:13-51 et seq, including N.J.S.A. 18A:13-64. The Statement also indicates that the procedure embodied in those statutory provisions was intended to insure that "all employees [would be] held harmless in the event of withdrawal, and all tenure, seniority, pension and similar rights and benefits [would be] recognized and preserved." Id.

Finally, the Legislature again amended N.J.S.A. 18A:13-51 et seq. in 1993 to establish a procedure for the dissolution of a limited purpose regional school district. The Statement accompanying this legislation reflects that the Legislature intended to

establish a procedure which "parallels the procedure provided for the withdrawal of a district from a limited purpose regional district." The Statement further indicates that the legislation was intended to establish "a mechanism for the allocation of debt, property and personnel among the constituent districts" and to insure that "all employees are held harmless in the event of a dissolution and all tenure, seniority, pension and similar rights and benefits are recognized and preserved."

We recognize that construction of a statute is ultimately a judicial, and not an executive, function. Middle Dept. Inspection Agency, Inc. v. New Jersey Dept. of Community Affairs, Div. of Housing and Development, 278 N.J. Super. 573 (App. Div. 1995), certif. denied, 140 N.J. 329 (1995); MCG Associates v. Department of Environmental Protection, 278 N.J. Super. 108 (App. Div. 1994). We further recognize that because administrative agencies such as our own exercise executive power in administering legislative authority which has been selectively delegated by statute, administrative adjudication does not constitute the exercise of judicial authority. City of Hackensack v. Winner, 82 N.J. 1, 28-30 (1980). However, we are also aware that courts generally accord substantial deference to the interpretation given by an administrative agency to a statute which that agency is charged with enforcing. E.g., GE Solid State, Inc. v. Director, Div. of Taxation, 132 N.J. 298 (1993). Hence, we have been attentive to the judicial principles applicable in this context as well as appreciative of our executive nature and regulatory concerns as we reviewed the declaratory judgment in this case. Hackensack v. Winner, supra at 29-30.

Our duty in construing the statute involved here is to determine and effectuate the intent of the Legislature. E.g., Jacobitti v. Jacobitti, 135 N.J. 571 (1994);

St. James v. Department of Environmental Protection and Energy, 275 N.J. Super. 342 (App. Div. 1994). The principal source of such intent is the legislation itself. Midlantic Nat. Bank v. Peerless Ins. Co., 253 N.J. Super. 137 (App. Div. 1992). However, the policy behind the statute, concepts of reasonableness and the legislative history are also among the sources to be used to determine legislative intent. E.g., Lesniak v. Budzash, 133 N.J. 1 (1993); Coalition of Concerned Nurses v. New Jersey Dept. of Higher Educ., 243 N.J. Super. 65 (App. Div. 1990).

We have therefore reviewed the statute at issue with close and careful consideration of its language, structure, purpose and history, as well as prior decisional law. Fiore v. Consolidated Freightways, 140 N.J. 452 (1995). We remain convinced that the Commissioner properly determined the scope of the employment rights of the employees of the regional school district upon dissolution of that district.

Again, the Commissioner distinguished between the rights attached to initial assignment and subsequent tenure/seniority entitlements. As articulated by the Commissioner:

> Upon dissolution of the regional district, a staff member is entitled to continue in the position of teacher, as it would have existed had the regional district not been dissolved. This does not create an absolute entitlement for a displaced staff member to choose a particular initial assignment, any more than a particular assignment could have been chosen or rejected had employment continued in the regional district and a transfer been lawfully made by the board of education, whether in a subject area within the scope of a staff member's certificate or in building assignment. Once the initial assignment has been made and the statutory right to continued employment thus honored, however, the regional staff member becomes an employee of the constituent district....

Commissioner's Decision, slip op. at 5.

This is consistent with the construction of N.J.S.A. 18A:13-64 set forth in the Commissioner's decision in Board of Education of the Central Regional High School District v. Board of Education of Lacey Township and the Central Regional Education Association (hereinafter "Central Regional"), 1980 S.L.D. 553. Central Regional involved the withdrawal of the Lacey Township Board from the regional high school district. The voters approved the withdrawal on December 14, 1977, to be effective July 1, 1978, and the Lacey Board sought a declaratory judgment from the Commissioner with respect to the rights of the parties.

The withdrawal in that case was to be effectuated when Lacey began to operate its schools in the 1980-81 school year to include grades seven and eight, which students would otherwise have attended Central Regional High School. Then, commencing with 1981-82, Lacey would provide an educational program for all of its students K-12. Central Regional, in turn, had stated its intentions to act pursuant to N.J.S.A. 18A:28-9 to reduce its staff by twenty-six teachers in 1980-81 and to reduce its staff again in 1981-82 when Lacey Township opened its high school.

The Administrative Law Judge found that N.J.S.A. 18A:13-64 provided equal, if not greater, protection to employees of a withdrawing school district than did numerous other statutes in Title 18A which protected employment rights, especially those of tenured teachers, in a variety of other situations. Stressing that N.J.S.A. 18A:13-64 protected the employment rights of all employees, the ALJ found it necessary for Central Regional to establish the "seniority" status for tenured and non-tenured personnel in its employ. Accordingly, the ALJ declared that "those employees of the

Central Regional School District, who were employed prior to July 1, 1978 and who [would] be the subject of a reduction in force as the result of the withdrawal of the Lacey Board...shall be granted a transfer to the Lacey Board's Middle School for the 1980-81 school year and to the Lacey Board's Senior High School for the 1981-82 school year." 1980 S.L.D. at 568.

The Commissioner accepted the ALJ's recommendations, but clarified that because the employment entitlements of N.J.S.A. 18A:13-64 applied to all employees, rather than only to tenured teaching staff members, the "seniority" lists created for purposes of effectuating the transfer were not to remain in force beyond the point at which the transfer of personnel between the two districts had been accomplished.

Although Central Regional involved a withdrawal rather than a dissolution, the legislative intent of N.J.S.A. 18A:13-64, as previously discussed, is identical in both situations in that the purpose of the statute is to insure that all employees will be held harmless in the event of either a withdrawal or a dissolution. However, in contrast to Central Regional, there is no indication that the regional district in this case has acted to reduce its staff pursuant to N.J.S.A. 18A:28-9. Accordingly, we have not been called upon to resolve any questions relating to such action in the context of this dissolution.

As the Commissioner determined in the case now before us, we find that the right conferred by N.J.S.A. 18A:13-64 on teachers employed by the regional district prior to July 1, 1997 is initially to continued employment as a teacher in one of the constituent districts. Because the entitlement to continued employment conferred by that statute does not depend on tenure status, regional staff do not have the right under the education law to claim a particular assignment in a constituent district following

dissolution, and the prerogative to determine the initial placement of former regional staff members ultimately lies with the constituent districts. Hence, the responsibility for effectuating such initial placements within the parameters of the law also rests with the boards of education of the constituent districts. Central Regional, supra at 572.

As the Commissioner recognized, the selection process in this case could properly be effectuated by allowing employees to select assignments which would be available in the constituent districts on the basis of the employees' relative length of service in the regional district at the point at which the dissolution was approved by the voters. Further, in that selections made on the basis of such comparisons do not implicate statutorily-derived seniority rights, such lists do not constitute determinations of seniority within the meaning of N.J.S.A. 18A:28-12 and may not be used for such purposes by any of the constituent districts after the dissolution is effected. Central Regional, supra. At the same time, we stress that the constituent districts must implement their selection process so as to effectuate the employment rights under N.J.S.A. 18A:13-64 of all regional staff members employed on the effective date of the dissolution. Central Regional, supra.

Again, in the absence of a reduction in staff under N.J.S.A. 18A:28-9 by the regional district prior to its dissolution, see Central Regional, supra, the initial assignments of the former regional teaching staff members by the constituent districts do not turn on tenure status or implicate statutory seniority rights. However, as the Commissioner recognized, once a constituent district employs the former staff member by appointing that individual to a position within the scope of his or her certification, the statute requires that it must recognize and preserve all rights of tenure and seniority

accrued by that individual by virtue of service with the regional district. This requires that in any subsequent personnel action, each of the constituent districts must credit teaching staff members who were previously employed by the regional district for all of their service to the regional district up to the date upon which the dissolution is effected.

We reiterate that initial appointments in each of the constituent districts made by the district board of those districts must be made in conformance with the parameters of the education law. Hence, we again stress that an individual aggrieved by such appointment may pursue a claim under the education laws by initiating proceedings before the Commissioner pursuant to N.J.S.A. 18A:6-9.

In all other respects and for the reasons expressed in the Commissioner's declaration, we affirm his decision in this matter, including his determination that the constituent districts are required to maintain the salary of tenured staff members when establishing their level of compensation under the salary guides of those districts. In so doing, however, we decline in this context to delineate what, if any, additional benefits former employees of the regional district may be entitled to under the education laws beyond those expressly enumerated in N.J.S.A. 18A:13-64. See Hyman v. Board of Education of the Township of Teaneck, decided by the State Board, March 6, 1985, aff'd, Docket #A-3508-84T7 (App. Div. 1986), cert. denied, 104 N.J. 469 (1986).

Attorney exceptions are noted.

October 1, 1997

Date of mailing OCT 03 1997

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MARY ELLEN DI PILLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, teaching staff member who was restored to her position following tenure proceedings, sought resolution of dispute with Board over the amount of back pay due.

ALJ determined that the matter was not time-barred. ALJ found that the only monetary and/or other benefit deprivation which petitioner should suffer was the sanction of six months' loss of pay imposed by the State Board. Thus, the ALJ ordered the Board 1) to restore to petitioner the increments withheld for the 1991-92 and 1992-93 school years, together with post-judgment interest from July 8, 1995; 2) to restore credit for 10 additional sick days per year for the school years 1990-91, 1991-92 and 1992-93; and 3) to restore credit for 3 personal leave days and to direct that 5 personal leave days be credited to the compassionate leave bank.

Commissioner affirmed in part and reversed in part the initial decision. Commissioner concurred that matter was not time-barred. Citing State Board decision in *Barshatky*, Commissioner found inasmuch as salary increments are a reward for meritorious service, such increments need not have been awarded to petitioner as a suspended employee following certification of tenure charges. In that petitioner did not prevail on the merits of the Board's tenure claims, she possessed no entitlement to be made whole through retroactive restoration of her salary increments and it was unnecessary to consider ALJ's assignment of post-judgment interest. As to sick leave time and personal leave time, the Board was directed to credit petitioner consistent with the terms of her contract.

December 12, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION
OAL DKT. NO. EDU 11879-95
AGENCY DKT. NO. 272-7/95

MARY ELLEN DIPILLO,
Petitioner,
v.
BOARD OF EDUCATION, TOWNSHIP OF RANDOLPH,
Respondent.

Sheldon H. Pincus, Esq., and Mary J. Hammer, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Aron M. Schwartz, Esq. for respondent
(Vogel, Chait, Schwartz & Collins, attorney)

Record Closed: September 14, 1996 Decided: October 25, 1996

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

Pending before me in this matter are cross-motions for summary decision. As the result of the filing and pendency of those motions, a plenary hearing scheduled for October 3 and 4, 1996 was adjourned. The following constitutes my initial decision granting petitioner's motion and denying respondent's cross-motion.

By way of background, this matter commenced with the filing by the petitioner, Mary Ellen DiPillo, of a Verified Complaint contending that the respondent, Randolph Board of Education, improperly had withheld salary and other benefits from her in 1991-92 and 1992-93 during the pendency of a tenure case brought against her by the

Board in 1990. Details with respect to the outcome of that earlier case may be found in: (a) the initial decision of the undersigned administrative law judge, dated September 2, 1992; (b) The decision by the Commissioner of Education modifying, in part, my decision with respect to the penalty to be imposed; and (c) the decision by the State Board of Education which further modified the penalty imposed by the Commissioner. *See, Randolph Twp. Bd. of Ed. v. DiPillo*, 93 *N.J.A.R. 2d.* (EDU) 13, modified by the Commissioner, 93 *N.J.A.R. 2d.* (EDU) 24, modified by the State Board of Education, 95 *N.J.A.R. 2d.* (EDU) 206. The major issue before me in the instant case arises out of certain language contained in the final decision of the State Board of Education; to wit, "Consequently, we increase the penalty in this case to forfeiture of six months' salary, [two more than the Commissioner imposed] as well as the loss of salary increments for *1990-91*." *Randolph Bd. of Ed. v. DiPillo, supra*, 95 *N.J.A.R. 2d.* (EDU) 206, 208. (Emphasis added). According to petitioner, the Board's determination not only to withhold the petitioner's increment for 1990-91, but also its refusal to pay her increments for the 1991-92 and 1992-93 school years while she remained suspended with pay was contrary to the State Board decision. Furthermore according to petitioner, if the respondent wished to withhold her increments for those two school years it could have attempted to so but in that event was obliged to follow the procedure set out in *N.J.S.A.* 18A:29-14, which it failed to do.

Petitioner also maintains that in addition to the improper withholding of her 1991-92 and 1992-93 increments, the Board exacerbated her predicament by also failing to credit her with ten sick leave and three personal days for the three school years between 1990-91 and 1992-93. According to petitioner, had she not been suspended during those school years she would not have used any of those sick or personal days. Finally, petitioner maintains that in light of respondent's conduct toward her, any award of back pay and/or other benefits should take into account her entitlement to pre-judgment interest and, in addition, post judgment interest from July 8, 1995, the 61st day following the date of the filing of the State Board decision from which no appeal was taken. *See N.J.A.C.* 6:24-1.16. Petitioner therefore concludes that, taken together, she is entitled to improperly withheld increments in the amount of

approximately $26,000, plus interest, together with credit for her ten sick leave and three personal days for each of the school years in question.

The Randolph Board, both in response and in support of its own cross-motion for summary decision, raises a variety of claims. First, it insists that a necessary prerequisite for the award of any increment is meritorious service. Thus, any teaching staff member who, like petitioner, was suspended on charges, should not be rewarded for the period he or she was on suspension and therefore not providing any services. Simply put, the Board maintains that if a teacher, like DiPillo, did not engage in teaching, there was no performance which even could be evaluated and, therefore, no way to determine if she was deserving of an incremental increase. Thus, with regard to DiPillo's claim that she should prevail in light of the fact no formal action pursuant to *N.J.S.A.* 18A:29-14 was taken with respect to her entitlement to increments for the 1991-92 and 1992-93 school years, the Board argues that the statute is irrelevant given the fact that she was not teaching during those school years. Moreover, according to the Board, petitioner was aware that increments were not being awarded to her for the school years in question and her time to challenge that action had long expired by the time she filed the instant petition in July 1995. *See N.J.A.C.* 6:24-1.2(c).

Next, with respect to her claim for credit for personal and sick leave days that she did not take during the period of her suspension, the Board maintains that, historically, petitioner always used her full three personal day entitlement and continued that pattern when she returned to work for the 1994-95 school year.[*] So too, with respect to her claim to be credited for ten sick days per year, the Board notes that in light of petitioner's subsequent pregnancy, it is not unreasonable to assume that she likely would have stopped working, at the latest, two weeks before she gave birth. Therefore, the Board argues it may deduct from her entitlement the number of sick days she likely would have utilized had she been employed.

[*]DiPillo was on family leave in 1993-94.

Finally, with respect to her claim for pre-judgment and/or post-judgment interest, the Board maintains that the cited regulation does not apply for the following reasons. First, with respect to pre-judgment interest, there must be a showing of "bad faith" in order to assess that remedy against a public entity and such circumstances do not exist here. With regard to post-judgment interest, the Board argues that the regulation requires there be a final adjudication of the amount to which the person claiming post-judgment interest is entitled, which is the very issue to be adjudicated in this case. Thus, as the Board puts it, the instant case presents a matter of first impression -- whether, as a matter of law, a teacher under suspension with pay is during that period even eligible for employment and adjustment increments and other benefits thereby requiring the Board to invoke the statutorily prescribed procedural steps set forth in *N.J.S.A.* 18A:29-14. Since those issues were not addressed in the original proceedings before me, or by the Commissioner or to the State Board, there is no "final adjudication" to which any post-judgment interest can yet attach.

DISCUSSION

The essential facts necessary to a determination in this case are not in dispute. As noted above, petitioner was the subject of tenure proceedings first brought against her by respondent at the end of the 1989-90 school year. In August 1990, the Board formally determined to certify various tenure charges to the Commissioner. When the certification to the Commissioner was made, petitioner was suspended without pay. Following the running of the 120-day period applicable to tenured teaching staff members, her pay was resumed. *See, N.J.S.A.* 18A:6-14.

At the time of her suspension in August 1990, petitioner was on Level 4, Step 9, of the 1989-90 salary guide. During the period of her suspension with pay during part of 1990-91, and all of 1991-92 and 1992-93, while the tenure charges were being heard, decided and appealed, her salary remained the same. As noted, the tenure proceedings ultimately concluded with the May 1995 decision of the State Board of

Education which imposed a six-month suspension without pay and loss of the 1990-91 employment and adjustment increments.

In the interim, pending the State Board decision on her appeal, and beginning in the 1993-94 school year, petitioner was reinstated to an active teaching status, and her salary was adjusted to Level 6, Step L. However, as noted, petitioner did not actually commence teaching in September 1993. Rather, she took eight days' paid disability leave, followed by a one-year unpaid child rearing leave. In September 1994 she returned to an active teaching status. In late May 1995, following the State Board decision, petitioner's counsel wrote to the Board's attorney demanding that DiPillo be credited with additional salary, restoration of her increments, and credit for sick leave and personal leave days. As a result of the Board's rejection of that demand, the instant petition was filed.

In my view, resolution of the major legal issue in this case is not a complicated task. Although the tenure proceedings against DiPillo, which began in June 1990 and did not end until May 1995, arose out of the certification of various tenure charges, part and parcel of that litigation was the issue of an appropriate penalty, if any, to be imposed in the event one or more of the charges was found to be true. Thus, I as the administrative law judge who heard the case, then the Commissioner, and then the State Board, in our respective decisions all devoted attention to the penalty issue in light of our findings of misconduct on some of the counts of the tenure certification. Thus, the Board's claim that our determinations as to sanction were merely tangential to the underlying tenure proceedings are not persuasive.

Of course, the final agency arbiter of the penalty to be imposed upon petitioner for charges found to be proved was the State Board of Education. Thus, its May 3, 1995 decision it spoke directly to that subject in clear and unambiguous language -- that the penalty to be imposed upon DiPillo should be increased to a forfeiture of six months rather than four months' salary. This limited modification, of course, left intact the Commissioner's modification of my original initial decision regarding the status of

her future increments; namely, that in light of the flagrant nature of the misconduct found to have been proven there was no compulsion placed upon the Board automatically to restore the increments after 1990-91, even in light of DiPillo's additional loss of four months' pay. Thus, the Commissioner's decision as to penalty, and the modification by the State Board, seem to me clearly to have left the parties in a position whereby the usual withholding of increment procedures had to be followed. The Commissioner did not say that the Board should not restore petitioner's increments in subsequent years. To the contrary, he even italicized his reference to the fact that the Board would not be placed under any mandatory requirement that it do so. The result, therefore, of the subsequent language of the State Board seems to me to lead inextricably to the conclusion that while the Board would continue to be free to determine not to restore petitioner's increments at some subsequent date, if it wished not to do so it was obliged to follow the statutory procedure set forth in *N.J.S.A.* 18A:29-14. The Board was not free simply to have decided unilaterally to withhold restoration of DiPillo's increments in 1991-92 and 1992-93 and thereby deprive her of the statutory due process opportunity to challenge that withholding in a fair hearing context.

I concede that at first blush the respondent's argument that increments are a reward for meritorious performance and a teacher while suspended, by definition, cannot meet that standard makes sense. However, this argument overlooks the statutory requirement that all boards must follow in connection with withholding actions. For example, even though the Commissioner took pains to point out that the Randolph Board should not be required to restore DiPillo's increments because of the "flagrant" nature of some of the violations committed by her, had she timely been served with notice that her 1991-92 and/or 1992-93 increments were to be withheld she at least would have been afforded the opportunity to hear the Board's position and be able to respond to it. While the ultimate outcome of any such hearing arguably may have been a foregone conclusion, that is speculation. It is not outside the realm of possibility that if given the opportunity for such a hearing, petitioner conceivably could have made a variety of good arguments; *e.g.*, that the sanction of continued increment withholdings

during subsequent years was too severe in light of the particular circumstances, or that in light of her financial status, or for any one of a number of other ameliorative reasons which could have been proffered, continued withholding would be too severe. That opportunity is what a hearing is for -- an opportunity DiPillo never had.

Thus, by failing to follow statutorily prescribed procedures for withholding her 1991-92 and 1992-93 increments, the Board deprived a tenured teaching staff member of protections which the Legislature has determined were due her. However sympathetic one may be with the Board's rationale, it cannot override the exercise of legislative judgment in this area. Indeed, the Legislature, if it wished, could have addressed the subject of whether or not a teacher under suspension with pay also should be deprived of his or her increments without following the provisions of *N.J.S.A.* 18A:29-14. It apparently chose not to do so.

None of the cases relied upon by the Board with respect to this issue convince me to the contrary. While I agree that the holdings in various cases relevant to the issue stress that the withholding of increments is to prevent the unjust reward of teachers who have failed to display the requisite standards of performance, and arguably if one is not performing one cannot meet those standards, that still does not excuse a total disregard of the statutorily prescribed procedures. Nor is there anything in any relevant collective negotiations agreement between the Board and the Randolph Education Association which dictate a contrary decision. While they, too, refer to the fact that increments are not automatic but are based upon satisfactory service, etc., they cannot be relied upon to override the statutory requirements cited above.

Thus, I disagree with the Board's claim that failure to follow the notification and other procedural requirements of *N.J.S.A.* 18A:29-14 is irrelevant, or that DiPillo's claim would "elevate form over substance." As noted in the reply memorandum from DiPillo's counsel, the decision in *Marshall v. Bd. of Ed. of So. Ocean Cty. Reg., Dist.,* 1978 *S.L.D.* 593, does not hold to the contrary. Indeed, as counsel pointed out in that memorandum, *Marshall* actually involved to a substantial degree the application of the

procedures under *N.J.S.A.* 18A:29-14, unlike the present case where no official action of any sort was ever taken by the respondent with respect to DiPillo's salary increments for 1991-92 and 1992-93.

Nor, as respondent also claims, is petitioner's right to the restoration of her increments time-barred by virtue of *N.J.A.C.* 6:24-1.2(c). Indeed, until the decision by the State Board was rendered in May 1995, it was conceivable that the sanction could have been modified so as to avoid the need to challenge any increment withholding for the two school years in question. It was not until late May 1995 that petitioner knew that she now would have to challenge the Board's decision not to restore her increments and her petition, in that light, certainly was timely filed.

Thus, with respect to a calculation of the amount to which petitioner is entitled by virtue of the Board's failure properly to follow statutory procedural requirements in connection with the withholding of her increments, I will adopt the petitioner's mathematical calculations as set forth in her brief in support of the motion for summary decision, as slightly modified. Specifically, that calculation is as follows. For 1991-92, DiPillo should have been placed at Step 10, Level 6 on the 1991 salary guide and received a salary of $42,832. In addition, she was entitled to a $200 longevity payment, making her total compensation $43,032, rather than the $29,215 she was paid.

With respect to the 1992-93 school year, DiPillo should have been placed at Step 11, Level 6, calling for a salary of $46,832. In addition, she should have received a $400 longevity payment. Thus, her total compensation for that school year should have been $47,232 rather than $29,215. The differences for the two school years were $13,817 and $18,017, respectively, or a total of $31,834. Then, to be "credited" back to the Board against this amount is the additional two months' suspension without pay added by the State Board, or a total of $5,803. Although the balance following that deduction is $26,031, the petitioner's supplemental memorandum of August 16, 1996

demands payment in the amount of $25,991, plus interest. I will accept that latter figure for purposes of this decision.

Insofar as pre-judgment interest is concerned, the level of "bad faith" which must be shown in order to justify that severe sanction against a public entity has not even been approached in this case. The Board, I believe, has taken its position in this case in perfect good faith and with a sincere conviction that petitioner would have been unjustly enriched. While I have determined, as a matter of law, that the Board was mistaken, that does not convert its stance to one of bad faith. Thus, pre-judgment interest is denied.

With respect to post-judgment interest, the final adjudication from which post-judgment interest would have to be assessed did not come into being until May 8, 1995, the date the State Board decision was filed. Pursuant to *N.J.A.C.* 6:24-1.16(c)2 and (d)2, post-judgment interest therefore shall be awarded as of and in accordance with the prevailing rate of interest established by the Court Rules on July 8, 1995.

With regard to petitioner's claim that she also is entitled to credit for unused annual personal days and/or sick leave days during the period of her suspension, I agree they should be credited to her. The Board's claim that, historically, petitioner used those days, while perhaps factually accurate, is purely speculative insofar as whether she would have continued to use them during the subsequent school years. In this respect, I return, again, to the State Board decision which imposed a sanction of six months rather than four months' loss of pay. That is the only monetary and/or other benefit deprivation which petitioner should suffer. Thus, for each of the school years in question, petitioner's sick bank should be credited ten days. For each of the school years in question she also should be credited with three personal days. However since personal days are not cumulative (like sick days are), the maximum allowable credit to petitioner would only be three days and under the collective negotiations agreement unused personal days may be applied to a compassionate leave bank to a maximum of

five days. Thus, five of the six days which petitioner lost should be credited to that compassionate leave bank.

Accordingly, by way of recap, I have determined to grant DiPillo's motion for summary decision, except for pre-judgment interest, and to deny the Randolph Board's cross-motion and to **ORDER** that the respondent:

(a) Restore to petitioner withheld increments for 1991-92 and 1992-93 in the net amount of $25,991.00, together with post-judgment interest from July 8, 1995, pursuant to *N.J.A.C.* 6:24-1.16(c)2 and (d)2;

(b) Restore to petitioner credit for ten (10) additional sick days per year for the school years 1990-91, 1991-92 and 1992-93; and

(c) Restore to petitioner credit for three (3) personal leave days and to direct that five (5) personal leave days be credited to the compassionate leave bank.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 25, 1996
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

10/25/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

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MARY ELLEN DI PILLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

The Board initially excepts to the Administrative Law Judge's (ALJ) erroneous application of the requirements set forth in *N.J.S.A.* 18A:29-14 to conclude that petitioner was entitled to a retroactive award of salary increments. In this regard, the Board maintains that salary increments are in the nature of a reward for meritorious service and that petitioner was neither entitled to, nor eligible for, said increments for the years in which she did not work. (Board's Exceptions at p. 6) The Board insists that the ALJ's ruling is erroneous in three respects

> ***[F]irst, the lack of formal notification is irrelevant given [petitioner's] lack of eligibility for the increments; second, the ALJ elevated form over substance, a result the Commissioner has eschewed in the past; and third, the ALJ erroneously believed that petitioner had a right to a hearing before the Board and speculated

> that, had petitioner received notice of a proposed increment withholding, she would have been able to convince the Board to award her an increment even though she was on suspension while the Board was pursuing proceedings to fire her. (*Id.* at p. 8)

The Board argues that it contradicts common sense that it would actively seek to remove one of its employees and, yet, award that employee a salary increment which is conditioned upon a successful year of teaching. (*Id.* at pp. 9, 10) Citing *In re Tenure Hearing of Anthony Castaldo, Union County Reg. H.S. No. 1, Union County*, 1986 *S.L.D.* 3026, the Board contends that it was entitled to maintain petitioner at the *status quo* pending the tenure proceedings without taking formal action. (*Id.* at p. 10) Moreover, the Board warrants that neither the Commissioner's decision nor the State Board's decision on the tenure proceedings dealt with whether petitioner was eligible for, or was entitled to, increments for the 1991-92 or the 1992-93 school year. Thus, the ALJ erroneously concluded that these prior decisions compelled him to award retroactive salary increments to petitioner. The Board concludes,

> To the extent, if any, that petitioner may have had any claim to restoration of the 1991-92 and 1992-93 increments upon her reinstatement, she was made whole when she was placed at Level 6, Step L upon her return to active service in 1994-95, the level where she would have been had she never been suspended and had she received increments all along except for 1990-91. Nothing in the Commissioner's or the State Board's decisions in the tenure proceedings remotely suggests that petitioner also was to receive the 1991-92 and 1992-93 increments on a retroactive basis. She is entitled to nothing more. (*Id.* at pp. 13, 14)

In reply, petitioner argues that, notwithstanding that upon her return to work in 1994, the Board placed her at the step on the salary guide which she would have attained had her increments been timely granted for 1991-92 and 1992-93, she is still entitled to be "made whole" for that period of time during her suspension in which her salary remained static. (Petitioner's

Reply at p. 2) While petitioner recognizes that the Board was authorized, pursuant to *Castaldo, supra*, to withhold her increments during her suspension, she asserts that, upon issuance of the State Board's decision in May 1995, she was entitled to be made whole. Nor does petitioner find statutory support for the Board's implication that she is not entitled to retroactive restoration of increments unless she prevailed in the tenure proceedings. (*Id.* at footnote 1)

The Board next argues that petitioner's claims for the withheld salary increments are barred by the 90-day limitation period, pursuant to *N.J.A.C.* 6:24-1.2(c). Here, the Board maintains that the ALJ should have concluded that petitioner's claim accrued when she learned that she did not receive the increments, which was upon receipt of her first paycheck in the 1991-92 and 1992-93 school years. (Board's Exceptions at p. 17) The Board reasons that, notwithstanding that the ultimate decision in the tenure proceedings might have superseded or extinguished petitioner's claim, said claim nonetheless accrued according to the Board's timeline. (*Id.*)

In reply, petitioner maintains that her claims for restoration of increments did not arise until after the State Board issued its decision in May 1995. That is, petitioner argues that although she received her paychecks, absent increments, in the 1991-92 and 1992-93 school years, she was still on suspension. Petitioner avers that "***[she] had no way of knowing that respondent would refuse to pay her 1991-92 and 1992-93 salary increments until June of 1995, when the Board refused to pay what [she] believed was due her in accordance with the State Board decision." (Petitioner's Reply at p. 4)

With respect to the award of personal time, the Board again asserts that petitioner's pattern of using personal days in prior school years, as well as in the 1994-95 school

year, demonstrates that she would have used all three of her personal days each year and would not have accrued unused days to the bank. (Board's Exceptions at p. 19) As for sick time, the Board notes that each employee, by contract, is entitled to 10 sick leave days each school year. (*Id.*) However, the Board points to petitioner's supplemental answers to interrogatories wherein she indicated that she gave birth to her first child on October 4, 1990, while on suspension, and she would not have been available to return to work until October 30, 1990. (*Id.* at p. 20) Thus, the Board reasons that, assuming petitioner was capable of working up to and including October 3, 1990, it is entitled to deduct the 18 days which petitioner admittedly was unable to work and which would have been charged to her sick bank had petitioner not been on suspension. The Board further finds it doubtful that petitioner would have worked up until the day before delivery, and posits, therefore, that petitioner would reasonably have stopped working two weeks before delivery of her child. The Board, thus, concludes that it should rightfully deduct 28 days from any sick leave which may be credited to petitioner.[1] (*Id.*)

Petitioner counters that the Board's speculation as to the sick leave or personal time she *might have* taken is irrelevant. (Petitioner's Reply at p. 6) Moreover, petitioner contends that the Board's argument regarding the sick leave time which the Board posits she would have taken for the birth of her first child is without merit, since she was suspended without pay from August 7, 1990 until December 6, 1990. Thus, petitioner reasons that the Board cannot charge her for paid sick days "when she received *no pay* during the time she was unable to work.***" (emphasis in text) (*Id.* at p. 6)

[1] The record shows that, as of June 30, 1990, petitioner had 39.5 days in her sick bank. She received another 10 days at the beginning of the 1993-94 school year. (Brief in Support of Motion for Summary Decision on Behalf of Respondent, Randolph Township Board of Education, Exhibit E, Letter dated May 30, 1995 from petitioner's counsel to Board at p. 2)

The Board next contends that the ALJ erroneously awarded petitioner interest from July 8, 1995, essentially amounting to *pre*-judgment interest, rather than post-judgment interest, absent a finding of bad faith. (Board's Exceptions at p. 20) As per *N.J.A.C.* 6:24-1.16(c)(2), post-judgment interest, the Board instructs, "***shall be awarded when the respondent is determined *through adjudication* to be responsible for a payment, the precise amount of which was established or could have been established, and has failed to satisfy its obligation.***" (emphasis in text) (*Id.* at pp. 20, 21) Thus, the Board concludes that the ALJ's finding that post-judgment interest should run from the date of the judgment in another proceeding, rather than the date of the initial decision in *this* matter, is erroneous. (*Id.* at p. 21)

Petitioner reasons that the ALJ's assignment of post-judgment interest was appropriate since it is from the May 8, 1995 filing date of the State Board's decision that the Board knew how much it owed to petitioner. (Petitioner's Reply at p. 8)

Finally, the Board affirms that the ALJ should have permitted it to amend its answer so as to assert a separate recoupment defense and counterclaim. The Board's recoupment defense and counterclaim were based on the fact that while petitioner was on suspension, she gave birth to her first child. The Board asserts that, based upon petitioner's actions following the birth of her *second* child, she *would have* taken an unpaid child-rearing leave following the birth of her first child. Yet, she was being paid while on suspension. Thus, the Board maintains that petitioner received a windfall. By interlocutory order, the ALJ denied the Board's motion on the grounds that the issues raised by the Board should have been raised in the initial proceedings, as compelled by the Entire Controversy Doctrine. However, the Board notes that the present controversy was not a component of the tenure action and was not necessary to its resolution.

The recoupment defense and counterclaim, the Board avers, relate to the instant matter, and not to the tenure dismissal issue. (Board's Exceptions at p. 22) In any event, the Board also recognizes that, "[t]o the extent proven, the recoupment defense would offset petitioner's recovery but would not entitle the Board to recover monies over and above any recovery by petitioner." (*Id.* at p. 24) Thus, the Board concludes that the ALJ abused his discretion by denying the Board leave to amend. The Board urges the Commissioner to reject the initial decision of the ALJ and to dismiss the petition.

In reply, petitioner warrants that "[t]he ALJ's decision regarding the assertion of a separate recoupment defense and counterclaim are now the law of the case and may not be reversed at this level.***" (Petitioner's Reply at p. 9) In opposition to the Board's attempt to assert such claims, petitioner essentially argues that the claims are barred by the Entire Controversy Doctrine and should have been raised in the prior action to terminate her employment. (Petitioner's Reply at Exhibit G, Petitioner's Brief in Opposition to Respondent's Motion, at pp. 1-5) Petitioner also argues that the Board's proposed counterclaim is based upon incorrect information and mere speculation, that is, the Board had no reason to believe that petitioner was disabled due to the pregnancy of her first child at any time that she was on the payroll. (*Id.* at Exhibit G, at p. 6) Moreover, the Board merely speculates that because petitioner took a one-year child-rearing leave after the birth of her second child, she would have done so after the birth of her first child. (*Id. at* Exhibit G, at p. 7) Finally, petitioner asserts that the Board "***undoubtedly would have insisted on hearing dates to explore this speculative counterclaim ***. This additional drain on the judicial system *** is exactly the sort of abuse the

Entire Controversy Doctrine was designed to prohibit." (Petitioner's Reply at p. 10) Petitioner, therefore, urges the Commissioner to affirm the initial decision.

Upon careful and independent review, the Commissioner determines to affirm in part, and reverse in part, the initial decision of the ALJ. Initially, the Commissioner finds that the within matter is not time-barred, for the reasons set forth by the ALJ in the initial decision. With respect to salary increments withheld during the period of time in which petitioner was suspended pending a determination on the tenure charges, the Commissioner agrees with the Board that, inasmuch as salary increments are a reward for meritorious service, such increments need not have been awarded to petitioner as a suspended employee following certification of tenure charges by the Board. This principle was recently affirmed by the State Board of Education in a consolidated tenure proceeding and challenge to the employing board's withholding of the tenured employee's salary increments. The State Board noted,

> ***We stress that respondent had no entitlement to receive a salary amount that included an award of increments during his suspension following the Board's certification of tenure charges in August 1992. *In the Matter of the Tenure Hearing of Anthony Castaldo,* decided by the State Board, 1986 *S.L.D.* 3026. In requiring resumption of an employee's full salary 120 days after certification of tenure charges, *N.J.S.A.* 18A:6-14 does not provide for automatic raises from year to year while the litigation is in progress. "In that increments are intended to reward only those who have contributed to the educational process, *Bd. of Education of Bernards Tp. v. Bernards Tp. Ed. Assn.*, 79 *N.J.* 311, 321 (1979), the mandate of *N.J.S.A.* 18A:6-14 cannot be construed as conferring an entitlement to automatic raises during suspension." *In the Matter of the Tenure Hearing of John Eberly*, decided by the State Board, 1988 *S.L.D.* 2441, 2445.*** *(In the Matter of the Tenure Hearing of Jerry Barshatky, School District of the Freehold Regional High School District and Jerry Barshatky v. Board of Education of the Freehold Regional High School District, Monmouth County*, decided by the State Board May 1, 1996, Slip Opinion at p. 4)

In that petitioner did not prevail on the merits of the Board's tenure claims, she possesses no entitlement to be made whole through the retroactive restoration of her salary increments for the 1991-92 and 1992-93 school years. *Barshatky, supra,* at p. 7. Further, inasmuch as there is no monetary recovery for petitioner herein, the Commissioner finds it unnecessary to reach to the Board's arguments regarding the ALJ's assignment of post-judgment interest, or to the ALJ's refusal to grant the Board leave to amend its answer to assert a counterclaim and recoupment defense argument as an offset mechanism.[2]

As for petitioner's sick time withheld by the Board for the 1990-91, 1991-92 and 1992-93 school years, the Commissioner finds that both the terms of her contract (Board's Exceptions at p. 19) and the language set forth at *N.J.S.A.* 18A:30-2 *et seq.* establish an entitlement to 10 sick leave days per year. However, inasmuch as *N.J.S.A.* 18A:30-2 appears to contemplate that the employee will be on pay status at the time of eligibility to accrue sick leave,[3] it was not improper for the Board to stay the accrual of petitioner's sick leave during the period of time when she was suspended *without pay.* Nor should petitioner be entitled, for this period of time, to any retroactive credit of sick leave time, since she did not prevail on the merits of the tenure claim. *Barshatky, supra,* at p. 7. Consequently, the Commissioner finds that the Board must credit petitioner's sick leave bank with 10 sick days for the 1991-92 school year, and 10 sick days for the 1992-93 school year. Further, the Board is directed to prorate petitioner's

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[2] It is noted herein that, contrary to petitioner's assertion, "***all judges' orders are reviewable by any agency head in accordance with *N.J.A.C.* 1:1-14.10 *or when rendering a final decision under N.J.A.C. 1:1-18.6.*" (emphasis added) (*N.J.A.C.* 1:1-14.9(b))

[3] The statute reads, in pertinent part, "All persons holding any office, position or employment in all local school districts *** who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, *** shall be allowed sick leave *with full pay* for a minimum of 10 school days in any school year." (emphasis added) (*N.J.S.A.* 18A:30-2)

sick leave entitlement for the 1990-91 school year in accordance with the period of time in which petitioner was on pay status.[4]

Similarly, in accordance with petitioner's contractual entitlement, the Board is directed to credit petitioner with personal leave, *consistent with the terms of her contract*, for the 1991-92 school year and the 1992-93 school year. For the 1990-91 school year, petitioner's personal leave is to be prorated consistent with the ultimate restoration of her pay status, as noted above. In this regard, the Commissioner rejects as speculative the Board's contention that petitioner historically used all of her personal days each year and, therefore, *had* she been working during the years of her suspension, she would have had no personal days to bank.[5]

Accordingly, the initial decision of the ALJ is modified as set forth above. Petitioner's claim for retroactive restoration of her 1991-92 and 1992-93 increments is dismissed, and the Board is directed to credit petitioner with sick leave time and personal leave time in accordance with the parameters set forth herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 12, 1996
Date of Mailing, December 12, 1996

[4] Notwithstanding that the Board resumed petitioner's pay status as of December 6, 1990, in accordance with the State Board's decision, petitioner was directed to forfeit an additional two months' salary. Accordingly, she is deemed to have been removed from pay status for six months. Further since petitioner is receiving no credit for sick leave during this unpaid period of time, the Commissioner finds it is unnecessary to reach to the Board's argument regarding the sick leave which petitioner would have taken at the time of the birth of her first child on October 4, 1990.

[5] Although the Commissioner recognizes that petitioner's accrual of personal leave time is governed strictly by the terms of her bargaining agreement, in that such emolument is closely tied to petitioner's claims for restoration of her salary increments and her sick leave time, and the overriding issue in the instant matter is one of "statutory interpretation or educational policy" as to the effect of tenure proceedings, the Commissioner finds his intervention is not improper. See *River Dell Regional Board of Education v. Brenda Canal et al.*, 93 *N.J.A.R.* 2d (EDU) 784, aff'd State Board 94 *N.J.A.R.* 2d (EDU) 327.

547-96

EDU #11879-95
C # 547-96
SB # 2-97

MARY ELLEN DI PILLO,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,

RESPONDENT-CROSS/APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 12, 1996

For the Petitioner-Appellant, Bucceri & Pincus (Sheldon H. Pincus , Esq. and Mary J. Hammer, Esq., of Counsel)

For the Respondent-Cross/Appellant, Vogel, Chait, Schwartz & Collins (Aron M. Schwartz, Esq., of Counsel)

In August 1990, the Board of Education of the Township of Randolph (hereinafter "Board") certified tenure charges of unbecoming conduct against Mary Ellen DiPillo (hereinafter "petitioner"). Following a hearing, the Commissioner of Education adopted the finding of the Administrative Law Judge ("ALJ") that petitioner had exposed a fourth-grade student to humiliation by directing him to get down on his knees in front of his schoolmates to ask for the return of a textbook he had left in another classroom. The Commissioner determined the appropriate penalty for such conduct to be the loss of 120 days' salary and forfeiture of petitioner's salary increments for the 1990-91 school year.

8/6/97

On appeal, we found that the Board had also demonstrated a charge of corporal punishment against petitioner. That charge involved an incident in which petitioner had caused a nine-year-old student to hit the back of his head against a wall when she forcibly lifted his chin in order to get him to look at her. Stressing the gravity of the offense, we modified the penalty imposed by the Commissioner, directing that petitioner forfeit six months' salary, as well as her salary increments for the 1990-91 school year.

In July 1995, petitioner filed the instant petition with the Commissioner, alleging that the Board had improperly withheld her salary increments and other benefits for the 1991-92 and 1992-93 school years, during the pendency of those tenure charges.

On October 25, 1996, an ALJ recommended granting petitioner's motion for summary decision and directing the Board to restore petitioner's increments for 1991-92 and 1992-93, along with post-judgment interest. The ALJ also recommended crediting petitioner with sick and personal leave days for those years.

On December 12, 1996, the Commissioner accepted in part and rejected in part the ALJ's decision. Citing In the Matter of the Tenure Hearing of Jerry Barshatky, decided by the State Board of Education, May 1, 1996, the Commissioner stressed that petitioner had no entitlement to an award of increments during her suspension following the certification of the tenure charges. The Commissioner noted that since petitioner had not prevailed on the merits of those charges, she had no entitlement to be made whole through retroactive restoration of salary increments. The Commissioner agreed with the ALJ, however, that petitioner was entitled to sick leave and personal leave time for 1991-92 and 1992-93.

Petitioner filed the instant appeal to the State Board.

After a careful review of the record, we affirm the decision of the Commissioner with the following clarification.

We reject petitioner's contention that her salary increments for the 1991-92 and 1992-93 school years are required to be restored since our decision of May 3, 1995 did not direct the withholding of those increments. As pointed out by the Commissioner, a tenured teaching staff member has no entitlement to salary increments during his or her suspension while tenure proceedings are pending. Barshatky, supra. Nor is a district board required to take formal action to withhold increments during such period. Id. In this case, the Board's failure to provide petitioner with increments in 1991-92 and 1992-93 was not before us in the tenure case, and our decision on those charges did not address that issue, determine petitioner's entitlement to increments, or direct restoration of those increments. Moreover, since petitioner did not prevail on the merits of the tenure charges, she has no entitlement to such relief as is necessary to make her whole, including back pay for the period of her initial suspension and retroactive restoration of her increments.

Accordingly, with the above clarification, we affirm the decision of the Commissioner.

August 6, 1997

Date of mailing AUG 0 8 1997

548-96

548-96

IN THE MATTER OF THE TENURE	:	
HEARING OF EUNICE BELCHER,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF TRENTON, MERCER COUNTY.	:	
	:	

December 16, 1996

OAL DKT. NO. EDU 8282-95

IN THE MATTER OF THE TENURE	:	
HEARING OF EUNICE BELCHER,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF TRENTON, MERCER COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 16, 1996
Date of Mailing: December 16, 1996

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549-96

E.W., on behalf of minor, D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 16, 1996

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

28 OCTOBER 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

10/31/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 4 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

JOHN D. WADE, P.C.
1250 Chews Landing Road
Laurel Springs, NJ 08021
609-346-2800
Attorneys for Respondent

E.W. on behalf of minor D.P.	: OFFICE OF ADMINISTRATIVE LAW : DEPARTMENT OF EDUCATION
Petitioner	:
	: OAL DOCKET NO. EDUOS 04469-96S
vs.	:
	: AGENCY REF. NO. 116-3/96
BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, COUNTY OF CAMDEN	:
	: STIPULATION OF SETTLEMENT : AND CONSENT ORDER
Respondent	:

THIS MATTER having been brought before the Court by Erna Womack, natural mother of D.P. and Jerrold D. Colton, Esquire having entered a formal appearance on her behalf and John D. Wade, Esquire attorney for respondent Lindenwold Board of Education, and it further appearing that the parties have agreed to a settlement of this action and it further appearing that the parties have amicably resolved their differences and it further appearing that the parties have entered into a Stipulation of Settlement;

It is on this day of September, 1996 ORDERED as follows:

1. Upon the execution of this stipulation, the petitioner shall pay to the respondent the sum of $3,000.00 which shall represent all monies owed on account

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(549-96)

E.W., on behalf of minor, D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 14, 1997

E.W., on behalf of minor, D.P., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY, : DECISION

RESPONDENT. :

:

For Petitioner, Jerrold D. Colton, Esq.

For Respondent, John D. Wade, Esq.

This matter, having been brought before the Commissioner of Education by E.W., mother of D.P., and Jerrold D. Colton, Esquire, having entered a formal appearance on her behalf, and the residency dispute and counterclaim for tuition having subsequently been settled; and

The joint stipulation of settlement having been approved by the Commissioner by decision dated December 16, 1996; and

The Commissioner of Education having been notified by the Board by letter dated January 21, 1997, that petitioner failed to comply with the terms of said stipulation of settlement*; and

* The Board's Certification of Default states, in pertinent part, "1. Pursuant to the terms of paragraph 1 of said Stipulation, Petitioner failed to make the installment payment due on December 15, 1996, in the amount of $150.00.

Petitioner having been provided an opportunity, by letter dated February 3, 1997, from the New Jersey State Department of Education, to respond within 10 days to the Board's contention that she has not complied with the terms of the settlement; and

Petitioner having failed to respond to said notice; and

Pursuant to the terms of paragraph 2 of said stipulation, respondent being entitled to an entry of judgment in the amount due of the aggregate costs of the tuition, less any payments made under the terms of the settlement; now therefore

IT IS ORDERED on this 14th day of March 1997, that petitioner pay respondent the amount of $12,673, in accordance with the Board's Certification of Default and the terms of the Stipulation of Settlement.

COMMISSIONER OF EDUCATION

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2. Pursuant to the terms of paragraph 2 of said Stipulation, notice to petitioner's counsel of such default was made on December 17, 1996.*** 3. Pursuant to the terms of paragraph 5 of said Stipulation, petitioner has not provided an appropriate letter of apology to the Lindenwold Board of Education.*** 4. Pursuant to the terms of paragraph 7 of said Stipulation, petitioner has not provided sufficient proof of her financial condition so as to warrant the respondent's accepting the reduced settlement offer. ***" (Board's Certification of Default, January 6, 1997)

MARCH 14, 1997
DATE OF MAILING MARCH 14, 1997

550-96

550-96

S.A., on behalf of minor son, A.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner parent challenged Board's residency determination that his son was a nonresident of the District and, thus, not entitled to a free public education.

ALJ determined that petitioner did not prove by a preponderance of credible evidence that his son was a domiciliary of Paramus during the 1994-95 school year and, thus, tuition moneys were owed to the Board for the period of A.A.'s ineligible attendance. Moreover, the ALJ concluded that due to the fact that A.A. graduated from the school system, no continuing problem existed as to the appropriate school district based upon domicile and reimbursement was the only question which had to be answered for the period of ineligibility.

Commissioner concurred with the findings and conclusions of the ALJ in the initial decision. Commissioner found petitioner did not satisfy requirements of *N.J.S.A.* 18A:38-1. Petitioner was directed to remit to the Board $9,986, less any tuition collected for the 1994-95 school year. Petition was dismissed.

December 19, 1996

550-96

550-96

S.A., on behalf of minor son, A.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

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Commissioner concurred with the findings and conclusions of the ALJ in the initial decision. Commissioner found petitioner did not satisfy requirements of *N.J.S.A.* 18A:38-1. Petitioner was directed to remit to the Board $9,986, less any tuition collected for the 1994-95 school year. Petition was dismissed.

December 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6776-95
AGENCY REF. NO. 193-5/95

SYED AHMED on behalf of his minor son, A.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PARAMUS, BERGEN COUNTY,
Respondent.

Syed Ahmed, *pro se*

Lewis Francesi, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A., attorneys)

Record Closed: September 3, 1996 Decided: October 31, 1996*

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

PROCEDURAL HISTORY

This matter arises out of a petition of appeal contesting the determination of the Paramus Board of Education (Board) with respect to petitioner's minor son. This petition was filed on June 2, 1995 with the Department of Education and an answer and counterclaim requesting reimbursement for tuition expenses was filed with the Department of Education on June 20, 1995.

On June 29, 1995 the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held in the matter on November 30, 1995 at which time the petitioner was represented by counsel.

A motion for summary decision was filed by the respondent Board requesting judgment in its favor on its counterclaim and dismissing petitioner's appeal in its entirety. This was filed on October 13, 1995. Certification of service was also filed with this motion. No response was received by petitioner's attorney within the time frame set forth in *N.J.A.C.* 1:1-12.3 however, upon discussion of the matter at the in-person prehearing on November 30, 1995 it was determined that, in the interest of justice, petitioner would be allowed until December 6, 1995 to file appropriate responding papers should petitioner wish to do so.

The motion for summary decision was denied on the basis that the material facts in this case were in dispute and therefore summary decision could not be rendered.

The hearing was scheduled for April 29, 1996. On April 25, 1996 the petitioner made an appearance at the OAL and advised the guard located at the front desk of a death in the family and requested an adjournment of this matter from the April 29, 1996 date. At that time he also advised the staff of the OAL that Kenneth J. Hall, Esq., who had previously been representing him, was no longer was his attorney. That same date a letter was sent both by fax and regular mail to Kenneth J. Hall, Esq., indicating the circumstance and that, unless a substitution of attorney were filed, his appearance would be expected on April 29, 1996 in order to place his position or any request on the record. The letter specifically indicated that the matter was not adjourned and that all parties were required to be present absent proper steps being taken to secure an adjournment. A copy of this letter was also sent to the petitioner.

On April 29, 1996 Kenneth J. Hall, Esq., appeared in the place of petitioner and counsel for the Board also appeared. At that time little information was available and no affidavit or letter had been produced by or on behalf of petitioner. Based upon the representations by Mr. Hall and in the interest of justice an adjournment was granted and the matter was set down for September 3, 1996.

A letter was subsequently received and dated May 1, 1996 from petitioner indicating the reasons for his failure to appear at the April 29, 1996 hearing date. From that point in time until August 27, 1996 no contact was made by petitioner with the staff of the undersigned regarding representation or how this matter would proceed. As a result, on August 27, 1996 a conference call was held between the undersigned, Kenneth Hall, Esq., representing the petitioner, and Peter Schultz, Esq., representing the respondent-counterclaimant Board of Education. At that time it was determined that the hearing scheduled for September 3, 1996 would proceed as scheduled and that no further adjournments would be granted. Additionally, insofar as formal application for substitution of attorney on behalf of petitioner had yet to be submitted, notwithstanding a period of four months from the most recent scheduled hearing date within which to do so, as well as correspondence from the OAL, Mr. Hall would remain as counsel for the petitioner and appear in that capacity on the September 3, 1996 hearing date unless formal substitution papers were submitted to the undersigned and opposing counsel before the hearing date. It was further ordered that even if formal substitution was properly filed prior to the hearing date the matter would not be adjourned having had sufficient time to have this accomplished. Lastly, it was determined that should the petitioner fail to appear on September 3, 1996 he would be deemed to have abandoned any claims that he might otherwise have in this matter and the undersigned would then consider all papers filed by the respondent-counterclaimant in support of its counterclaim. These terms were memorialized by letter to all parties.

On September 3, 1996 both counsel for the Board as well as Kenneth Hall, Esq., were present however petitioner was not. At 9:20 a.m. petitioner called the

undersigned's chambers and indicated he would be approximately one-half hour late. At approximately 10:45 a.m. petitioner finally appeared for this hearing. Upon arrival petitioner stated that he wished to represent himself *pro se* and Kenneth Hall Esq. was released. On that date testimony was taken and the hearing record closed.

*The time the Initial Decision in this matter would have been due was October 18, 1996 however an Order of extension was granted and entered for good cause due to the undersigned's heavy caseload. This extended the time to file the Initial Decision until December 2, 1996.

ISSUE

The issue in this case is whether or not, petitioner was a domiciliary of the Borough of Paramus during the 1994-1995 school year.

If it is determined that he was not so domiciled then the issue of assessed tuition brought by respondent's counterclaim would be addressed.

BURDEN OF PROOF

Pursuant to *N.J.S.A.* 18A:38-1 a Board's decision denying a free public education within the district may be appealed to the Commissioner of Education. The challenging party shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in *N.J.S.A.* 18A:38-1. No child shall be denied admission during the pendency of such proceedings before the Commissioner and in the event the child is currently enrolled in the district, the student shall not be removed from school during the pendency of the proceedings. If however, in the judgment of the Commissioner, the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time the student's ineligible attendance in the school district.

As a result of the current law cited above the burden rests on the petitioner by a preponderance of the evidence to show that domicile did in fact exist in the district in which the child attended school.

TESTIMONY

The petitioner, Syed Ahmed, testified that he had been living in Paramus. He states that his sister moved to Ridgewood and has been living there between 1994 and the time of the hearing. He testified that he is single and was working with Burger King in the state of Connecticut. His belongings were with a cousin in Paramus and his son was living with his sister in Ridgewood.

Petitioner explained that he spent approximately 90 percent of his time in Connecticut for work purposes and approximately 10 percent in the state of New Jersey. Approximately four to five months prior to the hearing his work changed and he is now working in New Jersey in the town of Fair Lawn.

The petitioner acknowledges that his son was living in Ridgewood during the 1994-95 school year in question but stated that he, as the father, had an apartment rented in Paramus with his cousin, the cousin's wife her mother who lived at the Paramus address.

On cross-examination he stated that he had been staying in a hotel in Connecticut. He also confirmed that he slept there sometimes five or ten days in a row. It was in the end of 1995 that he returned to the state of New Jersey. He stated that he paid rent to a Mr. Sheik who is his cousin and that rental payments were made in cash. He had no receipts. At the time he was making approximately $30,000 per month and he was paying $350 per month for an apartment with the cousin, wife and her mother living there.

Petitioner's son is presently attending school in Yale. He testified that he had never reviewed the documents his son submitted for application to colleges but that his brother did. The petitioner was shown R-1EV. which he confirmed was sent to Yale University and is entitled "Additional statement by the custodial parent." This was signed by the petitioner. At this time petitioner acknowledged that he had participated in the process and had signed the letter. Petitioner also recognized the application for undergraduate admission filled out by his son and submitted to different schools.(R-2)

In the additional statement by the custodial parent which was sent to Yale University and signed by petitioner it states the following regarding his sister living in Ridgewood in the second paragraph: "Both A. and I have been living in her household for a number of years, and all our financial needs have been met by her, by way of a private loan." The application submitted by petitioner's son also lists the addresses of the various parties. The address listed for petitioner's son as his permanent home address is that of petitioner's sister in Ridgewood. On the second page of the exhibit petitioner confirmed that the application states under father's full name a line which is entitled "home address if different from yours". The response was "currently the same address" referring back to the Ridgewood address.

Additionally, although petitioner stated that he had been living with his sister for four or five years previous to her move to Ridgewood he never obtained a New Jersey driver's license but always retained a New York driver's license where he states he was not a resident. He owned a white Toyota Tercel but traveled by train to Connecticut. Petitioner testified that the car was always garaged at the Paramus address and that nobody else drove this vehicle.

Petitioner also testified that while living in Connecticut he stayed at the Paramount Hotel and he gave the hotel his home address as being the address in Ridgewood.

That concluded all testimony on behalf of petitioner.

Respondent produced the testimony of Jerome Bohnert who is a school business administrator and secretary to the Board of Education. He is involved in support activities as well as residency problems which are referred for verification. He stated that he had received several inquiries regarding petitioner and his address. Petitioner's son was a senior who graduated at the end of the 1994-95 school year. The tuition for that school year was $9,986.

According to this witness it was the position of Paramus that petitioner was either a resident and domiciliary of Connecticut or Ridgewood but not of Paramus where his son attended school. In March 1994 tuition was assessed and petitioner's brother paid for approximately one month of tuition. At that time Mr. Asad came back with a bank statement and the school district "gave him the benefit of the doubt."

Subsequently they received information that petitioner's son was in the process of filling forms and that his aunt in Ridgewood was in fact paying the fees. When they received the applications which were to go out at the end of the school year they saw the amount paid and that both petitioner and his son were, according to the application, living with and dependent upon petitioner's sister in Ridgewood for support.

According to the witness petitioner's son had told a guidance counselor that if he moved to Ridgewood, although an excellent student, his class rank would go down slightly.

The witness confirmed that although phone calls were received that petitioner was not domiciled in Paramus that merely started the investigation. Several investigations were conducted which included two locations in Paramus as well as the Ridgewood location.

The next witness who testified for the school board was Ben Campagnone. Detective Lieutenant Campagnone is employed by the Paramus police department and is in charge of the juvenile bureau. He is also employed by the board of education as the attendance officer. In that capacity he deals with truancy and residency/domiciliary questions. The witness testified that he has been doing investigative work for approximately 33 years for the police department.

Campagnone was advised by the board of education that there was a question regarding residency and as a result he went to the house given by petitioner as the location of his domicile in Paramus. Lieutenant Campagnone went approximately 25 times, sometimes early in the morning, and sometimes very late such as 1:00 a.m. On one occasion he rang the doorbell and spoke with a teenage girl in the home. She stated that she was the homeowner's niece. At first when asked if the petitioner was there she did not respond. Finally she stated that she was unable to say when he would return and was also unable to say when he had left.

Lieutenant Campagnone also testified that on his trips to the house which petitioner states he had been renting room in, he looked in the garage a number of occasions. At no time did he ever see a white car at the location.

FINDINGS OF FACT

Having heard the testimony of the witnesses, and having assessed their credibility as well as having reviewed the documentary evidence I **FIND** the following to be fact:

1. During the 1994-95 school year petitioners son lived with his aunt in Ridgewood.

2. During the same period of time petitioner lived out of state approximately 90% of the time.

3. Although petitioner claims his actual domicile was in Paramus insufficient credible evidence was presented to support this.

4. No rent receipts were provided at the hearing, nor was testimony of any individual other than petitioner offered.

5. Surveillance visits were conducted and at no time was petitioner ever located at the address in Paramus which he had provided.

6. Petitioner testified that at all times pertinent to this cases he owned a white Toyota vehicle that was always garaged at the Paramus address and never moved, nor did anyone else use the vehicle. Surveillance showed that at none of Det. Lt. Campagnone's visits was the car garaged as claimed by petitioner in his testimony. Det Lt. Campagnone's testimony was clear concise and credible.

7. Petitioner's son filled out college applications stating that his father lived in Ridgewood with him at his aunt's house.

8. Petitioner also filed a letter as a statement of the custodial parent in which he stated that they had been living with and dependent on his sister who resided in Ridgewood.

9. Tuition for the 1994-95 school year for petitioner's son was $9,986.

10. Petitioner has failed to show that he was in fact domiciled in Paramus during 1994-95.

11. Petitioner shall be assessed $9,986 in tuition costs less any payments already credited on the counterclaim which has been proven by respondent.

LEGAL DISCUSSION

Pursuant to *N.J.S.A.* 18A:38-1, public schools shall be free to persons over five and under twenty years of age who are domiciled within the school district. While there are certain exceptions this case is not a case of exceptions but instead a case of questioned domicile. It is the position of petitioner that he was, at all times pertinent to this case, domiciled in the district of Paramus.

The burden of proving that petitioner is domiciled within the school district of Paramus falls squarely upon petitioner. It is petitioner's burden to show that he was domiciled in Paramus and that his son was appropriately attending school there.

The proof in this case by petitioner falls well short of meeting the burden. Petitioner stated he was, during the majority of the time of the 1994-95 school year, working in Connecticut and spending approximately ten percent of his time in New Jersey. He stated that his domicile was in Paramus and that he paid rent in cash to a cousin. No other individual was called to testify that he had any link with that location in Paramus. No other witness, relative, neighbor, nor were any rent receipts produced. In fact, no record of any transaction was produced for the benefit of the undersigned.

The records that were persuasive in this case went to the school board's rebuttal of petitioner's sworn testimony. In petitioner's son's application for college it states clearly that petitioner was living at the pertinent time with his sister in Ridgewood. No mention is made in the application of any address in Paramus. While that alone might not be dispositive, other factors shown by the school board clearly and convincingly rebutted the testimony of petitioner.

The trips by Lieutenant Campagnone approximately 25 times to the address given by petitioner are perhaps most illustrative. Upon knocking at the door on one occasion he was told by the homeowner's daughter that she did not know when petitioner had left nor when he would return. The most telling portion of Lieutenant Campagnone's testimony was that on a number of occasions he checked the garage to see if the car registered to petitioner was located there as Ahmed had insisted it was while testifying. In each instance Lieutenant Campagnone found no car.

Based upon the credibility of the witnesses and the burdens assessed in this case it is clear that petitioner has not met the burden of proving that he was domiciled in Paramus during the pertinent period of time. As a result the next question presented is that of tuition reimbursement pursuant to *N.J.S.A.* 10:38-1 which permits the assessing of a parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district.

In this case the tuition for the 1994-95 school year was $9,986. There was however testimony that one month's tuition was paid to the district. It is unclear whether or not, upon receipt of the information at that time whether the money either was retained by the district or was returned to petitioner. As a result the appropriate award on the counterclaim is tuition reimbursement in the amount of $9,986 for the 1994-95 school year. It should be noted that if the one month's tuition that was paid was in fact retained by the school district that amount shall be credited as an offset against the total award.

CONCLUSION

Based upon the foregoing I hereby **CONCLUDE** that petitioner has not met the burden of proof applicable here, that of a preponderance of the credible evidence, that he was domiciled in the city of Paramus during the 1994-95 school year. I further **CONCLUDE** that the Paramus Board of Education is entitled to reimbursement of

tuition costs in the amount of $9,986 less credit for any tuition which may have been paid during that school year. I further **CONCLUDE** that, due to the fact that petitioner's son has graduated from the school system no continuing problem as to the appropriate school district based upon domicile exists at this time and reimbursement is the only question which has been answered for the period of ineligibility.

ORDER

It is hereby **ORDERED** that petitioner's claim be and hereby is **DISMISSED.** It is further **ORDERED** that respondent's counterclaim for tuition reimbursement be and hereby is **GRANTED** for tuition reimbursement of $9,986 less any tuition already collected for the 1994-95 school year.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/31/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

11-4-96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 6 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am(FV)mxl

APPENDIX

Witnesses

For petitioner:

Syed Hassan Ahmed

For respondent:

Jerome Bohnert
Ben Campagnone

Evidence

C-1 Letter dated April 26, 1996 to Kenneth J. Hall, Esq.

P-1 (id only) Letter dated April 30, 1995 to Board of Education from Riaz M. Sheikh

P-2 Letter from Ramsey Municipal Court to Syed Ahmed dated April 18, 1995

P-3 Copy of bank statement February 17 to March 20, 1995 NatWest Bank

P-4 Driver's license issued to Syed Ahmed issued 9/23/94

R-1 Two-page transmittal of statement by custodial parent from Syed Ahmed

R-2 Application for undergraduate admission

R-3 Letter dated April 15, 1995 from Ben Campagnone to Jerome Bohnert

R-4 Vehicle registration for Syed Ahmed

R-5 U.S. individual income tax return

OAL DKT. NO. EDU 6776-95

S.A., on behalf of minor son, A.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) for the reasons well-expressed therein. In so finding, the Commissioner concurs that, pursuant to *N.J.S.A.* 18A:38-1, A.A. is not entitled to a free public education in the Paramus School District, and that petitioner must reimburse respondent for the period of A.A.'s ineligible attendance.

Accordingly, petitioner is directed to remit to the Board $9,986, less any tuition already collected for the 1994-95 school year, in accordance with the ALJ's recommendation, and the within appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 19, 1996

Date of Mailing, December 19, 1996

551-96

551-96

LAWRENCE H. CHAMMINGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3131-95
AGENCY DKT. NO. 29-2/95

LAWRENCE H. CHAMMINGS,
Petitioner,
v.
ROCKAWAY TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Anthony P. Sciarrillo, Esq., for respondent,

Record Closed: October 30, 1996 Decided: October 30, 1996

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of Facts

This matter was transmitted to the Office of Administrative Law on March 23, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Oct. 30, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11-4-96
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 6 1996
DATE

Barbara A Harner
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED OCT 25 1996

Oct 30 11 08 AM '96

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
1479 Pennington Road
Trenton, N.J. 08618
(609) 771-9080
Attorneys for PETITIONER

Plaintiff LAWRENCE H. CHAMMINGS *vs.* *Defendant* ROCKAWAY TOWNSHIP BOARD OF EDUCATION	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** *Agency Reference No.* 29-2/29 ***CIVIL ACTION*** Settlement Agreement

WHEREAS, the Petitioner, Lawrence Chammings, filed a Petition of Appeal before the Commissioner of Education in which he claimed that the Rockaway Board of Education (hereinafter referred to as "Rockaway") had violated his rights of tenure; and

WHEREAS, Rockaway filed an answer and, with the Petitioner, was bound to a Prehearing Order entered by the court on or about July 19, 1995; and

WHEREAS, the matter proceeded to trial on or about January 4, 1996; and

WHEREAS, the litigation now before the Commissioner of Education will result in substantial costs and fees incurred by both parties; and

WHEREAS, the parties wish to amicably resolve all issues emanating from this matter;

NOW, THEREFORE, Rockaway and Lawrence Chammings, agree as follows:

1. In consideration for the dismissal of the action brought by the Petitioner, Lawrence Chammings, and in the event that Mr. Chammings retires by the conclusion of June 30, 1998, notice of which shall be given to Rockaway no later than June 30, 1997, Rockaway shall compensate Mr. Chammings in the sum of $8,000.00. If Mr. Chammings retires after June 30, 1998, but before the conclusion of June 30, 1999, notice of which shall be given prior to June 30 1998, the said payment made by Rockaway to Mr. Chammings shall be reduced to $5,000. If Mr. Chammings retires after June 30, 1999 Rockaway shall be under no obligation whatsoever to make any additional payment to Mr. Chammings other than the salary to which he would be entitled to as a teaching staff member employed by Rockaway.

2. Rockaway agrees that the said sum of $8,000 to be paid to Mr. Chammings if he retires at the conclusion of June 30, 1998, notice of which shall be provided to Rockaway by Mr. Chammings no later than June 30, 1997, shall be in addition to his contracted salary as a teaching staff member and shall be incorporated into his 1997-1998 contracted salary with Rockaway. In the event that Mr. Chammings chooses to retire at the conclusion of June 30, 1999, notice of which shall be provided no later that June 30, 1998, Rockaway agrees that in addition to Mr. Chammings' 1998-1999 contracted salary as a teaching staff member it shall pay him the sum of $5,000 which shall be incorporated into his 1998-1999 contracted salary.

3. In consideration therefore, Petitioner agrees to withdraw the Petition in the within matter resulting in a voluntary dismissal with prejudice of the action entitled Chammings v. Rockaway Board of Education OAL Docket # EDU 3131-95, Agency Docket # 29-2/95.

4. In addition to his withdrawal of the Petition now pending before the Commissioner, by way of this settlement, Mr. Chammings also agrees to release and forever discharge Rockaway, its employees, agents and officers from any and all claims whatsoever pertaining to the subject matter of the dispute set forth in the

matter of Lawrence H. Chammings v. Rockaway Township Board of Education OAL Docket # EDU 3131-95, Agency Docket # 29-2-95 as well as any related claims which may arise under State or Federal Law, including a claim under the Age Discrimination In Employment Act, 29 USCA 621 et. seq., claims for attorneys fees, any and all claims based upon contract or tort, claims for damages, back pay and for equitable relief.

5. It is understood that this agreement is subject to the approval of the Rockaway Board of Education.

6. All parties hereby certify that they have read the terms of this AGREEMENT which also includes a GENERAL RELEASE, that they have had an opportunity to discuss it with their respective counsel, and that they understand its terms and effects. All parties further certify that they are executing this AGREEMENT and GENERAL RELEASE on their own volition, with the full understanding of its terms and effects, and with the intention of abiding by all the terms set forth herein, which they acknowledge are satisfactory and adequate.

Sheryl L. Williams
WITNESS

Lawrence H. Chammings
LAWRENCE H. CHAMMINGS

Thomas C Parcak
WITNESS

Lanne AM Glunt
ROCKAWAY TOWNSHIP
BOARD OF EDUCATION

RESOLUTION

RESOLVED, that the Board of Education of the Township of Rockaway approves the Settlement Agreement in the matter of *Lawrence Chammings v. Rockaway Township board of Education, Agency Reference No. 29-2/29*, as per the attached.

Roman C Tarczak

DATED: 10/22/96

OAL DKT. NO. EDU 3131-95

LAWRENCE H. CHAMMINGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.* The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 19, 1996
Date of Mailing, December 19, 1996

* Term No. 5 of the within settlement agreement indicates that this agreement is subject to Board approval. It is noted that the record in this matter confirms that Board approval was accomplished in October 1996.

553-96

553-96

NANCY WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 23, 1996

OAL DKT. NO. EDU 4898-96
AGENCY DKT. NO. 165-5/96

NANCY WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 23, 1996
Date of Mailing, December 23, 1996

554-96

554-96

MARTIN A. DOMACASSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 23, 1996

OAL DKT. NO. EDU 5229-96
AGENCY DKT. NO. 85-3/96

MARTIN A. DOMACASSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 23, 1996
Date of Mailing, December 23, 1996

555-96

555-96

S.W., on behalf of minor, A.W., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF BLOOMFIELD, AND BOARD
OF EDUCATION OF THE ESSEX COUNTY :
VOCATIONAL SCHOOLS, ESSEX COUNTY,
:

RESPONDENTS.
:

December 27, 1996

OAL DKT. NO. EDU 7072-96
AGENCY DKT. NO. 179-5/96

S.W., on behalf of minor, A.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, AND BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 27, 1996
Date of Mailing, December 27, 1996

556-96

556-96

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

December 23, 1996

OAL DKT. NO. EDU 9621-95
AGENCY DKT. NO. 304-7/95

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 23, 1996
Date of Mailing, December 23, 1996

557-96

557-96

FRED W. AND RITA K. HOLDEN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 23, 1996

OAL DKT. NO. EDU 3007-96
AGENCY DKT. NO. 4-1/96

FRED W. AND RITA K. HOLDEN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 23, 1996
Date of Mailing, December 23, 1996

558-96

Y.A.L.E. SCHOOL, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENTS.	:	
	:	

December 27, 1996

OAL DKT. NO. EDU 8696-94
AGENCY DKT. NO. 72-4/94

Y.A.L.E. SCHOOL, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 27, 1996
Date of Mailing, December 27, 1996

559-96

559-96

IDA AND JOSEPH MONDI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BELLMAWR *ET AL.*, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

December 27, 1996

OAL DKT. NO. EDU 4461-96
AGENCY DKT. NO. 138-4/96

IDA AND JOSEPH MONDI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BELLMAWR *ET AL.*, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 27, 1996
Date of Mailing, December 27, 1996

561-96

561-96

DR. COLUMBUS SALLEY AND THE BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EXAMINERS, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that Respondent State Board of Examiners' denial of a school administrator endorsement was arbitrary, capricious and unreasonable. Petitioner had previously served as chief school administrator in the Newark public school system and possessed an administrative certificate with the endorsement of executive superintendent. However, respondent determined that a superintendent of schools must hold an administrative certificate with a school administrator endorsement, Applying current regulations effective September 1, 1992, respondent ruled that petitioner had to pass a national test and complete a mentorship program before becoming eligible for the school administrator endorsement.

Upon *de novo* review, ALJ determined that petitioner was authorized to serve as superintendent of schools in any New Jersey public school district by virtue of his executive superintendent endorsement which he was issued in 1981. ALJ determined that the executive superintendent endorsement necessarily subsumes the regular school administrator endorsement as requirements for the former were more rigorous than for the latter. Moreover, ALJ found that if petitioner's credentials are now deficient to acquire a school administrator endorsement, because they fall short of the common requirements for obtaining an administrative *certificate*, then he should have never received an administrative certificate with executive superintendent endorsement in 1981. Thus, the ALJ found that given the internal logic of the regulatory plan, persons who earned a valid executive superintendent endorsement prior to September 1, 1992 fall within the intended coverage of the grandfather clause and are exempt from the testing and mentorship requirements applicable to newcomers.

In light of the record of this matter including transcripts of the proceedings, the Commissioner determined to affirm the factual findings of the ALJ, as well as his ultimate conclusion. Commissioner noted that in 1981, petitioner was issued a lifetime *administrative certificate* with an executive superintendent endorsement. Respondent's assertion that petitioner could not have met the requirement for the school administrator endorsement, which serves as the basis for its denial of his present application, was based solely on the logic that his credentials fell short of the common certificate requirements, a conclusion which, on its face, was arbitrary, capricious and unreasonable, given the regulations in effect at the time and respondent's prior awarding of an executive superintendent endorsement under the same certificate. Having set aside respondent's decision as arbitrary and capricious, Commissioner did not reach to remaining issues, but found petitioner eligible to invoke the grandfather clause found at *N.J.A.C.* 6:11-9.4(h). Commissioner directed respondent to issue forthwith the school administrator endorsement to petitioner's administrative certificate so as to authorize him to serve as chief school administrator of the City of Orange Township School District or of any other school district in this State.

December 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5616-96
AGENCY DKT. NO. 154-4/96

DR. COLUMBUS SALLEY and the
BOARD OF EDUCATION OF THE CITY
OF ORANGE TOWNSHIP, ESSEX COUNTY,
Petitioners,
v.
BOARD OF EXAMINERS,
DEPARTMENT OF EDUCATION,
STATE OF NEW JERSEY,
Respondents.

Nicholas Celso III, Esq. and **Mark A. Tabakin**, Esq., appearing for petitioners
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Michelle Lyn Miller, Deputy Attorney General and **Maria Desautelle**,
Deputy Attorney General, appearing for respondent
(Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: October 1, 1996 Decided: October 29, 1996

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal from a ruling by the State Board of Examiners ("Examiners") that petitioner Dr. Columbus Salley lacks the appropriate license necessary to become superintendent of schools for the City of Orange. The Orange Board of Education

("Board"), which last January hired him as its superintendent of schools, joins Dr. Salley in bringing this appeal. Dr. Salley had previously served as chief school administrator in the Newark public school system. He possesses an administrative certificate with the endorsement of "executive superintendent."[1] However, the state licensing agency determined that a superintendent of schools must hold an administrative certificate with a "school administrator" endorsement. Applying current regulations which took effect on September 1, 1992, the state agency ruled that Dr. Salley had to pass a national test and complete a mentorship program before becoming eligible for the school-administrator endorsement.

First, Dr. Salley contends that the Examiners' interpretation of the regulations is inconsistent with the enabling legislation that created the position of executive superintendent, *N.J.S.A.* 18A:17A-1 to 11. Second, he maintains that he fulfills the requirements of the grandfather clause for issuance of a school-administrator endorsement under the current regulations, *N.J.A.C.* 6:11-9.4(h). Last, he challenges the Examiners' decision as arbitrary, capricious and unreasonable, both substantively and procedurally. He alleges numerous procedural irregularities in the proceedings before the Examiners which, he says, contributed to an erroneous result.

Procedural History

By letter dated December 29, 1995, the Essex County Superintendent of Schools notified Dr. Salley that he did not possess the proper endorsement needed to assume the office of superintendent of schools in Orange. One week later, on January 4, 1996, the Office of Licensing & Academic Credentials ("Office of Licensing") issued a written evaluation identifying certain deficiencies which must be remedied in order for

[1] There are three types of regular certificates that an educator may acquire: instructional, administrative, and educational services. *N.J.A.C.* 6:11-2.3. Each certificate may be marked with various special "endorsements." These endorsements coincide with educational subjects or positions that share common attributes and thus are grouped under a particular certificate. *Dennery v. Bd. of Educ. of Passaic Cty. Reg. High Sch. Dist. #1*, 131 *N.J.* 626, 633 (1993). For a fuller explanation, see *Howley v. Ewing Bd. of Educ.*, 6 *N.J.A.R.* 509, 513-512 (Comm'r Dec. 20, 1982).

Dr. Salley to obtain a school-administrator endorsement. On January 31, 1996, petitioners filed a petition for review of the evaluation by the Examiners. Pending the outcome of this review, the Commissioner of Education ("Commissioner") entered orders allowing Dr. Salley to continue serving as acting superintendent, initially to April 1, 1996 and later to June 30, 1996. Meanwhile, the Examiners considered petitioner's appeal at their regular meeting on March 28, 1996. Subsequently, on April 15, 1996 the Examiners issued a written decision denying the requested relief. Thereafter, on April 29, 1996, petitioners filed an appeal to the Commissioner. Respondent filed its answer on May 13, 1996.

On June 12, 1996, the Commissioner entered an order extending Dr. Salley's authorization to serve as acting superintendent until September 30, 1996 and forwarding the matter to the Office of Administrative Law ("OAL") for an expedited hearing. While the matter was pending before the OAL, Dr. Salley received permission to file an amended petition on July 30, 1996 and respondent filed an amended answer on July 31, 1996. The OAL held hearings on September 3 and 4, 1996. Both parties submitted post-hearing briefs on October 1, 1996. Witnesses and exhibits are listed in the appendix.

Findings of Fact

All of the material facts needed to resolve this dispute were developed at the administrative hearings. **I FIND**:

Dr. Columbus Salley majored in intermediate education at Chicago Teacher's College and earned his bachelor of science degree in December 1965. Chicago Teacher's College, now called Chicago State University, has been approved since at least 1981 by the State of Illinois for certificate programs in elementary and secondary education. Additionally, Chicago Teacher's College was and is accredited by the

National Council for Accreditation of Teacher Education ("NCATE").[2] From January through June 1996, he taught eighth-grade mathematics in the Chicago public school system. Throughout his teaching career, he taught under a regular teacher's certificate issued by the City of Chicago.[3] For the 1966-67 academic year, Dr. Salley taught a self-contained sixth grade class, with emphasis on mathematics and language arts, at another Chicago public school. Over the summer of 1967, he developed and produced a set of videotapes for teaching mathematics to inner-city children. In 1967-68, he returned to the sixth grade classroom for another academic year. Altogether, Dr. Salley has a total of two full academic years and seven or eight months of teaching experience in the Chicago public schools.

After leaving the Chicago school district, Dr. Salley worked for a major educational publishing company, first as a sales representative and later as an editor. While working in the publishing field, he attended graduate school part-time at Loyola University of Chicago and received his master's degree in educational administration in 1970. Loyola's program was approved by the State of Illinois and accredited by NCATE. During 1969-70, Dr. Salley taught courses in sociology and psychology at Trinity College in Deerfield, Illinois.

Dr. Salley became one of a select number of students chosen as a Ford Fellow at the University of Pennsylvania. Ford Fellowships are grants from the Ford Foundation to train educational leaders in urban centers across the country. As part of his training, Dr. Salley served as administrative assistant to the principal at a

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[2]NCATE is a national accreditation entity, comprised of representatives of various professional organizations, which sets standards for college teaching programs. Although New Jersey currently uses a different accreditation system known as the National Association of State Directors of Teacher Education and Certification ("NASDTEC"), that organization's standards are not as "comprehensive" or "professionally rigorous" as NCATE's standards. State witnesses concede that NCATE is "top of the line" and that NASDTEC is "not as strong."

[3]New Jersey recognizes teaching certificates issued by other states, but not by cities like New York City or Chicago. Generally, New Jersey enters into reciprocity agreements with other states, not with individual cities. See *N.J.S.A.* 18A:26-11.

Philadelphia public high school, where he implemented a model curriculum and administered the daily operations of a secondary school program. He graduated from the University of Pennsylvania in 1974, with a doctoral degree in educational administration.

Following graduation, Dr. Salley held a number of prominent positions. Initially, he was employed by the Consortium For Educational Leadership ("CLE"), a nonprofit group of seven leading universities, funded by the Ford Foundation and dedicated to training educational leaders and conducting research related to leadership training and practice. Starting as deputy executive secretary, Dr. Salley enjoyed what his supervisor termed "a superb apprenticeship for top level educational leadership." Among other duties, he helped prepare a highly-regarded scholarly study on the effectiveness of school principals. Ultimately, in 1976, he rose to executive secretary in charge of the entire operation, including recruiting candidates for training, editing publications and planning seminars. In 1977, Dr. Salley left CLE to accept a Rockefeller internship at the University of Chicago's Industrial Relations Center. There he expanded his earlier academic research into a similar study on the role of the superintendent of schools. He had the opportunity to gain practical experience in financial planning and budgeting, personnel matters, contract negotiations, collective bargaining and grievance procedures..

Three years later, in the fall of 1980, Dr. Salley went to Washington to take a post as director of policy, planning and program development at the United States Department of Education. In that capacity, he had primary responsibility for the formulation of a $4.8 billion budget for federal aid to elementary and secondary education, including the Title I and Headstart programs for economically disadvantaged children. An important part of his job was to monitor the efficacy of these programs to ensure that the money was well spent.

When administrations changed in Washington, Dr. Salley came to New Jersey to become executive superintendent of the Newark public school district. In the interim, he also did consulting work for various clients, including Virginia State University and

school districts in New Orleans and Miami. He served as executive superintendent in Newark from 1981 through 1985. At that time, the Newark school system had about 65,000 students, 8,500 employees and a budget of $300 to $400 million. As executive superintendent, Dr. Salley had oversight responsibility over all instructional, managerial and financial activities of the district. In order to qualify for the position, Dr. Salley had to apply to the New Jersey licensing authorities for the appropriate administrative certificate. Before issuing the certificate, state officials requested written documentation of Dr. Salley's prior work experience and questioned him about his teaching background. Satisfied with his answers, the Examiners issued him a standard administrative certificate with the "executive superintendent" endorsement in October 1981.

Upon completion of his employment in Newark, Dr. Salley left the field of education and worked in private enterprise for the next ten years. In November 1995, he applied for the position of superintendent of the Orange school district. The Orange Board of Education had retained a consultant from the New Jersey School Boards Association to provide technical assistance in its search for suitable candidates. During the screening process, the consultant reviewed Dr. Salley's credentials and informed him that everything was "in order." Shortly thereafter, the Board and Dr. Salley entered into a four-and-one-half-year contract for Dr. Salley to serve as superintendent, effective January 1, 1996.

Just two days before Dr. Salley was due to take office, Rene Rovtar, acting Essex County superintendent of schools, notified the Board of her concern that Dr. Salley possessed the wrong endorsement. Elizabeth Strother, an assistant director of the Office of Licensing who does thousands of evaluations every year, reviewed Dr. Salley's file and concluded that he did not satisfy the present requirements for issuance of a school-administrator endorsement. Looking only at his graduate-school records, she determined that Dr. Salley's qualifications were deficient in two essential respects. He had not attained a passing score on the state-mandated test of knowledge and he

had not completed a one-year mentorship program under a provisional certificate.[4] Literature describing the state-mandated test says that it is "intended primarily for those who are candidates for master's degrees or who already possess a master's degree and are seeking first appointments as administrators or supervisors."[5] Ms. Strother's analysis was limited to whether Dr. Salley is eligible for the school-administrator endorsement. It was beyond her authority to determine whether Dr. Salley could act as superintendent under a different endorsement. Since the regulations expressly provide that the test requirement could not be waived, Ms. Strother did not feel she had the authority to overlook the defect.

On appeal, the Examiners upheld the determination below that Dr. Salley is ineligible for a school-administrator endorsement. Further, the Examiners ruled that Dr.Salley could not "circumvent" the requirements for obtaining a school-administrator endorsement "by suggesting that his former endorsement is equivalent or worthy of substitution." Despite Dr. Salley's complaint that he never received formal notice of their meeting, he was admittedly aware at least two weeks in advance that the Examiners would be discussing his case on March 28, 1996.[6] Proceedings before the Examiners are tape-recorded. Ida Graham, who serves the dual function of secretary of the Examiners and director of the Office of Licensing, outlined the circumstances concerning Dr. Salley's application. A transcript reveals that the Examiners adopted the recommendations of Ms. Graham with little public discussion. There is no indication on the public record that the Examiners conducted their own independent

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[4]In addition, a deficiency check list filled out by Ms. Strother indicates that Dr. Salley had not "agree[d] to undergo an assessment of performance" and that he did not have "an offer of employment in a position requiring the school-administrator endorsement." At the hearing, Ms. Strother conceded that the assessment measure does not exist, so that nobody is being held to that standard. When completing the check list, she was unaware of the Board's employment offer.

[5] Dr. Salley, of course, has a doctoral-level degree and has served as chief school administrator in the state's largest school district

[6]Dr. Salley had been advised of the meeting by his counsel, but chose not to attend because of his understanding that neither he nor his representative would be permitted to speak.

review of Dr. Salley's written submissions. At one point, the Examiners went into executive session to discuss the merits of Dr. Salley's appeal. No reason for this action is set forth on the record of the public meeting. Minutes of the meeting recite that the Examiners "voted to convene in executive session to discuss legal matters." Testimony indicates that during such executive session the Examiners sought legal advice from their deputy attorney general.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that petitioner's executive-superintendent endorsement allows him to serve as school superintendent of any public school district in New Jersey.

At the outset, it is necessary to clarify the scope of the Commissioner's review of a decision made by the Examiners. Controversies and disputes arising under the school laws may be "heard" by the Commissioner. *N.J.S.A.* 18A:6-9. Citing several administrative decisions, the Examiners argue that their decision can only be set aside if shown to be arbitrary, capricious or unreasonable. But the leading case on the subject holds that, where the proceedings before the Examiners do not constitute a full and fair "hearing" of evidence and argument, then the right of appeal to the Commissioner "signifies a completely *de novo* and independent decision on the facts." *In re Masiello*, 25 *N.J.* 590, 606 (1958). If it appears to the Commissioner "that an interpretation by the Board of Examiners of any rule of the Board of Education is violative of the letter or spirit of such rule, the proper discharge of his duty requires corrective action." *Masiello*, at 607. Until the OAL level, Dr. Salley did not receive a full trial-type hearing, including the right to representation, broad discovery and subpoena power. *See J.E. on Behalf of G.E. v. Dep't of Human Servs.*, 131 *N.J.* 552 (1993). Hence, the proper standard to be applied is a completely fresh appraisal of both facts and the law. On a hearing *de novo*, the appellate tribunal is not restricted to the "abuse-of-discretion" or "arbitrary, capricious or unreasonable" test, but must make

independent findings and conclusions of its own. *Grasso v. Borough Council of Glassboro*, 205 *N.J. Super.* 18, 25 (App. Div. 1985), *certif. den.* 103 *N.J.* 453 (1986).[7]

The title "executive superintendent" is an invention of the New Jersey Legislature. Alarmed by "the increasingly intolerable chaos infecting the Newark public school system," the Legislature responded in 1975 by enacting a special organizational structure applicable to "districts in cities of the first class with a population over 325,000." *L.* 1975, *c.* 196. *Gibson v. Newark Bd. of Educ.*, 205 *N.J.* 48, 50 (App. Div. 1985). Newark is the only school district fitting that description. *Sponsor's Statement to Senate Bill.* 3166 (1975). Conditions leading to the creation of the new management system had "existed over a very long period" and the reform was preceded by a number of study commissions and investigatory bodies, including an emergency task force appointed by the Commissioner. *Report of the Special Agent Appointed by Commissioner Fred G. Burke to Oversee the Implementation of Fiscal Reforms in the Management of the Newark School System,* 1-8 (1975) (hereafter "*Report of the Special Agent*"). In general, "the legislative scheme created for Newark was the so-called unit control system, achieved by the creation of the unique office of executive superintendent exclusively responsible for the day-to-day educational, fiscal and operational activities of the district and the concomitant allocation to the Newark Board of Education . . . of a role limited to policy making." *Gibson,* at 50.

By legislative design, the powers and duties of an executive superintendent exceed those of a regular superintendent of schools in other districts. *Rotondo v. Carlstadt-East Rutherford Bd. of Educ.*, 276 *N.J. Super.* 36, 40 (App. Div. 1994). *N.J.S.A.* 18A:17A-2 specifies, in part, that, "No person shall be appointed, or act as, or

[7]Administrative decisions cited by the Examiners rely on an questionable reading of *Babicz v. St. Bd. of Examiners*, 1978 *S.L.D.* 937 (Comm'r Dec. 11, 1978), *aff'd* 1979 *S.L.D.* 816 (April 4, 1979). In that case, the Commissioner noted the absence of a sufficient showing that the Examiners' determination was "other than a reasoned exercise of discretionary authority," 1978 *S.L.D.* at 939, but did not necessary mean to imply that an abuse-of-discretion standard should be the *exclusive* basis for overturning an incorrect outcome.

perform the duties of, executive superintendent, unless he holds an appropriate certificate as prescribed by the State board; provided, however that in addition to State certification requirements the executive superintendent shall meet additional criteria as shall be determined by the board of education." Further, *N.J.S.A.* 18A:17A-3 directs that the executive superintendent shall be "the chief executive officer and administrator of the district" and shall have supervisory authority "over the organization and the educational, managerial, and fiscal operations of the district" as well as "over all officers and employees, professional and nonprofessional, . . . all of whom shall report to him[.]" Most important of all, *N.J.S.A.* 18A:17A-4 abolished most of the central office staff in the Newark district and instead provided that "the executive superintendent shall perform all the duties and possess all the powers heretofore and hereafter assigned to the superintendent of schools, secretary of the board of education, school business administrator, school business manager, and assistants and clerks thereto[.]"

One of the main purposes of the legislation was to establish a new position "in lieu of the position of superintendent of schools as chief school officer and vest in him complete authority over the educational, managerial and fiscal operations of the school district." *Sponsor's Statement.* Or, as the Appellate Division aptly observed, the Act created a "super" superintendent. *Rotondo*, at 40. *See also*, *Gibson v. Newark Bd. of Educ.*, 1986 *S.L.D.* 3044 (St. Bd. May 6, 1986), *aff'd* No. A5209-83T6 & A-3111-84T5 (N.J. App. Div. Oct. 15, 1986), where the State Board of Education remarked that the enabling legislation entrusts to the executive superintendent "a level and scope of responsibility beyond that imposed upon superintendents of any other district." (at 3059).

Implementing regulations reinforce the view that an "executive superintendent" is a superintendent with special qualifications and extra responsibilities. Common provisions applicable to all administrative certificates in 1981 required possession of a standard New Jersey teacher's certificate "or its equivalent" and "[t]hree years of successful teaching experience." *N.J.A.C.* 6:11-10.2(a)(3) (1977). Thus, when Dr. Salley applied for his administrative certificate in 1981, an executive superintendent was subject to exactly the same teaching requirements as any other school

superintendent. Former regulations, adopted in 1975 as *N.J.A.C.* 6:11-10.12 and still in effect in 1981, required, among other things, that the executive superintendent "possess and be able to demonstrate a knowledge of the complex problems of an urban community, involving the educational, societal, fiscal and political aspects" and "have five years of administrative experience in which three years must be in an organization of comparable complexity and magnitude." [7 *N.J.R.* 459(b) (Oct. 9, 1975); 7 *N.J.R.* 547(a) (Dec. 4, 1975). Significantly, Commissioner of Education Fred G. Burke wrote at the time that, "The requirements for Executive Superintendent embrace wide areas of knowledge and are designed to accommodate a generalist who would be *recognized as a peer* by New Jersey Superintendents." *Explanatory Summary of Fred G. Burke* (Oct. 27, 1975) (Emphasis added.) In comparison, a regular superintendent in 1981 did not need to demonstrate actual knowledge in any particular area and need only have "three years of educational administrative or supervisory experience." *N.J.A.C.* 6:11-10.7 (1977).

Statutes should not be read to reach an absurd result. *State v. Provenzano*, 34 *N.J.* 318, 322 (1961). A statute must, if reasonably possible, be accorded a construction which is sensible and "consonant to reason and good discretion," rather than one which, though literal, "leads to absurd consequences." *In re Petition of Gardiner*, 67 *N.J. Super.* 435, 444 (App. Div. 1961). When construing a statute, "every effort should be exerted to avoid . . . an anomalous result." *Reisman v. Great Am. Recreation , Inc.*, 266 *N.J. Super.* 87, 96 (App. Div. 1993), *certif. den.* 134 *N.J.* 560 (1993). Since the enabling statutes and the implementing regulations contemplate that an executive superintendent must meet a higher level of expertise than an ordinary superintendent, it would be illogical to assume that an executive superintendent is qualified to manage the largest and most complicated school district in the State but no other district. Rather, the sensible interpretation of the law, keeping in mind the legislative purpose behind unifying separate administrative functions in a single individual, is that the executive-superintendent endorsement necessarily subsumes the regular school-administrator endorsement. Such interpretation is consistent with the hierarchical nature of administrative endorsements, whereby in 1981 the holder of a school-administrator endorsement was authorized to do everything that a principal can

do and the holder of a principal endorsement was authorized to do everything that a supervisor can do. *Compare N.J.A.C.* 6:11-10.4(a), (b) and (c) (1977).

Nonetheless, the Examiners argue that Dr. Salley would not have been entitled to a school-administrator endorsement had he applied for it in 1981. Specifically, they assert that New Jersey does not recognize his Chicago teaching certificate as the equivalent of a New Jersey teaching certificate and that he has not completed three full academic years of teaching. That reasoning is flawed, however, because those particular requirements were common to all types of administrative endorsements. If Dr. Salley were deficient in teaching experience, he should never have received his executive-superintendent endorsement in the first place. Certainly no allegation is made that Dr. Salley ever misrepresented the type of certificate he holds or the length of his prior teaching experience in the Chicago school system. Therefore, the record demonstrates that whoever reviewed Dr. Salley's teaching credentials in 1981 was willing to accept them as being in substantial compliance with the existing regulations. Testimony shows that the State of Illinois itself recognizes the city-issued certificate as valid to teach in that city and that New Jersey licensing authorities have discretion to look at the quality of teacher preparation in deciding whether to grant recognition to an out-of-state certificate. It would be grossly unfair to question Dr. Salley's teaching background now, after he has served for five years in Newark under the executive-superintendent endorsement.

In light of the fact that three years of teaching is a common requirement for both endorsements, it is unclear exactly what the Examiners meant by their comment that qualifications for the executive-superintendent endorsement "can be construed as having been less demanding of educational/classroom experience" than the school administrator endorsement. An applicant for the school-administrator endorsement had to complete certain academic coursework, *N.J.A.C.* 6:11-10.7 (1977), while an applicant for the executive-superintendent endorsement had to be able to demonstrate knowledge of various problems of an urban school setting, including the "educational" aspects. *N.J.A.C.* 6:11-10.12 (1977). Moreover, the distinction itself may not be

particularly helpful. In one of the reports leading to formation of the unit control system in Newark, the author noted:

> The conception that fiscal and educational management can be held separate and distinct is no longer valid in the modern world. To a major extent, the educational quality of a school system is shaped by budgetary decisions, by the employment of computerized learning aids, and is the result of resource - both people and money - allocations. *Report of the Special Agent*, at 30.

Likewise, the Examiners' reliance on *Marshello v. N.J. State Bd. of Examiners*, 92 *N.J.A.R.* 2d (EDU) 378 (Comm'r May 12, 1992) as additional grounds for their ruling is misplaced. In that case, the Commissioner upheld the Examiners' refusal to recognize an accountant's work experience as a substitute for the academic course work necessary to qualify for a school-business administrator endorsement. Mr. Marshello claimed that his eight years of service as auditor general of the Newark school district required him to engage in all aspects of the district's business affairs. Proofs showed, however, that he had inadequate exposure in the area of school buildings or school business administration and "very little involvement in those aspects of school business operations which necessarily involve academic considerations and decision-making." (at 381). Even his own expert was "less than enthusiastic about Marshello's credentials." (at 380). Insofar as the reported decision reflects, Mr. Marshello had no formal academic preparation in any field of education and held no certificates entitling him to work in any school district. Consequently, the situation is vastly different from the present case, where Dr. Salley has a doctoral-level degree in educational administration, holds a valid New Jersey administrative certificate and has amply documented his teaching and administrative experience.

An overhaul of the certificate regulations in 1990 made substantial changes in the requirements for school administrators. [22 *N.J.R.* 1873(a) (June 18, 1990); 22 *N.J.R.* 3240(a) (Oct. 15, 1990). Current requirements for the school-administrator endorsement include issuance of a provisional certification, the holding or a master's degree or its equivalent, a one-year residency program under the direction of a State-

approved mentor, and a passing score on a written examination. *N.J.A.C.* 6:11-9.4. Under the new regulations, an applicant may apply to the Examiners for permission to substitute alternative education or experience for required preparation, except that a passing score on the state-mandated test cannot be waived. *N.J.A.C.* 6:11-3.24. Ironically, teaching experience has been eliminated as a requirement, so that today a candidate with appropriate academic credentials, such as a master of business degree, can obtain a school-administrator endorsement without any teaching experience whatsoever.

As part of the recent revision, the regulations pertaining to the separate executive-superintendent endorsement were repealed. In their place, the school-administrator endorsement is now required for any position that involves services as a district-level administrator, including executive superintendent.[8] *N.J.A.C.* 6:11-9.2(a) (1990). Explanatory comments accompanying this change indicate that, "The proposed amendments eliminate the special endorsement that is currently issued to persons who hold the title of executive superintendent pursuant to *N.J.S.A.* 18A:17A-1. Holders of this title would be required to possess the chief school administrator endorsement." 22 *N.J.R.* 1875 (June 19, 1990).

Although the new requirements for a school-administrator endorsement were adopted in 1990, they did not take effect until September 1, 1992. Pursuant to a grandfather clause, the new requirements do not apply to "persons who earn the school administrator endorsement before that date." *N.J.A.C.* 6:11-9.4(h) (1990). Since his old endorsement authorizes him to serve as superintendent of schools in Orange, it does not really matter whether Dr. Salley can claim the benefit of this grandfather clause. Nevertheless, Dr. Salley urges that his service as executive superintendent of Newark

[8]Due to the local board's failure to provide the children of Newark with a thorough and efficient education, the State took over operation of the Newark school district in July 1995. *Contini v. Newark Bd. of* Educ., 96 *N.J.A.R.* 2d (EDU) 196 (Comm'r July 5, 1995). Presently the operation of the district is under the supervision of the State district superintendent. *N.J.S.A.* 18A:7A-35. Presumably, the post of executive superintendent will resume when the district eventually returns to local control. *See N.J.S.A.* 18A:7A-49.

under a valid administrative certificate fulfills the spirit, if not the letter, of the grandfather clause. It has already been pointed out that the requirements needed for an executive-superintendent endorsement were more rigorous than those for a school-administrator endorsement. Clearly it would be incongruous if someone who met the easier requirements before September 1, 1992 were automatically entitled to a school-administrator endorsement, whereas someone who met the more difficult requirements were not. Given the internal logic of the regulatory plan, persons who earned a valid executive-superintendent endorsement prior to September 1, 1992 fall within the intended coverage of the grandfather clause and are exempt from the testing and mentorship requirements applicable to newcomers.

Finally, Dr. Salley raises a variety of alleged procedural and due-process infirmities, including: the failure of the Examiners to give him adequate notice of the meeting at which his petition would be discussed; the failure to provide him an opportunity to be heard at that meeting; the failure to develop a full factual record; and several violations of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 to -21, particularly the Examiners' meeting in executive session to consider Dr. Salley's qualifications. In response, the respondent maintains that appeals to the Examiners from improper rulings by the Office of Licensing are submitted wholly on the papers, as compared to requests for substitution of alternate education or experience where the applicant is allowed to make an oral presentation (*Compare N.J.A.C.* 6:11-3.15 *with N.J.A.C.* 6:11-3:24 to -27); that its written decision issued on April 15,1996 fully sets forth the factual basis for its ruling; that a public body is legally permitted to convene in executive session to consult its attorney; and, in any event, that the Open Public Meeting Act claims were not brought within forty-five days as required by *N.J.S.A.* 10:4-15.

Since Dr. Salley has received a *de novo* hearing before the OAL, it is unnecessary to address his allegations of procedural irregularities below. While Dr. Salley is entitled to a fair and impartial hearing on the merits of his appeal, courts "will not undertake to say . . . at what level of operations it shall be provided." *In re Masiello*, 25 *N.J.* at 605. Put differently, the prejudice, if any, which may have existed below is cured by the *de novo* appeal to the OAL, where new findings of fact and

conclusions of law have been made. *In re Morrison*, 216 *N.J. Super.* 143, 151 (App. Div. 1987). Dr. Salley recognizes as much by the type of relief he is seeking. Even if reversible error was committed, Dr. Salley does not want the case to be remanded to the Examiners for reconsideration. Instead, he merely asks that the Commissioner review the entire record, including the facts developed at the hearing before the OAL, and reach his own independent judgment on the merits of the case.

Order

It is **ORDERED** that Dr. Salley is authorized to serve as superintendent of schools in any New Jersey public school district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

OCT. 29, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

10/31/96
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 1 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Dr. Columbus Salley, superintendent of schools, Orange public school district

2. Dr. Elena J. Scambio, director of teacher education, Bloomfield College

3. Gwendolynne Blakeley, president, Board of Education of the City of Orange

4. Elizabeth Strother, assistant director and planning associate, office of licensing and academic credentials, New Jersey Department of Education

5. Ida Graham, director, office of licensing and academic credentials, New Jersey Department of Education and secretary to the State Board of Examiners

List of Exhibits

No.	Description
J-1	Copy of letter to Ronald Lee from Rene T. Rovtar, Ed.D., dated December 29, 1995
J-2	Copy of letter to Rene T. Rovtar, Ed.D. from Gwendolynne A. Blakeley, dated December 29, 1995

J-3 Copy of letter to Gwendolynne A. Blakeley from Leo Klagholz, dated January 2, 1996

J-4 Copy of letter to Dr. Columbus Salley from Ida B. Graham, dated January 4, 1996

J-5 Copy of teacher's certificate for the intermediate and upper grades issued by the Public Schools of the City of Chicago, dated March 19, 1966

J-6 Copy of resume of Dr. Columbus Salley

J-7 Audio recording of the meeting of the State Board of Examiners held on March 28, 1996

J-8 Copy of decision of the State Board of Examiners, dated April 15, 1996

J-9 Copy of table of organization of the Newark Board of Education, undated

J-10 Copy of letter to Leo Klagholz from Gwendolynne A. Blakeley, dated March 13, 1996

J-11 Copy of letter to Leo Klagholz from Columbus Salley, Ed.D, dated March 13, 1996

J-12 Copy of decision by Commissioner Leo Klagholz entitled *In re Certification of Dr. Columbus Salley,* Agency Dkt. No. 255-96M, dated June 12, 1996

J-13 Copy of minutes of the meeting of the State Board of Examiners held on March 28, 1996

P-1 Copy of teacher service record of the Chicago Public Schools, undated

P-2 Copy of appointment record of the Chicago Public Schools, dated January 3, 1966

P-3 Copy of temporary teacher Efficiency Report, dated June 6, 1996

P-4 Copy of letter to Robert Boose from Davis B. Martin, dated September 15, 1981

P-5 Copy of letter to Dr. Fred A. Price from R. Bruce McPherson, dated October 15, 1981

P-6 Copy of letter to Dr. Robert E. Boose from Wallace G. Lonergan, Ph.D., dated September 14, 1991

P-7 Copy of letter to Dr. Gustav Ruh from Wallace G. Lonergan, Ph.D., dated October 7, 1981

P-8 Copy of letter to Dr. Gustav Ruh from Sally H. Christensen, dated October 9, 1981

P-9 Copy of article entitled "Superintendent's Job Priorities" in the Administrator's Notebook published by the University of Chicago, Vol. XXVIII (1979-80) No. 1

P-10 Copy of records maintained by the Office of the Essex County Superintendent of Schools, together with certification of Carol Sorcinelli, dated September 4, 1996

P-11 Copy of job description for executive superintendent adopted by the Newark Board of Education, undated

P-12 Copy of description of duties of the executive superintendent adopted by the Newark Board of Education, undated

P-13 Copy of written evaluation for school-administrator certificate conducted by the Office of Licensing & Academic Credentials, dated January 4, 1996

P-14 Copy of front page of the cover sheet for the test on Educational Leadership: Administration and Supervision, undated

P-15 Copy of petition entitled *Dr. Columbus Salley v. Office of Teacher Certification & Academic Credentials*, filed on January 3, 1996

P-16 Copy of sworn statement of evidence of Dr. Columbus Salley, dated January 26, 1996, together with attachments No. A to J

P-17 Copy of resolution No. 96060 adopted by the Board of Education of the City of Orange, dated March 12, 1996

P-18 Copy of letter to Gwendolynne A. Blakeley from Leo Klagholz, dated March 27, 1996

P-19 Resume of Elena J. Scambio, Ph.D., undated

P-20 Copy of certified transcript of audio recording of the meeting of the State Board of Examiners held on March 28, 1996

P-21 Copy of decision of the State Board of Examiners entitled *In Re Eugene Vasile*, entered on January 14, 1993

P-22 Copy of memorandum to Gerri Lewis from Jennifer H. Hale, dated August 27, 1996, together with a copy of the Twenty-Seventh Annual List of NCATE-Accredited Schools for 1980-81

P-23 Copy of the Directory of Approved Programs for the Preparation of Educational Personnel in Illinois Institutions of Higher Education, dated July 1, 1981

P-24 Copy of the administrative certificate of Alonzo W. Kitrells endorsed as executive superintendent, issued in July 1977

P-25 Copy of administrative certificate of Robert T. O'Bannon, Jr. endorsed as school administrator, issued in February 1991

P-26 (Id.) Copy of *N.J.S.A.* 18A:17A-1 to - 11

R-1 (Id.) Copy of *N.J.A.C.* 6:11-10.1 to -10.14 (1977)

R-2 Copy of The New Jersey State Board of Examiners Reference Guide, dated September 1988

R-3 Copy of agenda of a meeting of the State Board of Examiners, dated March 14, 1996

R-4 Copy of statement from the Chicago Board of Education, dated September 21, 1981

R-5 Copy of transcript from The Graduate School of Loyola University, undated

R-6(a) Copy of fax transmittal sheet to Dr. Columbus Salley from Ida Graham, dated January 5, 1996

(b) Copy of Praxis Series registration form and background information questionnaire for 1995-96

R-7 Copy of application for school-administrator endorsement by Columbus Salley, dated January 2, 1996

R-8 Copy of transcript of the University of Pennsylvania Graduate School of Education, dated September 25, 1981

R-9 Copy of requirements for certification as school administrator, effective September 1, 1992

DR. COLUMBUS SALLEY AND THE BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EXAMINERS, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions, and the reply thereto, were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondent initially takes exception to the ALJ's application of a *de novo* standard of review in this matter, pursuant to the limited holding in *Masiello, supra,* thereby supplanting "agency interpretation of regulations and knowledge of long-standing practices with that of the opinion of the Administrative Law Judge***." (Respondent's Exceptions at pp. 1, 2) Respondent takes the position that *Masiello* cannot be read in a vacuum. Rather, the line of cases following *Masiello* establishes the basis for respondent's contention that the ALJ applied the incorrect standard of review in this matter. Here, respondent cites *Kopera v. Board of Education of the Town of West Orange, Essex County*, 60 *N.J. Super.* 288 (App. Div. 1960) to advance the proposition that the Courts have established a "three class" approach to the resolution of administrative cases, and that the instant matter falls within the purview of the "third class,"

wherein "***the scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether that had a reasonable basis for their conclusions." (*Id.* at pp. 3-4, citing *Kopera, supra,* at 296) In this regard, respondent further emphasizes that the facts in this matter, *i.e.*, Dr. Salley's background, academic credentials and experience, were not contested; rather, the controversy arose upon the State Board's discretionary application of the facts to the regulations. (*Id.* at p. 6) Respondent determines that the regulatory interpretations rendered by the State Board of Examiners were not accorded due deference. (*Id.* at p. 7)

In reply, petitioners assert that the *de novo* standard of review applied by the ALJ was correct and appropriate, considering the relevant legal precedents and the record in this matter. (Petitioners' Reply at p. 2) Here, petitioners contend that "***the record clearly demonstrates that the parties unequivocally understood that [the ALJ] would apply the *de novo* standard of review***." (*Id.*) However, respondent failed to state any objection on the record. Accordingly, petitioners reason that respondent has waived its right to "appeal" that aspect of the case. (*Id.* at p. 3) As to respondent's cited "three class" approach, petitioners counter that respondent's reasoning is flawed.

> First, petitioners do not agree that the issues presented in the present matter fall neatly into any of the three categories mentioned. Rather, they involve mixed matters of law, fact and agency discretion and, as the record clearly reveals, the Examiners: (1) misconstrued and misapplied the relevant law; (2) misrepresented and misunderstood the relevant facts, and (3) exercised their discretion in an arbitrary, capricious and unreasonable manner. In order for the Commissioner fully to appreciate the magnitude of these errors, detailed analysis of the record in this matter, especially the documentary evidence and testimony presented to the ALJ, is imperative.*** (*Id.* at p. 6)

Petitioners call attention to the Examiners' decision, Exhibit J-8, which "contains numerous errors of law and fact, several of which bear directly upon contested issues concerning

Dr. Salley's credentials, background and experience." (*Id.* at p. 7) Consequently, petitioners contend it is "ludicrous" for respondent to assert that Dr. Salley's credentials and experience were not contested. (*Id.* at p. 9) However, they conclude that even assuming, *arguendo*, that the instant matter should have been analyzed as a "third class" discretionary matter, the Examiners' decision should nonetheless be determined arbitrary, capricious and unreasonable.[1] (*Id.* at p. 10)

Respondent next objects to the ALJ's finding that the executive superintendent endorsement could be used by an individual to take the position of superintendent in a district other than the (now) State-operated School District of the City of Newark (hereafter, "Newark"). (Respondent's Exceptions at p. 7) Rather, respondent argues that the executive superintendent endorsement was to be restricted to cities which meet the criteria established pursuant to *N.J.S.A.* 18A:17A-1, which effectively limits the use of the position to Newark. Nor does respondent find that the enabling statute, as cited, confers powers and duties upon the executive superintendent which exceed those of the regular superintendents of schools in other districts. (*Id.* at p. 8) Respondent maintains that the creation of an executive superintendent position was for the unique purpose of vesting that individual with "***the duties formally vested with the board of education, thereby limiting the role of the board of education ***." (*Id.* at p. 9) Moreover, respondent contends that the sponsor's statement for the legislation evidences an intent to create a structure enhancing fiscal management and accountability, rather than focusing

[1] Petitioners cite as cause for such a proposed finding: that the Examiners' decision "sets forth as its legal foundation the blatant misrepresentation that the Legislature abolished the executive superintendent endorsement ***" (Petitioners' Reply at p. 10); that the Examiners failed to make any findings of fact on the record but, rather, accepted the recommendation of the Director of the Office of Certification (*id.* at p. 11); that the Examiners' deliberation took place in private (*id.* at p. 12); that the only reasons offered for the Examiners' decision are facially invalid (*id.* at p. 13); that the Examiners' interpretation should not be accorded due deference since it is illogical, considering the hierarchical relationship between administrative endorsements in effect at the time (*id.* at p. 14); and that the Examiners fail to cite any authority for their conclusion that the regulations for the executive superintendent endorsement were less demanding of educational/classroom experience (*id.*).

on traditional classroom experience. (*Id.*) Accordingly, the regulations establishing the executive superintendent endorsement were similarly concentrated.

In reply, petitioners argue that the ALJ was correct in his conclusion that the executive superintendent endorsement entitles the holder to serve as superintendent in any New Jersey school district. (Petitioners' Reply at p. 15) Indeed, petitioners counter that there are no words of limitation in the enabling statute, *N.J.S.A.* 18A:17A-1. Moreover, respondent's reliance upon the bill sponsor's statement is, petitioners add, unpersuasive. Petitioners aver that, instead, the sponsoring statement evidences an intent "at the outset to make the executive superintendent a 'super-superintendent' (*see Rotundo, supra*, 276 *N.J. Super.* at 40)." (Petitioner's Reply at p. 16) Further, petitioners underscore the language in the enabling legislation which provides that the executive superintendent "***shall perform all the duties and possess all the powers heretofore and hereafter assigned to the superintendent of schools ... in Title 18A of the New Jersey Statutes." *N.J.S.A.* 18A:17A-4. Petitioners reason,

> Assuming, as the Commissioner must, that the State Board of Education was fully cognizant of the above stated Legislative command when the State Board promulgated the former regulations, *N.J.A.C.* 6:11-10.1 through 6:11-10.14, then it necessarily follows that the regulations were intended to permit the holder of the executive superintendent endorsement to do at least as much as any other superintendent legally could do, and then some.*** (*Id.* at p. 17)

Thus, petitioners attest that Dr. Salley met and/or exceeded the then requirements for the school administrator endorsement. (*Id.* at p. 18)

Respondent, however, maintains that Petitioner Salley was not qualified to earn the school administrator endorsement in 1981 when he applied for the executive superintendent's endorsement, contrary to the finding of the ALJ. (Respondent's Exceptions at p. 12) That is,

Dr. Salley could not have met the "common requirements" set forth at *N.J.A.C.* 6:11-10.2, which were then in effect. (*Id.* at p. 14) Respondent continues,

> [T]he Office of Licensing *did not* utilize the common requirements indicated at *N.J.A.C.* 6:11-10.2 in reviewing applications for the executive superintendent endorsement. *** Rather, *** an applicant for the executive superintendent endorsement was not required to hold a New Jersey teaching certificate or the equivalent, nor have three years teaching experience. (emphasis in text) (*Id.* at pp. 10, 11)

Petitioners assert that respondent's "revelation that it did not utilize the common requirements mandated by *N.J.A.C.* 6:11-10.2 in reviewing applications for the executive superintendent endorsement in 1981 is *** a scathing admission, indicative of its cavalier disregard for the regulations ***." (Petitioners' Reply at p. 18) Here, petitioners observe that there is no language in the regulations pertaining to the executive superintendent endorsement which permits the Examiners to forego application of the common requirements. (*Id.*) Petitioners find this argument of respondent to be further revealing of its "selective manner" of applying the common core requirements of the State Board of Education regulations. (*Id.* at p. 20)

Respondent next excepts to the statements in the initial decision cited from the New Jersey Register which are taken out of context and are interpreted contrary to their plain meaning. (Respondent's Exceptions at p. 14) Respondent argues that the plain meaning of the statements found at 22 *N.J.R.* 3249-3250, 22 *N.J.R.* 1875, and 22 *N.J.R.* 1874 indicate "***[t]hat a person in possession of the 'special' executive superintendent endorsement would now be required to hold a chief school administrator endorsement.***" (*Id.* at pp. 14-15) The statements do not, respondent claims, direct that one can use the executive superintendent endorsement in lieu of the school administrator endorsement.

Petitioners counter that there is nothing taken out of context or misinterpreted by the ALJ. (Petitioners' Reply at p. 21) The plain language of the statement cited by respondent "specifies the endorsement that would be necessary in the future for anyone who wishes to hold the position of executive superintendent***." (*Id.* at p. 22) Petitioners observe that the statement does not provide "***[t]hat a person already in possession of the executive superintendent endorsement is disenfranchised." (*Id.*) Petitioners reason that the change was prospective, rather than retroactive, and it was not, therefore, improper for the ALJ to consider their argument that Dr. Salley's executive superintendent endorsement was encompassed by the grandfathering provision of *N.J.A.C.* 6:11-9.4(h) of 1990. (*Id.*)

Respondent next takes exception to the ALJ's characterization of the State Board of Examiners' meeting held on March 28, 1996. That the ALJ insinuates that the written decision of the Examiners was flawed by virtue of a "less than lengthy discussion" is, according to respondent, erroneous. (Respondent's Exceptions at p. 16)

In reply, petitioners note that the transcript of the Examiners' meeting speaks for itself. (*Id.* at p. 23) Petitioners attest that "[t]he record of the Examiners' public conduct is compelling and clearly warrants the ALJ's conclusion that the Examiners [sic] decision was inadequately developed and fatally flawed." (*Id.* at p. 24)

Finally, respondent objects to the ALJ's failure to apply as controlling in the instant matter the holding in *Thomas J. Marshello v. New Jersey State Board of Examiners*, 92 *N.J.A.R.* 2d (EDU) 378, aff'd Commissioner of Education, 92 *N.J.A.R.* 2d (EDU) 381. There, an applicant who was auditor general for eight years in the Newark School District was determined not to meet the requirements for a school business administrator endorsement, and was so denied the endorsement. Marshello appealed that decision, arguing that he was qualified to perform the duties of a school business administrator. Respondent recounts that Marshello, like petitioner,

maintained that he had as much, if not more, experience than any other certified school business administrator. The Court found that, notwithstanding the quality and quantity of Marshello's experience, it was compelled to apply an "arbitrary and capricious" standard of review and uphold the denial of the endorsement. (*Id.* at p. 17) Respondent, thus, concludes,

> Whether an applicant could or could not perform the duties of a particular position is not considered by the Office of Licensing or the Examiners. Rather, these bodies are restricted to evaluate applications on criteria found in the Code. Moreover, the Examiners are constrained in its [sic] ability to waive or substitute requirements, also by Code provision. *** However, this does not render [the] determination by the Examiners unreasonable. *** Here, Dr. Salley's experience *** cannot be used as a substitute for a passing score on the national examination or satisfactory completion of a mentorship program, much like the failed attempt to substitute experience for required course work in *Marshello.*
>
> (*Id.* at p. 18)

In reply, petitioners argue that the conduct of the Examiners, as stated above, "***lends strong support to the ALJ's determination not to apply the standard of review embraced in [*Marshello, supra*]." (Petitioners' Reply at p. 24) Here, petitioners advise that, unlike *Marshello*, the present matter requires statutory interpretation. Additionally, in the instant matter, Dr. Salley was never afforded a hearing prior to the proceeding at the OAL, and, consequently, were the *de novo* standard now to be set aside, Dr. Salley would be deprived of a property interest in violation of his due process rights. Finally, petitioners contend that, in the present matter, the Examiners "abdicated their responsibility" by "failing to develop an adequate record deserving of deference." (*Id.* at p. 25) Thus, petitioners conclude that the ALJ was "virtually compelled" to apply a *de novo* standard of review so as to cure "the procedural and substantive infirmities inherent in the proceedings of the Examiners." (*Id.* at p. 26) The initial decision of the ALJ, petitioners urge, should be affirmed in its entirety.

Upon careful and independent review of the record in this matter, which included transcripts of the proceedings conducted on September 3, 1996 and September 4, 1996, the Commissioner determines to affirm the factual findings of the ALJ, as well as his ultimate conclusion, for the reasons set forth herein.

Assuming, *arguendo*, that respondent is correct in its position that the decision of the State Board of Examiners is entitled to a presumption of correctness and must not be disturbed absent a finding that it was arbitrary, capricious or unreasonable, then the Commissioner's analysis is limited to determining: (1) whether the underlying facts in this matter were as the State Board of Examiners claimed, as the body that conducted the review, and (2) whether it was unreasonable for the Examiners to conclude as they did upon those facts, bearing in mind that they possess the requisite expertise. (*Kopera, supra*, at 296, 297) The burden of proving unreasonableness rests with the parties challenging the State Board of Examiners' action. (*Id.* at 297) Setting aside for the purpose of this discussion the broader inaccuracies cited by petitioners in the Examiners' decision,[2] the Commissioner notes that the essential facts in this matter do not markedly differ from those which the State Board of Examiners recognized and utilized as the basis of its decision. However, the Commissioner finds that the Examiners' conclusion, based on these particular facts, was inherently unreasonable.

As the ALJ noted, "***Common provisions applicable to *all* administrative certificates in 1981 required possession of a standard New Jersey Teacher's certificate 'or its equivalent' and '[t]hree years of successful teaching experience.' *N.J.A.C.* 6:11-10.2(a)(3) (1977)." (emphasis in text) (Initial Decision at p. 10) There is no dispute that in 1981, Dr. Salley was issued a lifetime *administrative certificate* with an executive superintendent endorsement

[2] Such as the Examiners' mistaken reference to the Legislature's abolishment of the executive superintendent endorsement (Exhibit J-8 at p. 3) and the erroneous use of the term "certification," rather than "endorsement." (*Id.*)

which, by regulation, encompassed these "common requirements." Yet, respondent takes the position that while Dr. Salley met the requirements for the executive superintendent endorsement in 1981, he could not have met the requirements for the school administrator endorsement because he does not hold a standard New Jersey instructional certificate, or its equivalent, and he also did not demonstrate three years of successful teaching experience. Thus, as the ALJ correctly observes, respondent finds Dr. Salley's credentials to ostensibly be deficient with respect to these "common requirements" associated with all administrative certificates. (Initial Decision at p. 12) Yet, as the ALJ further finds, respondent's reasoning is flawed because "***those particular requirements were common to all types of administrative endorsements. If Dr. Salley were deficient in teaching experience, he should have never received his executive-superintendent endorsement in the first place." (*Id.*)

The record shows that, before issuing Dr. Salley his administrative certificate in 1981, the Office of Licensing questioned Dr. Salley and requested additional documentation. Dr. Salley was then issued an administrative certificate, notwithstanding that the Office of Licensing apparently did not evaluate his credentials against the common requirements then found at *N.J.A.C.* 6:11-10.2(a). Respondent's assertion that Dr. Salley could not have met the requirements for the school administrator *endorsement*, which serves as the basis for its denial of his present application, is based *solely* on the logic that his credentials fall short of the common certificate requirements, a conclusion which, on its face, is arbitrary, capricious and unreasonable, given the regulations in effect at the time and respondent's prior awarding of another endorsement under the same certificate. Respondent advances no arguments contending that Dr. Salley's credentials are in any manner insufficient to meet the then-existing requirements for acquiring the school administrator *endorsement, N.J.A.C.* 6:11-10.7[3]; nor does it provide an

[3] As opposed to the common requirements for obtaining the *administrative certificate* found at *N.J.A.C.* 6:11-10.2.

explanation for why the common requirements were "not utilized" in 1981 in reviewing the applications for the executive superintendent endorsement, but should now be determinative of Dr. Salley's eligibility for the school administrator endorsement.

Having thus determined that respondent's decision was arbitrary and capricious, the Commissioner finds it unnecessary to reach to the remaining issues raised in this matter. Instead, on the basis that it was arbitrary and capricious, the Commissioner sets aside respondent's decision and finds that Dr. Salley, by virtue of his having been previously found qualified for an administrative certificate which he still holds and which remains in full force and effect, and by virtue of his having met the requirements as they existed in 1981 for the school administrator endorsement, is deemed eligible, under the unique circumstances herein, to be awarded a school administrator endorsement and to invoke the "grandfather" clause set forth at *N.J.A.C.* 6:11-9.4(h).[4]

Accordingly, the initial decision of the ALJ is affirmed as to its fact finding and ultimate conclusion, on the basis of analysis as modified herein. Respondent is directed to issue forthwith the school administrator endorsement to Dr. Salley's administrative certificate so as to authorize him to serve as chief school administrator of the City of Orange Township School District, or of any other school district in this State.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 13, 1996, Date of Mailing, December 13, 1996

[4] This section provides that the requirements set forth under *N.J.A.C.* 6:11-9.4 for obtaining the school administrator endorsement shall not apply to persons who earned the school administrator endorsement before September 1, 1992.

562-96

562-96

L.A, on behalf of minor child, M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning aunt alleged that her niece, M.L., was wrongfully denied access to school due to residency dispute.

ALJ found that M.L. was not residing with her aunt in order to receive a free education in West Orange; instead, petitioner established by a preponderance of the credible evidence that M.L was domiciled in West Orange pursuant to N.J.S.A. 18A:38-1a -- petitioner had power of attorney and a custody order. ALJ ordered that M.L. was entitled to a free public education in the District.

Commissioner concurred with the ALJ that petitioner met her burden under *N.J.S.A.* 18A:38-1 that M.L. was domiciled in respondent's District and that M.L. was entitled to a free public education in the District.

December 16, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 12291-95

AGENCY DKT. NO. 440-11/95

L.A., ON BEHALF OF
MINOR CHILD, M.L.,
Petitioner,
v.
BOARD OF EDUCATION,
TOWN OF WEST ORANGE,
Respondent.

L.A., petitioner, *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: September 11, 1996 Decided: October 28, 1996

BEFORE **DIANA C. SUKOVICH**, ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

At a meeting held on October 9, 1995, the Town of West Orange (West Orange) Board of Education (Board or respondent) determined to deny the application of L.A. (petitioner) to enroll M.L., a minor child, as a student in the district. The Board formally

advised L.A. of its determination by letter dated October 10, 1995. L.A. filed a petition with the State Department of Education (DOE) on November 14, 1995, contesting the denial. The DOE transmitted the matter to the Office of Administrative Law on December 8, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A hearing was conducted on June 25, 1996. At the close of the hearing, respondent's counsel presented oral argument. It was agreed that petitioner would be permitted to subsequently file a written reply. The Board filed an exhibit unavailable at the hearing on June 26, 1996 (Exhibit R-2). Petitioner filed a written reply to respondent's position on July 9, 1996, and the Board filed a response thereto on July 17, 1996.

At the hearing and in their initial filings, the parties focused on whether petitioner meets the requirements of *N.J.S.A.* 18A:38-1(b). Subsequently, after further considering the matter, by letter dated August 19, 1996, this judge requested that the parties file supplemental memoranda, within ten days, addressing the question of whether petitioner meets the requirements of *N.J.S.A.* 18A:38-1(a). Respondent filed supplemental letter memoranda on August 29, 1996 and on September 11, 1996, the latter document addressing a newly discovered decision of the Commissioner of the DOE (Commissioner). Petitioner did not file a supplemental memorandum, and the record is deemed closed on September 11, 1996.

The issue to be decided, broadly, is whether M.L. meets the requirements for enrollment in respondent's schools, pursuant to *N.J.S.A.* 18A:38-1.

FINDINGS OF FACT

Based upon a review of the entire record, including credibility assessments, I **FIND** the following to be facts.

M.L. was born on October 24, 1981. R.B. is her mother, and L.M. is her aunt. M.L.'s father has been deceased for at least thirteen years.

R.B., who is single, resides in Brigantine, New Jersey (Brigantine). She is employed at the Showboat Casino in Atlantic City, New Jersey (Atlantic City).

Prior to approximately November 1995, M.L. attended public schools in Brigantine. Brigantine has a kindergarten through eighth grade public school system. Public school students residing in Brigantine attend high school in Atlantic City.

Petitioner moved to West Orange on October 1, 1995. She has several children, including a daughter. M.L. has resided with petitioner in West Orange since October 1, 1995.

On October 2, 1995, R.B. executed a document giving a power of attorney to L.A. The content of this document is as stated in Exhibit P-3. The document states, in pertinent part, that R.B. "gave L.A. full power and authority over my minor child, M.L.," who would be residing with petitioner in West Orange (Exhibit P-3, p.1).

On or about October 3, 1995, petitioner filed a Civil Action Complaint for Custody of M.L. in the Chancery Division, Family Part, Essex County, Superior Court of New Jersey. L.A.'s stated reasons for seeking custody of M.L. were that petitioner believed such was in M.L.'s best interest and "L.A. wants custody of her niece so that she can go to school here. M.F.R. is deceased" (Exh. P-2, p.2). The court issued an order on October 6, 1995, granting custody of M.L. to L.A. The order noted that M.L.'s father had been deceased for 13 years, that M.L. had resided with petitioner since October 1, 1995, and that L.A. requested custody of M.L. and agreed to provide for M.L.'s well-being and accept complete responsibility for her welfare.

Thomas J. Scharf (Scharf) has been employed by respondent for 20 years. He is in charge of the district's child custody team and is responsible for the provision of medical services, the evaluation of records, central office registration matters, and school eligibility matters generally.

It is the Board's practice to require certain registration documents, including affidavits from parents and other relevant individuals, when someone seeks to enroll a child who is not that individual's adopted or natural child in respondent's school system.

In September or October 1995, Scharf received from petitioner a completed and signed Affidavit for Non-Resident Pupil Enrollment form in relation to an application by L.A. to enroll M.L. in respondent's school system. The content of this document is as stated in Exhibit P-5. Petitioner stated, in part, that M.L. was solely supported by L.A. "gratis" and that petitioner would assume all personal obligations for M.L. Petitioner also stated that M.L. had been living with L.A. since October 1, 1995, that M.L. did not live with her mother during any part of the week, that M.L. would live with her mother during the summers, and that petitioner had never declared M.L. as a dependent for federal income tax purposes. Petitioner did not complete a portion of the form which requested the date until which the child in question would continuously live with L.A.

Scharf's secretary is a notary public in New Jersey. Scharf concluded that petitioner had not established an economic or family hardship in support of her application to enroll M.L. He therefore did not "accept" petitioner's affidavit, and, as a result, it was not dated nor notarized (Scharf's direct testimony).

In reaching this conclusion, Scharf also considered an affidavit which had been executed by R.B. on October 6, 1995. The content of this document is as stated in Exhibit P-4. In response to a question asking for the specific reasons supporting a position that the applicant was not capable of supporting or providing care for the child in question, R.B. stated the following:

ODD WORK SCHEDULE

M.L FEELS LONELY

GREAT ATTACHMENT TO HER AUNT AND COUSIN M.

MY STRONG BELIEF THAT L. IS MORE THAN MOTHER TO HER.

[Exh. P-4, p.1.]

R.B. did not provide with her affidavit, as requested in the document, documents in support of her position that she could not support or provide care for M.L. R.B. attested in the document, which was notarized, to statements that petitioner would support M.L. "gratis" and assume all personal obligations for her relative to school requirements, that L.A. would keep and support M.L. ". . . for a longer time than merely through the school term (September through June)," and that R.B. was not placing M.L. with L.A. solely for the purpose of receiving a free public education in West Orange. (*Id.* at p.2).

By letter dated October 10, 1995, petitioner was advised that the Board had denied her application to enroll M.L. in the district's school system. L.A. filed a petition with the DOE contesting the denial on or about November 14, 1995. M.L. was enrolled in respondent's schools, in an eighth grade class, commencing in either November or December 1995. She was not a classified student.

The West Orange School District consists of six elementary schools, two middle schools, and a high school. The enrollment rate has recently substantially increased. During the 1995-96 school year, there were a total of between 5,500 and 6,500 students in the district schools. Four years previously, there was a total of 3,500 students. One of the middle schools is at 112 percent of capacity. Class sizes generally are between 32 and 33 students, a situation previously "unheard of" (Scharf's direct testimony).

At least in part because of this situation, the Board has recently made efforts to identify and remove children improperly enrolled in its schools. During the 1994-95 school year, respondent took action to remove 80 to 85 students. Respondent has recently experienced an increase in enrollments based on affidavit situations. More than eighty students were so enrolled during the 1995-96 school year, compared to a total of 25 to 30 annually in prior years.

The Board only accepts as tuition students children who are classified. The annual tuition cost for the 1995-96 school year for grades six through eight was $8,525.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9 (Supp. 1996). Pertinent statutory provisions address residence requirements relative to attendance at local district schools.

Public schools are required to provide a free education to individuals between the ages of five and twenty--five years in certain circumstances, including to individuals who are domiciled within the school district. *N.J.S.A.* 18A:-38-1(a) (Supp. 1996).

Local school districts must also provide a free education to individuals who are kept in the home of another person domiciled within the school district and supported by such other person gratis, as if he/she were such other person's own child, upon the filing by that person with the board of education of a sworn statement. Such statement shall, if so required by the board, state that he/she is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements. The sworn statement must also state that he/she intends to keep and support the child gratuitously through the school term. A copy of the lease, if a tenant, or a sworn statement by a landlord acknowledging tenancy, if residing as a

tenant without a written lease shall also be filed. The child's parent or guardian shall file with the local board of education a sworn statement that he/she is incapable of supporting or providing care for the child because of a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education therein. The statement shall be accompanied by documentation supporting the validity of the sworn statements. If in a board's judgment the evidence does not support the validity of the resident's claim, the board may deny admission to the child. *Id.* at §(b)(1).

Pertinent statutory provisions also address procedures if a local board denies admission. The resident may contest a decision to the Commissioner and shall be entitled to a hearing on the validity of the claim. The resident shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the statutory criteria. No child shall be denied admission during the pendency of such proceedings. If the child in question is then currently enrolled in the district, he/she shall not be removed during the period in which the resident may contest the board's decision nor during the pendency of the proceedings before the Commissioner. *Ibid.* If in the judgment of the Commissioner the evidence does not support the resident's claim, the Commissioner shall assess tuition for the student, prorated to the time of the student's ineligible attendance in the district. *Ibid.*

Traditionally, the domicile of a child for school law purposes was viewed as that of the natural parent. *Mansfield Twp. v. State Bd. of Ed.,* 101 *N.J.L.* 474 (Sup. Ct. 1925) (*Mansfield*). *Mansfield* involved an individual residing in Mansfield Township who used her residential home to board children and provide an education as far as the eighth grade. The parents of the child in question, who wished to attend high school in the Township, resided in New York City for many years, although at the time of the Court's decision, they were separated. For ten years, the child had been placed under the care of an individual who resided in the Bronx, New York, until sent by her father to the Mansfield home. The father paid $60 monthly for board and tuition and provided the child with necessities. *Mansfield* at 476.

The Court found that the child was not domiciled in Mansfield and therefore was not entitled to a free public education in that town. The Court noted in this respect that the fact that the child

> . . . intends to remain in the home of Miss Towner during her attendance at the high school, or for an indeterminate period, does not make her residence a permanent one, especially since it does not appear that she was emancipated or was under the legal control of Miss Towner, but, on the contrary, it appears that she was in neither situation, and that her father, who was domiciled and actually resides in the state of New York, will continue to make provision for her future support and comfort.
>
> [*Id.* at 478.]

The Court found that the general principal that a resident includes any person who comes into the State and remains with the intention to make it his/her permanent abode does not apply to a child who was brought or sent into the State by a parent or guardian who was a non-resident, for the purpose of receiving an education in the public schools of this State. "The permanent residence of the father is that of the child, until the latter is emancipated and chooses a place of residence of its own." *(Ibid.)*

However, in its analysis, the Court placed emphasis upon the concept of "legal control" of a child as relevant to determining domicile issues. *Id.* at 478-479. The Court noted in this respect that 'other persons having legal control'

> would manifestly include foster parents who have lawfully adopted children or those to whose care and custody children are committed by operation of law, & c. . . . the persons indicated by this section, as those having legal control, must have the legal status of parent or guardian.
>
> [*Id.* at 479.]

Finally, the Court stressed that

> [A] child, in law, can have no residence of its own, and can only lawfully acquire one when it has been emancipated. Its residence under the School Law follows that of its parent or guardian or other person having legal control of it."
>
> [*Id.* at 479-480.]

Discussion and application of the traditional approach to domicile questions was addressed by Judge LeFelt in *V.R. on Behalf of A.R. v. Bd. of Ed. Bor. of Hamburg*, 2 *N.J.A.R.* 283 EDU (1980), *aff'd* State Bd., 1981 *S.L.D.* 1533, *rev'd* on other grounds, *Rabinowitz v. N.J. State Bd. of Ed.*, 550 *Fed. Supp.* 481 (D.N.J. 1982) (*V.R.*). Petitioner, a New York resident, sought an order compelling the Borough of Hamburg Board of Education to provide a free education to his minor handicapped daughter, whose all-year-round continuous dwelling had been in Hamburg since 1975. For four years prior to the litigation, the child had not attended nor been enrolled in any educational program. She lived, since 1975, with an unrelated resident in Hamburg, who was paid by *V.R.* for looking after A.R., and was therefore unable to affirm a willingness to support A.R. gratis, pursuant to *N.J.S.A.* 18A:38-1(b). The ALJ acknowledged that the traditional approach was not absolute:

> The law establishing an infant's domicile seems based on the rationale that an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location. . . . Changing times should, therefore, affect the domicile law only when the factual situation undercuts this rationale.
>
> [*V.R.*. at 286 (citations omitted).]

In determining that the child did not qualify for a free public education pursuant to *N.J.S.A.* 18A:38-1(a), the judge noted that:

> The fact that a third person provides the day-to-day care and control of A.R. at the request of A.R.'s parents seems insufficient to overturn normal domicile principles. Thus, in the absence of a legal termination of parental responsibility, a finding that A.R.'s domicile is in New York would not be mechanical, but rather would be a reasonable application of the general rule. Wherever A.R. is placed by her parents, until emancipation,

> her domicile must remain in New York, as long as her parents live there. Control, in a legal sense, over A.R.'s life clearly rests with her parents.
>
> [*Id.* at 287 (citations omitted).]

I am persuaded that, if applicable, petitioner has not demonstrated compliance with *N.J.S.A.* 18A:38-1(b). The record does not establish that R.B. is incapable of supporting or providing care for M.L. because of a family or economic hardship. R.B. is employed, and M.L. resided with her prior to October 1995. Mere preference to reside with one family member rather than another is not sufficient pursuant to the statutory provision in question.

However, I am persuaded that petitioner has established, by a preponderance of the credible evidence, that M.L. is currently domiciled in West Orange pursuant to *N.J.S.A.* 18A:38-1(a) and is therefore entitled to a free public education in West Orange pursuant to that provision.

As noted in *V.R., supra.*, the traditional notion that a child's domicile automatically follows that of a natural parent is still applicable but not strictly, depending on the circumstances of a particular case. In both *Mansfield, supra.*, and *V.R.*, the concepts of custody and legal control were deemed pivotal in determining whether domicile is established for purposes of obtaining a free public education. In addition, as noted in both cases, the existence of a custody order may be an indication that legal control is with an individual other than the natural parent.

The October 2, 1995 power of attorney and, more significantly, the custody order of October 6, 1995 lend support to a conclusion that M.L. is domiciled in West Orange pursuant to the school laws. L.A.'s relationship with M.L. lends some support to such a conclusion, although it is not determinative. At this time, L.A. clearly has legal control over M.L., even if M.L. may visit her mother during the summer. I am also not persuaded that M.L.'s and R.B.'s motives pertinent to the custody order are determinative. The order must be accepted on its face.

Respondent relies on *Cranford Twp. Bd. of Ed. v. M.C.G.*, 95 *N.J.A.R. 2d.* (EDU) 74 (1994), in which the presiding administrative law judge, and subsequently the Commissioner, rejected a claim that a custody order, by itself, gave students, who allegedly lived with their grandmother in Cranford, a right to a free public education in Cranford. I note, parenthetically, that the custody order was of a temporary nature. More importantly, however, the ALJ's and the Commissioner's analyses focused on *N.J.S.A.* 13A:38-1(b), not *N.J.S.A.* 18A:38-1(a), and their analyses regarding issues of legal control seems somewhat at odds with the analyses in *Mansfield* and *V.R.*

CONCLUSION

I **CONCLUDE** that petitioner has established by a preponderance of the credible evidence that M.L. is domiciled in West Orange, pursuant to *N.J.S.A.* 18A:38-1(a), and that respondent is therefore required to provide her with a free public education pursuant to that provision.

ORDER

Respondent is hereby **ORDERED** to provide M.L. with a free public education. It is also **ORDERED** that neither petitioner nor R.B. be required to reimburse respondent for the cost of educational services provided by respondent to M.L. to date.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 28, 1996
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

10/31/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 1 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Witnesses

For Petitioner:

L.A.

For Respondent:

Thomas J. Scharf

Exhibits in Evidence

P-1 Petitioner's Verified Statement dated November 6, 1995

P-2 Order of Custody dated October 6, 1995 and Civil Action Complaint dated October 3, 1995

P-3 Power of Attorney dated October 2, 1995

P-4 Affidavit of Parent dated October 6, 1995

P-5 Affidavit for Non-Resident Pupil Enrollment

R-1 New Student Registration form

R-2 Memorandum dated April 5, 1995

L.A, on behalf of minor child, M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ) contending, *inter alia*, that this matter should be decided under *N.J.S.A.* 18A:38-1b, rather than *N.J.S.A.* 18A:38-1a, in that M.L. is not *domiciled* in respondent's School District, so that the order granting L.M. custody of M.L. is not determinative to this case. (Respondent's Exceptions at pp. 1-3) Rather, respondent avers, the matter should be decided in accordance with *Cranford Twp. Bd. of Ed. v. McG.*, 95 *N.J.A.R.* 2d (EDU) 74 (1994), which was decided pursuant to *N.J.S.A.* 18A:38-1b, despite petitioner's possession of a custody order. (Respondent's Exceptions at pp. 3-4) Respondent states,

> Here, as in *Cranford*, the petitioner's acquisition of a custody order should not permit her to circumvent the requirements of *N.J.S.A.* 18A:38-1(b). As the Commissioner well knows, these custody orders are easily obtainable. They are used by the holders, the affidavit hosts, to gain admission to school districts for their affidavit pupils.*** (Respondent's Exceptions at p. 4)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that for purposes of *N.J.S.A.* 18A:38-1, M.L. is domiciled in respondent's District. In so ruling, the Commissioner is satisfied that the ALJ considered the applicability of the *Cranford* decision to the present case, as well as related case law and pertinent statutory provisions. The Commissioner further finds that the facts in *Cranford, supra,* are clearly distinguishable from the present case in that R.B. has legal and physical custody of M.L.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL that M.L. is entitled to a free public education and that neither petitioner nor R.B. is required to submit reimbursement to respondent for the cost of educational services provided to M.L. prior to the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 16, 1996
Date of Mailing, December 16, 1996

562-96

EDU #12291-95
C # 562-96
SB # 3-97

L.A., on behalf of minor child, M.L.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 16, 1996

For the Petitioner-Respondent, L.A., pro se

For the Respondent-Appellant, Stephen J. Christiano, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We add only that there is no evidence of fraud on the part of petitioner in this matter.

May 7, 1997

Date of mailing MAY 09 1997

563-96

PATRICIA BYRON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teaching staff member, challenged her school evaluation as English Department Building Supervisor as arbitrary, capricious and unreasonable. District contended petition was untimely filed.

ALJ concluded that, notwithstanding whether petitioner's *pro se* letter which preceded her petition or her actual petition of appeal was considered, her claim was time-barred by N.J.A.C. 6:24-1.2.

Commissioner adopted findings and conclusion of the ALJ as his own. Petition was dismissed as untimely filed.

December 16, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 12119-95
AGENCY DKT. NO. 427-10/95

PATRICIA BYRON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Philip Feintuch, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Patricia A. Taylor, Assistant General Counsel, State-Operated School District of Jersey City
(Charlotte Kitler, General Counsel, attorney)

Record Closed: September 12, 1996 Decided: October 28, 1996

BEFORE: **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

PROCEDURAL HISTORY

This case comes by way of verified petition filed with the Department of Education on October 31, 1995. An answer was filed on November 20, 1995 and on November 27, 1995 the matter was transmitted to the Office of Administrative Law

(OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A settlement conference was held in the matter on June 19, 1996 and a hearing date was scheduled for September 12, 1996. The hearing date was adjourned and the matter was determined to be decided upon the papers.

MOTION FOR SUMMARY DECISION BY RESPONDENT

This matter comes by way of a petition filed challenging an evaluation received by petitioner in the course of her employment on June 15, 1995. The respondent filed a motion to dismiss the petition and requested summary decision in the matter on the basis that the filing of the petition was not timely and did not fit the 90-day rule found in N.J.A.C. 6:24-1.2 regarding filing and service of petition.

The facts in this case necessary to make a determination with respect to timeliness are not in dispute. Although petitioner's counsel argues in his papers that his client originally filed a letter with the Department of Education and that the subsequent petition of October 27, 1995 which was filed on October 30, 1995 is essentially, the embodiment of a timely letter to the Commissioner. The *pro se* letter which preceded the actual petition in this matter was stamped "filed" at the Office of the Commissioner of Education October 16, 1995 at 10:37 a.m. The envelope in which it was mailed indicates a postage date of October 11, 1995.

The question is one of timeliness. It is clear that whether counting from the time of the *pro se* letter or from the time of the petition both of these items complaining of the evaluation were filed outside the 90 days. The evaluation took place on June 15, 1995 and no letter of complaint or petition was filed by September 13, 1995. In fact the letter of complaint which was the deficient document and was returned to petitioner who then

consulted with an attorney was not stamped "filed" with the Department of Education until October 16, 1995. That is more than one month beyond the 90-day period.

Pursuant to *N.J.A.C.* 6:24-1.2 in order to initiate a contested case for the Commissioner's determination the petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency which is the subject of the requested contested case hearing. The 90-day requirement has been strictly construed by the Commissioner of Education, the State Board of Education and the courts. *North Plainfield Education Association v. Board of Ed.,* 96 *N.J.* 587, 96 *N.J.* 587, 594 (1984).

While counsel argues that the only defect is that petitioner filed a letter in time but did so defectively that clearly is not correct.

Counsel argues that in a case such as this it should be treated as though petitioner wrote the letter timely and then upon receiving a letter from the Commissioner advising her how to correct any defects she then, through her attorney, filed an appropriate petition. The argument however is predicated upon the timeliness of the original letter to the Commissioner. The documentation shows that the original letter was not timely nor was the subsequent petition.

As a result the petitioner must be dismissed as not meeting the constraints of N.J.A.C. 6:24-1.2(c) and as being outside the 90 days required by the rule.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision be and hereby is **GRANTED** and that the petition in the instant matter be and hereby is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/24/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

10/31/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 1 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am(FV)mxl

PATRICIA BYRON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon such review, the Commissioner agrees with the findings and conclusion of the Administrative Law Judge that, notwithstanding whether petitioner's *pro se* letter which preceded her petition or her actual petition of appeal is considered, her within claim is time-barred by *N.J.A.C.* 6:24-1.2. The Commissioner further concludes that neither the circumstances of this case nor any argument advanced by petitioner presents any equitable grounds or meritorious factual explanation to justify the relaxation of this rule.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. Summary decision is hereby granted to respondent and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 16, 1996
Date of Mailing, December 16, 1996

564-96

564-96

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
KEITH JOHNSON, LAKELAND	:	DECISION
REGIONAL HIGH SCHOOL DISTRICT,	:	
PASSAIC COUNTY.	:	
	:	

December 13, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1223-96
AGENCY DKT. NO. 418-10/95

LAKELAND REGIONAL
HIGH SCHOOL DISTRICT,
Petitioner,
v.
KEITH JOHNSON,
Respondent.

Cherie L. Maxwell, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Terrance O'Connell, Esq., for respondent,

Record Closed: October 7, 1996 Decided: October 25, 1996

BEFORE: **ELINOR R. REINER**, ALJ:

On or about October 23, 1995, respondent, Lakeland Regional High School District moved for an Order to Show Cause by the Commissioner of Education seeking the suspension of the teaching certificate of respondent for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10. The Commissioner of Education signed the Order to Show Cause on November 16, 1995. By letter dated November 16, 1995, Deborah M. Antanaitis, Director of the Bureau of Controversies and Disputes, advised counsel for petitioner that the Order was to initiate proceedings to consider the suspension of respondent's certificate for resigning from employment with petitioner on inadequate notice. On January 2, 1996, respondent filed an answer to petitioner's Order to Show

cause, and on January 18, 1996, this matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The case was assigned to the undersigned judge on February 23, 1996, and a telephone prehearing conference scheduled for May 1, 1996. The prehearing conference was adjourned at the request of respondent and held on May 28, 1996. On that date the issues were isolated, and a hearing scheduled for September 24, 1996 at the Office of Administrative Law. The parties filed a joint stipulation of facts on September 13, 1996 and appeared for hearing on September 24, 1996. On that date, settlement conferences were held and a settlement was reached. Thus, the hearing was not held.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement, indicating the terms of settlement.

I have reviewed the record and the terms of settlement, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

October 25, 1996
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

October 29, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

LAW OFFICES
THOMAS W. WILLIAMS
220 FRANKLIN TURNPIKE
MAHWAH, NEW JERSEY 07430
Phone: (201) 529-4420 • Fax: (201) 529-1351

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MEMBER OF NJ & NY BARS

NEW YORK OFFICE
125 ROUTE 59
P.O. BOX 97
SUFFERN, NEW YORK 10901

September 30, 1996

The Honorable Elinor Reiner, A.L.J.
Office of Admistrative Law
185 Washington Street
Newark, New Jersey 07012

Re: Lakeland Regional High School District Board of Education
vs. Keith Johnson
OAL Docket No. EDUOR-01223-96N

Dear Judge Reiner:

Enclosed is an executed Stipulation of Settlement on the above matter.

Very truly yours,

Thomas W. Williams

TWW/ll
enc.
cc: Peter Schultz
Keith Johnson

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Petitioner

96 DEC -2 A10:20

LAKELAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	
-vs-	OAL DOCKET NO. EDUOR 01223-96N AGENCY REF. NO.: 418-10/95
KEITH JOHNSON,	**STIPULATION OF SETTLEMENT**
Respondent.	

The parties to this action hereby stipulate and agree to the following terms in settlement of the above-captioned matter:

1. Petitioner agrees to withdraw the instant petition.

2. Pursuant to N.J.S.A. 18A:28-8, as a consequence of Respondent's failure to provide Petitioner with sixty (60) days notice of his resignation, Respondent agrees and consents to the suspension of his New Jersey teacher's certificate for a period of six (6) months.

3. The period of suspension of Respondent's New Jersey teacher's certificate shall be from September 24, 1996 to March 24, 1997.

LAKELAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

By: Peter Schultz
PETER SCHULTZ, ESQUIRE
Attorney for Petitioner

Dated: 11/6/96

KEITH JOHNSON

By: [signature]
THOMAS W. WILLIAMS, ESQUIRE
Attorney for Respondent

Dated:

3C

OAL DKT. NO. EDU 1223-96

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
KEITH JOHNSON, LAKELAND	:	DECISION
REGIONAL HIGH SCHOOL DISTRICT,	:	
PASSAIC COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 13, 1996
Date of Mailing, December 13, 1996

565-96

565-96

KEMRY MC FARLAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 19, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8429-96

AGENCY DKT. 366-8/96

KEMRY MCFARLAND,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner, (Zazzali, Zazzali, Fagella & Nowak, attorneys)

James L. Jackson, Esq., for respondent

Record Closed: November 6, 1996 Decided: November 19, 1996

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on September 23, 1996, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

19 November 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

11/22/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 25 1996
DATE

Barbara A Hamel
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

NOV 6 3 51 PM '96

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(201) 623-1822
Attorneys for Petitioner

KEMRY MCFARLAND, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION OAL DKT. NO. EDUOA 08429-96S AGENCY REF. NO. 366-8/96 STIPULATION OF SETTLEMENT

The above-captioned matter having been brought before the Commissioner of Education upon the Petition of Appeal of Kemry McFarland and Petitioner and Respondent having reached an amicable settlement of this matter, the parties, by and through their attorneys, hereby stipulate and agree to the following:

1. Petitioner shall be appointed to a 12 month position as a Secretary in the Pleasantville School District commencing July 1, 1996, with no break in her previous service to Respondent and no break in her pension credit.

2. Petitioner shall report for work at the Pleasantville School District on November 11, 1996 following official Board action reappointing her.

3. Giving credit to Petitioner for her 17 years of service, Petitioner's base salary commencing July 1, 1996 is $25,308.00, with $1,416.00 credit for longevity, for a total

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

annual salary of $26,724.00 for the 1996-97 school year.

4. Any sums received by Petitioner from unemployment compensation or wages earned from employment during the period July 1, 1996 through November 11, 1996 shall be deducted from any sums owed by Respondent to Petitioner as back pay for that period.

5. This settlement does not limit Petitioner's right in the future to take other employment outside the Pleasantville School District provided she complies with the notice provisions of any contract of employment she enters into with Respondent.

6. The terms of this Stipulation of Settlement are fully understood and agreed to by Petitioner and Respondent. This settlement is consistent with the law, is voluntarily made by Petitioner and Respondent, and is fully dispositive of all the issues in controversy in this matter.

Kathleen A. Naprstek, Esq.
ZAZZALI, ZAZZALI, FAGELLA
& NOWAK, P.C.
For Petitioner, Kemry McFarland

JAMES L. JACKSON, ESQ.
For Respondent, Board of
Education of the City
of Pleasantville

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

KEMRY MC FARLAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the terms of the settlement appear to already have been effectuated through the Board's appointment of petitioner to a 12-month secretarial position commencing July 1, 1996, and by her reporting to work on November 11, 1996. The Commissioner, thus, admonishes the parties that settlements of controverted matters are of no force or effect and may not be implemented absent the Commissioner's approval, pursuant to *N.J.A.C.* 1:1-19.1

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

DECEMBER 19, 1996
DATE OF MAILING DECEMBER 19, 1996

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BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

Petitioning Board contested Department's determination that it was responsible for paying educational costs of M.M., minor child in a residential treatment center, for the 1993-94 school year. Matter was remanded by the Commissioner for additional fact-finding as necessary to clarify discrepancy in critical testimony.

In light of testimony of witnesses and the record in this matter, the ALJ found that there was no evidence that M.M.'s mother, V.M., resided in Wildwood on October 15, 1993. *N.J.S.A.* 18A:7B-12 provides that the school district responsible for a child's education is the "present district of residence" of the parent or guardian, which is the residence of the parent as of the last school day prior to October 16. ALJ could not determine where V.M. resided on October 15, 1993, but he was satisfied by the evidence that she did not reside in Wildwood on that date. Therefore, ALJ concluded that the State was the proper party to assume financial responsibility for M.M. during the 1993-94 school year and not the Wildwood Board.

Commissioner set aside the initial decision of the ALJ. Commissioner found that the Board failed to meet its burden of proving that Wildwood was not responsible for M.M.'s educational costs. Commissioner noted it was of no import that V.M. did not reside in Wildwood on October 15, 1993, since, if the finder of fact cannot determine where V.M. resided as of that date, as the ALJ could not, then, according to *N.J.S.A.* 18A:7b-12b, Wildwood, as the district of *prior* residence, was responsible for M.M.'s tuition for the 1993-94 school year.

December 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10066-95

ON REMAND EDU 8017-94

AGENCY REF. NO. 193-6/94

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Bruce M. Gorman, Esq., for petitioner

JoAnn Fitzpatrick, Deputy Attorney General, for respondent,
(Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: September 3, 1996 Decided: September 27, 1996

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondent, New Jersey State Department of Education (DOE), charged the petitioner, Board of Education of Wildwood (W.W.) with the cost of the education of M.M., a minor child, at Bonnie Brae Residential Treatment Center (B.B.), for the 1993-94 school year.

M.M. was placed at B.B. by the Division of Youth and Family Services (DYFS). The basis of the charge was that at the time of placement on November 23, 1992, M.M.'s mother resided in Wildwood, New Jersey. N.J.S.A. 18A:7B-12 provided that the school district responsible for a child's education is the present district of residence of the parent or guardian. If this cannot be determined, then the responsible district is the district is which the child resided prior to placement. If the district of residence of the parent cannot be determined according to the following criteria or if the district of residence is outside the state, the State shall assume fiscal responsibility for the child's education. The criteria identifies the "present district of residence" as the residence of the parent as of the last school day prior to October 16. N.J.A.C. 6:20-5.3.

An Initial Decision was rendered in the matter on August 17, 1995. On October 6, 1995, the Commissioner ordered that the matter be remanded to the Office of Administrative Law (OAL) so that the Administrative Law Judge (ALJ) could "reconcile" the contradiction between witness Lewis' written comments and his telephonic testimony. The matter was transmitted to the OAL on October 17, 1995. The parties agreed that a transcript of Lewis' testimony would help to resolve the problem and transcripts were ordered. The record closed thereafter on September 3, 1996.

During the plenary hearing the parties agreed that M.M.'s mother resided in W.W. on November 23, 1992, when she signed the necessary authorizations for DYFS to enroll M.M. in B.B.

The DOE called Glenn Daisey as its witness. He was the DYFS worker who obtained M.M.'s mother's signature on November 23, 1992, and who was the case worker assigned to M.M.'s family. He testified after November 23, 1992 that he never again saw M.M.'s mother.

Daisey did attempt to track M.M.'s mother after she left W.W. He obtained information that she resided in Philadelphia, Pennsylvania in December of 1992; her other son of whom she also had custody was registered in a Philadelphia school at that time.

Daisy next learned that M.M.'s mother enrolled him (her other son) in the Millville School system in 1994. Daisy tracked down her landlord in Millville who told him that M.M.'s mother lived in Millville until January 1994.

This was the total proof offered by the DOE and clearly indicates no basis whatsoever to find that M.M.'s mother resided in W.W. on October 15, 1993. There is not a hint in the testimony that she was even seen in Wildwood again after November 23, 1992. All the inferences are that she was not in Wildwood after that date. Her son who remained with her and in her custody was enrolled in schools in Philadelphia, Pennsylvania and Millville, New Jersey, not Wildwood, New Jersey.

W.W. however, employed a private detective who did locate M.M.'s mother. He located her in Orlando, Florida through her landlord Paul Lewis. The detective interviewed Lewis by telephone and sent him a Certification to sign. Paul Lewis signed the Certification prepared by the private detective which requested that Lewis fill in the dates M.M.'s mother resided at 1261 23rd Street in Orlando. Lewis did fill in the dates. In the blank following the word "FROM DATE," Lewis wrote "Prior to Sept. '94." In the space following "TO" he wrote "Oct. 1, 1994." Then Lewis signed the document and added a footnote. The footnote reads in its entirety as follows: "Last year app. 6/93 thru 9/93 they rented from me @1261-23rd St." Thereafter he affixed another signature.

During his telephone testimony at the OAL hearing, Lewis clearly identified the family of which he spoke as V.M. (M.M.'s mother) her son (not M.M.) and her paramour. In fact, it was through the paramour that Douglas was able to trace the family because the paramour (now deceased) was receiving dialysis.

Lewis is a landlord who operated approximately 100 properties for approximately 200 tenants in 1993 and 1994. He kept records for his accountant and then disposed of anything not required by the IRS.

He distinctly recalled that V.M. and her family lived at 1216-B Twenty Fifth Street, a one bedroom apartment. When a two bedroom apartment opened up at 1261 23rd Street in "six of '93" they moved in and remained there until "nine of '93" at which time the family left and moved to "1245 Twenty-third Street."

Lewis said he subsequently purchased 1245 Twenty-third Street in August of 1994. Sometime after he purchased it, V.M. moved out.

The testimony of Lewis clearly explains what appears to be a gap in his written response to Douglas' form. At sometime she lived in a property he did not own and at a different address than Douglas listed on the form.

Lewis' testimony can be summarized as follows: V.M., her son, and her paramour rented a one bedroom apartment from him prior to June 1, 1993, at 1216-B Twenty-fifth Street in Orlando, Florida. From there they moved to 1261 Twenty-third Street in June of 1993 and remained there until September of 1993. Lewis owned both of these properties. In September of 1993, the family moved to 1245 Twenty-third Street, a property Lewis did not own. They remained there until at least August of 1994, because in August of 1994, Lewis purchased 1245 Twenty-third Street and shortly after he purchased it, she moved out. On the form provided by Douglas only the address of 1261 23rd Street appears, obviously a mistake.

It is clear that all the evidence in this case points to the fact that V.M. has not resided in W.W. since at least December of 1992. The DOE produced evidence that V.M. was residing in Philadelphia, Pennsylvania in December of 1992. The DOE also provided evidence that M.M.'s brother was enrolled in school in Millville, New Jersey for one week. The DOE's witness located V.M.'s landlord in Millville, New Jersey, who said she left there in January of 1994. Perhaps she came north from Orlando on a holiday visit, we do not know. But it is clear she was back in

Orlando shortly thereafter. Lewis saw her in 1245 Twenty-third Street when he was buying the property and she left shortly after he bought the property in August of 1994.

As a result I **FIND** that there is absolutely no evidence that M.M.'s mother resided in W.W. on October 15, 1993.

I **FURTHER FIND** that all the evidence produced by the parties compels one to the belief that M.M.'s mother left W.W. by at least December 1992, when she resided in Philadelphia, Pennsylvania.

Furthermore, I **FIND** that M.M.'s mother resided in Orlando, Florida from sometime prior to June 1993 until August of 1994, except for a short stay in Millville, New Jersey in January 1994.

I cannot determine where V.M. resided on October 15, 1993, but I am satisfied by the evidence produced at this hearing that she did not reside in Wildwood, New Jersey on that date.

I **CONCLUDE** that pursuant to N.J.S.A. 18A:7B-12(d) the State is the proper party to assume financial responsibility for M.M. during the 1993-94 school year and not the Wildwood Board of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9 27 96
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

10/4/96
DATE

DNJ
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 7 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

ROBERT DOUGLAS

PAUL LEWIS

FOR RESPONDENT:

GLENN DAISEY

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS:

J-1 TRANSCRIPT OF MARCH 31, 1995, EDU 8017-94

J-2 TRANSCRIPT OF JULY 10, 1995, EDU 8017-94

FOR PETITIONER:

P-1 DOUGLAS TO LEWIS

P-2 PRINTOUT V.M.

P-3 PRINTOUT V.M.

P-4 PRINTOUT V.M.

P-5 PRINTOUT P.F.

P-6 FAX AND COVER NEEDHAM

FOR RESPONDENT:

R-1 DYFS TO POSTMASTER

R-2 DAISEY TO HOSPITAL

R-3 DAISEY TO DMV

R-4 DYFS ABSENT PARENT UNIT

R-5 DAISEY TO MATTERN

R-6 DAISEY TO STATE POLICE

R-7 DAISEY TO PROBATION

R-8 DAISEY TO WILDWOOD POLICE

R-9 DYFS TO POSTMASTER

R-10 DYFS TO SOCIAL SECURITY

R-11 DYFS TO V.M.

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent asserts that the initial decision of the Administrative Law Judge (ALJ) "***does not rest on substantial, credible evidence in the record and also misinterprets the statutory and regulatory requirements for determining the district of residency for years subsequent to [M.M.'s] original placement" in November 1992. (Respondent's Exceptions at p. 1) In this regard, respondent contends that the ALJ incorrectly applied the pertinent statute and regulations. Respondent considers the ALJ's statement that he could not determine where V.M. resided on October 15, 1993, yet was satisfied that she did not reside in Wildwood on that date.

> *** Moreover, the ALJ noted that the testimony of Glenn Daisey, M.M.'s DYFS caseworker, indicated that there was no basis whatsoever to indicate that V.M. lived in Wildwood, New Jersey on October 15, 1993***. These two statements alone demonstrate that the ALJ has misinterpret [sic] the criteria to the extent that the respondent must prove that M.M. was living in Wildwood as of October 15, 1993 and, if it cannot, then the DOE is liable. This is clearly incorrect since, as the above criteria indicates [sic], if the residence of V.M. as of this date cannot be proved, then her district of residency as of M.M.'s initial placement, Wildwood, is the district which is responsible for the 1993-94 school year. (*Id.* at p. 3)

Citing *Board of Education of the City of Atlantic City v. New Jersey Department of Education*, 92 *N.J.A.R.* 2d (EDU) 545, 550 (1992), respondent warrants that the burden of proof should properly be placed upon the Board to challenge respondent's determination that Wildwood is the district responsible for the educational costs for M.M. for the 1993-94 school year. (Respondent's Exceptions at p. 3) However, respondent argues that the Board's burden has not been met in that crucial testimony from Paul Lewis, a landlord in Orlando, Florida, "was inconsistent, not credible and cannot support a finding that V.M. resided in Orlando as of October 15, 1993." (*Id.* at p. 4) In this regard, respondent points out that Mr. Lewis had no documentation to support his conclusions or to verify where V.M. was on October 15, 1993; rather, he "***was clearly relying on his memory when he stated that he saw V.M. at the 1245 23rd Street address *some time after* September of 1993 and could not even give the month in which he saw her.***" (emphasis in text) (*Id.* at p. 6) Respondent concludes that the "haziness" of Lewis' testimony and the lack of documentation, but for "a contradictory unsworn statement from Lewis" compel a finding that the Board has failed to meet its burden and the Commissioner must, therefore, reverse the initial decision of the ALJ. (*Id.* at p. 7)

Upon a careful and independent review of the record in this matter, including the transcripts of the hearings held on March 31, 1995 and July 10, 1995, the Commissioner determines to reverse the initial decision of the ALJ, for the reasons set forth herein.

Initially, the Commissioner concurs with respondent that the ALJ incorrectly interpreted the pertinent statute in this matter. Specifically, it is of no import that V.M. did not reside in Wildwood on October 15, 1993, since, if the finder of fact cannot determine where V.M. resided as of that date, as the ALJ could not (initial decision at p. 5), then, according to *N.J.S.A.* 18A:7B-12b, Wildwood, as the district of *prior* residence, is responsible for M.M.'s tuition for the 1993-94 school year.

As respondent properly notes, the burden of proof in this matter rests with petitioner to establish, by a preponderance of credible evidence, that the Department's determination to assign responsibility to the Board for M.M.'s tuition for the 1993-94 school year was either contrary to mandate,

or was arbitrary, capricious and unreasonable. See *Board of Education of the City of Atlantic City, supra.* As respondent notes, the testimony of Paul Lewis is critical to the outcome of this matter, particularly given the paucity of documentary proofs to support the Board's claim. Had there been no evidence that V.M. was in Millville in January of 1994, then the Commissioner could find it more probable than not, even given the weaknesses in Lewis' testimony, that V.M. was in Orlando from approximately June 1993 until August 1994 when Lewis purchased the 23rd Street property V.M. had been renting. However, since there is credible evidence that V.M. left Florida at some point, and returned to New Jersey, the Commissioner cannot confidently rely on the record as it stands to determine, with any degree of certainty, that V.M. resided in Florida on October 15, 1993, so as to absolve the Board, as the district of prior residence, from responsibility for tuition payments in this matter.

Accordingly, the initial decision of the ALJ is reversed for the reasons set forth herein, and M.M.'s residence for the 1993-94 school year is determined to be within the jurisdiction of the Board by virtue of *N.J.S.A.* 18A:7B-12b. The Petition of Appeal is hereby dismissed and the Board is ordered to remit tuition payment, as determined by respondent to be due and owing for the 1993-94 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 30, 1996
Date of Mailing, December 30, 1996

570-96

570-96

IN THE MATTER OF THE TENURE	:	
HEARING OF KATHERINE FRETZ,	:	COMMISSIONER OF EDUCATION
DEPARTMENT OF HUMAN	:	DECISION
SERVICES.	:	
	:	

December 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4455-96

AGENCY DKT. NO. 59-2/96

IN THE MATTER OF THE TENURE HEARING OF KATHERINE FRETZ, DEPARTMENT OF HUMAN SERVICES,

---

Joel N. Weissman, Esq., member of the New York State Bar, admitted *pro hac vice,* for petitioner (Weissman and Mintz, attorneys). Attorney of Record: Steven P. Weissman, Esq., (Weissman and Mintz, attorneys)

Deborah J. Gottlieb, Deputy Attorney General, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: November 14, 1996 Decided: November 14, 1996

BEFORE **BRUCE R. CAMPBELL,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 21, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

14 NOVEMBER 1996
DATE

Bruce R Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11/18/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 19 1996
DATE

Barbara A Kermel
OFFICE OF ADMINISTRATIVE LAW

slf

Peter Verniero
Attorney General of New Jersey
R. J. Hughes Justice Complex
CN 112
Trenton, NJ 08833
Attorney for Petitioner NJ Dept. of Human Services

By: Deborah J. Gottlieb
Deputy Attorney General
(609) 633-1972

IMO Tenure of Katherine Fretz : Office of Administrative Law

EDU 04455-96

STIPULATION OF SETTLEMENT

THIS MATTER having come before the Office of Administrative Law by way of petition to enforce the 5-day suspension of Katherine Fretz, a ~~former~~ teacher employed with the NJ Department of Human Services, and Katherine Fretz being represented by Weissman and Mintz, Joel Weissman, Esq., appearing and the NJ Department of Human Services being represented by Peter Verniero, Attorney General

of New Jersey, Deborah J. Gottlieb, Deputy Attorney General Appearing, and the parties wishing to settle their disputes and resolve this matter in an amicable fashion and set forth the terms of their agreement herein below, it is hereby Stipulated and Agreed as follows:

1. In Consideration of the fact that Katherine Fretz has been on extended medical leave from her employment as a teacher with the NJ Department of Human Services and in further consideration of the fact that Katherine Fretz intends to retire from her position as a teacher with the NJ Department of Human Services, the NJ Department of Human Services hereby agrees that

2. It will delete the 5-day suspension at issue herein from the permanent employee record of Katherine Fretz and the NJ

Department of Human Services further agrees to

3. Pay over to Katherine Fretz the amount of her salary not received by her during the 5-day suspension at issue herein and
4. Katherine Fretz agrees to apply for retirement from her position as a teacher with the NJ Department of Human Services and Katherine Fretz further agrees that
5. She will not receive the amount of her salary referenced hereinabove at paragraph 3 ~~above~~ unless and until she files ~~completely~~ a fully completed retirement application with the NJ Department of Treasury, Division of Pensions.
6. Katherine Fretz further agrees that she will not in the future seek employment with the NJ Department of Human

Services.

This Stipulation becomes effective upon approval and acceptance by the NJ Department of Education.

DATED: Katharine Fretz 11-14-96
Katherine Fretz
Respondent

DATED: 11/14/96
Joel Weissman, Esq.
Weissman & Mintz
Attorneys for Respondent

PETER VERNIERO
Attorney General of New Jersey

DATED: 11/14/96 By:
Deborah J. Gottlieb
Deputy Attorney General
Attorney for Petitioner

OAL DKT. NO EDU 4455-96

IN THE MATTER OF THE TENURE	:	
HEARING OF KATHERINE FRETZ,	:	COMMISSIONER OF EDUCATION
DEPARTMENT OF HUMAN	:	DECISION
SERVICES.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as, under the unique circumstances of this matter, they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 30, 1996
Date of Mailing, December 30, 1996

571-96

571-96

L.W., on behalf of minor child, G.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

December 30, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8115-96
AGENCY DKT. NO. 335-8/96

L.W. ON BEHALF OF
G.W.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CITY OF GLOUCESTER,
Respondent.

L.W., petitioner, *pro se*

Robert A. Muccilli, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: November 19, 1996 Decided: November 20, 1996

BEFORE **BRUCE R. CAMPBELL,** ALJ:

This case concerns a parent's appeal from a grade placement made by the Gloucester City Board of Education.

This matter was transmitted to the Office of Administrative Law on September 3, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties met with the undersigned on September 9, 1996 and worked out an agreement resolving the issue.

The parties have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

20 NOVEMBER 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

11/22/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 25 1996
DATE

Barbara A Kornel
OFFICE OF ADMINISTRATIVE LAW

slf

LAW OFFICES
CAPEHART & SCATCHARD, P.A.
FOUNDED 1876

BLAINE E. CAPEHART
WILLIAM E. REIFSTECK
ALAN R. SCHMOLL
RICHARD T. DeCOU □
TIMOTHY E. ANNIN ††
GLENN R. PAULSEN †
CHARLES A. RIZZI, JR.
PETER S. BEJSIUK *
JOHN H. GEANEY
JOSEPH F. BETLEY *
CARMEN SAGINARIO JR. †
F. J. FERNANDEZ-VINA *††
ROBERT J. HAGERTY *
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REPLY TO MOUNT LAUREL

November 7, 1996

THE HONORABLE BRUCE R CAMPBELL
ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW
QUAKERBRIDGE ROAD
9 QUAKERBRIDGE PLAZA
TRENTON NJ 08625

Re: L.W., on behalf of G.W., a minor child vs. Gloucester City Public Schools
OAL Docket No.: EDU8115-96
Our File No.: 3164.57896

Dear Judge Campbell:

I apologize for the delay. I received the revised Settlement Agreement signed by Ms. Walker last week. Enclosed you will find an original for your record. Kindly sign the Order of Dismissal and enter same in accordance with the terms of the Settlement.

If you have any questions concerning this matter, please feel free to contact me.

Very truly yours,

CAPEHART & SCATCHARD, P.A.

Robert A. Muccilli

RAM/bne5617
Encl.
cc: James A. Hetherington
Ms. Lori Walker

FILED
Office of Administrative Law
96

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made by and between Lori Walker (L.W.) on behalf of George Walker (G.W.), a minor child ("Petitioners"), and the Gloucester City Board of Education (Respondent") in L.W., on behalf of G.W. v. Gloucester City Board of Education, venued in the Office of Administrative Law ("OAL") (EDU 8115-96).

WHEREAS, Petitioners filed a Petition of Appeal and Application for Emergent Relief seeking, in pertinent part, an Order directing that the Respondent: (1) award credit toward graduation for certain courses taken while G.W. was in the eighth grade at the Moorestown Friends School during the 1995-96 school year; and (2) place G.W. in the tenth grade for the 1996-97 school year in Gloucester City Public Schools;

WHEREAS, the Emergent Application was denied by Order dated September 9, 1996 which reserved the credit and placement issues for a plenary (full) hearing;

WHEREAS, the court supervised a Scheduling Conference convened on September 20, 1996 at which time the parties discussed and agreed to a settlement of these outstanding issues;

WHEREAS, the Petitioners and Respondent have determined to resolve this matter amicably and without resort to time consuming and costly litigation;

NOW, THEREFORE, the parties enter into this compromise Settlement Agreement and agree as follows:

1. G.W. will be placed in the tenth grade home room for the 1996-97 school year at Gloucester City Public Schools. His curriculum for the 1996-97 school year will be that which was agreed to and set forth in paragraph 3 of the Court's Order of September 9, 1996, subject to G.W.'s ability to continue demonstrating proficiency in undertaking the stipulated courses of study.

2. Petitioners agree that placement of G.W. in the tenth grade home room for the 1996-97 school year has no bearing on G.W.'s eligibility for graduation. Eligibility for graduation will be determined on the basis of G.W. satisfying the Respondent's graduation requirements, including the mandate that G.W. obtain the required number of high school credits toward graduation.

3. Respondent agrees to consider awarding credits toward graduation for high school or college courses taken by G.W. outside the Gloucester City Public Schools provided that:

(a) G.W. gives sufficient notice to Respondent of his intention to take a particular course to permit Respondent to adequately consider the course selection for the purpose of making a preliminary determination of whether the course warrants an award of credit toward graduation.

(b) G.W. obtains preliminary approval from Respondent for the course in advance of taking same, said determination being within the discretion of the school district.

(c) The course selection meets the standards of Respondent and the State Department of Education in terms of content, faculty credentials, number of hours, school accreditation, credit and other relevant factors.

(d) G.W. demonstrates proficiency in the subject matter of the course selection and successfully completes the course as determined by Respondent in accordance with its standards.

4. Petitioners understand and agree that petitioners will bear the entire cost of any course selection taken at an educational institution other than Gloucester City Public Schools.

5. Petitioners agree to dismiss the Petition of Appeal with prejudice and without costs. Petitioners understand that this will bar the graduation credit and placement claims raised by the Petition of Appeal from being raised in the future.

6. Petitioners hereby release and give up any and all claims and rights arising from the Petition of Appeal, including but not limited to, claims for credit toward graduation for courses G.W. took at Moorestown Friends School during the 1995-96

school year and for placement in the tenth grade for the 1996-97 school year in the Gloucester City Public Schools.

7. Nothing set forth in this Agreement, nor the execution of same, shall be construed or considered an admission of liability by the Respondent. The Respondent expressly denies any liability relating to Petitioner's claims.

8. This Agreement shall be executed and delivered, and it is intended to be performed, in the State of New Jersey, and all provisions hereof and all rights, obligations and liabilities arising hereunder shall be covered by and construed and enforced in accordance with the laws of the State of New Jersey without regard to any principles of choice of law that may otherwise be applicable.

9. This Agreement is binding upon and shall enure to the benefit of the Parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successor and/or assigns.

10. If any Party by its actions or admissions, waives or is adjudged to have waived any breach of this Agreement by any other Party, any such waiver shall not operate or be construed or asserted as a waiver of any other or subsequent breach of this Agreement.

11. Except as may be otherwise provided by this Agreement, this Agreement can only be changed or modified by a written document executed by the Parties or by their respective heirs, executors, administrators, personal or legal representatives,

successors and/or assigns.

The Parties hereto have set their hands and seals on this First day of November, 1996.

Lori Walker, on behalf
of George Walker, a minor child

James H. Hetherington,
Superintendent of
Gloucester City Public Schools

misc>cde>57896.1

OAL DKT. NO. EDU 8115-96

L.W., on behalf of minor child, G.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 30, 1996
Date of Mailing, December 30, 1996

574-96

574-96

LISA DE FLORA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 31, 1996

OAL DKT. NO. EDU 5615-96
AGENCY DKT. NO. 158-4/96

LISA DE FLORA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 31, 1996
Date of Mailing, December 31, 1996

575-96

575-96

N.C. and G.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

December 31, 1996

OAL DKT. NO. EDU 5921-96
AGENCY DKT. NO. 211-6/96

N.C. and G.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal of the Application for Emergent Relief, together with the case on its merits. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 31, 1996
Date of Mailing, December 31, 1996

576-96

576-96

HARRY ALEXANDROWICZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

December 31, 1996

OAL DKT. NO. EDU 8927-95
AGENCY DKT. NO. 319-8/95

HARRY ALEXANDROWICZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 31, 1996
Date of Mailing, December 31, 1996

577-96

577-96

JAMES BENDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 31, 1996

OAL DKT. NO. EDU 11111-95
AGENCY DKT. NO. 345-8/95

JAMES BENDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 31, 1996
Date of Mailing, December 31, 1996

578-96

578-96

JOHN SPIVAK AND CATHERINE A. MARSCHEAN-SPIVAK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
JUNE CLARK, BOARD OF EDUCATION OF THE WESTWOOD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, AND DR. JOSEPH FISLER,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents alleged their daughter, E.S., was wrongfully denied admission into the sixth grade honors program for gifted and talented students.

ALJ concluded that the removal of E.S. from the District ended the controversy between the parties. ALJ found there was no immediate adversity herein to sustain a justiciable controversy. Matter was dismissed as moot.

Commissioner adopted the initial decision as his own, dismissing the matter as moot and concurring that the issues raised, concerning the Board's denial of E.S. to an honors program, are not of such substantial importance to otherwise mandate judicial review.

December 27, 1996

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1229-96

AGENCY DKT. NO. 475-12/95

JOHN A. SPIVAK AND

CATHERINE A. MARSCHEAN-SPIVAK,

Petitioners,

v.

JUNE CLARK, BOARD OF EDUCATION OF THE WESTWOOD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, AND DR. JOSEPH FISLER,

Respondents.

John A. Spivak and **Catherine A. Marschean-Spivak**, *pro se*

Rodney T. Hara, Esq., for respondents
(Fogarty & Hara, attorneys)

Record Closed: September 6, 1996 Decided: November 20, 1996

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a petition with the Commissioner of Education ("Commissioner"), alleging that their daughter was wrongfully denied placement in the Westwood Regional School District (District) honors program for gifted and talented students. The matter was transmitted to the Office of Administrative Law on January 18, 1996, for

hearing. *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. An in-person prehearing conference was held on May 20, 1996, and a prehearing order was issued on June 4, 1996. Pursuant to that Order, petitioners amended the petition to include the District and the Westwood Board of Education as respondents and to seek monetary relief as an alternate remedy.[1]

FINDINGS OF FACT

I **FIND** the following as **FACT**:

Petitioners' daughter, E.S., was enrolled as a fifth grade student in the District's Ketler Elementary School. The respondents are The Westwood Regional Board of Education ("Board"), the superintendent, Dr. Fisler and June Clark, the secretary of the Board. The respondents are responsible for operating the District schools. The District is comprised of the Borough of Westwood and Township of Washington. The District provides a sixth grade honors program as part of its gifted and talented program. Additionally, the District as an enrichment plan for its five elementary schools.

In 1990, the Board adopted a gifted and talented policy. It delegated to the District superintendent the authority to coordinate the development of criteria for the identification and acceptance of pupils into the honors program. The input of other members of the administration and teaching staff was solicited.

Placement in the honors program was based on an assessment of the highest score achieved on a matrix developed by the District and was also dependent on the proportionate number of students deemed eligible for the program. Each year, the principals of the five elementary schools in the District collectively recommended to the superintendent a cutoff matrix score for admission into the honors program. Since the students' matrix scores varied from year to year, the cutoff scores would change each

[1] Petitioners' original petition named the secretary and the superintendent as the respondents. Further, the petitioners requested that E.S. be provided with a special advanced curriculum during the 1994-95 school year. By the time the matter was scheduled to be heard, E.S. no longer resided in the district.

year. For the 1994-1995 school year, the matrix scores of the enrolled students ranged from 37 to 57. For the 1995-1996 school year, the matrix scores of the enrolled students ranged from 52 to 72.[2]

In the 1994-1995 school year, E.S. had a matrix score of 46, and this was below the required matrix score of 52. Consequently, E.S. was not accepted into the 1995-96 honors program. The petitioners sought reconsideration by the superintendent and the board. The denial was subsequently affirmed by the board.

ARGUMENT

Petitioners allege that E.S. was improperly denied admission into the sixth grade honors program. Specifically, petitioners allege that E.S. is a "gifted and talented" child for whom special programs must be provided consistent with N.J.A.C. 6:8-4.5(4). Respondents have implemented an arbitrary and capricious selection process that violates *N.J.A.C.* 6:8-8.4.54. Petitioners request that the District be required to provide written administrative procedures for the identification of pupils with gifted and talented abilities before the next program participants are identified. Further, the petitioners request that respondents provide them with "funds" to enroll E.S. in a comparable gifted and talented program.

Respondents move to dismiss this matter on the grounds that the petitioners no longer reside in the district, and therefore the matter is moot.

DISCUSSION, FINDINGS AND CONCLUSION

N.J.A.C. 1:1-12.5 provides for summary decision when the papers and discovery, together with the affidavits, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. An adverse party in order to prevail must by responding affidavit set forth specific

[2] See respondent's motion briefs for summary judgment and attached Exhibit C.

facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. Recently, in *Brill v. Guardian Life Insurnce Co. of America*, 142 *N.J.* 520 (1985), the New Jersey Supreme Court set forth a more definitive standard for determining whether summary decision should be granted. The motion judge, after granting all favorable inferences to be drawn from the facts to the non-movants, is to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict:

> ". . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. That weighing process requires the court to be guided by the same evidentialry standard of proof -- by a preponderance of the evidence or clear and convincing evidence -- that would apply at the trial on the merits when deciding whether there exists a "genuine" issue of material fact.
>
> [*Brill, supra*, 142 *N.J.* at 533-34; citations omitted]

Finally,

> when the evidence is "so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment.
>
> [*Id.* at 540; citation omitted]

Applying the *Brill* standard to this matter, I **FIND** that summary decision is appropriate. I further **FIND** that the petition is moot and should be dismissed.

An action is considered moot when it no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Victoria v. Bd. of Ed. of the Twp. of Woodbridge*, 1982 *S.L.D.* 1. Courts will not usually hear moot cases, for two reasons:

> First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court.

Anderson v. Sills, 143 N.J.Super. 432, 437-38 (Chan.Div. 1976). An exception to the general rule exists when issues are presented that "are of substantial importance and are capable of repetition yet evade review." *In the Matter of J.I.S. Indus. Serv. Co. Landfill*, 110 N.J. 101, 104 (1988). *See also*, *Handabaka v. Div. of Consumer Affairs*, 167 N.J.Super. 12, 14 (App.Div. 1979).

Likewise, the Commissioner of Education does not decide moot cases. J.B. v. Bd. of Ed. of Asbury Park, OAL Dkt. No. EDU 7940-87 (Oct. 12, 1988). In *Feldman v. Bd. of Ed. of the City of Linwood*, OAL Dkt. No. EDU 1665-94, (Oct. 14, 1994), the petitioners therein argued that their child was being deprived of the opportunity to attend a gifted and talented program as required by N.J.A.C. 6:8-4.5(4), because the respondent school district did not have an honors program for first graders. During the pendency of the hearing, the petitioners transferred their child to a private school. It was held that the removal of A.F. from the Linwood school system and its policies and dictates destroyed the concrete, immediate adversity necessary to sustain a justiciable controversy. *In F.G. v. Bd. of Ed. of Caldwell-West Caldwell*, 76 S.L.D. 582, the beginning of a new school year mooted the issue of whether a child was properly placed in a combined grade classroom.

In *Pinkham v. Bd. of the Borough of South River*, 74 S.L.D. 1103, the petitioner failed a physical education course and consequently did not graduate. Petitioner sought relief seeking a diploma, alleging that a school requirement that female, but not male, physical education students take written exams constituted sex discrimination. This issue was held moot because the petitioner attended summer school and received her diploma. *See Polskin v. North Plainfield Bd. of Ed.*, 1968 S.L.D. 217, (mooted because of changed circumstances, where the conclusion of the tennis season mooted a student's challenge of his exclusion from the team); *Oxfeld v. N.J. State Bd. of Ed.*, 68 N.J. 301 (1975) (mooted by the New Jersey Supreme Court because the students had already graduated and were not subject to the regulation). In *Prout v. Erickson*, OAL Dkt. No. EDU 6980-80 (March 4, 1981), (the petitioner demanded that the alleged harassment of her children while in school be stopped. The matter was held moot

because her children were no longer enrolled in the school. In *Hulej v. Keyport High School*, OAL Dkt. No. EDU 0893-79 (March 25, 1980), (a petition challenging respondent's "student behavior code" was dismissed for mootness when it was revealed at the hearing that petitioner removed her son from the public high school).

As in the Feldman case, E.S.'s enrollment in another school district destroys the concrete, immediate adversity necessary to sustain a justiciable controversy. The relief requested by petitioners, that respondent be required to approve written administrative procedures for identifying gifted and talented students, would have no effect on their daughter's education at another school. Therefore, the petitioners' interest in the outcome of the case is negated, and a ruling on the merits herein amounts to an impermissible hypothetical opinion.

Further, this matter is not one of substantial importance that demands a judicial review. *See In the Matter of J.I.S. Indus. Serv. Co. Landfill*, 110 *N.J.* 101, 104 (1988). In *Handabaka v. Div. of Consumer Affairs*, 167 *N.J. Super.* 12, 14 (App. Div. 1979), the court held that there is no "bright-line rule" for determining when a case is important enough to justify review despite its mootness. Thus, it has been found that an issue regarding who should pay costs for additional costs incurred in the cleanup of a landfill is important enough to justify review, *J.I.S. Landfill*, *supra*, while the issue of whether a regulation impinged on free-speech in a public school was not, *Oxfeld*, *supra.*

Petitioners' claim for money damages for private tutoring of their daughter does not alter the moot nature of this dispute, because such damages cannot be awarded by the Commissioner. Generally, the "award of damages to a person suffering monetary loss as the result of the unlawful action of a third party has traditionally been limited to judicial proceedings. Power to award damages will not be extended to an administrative body unless the legislative purpose to grant such power is plainly indicated." *Jackson v. Concord Co.*, 101 N.J.Super. 126, 133 (App.Div. 1968).

The award of money damages in education cases occurs in a limited number of cases, such as for lost earnings, *McLean v. Bd. of Ed. of Glen Ridge*, 1977 S.L.D. 311,

or restoring an increment improperly withheld, *Smith v. Bd. of Ed. of Hamilton*, OAL Dkt. No. EDU 5468-87, adopted in part and rejected in part on other grounds, Comm. of Educ. (April 21, 1988). Further, the Commissioner cannot award punitive damages, *North Bergen Fed. of Teachers v. Bd. of Ed. of Bergen*, 1975 S.L.D. 461.

The Commissioner has authorized tuition reimbursement in special education cases, but such reimbursement is authorized by regulation. N.J.A.C. 6:28-1.1(h). *See* also, *J.B. v. Hamilton Twp. Bd. of Ed.,* 95 N.J.A.R.2d 64, 72. Tuition reimbursement has not been upheld unless specifically authorized. *VM/O T*, 1974 S.L.D. 420, 429 holding that the Commissioner can find no authority of law whereby, under those circumstances, he could order the Board to pay an award of monetary damages to the parents of T for expenditures for educational services they have privately obtained rather than availing themselves of the instructional program provided by the school district.

Neither *N.J.A.C.* 6:8-4.1 nor *N.J.A.C.* 6:8-4.5(a)(4) provides the Commissioner with the authority to award tuition reimbursement. Indeed, the latter regulation was not intended to impose greater substantive burdens on local districts. Rather, the intent was to recodify existing authority that the State standards for gifted and talented programs are guidelines and not a monitoring checklist. *Kanter v. Mountain Lakes Bd. of Ed.,* 95 N.J.A.R.2d 454, 456, quoting *Humcke v. Tinton Falls Bd. of Ed.,* 1981 S.L.D. 165.

Therefore, I **FIND** and **CONCLUDE** that the removal of E.S. from the Westwood Regional School District ended the controversy between the parties. There is no immediate adversity here to sustain a justicable controversy. Accordingly, the matter is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/20/96
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

DNA
DATE

11/22/96
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 22 1996
DATE

Barbara A. Harner
OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU 1229-96

JOHN SPIVAK AND CATHERINE A. MARSCHEAN-SPIVAK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
JUNE CLARK, BOARD OF EDUCATION OF THE WESTWOOD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, AND DR. JOSEPH FISLER,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner affirms the initial decision of the Administrative Law Judge to dismiss this matter as moot because petitioners no longer reside in respondents' District. The Commissioner further concurs that the issues raised, concerning the Board's denial of petitioners' child to an honors program for gifted and talented students, are not of such substantial importance to otherwise mandate judicial review. See *In the Matter of J.I.S. Indus. Serv. Co. Landfill*, *supra*.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 27, 1996
Date of Mailing, December 27, 1996