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NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1983 to December 31, 1983

Vol. 2

New Jersey State Department of Education
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SAUL COOPERMAN
Commissioner of Education

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1942-82
AGENCY DKT. NO. 42-2/82A

SCHOOL DISTRICT OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,
Petitioner
v.
DOUGLAS NOGAKI,
Respondent

APPEARANCES:

David A. Wallace, Esq., on behalf of petitioner
Sheldon H. Pineus, Esq., on behalf of respondent
(Bucceri & Pineus, attorneys)

Record Closed: June 24, 1983 Decided: August 8, 1983

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

On February 8, 1982, petitioner, Board of Education of the Borough of New Milford, certified charges of unbecoming conduct to the Commissioner of Education against respondent, Douglas Nogaki.

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On March 4, 1982, the Department of Education, Bureau of Controversies and Disputes, transmitted this dispute to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. After notice to all parties, a prehearing conference was held on July 2, 1982 and the following issues were isolated:

1. Did the alleged actions of respondent, Douglas Nogaki, constitute incapacity, unbecoming conduct or other just cause in violation of N.J.S.A. 18A:6-10?

2. If the charges are found to be true, would such alleged conduct warrant a dismissal or reduction in salary or other action?

Thereafter, the case was heard on November 22 and 23, 1982; December 13, 1982 and March 24, 1983. Witnesses who testified and exhibits marked into evidence are listed in the appendix attached hereto.

It is essentially uncontroverted that on or about October 1981 Douglas Nogaki, a gym teacher, gave a command to his ninth grade gym class to assume the "dress right dress position." Although the rest of the class apparently complied, Do. and Dr. Y., twins and students in that class, determined not to comply with the command. Nogaki confronted the boys in response to their disobedience. There is no question but that he placed himself directly in front of the boys, who were standing in the back of the two lines Nogaki had established, repeated his command and was met with continued non-compliance. At issue is the substance of the encounter between the Ys. and Nogaki over the refusal of the Y. boys to comply with Nogaki's order.

Testifying as to this episode, Do. Y. stated that he was standing third from the left in the second line, his brother Dr. was to his immediate left (approximately six inches away) and G.B., another student, was to his far left. He recalled that Nogaki noticed that he did not perform the position; thus, after checking the first line, Nogaki came up to

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within one foot of Dr. and asked Dr. in a loud voice to get into the position. When Dr. did not comply, Nogaki asked him again. Dr. still did not assume the position. Instead, he stood straight in line, with his hands at his side, and answered Nogaki back by stating, "What is this, military school?" Do. recalled that without warning and from about an arm's length, Nogaki punched Dr. in the center of his chest, causing his brother to lose his balance and fall back two steps from the force. He noted that his brother then stepped back in line.

Testifying as to his own interaction with Nogaki, Do. explained that he had determined that day while seated on the gym floor not to follow the command, believing it to be a military type drill which he did not have to do, and had advised his brother of his decision. He did not recall Dr.'s response to his statement. Referring to the incident, Do. recalled that when he did not follow the command, Nogaki, seemingly angry, came to within one arm's length of him and issued the command in a loud voice. Although aware of what Nogaki wanted him to do, Do. admitted that he did nothing. Thereupon, Nogaki grabbed his left arm, forced it on his hip and turned his head to the right. Do., who asserted that he tried to resist Nogaki's effort, indicated that he turned his head and looked back at Nogaki and said, "What is this, military school?" Do. testified that Nogaki then punched him in the chest, knocking him back and off balance. When Do. told him never to put his hands on him, Nogaki told him to get dressed and leave class.

It is noteworthy that on cross-examination Do. changed his testimony by indicating that Nogaki had positioned Dr. in the dress right dress position, when Dr. turned around and said "What is this, military school?" In fact, Do. admitted that he did not recall the exact sequence of events and did not know whether Nogaki used his right or left hand or an open or closed fist to punch Dr. He was sure, however, that regardless of the precise sequence, the events had occurred; more specifically, he noted that Nogaki had forcibly (in a quick manner by grabbing his hand) placed Dr. in the dress right dress

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position and, inasmuch as he heard a thud, recalled Nogaki had punched Dr. In addition he pointed out that when Nogaki hit him he used the front part of his fist (the palm facing out and the thumb out), more of the fingers than the butt of his hand and presumably more of the portion of the hand from the knuckle up to the tips of the fingers. He recalled that he had given a statement in which he admitted that he had not been hurt and further confirmed the fact that he had not seen the school nurse or a doctor. Although he alleged that he felt the pain of the punch, he acknowledged that it was not lasting and did not leave a mark. However, he recalled that his brother had advised him that his chest was red and that he had felt pain in the center of his chest where he had been punched.

Corroborative of Do.'s testimony was that of his brother Dr., who recalled standing with Do. to his right and G.B. to his left when Nogaki gave the command. When neither he nor Do. obeyed (Dr. recalled that his brother had advised him shortly before class that he would not follow the command), Nogaki looked at him, in an angry manner and walked over to him. Standing inches from him, he said, "I said, "Dress right dress." Dr. recalled responding, "It's not the army." Dr. testified that when Nogaki gave the command again and he did not obey, Nogaki punched him with a closed fist (he did not know what part of the fist). He stated that he received a short jab in the upper part of his chest, causing him to be thrown back one or two feet. He felt pain, which remained for longer than a few minutes, and approximately 40 minutes later noted redness where he was hit. The next day he observed the appearance of a black and blue mark about two inches long and one inch wide. Dr. recalled that after he was hit, he stepped back in line and Nogaki tried to force his head and arms into the dress right dress position. He admitted, however, that when Nogaki let go of him, he let go of the position.

Referring to the exchange between Nogaki and Do., Dr. recalled that Nogaki attempted to force Do. into the position. When Do. advised Nogaki to take his hands off him, Nogaki said, "One more word and you're out." After Do. repeated his request, Nogaki punched Do., causing him to move a couple of inches. Dr. indicated that he did not see the punch but heard the sound of it.

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It is to be noted that although Dr. admitted that he played football for about 40 minutes after the incident, he did not recall anyone touching him during the game and had no doubt that the redness was caused by Nogaki's punch. He recalled that after he went to the office to file a complaint, he was sent by the principal to the nurse, who noticed the redness, advised him that it was nothing and told him to take a shower.

Testifying in support of the Ys.' testimony were several students present in the gym class on that day. First of such students to testify was R.S., who was positioned five people to the right of Do. and Dr. A friend of the Ys., he stated that when he spoke with Dr. after gym class, Dr. told him that Nogaki hit him because he did not obey the dress right dress command. R. recalled that Dr. informed him that his father had said he did not have to do dress right dress if he did not want to.

On cross-examination, R. explained that the reason he asked Dr. what happened was because he had seen Nogaki in front of the two boys and had heard a "thump" which sounded like a hollow punch to the chest. Although he had not seen Nogaki hit either of the Ys., he had observed Nogaki pull his body or arm away from the Y. boys.

Also present in the gym class was 15-year-old W.J.M. He was standing in the front line with his back to the right of the Ys. until he heard a commotion which caused him to look around. Thus, he recalled that Nogaki went to the second line, stood between Do. and Dr. (approximately .two feet from them) and said in a louder voice, "I gave the command, dress right dress." Able to tell the difference between the twins (he was a good friend of theirs), he stated that Dr. said, "This is not a military school." He then observed Nogaki take a step back and hit Dr. in the chest with his fist, causing Dr. to be pushed back a couple of steps by the punch.

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M.'s further recollection involved Do. He related that Nogaki had advised Do. that he had given the dress right dress command. After Do. responded that it was not an army school, Nogaki tried to push Do.'s hands and head into the position. When Do. appeared to resist, M. recalled that Nogaki hit Do. in the same place on his chest as he had hit Dr., i.e., the upper portion of the center of the chest, causing Do. to move backwards. He recalled that Nogaki used his hand to hit the boys, that his fingers were in, but the fist was not closed, and that the thumb stood out. When Do. responded to the blow by saying, "Don't ever touch me again. Keep your hands off me," and did not keep quiet, Nogaki threw him out of class.

On cross-examination, M. demonstrated how Nogaki hit the boys. Using his right hand and a closed fist, he exhibited a short, choppy direct punch. Although he could not recall specifically with which hand Nogaki punched Dr., he did seem to believe that in regard to Dr., Nogaki used his right hand and his whole fist. Although in reference to Do. he indicated that Do. was hit with half a fist, he did not know which hand Nogaki used to hit him. He did not dispute the fact, however, that he may have stated in municipal court that Nogaki hit Do. with his left hand.

An evaluation of M.'s testimony requires that it be reviewed in light of his strong feelings for Nogaki. M. was a football player who was coached by Nogaki and, as a result, looked up to him. Apparently surprised and upset by the incident, his feelings were so strong for his football coach that he did not wish to testify against him. Not only did he indicate that he was about to leave home to avoid having to do so, but when asked what he meant by that statement, he became very upset and started to cry in the courtroom. He proceeded to leave the courtroom, slamming the door behind him. Although he obviously did not wish to testify, he stated that his statements were not influenced by anyone and were true.

Fifteen-year-old A.M., who was in Nogaki's gym class when he attended New Milford High School in the ninth grade, testified as to his observations of the incident. Standing in the first line, A.M. observed Nogaki walk toward the

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Ys. and heard Nogaki, in a voice louder than his usual and angry in tone, give them the dress right dress command. Although he did not hear the other words spoken clearly, he stated that when he heard Do. say, "Don't ever hit me again," he turned around and saw Nogaki walk away from Do., who was rubbing the upper part of the middle of his chest. In addition, he recalled that Do. pointed at Nogaki when he advised him not to hit him again and that Nogaki advised Do. to go in and get changed. He testified that he had not seen the incident between Nogaki and Dr. nor had he seen or heard a punch thrown.

On cross-examination, A. admitted that he has known the boys for six or seven years. He recalled that he discussed the incident with both brothers and that Do. told him that Nogaki had hit him. He stated, however, that his friendship with the Ys. had not influenced his testimony.

In an effort to refute the Ys.' version of the facts, as corroborated by several other students who were also in the gym class at the time, petitioner called G. B. to the stand to testify. A student in the gym class, G. recalled that he was standing to the left of Do. or Dr. (he could not tell the twins apart) when Nogaki gave the command. The Ys., who were not in line, did not obey the command and instead continued to talk to each other. After repeating the command several times, and getting no response, G. observed Nogaki walk over to the Ys. at his usual pace; he did not appear angry or out of control. Standing in between the Ys., approximately three feet away, Nogaki repeated the command. When the Ys. did not respond (apparently, they did stop talking), G. observed Nogaki (seemingly to place them back into line), with very little force, take the front side of his arm and simultaneously push them into line. Apparently, Nogaki's arm came into contact with the middle of each boy's chest, causing each to be placed back in line. Although G. did not recall either boy resisting, he did recall that the boy nearest to him said, "What is this, military school? Don't touch me again," and that Nogaki asked the boy closest to him to get dressed. G. did not recall any further contact between the Ys. and Nogaki.

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On cross-examination, G. indicated that Nogaki made physical contact with both boys. Although he did not remember hearing a "thump," he did recall Nogaki touching the boys at the end of the breastbone and the beginning of the abdomen. More specifically, G. observed Nogaki, using his right arm and an open hand, move his arm forward, thereby touching the boy closest to him with his elbow and the other boy with his wrist. G. was not sure if the center of the chest was touched.

In a further effort to refute the Ys.' testimony, respondent relied on the testimony of Mary Jean Sokolik, employed by petitioner as a physical education teacher for six years. In this capacity, she shared the gym with Nogaki, instructing the girls' gym class, which faced the north wall, while Nogaki's boys' gym class faced the south wall. Sokolik faced her class and the south wall and Nogaki, who faced the north wall. She was approximately 45 feet away from the boys in Nogaki's class.

Positioned in this manner, Sokolik saw Nogaki's class standing and heard Nogaki give the dress right dress command. She was distracted by Nogaki's class when she heard him raise his voice. She then observed him approach and apparently speak to one of the Y. boys, who she believed was not following his directions. Although Nogaki yelled something, she did not hear the words. Moreover, she heard Nogaki give the command only once and did not hear either of the boys talk back to him. She did state, however, that she observed one of the Ys. approximately three feet out of line and that the other boy was apparently not doing what Nogaki had requested. (She did not know what caused one of the Ys. to be out of line.) It was her testimony that she saw one of the Ys. leave the classroom and did not see Nogaki place his hands on or strike either of the boys. She admitted, however, that from her vantage point the backs of the boys blocked her view of Nogaki and, thus, she could not see what Nogaki did with his hands and could not testify as to whether Nogaki touched the students.

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Testifying on behalf of Nogaki was Elizabeth Titunik, the school nurse at the high school for the last 18 years. She recalled that Dr. came to her office around 11:15 a.m. on October 16, 1981 and advised her that the vice principal had sent him to have her examine his chest. (On cross-examination, she recalled more specifically that Dr. told her that the vice principal had sent him because he was hit in the chest.) Although Dr. advised her that he had been playing football a couple of weeks before and had hurt his chest, Titunik stated, on cross-examination, that she believed Dr. had been sent to her office regarding a separate chest injury. In essence, she believed Dr. actually said he had been injured in football two weeks ago and had been hit again that day. Titunik recalled that Dr. did not complain when she ran her hand over his chest (he did complain, apparently, about the center, upper portion of his chest) and indicated that, although she observed no marks, she saw a slight bit of redness which appeared as if Dr. had been rubbing his chest. She concluded that Dr. did not need medical attention and advised him to take a long, hot shower. On cross-examination, Titunik clarified her observations. She stated that on the basis of what she saw she could not rule out the conclusion that Dr. received a punch; however, although marks sometimes show up later, there is usually a distinct mark prior to a bruise.

In a further effort to counter the version of the facts presented by petitioner, Douglas Nogaki assumed the stand on his own behalf. Employed by petitioner as a teacher of physical education, driver instruction and health education for the last 13 years, Nogaki explained the class routine. He indicated that he takes attendance first, then has the boys stand at attention, and then gives the dress right dress command. On the day in question, Nogaki recalled that he was standing in front of the first line, with his attendance book in hand, when he gave the command two times. Observing that the Ys. (whom he could distinguish) were standing out of line talking, he went through the first line and approached them. Standing approximately two feet in front of Do. and directing his comments to him, he recalled advising Do., "You are supposed to be in line and in a dress

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right dress position." When Do. did not respond (Nogaki believed Dr. stepped back into line at some point), Nogaki indicated that he placed him back in line by putting the front of his left hand on Do.'s sternum area. Although Do. did not physically resist his efforts, he recalled that Do. said, "What is this, a military school?" Nogaki indicated that he told Do. that if he gives him "lip service," he would ask him to leave the class. Nogaki stated that after Do. was back in line, he still failed to assume the dress right dress position. When he told Do. to do so and Do. failed to respond, Nogaki assisted him. More specifically, he put Do.'s hands in the proper position and placed his fingers on Do.'s left cheek in order to turn Do.'s face to the right. Do. responded by advising Nogaki not to put his hands on him since it was not a military school. Nogaki told Do. to leave and get dressed. Although Do. complied with Nogaki's request to leave, as he left he apparently advised Nogaki not to put his hands on him again since it was not a military school. In sum, Nogaki stated that he had no intention to hit, hurt or punch Do. and had, as his only purpose, the intention to show him the dress right dress position. Since Do. would not budge, he took it upon himself to help him. He recalled that after the incident, Do. asked to make a phone call. Although he informed Do. that he was not allowed to do so until class was over, about 20 minutes later and prior to the end of class, Do. took it upon himself to leave the classroom.

Testifying in regard to Dr., Nogaki indicated that Dr. did not obey the command. He stated, however, that he never spoke to Dr. directly and did not lay a hand on him, even in order to assist him in the dress right dress position. He recalled that Dr. played touch football during the class.

In conclusion, Nogaki recalled that the incident, which lasted about two minutes, confused him since he could not understand what the boys were doing. He did not perceive himself as out of control and claimed that he was not attempting to discipline them.

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On cross-examination, it became apparent that Nogaki has a wrestling and football background. Nogaki, five foot, seven inches tall and 170 lbs., admitted to being in good shape and "a relatively strong guy." Since the Y. boys are approximately five feet to five feet, two inches tall and approximately 110 lbs., he admitted that he is substantially stronger and heavier than they. Having had some training in karate, he considered himself, however, to be disciplined and self-controlled. In fact, he stated that he is displeased by lack of discipline.

Of note to this court is the fact that Nogaki indicated that, although the Ys. had been instructed in the command (the class was instructed in the command approximately ten to twelve times during the school year), knew what they were supposed to do, and had performed properly prior to October 16, he did not know that the Ys. understood what to do. Although noting that they were defiant, he contended that his physical response had an instructional purpose, i.e., to demonstrate and instruct Do. in the proper position. Although he initially stated that he always used physical means to get students to assume correct positions, he indicated during his later testimony that he assumed Do. understood the command and was actually disobeying a direct order. Although familiar with the procedure for dealing with defiant children (see P-3 in evidence) and the distinction between an individual who tries to perform and is not performing correctly and an individual who simply refuses to comply, he admitted that his response to the defiance was to physically place Do. back in line. On further questioning, he admitted that during the exchange with Do., he felt he was losing control of the class and that he did raise his voice to Do. Although Nogaki was somewhat unclear in certain of his responses, it became apparent that he likes to handle disciplinary problems himself, gets obedience through physical action and, in this situation, felt he had no alternative but to use this physical method and his own "channels."

Nogaki stated on cross-examination that the Ys. had been disciplinary problems and contended that the transcript of a prior proceeding should have reflected

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this rather than the statement which appeared in the transcript to the effect that they were not problems up until this point. More specifically, on redirect, Nogaki alleged that there had been constant problems with them in class. They came late to the floor for attendance and lagged behind when the class had gym outside. In fact, he indicated that they demonstrated an attitude problem (apparently, he sent a progress report to the Ys. in reference to their attitude prior to the incident), which he believed could become a disciplinary problem if not corrected.

More to the point, Nogaki contended that the Ys. did not tell the truth. He attributed this to the manner in which they were brought up, believing that they were brought up not only to do just what they wanted, but to lie.

In evaluating the testimony in regard to corporal punishment of Dr.Y., this court has considered and found plausible the version of the facts presented by Dr.Y. Dr. appeared to this judge to be a credible witness who could recall with some degree of specificity the incident in which Nogaki punched him in the chest. Moreover, his testimony was corroborated in substantial measure, and, in regard to the salient points, by the testimony of his brother Do. In addition, his testimony was supported by the statements of R.S., who indicated not only that Dr. had advised him that Nogaki had hit him because he did not obey the dress right dress command, but that, although he had not seen Nogaki hit either of the Ys., he heard a "thump" which sounded like a hollow punch to the chest. As alluded to above, of particular importance to this court was the testimony of W.J.M., who indicated that Nogaki took a step back and hit Dr. in his chest with his fist, causing Dr. to be pushed back a couple of steps. This testimony was particularly impressive to this court in light of the fact that W.J.M. obviously struggled with his obligation to testify based on his strong feelings for Nogaki. Moreover, despite his reluctance to testify, in what was perceived by the court as a desire to protect his coach, he admitted that his statements were true and not influenced by anyone.

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The court has similarly considered the testimony adduced in regard to corporal punishment as it relates to Do.Y. In so doing, the court has found Do.'s testimony to be credible and worthy of belief. Do. presented a rather clear and concise picture of his interaction with Nogaki. Moreover, he did not hesitate to clarify for the court his part in the exchange, as well as the statements that he made to Nogaki. While he could not recall the precise sequence of events that day, his testimony seemed honest, forthright and credible. Quite simply, it had the ring of truth. Moreover, Do.'s testimony was corroborated by his brother Dr.'s. In addition, it was corroborated by the testimony of W.J. M., who recalled that Nogaki hit Do. in the same place on his chest as he had hit Dr. Further corroboration came by way of the testimony of A.M., who recalled that he turned around and saw Nogaki walk away from Do. who was rubbing the upper part of the middle of his chest.

In order to evaluate the veracity of the charges of corporal punishment, this court has considered the import of the testimony of the witnesses presented by respondent in his effort to refute the charges. Clearly, the testimony of Mary G. Sokolik, who admitted that since her view was blocked by the backs of the boys she was unable to see whether Nogaki touched the students, is of no moment. Similarly, the testimony of Elizabeth Titunik, the school nurse, is of no aid to respondent's cause. Although she concluded that Dr. did not need medical attention (she advised him only to take a long, hot shower), she could not, on the basis of what she saw, rule out the fact that Dr. had been punched. In fact, even though she indicated that there is usually a distinct mark prior to a bruise, she acknowledged that marks sometimes show up later. In sum, her testimony to the effect that Dr. complained of an injury to his chest and that there was in fact a slight bit of redness (albeit this could be the result of Dr. having rubbed his chest) did not lend support to Nogaki's position. More to the point, and worthy of review,

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is the testimony of G.B. While his testimony was not supportive of petitioner's contention that Nogaki punched both Ys., he did state that Nogaki made physical contact with both boys. He testified that Nogaki used the front side of his arm in order to push both boys simultaneously into line and that Nogaki's arm came in contact with the middle of each boy's chest, causing them to be placed back in line. In effect, G. revealed that Nogaki made physical contact with both boys in an effort to get them to do what he wanted. Thus, while G.'s testimony indicated substantially less contact than that which was presented by petitioner's witnesses, it cannot be viewed as an absolution for Nogaki.

This court in evaluating the nature of the incident is therefore left with the testimony of Douglas Nogaki, who assumed the stand on his own behalf. Nogaki claimed that Do. was out of line and refused to get back in line after being ordered to do so. In response, he placed Do. back in line by putting the front of his left hand on Do.'s sternum area. Moreover, when Do. refused to assume the dress right dress position he "assisted him," by placing Do.'s hands in the proper position and his own fingers on Do.'s left cheek in order to turn Do.'s face to the right. According to Nogaki, the above constituted his only physical contact with either of the boys.

This court has carefully evaluated Nogaki's testimony and finds it to be incredible and unworthy of belief. Particularly unimpressive and difficult to swallow was the explanation given by Nogaki to the effect that his physical response was of an instructional nature. Not only did Nogaki admit that the Ys. had been instructed in the command on a number of occasions, knew what they were supposed to do and had performed the command properly prior to October 16, but he acknowledged at a later point in his testimony that Do. understood the command and that the Ys. had actually disobeyed a direct order. Thus, far from being an instructional effort, it is clear from his testimony that his physical response of placing Do. back in line was in reaction to the defiance. Further support for this conclusion may be gleaned from Nogaki's testimony in regard to discipline. Although Nogaki's testimony was filled with inconsistencies and contrary positions, what became apparent from it was the fact that Nogaki believed that he had no alternate means of obtaining compliance from the Y. boys short of the use of a

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physical method, that he obtained Do.Y.'s compliance, which Do. was withholding, through the use of a physical mechanism and, more generally, that he apparently relies on physical action in order to obtain obedience. In sum, given the fact that he felt that the Ys. were being insubordinate, that he was losing control of the class, that he raised his voice in order to discipline the Ys., and further that he believed that it was necessary to handle his own disciplinary problems, this court must agree with petitioner that Nogaki's contention that he was simply instructing the Y. boys is "absurd." Thus, Nogaki's testimony, fraught with confusion, inconsistencies and lacking in credibility, not only does not help support his version of the facts but in essence serves to bear out the version of the incident recounted by petitioner's witnesses.

Based upon the demeanor of the witnesses, as well as an assessment of the testimony and evidence presented, this court finds that:

1. On or about October 1981, Douglas Nogaki commanded Do.Y. to assume the dress right dress position. When Do. continually refused to assume said position, Nogaki punched Do. in the chest, knocking him back and off balance.

2. On or about October 1981, Douglas Nogaki, a gym teacher, commanded Dr. Y. to assume the dress right dress position. When Dr. refused to assume the position and did not obey the command, Nogaki punched him in the upper part of his chest, causing him to be thrown back one or two feet. The next day Dr. had a black and blue mark about two inches long and one inch wide as a result of the punch.

3. On or about October 1981, Douglas Nogaki attempted through physical contact to force Dr. into the dress right dress position.

4. On or about October 1981, Douglas Nogaki attempted through the use of physical means to place Douglas Nogaki in the dress right dress position.

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CONCLUSIONS OF LAW

Given the above discussion and findings of fact, at issue is whether Nogaki's conduct constitutes corporal punishment. N.J.S.A. 18A:6-1 provides:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amount of force as is reasonable and necessary:
>
> (1) to quell a disturbance, threatening physical injury to others;
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
> (3) for the purpose of self-defense; and
> (4) for the protection of persons or property;
>
> and such acts, or any of them, shall not be construed to consitutute corporal punishment within the meaning and intendment of this section.

There is no question that the conduct described by each of the Y. boys, and found as fact by this court, clearly amounted to corporal punishment in violation of the above-cited statute. Mr. Nogaki's administration of discipline to the Ys. by means of punching them in the chest and forcing them into a certain position in order to get their obedience, is certainly the very behavior prohibited by the corporal punishment statute. Moreover, it is clear that his actions do not fall within those provisions of the statute which permit reasonable and necessary use of force. Based on the fact that this court has determined that the preponderance of the credible evidence established that the charges against Mr. Nogaki were true, this court need not consider whether Nogaki's own version of the events, to the effect that he was simply instructing the boys in the dress right dress

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position, if believed, would contravene the statute. This court notes only that if this instruction were done in an unreasonable and unnecessary manner it would constitute force in violation of N.J.S.A. 18A:6-1.

Based on this court's conclusion that Mr. Nogaki has inflicted corporal punishment, the sole issue to be decided is whether Mr. Nogaki should be removed from his tenured position or be subject to some other penalty.

In order to assess the proper penalty, it is necessary to take into consideration the nature of the offense, any mitigating circumstances and the teacher's performance record. In the Matter of the Tenure Hearing of William H. Kittell, 1972 S.L.D. 535, 541. In this matter, the court has considered the nature of the offense in light of the circumstances in which it arose. While it goes without saying that each student has the right to freedom from offensive bodily touching, except under certain prescribed circumstances, this court notes that the touching herein occurred in a gym class which by its very nature allows for more physical contact than a strictly academic setting. There is certainly more physical interaction among the students and the teacher in such an active setting than there is in a structured classroom. With this as a background, the court further observes that respondent did not demonstrate a total lack of self-control nor did he seem to intend to inflict physical pain on the students. Rather, it appears that he punched the boys and used unwarranted force in an effort to get them to obey his command. While this action cannot be tolerated in any manner, the court notes that there is no indication that respondent's actions were premeditated, cruel or vicious or done with specific intent to inflict corporal punishment upon the students. See In the Matter of the Tenure Hearing of Portia Williams, OAL DKT. EDU 3808-80 (July 10, 1981) aff'd State Bd. of Ed. (March 24, 1982), aff'd Superior Court of New Jersey, Appellate Division, Docket No. A-4036-81 (December 15, 1982). It seems more likely than not that respondent was simply frustrated in his efforts to get the boys to comply with his orders and took an inappropriate action in response. Moreover, there is no indication in the record that respondent's actions had any lasting effect on the continued operation of the school or the students involved.

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I **CONCLUDE** that the conduct of respondent as herein shown, although serious and unprofessional, is not sufficiently flagrant to warrant the forfeiture of his tenure rights. Therefore, I **ORDER** that respondent be continued in his tenure status as an employee of petitioner. However, in order to impress upon respondent that his actions are not to be condoned, I **ORDER** that respondent be denied his salary increment for the 1983-84 school year and further that respondent's salary be reduced for the 1983-84 school year by the forfeiture of one month's salary.

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

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

August 5, 1983
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

Seymour Wilens
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 15, 1983
DATE

Elizabeth Rogers, Cg
FOR OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 1942-82

LIST OF WITNESSES

FOR PETITIONER:

Do. Y.
Dr. Y.
R.S.
W.J.M.
A.M.

FOR RESPONDENT:

G.B.
Mary Jean Sokolik
Elizabeth Titunik
Douglas Nogaki

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LIST OF EXHIBITS

P-2 Witness form for R.S., date of incident, October 16, 1981

P-3 Corporal punishment policy of the Board of Education of New Milford #320 (2 pages)

R-4 Memo from Elizabeth Titunik, undated but in reference to October 16, 1981

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IN THE MATTER OF THE TENURE	:	
HEARING OF DOUGLAS NOGAKI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF NEW MILFORD,	:	
BERGEN COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that each party filed, in turn, primary and reply exceptions all in a timely fashion.

The Board primarily excepts only to the penalty set down in the initial decision herein by Judge Reiner. The Board pleads for dismissal of respondent contending that the nature and seriousness of the conduct of the teacher warrants such dismissal in order to protect the public school pupils of the Borough of New Milford. The Board cites, inter alia, In re Frederick L. Ostergren, 1966 S.L.D. 185. Alternatively to dismissal, the Board requests a remand in order to expand on the evidence in the record.

Respondent in reply exceptions argues that the cases cited by the Board are inapplicable to the present matter, further stating that there is no basis in the present case for imposing any penalty other than the anguish he has already been forced to endure.

Respondent's primary exceptions stress the humiliation and anguish allegedly already suffered by him and objects to the financial penalty imposed by the judge as unreasonable and unwarranted citing in particular Palmer v. Board of Education of Audubon, 1939-49 S.L.D. 183, 188 regarding the testimony of children. Respondent alleges that the judge failed to properly examine the whole context of the incident and the defiance of the "Y" brothers to his directives. Respondent argues that there is no support for the finding of corporal punishment in this case.

Lastly, respondent argues that the administrative tribunal in this matter is bound by the doctrine of collateral estoppel in view of a trial on December 9, 1981 before the Honorable Dominick Preziosi, J.M.C.

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The Board in reply exceptions refutes the arguments advanced by respondent in his primary exceptions. The Board argues that the findings by the judge of physical contact by the teacher with the pupils is amply borne out by the record. Further, the Board contends that the judge properly considered the credibility of the children as witnesses, weighing and evaluating their testimony with caution. The Board argues that the doctrine of collateral estoppel must be disregarded as being improperly raised and based upon the transcript of a municipal court proceeding never introduced into evidence and therefore not a part of the present record. The Commissioner cannot agree in entirety with the exceptions filed by either party.

The Commissioner finds no merit in the Board's request for a remand and finds nothing in the record or law that would have prohibited it from raising such arguments before the judge prior to the close of the trial. Respondent's arguments that the testimony and credibility of children be viewed with caution, in the opinion of the Commissioner, were factors weighed and considered properly by the judge. The Commissioner finds no merit in respondent's argument of collateral estoppel. Such argument is based upon an attempt to introduce into the record the transcript of a municipal trial not submitted into evidence and not now considered by the Commissioner. Consideration will now be given by the Commissioner to respondent's arguments that no punishment is warranted in the present case.

An examination of the entire record, including a close reading of the initial decision, the documents in evidence, the testimony of witnesses, the arguments of law and the numerous exceptions filed by the parties, convinces the Commissioner that the teacher herein resorted to the use of unlawful physical force when faced with the recalcitrant behavior of the "Y" brothers. There can be no denial of the use of force by the teacher in this matter in an injudicious attempt to compel the pupils in question to obey his directives to dress right dress, by a blow to the chest of the pupil followed by the physical manipulation by the teacher of the pupil's arm and head in an attempt to compel a semblance of his directive. The Commissioner has been faced with similar circumstances in prior cases and refers in particular to In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, 1969 S.L.D. 159, wherein he said:

> "***While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not

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only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 186 The Commissioner said further, In the Matter of the Tenure Hearing of David Fulcomer, 1962 S.L.D. 160, 162, remanded State Board of Education 1863 S.L.D. 251, decided by the Commissioner 1964 S.L.D. 142, affirmed State Board of Education 1966 S.L.D. 225, reversed and remanded 93 N.J. Super. 404 (App. Div. 1967), decided by the Commissioner 1967 S.L.D. 215,

> '***that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discripline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that "it was one of those things that just happen"***. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibilty for exemplary restraint and mature self-control.'

Thus, when teachers resort 'to unnecessary and inappropriate physical contact with those in their charge [they] must expect to face dismissal or other severe penalty.' In the Matter of the Tenure Hearing of Frederick L. Ostergren, supra." (at 172-173)

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The Commissioner finds these words set down above to be directly applicable to the matter at hand. The Commissioner does not condone the recalcitrant and defiant attitude exhibited by the pupils herein and finds no merit in such behavior. By the same token, the Commissioner has never before nor does he now condone the use of force outside the prescription set down in N.J.S.A. 18A:6-1. For the foregoing reasons the Commissioner finds that respondent has exhibited conduct unbecoming a teacher sufficient to warrant his removal from the School District of the Borough of New Milford. The monetary punishment fashioned by Judge Reiner is accordingly set aside. Respondent shall be and is removed from his tenure status and the employ of the Board as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 26, 1983

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 8756-82
AGENCY REF. NO. 345-8/82A

LOUIS BORRELLI,
Petitioner
v.
BOARD OF EDUCATION OF THE
BOROUGH OF RUTHERFORD,
BERGEN COUNTY,
Respondent

APPEARANCES:

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

H. Ronald Levine, Esq., for respondent

Record Closed: July 22, 1983 Decided: August 9, 1983

BEFORE WARD R. YOUNG, ALJ:

Louis Borrelli, a tenured guidance counselor, alleged action of the Rutherford Board of Education (Board) in permanently withholding his salary increment at its June 14, 1982 public meeting was arbitrary, capricious, retaliatory, discriminatory, and too severe; lacked a rationale basis in fact; and is barred by the doctrine of laches. He seeks reinstatement of the increment and back pay.

The Board avers its action was a proper exercise of its discretionary authority and seeks dismissal of the petition.

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The matter was transmitted to the Office of Administrative Law on September 21, 1982 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on December 22, 1982, and a hearing was held on June 2 and 21, 1983 at the Office of Administrative Law in Newark. The parties filed simultaneous briefs and the record closed upon receipt of same on July 22, 1983. Responsive briefs were waived.

A review of independently submitted Stipulations of Fact by the parties results in a determination of the following joint stipulations, adopted herein as FINDINGS OF FACT:

1. Borrelli is a tenured guidance counselor employed by respondent, Rutherford Board of Education.

2. On June 14, 1982, respondent resolved to withhold petitioner's employment and adjustment increments for the 1982-83 school year.

3. As a result of said action, petitioner's 1982-83 salary is being maintained at the annual rate he received for the 1981-82 school year.

4. Respondent informed petitioner that its withholding of increment action was based on two grounds:

   (a) an unauthorized absence; and
   (b) an unauthorized acquisition and use of the Minimum Basic Skill (MBS) test.

5. The absence, for which respondent resolved to withhold petitioner's 1982-83 increments, took place during the course of the 1980-81 school year.

6. The acquisition and use of the MBS test, for which respondent resolved to withhold petitioner's 1982-83 increments, took place during the course of the 1980-81 school year.

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7. In or about the spring of 1981, respondent resolved to grant petitioner an employment and adjustment increment for the 1981-82 school year.

8. During the school year 1980-81, the MBS test was administered on March 24 and March 25.

9. During the course of the 1980-81 school year, Carol Cohen (another teaching staff member in respondent's employ) had an unauthorized absence from her duties. Despite a recommendation from her building principal to dock a day's pay for said unauthorized absence, Cohen did not suffer monetary penalty, nor was she subjected to a withholding of increment action.

10. During the course of the 1980-81 school year, Richard Start (another teaching staff member in respondent's employ) had unauthorized absences from his duties. He took with him three students during the period of unauthorized absence. The Superintendent of Schools informed the Secretary of the Board of Education to dock Start two days pay for his unauthorized absences. This was in fact done; however, Start was not subjected at any time thereafter to a withholding of increment action arising from the incident.

RELEVANT TESTIMONIAL EVIDENCE

Borrelli testified that he was absent from his duties on January 5, 6, 8 and 9, 1981 (January 7, was a snow day) because he took a spontaneous trip to Montego Bay with his wife for the purpose of achieving a reconciliation with her. He called the assistant principal prior to his departure to advise him of his anticipated absence due to illness, said illness being that he was mentally distraught. His principal recommended that Borrelli be docked for his absences, which was endorsed by the Superintendent. Borrelli concurred with the disciplinary action.

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The principal testified that teaching staff member Richard Start and three pupils were absent during the 1980-81 school year to put on a show in another town. The program was not sanctioned as a school sponsored event. Start was docked for his absence.

The principal also testified that teaching staff member Cohen was denied a personal day request to attend a Bar Mitzvah. She had no personal day available to her. She took the day off and called in sick. The principal recommended "docking," which was endorsed by the Superintendent, but never was done due to an office foul-up, according to the Superintendent's testimony.

The principal also testified that teaching staff members Trotter and Magdich were absent from their duties on a Monday during the 1982-83 school year, having been delayed in returning from a weekend ski trip to Vermont, on which they were accompanied by the Board president, a Mrs. Klein. Consistent with prior recommendations, the principal recommended a "docking," which was again endorsed by the Superintendent before and after a consolidated grievance process. The Board reversed, according to the Superintendent's testimony, on the basis of Mrs. Klein's indication that both were ill.

Borrelli also testified that the MBS tests were administered on March 23 and 24, 1981. He secured a copy of the sixth grade test on March 31 at the request of his sister, a resident of New York, who had an interest in reviewing it. He brought it home and returned it on or about April 3, 1981. Borrelli's own children were in attendance in another New Jersey school district in grades 5, 6, and 10. (See R-8, p. 33).

The record reveals conflicting testimony on how Borrelli secured a copy of the test. It is undisputed the Borrelli was told not to take the copy from the Office of Superintendent's administrative assistant as it was his sole copy. Borrelli finally received a copy from an elementary guidance staff member, who testified that Borrelli told her he had the approval of the Superintendent's administrative assistant to secure it. Borrelli allegedly told her he had the administrative assistant's copy, but had to return it because it was his sole copy. (See R-8, p. 30).

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The administrative assistant testified that his secretary called him at home to advise him of Borrelli's request for the test. He told her that Borrelli could have a copy after the administration of make-ups for pupils absent on March 23 and 24.

The secretary to the administrative assistant testified that she indeed called the administrative assistant concerning Borrelli's request, and also memorialized the incident and voluntarily submitted same to the Superintendent, which was received by him on April 3. She states the incident occurred on April 1, which coincides with the testimony of the guidance staff member from whom Borrelli secured the test, but conflicts with Borrelli's testimony that it occurred on March 31. The guidance staff member's testimony conflicts with her own memo to the Superintendent, which states a belief the incident occurred on March 26. (See R-7).

The Superintendent testified that he spoke to his administrative assistant, who advised him he did not authorize Borrelli to take the MBS test from the school. The Superintendent also testified that he called Borrelli on the phone; advised him that he was upset that Borrelli used the administrative assistant's name to secure the test and that Borrelli was not authorized to take the test from school. The Superintendent further testified that he sent a memo to Borrelli on April 3 after his phone conversation with him, which led the Superintendent to believe that Borrelli took the test home after the phone conversation. (See R-5).

Borrelli testified in deposition that he took the test home on April 3 and returned it on the following Monday (April 6). (See R-8, pp. 34, 35).

Borrelli also testified that MBS test results were invalidated because a principal had prompted teachers to prepare their students prior to the MBS test administration, and believed that all personnel involved had letters of reprimand placed in their personnel folders. The principal involved testified that the tests were in fact voided due to the technique used in administration which tainted the results. No questions or answers were given to the pupils, but the principal said she over-emphasized the avoidance of careless pupil mistakes. The disciplinary action taken against her involved public apologies and a

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"probation placement" by the Board. She testified that involved teachers were reprimanded and placed on probation. There were no increment withholdings.

It is not disputed that MBS make-up tests were administered during the week of March 30.

The Superintendent also testified that his personal counsel advised him not to take disciplinary action against Borrelli until after the resolution of litigation of a Civil Rights suit in Federal court, which was initiated by Borrelli against the Superintendent and the Board. He also testified that legal counsel for the Board gave the same advice to the Board.

A review of the entire record in this matter results in the following FINDINGS OF FACT:

1. The disciplinary action of "docking" Borrelli for his absences was consistent with administrative recommendations and actions for similar indiscretions of other teacher staff members.

2. The process of reducing teacher compensation through the docking process by administrative fiat is ultra vires, but is not at issue in this dispute.

3. The reversal by the Board of the Trotter and Magdich dockings, although inconsistent with dockings by administrative fiat, was an exercise of the Board's discretionary authority. No finding shall be made as to whether that exercise was abused as it is not at issue here.

4. Borrelli was granted his salary increase for the 1981-82 school year, following the causes of action given by the Board for its action in withholding Borrelli's salary increments for the 1982-83 school year.

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5. Borrelli implied he had the permission of the administrative assistant to secure the MBS test when he requested same of the guidance staff member.

6. Borrelli did not have permission to take the MBS test copy prior to the administration of the MBS make-ups.

7. Borrelli had possession of the MBS test copy during the administration of make-ups.

8. Borrelli did not take the MBS test copy home until after the administration of make-ups.

9. Borrelli took the MBS test copy home after being advised by the Superintendent that he was not authorized to do so.

DISCUSSION

The inability of counsel to cooperate in the litigation process created delays in the adjudication of this dispute. The Board's efforts to seek discovery to support its salary withholding action rationale of a misuse of the MBS test copy were thwarted by court's Decision on Motion, which denied said discovery because of its irrelevance and untimeliness. The time for the Board to seek such supporting evidence was prior to its withholding action, not after the filing of a Petition of Appeal to contest the action.

A Decision on Motion of the Board objecting to the direct testimony of petitioner concerning settlement discussions in the civil rights action filed in Federal court, at which Borrelli's January, March, and April 1981 conduct relating to his absences and the MBS test copy were presumably interjected, overruled the Board's objection on the basis of possible relevance to the petitioner's allegation that the withheld action was retaliatory.

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Considerable time was consumed relating to releases executed as the result of a sealed settlement in the Federal action. Only the Board's release is in evidence. (See C-1).

A review of C-1 clearly established it to be a general release of all claims related to the civil rights action which was triggered by the Board's determination to appoint someone other than Borrelli to a position he sought. The reasons given by the Board for its withholding action were not issues in that action. Borrelli, there, was the plaintiff.

Borrelli argues that the withholding action was ultra vires because it was taken after the 1981-82 school year began for reasons which occurred during the 1980-81 school year. Said action was taken prior to the beginning of the 1982-83 school year in which the increment withholding was effective. The Board asserts it waited until after the resolution of the civil rights litigation as the result of legal advice. Borrelli argues for the application of the "doctrine of laches."

Laches is a neglect to assert a right or claim which causes prejudice to an adverse party. It may be invoked to dismiss matters in which such neglect is unreasonable and unexplained. Wooded Shores Property owners Ass'n., Inc. v. Mathews, 37 Ill. App. 3d 334, 345 N.E. 2d 186, 189; Lake Development Enterprises, Inc. v. Kojetinskyk, Mo. App, 410 S.W. 2d 361, 367; People ex rel. Mulvey v. City of Chicago, 292 Ill. App. 589, 12 N.E. 2d 13, 16.

The only prejudice to Borrelli caused by the delay in the Board's withholding action, as perceived here, is that the amount of salary increase withheld for 1982-83 may have been greater than Borrelli's salary increase for 1981-82. The Board's delay was not otherwise unreasonable and was indeed explained as following counsel's advise. The State Board of Education also said in Edith E. Trautwein v. Board of Education of the Borough of Bound Brook, 1979 S.L.D. 876 at 877: "So in the case of withholding an increment, past conduct over a reasonably relevant period of time may properly be considered by a board of education in determining whether or not a teacher's increment should be withheld."

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Relative to Borrelli's argument that the Board's withholding action was ultra vires, he cites N.J.S.A. 18A:29-14; Board of Education of the Northern Highlands Regional High School District v. James Martin, 1977 S.L.D. 886, aff'd State Board 1978 S.L.D. 1031, rev'd App. Div. Sup. Ct. 1979 S.L.D. 852; and Greenway v. Camden Bd. of Ed. 129 N.S.L. 461 (E. & A. 1942).

N.J.S.A. 18A:29-14 provides:

> Any board of education may withhold, for inefficiency or other just cause, the employment movement, or the adjustment increment, or both, of any member in any year. . . . It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

The court in Northern Highlands reversed the State Board, which had affirmed the Commissioner's decision to set aside the Board's withholding action, in holding "that the Commissioner's determination was hyper-technical and that the substance of the statutory requirement is satisfied when the school board acts . . . prior to the commencement of the school year involved. . . ."

The Court in Greenway said: "Increments, as used here, are the periodic, consecutive additions or increases which do not become a part of the salary of a teacher until they accrue under the rule making such a provision. . . ."

The Board counters by citing Trautwein.

In construing the intent of the Legislature, I cannot agree with Borrelli's interpretation. N.J.S.A. 18A:29-14 clearly states "in any year." If they intended that such action must be taken during the year the cause of action occurred, to be effective the school year following the cause of action, they could have said so. If this were not so, the absenteeism of Trautwein prior to the year in which the Board acted to withhold her increment would have been disregarded. "Prior to the commencement of the school year

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involved," as stated in Northern Highlands, is believed here to simply mean the Board may not act to withhold an increment during a school year after that school year begins, as the salary increase indeed would have accrued.

In the instant matter, the Board acted on June 14, 1982 to withhold Borrelli's salary increase for 1982-83. The anticipated increase certainly would not have accrued until July 1, 1982, the beginning of the 1982-83 school year.

Additional FINDINGS OF FACT and DISCUSSION follow as they relate to each issue framed in the Prehearing Order.

DID A RATIONAL BASIS IN FACT AND IN LAW EXIST FOR THE BOARD'S ACTION IN WITHHOLDING PETITIONER'S INCREASE FOR THE 1982-83 SCHOOL YEAR?

I FIND the reason of Borrelli's January 1981 absences to be irrational, discriminatory, and indeed selective. Borrelli's reasons for his absence were fully disclosed by him with the expectancy of confidentiality prior to his absence, and were indeed more genuine than the reasons for the absence of other teaching staff members against whom there were no withholding actions. If Borrelli's absence was the only reason for the withholding of his increment, there would be no hesitancy here to set the Board's action aside.

Borrelli's conduct relating to the MBS test copy is a far more serious matter. The record does not support a finding of misuse of the test by Borrelli. There is no evidence to support a contention that Borrelli conveyed test content to his sixth grade child before the test was administered to that child in another New Jersey school district. Nor is there evidence that such a test was administered to that child after Borrelli had possession of it, or that the presumed request of Borrelli's out-of-state sister to review the test was a guise created by Borrelli to get the test.

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Yet, Borrelli indeed implied he had the administrative assistant's permission to secure the test, when in fact he didn't. Borrelli also testified in deposition that he indeed took the test home after being advised by the Superintendent that he was not authorized to do so. His conduct was insubordinate and sufficient cause in fact for the Board's withholding action. The authority of the Board to do so pursuant to N.J.S.A. 18A:29-14 is undisputed.

WAS THE BOARD'S ACTION RETALIATORY?

Since Borrelli had instituted a civil rights action prior to the causes of action for the Board's withholding action, the latter has all the earmarks of being retaliatory. Nevertheless, earmarks do not require such a finding. In addition to Borrelli's concession that the withholding action was contemplated at the time the Board executed its release in the civil rights matter (see Pb12), it is also clear that the Board contemplated such action prior to that time when it was advised by counsel to delay it.

I believe the Board would have acted to withhold Borrelli's increment for the 1981-82 school year had the civil rights matter not been in litigation, and therefore **FIND** that its action was not retaliatory.

WAS THE BOARD'S ACTION ARBITRARY CAPRICIOUS AND/OR TOO SEVERE?

Having found that the Board's withholding action was delayed on advice of counsel, and that said action was not retaliatory, **I FIND** that Borrelli has not met his burden of proof to support a finding of arbitrariness or capriciousness. Relative to the severity of its action, **I ALSO FIND** that Borrelli's unprofessional conduct associated with the MBS test copy incidents would have been sufficient ground for the certification of tenure charges. The withholding of his increment was therefore not too severe.

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SHOULD THE DOCTRINE OF LACHES BE APPLIED TO NULLIFY THE BOARD'S ACTION?

For reasons above, I **FIND** the doctrine of laches should not be invoked in bar of Board action.

COROLLARY ISSUES - SUA SPONTE

I am constrained to briefly address two corollary issues that were not framed at prehearing in order to bring same to the attention to the Commissioner, the Board, and its agents.

The Legislature has vested broad discretionary authority in local Boards to establish and amend rules to fulfill their statutory obligations. Said rules must, however; not be inconsistent with statutes or regulations. See N.J.S.A. 18A:11-1.

The Board has the authority to adopt and revise salary policies. The "docking" of teaching staff members for services not rendered due to absenteeism is a salary alteration. Said alterations are the sole responsibility of the Board. It appears that administrators are limited to recommending said action, which must be acted upon by the Board.

I also note the resolution approved by the Board which withheld Borrelli's salary increase. See P-6. It incorporates the granting of approval "for a permanent withholding of an increment and/or adjustment for the 1982-83 school year." The permanence of the action seems to indicate the intent of the Board to bind future Boards. Future Boards may not be so bound, and are free to exercise the discretionary authority vested in them by the Legislature that also gave that authority to the Board that exercised it in withholding Borrelli's salary increase.

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CONCLUSIONS OF LAW

In addressing the "doctrine of laches," it was indicated that the only prejudice caused by the delayed action of the Board is the possibility that the withheld salary increase for 1982-83 school year may have been greater than Borrelli's increase for 1981-82. If that be so, I believe that fairness requires that relief be granted.

The Board is **ORDERED** to compensate Borrelli in the amount of salary withheld for the 1982-83 school year which, if any, exceeded that which would have been withheld if the withholding action was effective for the 1981-82 school year, and to compensate him for that amount annually until such time as the Board may reinstate said increments.

Subject to the above, **I CONCLUDE**, consistent with the FINDINGS OF FACT and reasons expressed herein, that the Petition of Apppeal shall be and is hereby **DISMISSED**.

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

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OAL DKT. NO. EDU 8756-82

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

9 August 1983
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 15, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES

For petitioner:

Louis R. Borrelli, petitioner
William B. Bauman, principal
Anna Marie Amorelli, principal

For the Board:

Luke A. Sarsfield, Superintendent of Schools
Linda Verdino, Secretary
Roxana Cooper, Elementary Guidance
Joseph Loffredo, Administrative Assistant to Superintendent

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EVIDENTIARY DOCUMENTS

P-1: January 20, 1981 letter, Sarsfield to Borrelli
P-2: January 22, 1981 letter response to P-1, Borrelli to Sarsfield
P-3: June 1, 1982 letter, Sarsfield to Borrelli
P-4: June 15, 1982 letter, Sarsfield to Borrelli
P-5: June 17, 1982 letter, Auger to Borrelli, w/P-3 attached
P-6: Relevant June 14, 1982 Board minutes
P-8: April 3, 1981 Borrelli to Sarsfield memo
P-9: April 7, 1981 Sarsfield to Borrelli memo
P-10: April 9, 1981 Sarsfield to Borrelli memo

(P-7 not in evidence - marked for identification only)

R-1: February 10, 1981 letter, Sarsfield to Borrelli
R-3: April 3, 1981 letter, Sarsfield to Borrelli
R-6: April 3, 1981 Verdino memorialization
R-7: April 3, 1981 Cooper to Sarsfield memo with letter's notation
R-8: March 17, 1983 Borrelli's deposition (p. 38)

(R-2, R-4, R-5 not in evidence - duplicative or not submitted)

C-1: February 2, 1982 release is District Court litigation

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LOUIS BORRELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of the instant matter including the initial decision rendered by the Office of Administrative Law, Ward R. Young, ALJ.

It is observed that petitioner's exceptions to the initial decision and the Board's reply exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner has reviewed the exceptions filed by the parties and finds that the arguments advanced therein are essentially those which were made to the judge and addressed in the initial decision. The Commissioner incorporates said exceptions by reference herein.

In the Commissioner's judgment the facts and circumstances giving rise to the matter herein controverted warrant a modification of the judge's findings and conclusions set forth in the initial decision. The Commissioner finds and determines that the Board's action to permanently withhold petitioner's salary and adjustments increment for the 1982-83 school year, relying upon those reasons involving petitioner's conduct during the 1980-81 school year, is misplaced, improper and an abuse of its discretionary authority pursuant to the provisions of N.J.S.A. 18A:29-14 as amended.

The record of this matter clearly establishes that the Board's action in this regard was a conscious decision made for reasons which were self-serving and may not be condoned as a proper exercise of its legal authority pursuant to N.J.S.A. 18A:29-14. The Commissioner so holds.

Accordingly for the reasons set forth herein, the Commissioner hereby reverses those specific findings and recommendations of the judge which uphold the Board's authority to withhold petitioner's salary and adjustment increments for the 1982-83 school year based upon its assessment of his performance during the 1980-81 school year.

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The Board is hereby directed to restore petitioner's 1982-83 salary and adjustment increments which the record reveals were earned by him during the 1981-82 school year. It is further directed that the restoration of petitioner's salary and adjustment increments for the year in question be calculated in any salary or adjustment increment he may otherwise be entitled to receive on the Board's salary guide for the 1983-84 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 26, 1983

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 225-83
AGENCY DKT. NO. 448-11 82A

DOLORES KIMINKINEN,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP
OF RANDOLPH, MORRIS COUNTY
Respondent

APPEARANCES:

Robert A. Fagella, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Robert M. Tosti, Esq., for respondent
(Rand & Algeier, attorneys)

Record Closed: July 25, 1983 Decided: August 10, 1983

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

Petitioner, Delores Kiminkinen, appealed to the Commissioner of Education, alleging that respondent failed to renew her employment as a teaching staff member for the 1982-83 school year in violation of her tenure rights. The petition was filed on November 16, 1982 and on January 13, 1983, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held in this matter on March 15, 1983 at which time the following issues were isolated:

1. Was respondent's failure to renew petitioner's employment for the 1982-83 school year in violation of her tenure rights, pursuant to the provisions of N.J.S.A. 18A:28-5?

   a) Can petitioner's employment as a part-time teacher be counted towards the accrual of tenure as a full-time teacher?

Pursuant to the prehearing order, the parties provided the court with a stipulation as to all pertinent facts. They may be summarized as follows:

1. Petitioner was employed by the respondent, Randolph Township Board of Education, from September 1965 to June 1974 in both full-time and part-time teaching capacities;

2. Petitioner was employed by the respondent Board from September 1978 to June 1979 as a part-time contractual compensatory education teacher;

3. Petitioner was employed by respondent Board from September 1979 to June 1980 as a half-time contractual kindergarten teacher;

4. Petitioner was employed by respondent Board from September 1980 to June 1981 as a full-time contractual kindergarten teacher;

5. Petitioner was employed by respondent Board from September 1981 to June 1982 as a full-time contractual kindergarten teacher;

6. On or about June 1982 respondent Board effected a reduction in force of a large number of teachers, including petitioner. The legitimacy of this reduction in force is not in question;

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7. If petitioner is found to have full-time tenure in her teaching position, she is entitled to back pay and reinstatement retroactive to September 1982; and

8. The service relevant to the tenure claim made in this case can be charted for convenience as follows:

September 1978 - June 1979 (part-time hourly);
September 1979 - June 1980 (half-time kindergarten);
September 1980 - June 1981 (full-time kindergarten); and
September 1981 - June 1982 (full-time kindergarten).

Based upon these stipulated facts, the matter has been submitted on cross motions for summary decision. As outlined above, the issue for determination herein is petitioner's tenure status. In that regard, petitioner contends that given her employment history she is entitled to tenure in a full-time position. More specifically, she alleges that since she was employed full-time after three years and one day of continuous employment in the district, her tenure would be in a full-time position. Petitioner bases this conclusion on her contention that a teacher's employment status on the date tenure attaches determines the nature of the tenure and cites Kelly v. Bd. of Ed. of Chatham, 1981 S.L.D. _____(May 7, 1981 and September 18, 1981); Faro v. Bd. of Ed. of Riverdale, 1981 S.L.D. 111; Carlson v. Cranford, 1981 S.L.D. _____ aff'd 1981 S.L.D. _____ (May 1981), aff'd (N.J. App. Div., Dec., A4433-80-T3)(unreported), as well as Greiner v. Bd. of Shamong OAL DKT. NO. EDU 7590-82 (February 23, 1983), rev'd Comm. of Ed., (April 7, 1983) in support thereof. Petitioner contends that if this approach were not adopted, a teacher who was employed in a part-time capacity at any point while the statutory period necessary for tenure to attach was running would always be tenured in the lowest capacity in which she served, regardless of her status at the time a reduction in force was effectuated. Petitioner believes that "the inequity of such a situation would be exceeded only by the absurdity of the conclusion that such a teacher could never claim entitlement

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to a full-time position over any other individual, regardless of how long employed in a full-time status." "Once part-time, always part-time" would become the new talisman for boards bent upon eliminating tenure rights regardless of the reality of a teacher's employment." Thus, petitioner contends that unless her approach to tenure was to prevail, boards could be expected to insure that any teacher who is not yet tenured would be employed in a part-time capacity at some point during the period mandated by N.J.S.A. 18A:28-5 simply to guarantee that such individuals would never have a claim in the future to a full-time teaching position.

Respondent's argument is to the contrary. Respondent contends in the first instance that since Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) is not to be given retroactive application, petitioner's part-time service is unavailable for tenure credit. More specifically, respondent argues that petitioner cannot rely on the part-time hourly service in 1978-79 to help her tenure claim. Since that service was rendered during a time when it was generally understood that such service was nontenurable, and petitioner was neither before the court in Spiewak nor renewed for employment in Randolph in September 1982, respondent views that year as unavailable for tenure credit. It is, therefore, respondent's contention that without a consideration of petitioner's part-time service, she is left only with three academic years of service creditable to tenure and has simply no tenure status. In addition, respondent argues that a careful review of Zubkoff v. Madison Bd. of Ed. (N.J. App. Div., March 27, 1981, A-4516 - 79) (unreported) and Carlson, reveals that the ruling in Kelly will not withstand scrutiny. Thus, even if petitioner's part-time employment can be counted towards the accrual of tenure, petitioner has not served three full years and one day as a full-time teacher and, therefore, at best, would be entitled only to part-time tenure.

This court has considered the arguments presented herein. At the outset, it should be stated that it is now apparent that a teacher's part-time employment can be counted towards the accrual of tenure. Clearly, Spiewak reversed previous case and agency law which had held that certain remedial and supplemental teachers were not "teaching staff members" eligible for tenure pursuant to N.J.S.A. 18A:28-5. In essence, the court concluded that "public school teachers who provide part-time remedial or

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supplemental instruction to educationally disabled children may acquire tenure if they meet the specific criteria in N.J.S.A. 18A:28-5." Spiewak at 84. Focusing on the fact that the above-cited statute does not specify that employment during the three calendar or academic years must be full-time to be counted towards tenure, the court in Spiewak allowed part-time service to be used in calculating tenure employment under N.J.S.A. 18A:28-5. Not only did the court in Spiewak conclude that part-time employment can be counted towards the accrual of tenure, but it determined that the holding would apply to "all currently employed supplemental and remedial teachers." It was the conclusion in Spiewak that all such employees "should have their tenure eligibility calculated on the basis of this opinion from the beginning of their employment." Spiewak at 83, F.N. 2. It is clear, based on this language, and the fact that petitioner herein was employed through June 1982, that the holding in Spiewak is applicable to petitioner. Consequently, petitioner's service during the 1978-79 school year is calculable towards tenure in the same manner as any other teaching staff member who taught in a less than full-time capacity.

The sole remaining issue involves the status of petitioner's tenure as part-time or full-time. While it is noted that there are a number of administrative decisions which have addressed this issue and appeared to indicate that a teacher's employment status on the date tenure attaches determines the nature of the tenure (see e.g. Faro v. Bd. of Ed. of Riverdale, 1981 S.L.D. 111; Kelly v. Bd. of Ed. of Chatham, 1981 S.L.D. _____ (May 7, 1981 and September 18, 1981)), this court opines that the issue is governed by Carlson v. Bd. of Ed. of the Township of Cranford, Union County (N.J. App. Div., March 24, 1982 A-4433-80-T3) (unreported).*

* After this opinion was written and prior to publication counsel for petitioner provided the court with a copy of the Commissioner's decision in Carnathan v. Randolph Township Board of Education, decided July 18, 1983. I have reviewed that decision and find the Appellate Division decision in Carlson to be controlling. Therefore, notwithstanding Carnathan, I find that petitioner acquired tenure only in a part-time capacity since neither her full-time service nor her half-time service was itself sufficient to generate full-time tenure.

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In Carlson, appellant, certified to teach grades kindergarten through 8, was employed by respondent as a full-time teacher for the three school years between September 1973 and June 1976. After proper notice, she was terminated at the end of the 1975-76 school year for reasons of economy and decreasing enrollment. Subsequently, respondent determined that a half-time kindergarten teacher would be needed for the 1976-77 school year. Appellant applied for that as well as for other full-time positions, and she was hired for the half-time position. She was again hired as a half-time teacher for the 1977-78 school year. During her two years as a half-time teacher, appellant continually expressed interest in full-time positions; respondent employed nontenured teachers in certain full-time positions during that period. Beginning with the 1978-79 school year and apparently continuing at least through March 24, 1982 (the date on which Carlson was decided), appellant was employed in a full-time position as a kindergarten teacher. Carlson at 3. In rejecting her claim for full-time tenure, after serving the first day of her fourth year, notwithstanding that day was as a half-time teacher, the administrative law judge ruled that appellant had achieved tenure for the 1976-77 school year as a half-time teacher only, and thus, she had no claim to tenure or seniority as a full-time teacher during her two years in question. In affirming the administrative law judge's ruling, the Appellate Division ruled that appellant acquired tenure as a half-time teacher only. In so doing, the court stated that, "it is length of service in a single position, not length of service in the district in any capacity, which determines tenure in that position." Carlson at 4. Thus, the court reasoned that when appellant was terminated at the end of her third year, she had not yet achieved tenure. Upon employment in a half-time position for her fourth year, she acquired tenure as a half-time teacher, since she then had worked the equivalent of more than three years as a half-time teacher (a full-time position necessarily encompassing a part-time one). In conclusion, the court held that appellant could not use her seniority (in terms of number of years of service) to acquire greater tenure rights than those to which she was entitled. In so doing, the court noted that the Commissioner of Education has consistently held that tenure in a part-time position does not entitle a teacher to a full-time position. Carlson at 5.

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Applying the holding in Carlson to the facts herein, it is clear that petitioner acquired tenure only in a part-time capacity. Petitioner was employed as a part-time teacher from September 1978 through June 1979. Her employment as a half-time teacher from September 1979 through June 1980 encompassed part-time employment, as did her full-time service from September 1980 through June 1981 and from September 1981 through June 1982. However, neither her full-time service from September 1980 through June 1981 and September 1981 through June 1982 nor her half-time service from September 1979 through June 1980 was itself sufficient to generate full-time tenure, pursuant to N.J.S.A. 18A:28-5 or N.J.S.A. 18A:28-6. Petitioner served the appropriate length of service of three consecutive academic years, together with employment at the beginning of the next succeeding academic year only in her part-time capacity.

Based upon the foregoing, it is concluded that:

1. Petitioner achieved tenure status in her part-time employment in September 1981 under N.J.S.A. 18A:28-5(b), having had employment in the district for three consecutive academic years, together with employment at the beginning of the next succeeding academic year.

2. Petitioner's tenured employment is part-time not full-time under Carlson, even though she was employed full-time in September 1980 through June 1981 and September 1981 through June 1982.

3. Not having acquired full-time tenure, petitioner possesses only such rights of preferential eligibility for reemployment in order of seniority as are hers under N.J.S.A. 18A:28-12 for part-time employment.

For the foregoing reasons, it is hereby **ORDERED** that petitioner be afforded her tenure rights as a part-time teacher in accordance with this opinion.

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

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

August 10, 1983
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 16, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions to the initial decision by Judge Reiner argues that she has tenure in a full-time position. Petitioner in support of her argument cites Carnathan, supra. The Board in primary exceptions purportedly supports the initial decision herein (which determines that petitioner has part-time tenure) but cites Greiner, supra, to contend that petitioner has no entitlement to tenure of any kind. The Board cannot have it both ways. The Commissioner cannot agree with the Board's position and looks with favor on the arguments advanced by petitioner.

An examination of the circumstances of the present matter reveals to the Commissioner that petitioner was employed full-time after three years and one day of continuous employment in the district. Her tenure, as a consequence, is that of a full-time teacher as a teacher's employment status on the date tenure attaches determines the nature of the tenure . Carnathan, supra Further, a recent Supreme Court decision, Shirley Lichtman v. Board of Education of the Village of Ridgewood, Bergen County, A-96 decided June 20, 1983, decided that there be allowed a pro rata calculation of seniority based upon the actual service accumulated in a specific category giving seniority entitlement over a nontenured applicant and, in the opinion of the Commissioner, over any tenured teaching staff member in that specific category with lesser seniority. The Commissioner so holds.

Accordingly, the conclusions reached by the judge are set aside. Petitioner Kiminkinen has tenure in a full-time position and shall be immediately reinstated in a position to which she is entitled by certification and seniority rights with back pay and emoluments retroactive to September 1982.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 26, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 0337-83
AGENCY DKT. NO. 399-10/82A

DONALD F. RUBY,
Petitioner,
v.
BOARD OF EDUCATION OF THE
HUDSON COUNTY AREA
VOCATIONAL-TECHNICAL SCHOOLS,
Respondent.

APPEARANCES:

Sanford R. Oxfeld, Esq., for petitioner
(Rothbard, Harris & Oxfeld, attorneys)

Frank DeStefano, Esq., for respondent
(Schumann, Hession, Kennelly & Dorment, attorneys)

Record Closed: June 27, 1983 Decided: August 11, 1983

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

Procedural History

This is an appeal by a tenured school administrator who was involuntarily transferred by respondent Board of Education from the position of principal of the Hudson County Vocational-Technical High School to the position of "principal" of the Adult High

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School for the 1982-83 school year. On October 12, 1982, petitioner Donald F. Ruby filed a petition with the Commissioner of Education challenging the validity of the transfer on two separate grounds: (1) that the transfer was from a tenured to a nontenured position; and (2) that the new position had no job description, virtually no duties, and few students, and, thus, did not genuinely exist. Consequently, Ruby contends that his removal from the tenured position of principal in the absence of the bringing of specific charges or a reduction in force constituted a "dismissal" within the contemplation of the tenure law, N.J.S.A. 18A:28-5.[1]

In its answer filed on February 3, 1983, the Board denies that the new position was either nontenured or nonexistent. Further, the Board maintains that its action was a valid exercise of its managerial prerogative to transfer employees under the authority of N.J.S.A. 18A:25-1. Subsequently, the Commissioner of Education transmitted the case to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A hearing was held on May 17, 1983. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Upon filing of an order granting the Board's motion to dismiss part of the petition, the record closed on June 27, 1983. As shall be seen, the Board's action was taken in bad faith and Ruby is entitled to reinstatement to the position of principal in the district.

[1]Additionally, Ruby sought to enforce the provisions of an earlier settlement agreement reached by the parties and to assert a claim involving contributions by the Board to the pension fund. On the record at the hearing, these portions of the petition were dismissed for lack of jurisdiction. This ruling was incorporated into an order entered by the Office of Administrative Law on June 27, 1983, subject to review by the Commissioner of Education.

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Undisputed Facts

Many of the background facts are not in dispute. Respondent Board of Education operates two facilities in Hudson County, the Jersey City Center in Jersey City and the North Hudson Center in North Bergen. It offers four different types of programs at these facilities. The regular vocational program is geared to high school students sent by their home schools for a half-day of vocational instruction. Other high school students are enrolled in a full-day "special needs" program. For adults, there is the Adult Evening School offering night-time training in vocational skills for tuition-paying students. Lastly, the Adult High School has a program designed to assist adults who never finished high school in earning enough credits to obtain their diplomas. Until recently, both the Adult Evening School and the Adult High School were conducted under the supervision of one Edward Davis, who held the title of "coordinator." Starting in August 1982, however, the responsibilities were divided and the title of the supervisor of each program was upgraded to "principal." Davis continued as principal of the Adult Evening School. And Ruby was transferred to become principal of the Adult High School.

Ruby has been employed by the Board since August 3, 1974, except for a period between 1977 and July 1980 which ended with full recognition of Ruby's tenure and seniority dating back to his original date of employment.[2] He holds a supervisory certificate properly endorsed for the position of principal. The Board acknowledges that he is tenured in the position of principal. Indeed, Ruby is the only administrator currently in the district who has acquired tenure in that position. Nor does anyone question Ruby's competence or ability as an administrator. Testifying on behalf of the Board, the superintendent of schools described Ruby as a "very professional person" who has "a great deal to offer to the district."

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[2]See Ruby v. Bd. of Trustees of the Hudson Cty. Area Voc-Tech. Sch., 1980 S.L.D. ____ and Ruby v. Bd. of Ed. of Hudson Cty. Area Voc-Tech. Sch., 1979 S.L.D. _____.

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Prior to 1977, Ruby had been assigned as principal of the Vocational-Technical High School at the North Hudson Center. In that capacity, he was directly responsible for the daily operation of the high school, including supervision and evaluation of certified teachers, discipline of students, and oversight of the custodial staff. After his return in July 1980, he was assigned the same function in the high school at the Jersey City Center. His duties in both these assignments were performed in accordance with a written job description which accurately set forth the requirements of the job.

Sometime in August 1982, the Board notified Ruby that he would be reassigned to the newly-created post of principal of the Adult School for the upcoming school year.[3] Neither Ruby nor Davis suffered any loss of salary as a result of this transfer. Actually, Ruby's salary for 1982-83 was 10% higher than it was for 1981-82. Nobody was hired to replace Ruby as the principal of the high school at the Jersey City Center. Instead, the untenured principal of the North Hudson Center was placed in charge of both high schools.

Summary of the Disputed Evidence

The main point of disagreement between the parties centered on the characteristics of the new position to which Ruby was assigned. According to Ruby, he was unable to otain a copy of the job description from the superintendent's office. At the hearing, the superintendent of schools admitted that a job description for "principal of the Adult School" did not yet exist, even though there were separate job descriptions for principal of the Vocational-Technical High School and principal of special education. When Ruby took over in September, his predecessor, Davis, handed him a portfolio of papers and told him, "It's all yours, baby - It's your ball game." He received little additional guidance on what his job duties were supposed to entail.

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[3]Among his other complaints, Ruby urges that the transfer was accomplished in violation of the procedural protections contained in the collective negotiating agreement between the Hudson County Area Vocational-Technical Schools Education Association and the Board of Education. Whatever the merits of this complaint, the Commissioner of Education is not the proper forum in which to resolve such issues.

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Ruby's hours at the Jersey City Center were 3:00 p.m. to 10:00 p.m. on Mondays through Thursdays and 9:00 a.m. to 4:00 p.m. on Fridays. Aside from a security guard and some clerical personnel, no one other than Ruby was present in the building on Mondays through Thursdays until 7:00 p.m. During the four hours until 7:00 p.m., Ruby would "try to keep busy," although he had almost nothing to do. Vocational classes which began at 7:00 p.m. were part of the Adult Evening School as distinguished from the Adult High School and, therefore, were under the jurisdiction of Davis rather than Ruby. Some of the students participating in the Adult High School were attending classes offered by the Adult Evening School. On Fridays, during Ruby's working hours, the building was also occupied by the special needs program over which Ruby did not have any control.

Previously, Ruby had observed and evaluated certified teachers as an integral part of his job duties. Now he did not have any teachers to observe or evaluate since, in Ruby's words, "no instruction was going on." Under the Adult High School program, adults could gain credit toward a diploma for certain life experiences, such as military service, prior work or prior high school courses. Staff members who reported to Ruby included six "brokers" whose duties resembled those of a guidance counselor. Their job was to review the information submitted by students and "assist [the] learner in chosen areas to receive credit" for various "life skills." Another group of staff members reporting to Ruby were three "computer instruction assistants" who delivered a programmed series of lessons intended to bring students up to a ninth grade level of proficiency. All three of these assistants worked at the North Hudson Center away from Ruby's physical location at the Jersy City Center. Ruby was also nominally in charge of two full-time and two part-time "G.E.D. examiners" whose job was to prepare candidates for the general educational development test, i.e., a type of high school equivalency exam. Evaluation of the performance of the G.E.D. examiners was done by State officials and not by Ruby. Two of the G.E.D. examiners, assigned to the Jersey City Center, ended their day at 3:00 p.m. just as Ruby was arriving for work. The other two were assigned to the North Hudson Center.

None of the persons reporting to Ruby was required by job description to hold a certification issued by the State Board of Examiners. Brokers and G.E.D. examiners

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were not even required to have graduated from college. Without denying that such positions could be filled by persons who lacked certification, the superintendent of schools insisted that seven of these employees did in fact hold certifications as either teachers or guidance counselors. However, the Board failed to produce copies of these certifications to verify this contradiction of Ruby's testimony. Although the Board insisted that all staff members must be certified beginning in September 1983, it ignored an invitation to document this apparent change in its own past practice.[4] Similarly, the superintendent gave vague assurances that the hiring of teachers certified in English and history was "projected" for next year. Again, no hard evidence was introduced to substantiate that contracts for these positions have been approved or that money is actually available to pay for these additional teachers.

In addition to the absence of any supervisory functions, Ruby complained that the number of students enrolled in his program had been vastly exaggerated. At the time of his transfer, Ruby had been informed that some 600 students were enrolled in the Adult High School. Later, he discovered that many of the student folders were empty and that the true number of students in the program was closer to 175 or 200. The superintendent confirmed that the school administration "still [doesn't] know how many students are in the program" and was willing to rely on Ruby's estimate. Few of the students were actually attending classes, since the majority were obtaining credits for life experiences. Of those students who took classes, most were enrolled in the Adult Evening School, which remained under the supervision of Davis.

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[4]Regulations effective October 15, 1983 extend the new high school graduation requirements to adult applicants for the State-endorsed high school diploma issued by a district board of education. 13 N.J.R. 721(a). Presumably, these are the regulatory changes to which the Board was referring. One of the primary effects of these new regulations is to increase the number of credits required for graduation from 80 to 92. No specific mention is made, however, of any certification requirement for instructors in an adult high school.

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Unlike his former position, Ruby indicated, his new position lacked the basic amenities generally associated with the job of principal. For example, Ruby was not given his own secretary. Such paperwork as Ruby managed to generate would be handled by a clerk-typist. Brokers and others under Ruby's jurisdiction had already received their assignments from Davis and performed their work independently of Ruby's control. On no occasion did the superintendent of schools ever visit to observe and evaluate Ruby's performance on the job. Ruby was left very much on his own. He was not even sure whether the custodial staff in the building was answerable to him or to someone else. Since his job ratings in the position of principal had always been satisfactory, Ruby attributed his sudden loss of status to retaliation for his political affiliation. Ruby identified himself as a personal friend and supporter of an elected public official who has taken stands in opposition to the Board's policies.

Findings of Fact

From the proofs presented at the hearing, I **FIND** that the position to which Ruby has been transferred is something less than the position of a principal.

Several factors support the finding that the new position is not equivalent to the one in which Ruby holds tenure. First, the position has previously been regarded as one small part of the duties of a "coordinator" until the duties were reduced and the name changed to accommodate Ruby's transfer. Second, there is no job description which accurately sets forth the duties and responsibilities of the job. Third, the workload is insufficient to keep Ruby occupied, so that he spends large portions of his day with nothing to do. Fourth, Ruby's working hours are arranged so that he is alone in an empty building, without teachers to supervise or students to teach. Fifth, the persons working under Ruby are not required to hold appropriate certifications and do not engage in teaching. Sixth, Ruby does not conduct observations and evaluations of certified teaching staff members. Seventh, the comparatively small number of students enrolled in the program does not justify the creation of a separate position to handle the work. Eighth, those students who attend classes are doing so at the Adult Evening School outside Ruby's area of responsibility. Ninth, Ruby has been denied the use of a personal secretary and related services which are incidental to proper performance of the job of principal.

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Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Ruby's involuntary transfer constituted a "dismissal" from his position as vocational high school principal in violation of his tenure rights.

Initially, Ruby argues that his transfer was invalid as a matter of law because he was transferred to a position in which the occupant cannot acquire tenure. Earlier cases had suggested that tenure was unavailable to school employees in an adult high school due to the need to preserve flexibility in the operation of such optional programs. Thus, in Capella v. Camden Cty. Voc. Tech. Sch. Bd. of Ed., 145 N.J. Super. 209 (App. Div. 1976), the Appellate Division ruled that guidance counselors working part-time at an adult evening high school were not entitled to the protection of the tenure laws. See also, Local 357, N.J. Fed'n of Teachers v. Perth Amboy Bd. of Ed., 1981 S.L.D. ___ (Dec. 12, 1981). Recently, however, in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), the New Jersey Supreme Court rejected these older cases and held that tenure may be acquired by any school employee who (1) works in a position for which a teaching certificate is required; (2) holds the appropriate certificate; and (3) serves the requisite period of time. 90 N.J. at 74. By these standards, certified employees of an adult high school are eligible for tenure.

Pointing out that Spiewak never expressly overruled Capella, Ruby urges that Capella is still good law. But the Capella court's ultimate conclusion that tenure should be denied because the guidance counselors were not "full time" employees has been eroded by the granting of tenure to part-time employees in Spiewak. Moreover, Capella's reasoning has no application to the present case where Ruby was clearly a full-time employee. Since Spiewak was decided, the Commissioner of Education has determined that employees of an adult school can become tenured in their positions. Rabolli v. Bergen County Voc.-Tech. Schs. Bd. of Ed., 1983 S.L.D. ___ (March 18, 1983). That authoritative determination is binding in this case.

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Assuming, therefore, that tenure status may be achieved in an adult high school position, the next issue is Ruby's contention that his transfer was a "sham" and a "fraud." Generally, N.J.S.A. 18A:25-1 confers upon local boards of education the broad authority to transfer or reassign staff members within the scope of their certifications. Downs v. Hoboken Bd. of Ed., 12 N.J. Misc. 345 (Sup. Ct. 1923), aff'd sub. nom. Fletcher v. Hoboken Bd. of Ed., 113 N.J.L. 401 (E. & A. 1934). A board has a "duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education." Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978). More specifically, a board is empowered to transfer a principal from a high school to an elementary school assignment, even though the future salary expectation in the new position may be lower. Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980), certif. den. 87 N.J. 300 (1981).

Nonetheless, the extent of the board's authority is necessarily limited by other statutes granting tenure rights to certain positions. Where, as here, a principal has acquired tenure in his position, he "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause." N.J.S.A. 18A:28-5. Under the particular facts of this case, the Board has effectively "dismissed" Ruby by transferring him to a non-position which is a principalship in name only. Local boards have considerable discretion in such matters, but they must exercise that discretion in good faith for legitimate educational or policy considerations. In this case, the proofs conclusively established that Ruby has retained none of the duties and responsibilities commonly associated with the job of principal. It is difficult to see how Ruby has any remaining duties at all, other than the purely ceremonial function of signing diplomas. The situation is exactly such type of dismissal for "unfounded, flimsy, or political reasons" which the tenure law was enacted to prevent. Zimmerman v. Newark Bd. of Ed., 38 N.J. 65, 71 (1962), cert. den. 371 U.S. 956 (1963). Nor can the Board's action be justified on the theory that Ruby suffered no harm since he continued to receive his full salary. N.J.S.A. 18A:25-5 prohibits either dismissal or reduction in compensation - in the alternative - unless accomplished in accordance with the procedural requirements of the tenure law. Public interest would hardly be well-served if a local board were permitted to evade the reach of the law by the simple

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expedient of paying employees for not doing their jobs. While continuation at the same or greater salary is certainly one of the factors to be examined, it does not negate the conclusion that an employee has been wrongfully dismissed when the other surrounding circumstances point so strongly in that direction.

Order

It is **ORDERED** that the Board immediately reinstate Ruby to the position of principal of the vocational-technical high school or to some other position commensurate with Ruby's tenure as a principal. Ruby's claim for compensatory and punitive damages is denied.

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

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

August 11, 1983
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 16, 1983
DATE

Elizabeth Lazzara, CS
FOR OFFICE OF ADMINISTRATIVE LAW

al

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APPENDIX

List of Witnesses

1. Donald Ruby

2. Earl Byrd

List of Exhibits

No.	Description
J-1	Initial Decision in the matter entitled Ruby v. Hudson County Area Vocational-Technical School, Agency Dkt. No. 317-9/77 (December 10, 1980)
J-2	Job Description of Vocational-Technical High School Principal, dated July 1974
P-1	Job Description of Chief Examiner for G.E.D. testing, dated February 8, 1982
P-2	Job Description of Assistant Chief Examiner for G.E.D. testing, dated February 8, 1982
P-3	Job Description of Adult High School Borker, dated April 5, 1982
P-4	Portions of the Agreement between the Hudson County Area Vocational-Technical Schools Education Association and the Board of Education covering the period 1981 to 1983

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DONALD F. RUBY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record in the instant matter including the initial decision rendered by the Office of Administrative Law, Ken R. Springer, ALJ.

It is observed that no exceptions to the initial decision have been filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner finds and determines that those findings set forth in the initial decision of this matter correctly conclude that the relief requested by petitioner be granted. The Commissioner concurs with the ALJ findings and recommendations in the instant matter and hereby adopts them as his own.

Accordingly, the Board is directed to immediately reinstate petitioner to the position of principal of the vocational-technical high school or, in the alternative, to some other position commensurate with his status as a tenured principal.

Petitioner's claims for compensatory and punitive damages are, however, hereby dismissed.

COMMISSIONER OF EDUCATION

SEPTEMBER 26, 1983

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 226-83
AGENCY DKT. NO. 465-11/82A

JACQUELYN A. COCHRAN,
ANGELA P. PIEGARI and
BARTON LILENFIELD,
Petitioners
v.
WATCHUNG HILLS REGIONAL
HIGH SCHOOL BOARD OF EDUCATION,
Respondent.

APPEARANCES:

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

William S. Jeremiah II, Esq., for respondent (Buttermore, Mullen, Jeremiah and Phillips, attorneys)

Record Closed: June 27, 1983 Decided: August 9, 1983

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

Petitioners seek an order immediately reinstating them to full-time, tenure positions on the child study team of the Watchung Hills Regional High School Board of Education and reimbursement of any salary wrongfully withheld. Petitioner Lilenfield also alleges improper salary computation and seeks adjustment of salary and further seeks an order directing the Board to cease and desist discriminating against him on the basis of sex.

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This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for disposition as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted on April 5, 1983, and the following issues were framed:

A. May a board of education reduce a child study team from full-time to part-time service and supplement the team's services with contracted services;

B. Is petitioner Lilenfield's salary for 1982-83 properly computed;

C. If not, does this constitute sex discrimination under the circumstances.

The matter was set down for hearing on June 9 and 10, 1983. It was further agreed that the first two issues would be addressed by cross-motions for summary judgment with supporting papers. For good cause shown, the date for the last submission was extended to June 8, 1983.

On June 8, a second conference of counsel was conducted ia telephone. It was agreed that the whole matter was ripe for summary disposition. Counsel for the Board agreed to submit a salary history of Lilenfield. The salary history was received on June 21, and, with the consent of the court and his adversary, petitioners' attorney filed a reply brief which was received on June 27, 1983.

I.

The following facts, essentially undisputed, reveal the context of the case. Petitioner Jacquelyn A. Cochran was at all relevant times a tenured teaching staff member employed by the Board as a learning disability teacher-consultant. Petitioner Angela P. Piegari was at all relevant times a tenured teaching staff member employed by the Board as a social worker. Petitioner Barton Lilenfield was at all relevant times a tenured teaching staff member employed by the Board as a school psychologist.

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On or about April 12, 1982, the Board, for reasons of economy, voted to abolish the full-time positions of learning disability teacher-consultant, social worker and school psychologist. On or about May 10, 1982, the Board voted to create half-time positions of learning disability teacher-consultant, social worker and school psychologist. On or about July 30, 1982, Cochran was offered and rejected a half-time position. Piegari and Lilenfield accepted half-time positions.

On or about September 7, 1982, petitioners discovered that the Board had entered into a contractual relationship with the Somerset County Educational Services Commission under which the Educational Services Commission (ESC) agreed to provide child study team (CST) services for the Board including, but not limited to, duties performed by a learning disability teacher-consultant, social worker and school psychologist. On or about September 15, 1982, petitioners discovered that the ESC did not employ certified CST members, but rather, in turn, entered into a contractual relationship with one Dr. Irwin Blake, who provided the CST services for the Board.

On these facts, each seeks reinstatement to a full-time tenure position with reimbursement of any salary wrongfully withheld, together with benefits and emoluments of office.

In addition, Lilenfield on or about July 19, 1982, received notification from the Board of a part-time school psychologist position being created. The position was to be exactly one-half of the full-time position. On or about July 27, 1982, petitioner wrote the Board a letter exercising his tenure rights to the half-time position.

During the 1981-82 school year, Lilenfield's full-time salary was $29,573. In the summer of 1982, his collective bargaining agent and the Board entered into a contract for school year 1982-83 under which each member of the bargaining unit was to receive a 9.5 percent increase. On or about September 7, 1982, Lilenfield was tendered by the Board a contract for school year 1982-83 reflecting an annual salary of $13,109. Since that date, the Board has tendered to Lilenfield a corrected contract for school year 1982-83 providing for an annual salary of $14,511.

The Board is paying Lilenfield based upon the corrected contract. Lilenfield asserts that his salary for school year 1982-83 should be $16,191.21. He arrives at this figure by multiplying his 1981-82 salary of $29,573 by the negotiated increase of 9.5 percent, yielding a full-time 1982-83 salary of $32,382.43 and dividing that figure by two, thus deriving a half-time salary of $16,191.21.

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On these facts, Lilenfield seeks, in addition to other relief, an order requiring the Board of Education to remit the difference between the claimed amount of $16,191.21 and the amount being remitted, $14,511, the difference being $1,680.21.

II.

PETITIONERS' ARGUMENTS

Petitioners argue that the Board violated their tenure and seniority rights by reducing their positions to part-time and then supplementing their services with contracted services. Each petitioner enjoyed a tenure status. The significance to be attached to the rights of teachers under tenure has received considerable attention from the courts, the Legislature and administrative agencies. In Downs v. Bd. of Ed., Hoboken, 13 N.J. Misc. 853 (Sup. Ct. 1935), the court stated

> The Teacher Tenure Act is not a gesture but a provision of law to protect teachers in their position by reason of years of experience.
>
> While in the interest of economy, reduction in number may be made, those having tenure should have preference in appointment where vacancies occur.

Downs dealt with the rights of tenured employees as opposed to those who are not tenured. However, the seniority system, whereby distinctions are drawn among tenured personnel, clearly fits within the logic of that case. In effect, seniority increases the preferential status of a tenured employee by establishing rights as against other tenured persons, as well as against those who are not tenured. N.J.S.A. 18A:28-10.

The Commissioner of Education has upheld the seniority rights of tenured employees in the context of a reduction in force. See, e.g., Dedrick v. Hammonton Bd. of Ed., 1977 S.L.D. 1043; Polaski v. Burlington Cty. Vocational-Technical High School Bd. of Ed., 1977 S.L.D. 346; McKay v. Red Bank Bd. of Ed., 1972 S.L.D. 606. These cases and others clearly stand for the proposition that tenured employees must be retained if positions for which they are qualified exist in the district and are held by individuals with lesser or no seniority.

It is petitioners' position that it is irrelevant that petitioners' replacements are subcontractors and not direct employees of the Board. Respondent may not do by indirection that which it cannot do by direction.

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Local public entities are limited to powers granted them by the Legislature either expressly or by necessary implication. Fair Lawn Education Ass'n v. Fair Lawn Bd. of Ed., 79 N.J. 574 (1979). The Supreme Court has consistently refused to read powers into statutes giving authority to local school boards or other administrative agencies such as the Department of Education beyond that which is set forth on the face of the statute.

In construing statutory enactments, the controlling factor is the intent of the Legislature, Matawan Borough v. Monmouth Cty. Tax Board, 51 N.J. 291 (1968). The intent must be gathered from the plain language of the statute being reviewed, Witt v. Witt, 98 N.J. Super. 590, 595 (Ch. Div. 1967), and words and phrases are to be read in context and "given their generally accepted meaning according to the approved usage of the language" N.J.S.A. 1:1-1.

As a rule, a board of education is not permitted to provide professional services to its students by means of nonemployees. N.J.S.A. 18A:16-1 provides

> Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss a secretary or school business administrator to act as secretary and may employ and dismiss a superintendent of schools, a treasurer of school monies, when and as provided by Section 18A:13-14 or 18A:17-31, and such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment. Amended by L.1981, c. 1974, Section 2, eff. June 19, 1981. [emphasis added]

The Administrative Code provisions applicable to the case at bar recognize a board's limited right to use nonemployees to perform professional duties for its pupils by providing at N.J.A.C. 6:28-1.3 that

> (a) A basic child study team shall consist of a school psychologist, a learning disabilities teacher-consultant and a school social worker. All members of the basic child study team shall be employees of the local board of education, have an identifiable apportioned time commitment to the local school district and shall be available during the hours pupils are in attendance.
>
> (b) Each local public school district shall employ basic child study teams in numbers sufficient to ensure provision of required services pursuant to these regulations.

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N.J.A.C. 6:28-1.3(f) which provides

> Prior approval by the Office of the County Superintendent of Schools and the Bureau of Special Education and Pupil Personnel Services shall be obtained for the purchase by any local school district of services of eligible, approved diagnostic clinics; agencies; or professionals in private practice representing a basic child study team discipline to supplement members of the basic child study team. When such approval is granted to a local school district for the purchase of external diagnostic or professional services, the local school district's basic child study team shall develop and coordinate the appropriate individualized education program,

creates limited exception. The limited exception permits an outside agency to supplement but not supplant the Board's CST.

"Supplement" is not defined in the Administrative Code. New Jersey courts have had occasion to define the word, however. In Mayor of Jersey City v. Borst, 90 N.J.L. 454 (Sup. Ct. 1917) the court stated, "[n]ow the ordinary meaning of the word 'supplement' doubtless is a supplying by addition of what is wanting. Rahway Savings Institution v. Mayor, etc. of Rahway, 53 N.J.L. 51. . . ."

Petitioners urge that the Board cannot claim, after reducing its basic child study team from full-time to part-time that an outside agency is needed "to supply by addition . . . what is wanting." If there is a "wanting" or a need for supplementation, the statutes and regulations cited above mandate that any needed additional work be performed by the basic team.

Further, assuming that the Board was somehow authorized by statute or regulation to reduce petitioners' positions to part-time and then enter into a contractual relationship with an ESC, N.J.S.A. 18A:28-16 preserves petitioners' tenure, sick leave and pension rights.

On the question of Lilenfield's salary for school year 1982-83, petitioners argue that Lilenfield received notification from the Board on or about July 19, 1982, of a part-time school psychologist position being created. The position was to be exactly one-half of the full-time position. On or about July 27 1982, Lilenfield wrote a letter to the Board exercising his tenure rights to the half-time position. During school year 1981-82, his full-time salary was $29,573. In the summer of 1982, his collective bargaining unit and the Board entered into a contract for school year 1982-83 under which each member of

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the unit was to receive a 9.5 percent increase. On or about September 7, 1982, Lilenfield was tendered by the Board a contract for school year 1982-83 reflecting an annual salary of $13,109. Since that date, the Board has tendered to Lilenfield a corrected contract for 1982-83 providing for an annual salary of $14,511. The Board is paying him based on the corrected contract.

Based upon these facts and the applicable law, Lilenfield asserts that his salary for 1982-83 should be $16,191.21. He arrives at this figure by multiplying his 1981-82 salary of $29,573 by the negotiated increase of 9.5 percent for a fulltime 1982-83 salary of $32,382.43. Dividing that figure by two, yields a result of $16,191.21, which reflects one-half of the full-time salary he would have received for 1982-83.

On these facts, he seeks an order requiring the Board to remit the difference between the claimed amount and the amount being remitted, $1,680.21.

Petitioner contends that the law in respect to this issue has been resolved, in his favor, by the Commissioner and the State Board of Education.

Ebel v. South Amboy Bd. of Ed., 1980 S.L.D. 158, aff'd, State Board 171 involved a learning disability teacher-consultant whose position was reduced from full-time to half-time pursuant to N.J.S.A. 18A:28-9. Simultaneously, Ebel's salary was reduced, not to 50 percent of her prior full-time salary plus increment, but to $50 per day. This action was voided by the Commissioner and his decision was affirmed by the State Board. The Initial Decision holds that

> It is agreed that boards of education have the authority to abolish or reduce positions. However, a board may not, in my view, act arbitrarily in such action. If a person is employed by a board on a full-time basis, acquires tenure and, accordingly, seniority, and is compensated on a 100 percent basis, then such a person may not be subjected to a salary reduction except through the provisions of the statutes. (N.J.S.A. 18A:28-5).
>
> If a person, with tenure and seniority, is paid a full salary for a full day's or full year's work by a Board and that Board abolishes the full-time position, creates a part-time or 50 percent position, then that Board must compensate that person 50 percent of the full-time position. [at 167]

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Upon review, the Commissioner of Education affirmed the decision. Ebel is binding upon this court. In re Kallen, 92 N.J. 14 (1983). Petitioner Lilenfield is entitled to the $1,680.21 wrongfully withheld.

III.

BOARD'S ARGUMENTS

The Board argues it is well established that a board of education has broad discretion to employ such persons as are necessary to provide a thorough and efficient education and to comply with the requirements of the school law and regulations adopted pursuant thereto. N.J.S.A. 18A:11-1 and 18A:16-1.

There is no question that a board has the authority to reduce its force for reasons of economy or other good cause. N.J.S.A. 18A:28-9 et seq.

Petitioners have the burden to prove that the reduction in force was in bad faith or was arbitrary, capricious or unreasonable. The decision to reduce force has not been challenged. The only action by the Board which is under challenge is the subcontracting of CST services to supplement the work of the CST, the claim being that such action violates the tenure and seniority rights of petitioners.

The right of a board of education to subcontract has been clearly established. In re IFPTE Local 195, AFL-CIO v. State of New Jersey, 176 N.J. Super. 85, aff'd, 88 N.J. 393 (1982), the Appellate Division said the following:

> We think it perfectly plain that a determination to contract or subcontract out work is a matter of managerial prerogative. Clearly inherent in such a decision would be cost criteria, efficiency and quality consideration, determinations as to the time that the service may be needed, necessity to transfer employees, reduction in supervision needed, and indeed any number of factors that from a management point of view may make contracting out work a sound decision. It is difficult to conceive of a more fundamental management decision in the determination of who will perform a particular function. Id. 176 N.J. Super. at 91.

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The regulations governing the work of child study teams expressly authorize a board to supplement the work of its own team. N.J.A.C. 6:28-1.3 provides

> . . . .
>
> (b) Each local public school district shall employ basic child study teams in numbers sufficient to ensure provision of required services pursuant to these regulations.
>
> . . . .
>
> (f) Prior approval by the Office of County Superintendent of Schools and the Bureau of Special Education and Pupil Personnel Services shall be obtained for the purchase by any local school district of services of eligible, approved diagnostic clinics; agencies; or professionals in private practice representing a basic child study team discipline to supplement members of the basic child study team. When such approval is granted to a local school district for the purchase of external diagnostic or professional services, the local school district's basic child study team shall develop and coordinate the appropriate individualized education program.

Other sections in the statute also authorize outside contracts for services needed in this area. N.J.S.A. 18A:46-11 and 18A:46-19.7.

The Board, in this case, has exercised its discretion to staff its CST in a manner which it finds to be best suited to the needs of the district. In addition to economy, the Board is concerned with the ability to meet time requirements imposed upon the work of the child study team by regulation. The specific regulation, N.J.A.C. 6:28-1.6(b), provides

> A comprehensive evaluation leading to a decision on classification of a pupil shall be completed within 60 calendar days from the date a pupil has been referred to a basic child study team, unless extended by the chief school administrator when the basic child study team presents written evidence that reasonable extenuating circumstances relating to the individual pupil preclude accomplishment of this requirement. Such exceptions shall be reported to the Office of the County Superintendent of Schools.

Because of this 60-day limitation and because a CST may have periods of time, however limited, when the load of the team is such that it cannot comply with the 60-day requirement, the Board adopted a method to deal with the requirement in the most flexible manner possible. The method of subcontracting services is also cost effective and efficient. The requirements of the statute concerning reductions in force are satisfied.

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The actions taken by the Board in this case are supported by the decision of the State Board of Education in Klinger v. Cranbury Township Bd. of Ed., OAL DKT. EDU 5679-79 (Nov. 19, 1980), adopted, Comm'r of Ed. (Jan. 8, 1980), rev'd State Board (Jan. 8, 1982), aff'd, N.J. App. Div., Nov. 10, 1982, A-227-81T3 (unreported). In Klinger the board had two full-time physical education positions. One was filled by a tenured employee and the other by a nontenured employee. The board decided that it could satisfy the scheduling requirements of the district by reducing the two full-time positions to 7/10ths positions. The tenured teacher complained of the action as violating his tenure rights. He claimed that if there were work to be done equivalent to more than one full-time instructional position, the teacher with tenure would be entitled to continue to have a full-time job. The State Board of Education disagreed:

> The law is well established that unless the local board's action to reduce full-time positions to part-time was taken in bad faith or constituted an abuse of discretion, its determination to abolish or change positions may not be disturbed by the Commissioner. . . . Boult and Harris v. Bd. of Education of Passaic, 1939 S.L.D. 7, 13, aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947) 136 N.J.L. 521 (E. & A. 1948); Bierman v. Board of Education of the Borough of Glen Rock, 80 S.L.D. (decided by Commissioner July 17, 1980). We do not find it arbitrary for a local board to decide, when having to reduce its physical education program, to have two part-time teachers rather than one full-time. Th [sic] tenure and seniority rights of an incumbent cannot prevail againt [sic] the authority of the board when exercised in good faith and with some rational basis. The mere fact that Petitioner was qualified to handle the entire physical education program on his own is not material; nor is the fact that the board might have organized its physical education differently.
>
> The foregoing decision accords with other precedents set by the Commissioner and State Board of Education in disallowing tenure claims to an abolished full-time position when its functions were continued with an equivalent amount of money and work but with a different staff organization. See for example, Bick v. Board of Education of Montclair, decided by Commissioner, February 20, 1980, aff'd by State Board of Education, September 3, 1980; Belvidere Education Assocation v. Board of Education of Belvidere, decided by Commissioner December 1, 1980.
>
> We also deem it appropriate to repeat here the oft-quoted principle that "the public schools were not created, nor are they supported for the benefit of the teachers therein*** but for the benefit of the pupils and the resulting benefit to their parents and the community at large." Smith v. Board of Education of Paramus, 68 S.L.D. 62:67.

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The Board also argues that petitioners' reliance on N.J.S.A. 18A:28-16 is misplaced. The statute refers to a situation in which an ESC or other officer, board or commission under its authority undertakes the operation of a school. Clearly, there has been no takeover by the Somerset County ESC of a school in this case. The statute is not applicable to supplementing the services of a child study team which are expressly authorized by separate regulation.

The petitioners also cite In re Jamesburg High School Closing, 83 N.J. 540 (1980) as being the backdrop against which the issue at bar must be decided. The Jamesburg decision, however, involved simply an interpretation of the requirements of N.J.S.A. 18A:28-6.1, which deals with a factual situation which is far different from that presented in this case. Petitioners fail to recognize that a CST and the services which are to be provided are unique and must be dealt with only in the context of the statute and regulations concerning CST services. Although jointure commissions are permitted by statute, N.J.S.A. 18A:46-20, the facts in this case do not involve such an arrangement. The analogies which petitioners make to closings of schools or takeovers of schools by outside agencies are irrelevant.

The Board essentially agrees with the figures presented by Lilenfield in regard to his salary in school years 1981-82 and 1982-83. The Board contends, however, that what is not stated by Lilenfield is that the salary he received in 1982-83 is exactly one-half of the amount to which a teaching staff member with his experience is entitled under the teachers salary guide.

When the full-time position of Lilenfield was abolished in April 1982, he had rights by seniority to the newly created half-time position. His seniority rights, however, did not give him the right to be paid for the position more than the collective bargaining agreement provided.

Dr. Lilenfield has been paid for many years above the salary guide as a full-time school psychologist. Nothing in the collective bargaining agreement requires the Board to pay him above the guide as a one-half time teacher. Therefore, the Board paid Lilenfield in the same manner it would pay any other teacher in accordance with the salary guide.

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There is no challenge that the amount of experience credited to Lilenfield for purposes of his placement on the salary guide was incorrect. The Board is a party to a collective bargaining agreement and has the right to rely upon the salary schedule in that agreement for payment of all teachers in the district, including Lilenfield.

No authority is cited by the petitioners to support the proposition that the Board is required to pay Lilenfield more than one-half the amount to which he is entitled on the salary guide. He relies upon Ebel v. South Amboy Bd. of Ed., 1980 S.L.D. 158, aff'd, 1980 S.L.D. 171. However, the facts in that case indicate that the teaching staff member who was reduced from a full-time position to a half-time position was not paid one-half of the salary to which the teacher was entitled under the salary guide, but to a per diem that was much less than that provided for on the guide. Therefore, the holding in that case is inapplicable to the facts in this case.

The Board has complied with its contractual agreement. Nothing more can be required of the Board and for that reason so much of the petition as seeks additional salary for Lilenfield should be dismissed.

IV.

It is first noted that IFPTE Local 195 v. State, above, is inapposite to the present case. Since IFPTE deals with the permissible scope of negotiations in public employee contract bargaining, it is inapplicable to the present matter.

N.J.S.A. 18A:28-16 is also inapposite. It deals with the effects of change of government. It does not speak to a reduction in force, nor is it applicable thereto by analogy.

There are no special statutes regarding the existence of child study teams at the local district level. A number of administrative regulations exist, however, regarding the establishment and use of basic child study teams.

N.J.A.C. 6:28-1.3(b) requires that each local district employ a basic child study team. That provision states "[e]ach local public school district shall employ basic child study teams in number sufficient to ensure provision of required services pursuant to these regulations." N.J.A.C. 6:28-1.3(a) requires that the members of the local CST be

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employees of the local board of education. It specifically requires that a basic CST shall consist of a school psychologist, a learning disabilities teacher-consultant and a school social worker.

All members of the basic CST shall be employees of the local board of education, have an identifiable apportioned time commitment to the local school district and shall be available during the hours pupils are in attendance. Thus, the regulations require that each local district employ a basic CST and that the members of the team be employees of the local board of education.

Whether a local district may reduce its CST members from full-time to part-time positions and then supplement their services with contracted services depends on two factors. First, do any special statutes or regulations exist regarding the dismissal or reduction in force of CST members. Second, if no statute or regulation exists, has the local board complied with all the provisions of the Teacher Tenure Act, N.J.S.A. 18A:28-1 et seq.

In the present matter, the members of the CST are eligible for tenure if they meet the statutory criteria. If the members have met the criteria, the local board may not reduce them from full-time to part-time unless the board follows the provisions of the tenure laws. N.J.S.A. 18A:28-9, however, provides as follows:

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

This statute permits a local board to reduce the number of its teaching staff members for any one of four reasons. It may reduce the number of staff for (1) reasons of economy, (2) reduction in the number of pupils, (3) change in the administrative or supervisory organization of the district, or (4) other good cause.

The Appellate Division has held that when a position is abolished for reasons of economy under this statute, the abolition must be one of substance, not merely of appearance. In Viemeister v. Bd. of Ed. of Prospect Park, 5 N.J. Super. 215 (App. Div.

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1949), the board abolished the position of principal at one of its schools, terminated its contract with the principal and assigned his duties to an eighth grade teacher whose new position was called "teaching principal."

The Appellate Division affirmed the decision of the State Board of Education which, in turn, had affirmed the Commissioner's order directing the local board to reinstate the plaintiff to his former position as principal. The court noted that "[w]e looked to the substance rather than to the form and, in substance the principalship was continued but transferred to Miss Berdin." Viemeister, 5 N.J. Super. at 218. Thus, the protection of the principal's tenure status was violated and the plaintiff had to be reinstated to his former position.

Similarly here, the CST members are all tenured full-time employees. The Board proposes to reduce them to part-time employees and assign their duties to a specially contracted team. Although the Board is allegedly seeking to transfer the duties of its team to the contract team for reasons of economy, it cannot do so under the principle established in Viemeister.

Clearly, the Board is not seeking to abolish the duties of its CST. It merely wishes to reduce the number of its full-time employees. Under the Viemeister principle, the Board may only reduce its CST members to part-time positions if it seeks also to diminish the substantive duties of those members. It may not reduce the tenured CST members to part-time positions while at the same time transferring the team's duties to outside contractors.

Here, as in Viemeister, the Board does not really seek to abolish the position. Rather, it seeks to continue the position but to transfer some of its duties to an independent outside contractor. This action, like that in Viemeister, violates the tenure rights of the CST members.

As to the salary of Lilenfield, records submitted by the Board show that Lilenfield's full-time salary in the 1981-82 school year was $28,573. In the following year, therefore, his salary could not be less than one-half of that figure or $14,787. Even after a corrected contract was issued as referred to in the facts, above, Lilenfield was compensated in 1982-83 at $14,511. Irrespective of any negotiated increase or of any adopted salary guide applicable to him, Lilenfield was undercompensated by $276.

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Based upon the foregoing and a careful review of the pleadings and all documents submitted, I **FIND:**

1. The Watchung Hills Regional High School Board of Education on or about April 12, 1982, voted to abolish the full-time positions of learning disability teacher-consultant, social worker and school psychologist.

2. On or about May 10, 1982, the Board voted to create half-time positions of learning disability teacher-consultant, social worker and school psychologist.

3. Petitioners Piegari and Lilenfield accepted half-time positions.

4. Subsequently, the Board entered into a contractual relationship with the Somerset County Educational Services Commission under which the ESC agreed to provide CST services for the Board.

5. The Board knew when it reduced the CST to half-time that it would have to contract for aditional CST services.

6. This arrangement runs counter to the principles laid down by the Commissioner in Viemeister, above.

7. The Board has underpaid petitioner Lilenfield, on a half-time basis, by $276.

The CST members in this matter are tenured full-time employees of the Board. They may not be reduced from full-time to part-time absent compliance with the terms of the tenure laws. Since their Board has not complied with the tenure laws as those provisions are interpreted in Viemeister, they may not be reduced from full-time to part-time employment.

Ebel, above, is distinguishable from the present matter in that Ebel was reduced in salary from a full year's compensation not to 50 percent of that amount, but to a per diem rate which was substantially less than 50 percent of that amount.

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Lilenfield's salary for 1982-83 was one-half the amount calculated for his place on the teachers' salary guide. Notwithstanding the Board's argument that he cannot be paid more than the negotiated contract calls for, it cannot pay him less than it did in the prior year. Annette Shteir v. Bound Brook Bd. of Ed., OAL DKT. EDU 2414-79 (Feb. 4, 1980), adopted, Comm'r of Ed. (Mar. 24, 1980).

If Lilenfield were, for the first time, on a negotiated salary guide, the Board could correctly keep him at his present salary or a proper proration thereof until the guide caught up with his salary. But the Board may not reduce his salary except as provided in the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

I **CONCLUDE,** therefore, that petitioners have carried their burden of proof. The Watchung Hills Regional High School Board of Education shall reappoint petitioners on a full-time basis retroactive to September 1, 1982. Petitioner Piegari shall be compensated forthwith the difference between actual salary received in 1982-83 and that which she would have received if serving on a full-time basis with all appropriate emoluments and benefits and Teachers Pension and Annuity Fund adjustments. Petitioner Lilenfield shall be compensated forthwith the difference between actual salary received in 1982-83 and the amount which he would have received if serving on a full-time basis with all appropriate emoluments and benefits and Teachers Pension and Annuity Fund adjustments plus $276. Petitioner Cochran, having rejected a half-time position, bore a burden of mitigation. If petitioner Cochran was not employed in the 1982-83 school year, she shall be entitled to reappointment without waiver of seniority rights. If she was employed in the 1982-83 school year, she shall be compensated forthwith the difference between actual salary received and the amount which she would have received if serving on a full-time basis in the Watchung Hills Regional High School District with all appropriate emoluments and benefits and Teachers Pension and Annuity Fund adjustments.

It is so **ORDERED.**

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

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

9 AUGUST 1983
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, A.J.J

Receipt Acknowledged:

DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 16, 1983
DATE

Elizabeth Y. Foggin, CS
OFFICE OF ADMINISTRATIVE LAW

ks/EE

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JACQUELYN A. COCHRAN ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record in the matter controverted herein as well as the initial decision. The Commissioner notes that both parties filed initial exceptions in a timely manner and petitioners filed repy exceptions as prescribed by the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board takes exception to the finding of the judge that petitioners herein are entitled to restoration to full-time positions as members of the district child study team (CST). The Board contends that its determination to reduce its CST from full time to part time was made in good faith and for reasons of economy, as well as being based upon a judgment that the mandated services required of such team could be provided by a half-time team supplemented by contracted services as permitted by N.J.A.C. 6:28-1.3(f).

The Board contends that the decision to abolish its full-time services and to supplement CST services through contracting was approved and encouraged by the Somerset County Superintendent of Schools.

The Board's exceptions contend that its actions fully comply with the requirements of N.J.S.A. 18A:28-9 to conduct a reduction in force relative to its CST's services. The Board takes exception to the judge's apparent conclusion that the work contracted to the Somerset County Educational Services Commission constituted the equivalent of one half of the total CST work load. The Board urges the Commissioner to find that it did not contract out one half of its CST services but merely supplemented, when necessary, the services of the one-half time CST employed by the district.

The Board further takes exception to the judge's reliance upon Viemeister, supra, alleging that that particular case dealt with a tenured principal having been reduced to a teaching staff position while all of his duties were assigned to another person. The Board contends that its actions in the matter herein controverted continued petitioners in their employ and assigned out only some work to an outside team if and when it was necessary to do so to meet the timelines established by regulations.

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The Board urges that the Commissioner determine that there has been no finding that the amount of work contracted out represents 50% of the actual CST services required by the district. The Board contends that requiring it to continue to maintain full-time services of a CST when those services could be rendered by a half-time team supplemented to a minor degree by contracted services would represent a "windfall" to petitioners herein. Should the Commissioner find that the Board erred in its determination to reduce the CST's services to half time, the Board urges that the matter be remanded to the judge to determine what relief, short of restoration to full-time duties, could be justified.

The Board's final exception is to the judge's conclusion that Petitioner Lilenfield's salary be held in place until the guide catches up with him. The Board contends that it has the right to pay Lilenfield one half of the salary to which he is entitled by virtue of the salary guide. The Board further urges that, should the Commissioner find for Petitioner Lilenfield, the $276 which the judge directs be paid Lilenfield should be deleted from the relief required since he would be entitled to be paid a full-time salary thus subsuming the $276.

Petitioners' exceptions generally urge affirmance of all of the judge's findings except that which deals with Petitioner Lilenfield's salary. Petitioners contend that Petitioner Lilenfield never was on the teachers' negotiated guide and that the common practice had been for him to receive the same percentage of increase from year to year as that which was accorded other teaching staff members. Such practice, argue petitioners, precludes the judge's determination that the Board be entitled to place him upon the regular teachers' guide thus, in effect, denying him an increment without recourse to N.J.S.A. 18A:29-14. Further, petitioners argue that N.J.S.A. 18A:29-7 mandates a salary guide of fourteen steps for persons holding a doctor's degree.

Petitioners argue once an individual has passed the fourteenth step, as has Petitioner Lilenfield, the parties may agree as they mutually please.

The Commissioner also notes that petitioners' reply exceptions generally refute the contention of the Board that its reduction of CST services was both in good faith and in conformity with statute and regulation.

Further, petitioners' reply exceptions contest the claim by the Board that it received the approval of the Somerset County Superintendent of Schools before making the decision to contract for CST services from the Somerset County Educational Services Commission. In support of their arguments, petitioners cite a monitoring report of the Watchung Hills Regional School District Special Services prepared by representatives of the Division of Special Needs-Handicapped of the State Department of Education. The contents of this report, as cited in petitioners' reply exceptions, are incorporated herein by reference.

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The Commissioner has carefully considered the arguments raised by the parties in their exceptions. Such examination leads the Commissioner to find the Board's arguments essentially self-serving. Experience and common sense dictate that a regional high school district enrolling as many students as does the Board herein, cannot provide those CST services required by statute and regulation with a half-time team. Fortunately, in the instant matter, the Commissioner need not rely exclusively upon experience and common sense but may draw support from the results of the monitoring activities of personnel from the Department of Education's Division of Special Needs-Handicapped whose report of June 1983 based upon review of the special education services provided by the Board herein raised serious questions relative to the legality of contracting for services as did the Board herein without the written approval of the county superintendent. Consequently, the Commissioner finds those arguments unconvincing to the effect that the Board was providing all services necessary with a half-time team and merely contracting out for occasional services. While the Board's argument that no finding of fact was made to demonstrate that it had subcontracted out the full 50% remainder of the CST services superficially seems to have a certain merit to it, the Commissioner finds a remand for purposes of such findings of fact totally unnecessary. Further, the Commissioner notes petitioners' refutation of such argument. Therefore, in the interest of speedy adjudication of the issues herein and based upon the experience and logic heretofore cited by him as well as his own monitoring activities, the Commissioner denies said request for remand.

The Commissioner likewise finds little merit in the Board's argument that Viemeister, supra, has no bearing upon the instant matter. On the contrary, the Commissioner finds that the judge's citing of Viemeister is directly on point in that the circumstances of the abolition of one half of the duties of the CST were like those in Viemeister -- an attempt to abolish the duties of petitioners herein but to transfer those same duties which were abolished to an outside contractor in violation of petitioners' rights of tenure.

The Commissioner in evaluating the exceptions entered by petitioners on behalf of Petitioner Lilenfield can find little in such exceptions to convince him that the judge had erred. In the Commissioner's view the judge has properly evaluated the testimony and the record and reached a conclusion consistent with law and regulation.

Accordingly, and for the reasons as stated herein, the Commissioner affirms the findings and recommendations of the judge and makes them his own.

COMMISSIONER OF EDUCATION

SEPTEMBER 26, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1078-82
(OAL DKT. NO. EDU 1844-82 ON REMAND)
AGENCY DKT. NO. 22-1/82A

IN THE MATTER OF THE TENURE HEARING OF
STANLEY J. ZIOBRO, SCHOOL DISTRICT OF
THE TOWN OF WESTFIELD, UNION COUNTY

APPEARANCES:

Joseph A. Rizzi, Esq., for petitioner
(Winne, Banta & Rizzi, attorneys)

Stephen E. Kausner, Esq., for respondent
(Klausner & Hunter, attorneys)

Record Closed: June 20, 1983 Decided: July 28, 1983

BEFORE ROBERT P. GLICKMAN, ALJ:

Petitioner, Westfield Board of Education, through the Superintendent of Schools, Laurence F. Greene, charged respondent on December 15, 1981 with conduct unbecoming a teacher by executing the following written charge:

> ...Stanley J. Ziobro...did
>
> (a) Take a female child age eleven into the Roosevelt Junior High School on November 13, 1981, a day when the school was in recess, and
>
> (b) Make improper advances to said minor child and take improper liberties with her, and
>
> (c) By those acts abuse his position as a member of the teaching staff of the Westfield Public Schools.

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On January 19, 1982, the Board of Education voted to certify tenure charges to the Commissioner of Education. On January 22, 1982, the certified charges were received by the Commissioner of Education. On February 23, 1982, respondent submitted his answer and separate defenses to the Commissioner of Education.

On March 1, 1982, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on April 16, 1982, the following issues were identified:

(a) Did respondent, in fact, commit any of those acts charged by petitioner?

(b) Do the alleged acts of respondent constitute conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10?

(c) If the charges are found to be true, would such conduct warrant dismissal, reduction of salary or other action?

After the commencement of trial, the parties entered into a settlement agreement which was memorialized by an Order dated October 18, 1982 and which became part of an Initial Decision dated October 26, 1982.

On December 13, 1982, the Commissioner of Education, in a written decision, determined to remand the matter to the Office of Administrative Law for a more definitive statement regarding the basis upon which the parties had consented to settle and withdraw the tenure charges. Additionally, the Commissioner of Education directed that the respondent be given an option to proceed with his defense in the matter in view of the provisions of N.J.A.C. 6:11-3.7 setting forth the role of the State Board of Examiners regarding tenure cases. On December 23, 1982, the matter was remanded to the Office of Administrative Law for the court to take action in conformance with such remand. On January 24, 1983, an additional prehearing conference was scheduled setting forth those same issues which were previously set forth in the original prehearing conference.

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Based on respondent's desire to go forward with the trial, the trial was completed. The matter was heard on the following hearing dates: September 8, 9, 10, and 13, 1982; April 19, 21, 22, and May 11, 1983. Post-hearing proposed findings of fact and conclusions of law were submitted and the record was closed on June 20, 1983. The witnesses who testified and that exhibits marked into evidence are set forth in the attached appendix. Many prehearing motions were filed by the parties, which decisions are clearly set forth in the transcript of these proceedings and are hereby incorporated by reference. Additionally, any motions made during the trial and decisions by me relating thereto are incorporated herein by reference.

DISCUSSION OF FACTS

By way of background information, Stanley J. Ziobro has been a teacher for the Westfield Board of Education for the past 25 years. During the 1981-82 school year, Ziobro was assigned to and was head of the Mathematics Department at Westfield's Roosevelt Junior High School. It is undisputed that Ziobro has been an outstanding and excellent teacher while employed by the Westfield Board of Education.

In order to put this matter in its proper perspective, it is necessary to examine three incidents:

1. Respondent's activities at the home of A.B. while tutoring her in mathematics;

2. The incidents which occurred at Roosevelt Junior High School on November 13, 1981;

3. The incidents involving XY, a former student of respondent.

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RESPONDENT'S ACTIVITIES
AT THE HOME OF A.B.

During the 1981-82 school year, A.B. was eleven years old and attended Westfield's Franklin School as a sixth-grade student. She did not attend Roosevelt Junior High School where Ziobro taught. A.B. and Ziobro were neighbors, Ziobro living diagonally across the street from her. Ziobro initially met A.B. and A.B.'s mother sometime earlier when A.B., while learning to ride a bicycle, struck a parked car, hurt herself and was picked up by Ziobro who took her home. More recently, some time in October 1981, Ziobro met A.B.'s mother in a local supermarket. At that chance meeting, A.B.'s mother asked Ziobro to recommend a mathematics tutor for A.B.. Ziobro suggested that A.B. first be tested in order to determine her relative strengths and weaknesses in mathematics. Ziobro offered to test A.B., A.B.'s mother agreed, and the test was administered at A.B.'s house in October 1981 in the dining room. Nothing unusual occurred at this first home session.

As a result of the test that A.B. took, Ziobro agreed to tutor her at home on Tuesdays from 4:00 to 5:00 p.m. These tutoring sessions took place in October and November, 1981 in A.B.'s dining room. According to the testimony, the dining room contains an oval, tableclothed dining room table with four chairs, the backs of which were approximately four feet in height. Two of the four chairs had arms that fit underneath the table when the chairs were pushed in; these two chairs could be characterized as being at the head of the table, each facing the other. The two remaining chairs had no arms and were situated halfway around the oval table facing each other. During the tutoring sessions, Ziobro and A.B. sat at the dining room table, A.B. sitting on a chair with arms at the head of the table while Ziobro sat in one of the armless chairs to A.B.'s right. During such sessions, the two chairs were next to each other about 6 to 12 inches apart.

At the second home tutoring session, Ziobro and A.B. reviewed the corrections on the examination previously administered. While Ziobro and A.B. were alone in the dining room, Ziobro, with his fingers, drew circles on the palm of A.B.'s hand. This occurred

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while A.B.'s hand was under the tablecloth and close to her knees. Although A.B. did not like Ziobro's actions, she did not express her displeasure to either Ziobro or anyone else at that time. At the end of the second home tutoring session, A.B.'s mother, who was an artist, and Ziobro agreed that as remuneration for his tutoring services, Ziobro would accept and receive, rather than money, one of A.B.'s mother's paintings.

At a third home tutoring session, while Ziobro and A.B. were seated in the dining room at the same place as on the previous occasions, and while working on math ditto sheets, Ziobro drew figure eights with his fingers on A.B.'s thigh. This incident occurred while A.B.'s chair was under the table and, thus, A.B. sitting on the chair had her thigh also under the table. Again, a tablecloth covered the dining room table. A.B. did not tell Ziobro to stop nor did she express her dissatisfaction to him or anyone else at this time. At the end of this session, Ziobro suggested to A.B.'s mother that it might be a good idea, as a motivational tool for A.B., to visit Roosevelt Junior High School in order to work on some of the computers. Ziobro suggested that A.B. come to the school on one of the N.J.E.A. convention days when classes were not in full session. It was agreed between A.B.'s mother and Ziobro that such a visit would take place on November 13, 1981.

Ziobro points out, in connection with the incidents in the house, that somebody was usually present during the tutoring sessions. During the second session, A.B.'s sister, C.B., walked through the dining room. During the third session, although A.B.'s mother was not home when Ziobro arrived, she arrived 30 minutes into the session. During a fourth session, according to Ziobro, A.B.'s mother was in the house, Mr. B. was in the backyard, and A.B.'s sister, C.B., again came through the dining room.

Ziobro denies that he did anything improper in the house, including drawing circles on A.B.'s palm or drawing figure eights on her thigh.

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RESPONDENT'S ACTIVITIES AT SCHOOL

November 13, 1981 was an N.J.E.A. convention day, regarded by the board of education as a professional day. The Board promulgated a policy (P-16) which states:

> Schools are closed for two days as indicated on the yearly calendar, and these are known as professional days. Teachers are invited to attend the N.J.E.A. Convention at this time or to visit other schools as arranged in advance with Principals or Supervisors. Teachers not participating in either one of the activities listed, above are expected to report to school as usual for professional assignments by Principals or Supervisors.

Eugene J. Voll, Principal of the Roosevelt Junior High School, informed all teachers at a meeting prior to the first day of the school year 1981-82 that pursuant to the aforementioned Board policy, teachers were required to be either: 1) at the N.J.E.A. Convention, 2) at other schools, or 3) at Roosevelt Junior High School performing professional assignments. If a teacher expected to be excused from adherence to the Board policy, permission was to be obtained from the Mr. Voll.

On November 13, 1981, Ziobro, without obtaining permission from any superiors, brought A.B. into Roosevelt Junior High School to work on the computers. Ziobro, admittedly, was not at school to perform his own professional assignments. A.B. was picked up by Ziobro at approximately 9:30 a.m. on November 13, 1981 and taken to Roosevelt Junior High School. She was wearing seersucker overalls with a turtlenecked sweater underneath. On the date in question, the junior high school building consisted of two wings, the "old wing" which contained three floors of classrooms and the "new wing" which housed two floors of classrooms. Ziobro's office, Room 500, was located on a second floor hallway which connected the new wing of the building to the old one. His office was partitioned in half by a set of bookcases with books on them. There were two entrances leading into Room 500 and, because of the bookcases, there appeared to be two separate rooms. One of the partitioned portions of Room 500 was utilized as a social studies office and the other part was utilized as a combined math/science office. Ziobro's office and desk were located in the math/science portion of the room.

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While Ziobro and A.B. were at the school, they went to a number of places. After entering the building, they first went to Ziobro's office. Next, Ziobro took A.B. on a tour of the building, which included walking through a number of halls, down a number of stairwells, and into several classrooms, including the biology classroom, two math rooms, an art room, an A.L.P.S. room, a cafeteria, a woodsroom, and a gymnasium. The two of them viewed a weather station located on the roof of the building through a door window located in a third-floor alcove. At one point, they went into the auditorium. At certain locations within the building, while Ziobro and A.B. were alone, Ziobro, while standing behind A.B., put his hands inside of the opening in her seersucker overalls but on top of her turtlenecked sweater and touched A.B.'s chest area. This conduct took place at the following locations: 1) while Ziobro and A.B. were standing in the hallway and looking into a classroom; 2) when the two of them were on the third floor of the old wing in an alcove adjacent to Room 325 looking out to a weather station located on the roof; 3) when Ziobro and A.B. were on the second floor of the old wing in Room 206, the A.L.P.S. room, looking at a chart on the wall next to the door.

While A.B. and Ziobro were in Room 501, the biology room which was located on the second floor of the new wing, A.B. was looking at a jar containing a cat in formaldehyde located on some shelves. The jar on the shelves was approximately 5 feet, 11 inches high. While the two of them were in this room alone, Ziobro picked A.B. up to see the cat by placing his hands underneath her armpits and lifting her up into the air. A.B. did not ask to be picked up to see the cat in formaldehyde. In the process of picking A.B. up to see the cat, Ziobro touched A.B.'s middle chest area.

In the course of an interview with Detective Tracey of the Westfield Police Department on November 20, 1981, Ziobro gave the following statement:

> He stated that the only time he could remember that A.B. could misconstrue his touching her on the chest would be where he lifted A.B. up to view the embryo of a cat, I believe. At this time he said, "Maybe my hands were on her chest." Well, he said that he picked her up on the arms, under the armpits, and that his finger may have extended onto her chest.

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Additionally, during a meeting between Ziobro and Dr. Greene on November 24, 1981, which meeting was attended by Ziobro's then attorney, Theodore S. Meth, Ziobro admitted to Dr. Greene that while they were in the biology room, he lifted A.B. up by placing his arms under her armpits to see the fetus of the cat that was located high up on the shelves.

While Ziobro and A.B. were alone in Room 501, Ziobro, while standing directly behind A.B., Ziobro, facing A.B.'s back and having his hands on her shoulders, squatted up and down by bending his knees outward, similar to a plie, and touched his groin area to A.B.'s backside. A.B. testified that she felt Ziobro's "private part" against her backside. When this occurred, she moved away from Ziobro by going to another part of the room where she talked to Ziobro about some rocks.

on November 13, 1981, Room 225, located on the second floor of the old wing, contained a computer terminal equipped with a television-type screen. Individual work stations, shelving, a round table with four chairs, and cabinet-type bookshelves which contained text books were also located in Room 225. While Ziobro and A.B. were alone in Room 225, Ziobro again plied against her backside, in a similar fashion to that previously described when the two of them were in Room 501. A.B. again walked away from Ziobro, going to another part of Room 225 to look at a math game, but Ziobro followed and again plied against her backside. While they remained in the room, Ziobro and A.B. worked at a television computer terminal and operated the keyboard.

Room 219, a math room located on the second floor of the old wing of the building, contained two Decwriter II computer terminals. One was visible from the hallway and the other located along a wall separating the hallway from the classroom, was not visible from the classroom. Each of the terminals on November 13, 1981 had a keyboard and a printout capability. The computer was approximately 35 to 36 inches high, 30 inches at the front of the keyboard, and 2 feet by 2-1/2 feet across the top.

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Ziobro and A.B. visited Room 219 on several occasions for the purpose of using the Decwriter II computer terminal. On one occasion, they were in the room between 9:30 and 10:00 a.m. At that time, Michael Barba, a math teacher, was utilizing the computer. As a result, Ziobro and A.B. left the room to tour the building. Upon returning to Room 219 between 10:00 and 10:30 a.m., Ziobro and A.B. saw that Barba was still utilizing the computer. Ziobro informed Barba that he and A.B. would use the television computer terminal in Room 225. Barba indicated that he would retrieve Ziobro and A.B. when he was finished using the Decwriter II computer in Room 219, which occurred close to 11:00 a.m.

Ziobro and A.B. utilized the Decwriter II computer terminal from approximately 11:00 to 11:30 a.m., then left the room to tour the building and arrived back at approximately 11:40 a.m. to again use the computer until approximately 12:30 p.m.

While Ziobro and A.B. were in Room 219, at some point, Barba worked with them, programming certain pictures which were then printed out in a hard copy. Ziobro and A.B. did math, spelling, and picture exercises on the computer.

While Ziobro and A.B. were alone in Room 219, and were utilizing the Decwriter II computer terminal, that terminal along the wall not visible from the hallway, Ziobro told A.B. that she could sit on his lap so that she could see better. A.B. did sit on Ziobro's lap. A.B. never asked to sit on his lap. While on his lap, Ziobro instructed A.B. to punch certain keys on the computer terminal. A.B. did not complain when Ziobro had her sit on his lap and did not tell him that she wanted to go home because she thought that might be rude.

In court, Ziobro explained that A.B. was not really sitting on his lap but was on the end of his knees so that she could see into the terminal.

During an interview with Detective Tracey of the Westfield Police Department on November 20, 1981, Ziobro stated:

> He stated that the only thing that he could think of when his front touched the back of A.B. would be at the computer, when she sat down on his lap so she could view the computer.

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Ziobro went on to say to Detective Tracey:

> Again, several times when he was showing her different classrooms, he had his hand on her shoulders and he was against her back, but he stated that at no time did he have an erection.

During the conference between Ziobro, Dr. Greene and Theodore S. Meth, Esq., on November 24, 1981, Ziobro admitted that he lifted A.B. up in the biology room and then admitted that in the math room, he had A.B. sit on his lap for 15 minutes to one-half hour because, according to Ziobro, she was tired and could better see the computer.

After A.B. and Ziobro completed their stay at Roosevelt Junior High School, Ziobro took A.B. home at approximately 1:30 p.m.

During the evening of November 16, 1981, A.B. told her sister that because Ziobro was "doing stuff," she no longer wanted him as a tutor. As a result of that conversation, A.B.'s sister informed their mother who questioned A.B. about it. A.B. related what had happened between Ziobro and her.

The court had an opportunity to carefully listen to and observe A.B. during the trial. The court was favorably impressed with A.B., her brightness, recollection, specificity, and spontaneity. During some portions of the trial, when A.B. testified, she would suddenly start crying while recalling the events that took place. She obviously had difficulty testifying about those events which were distasteful to her. There were very few discrepancies between her testimony and the testimony of others on basic facts. I was unable to discern any motive why A.B. would make up such a story against Ziobro. In other words, I find that A.B. was a believable and credible witness, being both forthright and honest in her testimony.

With regard to the events of November 13, 1981, Ziobro denied that he did anything wrong. He described in detail his tour around the building from the time that he entered the building until the time that he left it. Ziobro attempted to account for almost every minute of the time while in school, describing each and every teacher who saw them.

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With regard to the biology room, Ziobro saw A.B. have a quizzical look on her face while looking at the top shelf that contained the cat in formaldehyde. Ziobro asked her if she wanted to be picked up to see the cat and she said yes. He, thus, picked her up under her armpits and denies any other physical contact.

While in Room 219, Ziobro testified that A.B. seemed tired, having sat on her leg most of the time. According to Ziobro, her temperament was changing. Ziobro asked A.B. if it would help if she sat at the end of his knees so that she could be elevated to see the computer terminal, to which she replied yes. Ziobro described A.B. as sitting at the end of his knees and not on his lap, with her back about one and one-half feet from his stomach.

Thus, Ziobro admits to picking A.B. up in the biology and having her sit at the end of his legs in the computer room, but denies any other kind of touching.

No other eyewitnesses saw any form of touching at any time between Ziobro and A.B..

RESPONDENTS ACTIVITIES WITH XY

During the trial, Ziobro denied that during his 25 years as a mathematics teacher for the Westfield Board of Education and while rendering either direct instruction or remedial instruction to students, he ever placed his hands on the thigh of a female student for more than a momentary period of time or ever stroked or rubbed a thigh of a female student.

Based on Ziobro's statement, a student who will be referred to as XY was called as a witness for the petitioner. She testified that she was in Ziobro's ninth grade Algebra I class and beginning in late October or early November 1980, sought extra help sessions from Ziobro. She went to Ziobro either every day or every other day for that period of time. All but one of the extra help sessions took place in Ziobro's office, Room 500; the other session took place in the math classroom. One or two of the sessions took place at the beginning of the school day, while the rest of them took place at the end of the school day. The sessions lasted approximately one-half hour. Ziobro's office door was closed during most of these extra help sessions.

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Ziobro and XY sat in chairs in front of Ziobro's desk; XY worked on a leaf which pulled out from the front of the desk. The two chairs were close together so that Ziobro could read what XY was writing. During all of the extra help sessions other than the first few, Ziobro, while seated next to XY at the desk, placed his hand on XY's thigh, palm downward and rubbed XY's thigh by moving his hand upward and downward from XY's knee area to about one-half way up her leg, occasionally stopping and then restarting such rubbing. Ziobro rubbed her thigh 15 to 20 times per session. No one was present during any of the times when he rubbed XY's thigh.

During one of the morning extra help sessions, prior to the morning bell, Ziobro was in Room 500 with XY and was rubbing her thigh when Mr. Pasteur, a fellow teacher, walked into the room unexpectedly. Ziobro very quickly moved his hand from XY's thigh.

XY did not tell Ziobro to stop rubbing her thigh during the extra help sessions because she hoped that he would remove his hand from her thigh, was trying to concentrate on the math work, and did not want Ziobro to get mad at her, and think that she was insinuating or suggesting that he was doing something wrong.

XY always thought of Ziobro as a very good friend and one of the finest teachers that she ever had. I found XY to be a forthright, honest and credible witness who had no motive to distort the truth. Ziobro never did anything to XY, either in giving her failing marks or criticizing or yelling at her in class, which might provide a motive for her coming forward and fabricating the truth. As a matter of fact, she is even more credible since she appears to have absolutely no motive for giving false statements. She was subpoenaed to come to court and reluctantly gave her testimony, oftentimes crying when giving sensitive information.

Ziobro denied that he ever touched XY's thigh. Ziobro stated XY was a "fairly good student but had to work at things." However, she had never gotten a C in his class, receiving a B as final grade. In 1981, when Ziobro was absent from school for two weeks, XY sent him a sympathy card. When XY was a ninth grader, she made cookies for Ziobro. After she graduated from Roosevelt Junior High School, she went back to school to visit Ziobro.

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Several classmates of XY, namely, A.G., C.N., N.H., T.L., and E.K. testified. The gist of their testimony was that XY had a reputation for exaggeration.

Again, I found XY to be trustworthy, believable, and credible. She cried spontaneously several times during her testimony during sensitive periods. I believe her when she said that she thought respondent would not like her if she told what had happened and would feel she made up the story. I also believe that XY did not want to get involved in this case nor did she want to testify, but testified because of the subpoena.

FINDINGS OF FACT

Based on a careful consideration of the testimony and evidence, including an assessment of the credibility of witnesses and the probability of the truth of their version of the incidents, I **FIND:**

1. Stanley J. Ziobro was employed by the Board of Education of Westfield in November 1981 as a school teacher.

2. Ziobro had been employed for 25 years in the school system and during the 1981-82 school year, he was head of the Mathematics Department at Westfield's Roosevelt Junior High School.

3. Except for the incidents in question, Ziobro was an outstanding teacher, having received fine evaluations.

4. During the 1981-82 school year, A.B., a female youngster of eleven years of age, was a sixth-grade student at Westfield's Franklin School. A.B. was not one of Ziobro's sudents.

5. Ziobro was a neighbor of A.B., living diagonally across the street.

6. As a result of discussions between Ziobro and A.B.'s mother, Ziobro began to tutor A.B. at her home for weaknesses in mathematics.

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7. During the first home tutoring session, Ziobro administered a test to A.B..

8. After the first home tutoring session, Ziobro tutored A.B. on several other occasions on Tuesday afternoons between 4:00 and 5:00 p.m.

9. On the second tutoring occasion, while Ziobro was seated next to A.B. at the dining room table, he drew circles on A.B.'s palm with his fingers. This occurred while A.B.'s hand was situated under the tablecloth of the dining room table.

10. I **FIND** that Ziobro's activities were not visible to anyone else.

11. During the third home tutoring session, Ziobro drew figure eight's with his fingers on A.B.'s thigh. This occurred while A.B. and Ziobro were seated at the dining room table, with the tablecloth covering such activity so no one else could see Ziobro's actions.

12. At the end of the aforementioned home tutoring session, Ziobro suggested to A.B.'s mother that she come to Roosevelt Junior High School on November 13, 1981, the N.J.E.A. convention day, to work on some computers.

12. Ziobro, in fact, did bring A.B. to Roosevelt Junior High School of November 13, 1981, the N.J.E.A. convention day.

13. Although not specifically charged with a violation of school policy, and although unnecessary to determine Ziobro's wrongdoing with regard to A.B., I **FIND** that Ziobro violated Board policy in bringing A.B. to school on a professional day (see P-16).

14. I **FIND** that Ziobro knew from announcements by Principal Eugene J. Voll at the beginning of the year that it was a violation of Board policy to bring a youngster to school on a professional day.

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15. Ziobro arrived at school with A.B. on November 13, 1981 between 9:30 and 10:00 a.m.

16. Ziobro's office was located on the second floor hallway which connected the new wing of the building to the old wing. His office was partitioned by a set of bookcases, half of the office utilized as a social studies office and the other used as a combination math/science office. Ziobro's desk was located in the math/science portion of the room.

17. After arrival at the school, Ziobro took A.B. on a tour of it.

18. While touring the building with A.B., and while alone, Ziobro, standing behind A.B., put his hands inside of the openings in A.B.'s seersucker overalls, on top of her turtlenecked sweater, touching her chest area. This occurred several times, once while Ziobro and A.B. were standing in a hallway looking into a classroom; another time while Ziobro and A.B. were on the third floor of the old wing in an alcove adjacent to Room 325 looking out to a weather station located on the roof of the building; and also, while Ziobro and A.B. were on the second floor of the old wing in Room 206, known as the A.L.P.S. room.

19. While Ziobro and A.B. were in Room 501, the biology room, A.B. observed a jar containing a cat in formaldehyde. This jar was stored on a shelf approximately 5 feet 11 inches high.

20. While A.B. was looking at the cat, Ziobro picked A.B. up to see the cat, placing his hands underneath her armpits. Ziobro also touched A.B.'s middle chest area. A.B. never asked Ziobro to pick her up.

21. When Ziobro was interviewed by Det. Tracey of the Westfield Police Department on November 20, 1981, he admitted that he lifted A.B. up to view the embryo of the cat. He further stated that maybe his hands were on her chest.

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22. While Ziobro and A.B. were alone in Room 501, Ziobro, while standing directly behind A.B., facing her back, with his hands on her shoulders, squatted up and down by bending his knees outward (like a ballet plie) and touched his groin area against A.B.'s backside.

23. When Ziobro plied, A.B. felt his "private part" against her backside.

24. While Ziobro and A.B. were alone in Room 225, and while A.B. was looking at a mini-encyclopedia, Ziobro again plied against A.B.'s backside, similar to that done before. A.B. attempted to get away from Ziobro in Room 225 by going over to another part of the room, but Ziobro followed A.B. and again plied against her backside.

25. While Ziobro and A.B. were alone in Room 219, which contained a Decwriter II computer terminal, Ziobro had A.B. sit on his lap. A.B. never asked to sit on Ziobro's lap.

26. When Ziobro was interviewed by Det. Tracey, he admitted that he had A.B. sit down on his lap so that she could view the computer.

29. When Dr. Greene, Superintendent of Schools, interviewed Ziobro on November 24, 1981, in the presence of Ziobro's attorney, Theodore J. Meth, Ziobro admitted that he lifted A.B. up in the biology room to see the cat and also admitted that he had A.B. sit on his lap for 15 minutes in the computer room.

30. On the evening of Monday, November 16, 1981, A.B. told her sister that Ziobro was "doing stuff" and that she no longer wanted him to tutor her. A.B.'s sister then informed A.B.'s mother of the incidents which resulted in A.B. relating everything to her mother.

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31. I found that A.B.'s testimony was forthright, honest, clear, credible, and had the ring of truth. She reacted to the incidents which she described with emotion and feelings. I **FIND** no reason presented for her to have any motive to lie.

32. I **FIND** that Ziobro's testimony, as compared to A.B.'s testimony and XY's testimony, was not forthright, clear or credible. He showed absolutely no emotion or feelings in connection with the trial. His version of what happened did not have the ring of truth.

33. I **FIND** that Ziobro's admissions to Det. Tracey and Dr. Greene demonstrated improper conduct for a teacher.

34. During Ziobro's testimony in court, he denied that during his 25 years of teaching, he ever placed his hand on the thigh of any female student nor did he ever stroke or rub the thigh of a female student.

35. XY, a former student of Ziobro's, testified that during the 1980-81 school year, she sought extra help from Ziobro after school for mathematics.

36. From late October or early November until late November 1980, she met with Ziobro quite often for extra help sessions.

37. All but one of the extra help sessions took place in Ziobro's office in Room 500.

38. During all of the extra help sessions, except for the first few, Ziobro placed his hand on XY's thigh, rubbing the thigh by moving his hand up and down from XY's knee area to about one half the way up her leg, occasionally stopping and then restarting such rubbing.

39. No one was ever present during the times that Ziobro rubbed XY's thigh.

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40. XY never told Ziobro to stop doing this because she feared that Ziobro would get mad at her and that she did not want Ziobro to think she was insinuating that he was doing something wrong.

41. I **FIND** and **CONCLUDE** that XY's testimony is only evidential as it bears on Ziobro's credibility.

42. I **FIND** that XY was a truthful, honest and forthright witness who had no motive to lie. She was a friend of Ziobro's who respected and admired him. She felt that he was one of the best teachers that she ever had.

CONCLUSIONS OF LAW

It is a difficult and unpleasant task that I am faced with in having to judge the actions and conduct of Stanley J. Ziobro, an outstanding teacher of 25 years experience in the Westfield School System. I have had an opportunity to observe Ziobro in court over a period of many months. He showed absolutely no emotions during the trial. He sat there stoicly, without any expression on his face. It was as if the trial involved another person, not Ziobro. He spoke flatly, without any inflection in his voice. I have the feeling that I was watching and listening to a robot, without any human feelings. I found Ziobro's version of the events not credible or believable as compared to the testimony of A.B. and XY. His credibility was placed gravely in doubt as a result of his admissions to Detective Tracey and Dr. Greene about lifting the child and having her sit on his lap.

Ziobro's recitation of the facts and the inferences he would want me to draw from them paints a picture that the incidents at A.B.'s home and in school on November 13, 1981 could not possibly have happened because there were too many people around. Since all of the the time was accounted for, Ziobro asserts that I should believe that she was merely a little girl with a vivid imagination. On the contrary, I found A.B. to be clear and concise in her description of what happened both while Ziobro was tutoring her at her house and while she went into the school. I also found XY's testimony accurate. I can find no motive on either youngster's part to fabricate a story against Ziobro.

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The law is clear that in a case involving tenure charges, the board of education has the burden of proving the charges true by a preponderance of the credible evidence. In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, Middlesex County, 1978 S.L.D. 506; In the Matter of the Tenure Hearing of Madeleine Ribacka, Sussex-Wantage Regional School District, Sussex County, 1978 S.L.D. 929; and In the Matter of the Tenure Hearing of Fred Brown, School District of the City of Bayonne, 1970 S.L.D. 239.

I am satisfied that the Board has sustained its burden of proof and has proved by a preponderance of the credible evidence that Ziobro engaged in conduct unbecoming a teacher as a result of his actions and conduct with A.B. on November 13, 1981 and prior thereto in her home while tutoring her. Ziobro's credibility was also effected by his denial in court that he touched the thigh of any other youngster while a teacher. This was clearly shown to be a false statement by the testimony of XY who indicated that Ziobro did rub her thigh on several occasions when she came to him for help before and after school during the year 1980.

The Commissioner has demanded high standards of moral conduct from teachers. A teacher stands in a very special relationship to his students.

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinion of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Tp. of Jackson, Ocean County, 1974 S.L.D. 97, 98-99.

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Looking at the proper role of a teacher a little differently, the Commissioner said:

> The citizens of this State, and of respondent's community, are entitled to expect a high order of professional conduct from those employees to whom young children, pupils of immature years, are entrusted.

In the Matter of the Tenure Hearing of Michael A. Pitch, School District of the Borough of South Bound Brook, Somerset County, 1974 S.L.D. 1176-1187.

Although there are not a substantial number of incidents of conduct unbecoming a teacher in the instant case, our courts have said that one flagrant incident is sufficient to prove unfitness for a task. As stated in Redcay v. State Bd. of Ed., 130 N.J.L. 369 (Sup. Ct. 1943), affirm'd 131 N.J.L. 326 (E. & A. 1944), the court stated:

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

In the matter before me, I **CONCLUDE** that Stanley J. Ziobro's conduct on November 13, 1981 was flagrant and outrageous. He had no business impermissibly touching, in any way, any pupil. No teacher should place his hands on a pupil, touch that pupil, lift that pupil, or have the pupil sit on his lap. This is inappropriate and constitutes unbecoming conduct.

I am mindful of the fact that several youngsters testified in this case. I recognize and appreciate that their testimony must be viewed with a great deal of caution. See In the Matter of the Tenure Hearing of John Birch, School District of the Borough of West Long Branch, Monmouth County, 1978 S.L.D. 63; In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, 1971 S.L.D. 566, affirm'd State Bd. 1973 S.L.D. 733, affirm'd Docket No. A-1680-72, N.J. Super. (App. Div. November 28, 1973); In

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the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock, 1971 S.L.D. 305. It is equally clear, however, that the issue of credibility with respect to the testimony of pupil witnesses is the responsibility of the trier of fact. See, Birch, supra.; In re Tenure Hearing of Grossman, 127 N.J. Super. 13 (App. Div. 1974); In re Hackensack Water Co. Application, 132 N.J. Super. 296 (App. Div. 1975). To reiterate, in light of what has just been enunciated, I **FIND** and **CONCLUDE** that the testimony of A.B. and XY, which was carefully scrutinized by me, was credible, believable, and forthright, and had the ring of truth. Both A.B. and XY were subjected to vigorous cross-examination by an experienced trial attorney. Neither one of their versions of the incidents that they recited was adversely affected by such cross-examination.

It is my **CONCLUSION**, therefore, based on the testimony and evidence, that Stanley J. Ziobro did take a female child, age 11, into the Roosevelt Junior High School on November 13, 1981 and make improper advances to said minor child and did take improper liberties with her, which conduct constitutes conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10. See In the Matter of Tenure of Frederick J. Nittel, School District of the Borough of Roselle Park, Union County, 1974 S.L.D. 1269, affirm'd State Bd. of Ed. 1975 S.L.D. 1111; In the Matter of the Tenure Hearing of Edward J. Quinn, School District of South Orange-Maplewood, Essex County, 1975 S.L.D. 397.

Certainly, Ziobro's actions and conduct violated the public trust placed in him. Such conduct warrants dismissal from his position. See In the Matter of the Tenure Hearing of Francis Bacon, School District of the Tp. of Monroe, 1971 S.L.D. 387, affirm'd State Bd. of Ed. 1972 S.L.D. 663; Matecki, supra. Because of respondent's own actions he has forfeited the tenure protection which is afforded by the statutes to the teaching staff members who have otherwise complied with the minimum requirement. See In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Tp. of Teaneck, Bergen County, 1971 S.L.D. 284; Bacon, supra.

Accordingly, it is **ORDERED** that respondent's penalty shall be dismissal as of the date of his suspension by the Westfield Board of Education.

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

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

DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

August 1, 1983

DATE

Ronald L. Lankenau

FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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APPENDIX

WITNESSES

A.B.	Amelia McTamaney
Stephanie Mannino	Dr. Laurence F. Greene
Det. Bernard Tracey	Natalie Best
Eugene J. Voll	Michael Barba
Thomas Masteller	Katharine Taylor
Margaret Merrill	Drude Roessler
Pauline Shannon	Ann Hearn
Bette Lipschultz	Stanley J. Ziobro
Claire Pigott	XY
A. G.	C. N.
N. H.	T. L.
B. K.	

EXHIBITS

C-1	Letter of Klausner dated July 30, 1982
C-2	Diagram of A.B.'s dining room
C-3	Diagram of English area
C-4	Diagram of videocomputer room
P-1	Cat printout from computer
P-2	Iceskater
P-3	"Timmy the Turtle"
P-4	Horseback rider
P-5	Minnie Mouse
P-6	Pinocchio
P-7	Snoopy and a football
P-8	Printout 11:00 a.m. on November 13, 1981

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P-9	Printout 11:15 a.m.
P-10	Printout 11:17 a.m.
P-11	Printout 12:13 p.m.
P-12	For identification, drawing pad
P-13	For identification, drawing done at office on September 2, 1982
P-14	For identification, drawing
P-15	For identification, fifth and sixth autograph book
P-16	Board policy on professional days
P-17	Sixth grade report card of A.B.
P-18	Picture of Ziobro's floor
P-19	Weather station
P-20	Picture of hallway and door to weather station
P-21	Picture of Room 225
P-22	Picture of Room 225
P-23	Room 225
P-24	Picture of Room 219
P-25	Picture of Room 219
P-26	Picture of door to Room 501
P-27	Picture of Room 501
P-28	Picture of Room 501
J-1	Diagram of Roosevelt School
R-1	Observation of Ziobro, November 22, 1976
R-2	Evaluation of Ziobro, 1976-77
R-3	Evaluation of Ziobro, December 12, 1977
R-4	Evaluation of Ziobro, June 2, 1978
R-5	Appraisal of growth of Ziobro, June 7, 1978
R-6	Evaluation of Ziobro, March 8, 1978
R-7	Evaluation of Ziobro, January 18, 1979
R-8	Appraisal of personal growth of Ziobro, May 25, 1979
R-9	Evaluation of Ziobro, June 8, 1979

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R-10	Evaluation of Ziobro, June 11, 1980
R-11	Evaluation of Ziobro, May 28, 1981
R-12	Evaluation of Ziobro, May 27, 1980
R-13	Picture of Room 225
R-14	Picture of Room 225
R-15	For identification, book written by A.B., June 1981
R-16	Math test
R-17	Picture of hallway on third floor
R-18	Marking book for 1980-81

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IN THE MATTER OF THE TENURE	:	
HEARING OF STANLEY J. ZIOBRO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN	:	DECISION ON REMAND
OF WESTFIELD, UNION COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision on remand rendered by the Office of Administrative Law, Robert P. Glickman, ALJ. It is observed that respondent's exceptions to the initial decision and the Board's reply exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

It is further noted that application has been made to the Commissioner to intervene in this matter amicus curiae by Margot Landale through the filing of a motion to that effect with accompanying affidavit. The movant states in her affidavit that she is a resident of Westfield seeking amicus status for herself and at least twenty other concerned residents of Westfield so named therein.

The ground for Ms. Landale's motion is primarily set forth in paragraph #7 and #8 of her affidavit which reads as follows:

> "***7. However, as citizens concerned for the future of Westfield, we believe that some expression should be made concerning this decision and the affect that the decision will have on the Town of Westfield, the Westfield school system and the teachers in the school system. This decision, affecting a teacher who has been in the Westfield school system for 25 years with an unblemished record and has taught the children of many of those names attached to this petition, has caused the grave concern throughout the Town. The decision by Judge Glickman states that Mr. Ziobro, 'violated the public trust placed in him'. We, as citizens and taxpayers, wish to present our views of what constitutes a public trust insofar as this teacher and all teachers in the Westfield School system are concerned. We wish to present our view as to what we believe a sound relationship should be between teacher and pupils. We are concerned that the decision could inhibit good teachers in Westfield from properly teaching the Westfield students.
>
> "8. We also are concerned that the penalty imposed by the Administrative Law Judge, namely dismissal, is unduly harsh and vindictive for a teacher who has served the Westfield school

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> system for 25 years in, as far as we know, an outstanding manner. Even the Administrative Judge pointed out in his decision that Mr. Ziobro was 'an outstanding teacher of 25 years experience in the Westfield School System'. We believe that our views should be presented on the penalty because we feel that the implications of this penalty can cause inestimable damage to the morale of the teacher[s] in the system and lead to erosion of the system as we have known it.***" (Affidavit, at pp. 3-4)

The Board by way of a letter memorandum of law opposes the Motion to Intervene, amicus. The Board relies on Rule 1:13-9 of the New Jersey Rules of Civil Practice and N.J.A.C. 6:24-1.7, as the decision of the Court in Casey et al. v. Male, 63 N.J. Super. 255 (Essex County Court 1960) in seeking to establish before the Commissioner that the motion should be denied.

In this regard the Board argues that movant's views as set forth in the affidavit are admittedly partisan in support of respondent and serve to advocate a partisan viewpoint rather than an advisory position regarding relevant matters of law before the Commissioner. The Board argues that the Court in Casey rejected such application for the following reasons:

> "***Definitively, amicus curiae has been said to be one who gives information to the court on some matter of law in respect of which the court is doubtful, or who advises of certain facts or circumstances relating to a matter pending for determination. Kemp v. Rubin, 187 Misc. 707, 64 N.Y.S. 2d 510 (Sup. Ct. 1946). This status is advisory rather than adversary***.
>
> "***As indicated above, the application by way of notice of motion recites that the petitioners seek leave to appear 'in support of the defense of the defendant, Raymond Male.' Taking the clear import of these words, it appears that the role which they desire to assume is that of advocate and not of advisor. A further reading of this cited language taken together with the quoted portion of the accompanying affidavit set forth at the outset of this opinion sufficiently discloses that the petitioners' position can only be inconsistent with the impartiality which clothes amicus curiae. Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as amicus curiae. Central Hanover Bank & Trust Co. v. Saranac River Power Corporation, 243 App. Div. 843, 278 N.Y.S. 203 (1935)***."
> (Emphasis added.) (at pp. 258-259)

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The Commissioner finds and determines that the motion fails to comply with the standards for granting such application in the instant matter. Accordingly, said motion is hereby denied.

The Commissioner observes that the judge relies heavily upon the demeanor of the pupil witnesses, A.B. and X.Y. in reaching a finding and conclusion that there has been a preponderance of credible evidence produced by the Board to warrant respondent's dismissal from his tenured teaching position.

It is further observed that the testimony of these pupils conflicts with that given by respondent who denies the alleged incidents related to the Board's tenure charges against him.

The Commissioner has reviewed the transcripts of the witnesses who testified in these proceedings and concludes that the testimony of A.B. and X.Y. bears further review with respect to the circumstances pertaining to those alleged incidents of improper physical bodily contact inflicted upon them by respondent.

The Commissioner notes that the purpose of X.Y.'s testimony in this matter has been admitted into the record in an attempt to challenge the credibility of respondent's testimony related to the tenure charges and also to show that respondent had a propensity to engage in improper bodily touching of his pupils.

The Commissioner is constrained to also observe that prior to the time tenure charges were certified against him, respondent served in the Board's employ for approximately 25 years and has been considered to be an outstanding teacher of mathematics.

Upon a careful examination of the record of the entire matter the Commissioner finds and determines that he does not concur with the judge's findings and conclusions with respect to the sufficiency of credible testimony adduced at the hearings from A.B. and X.Y. to conclude that respondent is guilty of deliberately making advances to, and taking improper liberties with, the pupil A.B. for the purpose of engaging in physical contact with her.

The Commissioner's determination is grounded upon the following reasons obtained from a review of the testimony of these pupils with respect to the alleged incidents involving respondent's unbecoming conduct:

1. A.B.'s unsatisfactory explanation regarding her failure to promptly report to her parents the two incidents pertaining to the touching of her hand and leg by respondent while she was being tutored at her home. Moreover, the record establishes that at least one member of her family was in the approximate vicinity of the dining room where these tutoring sessions took place.

2. A.B.'s failure to inform her mother of these incidents prior to the time she was permitted to accompany respondent alone in his car to visit the Roosevelt Junior High School on November 3, 1981.

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3. A.B.'s failure to promptly report the alleged incidents that occurred at the Roosevelt Junior High School after she was taken home by respondent.

The Commissioner is further constrained to observe that the record of this matter reveals that during the time A.B. and respondent were visiting the Roosevelt Junior High School on November 13, 1981, there were other teachers and pupils present in the school building at that time. It is noted that respondent made a conscious effort to introduce A.B. to other faculty members and that she engaged in limited conversation with certain faculty members during her visitation. Consequently, while it is claimed that the alleged incidents occurred in isolated areas of the school building, the Commissioner can only conclude that, under the circumstances, the incidents which have been supported by sufficient credible evidence are those involving respondent's lifting A.B. to see the embryo of the cat in jar of formaldehyde, and the incident in which respondent permitted A.B. to sit on his leg during the time he assisted her in the instruction and operation of the computer.

The Commissioner has also reviewed X.Y.'s testimony for the same reasons stated above. Similarly, he finds and determines X.Y.'s testimony to be unreliable for the following reasons:

1. The unsatisfactory explanation given by X.Y. regarding why she failed to report to the school authorities the several alleged incidents of physical touching by respondent. X.Y. testified she related these incidents to her mother who advised her to report these incidents if, in fact, she was not exaggerating.

2. X.Y. testified that she did not seek respondent's assistance for extra help in mathematics after the occurrence of the alleged incidents she described as having last taken place when she was in the ninth grade at the Roosevelt Junior High School during the 1981-82 school year. (Tr. April 22, 1983, vol. III-30; Tr. May 11, 1983 - 3-5, 10, 11)

However, there is sufficient credible testimony in the record to establish that X.Y. did, in fact, seek and receive respondent's assistance in plane geometry during the 1981-82 school year when she was enrolled as a tenth grade pupil in the Westfield High School. (Tr. May 11, 1983)

Based upon the foregoing findings and determination with respect to the circumstances surrounding the testimony of two of the Board's primary witnesses, pupils A.B. and X.Y., the Commissioner finds and determines that count (b) ante, of the Board's tenure charge against respondent is hereby dismissed. The Commissioner so holds.

The Commissioner, however, further finds and determines that the Board has sustained its burden of proof with respect to counts (a) and (c), ante, in support of its tenure charge of unbecoming conduct against respondent.

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The record of this matter clearly reveals that respondent did not obtain approval from the appropriate school official to take A.B. to the Roosevelt Junior High School on November 13, 1981 nor was he authorized to use the school's facilities for the purpose of providing instruction to a pupil whom he was privately tutoring. In the Commissioner's view, respondent's failure to follow the proper procedure in this instance may not be excused, especially in view of the fact that A.B. was a sixth grade pupil at that time who was not enrolled in the Roosevelt Junior High School.

The Commissioner cannot excuse or ignore the fact that respondent resorted to the use of physical contact with A.B. during those incidents which occurred at the Roosevelt Junior High School in the biology room or at the computer in room 219, on November 13, 1981. In this regard, the Commissioner finds and determines that, while respondent's testimony with respect to these incidents is deemed credible, he has clearly demonstrated a lack of sound professional judgment as an experienced teacher by regarding his conduct and behavior with A.B. under the circumstances described herein as being innocuous. The Commissioner finds that such lack of wisdom on respondent's part serves as a discredit to his otherwise outstanding reputation as a teacher in the Westfield School District.

Therefore, for the reasons set forth herein the Commissioner reverses the ALJ's finding and conclusions with respect to count (b), ante, of the Board's tenure charge of unbecoming conduct against respondent. Count (b) is hereby dismissed.

Counts (a) and (c), ante, of the Board's tenure charge against respondent are hereby sustained and respondent is found to be guilty of the charge of unbecoming conduct as a tenured teaching staff member for the reasons as herein described.

The Commissioner in determining the penalty to be imposed upon respondent rejects the judge's recommendation that he be dismissed from his tenured teaching position as being too punitive and excessive, given respondent's twenty-five years of outstanding service and performance as a teaching staff member in the Westfield School District.

Accordingly, it is determined that respondent, as a result of being found guilty as charged of unbecoming conduct, shall forfeit 120 days' salary commencing as of the date of the certification of the Board's tenure charges against him. The Commissioner so holds.

Except for the penalty imposed above by the Commissioner, the Board is ordered to immediately reinstate respondent to his

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former tenured teaching position with salary mitigated by earnings from alternate employment, if any, and other benefits and emoluments owing and due him as of the date of its certification of tenure charges against him.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 28, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 9379-82
AGENCY DKT. NO. 356-9/82A

EVELYN RUDOLPH-NACHTMAN and
ROBERT HERBERT,
Petitioners
v.
MIDDLETOWN TOWNSHIP BOARD
OF EDUCATION, MONMOUTH COUNTY,
Respondent.

APPEARANCES:

Robert M. Schwartz, Esq., for petitioners

Peter P. Kalac, Esq., for respondent (Kalac, Newman & Griffin, attorneys)

Record Closed: June 30, 1983 Decided: August 15, 1983

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

This matter concerns an action for reinstatement of petitioners as supervisors in the Middletown Township public schools with all back pay and emoluments and directing the Middletown Township Board of Education (Board) to inform petitioners of their seniority status as supervisors.

The Board asserts that petitioners are presently properly assigned. Positions as unit supervisors, formerly held by them, were lawfully abolished at the conclusion of the 1981-82 school year.

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It being stipulated that the abolishment of unit supervisor positions was a lawful and proper act of the Board, the issues to be tried are, were petitioners properly reassigned as classroom teachers upon abolishment of their positions, and if not, to what relief, if any, are they entitled.

The matter was commenced before the Commissioner of Education by the filing of a petition of appeal and answer. Thereafter, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Attempts at composing a joint stipulation of facts sufficient to enable the matter to move forward to summary judgment were unsuccessful. Subsequently, the matter was heard on April 25 and 26, 1983, at the Aberdeen Municipal Court.

The following essentially uncontroverted facts reveal the context of this matter. Petitioner Herbert was employed by the Board for the school year 1970-71 as an elementary supervisor. He served during that year as a supervisor of grades kindergarten through three. In the following year, he functioned as supervisor of grades kindergarten through six.

In the 1972-73 school year, Herbert was placed on special assignment by the superintendent. He continued in this position during the 1973-74 school year and, while so serving, he developed a job description which outlined the functions for an individual who was to be employed to head the district's pupil personnel services area. Herbert ultimately was an unsuccessful candidate for this position.

In 1974-75, Herbert was assigned as a unit supervisor, grades kindergarten through nine. He continued in that position until the 1978-79 school year when, at his request, he was assigned to an elementary teaching position. Herbert requested this assignment in order to determine whether new teaching concepts which were proposed by elementary unit supervisors were effective in the classroom.

In the 1979-80 school year, Herbert again served as a unit supervisor, grades kindergarten through nine and continued in that position through the 1980-81 and 1981-82 school years. The position of unit supervisor was abolished at the conclusion of the 1981-82 school year. He was assigned for the 1982-83 school year to a nontenured classroom teaching position.

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Petitioner Rudolph-Nachtman has been continuously employed by the district since February 1958. In her first four years of service, she taught in the elementary grades. In the 1961-62 school year, she was an acting head teacher in an elementary school. In 1962-63, she served as supervisor of grades four through six.

In 1963-64, Rudolph-Nachtman was assigned as a kindergarten through grade three supervisor and served in that capacity through the end of the 1968-69 school year. On July 1, 1969, she was assigned as an elementary unit supervisor, kindergarten through grade nine, and served in that capacity until June 30, 1982. The latter position was abolished at the end of the 1981-82 school year. For the 1982-83 school year, Rudolph-Nachtman was assigned as a teacher at the elementary level, a category in which she had previously attained tenure.

The petitioners contend that they have seniority in the category of general supervisor and/or subject supervisor as defined at N.J.A.C. 6:3-1.10(k)(10), (22). In addition, petitioner Herbert asserts a seniority claim as a classroom teacher based on his service as a fifth grade teacher during the 1974-75 school year. He also contends that, based on his previous service in a special administrative assignment, he has obtained a seniority status in the position of supervisor of special services.

I

The relevant testimony and exhibits reveal these additional facts. The special assignment of Herbert in 1972-73 involved a self-study of the district's pupil personnel services and programs. The study concluded that services could be improved and that additional personnel were needed. In the implementation phase of the study in 1973-74, he developed a job description for a position that would supervise all aspects of the special services area. Herbert was involved in the reorganization and expansion of the child study team.

Some time after his first year on special assignment, a grievance was filed by the teachers of the association. The gravamen of the grievance was that Herbert's position was not a special assignment and as a regular position had to be posted, that is, opened to applications from the teaching staff. The grievance was successful.

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Several documents were introduced for the purpose of showing the type and level of responsibility Herbert exercised while serving in this capacity (P-1 through P-5).

Part of 1974-75 were spent on implementation of the self-study. At some point, a new assistant superintendent position was filled. For the balance of 1974-75, Herbert was a unit supervisor, grades K-9. As part of his duties, he evaluated resource teachers. These personnel did not work at the ninth grade level.

Herbert subsequently taught for one year at the fifth grade level. He testified that he spent this year in the classroom "to regain the feel of the classroom." He wrote a report of his experience and, based on his experience, presented in-service education programs for elementary administrators.

In the 1980-81 school year, Herbert again served as a unit supervisor in the Thorne Unit. His duties were the same as they were when he previously served in that position, with the addition of teacher evaluations. He had a kindergarten through grade 12 responsibility in the social studies area. In that year, he did approximately six evaluations at the junior high school level plus the usual resource teacher evaluations.

In 1981-82 the number of evaluations for which he was responsible rose to approximately 14. Fewer of these evaluations were of resource people; more were of junior high school teachers. Of the approximately ten persons who were junior high school teachers, perhaps three of those exclusively taught at the ninth grade level. Mr. Herbert himself does not have secondary teacher certification but believes he is eligible for such certification.

During the 1980-81 school year, he estimates he spent approximately 30 percent of his time on evaluation of teaching staff members and approximately 70 percent on curriculum matters. In 1981-82, that percentage changed to approximately 40 percent spent on evaluations and approximately 60 percent spent on curriculum matters. He was also involved in interviews of candidates for elementary teaching positions.

As to child study team hiring and firing, his responsibility was limited to those occasions when he was called upon to sit in on interviews of candidates for positions. Herbert could not recall the names of any junior high school teachers presently employed whom he had interviewed.

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It was stipulated that Herbert held both administrative and general supervisory certificates at all times pertinent to this matter.

Rudolph-Nachtman began her employment in the district as a supervisor in 1962. At that time she implemented all new programs of instruction, prepared instructional sheets, was involved in in-service education of teachers and principals, was involved in evaluations of teaching staff members, interviewed prospective teachers, conducted demonstration lessons and handled other duties normally associated with the position of instructional supervisor.

Her involvement in special education was limited to the observation of classes, handling of parent complaints and meetings with the child study team.

In July 1963 she became supervisor of grades kindergarten through three. Her duties were essentially the same as in the prior year but the grades for which she was responsible had changed.

In July 1969 she assumed these duties for grades kindergarten through nine. Subsequently, in July 1973, Rudolph-Nachtman was named a unit supervisor at Thompson Junior High School and the elementary schools that fed into it. She later served in the same capacity at Bay Shore Junior High School and its feeder schools. She held a general supervisor's certificate, grades K-12, at all pertinent times.

Mrs. Rudolph-Nachtman testified that she had the same kindergarten through grade 12 curriculum responsibilities as did Herbert. Her responsibilities were in the English and language arts areas. She served as chairman for the committee that worked for three years on the individual language program. In addition, she had certain responsibilities concerning the Thorough and Efficient (T&E) process in the district.

In the period 1973 through 1982, Rudolph-Nachtman did elementary and junior high school resource teacher evaluations. In approximately 1979, some junior high school teachers were also evaluated by her. In 1980-81, eight teachers at the junior high school level were evaluated by Rudolph-Nachtman. In 1981-82 she evaluated approximately 15 junior high school teaching staff members. These teachers were in grades seven, eight and nine and, to the best of her knowledge, most of these teachers had secondary certifications.

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She recommended at a special administrative council meeting that the unit supervisors function more as curriculum liaison persons. They would help plan and act as secretaries for a continuity of curriculum project (P-7). Thereafter, regular weekly meetings of the unit supervisors were held. The subject of these meetings was curriculum articulation. The role of the unit supervisors was to articulate between and among grade levels (Id.).

The first junior high school teacher evaluations done by Rudolph-Nachtman were conducted in 1979-80. She does not recall how many of these persons were exclusively ninth grade teachers or just how many held secondary certification only. Rudolph-Nachtman has not evaluated teachers serving above the ninth grade level. In 1980-81, the number of junior high school staff she evaluated decreased while the number of elementary persons evaluated increased.

Mrs. Rudolph-Nachtman testified that she read the petition of appeal before it was filed. Paragraph eight alleges that the school district did not provide petitioner with a seniority list so as to advise her of her seniority in the position of supervisor, as required by N.J.S.A. 18A:28-11. The witness testified that the seniority list request was made of the assistant superintendent for personnel. She could not recall precisely when the request was made. The request might have been made before her position was abolished. In any event, she is sure that the request was made before September 7, 1982. Petitioner received a letter from the assistant superintendent showing the order of recall, that is, a preferred eligible list. N.J.S.A. 18A:28-12.

There are no longer unit supervisor positions in the district. Presently, there are supervisors of special education, of high school departments, and of athletics. The high school supervisors teach part-time and supervise part-time.

Rudolph-Nachtman is not certificated to teach at the secondary level. Her present assignment is in eighth grade English.

The assistant superintendent for personnel testified as to his background, certifications, and involvement in the interview of teacher candidates. Concerning those teachers at the junior high school level, some hold secondary certificates while some, perhaps the majority, hold elementary certificates.

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The present district organization does not delimit elementary and secondary areas. In 1973, the district was organized on a kindergarten through grade six elementary division, grades seven through nine junior high school division, and a grade ten through twelve senior high school division. According to the assistant superintendent, the curriculum at the high school is more advanced, departmentalization is more associated with secondary rather than elementary education, and the great majority of all seventh and eighth grade pupils are now in clusters of approximately 100 with four teachers assigned as opposed to a formal departmentalized organization. Laboratory courses are presented in the junior and senior high school, but not in the elementary school. Foreign languages are presented in the junior and senior high schools but not the elementary school, and home and mechanical arts are presented in the junior and senior high school but not the elementary school.

The number of junior high school teachers in the district has been reduced over the last three to four years. In his capacity as personnel administrator, he has had to compute seniority for reduction in force purposes. However, reductions have been made by attrition and by the release of nontenured personnel. Seniority has not actually been invoked in any reductions of junior high school personnel.

A junior high school principal testified that the curriculum in the junior high school is closely related to and designed to articulate with the high school program. The schools are scheduled in the same manner as the high school. Junior high school principals meet separately from high school principals although all administrators attend general administrated council meetings. On occasion, junior high school personnel attend separate secondary meetings, but do not attend separate elementary meetings.

In his opinion, eighth grade is part of the elementary program. The eighth grade teachers in his school hold elementary certifications so far as he knows.

During the Board's case, the assistant superintendent was recalled. He stated that a review of Board minutes as to the hiring of Rudolph-Nachtman and Herbert showed that Rudolph-Nachtman was named elementary supervisor effective July 1, 1962 (R-1); her actual title was acting supervisor of instruction at the fourth, fifth and sixth grade levels, and after this, there is no mention of any action in Board minutes as to transfer or promotion of Rudolph-Nachtman.

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The unit supervisor job description (P-9) was presented. It was established that the position was officially abolished on July 1, 1982.

The Board minutes of May 27, 1982, were introduced (R-2). The excerpt shows that the Board abolished the positions of three elementary supervisors at that time. Following these position abolishments, Rudolph-Nachtman reverted to an elementary classroom teacher position, a position in which she had seniority.

The Board minutes of June 21, 1982 (R-3), show an analysis of the positions, salaries and work years of administrators in 1981-82 and 1982-83. The vacation entitlements of theretofore 12-month employees are set forth. Rudolph-Nachtman was a 12-month elementary supervisor who was about to become a ten-month elementary teacher. She had 23 vacation days "in the bank." If these vacation days were converted into salary, the amount would be $3,591. Herbert was a 12-month elementary supervisor. He also had 23 vacation days to his credit. If these were converted to salary, the amount would be $3,687.

Immediately before the positions were abolished, the supervisory structure of the district showed an assistant superintendent for curriculum, an instructional coordinator, three elementary supervisors, and, also under the assistant superintendent for special education, a supervisor of special education classes and programs and a coordinator of guidance. Under the high school principal were 12 teaching supervisors who were also called department supervisors and who taught 40% of the time.

The assistant superintendent for personnel wrote to both Herbert and Rudolph-Nachtman on June 23, 1982, concerning the changes that were coming about in the district. This was a follow-up of the business administrator's letter informing them of the Board's action abolishing their positions.

The reduction in force for 1982-83 eliminated two elementary assistant principals, the instructional coordinator, three elementary supervisors, the coordinator of guidance and the assistant superintendent for pupil personnel (special education). It was prompted by a $2,000,000 cut in the district's budget.

After the reduction in force, there remained an assistant superintendnet for curriculum, a supervisor of special education classes and programs and 12 department

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supervisors in the secondary schools. In August 1982, the supervisor of special services position was created. It is a 12-month position.

A review of Board minutes shows approval of Herbert as elementary supervisor for grades K-3 effective July 1, 1970. With the exception of his special assignment, there is no record of any transfer or promotion.

The assistant superintendent further testified that he controls the balance of numbers of evalutions done by administrators. As to evaluations, both petitioners did some evaluations of teachers who taught at the ninth grade level or whose assignments were mainly at the ninth grade level. Procedures in place at the time indicate the length of the lesson—the period of time which the evaluator should spend in observation—was uniformally 45 minutes. Taking another 30 to 45 minutes to put this in writing plus another 30 to 45 minutes meeting with the teacher would yield some two hours and 15 minutes maximum time spent on evaluating each teacher. Two evaluations plus one annual meeting per year could consume some six and one-half to seven hours per teacher per year.

Each of the petitioners, then, could have been expected to spend some 110 hours per year on evaluations. This comprises approximately seven percent of their working time. In all the years petitioners served as unit supervisors, their jobs primarily were in the curriculum area in elementary schools.

At this point Rudolph-Nachtman's employment and certification history (R-7) and Herbert's employment and certification history (R-8) were entered. The employment and certification histories of other supervisors in the district (R-9 through R-11) were also introduced. On the basis of these documents, the assistant superintendent testified that both petitioners were considered by the district at all times to be elementary supervisors. Any transfers would have appeared on these documents, as would have any promotion.

The assistant superintendent also testified that there is no difference generally between supervisors at the ninth and tenth grade levels and that there is no difference generally between the evaluations conducted by supervisors at the ninth and tenth grade levels. As to assignments of supervisors to do evaluations, his concern was getting the evaluations done, not whether or not there was a distinction between the ninth and tenth grades.

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In reviewing the involvement of the petitioners in curriculum, the witness stated the belief that they did do some work concerning the ninth to tenth grade transition but he had no knowledge of what they did, if anything, in eleventh and twelfth grade curriculum. As to their employment histories, Exhibits P-7 and P-8 show them as elementary supervisors only, and no Board minutes show to the contrary.

The superintendent of schools, who has served in the district since August 1971, was also called. He testified that he recommended creation of the unit supervisor position. In 1971, there were 13 elementary schools, three junior high schools and one high school in the district. There were pupil housing problems and certain problems associated with supervisory staff. The unit supervisor arrangement was designed to increase articulation between the grades kindergarten through nine. Elementary supervisors were assigned to clarify functions that formerly were distributed horizontally among various administrators.

The major functions of the unit supervisors were to smooth the transition of pupils between sixth and seventh and to work on the sequential arrangement of curriculum throughout grades kindergarten through nine. A minor emphasis was curriculum content and self-evaluations of schools and school needs.

Self-study shows the need for greater coordination in the reading, mathematics, special education and career education areas. A study, chaired by a high school vice principal, was completed in June 1972. In August 1972, phase II, an implementation phase, was undertaken. Rudolph-Nachtman, Herbert and a supervisor named Barrett were involved. The superintendent, however, primarily considered them still elementary supervisors. As to Herbert's special assignment, while still serving as an elementary supervisor, Herbert had responsibilities in defining areas in special education that could be improved. In the following year, he created a kindergarten through grade nine sequence in "attendance districts." An attendance district is made up of four elementary schools and the one junior high school into which they feed pupils. During this time, the superintendent regarded Herbert as one unit supervisor who happened to be winding up phase II of the self-study. In 1972-73 and 1973-74, he had no responsibility for evaluations. Mrs. Noto, then supervisor of special services, did not report to him, nor was she evaluated by him.

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In the 1970's, no one in the district dealt with curriculum on a grade seven through twelve basis. Approximately five years ago, a Dr. Haddon was hired who did coordinate curriculum in grades seven through twelve. Her title was instructional coordinator, 7-12, but she did work with elementary supervisors, particularly in areas of articulation. Both petitioners had some input into seven-twelve curriculum development. They chaired certain kingergarten through twelve curriculum committees, incidental to their primary kindergarten through six responsibilities. In his opinion, both petitioners, when they served as unit supervisors, devoted 90% of their time to elementary supervision and 10% of their time to kindergarten through grade twelve curriculum matters.

A change in the functions of unit supervisors increased the range of petitioners' responsibilities. Where they had formerly been working in the kindergarten through grade three and grade four through grade six areas, general responsibilities were enlarged to include curriculum work in grades kindergarten through seven. The emphasis shifted over time to one of more concern with curriculum matters.

The superintendent viewed the unit supervisors as elementary supervisors even though they occasionally evaluated junior high school teachers. Each had a leadership role in certain T & E Committee matters, which crossed grade and division lines. These responsibilities were not primary or even major in comparison to their elementary supervision duties.

The unit supervisors did work with Dr. Haddon on grades seven through twelve curriculum matters. She evaluated them as elementary supervisors and also their work on T & E Committees.

In rebuttal, Rudolph-Nachtman testified that she had been told by an administrative assistant that the computer printout of her history in the district (R-7) showed her as an elementary supervisor because there was not a category on the computer program except elementary supervisor into which Rudolph-Nachtman would fit.

At a meeting of all unit supervisors, this question was again discussed and they were again told that there was nothing in the computer program to express what they did.

It was Rudolph-Nachtman's opinion that the grades nine through twelve curriculum responsibility inhered in the unit supervisor assignment. Petitioner Herbert

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testified similarly. He also testified similarly as to Exhibit R-8. He states he signed off on this document after being told that there was no other way to show his job. He concedes that the only position shown for him in official Board minutes is that of elementary supervisor. He reiterated that some 40% of his time as a unit supervisor was spent on evaluation and curriculum matters at the junior high school level.

II

Based upon the foregoing, I **FIND:**

1. Petitioners performed varied supervisory duties under several titles until the subject reduction in force.

2. At the time of the reduction in force, petitioners were serving as unit supervisors.

3. Unit supervisors were assigned to clarify functions formerly distributed horizontally among several positions.

4. These functions were essentially related to the elementary program.

5. There was some overlap of the secondary program in that ninth grade teachers supervised and/or evaluated by petitioners might have served under secondary certifications.

6. Petitioner Herbert served as an elementary classroom teacher in the school year 1978-79.

7. Petitioner Herbert served in a special assignment in the school years 1972-73, 1973-74 and part of 1974-75.

8. The purpose of this assignment was to develop proposals to implement a Phase II study by the State Department of Education regarding the district's special education program.

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9. As part of the study, Herbert developed and defined the role of a position to head the special education program.

10. Subsequently, he was an unsuccessful candidate for that position.

11. The unit supervisor positions were lawfully abolished by the Board on May 27, 1982.

Petitioner Herbert's argument that he has attained a seniority in the supervisor of special education position cannot be sustained. He was, at one time, assigned to a special project that led to creation of this position. Subsequently, he was an unsuccessful candidate for the position. He argues that while on special assignment conducting the self-study evaluation, he was actually gaining seniority in a position which was not in existence and which he himself ultimately proposed for creation as a result of the self-study. Nothing is before this court to compare years of service or the category or categories of service within in which the present supervisor of special education has served the district with the service of Herbert.

I further **FIND** that the duties of Herbert in the special assignment that led to creation of the special education position were developmental in nature and are not comparable to the duties now performed by that supervisor. The distinction is not one of degree but is one of kind.

Having considered the whole record as well as the argument advanced by both parties, I further **FIND** that petitioners have not served in positions substantially similar to those of the present supervisor of special services, supervisor of special education classes and programs, and athletic director.

It is well-established that the duties performed in a position control as to the determination of tenure and seniority rights, rather than the name given to a particular position. Boeshore v. North Bergen Bd. of Ed., 1974 S.L.D. 805. In the present matter, however, petitioners have not made a satisfactory showing that their particular duties were in any substantial way comparable to those of other supervisors.

The Board argues that recently enacted State Board rules and regulations have substantially revised N.J.A.C. 6:3-1.1 et seq. It is noted immediately, however, that those

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rules become effective in the school year 1983-84. The changes made in the standards for determining seniority cannot be invoked in a matter that arose in May 1982.

In consideration of the foregoing, it is determined that unit supervisor positions were properly abolished and that petitioners were properly reassigned to classroom teacher positions. A question remains as to the status of petitioner Herbert as a classroom teacher. The Board argues that petitioner Herbert may not be accorded tenure as an elementary teacher for failure to have served the requisite time in that position.

It is uncontested that Herbert taught in the 1978-79 school year at his own request in an elementary grade. The Board argues that his year of such service can, in reality, be considered as an extension of his supervisory role. I cannot agree.

N.J.S.A. 18A:28-6 provides for tenure upon transfer or promotion of a teaching staff member eligible for or under tenure. The statute provides that the period of employment in a new position, whether come to by transfer or promotion, provided only that the move has been with the employee's consent, shall be included in determining the tenure and seniority rights in the former position held by the staff member.

Under the rules in effect in the time that the unit supervisor positions were abolished, the fact that Herbert had elementary teacher certification while serving in a classroom teaching position leads to the conclusion that, one academic year and one day later, he achieved tenure as a classroom teacher. This is so even though at the time he had returned to the unit supervisor position. He did not serve two academic years and one day in the teaching position. However, because the statute applies not only to teaching staff members under tenure but also to those "eligible to obtain tenure," he obtained tenure in the elementary teacher category upon the expiration of two years and one day from the first day he taught in the 1978-79 school year.

Therefore, it is determined that petitioner Herbert has tenure as an elementary teacher in the district and seniority in that category dating to September 1, 1978.

For all of the foregoing reasons, I **CONCLUDE** that, except as to the determination that petitioner Herbert does enjoy tenure and seniority as an elementary

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teacher, petitioners have failed to carry the burden of persuasion. Accordingly, in all other respects, the petition of appeal is **DISMISSED.** It is so **ORDERED.**

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

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

15 AUGUST 1983
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

August 15, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 17, 1983
DATE

OFFICE OF ADMINISTRATIVE LAW

fms/ee

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DOCUMENTS IN EVIDENCE

P-1 Memorandum, Herbert to Schneider, June 5, 1973

P-2 Memorandum, Herbert to Noto, October 1, 1973

P-3 Memorandum, Czarnecki to Schneider, October 29, 1973

P-4 Letter, Herbert to Garrison, December 20, 1973

P-5 Letter, Herbert to Rongo, June 15, 1973

P-7 Role of Unit Supervisor as Curriculum Liaison Person, as revised, June 5, 1975

P-8 Job Description, Supervisor of Special Services, August 13, 1982

P-9 Job Description, Unit Supervisor, revised December 2, 1980

P-10 Job Description, Department Supervisor, June 28, 1976

R-1 Excerpt, Board Minutes, June 12, 1962

R-2 Excerpt, Board Minutes, May 27, 1982

R-3 Excerpt, Board Minutes, June 21, 1982

R-4 Letter, Ball to Herbert, June 23, 1982

R-5 Letter, Ball to Rudolph-Nachtman, June 23, 1982

R-6 Excerpt, Board Minutes, June 8, 1970

R-7 Employment and Certification History, Evelyn Rudolph-Nachtman

R-8 Employment and Certification History, Robert G. Herbert

R-9 Employment and Certification History, Francis E. Grimes

R-10 Employment and Certification History, Abigale Noto

R-11 Employment and Certification History, Philip A. Braun

R-12 Job Description, Supervisor of Special Education Classes and Programs, May 3, 1977

R-13 Job Description, Director of Athletics, February 6, 1979

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EVELYN RUDOLPH-NACHTMAN AND ROBERT HERBERT,

PETITIONERS,

V.

BOARD OF EDUCATION OF MIDDLETOWN TOWNSHIP, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the entire record in the instant matter, as well as the initial decision rendered by Judge Campbell. The Commissioner notes that petitioners filed timely exceptions pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners allege that the initial decision fails to recognize that they functioned primarily within a junior high school setting and were therefore not limited to the accrual of seniority as elementary supervisors but were entitled to be recognized as having accrued seniority as general supervisors. Petitioners argue that not only were the majority of their duties oriented toward the junior high school, but also they were operating under a supervisory certificate. In support of their position, petitioners cite Flanagan v. Board of Education of the City of Camden, 1980 S.L.D. 1283, aff'd Docket No. A-1826-81-T1, N.J. Superior Court, Appellate Division, January 24, 1983, wherein the Commissioner, the State Board and the Appellate Division all upheld the right of Flanagan, a specific subject supervisor, to assert a claim of seniority over other subject supervisors of lesser seniority notwithstanding the fact that he was not certified to teach the areas over which he sought to assert supervisory seniority, said assertion being the outgrowth of the possession of a supervisor's certificate authorizing the supervision of all grades and all subjects K-12 as set forth in N.J.A.C. 6:11-10.4(c).

Petitioners contend that the judge failed to take Flanagan into consideration in rendering his decision and further they allege that the judge erroneously applied the rationale of new seniority regulations recently adopted by the State Board of Education which specifically addressed the issue raised by Flanagan. Petitioners assert that the matter herein controverted arose within the context and framework of those rules in existence prior to September 1, 1983, the effective date of the revised version of N.J.A.C. 6:3-1.10.

Petitioners further take exception to the judge's finding that Petitioner Herbert did not acquire tenure and seniority as supervisor of special education. Petitioners contest that Petitioner Herbert, by virtue of his service for two years in a special assignment undertaken for purposes of evaluating the special services function and designing a position to assume responsibility for

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providing such services, has indeed acquired both tenure and seniority entitlement to such position. Petitioners cite Boeshore v. North Bergen, supra, in support of their position.

Upon review of petitioners' exceptions the Commissioner finds merit, in part, in such exceptions. Notwithstanding the changes in N.J.A.C. 6:3-1.10 which have been adopted by the State Board relative to seniority, petitioners are correct in their assertion that the present controversy arose prior to the adoption of these revised rules which did not become effective until September 1, 1983. Under such circumstances, the Commissioner is bound by the seniority rules which prevailed at the time in which this controversy arose. Pursuant to such circumstance, the Commissioner finds petitioners herein were not solely limited in their supervisory activities to the functions and category of elementary supervisors since their responsibilities clearly encompassed grades 7, 8 and 9 which are specifically categorized by N.J.A.C. 6:27-1.2(a) as a secondary school. Further, the Commissioner finds that petitioners are correct in their assertion that Flanagan is indeed the law of the case. Petitioners herein by virtue of their certification are entitled to any general supervisory position in the district that is within the scope of their supervisory certificates and from which they are not specifically excluded by virtue of a board-adopted job description which sets forth a specific additional certification requirement as defined in Bisler v. Woodbridge Board of Education, decided by the Commissioner May 18, 1982, aff'd State Board September 10, 1982.

The Commissioner, however, finds no merit in petitioners argument relative to Petitioner Herbert's contention that he had acquired both tenure and seniority by virtue of his two-year special assignment during the 1972-73 and 1973-74 school years. Since Petitioner Herbert failed to provide convincing evidence that he had actually served in the capacity of the position which he was involved in developing, the Commissioner affirms the judge's analysis. The Commissioner does not find Boeshore, supra, as cited by petitioners to be on point in that petitioner in that matter actually performed duties which were consistent with that of an assistant superintendent. Insufficient evidence to that effect exists in this matter.

Accordingly, the finding of the judge relative to the seniority claims of petitioners herein to positions as general supervisors is hereby reversed and the Board is directed to assign petitioners to any general supervisory positions to which they may be entitled by virtue of their seniority. In all other respects, the decision of the judge is affirmed.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1983

PENDING STATE BOARD

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INITIAL DECISION
AMENDED
OAL DKT. NO. EDU 1310-83
AGENCY DKT. NO. 484-12/82A

PENNS GROVE-CARNEYS POINT
EDUCATION ASSOCIATION,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH
OF PENNS GROVE-CARNEYS POINT,
SALEM COUNTY,
Respondent.

APPEARANCES:

John E. Collins, Esq., for petitioner (Selikoff and Cohen, attorneys)

Frank J. Hoerst, Esq., for respondent (Homan and Hoerst, attorneys)

Record Closed: June 21, 1983 Decided: August 12, 1983

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

This matter has been opened before this court by petitioner herein, on a motion and affidavit in support thereof, for reconsideration of the Initial Decision rendered in this matter, dated June 21, 1983. The Board of Education of the Borough of Penns Grove-Carneys Point (respondent) does not oppose petitioner's motion. Petitioner properly notes that the undersigned failed to make a determination with regard to the allegations set forth by petitioner in its Count Two of the Petition of Appeal. Petitioner

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further observes that it was stipulated by the parties that a determination regarding the allegations of Count Two would be made by this court subsequent to the submission of briefs of law by the parties. Those briefs were duly submitted in a timely fashion and now, by way of an Amended Initial Decision, there being no facts in dispute, the matter is ripe for summary disposition based upon the pleadings and briefs of law. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

ISSUE TO BE DETERMINED

As stipulated by the parties, the remaining issue in this matter for determination is whether a board of education has the authority to mandate that a ten-month teaching staff member who is employed as band director perform duties on weekends, holidays and during the summer months.

LEGAL ARGUMENT OF PETITIONER

Petitioner contends that any discussion of the issue presented herein must begin with a reference to the Appellate Division's decision in Ramapo-Indian Hills Education Assoc. v. Ramapo-Indian Hills Reg. High School Dist. Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980). In that case, as herein, a music teacher was assigned to the position of band director, which position required the performance of duties after school hours and on weekends. Unlike the instant case, however, there was no indication in the Appellate Division's decision that the affected teacher was mandated to perform duties on holidays and during the summer. The Appellate Division held that, while compensation for the extra duties imposed upon the band director was a negotiable term and condition of employment, the decision to create the position and the hours associated with it were non-negotiable and non-arbitrable. However, the Court noted that its decision did not leave the affected teacher without a remedy. As stated by the Court:

> Arbitrary or capricious exercise of managerial prerogative is susceptible to challenge by traditional means other than arbitration. Undoubtedly, arbitrary decisions by a board of education in performance of its inherent educational prerogatives are subject to scrutiny and correction by the Commissioner of Education.
>
> [Ramapo-Hills, supra, at 45]

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Later in its decision, the Court stated:

> There is no statutory provision in the education laws which prevents a board from requiring a teacher to work after school and on weekends. If the exercise of the board's prerogative in this respect is to be attacked as arbitrary or capricious, it must be by application for relief to the Commissioner of Education.
> [Id. at 47]

Petitioner asserts that the instant case presents the "application" envisioned by the Appellate Division in Ramapo-Indian Hills.

Preliminarily, petitioner notes that this case presents one issue not addressed in Rampo-Indian Hills, namely the assignment of duties to the band director on public holidays. As to these days, there is an express statutory prohibition against the assignment of duties to teaching staff members:

> No teaching staff member shall be required to perform his duties on any day declared by law to be a public holiday and no deduction shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day and any term of any contract made with any such member which is in violation of this section shall be void.
> [N.J.S.A. 18A:25-3]

Petitioner observes that the Legislature has also designated the following as public holidays: New Year's Day, Martin Luther King's Birthday, Lincoln's Birthday, Washington's Birthday, Good Friday, Memorial Day, July 4, Labor Day, Columbus Day, Veteran's Day, Thanksgiving, and Christmas. N.J.S.A. 36:1-1. Therefore, it is apparent that respondent may not require its band director, or any other teaching staff member to perform his/her duties on these days. Nor can any board of education circumvent the statutory mandate of N.J.S.A. 18A:25-3 by adopting a job description requiring service on these public holidays and then obtaining a teacher's voluntary contractual assent to such service. N.J.S.A. 18A:25-3 clearly provides that such a contract "shall be void." The Legislative intent underlying this statute is clear in forbidding a board of education from requiring a teacher to "volunteer" for holiday duty as a condition to his/her obtaining employment in the first instance or as a condition to his/her continued employment in the school district.

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Petitioner also notes that as to duties performed during the summer months, it is apparent from the Petition of Appeal that the school district's band directors have been required to work in the month of August for a three-week period in the direction and leadership of a summer band camp. Petitioner recognizes the line of cases holding that a board of education possesses authority to assign teachers to extracurricular and cocurricular activities. Ramapo-Indian Hills, supra; Mainland Reg. Teachers' Assoc. v. Bd. of Ed. of Mainland Reg. School District, 176 N.J. Super. 476 (App. Div. 1980); Smith, et al. v. Bd. of Ed. of the Borough of Paramus, 1968 S.L.D. 62. In Smith, supra, at 68, the Commissioner quoted with approval from a California decision as follows:

> A teacher's duties and obligations to students and the community are not satisfied by closing the classroom door at the conclusion of a class. The direction and supervision of extracurricular activities are an important part of his duties. All of his duties are taken into consideration in his contract for employment at the annual salary. All of this is, of course, subject to the test of reasonableness. * * *What is reasonable must necessarily depend upon the facts of the situation and the teachers are protected in that regard by the appropriate administrative and judicial procedure. Supervising the students and being present to protect their welfare at school athletic and social activities, conducted under the name and auspices of the school, is within the scope of the contract and such assignments are proper so long as they are distributed impartially, they are reasonable in number and hours of duty and each teacher has his share of such duty. McGrath v. Burkhard, 280 p.2d 864, 870 (Calif. App. 1955). See also Parrish v. Moss, 106 N.Y.S. 2d 577
> [emphasis added]

The Commissioner then stated:

> The Commissioner concurs and endorses the principles above enunciated as equally applicable to the schools of New Jersey. He therefore finds that petitioners' obligation to perform reasonable extra-classroom duties is mandatory. . . .
> [emphasis added] [Id. at 68]

Thus, petitioner argues, it is clear that the instant case necessitates a determination by the Commissioner as to whether the assignment to supervise a three-week summer band camp, during what would otherwise be vacation time, is a "reasonable" exercise of the Board's authority. The instant case goes one step further than the above cases dealing with the assignment of "extra-classroom" duties. Those cases all involved assignments to such duties during the normal school year. The instant case involves a ten-month employee who has been assigned to three weeks' additional duty in the summer.

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Petitioner asserts that such assignment clearly exceeds the bounds of "reasonableness" and must be declared invalid by the administrative law judge and Commissioner.

Petitioner contends that a different situation would be presented if the band director's position had been established as one of twelve months' duration. Petitioner states that if the Board feels that the need for a year-round band director's position exists, it possesses the legal authority to establish such a position. However, petitioner argues that as to a ten-month position, the assignment to three weeks' summer duty is clearly unreasonable.

Petitioner seeks, by way of relief, that this court declare the Board's assignment of extra duties to its band director, as outlined in Count Two of the Petition of Appeal, an unreasonable exercise of the Board's authority.

THE BOARD'S LEGAL ARGUMENTS

The Board observes that the New Jersey Supreme Court has consistently held that in the area of public employment, there are but two categories of activities relevant to collective negotiation:

1. Those which are mandatorialy negotiable; and
2. Those which are non-negotiable because they relate to the exercise of adherent managerial prerogative.

See, Ridgefield Park Education Ass'n. v. Ridgefield Park Bd. of Ed. 78 N.J. 144 (1978); State v. State Supervisory Employee's Ass'n., 78 N.J. 54 (1978); Bd. of Ed. of Woodstown-Pilesgrove School Dist. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. (1980).

The Board contends that in the current situation it is its endeavor to fill the position of band director and require the band director to perform certain duties "after hours," which are inherently necessary for the role of the position. The Board makes these requirements as reasonable and necessary because it would be impossible to function as band director and to supervise the training, instruction and implementation of band drills without the necessity of requiring the band to perform at football games, which are traditionally held on weekends, or after school hours. It would be inconceiveable to have

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a band director and not require him to perform these duties at times when it is most reasonable to expect the band to perform. It is without doubt or reason that the band's performance at these hours before the general public is a necessary learning tool and an opportunity to display the skills which are essential and a reasonable outgrowth of the learning process of this type of activity.

The Board observes that in the matter of Rampo-Indian Hills, supra, the Court held that compensation for those extra duties imposed upon the employee, was a negotiated term and condition of employment. It has been stated on several occasions and was spread upon the record herein that the Board is ready, willing and able to recognize that the extra hours required or the terms and conditions which are the issue at controversy in the instant case, will be compensated and will be a negotiated item. The Court went on to state that the decision to create the position and the hours to be associated with it were a non-negotiable and non-arbitrable manner.

The Board notes that it is traditional throughout the State of New Jersey that band directors avail themselves of the opportunity to enhance their instructional opportunities by holding band camps or by having sessions during the summer months. This avails the teacher of the opportunity for intensified instruction and the performance of skills to be displayed during the regular school year. The Board asserts that in light of the fact that it has always remained ready, willing and able to adjust the compensation based on the fact that the three week during the summer are necessary, it is most reasonable for a finding that this issue should be resolved in favor of the Board.

There is no doubt that the Board is of the opinion that the position is necessary as a viable instructional tool and that it possesses the legal right and authority to establish such a position and staff same. With regard to the reasonableness of the imposition of the obligation of the three-week summer camp, there can be no doubt in anyone's mind that it is a traditional extension in the area of band directors.

The Board, therefore, requests that this court and the Commissioner determine that its requirement of the imposition of three weeks' duty during the summer months and the extra time imposed during the school year is reasonable and shall be compensated.

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DISCUSSION AND CONCLUSIONS

The threshold issue in this portion of the controversy is whether the Board has the authority to mandate that a ten-month teaching staff member who is employed as its band director perform duties outside of the regular school day including weekends, holidays and during the summer months when school is not in session.

It is well settled, pursuant to statute N.J.S.A. 18A:25-3 and decisional law, that a board of education shall not require a teaching staff member to perform duties on any day declared by law to be a public holiday. Carl Moldovan, et al. v. Bd. of Ed. of the Tp. of Hamilton, Mercer Co., 1971 S.L.D. 246; Freehold Reg. H.S. Ed. Ass'n. and Walter Holcombe v. Bd. of Ed. of Freehold Reg. H.S. Dist., Monmouth Co. 1977 S.L.D. 1057; Herbert Levitt and the Elizabeth Ed. Ass'n. v. Bd. of Ed. of the City of Elizabeth, Union Co., 1978 S.L.D. 597, aff'd, State Bd. of Ed., 1978 S.L.D. 1027. Nor may a board of education enforce a term of a contract which would include a provision for the teaching staff member to perform such duties on a public holiday. Such a contract shall be void without any force or effect. N.J.S.A. 18A:25-3. The declared public holidays observed by this State, found at N.J.S.A. 36:1-1 as amended, have been enumerated in petitioner's arguments herein and need not be repeated here.

Accordingly, I **CONCLUDE** that the respondent Board shall not require the band director, or any other teaching staff member, to perform any duties on a day declared by law to be a public holiday. N.J.S.A. 18A:25-3; Moldovan v. Bd. of Ed. of Tp. of Hamilton.

The next item for consideration is whether the Board may exercise its broad powers to assign, in this instance, the band director to perform his duties after school hours and during the summer months. Those broad powers of the Board are set forth at N.J.S.A. 18A:11-1, which states, inter alia, as follows:

> The board shall***
>
> c. Make, amend and repeal rules***for its own government and the transaction of its business and for the government and managment of the public schools***

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> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct,***and maintenance of the public schools of the district.
>
> [emphasis supplied]

Within the scope and parameters of the above statute, the Board herein instituted, commencing with the 1982-83 school year, the requirement that its band directors shall perform their duties during the month of August for a period of approximately three weeks in the direction and leadership of a summer band camp. It is noted at this juncture, and also uncontroverted, that prior to the 1982-83 school year, the band directors in the Board's employ organized a summer band program at their own initiative (Petition of Appeal, Count Two, para. 3). It is noted further that petitioner and respondent have been parties to a series of collectively negotiated agreements which contain schedules for extracurricular positions and activities for which cash stipends have been afforded and paid to the band directors and assistant band director (Petition of Appeal, Count Two, para. 2).

It has consistently been held by decisional and case law that it is the board of education's managerial prerogative to determine what extracurricular (or co-curricular) activities it will provide its pupils and which teaching staff members it will assign to perform those duties. Ramapo-Indian Hills; Mainland Reg. Teachers Assn., Smith. The Appellate Division of the Superior Court aptly described such activities in the matter of the Mainland Reg. Teachers Ass'n., supra, at 482, where it said:

> Extracurricular school activities are traditionally an integral part of student life intended to enrich and augment the standard curriculum. It is safe to assume that every board of education in the State maintains such programs. Activities of this nature are part of a process designed not only to educate but to develop the student into a whole person. As such they are a significant part of the duty to furnish a thorough and efficient education. In this context such activity is, perhaps, more aptly labeled co-curricular rather than extracurricular.

In consideration thereof, the Mainland court discerned the distinctions between the board of education's managerial prerogatives to assign teaching staff members to cocurricular activities and the impact upon the teaching staff member so assigned. In so doing, the court cited, with approval, two recent New Jersey Supreme Court decisions addressing this issue, namely, Bd. of Ed. of Woodstown-Pilesgrove and Ridgefield Park. The Mainland court said, at 482, that:

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> It is manifest that when a teacher is directed to oversee such an extra classroom venture the assignment has impact upon his life and upon the terms and conditions of employment. That fact alone is not, however, determinative. Recently our Supreme Court directed that where the managerial prerogatives and the terms and conditions of employment conflict, a weighing or balancing must be made. The court stated:
>
> > . . . When the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter, including its impact to binding arbitration. Thus these matters may not be included in the negotiations and in the binding arbitration process even though they may affect or impact upon the employees' terms and conditions of employment. . . .

In Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978), the court reaffirmed the Dunellen and Englewood test which defined negotiable terms and conditions of employment as,

> "those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy."

Continuing, the Mainland court held at 483, that:

> Clearly, the decision as to which teacher is best qualified to undertake a specific kind of co-curricular student guidance and development must rest in the area of managerial prerogative. The contract between these parties in recognition of this provides that assignment of teachers is a sole right of the Board.
>
> The Board argues that as a matter of major educational policy, the assignment of a teacher to an extracurricular position must be made by the Board after a consideration of the qualifications of any applicants and, if necessary, after a consideration of the qualifications of nonapplicants, if that be the only way to fill the position. It urges that the "Board has an obligation to provide a 'thorough and efficient' education . . . and the determination of what co-curricular activities will be offered from year to year must be within the prerogative of the Board, not within the whim of such teachers as may choose to apply or volunteer for those positions." We agree and hold that the impact upon terms and conditions of employment, while real, is insignificant when weighed against the Board's managerial prerogative to assign teachers in a

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> manner consistent with its duty to provide all its students with a thorough and efficient education. This managerial decision would be significantly hindered were it to be the subject of mandatory collective negotiation.

Thus, it is well-settled that the Board herein has the inherent managerial prerogative to determine what extracurricular activities it will offer and provide to its pupils and which teaching staff member it will assign to perform those duties.

The final item for consideration is the test of reasonableness with regard to a board of education's assignment of a teaching staff member to an extracurricular or co-curricular activity. Neither the Commissioner nor the courts of this State have defined the reasonableness test with any degree of certainty. Both have, however, set forth general guidelines which, when balanced and weighed, provide direction to a board of education in making its determinations for co-curricular assignments to teaching staff members. The Commissioner, in Smith, concurred with California and New York state decisions and held that the first and foremost consideration was the welfare of the pupils under the board of education's direction and control through proper professional supervision. (Smith at 66, 68). Secondarily, the Commissioner endorsed the principles of the California courts' reasonableness test, which stated that teaching staff member assignments were proper so long as they were: (1) distributed impartially; (2) reasonable in number of hours of duty; and (3) each teacher has his/her share of such duty. Smith, at 68, citing with approval, McGrath v. Burkhard, 280 P. 2d 864, 870 (Cal. App. 1955).

In the case of Bd. of Ed. Asbury Park v. Asbury Park Ed. Ass'n., 145 N.J. Super. 495 (Chan Div. 1976), aff'd, in part, dismissed in part, 155 N.J. Super. 76 (App. Div. 1977), Judge Yaccarino, J.S.C., said at 506 that " . . . the touchstone for the exercise of [the board's] power is reasonableness. Assignments must be nondiscriminatory, related to the teacher's interests and expertise, and not require excessive hours. They need not, however, be compensated." In arriving at this determination, Judge Yaccarino relied, in part, upon the dicta set forth, and cited with approval, in the matter of Parrish v. Moss, 200 Misc. 375, 106 N.Y.S. 2d 577 (Sp. Ct., Spec. T.), aff'd without opinion, 279 App. Div. 608, 107 N.Y.S. 2d 580 (1951), which held:

> The hours in any case must be reasonable. The broad grant of authority to fix 'duties' of teachers is not restricted to classroom instruction. Any teaching duty within the scope of the license held by a teacher may be properly imposed. The day in which the

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> concept was held that teaching duty was limited to classroom instruction has long since passed. Children are being trained for citizenship and leadership in such training is the teacher. * * * Any teacher may be expected to take over a study hall; a teacher engaged in instruction in a given area may be expected to devote part of his day to student meetings where supervision of such teacher is, in the opinion of the board, educationally desirable. Teachers in the fields of English and Social Studies and undoubtedly in other areas may be expected to coach plays; physical training teachers may be required to coach both intramural and inter-school athletic teams; teachers may be assigned to supervise educational trips which are properly part of the school curriculum. The band instructor may be required to accompany the band if it leaves the building. These are illustrations of some of the duties which boards of education have clear justification to require of their employees. A board is not required to pay additional compensation for such services. The duty assigned must be within the scope of teachers' duties. Teachers may not be required, for instance, to perform janitor service, police service (traffic duty), school bus driving service, &c. These are not 'teaching duties.' The board may not impose upon a teacher a duty foreign to the field of instruction for which he is licensed or employed. A board may not, for instance, require a mathematics* teacher to coach intramural teams. Where the service is not part of the duties of a teacher, there is nothing to prevent the board from arranging for such extra service and paying for the same in its discretion . . . There are some activities that are part of instruction but, by their very nature, may be performed after the close of the regular school session. The athletic program, for instance, in many instances takes place under such circumstances. It has, nevertheless, over the years been always regarded as part of the school curriculum * * * Coaching in athletic sports is teaching. It, therefore, does not follow that because an activity is conducted after regular class hours, it is not part of the regular curriculum. [200 Misc. at 382, 106, N.Y.S. 2d at 584-85 (quoting from unreported opinion of Commissioner of Education) (Emphasis in original).*
>
> [Emphasis added]

Petitioner herein complains that the Board's imposition of duties upon the band directors to perform on weekends and during the summer months is unreasonable and, concomitantly, arbitrary, capricious and in bad faith. This court disagrees. The very nature of a school band, specifically a marching band, requires that its performances occur after the close of the regular schoolday and on weekends. The performance of the marching band at athletic events, particularly at the pre-game and half-time of football games, which typically take place in this State on Saturdays, is not only a tradition, but rather an expectation of the school community. It provides the pupils an opportunity to exhibit their marching and musical skills before the public and, in many instances, is a form of informal competition with the marching band representing the opposing athletic

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team. It is generally conceded that when a pupil enrolls to participate in a school's marching band, that pupil commits him/herself to after school practices and performances on Saturdays, particularly during the football season. Such a commitment and assignment has not been found to be unreasonable for pupils and, accordingly, I **CONCLUDE** that neither are they unreasonable for the band directors in order to provide guidance, supervision and leadership to their pupils who have made such a commitment.

With regard to the Board's imposition of a three-week duty assignment to the band directors in August, when school is not in session, the record herein demonstrates that the regulation complained of was initiated by those individuals now asserting the complaint. If, in the considered judgment of the band directors, the necessity for a summer band camp existed prior to the 1982-83 school year and it was not considered unreasonable to them then, can it now be considered unreasonable? I cannot agree and do not believe it is so. Petitioner's past practice demonstrates the necessity for and the "reasonableness" of such an activity. Petitioner's argument that the heart of this issue is the band director's voluntary accession to this extra duty, as opposed to the Board's imposition of a requirement to perform such duty, stretches credulity and places form over substance. Having observed the demonstrated necessity for a summer band activity, the Board's action was grounded upon the band director's past performance. It, therefore, and through its broad powers of governance (N.J.S.A. 18A:11-1), incorporated the summer band program as an integral part of its instructional program, for which it is willing to compensate. What was reasonable as a voluntary activity cannot now be deemed unreasonable because the Board has made it a requirement.

I **CONCLUDE**, therefore, that under the special facts and circumstances of this matter, the Board acted within its authority to impose a requirement that the band director's duties extend to a summer band activity.

Accordingly, partial summary judgment is hereby entered on behalf of petitioner with regard to the issue of foreclosing the Board to require its teaching staff members to perform duties on any day declared by law to be a public holiday. N.J.S.A. 18A:25-3; and

Partial summary judgment is hereby entered on behalf of the Board to require its band directors to perform their duties after school hours, on weekends and during the summer months with compensation.

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ORDER

It is hereby **ORDERED** that petitioner and the Board immediately engage in collective negotiations and to reach an agreement with respect to equitable compensations and/or contractual considerations for the band directors required to perform their duties as prescribed by this initial decision.

This court does not retain jurisdiction with respect to this ORDER.

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

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

12 August 1983
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

August 15, 1983
DATE

Seymour Wilson
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 17, 1983
DATE

Isabel Logan Esq
OFFICE OF ADMINISTRATIVE LAW

fms/ee

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PENNS GROVE-CARNEYS POINT EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions to the amended initial decision herein by Judge Law preliminarily notes that this decision is occasioned by petitioner's Motion for Reconsideration to Judge Law of his decision of June 21, 1983. Petitioner properly notes the August 1983 remand by the Commissioner of that initial decision. The Commissioner in a review of his own records is constrained to observe that the remand, through clerical oversight, was not transmitted to the judge as correctly conjectured in petitioner's exceptions. The Commissioner notes, however, that such remand has become moot by virtue of the decision herein.

Petitioner excepts to that portion of the present decision holding that a school band director may be assigned to mandatory duties on a weekend. Petitioner alleges that the judge correctly recognized that pursuant to N.J.S.A. 18A:25-3 no teaching staff member may be required to perform duties on a public holiday. Petitioner goes on to contend that N.J.S.A. 36:1-1 recognizes Sunday and every Saturday as public holidays which petitioner contends obviates the assignment of duties on weekends to its band directors. The Commissioner can only speculate as to the extension by petitioner of such alleged protection on weekends to coaches of sports, directors of dramatic presentations, supervisors of standardized testing programs and any other activity or contest normally and traditionally scheduled for presentation on Saturdays. The Commissioner will address such contention without further delay.

For purposes of accuracy the Commissioner sets down in entirety two statutes, N.J.S.A. 36:1-1 and 36:1-1.1, which must be read *in pari materia* as follows:

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"The following days in each year shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of dishonor, of bills of exchange, bank checks and promissory notes be treated and considered as the first day of the week, commonly called Sunday, and as public holidays: January 1, known as New Year's Day; January 15, known as Martin Luther King's Birthday; February 12, known as Lincoln's Birthday; the third Monday in February, known as Washington's Birthday; the day designated and known as Good Friday; the last Monday in May, known as Memorial Day; July 4, known as Independence Day; the first Monday in September, known as Labor Day; the second Monday in October, known as Columbus Day; November 11, known as Armistice Day or Veteran's Day; the fourth Thursday in November, known as Thanksgiving Day; December 25, known as Christmas Day; any general election day in this State; every Saturday; and any day heretofore or hereafter appointed, ordered or recommended by the Governor of this State, or the President of the United States, as a day of fasting and prayer, or other religious observance, or as a bank holiday or holidays. All such bills, checks and notes, otherwise presentable for acceptance or payment on any of the days herein enumerated, shall be deemed to be payable and be presentable for acceptance or payment on the secular or business day next succeeding any such holiday.

"Whenever any of the days herein enumerated can and shall fall on a Sunday, the Monday next following shall, for any of the purposes herein enumerated be deemed a public holiday; and bills of exchange, checks and promissory notes which otherwise would be presentable for acceptance or payment on such Monday, shall be deemed to be presentable for acceptance or payment on the secular or business day next succeeding such holiday.

"In construing this section, every Saturday shall, until 12 o'clock noon, be deemed a secular or business day, except as is hereinbefore provided in regard to bills of exchange, bank checks and promissory notes, and the days herein enumerated except bank holidays and Saturdays shall be considered as the first day of the week, commonly called Sunday, and public holidays, for all purposes whatsoever as regards the transaction of business in the public offices of this

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> State, or counties of this State; but on all other days or half days, except Sunday or as otherwise provided by law, such offices shall be kept open for the transaction of business."

And,

> "Each Saturday in each year shall, for all purposes whatsoever as regards the transaction of business in the public offices of this State, and the counties and municipalities in this State, be considered as the first day of the week, commonly called Sunday, and as public holidays."

A close reading of these two statutes does not sustain petitioner's contention that every Saturday is a legal holiday for purposes of barring the activities controverted herein. Rather, the Commissioner finds the constraints or lack thereof clearly set down in the statutes referenced above which need no repetition by the Commissioner. In summary, the Commissioner finds and determines that Saturdays are not considered to be legal holidays except as defined in statute, irrespective of the contentions by petitioner.

Petitioner further excepts to the holding by the judge that the Board may assign its band director to a three-week summer band activity. Petitioner contends such assignment constitutes the imposition of excessive hours and is therefore unreasonable.

Thirdly, petitioner excepts to the finding by the judge that the Board incorporated the summer band program as an integral part of its instructional program. Petitioner is prepared only to accept the assertion that a band or orchestra class regularly scheduled during a period of the school day constitutes part of the Board's instructional program. The Commissioner is constrained to comment that what petitioner is accepting as the Board's instructional program is the assignment of a teacher to duty within a regularly scheduled teaching day which, of course, is what a teacher contracts for when hired by the Board. The Commissioner finds petitioner's acceptance thereof to be a total redundancy. The Commissioner notes with approval the language of the court, ante, wherein is said:

> "Petitioner's past practice demonstrates the necessity for and the 'reasonableness' of such an activity. Petitioner's argument that the heart of this issue is the band director's voluntary accession to this extra duty, as opposed to the Board's imposition of a requirement to perform such duty, stretches credulity and places form over substance. Having observed the demonstrated necessity for a summer band activity, the Board's action was grounded upon the band director's past performance. It, therefore, and through its broad powers of governance (N.J.S.A. 18A:11-1),

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> incorporated the summer band program as an integral part of its instructional program, for which it is willing to compensate. What was reasonable as a voluntary activity cannot now be deemed unreasonable because the Board has made it a requirement."

The Commissioner herewith stresses the negotiability of two major aspects of the summer band activity, the length of time entailed and the compensation to be accorded the director. The Commissioner encourages the good-faith negotiation by the parties.

In the decision by the judge of June 21, 1983 the Commissioner observes and accepts the settlement agreement by the parties of counts one and three of the complaint with which the parties shall abide and notes that the decision herein of August 12, 1983 is addressed to count two of the Petition of Appeal.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, partial summary judgment is set down on behalf of petitioner foreclosing the Board to require its teaching staff members to perform duties on public holidays (N.J.S.A. 18A:25-3) Partial summary judgment is also set down on behalf of the Board to require band directors to perform their duties after school hours, on weekends, and during the summer months as negotiated for time and compensation.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1983

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3523-83
AGENCY REF. NO. 9-1/82A

TEANECK EDUCATION ASSOCIATION as Representative of TEANECK AUXILIARY EMPLOYEES,

Petitioner

v.

TEANECK BOARD OF EDUCATION,

Respondent

APPEARANCES:

Louis P. Bucceri, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Thomas M. DeLuca, Esq., for respondent
(Murray, Granello & Kenney, attorneys)

Record Closed: June 15, 1983 Decided: July 19, 1983

BEFORE WARD R. YOUNG, ALJ:

Petitioner appeals an imposition by the Superintendent of Schools that "all auxiliary staff members working with classified special education students will be required . . . to possess a Teacher of the Handicapped Certificate in addition to their general teacher certificate," and alleges said imposition to be inconsistent with law, arbitrary and capricious, and would be so even if adopted by Board resolution.

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The Board avers the Superintendent's "imposition" is nothing more than a memorandum for compliance with what is perceived to be required by regulation, but in the event of a finding of erroneous perception, it possesses that right by the discretionary authority vested by legislative enactment and decisional law to impose certification standards higher than those promulgated by State regulation.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq., was initially docketed as EDU 799-82; and was submitted for summary decision by agreement of the parties after their good faith efforts presumably resolved all factual disputes. The Initial Decision was rendered on March 18, 1983. The Commissioner remanded the matter on May 10, 1983 due to uncertainties "as to what certification is required of each type of teacher;" "a seeming conflict in the record as to the certification required for all three types of supplemental teachers;" and the assertion that "The Commissioner is perplexed by the precise definition of contract teacher versus that of supplemental teacher and asks that such terminology be clearly established."

A prehearing was held on June 6, 1983, at which the parties recognized a misreading of a stipulation (4a) which contributed to the uncertainties mentioned above. A supplemental Stipulation of Facts was developed and incorporated in the Prehearing Order entered on June 6, 1983. In the absence of objections from either party pursuant to N.J.A.C. 1:1-10.1(d), the parties were deemed to have consented to said Stipulations, and the record closed on June 15, 1983.

The determination rendered herein replaces in entirety that which was docketed as OAL DKT. NO. EDU 799-82 and filed with the Commissioner on March 21, 1983.

The issues framed at both prehearing conferences are as follows:

1. What are the certification requirements for auxiliary teachers who instruct students classified as educationally handicapped pupils?

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2. Was the directive of the Superintendent requiring certification as teachers of the handicapped consistent with law?

3. If issue #2 is determined to be negative, may certification requirements of a local school district exceed those required by law? If affirmative, is the Board's action in this instance arbitrary and capricious?

4. What certification is required for each teacher categorized in the Stipulation as 4(a), 4(b) and 4(c)?

5. What is a contract teacher?

6. What is a supplemental teacher?

The following facts have been stipulated by the parties and are adopted herein as FINDINGS OF FACT:

1. The respondent, Teaneck Board of Education currently employs approximately 37 auxiliary staff members, most of whom are part-time employees. The total varies from year to year.

2. Approximately 16 of these auxiliary employees are Title I/S.C.E./Basic Skills instructors who do not teach classified students and have not been directed to obtain teacher of the handicapped certificates. These individuals are not involved in this litigation.

3. Of the remaining 21 auxiliary teachers, known as supplemental teachers, at least 14 currently possess or are currently eligibile for teacher of the handicapped certification.

4. Supplemental auxiliary teachers deal with their students in varying settings. Three essential teaching formats can be isolated :

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a) The classified student is 'mainstreamed' to the extent of his individual abilities and comes to the supplemental teacher for individual or small group instruction in areas of deficiency. At times the supplemental teacher will work to reinforce subjects taught in the 'mainstream.' In other instances the supplemental teacher will be the only instructor in a given subject area. The 'mainstream' subject area teachers of all such students are not required to possess handicapped certification.

b) The supplemental teacher engages in 'team' teaching with a regularly contracted teacher of the handicapped. Responsibility is usually shared, although the contract teacher is considered to be the lead teacher. The supplemental teacher may be solely responsible for instruction in a particular subject area. When the contract teacher is at a meeting, or in some instances, if the contract teacher is absent, the supplemental teacher is solely responsible for the class for that period.

c) The 'team' teaching format is utilized for part of the day and 'mainstreaming' to nonspecial education classes may also occur. However, for two or three class periods per day the supplemental teacher is alone with the class and is solely responsible for instruction and supervision during those periods.

5. All three types of supplemental teachers may be involved in grading, testing, planning and similar functions to varying degrees depending upon the needs of the students, building practices and agreement among 'team' teachers. They will interact with parents, classroom teachers or other staff as the child's needs require.

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6. On October 9, 1981, a directive was issued which is attached hereto and made a part hereof as Exhibit J-1.

7. On December 28, 1981, this directive was revised. Exhibit J-2.

8. To date, the respondent Board of Education has not adopted a resolution embodying Exhibits J-1 or J-2. The Board reserves its alleged right to take such action.

9. Pursuant to Article XIV of the Collective Bargaining Agreement between the Board and the Teaneck Teachers' Association, the majority representative for the auxiliary instructors, the cost of any courses taken in furtherance of obtaining teacher of the handicapped certification will be borne by the Board.

10. The job description for all auxiliary personnel is attached hereto and made a part hereof as Exhibit J-3.

11. All teachers in Teaneck, other than those deemed to be auxiliary, are considered to be "contract" teachers.

12. All teachers in Teaneck, not construed to be "contract" teachers by definition, are "auxiliary" teachers.

13. "Auxiliary" teachers in Teaneck who are assigned instructional responsibilities with classified handicapped pupils are "auxiliary supplemental" teachers.

14. "Auxiliary" teachers in Teaneck who are not assigned instructional responsibilities with classified handicapped pupils are deemed to be either Title I teachers, State Compensatory Education (SCE) teachers, or Basic Skills teachers.

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15. In Teaneck "auxiliary supplemental" teachers are assigned instructional responsibilities for classified handicapped pupils in one of three settings as indicated in Stipulation 4(a), 4(b) and 4(c) on page 3 of the Initial Decision.

16. The memoranda of the Superintendent requires 4(a), 4(b) and 4(c) teachers to be certified as teacher of the handicapped. See J-1 and J-2.

17. Petitioners posit that certification as teacher of the handicapped is not required, as a matter of law, for 4(a), 4(b) and 4(c) teachers.

The propriety of the administrative memos, J-1 and J-2, will be addressed first. It is undisputed the substance of the memoranda relates to certification requirements for specific positions held by auxiliary teaching staff members and represents what petitioners believe to be a policy statement. It is conceded that no policy resolution was adopted by the Board. The Board, however, perceives the memoranda as notice for compliance with N.J.A.C. 6:28-2.3; notice of an extension of time for compliance; and notice of expected nonemployment for lack of compliance.

It appears to be obvious that if the Board's perception is correct the administrative memoranda were properly transmitted, and conversely, if petitioner's perception is correct, the memoranda in the absence of adopted Board policy, were improper.

In Marilyn Kuehn v. Teaneck Bd. of Ed. 1981 S.L.D _____ (decided November 25, 1981), rev'd State Bd. of Ed. (February 1, 1983), the State Board said: "We are constrained to observe that board personnel policies should be carefully considered, prepared in written form, and publicly proposed and adopted by boards of education." (slip opinion at 3).

It is not a complex procedure for a Board of Education to notice, discuss, consider and adopt policy. In the absence of any evidence in this record of Board disapproval of the memoranda, including non-reemployment action, it appears reasonable to address the substantive issues as if the Board had in fact adopted policy. Placing form

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over substance could conceivably extend litigation in this dispute. The determination herein will therefore be in the nature of a declaratory judgment.

The Board first argues the legal right to set standards higher than those imposed by State regulation by citing N.J.S.A. 18A:11-1 which states:

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

The State Legislature created the State Board of Examiners (N.J.S.A. 18A:6-34), and vested that Board with the powers and duties to issue certificates. See N.J.A.C. 18A:6-38. The State Legislature also vested general rule-making power in the State Board of Education. N.J.S.A. 18A:4-15 states:

> The state board shall make and enforce, and may alter and repeal, rules for its own government and for implementing and carrying out the school laws of this state under which it has jurisdiction.

N.J.A.C. 6:11-3.3 states: "The State Board of Education may make and enforce rules and regulations for the granting of appropriate certificates or licenses to teach . . . " and cites its authority as N.J.S.A. 18A:6-83.

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I **FIND** the broad discretionary authority vested in local boards is limited to the extent they may not be inconsistent with the rules of the State Board, and further, that any policy requiring a teaching certificate which is not required by the administrative code is ultra vires.

It remains to be determined, however, if the requirements at issue in this matter are inconsistent with the rules and regulations prescribed by the State Board of Education.

Respondent here argues that decision law has created exceptions to the findings here and cites D'Ambrosio v. Board of Education of the Borough of Palisades Park, et al. 1976 S.L.D. 718, aff'd State Board of Education, 1977 S.L.D. 1280, and Van Os v. Board of Education of the Township of Cinnaminson, 1977 S.L.D. 1040.

D'Ambrosio was a nonrenewed, nontenured teacher of Italian, certified only in that subject area, and filed a petition with the Commissioner alleging the reasons given for his nonrenewal were not true. The Commissioner disagreed in upholding the Board's properly exercised discretionary authority to reorganize and reduce its foreign language teaching staff, and employment of a teacher with dual certification in Spanish and Italian.

Van Os also was a nontenured teacher certified in English and Biology, who was nonrenewed as the result of the abolishment of his position due to "financial exigency and the need for educational efficiency." His application for a position of Biology teacher in the Middle School was rejected because he did not possess a comprehensive field endorsement which included biology, physics and chemistry, and which the Board required for the position. The Commissioner upheld the Board's action and said: "A board may establish higher standards of an applicant to be considered for employment as a teaching staff member beyond those minimum standards for teacher certification in the applied for area" (at 1043). He also said :

> Conversely, a board cannot be wholly arbitrary in its quest for teachers with multiple certification. Such requirements, if established for particular positions, must be based upon established

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> needs and/or purposes for such certification. The need may not be immediate, but be determined by proper preplanning and goal setting for a future date. The Commissioner so holds (at 1043).

The instant matter is distinguished from D'Ambrosio and Van Os. Here, there is no evidence of restructuring, nor is the Board establishing certification criteria for the employment of teachers new to the district to meet what it perceives to be its present and future needs. Although the Commissioner upheld the right of a Board to "establish higher standards . . . beyond those minimum standards for teacher certification in the applied for area," I **FIND** his holdings do not grant a Board the right to require certification beyond that required by the State Board in any areas taught or to be taught.

Reliance on Mirabello v. Board of Education of the Township of Rochelle Park, 1982 S.L.D. _____ (decided September 20, 1982) is misplaced. Mirabello was nonrenewed as a supplemental and home instruction teacher, and was determined to be tenured pursuant to Spiewak et al. v. Rutherford Board of Education, 180 N.J. Super. 312 (App. Div. 1981), aff'd 90 N.J. 63. No conclusory findings were made relative to certification requirements.

The expectancies of supplemental teachers is established in the job description, marked as J-3 and incorporated herein by reference. Other than the duties and responsibilities that would be applicable to all teachers, supplemental teachers are:

> 1. To tutor students (individual and/or small groups), to reinforce learning of materials and/or skills . . . .
>
> 3. To guide independent study, enrichment work, remedial work, etc., on a tutorial basis . . .
>
> 5. To follow a program of remedial instruction designed to meet the specific needs of underachieving students.

It is now essential to focus on the assignments and specific teaching responsibilities of supplemental teachers in the Teaneck school district, which are incorporated in the Stipulation of Facts and identified as 4(a), (b), and (c), and are summarized as follows:

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4(a) teachers "are required to possess handicapped certification," and provides individual or small group instruction in areas of deficiency to mainstreamed classified students.

4(b) teachers engage "in 'team' teaching with a regularly contracted teacher of the handicapped. Responsibility is usually shared, although the contract teacher is considered to be the lead teacher. The supplemental teacher may be solely responsible for instruction in a particular subject area, . . . if the contract teacher is absent, the supplemental teacher is solely responsible for the class for that period."

4(c) supplemental teachers are assigned in a 'team' teaching format which "is utilized for part of the day and 'mainstreaming' to nonspecial education classes may also occur. However, for two or three class periods per day the supplemental teacher is alone with the class and is solely responsible for instruction and supervision during those periods."

A review of the total record in this matter clearly reveals that the dispute is clouded by the classification of teaching staff members in reference to contract teachers, auxiliary teachers, auxiliary supplemental teachers, primary teachers, lead teachers, mainstream subject area teachers, and supplemental teachers deemed to be Title I teachers, State Compensatory Education teachers, or Basic Skills teachers. Teachers identified in Stipulations 4(b) and 4(c) even appear to be erroneously classified as supplemental teachers which further clouds the dispute. Form, in the classification of teaching staff members herein, however, shall not prevail over substance.

N.J.A.C. 6:28-2.3 states:

(a) All professional personnel serving educationally handicapped pupils shall possess appropriate New Jersey certification or licensing.

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(b) Pupils classified as educationally handicapped in special class programs shall be the primary instructional responsibility of a teacher certified to teach pupils so disabled. Such teachers shall work cooperatively with other teachers to whom the educationally handicapped pupil may be assigned for portions of his/her educational program.

(c) In programs other than special classes, the instructional responsibility shall be shared between teachers holding general or special education certificates, dependent on the nature of the program and the teachers providing required services.

Supplementary instruction is a special education program option pursuant to N.J.A.C. 6:28-2.2 (c)(1)(ii) in an educational program mandated pursuant to N.J.A.C. 6:28-2.2(a) which states that "An educationally handicapped pupil shall be placed in the educational program appropriate to the pupil's needs."

N.J.A.C. 6:28-3.2(b) states:

> Supplemental instruction shall be instruction provided educationally handicapped pupils which is given in addition to the regular instructional program of such pupils. It shall meet the following criteria:
>
> . . .
>
> 5. The teachers providing supplemental instruction shall be appropriately certified for the subject or level in which instruction is given.

N.J.A.C. 6:28-3.2(c) states:

> Resource room programs shall be instructional centers which offer individualized instruction in basic subject skills or other instructional areas which are described in a pupil's individualized education program and meet the following criteria.
>
> . . .
>
> 2. The resource room teacher shall hold appropriate certification as "teacher of the handicapped"; . . .

Subject or level, referred to in N.J.A.C. 6:28-3.2(b)(5), are not defined in N.J.A.C. 6:28-1.2, but are presumed here to mean an academic discipline, such as reading, art or music taught at either the elementary or secondary level.

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J-1 and J-2, the certification memoranda, refers to teachers classified in Stipulation 4(a), 4(b) and 4(c).

A determination of the principal issue in dispute herein, that is, the certification required of 4(a), 4(b) and 4(c) teachers, can only be made by analysis of the regulations in para materia to flush out the objective intended.

N.J.A.C. 6:28-2.3(a) refers to appropriate certification. N.J.A.C. 6:28-2.3(b) clearly requires a Teacher of the Handicapped certificate for those teachers assigned the primary instructional responsibilities in special class programs. N.J.A.C. 6:28-2.3(c) refers to a sharing of instructional responsibilities between teachers in programs other than special classes, and requires a general or special education certificate, dependent on the nature of the program and the teachers providing required services.

N.J.A.C. 6:28-3.2(b) defines supplemental instruction as that which is in addition to the regular instructional program, and requires in (5) the appropriate subject or level certificate in which instruction is given.

The nature of the program and the teachers providing required services appears to be the key to understanding the intent of the regulations and resolving this dispute. Unfortunately, reference cannot simply be made categorically to Stipulations 4(a), 4(b) and 4(c) as the language in said Stipulations further clouds the issue.

Special education programs are designed to meet the special needs of pupils who have not benefitted from placement in the regular classroom environment. Such programs have many objectives, but the principal objective in relation to the issues herein, is to enhance the pupil's educational opportunies with individualzed programs and attention to enable the pupil to regain placement in the regular school program. Some handicapped pupils never return to regular classroom placement. Others do. Rarely, however, is such a pupil simultaneously declassified and placed in the regular program in totality. The process is gradual and carefully monitored. This process is called "mainstreaming."

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The teacher to whom a special education pupil is assigned for instruction in the regular school program during the mainstreaming process is a classroom teacher, and the non-mainstreamed pupils taught by that teacher are not classified as handicapped. The nature of the program requires certification by subject and/or level, such as, elementary, physical education or secondary mathematics.

Nonclassified pupils in the regular school program, who are deemed to have some deficiencies, are programmed for individualized supplemental instruction. The nature of the program would require a subject or level certificate appropriate to instruction given. Classified special education pupils may also be programmed for similar supplemental instruction during the mainstreaming process, which arises from a determined need in the mainstreamed portion of his total program. The certification required of the supplemental teacher would again be according to subject or level.

All such teachers so described in Stipulation 4(a) are not required to possess certification as Teacher of the Handicapped.

An incongruous statement is included in Stipulation 4(a), which states that "In other instances the supplemental teacher will be the only instructor in a given subject area." If such a teacher is the only one providing subject instruction, said teacher is not supplemental, and would be required to possess a Teacher of the Handicapped certificate if the nature of the program comes within the special education program. Such a teacher assignment must necessarily be distinguished from the regular school program for said certificate to be required.

It has been previously stated that teachers referred to in Stipulations 4(b) and 4(c) appear to be erroneously classified as supplemental teachers. Nevertheless, the nature of the program in which said teachers are assigned instructional responsibilities for classified special education pupils clearly requires that said teachers possess the Teacher of the Handicapped certificate.

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This dispute was triggered by the memorandum from the assistant Superintendent to the auxiliary staff (working with handicapped students), which advises them that they are required to possess a Teacher of the Handicapped certificate, pursuant solely to N.J.A.C. 6:28-2.3(a), and those teachers who do not secure said certificate by September 1, 1982, "will not be employed" as contrary to N.J.S.A. 18A:27-2. See J-1. The date was extended to August 1983. See J-2.

The memoranda obviously created concerns because of its nonemployment statement, as well as its reliance on N.J.A.C. 6:28-2.3(a) alone, which requires the possession of an appropriate certificate, and which appears to have been construed by the Assistant Superintendent to mean the handicapped certificate.

To the extent the appropriate certificate required, consistent with determinations herein, is the Teacher of the Handicapped, the memoranda represent a directive for compliance with statute and regulations.

To the extent the appropriate certificate required is for subject or level, the memoranda must be deemed ultra vires.

I see no need to address the ramifications of the applicability of N.J.S.A. 18A:27-2 in the absence of the termination of any petitioner who may or may not be tenured.

In summary, I **FIND** and **DECLARE**:

1. Teaching staff members, assigned instructional responsibilities within and directly related to the special education program designed for pupils classified as handicapped, are required to possess the Teacher of the Handicapped certificate, deemed here to be the appropriate certificate. N.J.A.C. 6:28-3.2(c)2.

2. Team teachers are primary teachers regardless of any responsibility as lead teacher; are not supplemental; and are required to possess the Teacher of

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the Handicapped certificate if assigned instructional responsibilities in a special education program designed for pupils classified as handicapped. N.J.A.C. 6:28-3.2(c)2.

3. Teaching staff members, deemed to be supplemental by definition pursuant to N.J.A.C. 6:28-3.2(b), who are not assigned instructional responsibilities within the special education program designed for pupils classified as handicapped, need only to be certified for the subject or level in which instruction is given, pursuant to N.,J.A.C. 6:28-3.2(b)5.

4. The administrative memoranda, J-1 and J-2, are inconsistent with law due to incompleteness and failure to incorporate references to N.J.A.C.. 6:28-2.3(b) and (c).

5. Certification policy by administrative fiat in the memoranda, J-1 and J-2, inconsistent with determinations herein, are deemed to be null and void pursuant to Kuehn, supra.

6. Certification policy incorporated in the administrative memoranda, J-1 and J-2, which are consistent with law, are deemed to be proper communications for compliance with State Board regulations.

7. Certification policies of the Board of Education, if adopted, which are determined to be inconsistent with N.J.S.A. 18A:6-38, N.J.S.A. 18A:4-15, or in supererogation of N.J.A.C. 6:11-3.3, would be deemed to be ultra vires.

8. Contract teachers, incorporated as an issue to be defined, are all teaching staff members who accept an offer to provide an instructional service for a consideration, whether that consideration be hourly, per diem, or according to a negotiated salary guide. The only nexus between all teachers and the

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certification required is that which is determined by the nature of instructional services to be rendered. The titles given to teachers are irrelevant.

It is noted that efforts of local Boards of Education and administrators to purportedly increase the quality of instruction through the imposition of high standards of teacher qualifications are to be commended. Those efforts, however, must not be inconsistent with statute or regulations promulgated by the State Board of Education.

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

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

19 July 1983
DATE

WARD R. YOUNG, ALJ

7/25/83
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

July 27, 1983
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

EVIDENTIARY DOCUMENTS

J-1: Denham October 9, 1981 memo to Auxiliary Staff - working with Handicapped Students

J-2: Denham December 28, 1981 memo to all supplementary staff

J-3: Auxiliary Personnel (certificated) job description

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TEANECK EDUCATION ASSOCIATION as representative of TEANECK AUXILIARY EMPLOYEES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in primary exceptions to the initial decision by Judge Young objects to the lack of determination by the judge that all supplemental teachers involved in the education of handicapped pupils be required to possess an appropriate teacher of the handicapped certificate. The Board argues that it has the right to insist on higher standards of certification than required by law. Petitioner, in reply exceptions, refutes the arguments of the Board noting that the Board has not adopted a policy requiring handicapped certification for all such teachers so involved.

Petitioner in primary exceptions objects to the finding by the judge that teachers performing small group or individualized instruction of handicapped pupils in subject areas which are not also taught in the "mainstream" classroom must have teacher of the handicapped certification. Petitioner contends that nothing in the regulations supports such findings. Petitioner excepts to the finding that teachers described in paragraphs 4(b) and 4(c) of the stipulation, ante, must have handicapped certification. Petitioner contends that the presence of a "lead" teacher with a handicapped certificate makes it unnecessary to hold that certificate. The Commissioner cannot agree in entirety with the exceptions of either party.

The Commissioner notes with approval petitioner's argument that the Board has not established policy concerning certification requirements for the classes for the handicapped herein referenced. The Commissioner has considered similar circumstances in Mary Ann Popovich v. Board of Education of the Borough of Wharton, 1975 S.L.D. 737), wherein he said:

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> "***The Commissioner is constrained to caution all boards of education that the decision-making functions which are required by statute to be performed by boards of education may in no way be relegated to others. Wallace M. Nixon v. Board of Education of the City of Pleasantville, 1938 S.L.D. 56.***" (at 745)

For any certification requirements for teachers of the handicapped beyond those required by law to be effective the Board must take appropriate action. The Commissioner so holds.

In its refutation of certification requirements for teachers in stipulation paragraphs 4(b) and 4(c), petitioner argues that the teachers are in classroom situations, not in a resource room, and do not need special certification.

The Commissioner notes with interest an apparent conflict between petitioner's exceptions and initial brief on this point. Petitioner states in exception:

> "Type 4(B) and 4(C) teachers all work with handicapped certified lead teachers. They are auxiliary teachers (N.J.A.C. 6:28-3.2(d)(2)) who need not themselves have a handicapped certificate. (See petitioner's initial brief which is enclosed.)" (at p. 3)

In the initial brief filed by petitioner is stated:

> "Assuming the independent responsibility given to type 'C' auxiliary teachers is with board approval, petitioner does not contest the need for a handicapped certificate as to them." (at p. 11)

The Commissioner remains perplexed to know which argument by petitioner shall prevail.

In the opinion of the Commissioner the teachers described in 4(b) and 4(c) must be certified as teachers of the handicapped because of their duties clearly set down in the closing sentence of each job description as noted herein by emphasis:

> "4(b) teachers engage 'in "team" teaching with a regularly contracted teacher of the handicapped. Responsibility is usually shared, although the contract teacher is considered to be the lead teacher. The supplemental teacher may be solely responsible for instruction in a particular subject area,... if the contract teacher is absent, the supplemental teacher is solely responsible for the class for that period.'

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> 4(c) supplemental teachers are assigned in a "team" teaching format which 'is utilized for part of the day and "mainstreaming" to nonspecial education classes may also occur. However, for two or three class periods per day the supplemental teacher is alone with the class and is solely responsible for instruction and supervision during those periods.'"

In each of the above situations the Commissioner notes that the pupils involved become the sole responsibility of the teacher for a number of periods necessitating total certification as teacher of the handicapped. The Commissioner so holds.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Commissioner notes with approval the summary set down herein by the judge and adopts it by reference as his own.

IT IS SO DETERMINED.

COMMISSONER OF EDUCATION

SEPTEMBER 30, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10724-82

AGENCY DKT. NO. 231-6/82A

RONALD S. KULIK,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,

Respondent.

APPEARANCES:

Ronald S. Kulik, petitioner, pro se

Lois M. Van Deusen, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: July 21, 1983 Decided: August 16, 1983

BEFORE SYBIL R. MOSES, ALJ:

This matter comes before the Office of Administrative Law as the result of a petition filed by Mr. Kulik on June 21, 1982, pursuant to N.J.S.A. 18A:6-9, which vests the

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Commissioner of Education with the jurisdiction to hear or determine all controversies and disputes arising under the school laws. Mr. Kulik asked the Commissioner to determine that the resolution of the Montclair Board of Education (Board) withholding his adjustment increment for the 1982-83 school year was an arbitrary and capricious decision and should be reversed. An answer was filed by the Board on November 18, 1982 alleging that it had the right to withhold an increment as within its discretion, pursuant to N.J.S.A. 18A:29-14. The matter was forwarded to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq., on December 3, 1982.

A prehearing conference was held on March 16, 1983, and it was determined there was but one legal issue: Whether the Board of Education abused its discretion in withholding Mr. Kulik's salary increment for the 1982-83 school year? Discovery motions were heard and argued on that date and on subsequent dates. The Orders granting and denying parts of said motions for discovery are made a part of this decision, as if set forth at length.

A hearing was held on July 7, 1983 at the Office of Administrative in Newark, New Jersey. Appearances are noted above. At that hearing, Mr. Kulik relied on the testimony of the following witnesses, and the counsel for respondent relied on cross-examination of the same witnesses: Frank J. Rennie, Principal, Glenfield Middle School; Betty E. Veal, Assistant Superintendent for Instruction, Montclair Board of Education; Robert I. Schaefer, Personnel Administrator, Montclair Board of Education; Walter A. Lack, member, Montclair Board of Education; Robert H. Davis, Business Administrator and Assistant Secretary to the Montclair Board of Education; Mary Lee Fitzgerald, Superintendent of Schools, Montclair Board of Education, since April 1, 1982; Kenneth Miscia, member, Montclair Board of Education; Eve Marchiony, past member, Montclair Board of Education.

A review of the testimony of the above-named witnesses leads me to conclude that the facts herein are uncontroverted and only the legal issue of whether the Board acted arbitrarily in interpreting those facts to equal good cause for denying an increment to Mr.

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Kulik for the 1982-83 school year has to be decided. I adopt the ensuing version as my FINDINGS of FACT in this case.

Petitioner, Ronald Kulik, was first employed by the Montclair Board of Education in 1966 as a drivers' education and physical education teacher at the high school. He subsequently taught only drivers' education at the high school until June 1981. Petitioner was transferred to the Glenfield Middle School for the 1981-82 school year and was initially assigned duties as a physical education and health teacher. His assignment was later revised and, consistent with his certification, he taught only physical education. Over the course of the 1981-82 school year, a period totaling 180 days, Ronald Kulik was absent on 11 separate occasions for a total of 79 and one-half days. These absences required the use of approximately nine different substitute teachers, as well as coverage by the regular staff on several occasions.

Petitioner filed workers' compensation claims during the 1981-82 school year for various injuries which petitioner alleges arose as a result of his work as a physical education teacher. Mr. Kulik states that his absences were as a result of these work-related injuries. The Board received letters from Drs. Allen H. Verter and Paul A. O'Connor, Jr. concerning Mr. Kulik's physical condition. In addition, other letters and hospital and pharmacy bills were introduced into evidence to support Mr. Kulik's claim that he was, in fact, ill during the 1981-82 school year, which illness, he says, necessitated the 79 and one-half days of absence from the school.

It was the opinion of expert witnesses, including Betty E. Veal, Assistant Superintendent for Instruction, an extremely credible witness, that petitioner's absenteeism resulted in a loss of teaching effectiveness and efficiency. Furthermore, the Glenfield principal, Mr. Rennie, testified that as a result of his being absent so often, Mr. Kulik did not correctly apply the grading criteria during the first cycle of grading in 1981-82, resulting in the erroneous failure of over 60 students. Mr. Rennie had to subsequently cancel those grades. As a result of Mr. Kulik's poor attendance record, so few students signed up for his classes for the second cycle of the 1981-82 school year that Mr. Rennie had to make extensive reassignments in order to equalize the class loads.

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Mr. Kulik's 1982 annual performance evaluation indicated several areas in which improvement was needed and stated that petitioner's students had not demonstrated progress and/or growth. Mr. Rennie attributed the lack of progress and/or growth to Mr. Kulik's poor attendance record. It was the opinion of Mr. Rennie and Ms. Veal that the sporadic nature of his absences, which occurred on 11 separate occasions and which required the use of 9 different substitute teachers, destroyed the coherence and continuity of the physical education program. It was uncontroverted that the nature or cause of the absence is not crucial or relevant; only the fact that there are absences which affect the students in a negative manner because they lose motivation is relevant. It was uncontroverted that a teacher's absences of 79 and one-half days would have a truly negative effect on the developmental skills of the students. It was also uncontroverted that physical education is just as important as academic courses in regard to the social, emotional and developmental growth of the students.

Faculty absences are monitored by computer, and the Montclair Board's personnel administrator, Mr. Schaefer, reviews those absences. As a result of his reviewing Kulik's absences, Schaefer suggested at an administrative staff meeting on February 9, 1982, and to the Acting Superintendent of Schools, that Mr. Kulik's increment be withheld. After the administrators discussed petitioner's attendance record, Acting Superintendent Robert Davis advised Mr. Kulik by letter in February 1982 that a doctor's note would be required for future absences and that if the absences did not abate, the Board might take some action. Kulik's absences did continue and Mr. Schaefer, pursuant to his responsibilities, advised the Board of the extensive absences and recommended that Mr. Kulik's 1982-83 increment be withheld.

Mr. Kulik was notified on March 30, 1982 that a discussion of his increment would take place at the Board's April meeting. At that meeting, Mr. Schaefer advised the Board, in closed session, that for the period ending March 31, 1982, Mr. Kulik had been absent 71 and one-half days out of 125 school days. Schaefer told the Board that this was an unusual record of absenteeism because of the number of days and the number of separate instances when he was absent. The average number of absences per teacher in

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Montclair is no more than 7 or 8 days out of a 183- or 184-day year. The Board discussed the matter and agreed to withhold Mr. Kulik's increment. At the public meeting on April 5, 1982, which followed the closed session, the Board voted unanimously to adopt a resolution to withhold the petitioner's adjustment increment for the 1982-83 school year. Each Board member who testified stated that the reason he or she voted for the resolution and the reason the vote was unanimous was that Mr. Kulik's excessive absenteeism resulted in reduced effectiveness of his teaching and in deprivation of his students of quality teaching, and had a negative impact on the students' developmental, social and emotional growth. While there was some discussion of Kulik's assertion that his absences were the result of a work-related injury, the Board determined that the negative effect of the absenteeism on the students, whatever the reason for the absences, was such that it was more than sufficient reason to withhold his increment.

Mr. Kulik's salary for the 1981-82 school year was $28,320. The increment withheld from Mr. Kulik for the 1982-83 school year was $1,805. Mr. Kulik's salary for the 1982-83 school year was $28,320.

The following items were moved into evidence or marked for identification during the hearing:

JOINT EXHIBITS

J-1	Cumulative Absence Record for Ronald Kulik
J-2	Memorandum dated March 30, 1982 from Robert Davis to Ronald Kulik
J-3	Minutes of the Closed Session of the Board meeting of April 5, 1982
J-4	Resolution to Withhold an Increment - adopted April 5, 1982
J-5	Letter dated April 7, 1982 from Robert Davis to Ronald Kulik
J-6	Accident Report for Ronald Kulik dated October 19, 1981
J-7	Accident Report for Ronald Kulik dated October 30, 1981
J-8	Accident Report for Ronald Kulik dated December 8, 1981
J-9	Accident Report for Ronald Kulik dated January 8, 1982
J-10	Accident Report for Ronald Kulik dated January 18, 1982

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J-11	Accident Report for Ronald Kulik dated February 26, 1982
J-12	Accident Report for Ronald Kulik dated March 2, 1982
J-13	Accident Report for Ronald Kulik dated May 25, 1982
J-14	Annual Written Performance Report for Ronald Kulik dated June 30, 1982
J-15	Letter dated September 28, 1982 from Dr. Allan H. Verter
J-16	Letter dated February 3, 1982 from Dr. Paul A. O'Connor, Jr.
J-18	Letter dated February 10, 1983 from Bob Schaefer to Bob Seawright of McCarter & English
J-19	Responses to discovery questions #13, 17 and 18
J-10	Notes attached to computer statement of absences
J-21	Computer statement of absences (4 pages)
J-22	November 13, 1981 letter from Allan Verter
J-23	Note from Dr. Anthony Kaiser dated December 30, 1981
J-24	Pharmacy receipts (3 pages)
J-25	Mountainside Hospital bill dated January 22, 1982
J-26	Bill of Anthony J. Kaiser dated September 5, 1979 through April 2, 1982 (2 pages)
J-27	Note from Anthony Kaiser dated February 22, 1982
J-28	Letter from Allan Verter dated March 1, 1982
J-29	Letter from Allan Verter dated March 18, 1982 (4 pages)
J-30	Bills from Drs. Kaiser and Singhol
J-31	Letter dated March 25, 1982 from Anthony Kaiser to Frank Rennie

KULIK EXHIBITS

P-1	4.10 of Agreement (in evidence)
P-2	P.4 of Evaluation Procedures (in evidence)
P-3	Letter re transfer (for identification only)
P-4	Letter from Kulik July 20, 1981 (for identification only)
P-5	Letter July 23, 1981 (for identification only)
P-6	Letter August 24, 1981 (for identification only)
P-7	Statement of Betty Veal to Ms. Van Deusen (in evidence)

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P-8 Statement of Robert Shaefer (in evidence)
P-9 Letter from Robert Davis to Ronald Kulik (in evidence)
P-10 Letter from Frank Rennie to Ms. Van Deusen (in evidence)

Both Mr. Kulik and Ms. Van Deusen, counsel for the Board, timely filed written memoranda. The record closed on July 21, 1982.

Mr. Kulik argues that the evidence proves that the Board acted in an arbitrary and capricious manner for two reasons. He first asserts that the Board did not follow the procedures set forth in the contract between the Montclair Board of Education and the Montclair Education Association, specifically Provisions 4.10(a) and 4.10(b), before it resolved to withhold the increment on April 5, 1982. The Board did not follow the provision which he says required his supervisor and/or principal to initiate the recommendation for withholding, nor did it follow the provision which required that he receive written notice of the causes by April 1, 1982, nor was he given any particulars or the opportunity to correct or overcome the cause of the problem which led to the withholding of the increment. Mr. Kulik submitted the affidavit of the president of the Montclair Education Association, Lloyd H. Condit, dated July 19, 1983, stating that, as president of the Montclair Education Association, it is his interpretation that Provisions 4.10(a) and 4.10(b) mean that the time lines are strictly pronounced and mean that only the immediate supervisor and/or principal shall initiate the withholding of an increment.

Second, Mr. Kulik argues that the action of the Board was not only procedurally defective, but was substantively defective, as he had good cause for being absent. He states that 75.5 of 79.5 days of absences were the result of a work-related accident, which was validated by a note from a doctor. Mr. Kulik argues that this litigation is a waste of money and that the Board has caused a delay of over 206 days by late responses on various communications.

The Board argues that its actions were not procedurally defective since it complied fully with the provisions of N.J.S.A. 18A:29-14. The Board asserts that any conflicting requirement in the contract cannot stand in light of the statute. Counsel argues that

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since excessive absenteeism is a long-term problem and can only justify withholding of an increment when it has had a detrimental effect on a substantial portion of the school year, to require the Board to decide on the effect of such an attendance record 90 days before it votes on withholding would really cripple a Board's decision-making ability. Counsel argues that while the purpose of the 90-day notice requirement before the immediate supervisor and/or principal forwards a recommendation to the Board is to afford an employee the opportunity to correct deficiencies before there is a withholding, it does not mandate that the recommendation only come from a principal. The Board asserts that whether or not there was absolute technical compliance with the notice provision, there was substantive compliance, since petitioner was certainly aware both of the excessive nature of his absenteeism from the end of the first cycle and of the problems the absenteeism was causing.

In regard to the substantive question of whether the Board abused its discretion, counsel argues that the law is clear that the decision of a school board to withhold an increment is completely discretionary and will not be upset unless it is arbitrary, without rational basis or induced by improper motive. Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960). The Board relies on the unpublished opinion in Trautwein v. Board of Education of Bound Brook, Superior Court of New Jersey, Appellate Division, Docket No. A-2773-78, decided April 8, 1980, certif. den. 84 N.J. 469 (1980), which held that excessive absenteeism is sufficient cause to justify withholding an increment when it has had an adverse effect on a teacher's performance, and thus on the students, notwithstanding that the absences are legitimate.

My review of the law leads me to conclude that it is abundantly clear that a board of education possesses broad powers to withhold an increment of a teaching staff member, pursuant to N.J.S.A. 18A:29-14, which provides, in pertinent part:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education . . . .

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It is also well settled that while a Board has the authority to withhold increments, see, Filardo v. Board of Education of the Township of Mahwah, 1975 S.L.D. 830 and Dullea v. Board of Education of the Borough of Northvale, 1978 S.L.D. 558, aff'd State Board 1978 S.L.D., such power is not absolute, but is subject to certain procedural safeguards. See, Zacardi v. Board of Education of the Town of Nutley, 1980 S.L.D. (April 25, 1980).

In regard to the question of whether Mr. Kulik had adequate procedural safeguards before his increment was withheld, I conclude that the Board did, in fact, provide ample notice to Mr. Kulik of its intention to discuss and then actually withhold his 1982-83 increment. The immediately relevant provision of the Montclair Education Association-Montclair Board of Education agreement states:

> 4.10 Withholding Increments. Employment or adjustment increments may be withheld for inefficiency or other just cause related to an employee's performance of duties, but only in accordance with the following: . . . (b) the immediate supervisor and/or the principal shall not forward any recommendation to withhold an employees increment or a part thereof through the superintendent to the Board unless at least 90 calendar days prior thereto, and in no case later than April 1 of the preceding school year in which such action would take effect the supervisor/principal has given to the employee as to whom the recommendation shall be made, written notice of the alleged cause(s) for the recommendation specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome such cause(s).

I interpret that section to impose a limitation on the power of the teacher's immediate supervisor and/or principal to forward a recommendation to the Board to withhold an increment. That is to say that the supervisor or principal must give the teacher/employee directly under his or her control an opportunity to correct a deficiency which that principal or supervisor has observed and that opportunity shall consist of at least 90 calendar days. Provision 4.10(b) does not mean that there are no other good causes for the withholding of an increment other than those which the immediate supervisor/principal observes and gives the teacher an opportunity to correct. Section 4.10(b) is a limitation on the power of the principal/supervisor and not a limitation on the power of other administrative officials of a board of education to forward recommendations to the

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board of education for the withholding of an increment, pursuant to their duties and responsibilities. To interpret the section otherwise would lead to an absurd result, and the law holds that statutes and, by analogy, regulations and even contractual provisions, should not be read so as to lead to an absurd result. See, State v. Provenzano, 34 N.J. 318 (1961) as well as Gardiner v. Jersey City, 67 N.J. Super. 435 (App. Div. 1961).

I also conclude that the Board has completely complied with the procedural requirements of N.J.S.A. 18A:29-14, which states:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an asistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

Mr. Kulik was given written notice of the withholding within 10 days of the roll call vote of the Board of Education to withhold his increment, and he received a statement of the reasons for the decision. Furthermore, in this case the Board bent over backward to give Mr. Kulik notice of the problem and an opportunity to correct it. Mr. Rennie spoke to Mr. Kulik at the end of the first cycle when the grades had to be adjusted, telling him that the problem was caused by his absenteeism. Mr. Kulik received a letter in February 1982 from Mr. Davis indicating that his attendance record had been discussed on February 9, 1982, and since he had been absent so many times a doctor's note would be required for future absences. Kulik was told then that if the absences did not abate, the Board might take some action. Therefore, in February 1982, approximately 60 days before the Board actually acted, Mr. Kulik was well aware that action might come in the near future. It

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was only after the absences continued, despite the warning, that Mr. Schaefer advised the Board of the situation and recommended that the petitioner's 1982-83 increment be withheld. Petitioner also received notice on March 30, 1982, six days before the actual meeting, advising him of the Board's intent to discuss withholding his increment at its April 5 meeting.

In case at bar, the Board followed the statutorily prescribed requirements and gave the teacher verbal notice at the end of the first cycle of his absenteeism problem and written notice in February 1982 of his absenteeism problem. This situation is analogous to those cases where the Commissioner has held that even when a school board has failed to follow the statutory procedural requirements, its action will not be overturned where there was substantial compliance or where the teacher, in fact, had actual notice. See, Klein v. Board of Education of Cedar Grove, 1981 S.L.D. (October 15); Gollob v. Board of Education of the City of Englewood, 1980 S.L.D. (December 4); and Huth v. Board of Education of the Borough of Morris Plains, 1980 S.L.D. (July 28). I therefore conclude that the requirements of N.J.S.A. 18A:29-14 have been clearly met, and I further conclude that the intent of the procedural regulation set forth in the contract between the MEA-MBE has also been met, since any limiting language in that contract refers the power of the observing immediate supervisor/principal to recommend withholding an increment, and does not limit the Board to withhold increments in other situations which do not arise as a result of observation. The withholding of the increment should not be reversed because of any procedural defects.

The more immediate issue is whether the Board acted arbitrarily and unreasonably. While the authority of the Commissioner of Education to examine a board's decision to withhold an increment is clear, Kopera v. West Orange Board of Education, 60 N.J. Super. 288, that examination is limited to a determination of whether the underlying facts were as those who made the evaluation claim and to determine whether it was unreasonable for them to conclude as they did upon those facts. The Commissioner (and this judge) have to bear in mind that ". . . they were expert, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant . . .". Id. at 297. The Appellate Division also stated that, ". . . the scope

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State Board 1981 S.L.D. (February 4, 1981) and Virgil v. Board of Education of the Town of West Orange, 1981 S.L.D. January 2, 1981 aff'd State Board 1981 S.L.D. (May 6, 1981.)

In Angelucci, et al. v. Board of Education of the Town of West Orange the Commissioner found specifically that the continued absence of the teachers in that case had an adverse effect on the pupils and that frequent absences are more harmful than one long absence, due to the difficulty of finding a competent substitute and the resulting lack of continuity in a class. Angelucci involved two teachers who were unquestionably outstanding and who had received excellent appraisals, unlike Mr. Kulik, whose performance was either merely satisfactory or less than satisfactory (see J-14 in evidence). In Virgil v. Board of Education of the Town of West Orange, the Commissioner and the State Board held that a teacher, who had been absent 16 times in one year and whose increment was withheld for that reason, was not entitled to a reversal of that decision on the grounds that it was unreasonable, because of the fact that the continuity of a program is disturbed when a different substitute must be found for absences. Virgil held that an intermittent pattern of repeated absences is more detrimental to the learning process than a single extended absence. Id. at 4.

Mr. Kulik has received the mildest statutory disciplinary measure available to a board, that of withholding an increment. To uphold such a decision, it is unnecessary to martial the quantum of proof necessary to justify a suspension or dismissal. Hillman v. Board of Education of Caldwell-West Caldwell School District, Essex County, 1977 S.L.D. 218. Furthermore, there is no obligation for the Board to bear the burden to prove its reasons to withhold an increment, as the burden of proof is on the teacher. Trautwein v. Board of Education of the Borough of Bound Brook, A2773-78.

I conclude that the underlying facts were as the Board of Education claimed they were and that there is sufficient competent and credible evidence in the record before me to show that problems did exist with Mr. Kulik's effectiveness as a teacher and that his absences had a negative impact upon the students. The Board's determination that Mr. Kulik's absences, as of March 1, 1982, of 71.5 days out of 125 days, were the equivalent of excess absenteeism, resulting in inefficient or ineffective teaching and having a negative

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of the Commissioner's review is, . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions . . .". Id. at 29. Trautwein v. Board of Education of the Borough of Bound Brook, A-2773-78, decided April 8, 1980, certif. den. 84 N.J. 469 (1980), reaffirmed the Kopera test.

Applying the rationale and guidelines of Kopera and Trautwein, it is clear that Mr. Kulik, the petitioner, has the burden of proof to show that (1) the underlying facts were not as claimed by the Board of Education and (2) that it was unreasonable for the Board to conclude to withhold his increment based on those facts. Petitioner does not argue with the reasons given by the Board of Education in its resolution withholding his increment, but apparently bases his argument on the theories that his absences were legitimate because of medical problems caused by an on-the-job injury, that the students were all taught by certified teachers and fulfilled their health requirements and that he had not taught physical education for a long period of time and, therefore, would not have done such a good job anyway. The reasons given by the Board of Education for its actions are detailed in the Resolution and letter sent to Mr. Kulik, and include a conclusion that his record of absenteeism reduced his effectiveness as a teacher, deprived his students of the quality of teaching to which they are entitled and caused him to fall short of the performance standards which merit an adjustment increment (see J-5 in evidence). These reasons certainly support the withholding of an increment if grounded in fact. The underlying facts here clearly indicate that excessive absenteeism does have a negative effect on the students and does undermine a teacher's performance. Said excessive absenteeism is sufficient cause to justify withholding an increment when it has an adverse effect on a teacher's performance or a negative impact on the students' developmental growth. See, Trautwein v. Board of Education of Bound Brook, where the Appellate Division reversed the Commissioner's and State Board's reversal of that school board's decision to withhold an increment based on absenteeism, finding that it was not unreasonable and was well within the discretion of the board of education to determine that absenteeism can diminish a teacher's effectiveness and can cause a teacher to fall short of performance standards which merit an increment. Accord, Angelucci, et al. v. Board of Education of the Town of West Orange, 1980 S.L.D. (September 15, 1980) aff'd

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impact on the students, on its face alone, cannot be disturbed as being unreasonable. When it is supported by the expert opinions of Ms. Veal, the Assistant Superintendent for Instruction, and Mr. Rennie, the principal of the school, that the physical education programs in the Glenfield Middle School were, in fact, disrupted by Mr. Kulik's intermittent absences, it is ineluctable that the Board acted reasonably, within its discretion and not in an arbitrary fashion, when it determined to withhold Mr. Kulik's increment for the 1982-83 school year. The Board's conclusion is especially reasonable in light of the fact that Mr. Kulik had notice, after the first grading cycle, of the grading problems arising from his absenteeism and in light of the fact that he had official notice in February 1982 that the Board might take action if the absenteeism continued. I also conclude that it is of no relevance whether petitioner's absences were for legitimate medical reasons. It is the students whose interest must be first and foremost. As the Commissioner stated in Virgil, 1981 S.L.D. at 56, "irrespective" of the reasons for these absences, frequent absences of the regular teacher inevitably have an adverse effect on the learning which takes place in the classroom. Mr. Kulik has not proven that the Board's decision was unreasonable or arbitrary, and I will not grant his petition asking that it be overturned.

According, based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the petition of Ronald S. Kulik in the within matter be, and is hereby, dismissed.

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

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

Aug 16, 1983
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

August 17, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 22, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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RONALD S. KULIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions to the initial decision by Judge Moses lists a series of errors which petitioner contends were made by the judge whom he accuses of both bias and prejudice against him. Petitioner further contends that the judge improperly interpreted the negotiated agreement between the Education Association and the Board, to his detriment. Petitioner, while admitting to his being absent 71.5 days out of 125 days, avers that each absence is validated by competent medical authority and that it is absurd to impute guilt for such legitimate absences. Finally, petitioner contends that the Board must be punished for allegedly causing 200 days' delay in this matter and pleads for reversal of the decision herein.

The Board in reply exceptions refutes petitioner's attack on the judge. The Board contends that the judge gave petitioner every opportunity and assistance as a pro se litigant. The Board argues that the judge has properly applied the law (N.J.S.A. 18A:29-14) and interpreted the appropriate sections of the negotiated agreement. The Board contends that the excessive absenteeism shown by petitioner is sufficient cause to justify withholding an increment when it has an adverse effect on a teacher's performance. Trautwein, supra The Board avers that it followed statutory procedures in withholding petitioner's increment and was in substantial compliance with the provisions of the negotiated agreement. The Board states that the judge did not err in not imposing any penalty for delay by the Board contending to the contrary that any delay in prosecuting the case was necessitated by petitioner's burdensome and insistent discovery requests. The Board pleads for affirmation of the initial decision by the judge herein. The Commissioner looks with favor on the arguments presented by the Board and adopts them as his own.

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The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5143-83

AGENCY DKT. NO. 214-6/83A

KIRK SNYDER,

Petitioner

v.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

Respondent.

APPEARANCES:

William E. Wilson, Esq., on behalf of petitioner (Wilson & Fasano, attorney)

Michael J. Herbert, Esq., on behalf of respondent (Sterns, Herbert & Weinroth, attorneys)

Record Closed: July 29, 1983 Decided: August 18, 1983

BEFORE **STEVEN C. REBACK**, ALJ:

Petitioner, a student enrolled at Rumson-Fair Haven Regional High School, is requesting that the Commissioner of Education reverse a determination made by respondent, New Jersey State Interscholastic Athletic Association (NJSIAA), precluding the petitioner's participation on his high school football team for the 1983-84 academic year. The basis of NJSIAA's determination that the petitioner is ineligible for such athletic participation is the application of Article V, Section 4-J, of NJSIAA bylaws—the "eight semester rule," which precludes eligibility of a student for high school athletics after the expiration of eight consecutive semesters following his entrance into the ninth grade.

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Petitioner's contention is that respondent has acted arbitrarily and capriciously in applying the eight semester rule and that pursuant to the authority of the Commissioner of Education to hear appeals from decisions of NJSIAA involving public school districts, N.J.S.A. 18A:11-3, the application of the eight semester rule in the current matter should be reversed and petitioner should be permitted to participate in practice and as a member of the team for his final and fifth academic year.

Respondent contends that the decision holding petitioner ineligible to participate in high school athletics for the 1983-84 academic year is consistent with the objectives which the eight semester rule was designed to achieve and it is consistent, as well, with the policy of NJSIAA, at least with respect to its actions over the last two years, which has been to grant a waiver from the eight semester rule only in instances in which a student has been compelled to extend his or her secondary school career because of circumstances beyond the student's control. These circumstances have invariably involved the necessity to repeat a semester or year because of illness or other exigent circumstances. As a consequence, it is respondent's position that the determination to deny Mr. Snyder a waiver from the rule is reasonable on its face, consistent with NJSIAA policy which has been promulgated throughout the state and should not be overturned.

Procedurally, this matter commenced on June 30, 1983, when the petitioner served his verified petition of appeal upon the Commissioner of Education. The petition requested that an order be issued, pursuant to N.J.A.C. 1:1-9.6, granting emergency relief in the form of temporarily restraining NJSIAA[1] from preventing the petitioner's participation in practice or full membership on the football team and permanently restraining NJSIAA from interfering with the petitioner's right to participate in high school football throughout the 1983-84 academic year. As a consequence of the request for emergency relief, the Commissioner of Education, prior to receiving respondents' answers, immediately transferred the matter to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1 et seq., for oral argument on petitioner's emergency relief request.

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[1] At the time of the commencement of the action, the Rumson-Fair Haven Regional High School District, Monmouth County, was also named as a party respondent.

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Oral argument was conducted on July 18, 1983, at the Office of Administrative Law, Trenton, New Jersey. On that same date, Mr. Herbert, counsel for NJSIAA, submitted his original and amended verified answer as well as a letter memorandum of law opposing the request for interim relief. In addition, NJSIAA moved without objection to dismiss the matter in respect to the Board of Education of Rumson-Fair Haven Regional High School which, as was indicated, had been named initially as a party respondent along with NJSIAA. The basis of the motion was that as a participating school district in NJSIAA, the Rumson-Fair Haven Regional School District will comply with any order issued in this matter as against NJSIAA in respect to the application of the eight semester rule.

On July 21, 1983, an order on the petitioner's motion for emergent relief as well as an eight-page letter-ruling was issued. It was concluded that while the petitioner successfully established that if emergency relief were not accorded, irreparable injury would result, it was not established that there was a significant likelihood that he would prevail when the matter was fully disposed of on its merits. Accordingly, and applying the standards under which interim relief may be granted as set forth at N.J.A.C. 1:1-9.6, the petitioner's motion was denied.

As an incident to oral argument presented on July 18, 1983, it was agreed by counsel that no significant factual dispute appeared in this matter and that as a consequence the case would proceed on cross-motions for summary decision. I directed counsel for petitioner to submit his motion papers and supporting memorandum not later than July 25, 1983, and directed counsel for NJSIAA to submit his reply, if any, not later than July 29, 1983. Petitioner had requested discovery in the nature of the record of all prior NJSIAA determinations on waiver applications from the eight semester eligibility rule dating back two years. I advised counsel for respondent to submit all such information to petitioner not later than August 1, 1983. I also apprised petitioner that if as a consequence of the requested discovery he determined that additional relevant facts consistent with his opinion were elicited, he should apprise both his adversary and myself within the first week of August so that additional time would be provided to him for submission of his amended motion papers. He was also apprised, however, that if he did not inform the Office of Administrative Law to the contrary by the conclusion of the first week of August, the case would proceed under the assumption that no additional factual information which was germane to his case was brought to his attention as a result of the

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discovery and the record would close as of July 29, 1983. Since the petitioner's counsel did not advise OAL to the contrary, it is assumed that discovery has not changed his position and, therefore, the record in this matter was closed on July 29, 1983.

The facts in this matter do not appear to be in significant dispute; indeed, as a consequence of the submissions which were made by counsel subsequent to oral argument on the motion for emergency relief, the operative facts in this case are even less open to interpretation. Accordingly, I **FIND:**

The petitioner, Kirk Snyder, commenced high school as a freshman in the school year 1979-80. He attended Rumson Country Day School. For the following academic year, 1980-81, petitioner entered the Lawrenceville School where he repeated his freshman year because of academic reasons. He remained at the Lawrenceville School for his third consecutive high school year, 1981-82. For his fourth consecutive high school year, 1982-83, petitioner transferred to Rumson-Fair Haven Regional High School. He satisfactorily completed his fourth year of study and, commencing September 1983, he will once again return to Rumson-Fair Haven Regional High School to complete presumably his fifth consecutive year of high school and to be graduated in June 1984.

Petitioner has participated in football for much of his high school career. As a freshman at Rumson Country Day School, he played on the team in the 1979-80 school year; again in his repeated freshman year at the Lawrenceville School in 1980-81, he played on the freshman football team. In the last game of the season, he seriously injured his knee for which surgery and hospitalization were required. As a consequence, in his third (sophomore) year, 1981-82, the petitioner was unable to participate in football. His knee apparently having healed, Mr. Snyder was able to resume his football participation in his fourth consecutive year of high school, when he transferred to Rumson-Fair Haven Regional High School and participated on the second team.

Petitioner now wishes to participate on the football team at Rumson-Fair Haven Regional High School, commencing in his fifth consecutive year of high school. Based upon the application of Article V, Section 4-J, of the bylaws of NJSIAA, such participation has been denied.

Article V, Section 4-J, of the NJSIAA bylaws provides as follows:

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> J. Semesters of Eligibility - No student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his/her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated. This rule shall not apply to an honorably discharged serviceman/servicewoman, in which case the Executive Committee may make any adjustments of this rule as it may deem equitable.

The petitioner was ruled to be ineligible for participation in interscholastic activities for his fifth consecutive year, on June 1, 1983, when the Eligibility Committee of NJSIAA issued its determination. Thereafter, an appeal was taken to the Executive Committee of the organization, which conducted a hearing on June 8, 1983. As a consequence of that hearing, a written letter determination was issued by NJSIAA, dated June 14, 1983, and directed to the principal of the petitioner's high school. The letter ruling, which has been annexed as exhibit A to petitioner's amended answer, cites Article V, Section 4-J, as the basis for the petitioner's ineligibility. Moreover, the Executive Committee indicated that while the bylaw provides for a waiver of the eight semester rule ostensibly only to honorably discharged military service personnel, in the exercise of its discretion the Committee has granted waivers for other equitable reasons. Apparently, for the last several years, NJSIAA has engrafted a policy onto the military service exemption which counsel represents has been well-publicized and which is expressed in the letter of ineligibility forwarded to petitioner. It provides that waivers from the eight semester rule may be granted where:

> it has been shown the student was prevented from completing an academic semester or year because of circumstances beyond his/her control, such as illness or psychological reasons . . . . No such reasons have been presented in this case.

As a consequence of the submissions by counsel to NJSIAA subsequent to oral argument, I am convinced that for at least the past two years the waiver policy of NJSIAA which was expressed in the letter of ineligibility forwarded to petitioner has been reasonably applied on a case-by-case basis. As a consequence, its application upon the petitioner's waiver application is consistent with its past practices and cannot be said to have been arbitrary or unreasonable. In addition, as has already been indicated, the waiver policy has been promulgated through various literature to member schools.

As part of its post oral argument submissions, NJSIAA has provided an affidavit executed by Robert F. Kanaby, its Executive Director. He indicates at paragraph 8 as follows:

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> All requests for a waiver of the eight semester and other eligibility rules are first considered by the NJSIAA Eligibility Committee and on appeal, by the Executive Committee. Based upon this personal knowledge, and my review of the Association records, I have not uncovered any case where a student has been allowed to participate in interscholastic sports after the expiration of eight semesters from the student's entrance into a secondary school, except where the student has had to extend his/her secondary school career because of circumstances beyond his/her control. These exceptions have been limited to students who repeated a semester or more because of absences caused by physical or psychological illness to the student or his/her parents or Juvenile Court dispositions. In a few cases, an exception has been given to a classified, handicapped student whose secondary schooling was extended on the advice of school authorities, provided that student did not compete for more than four years. [emphasis added]

In addition and as part of the discovery requests made by petitioner's counsel, I have received an informational summary sheet which counsel for NJSIAA represents to be respondent's actions in respect to waiver requests from the eight semester rule made by students over the last two years. An examination of this summary sheet indicates that since June 1981 (presumably subsequent to the decision rendered by the Commissioner of Education in Smith v. New Jersey Interscholastic Athletic Association, 1981 S.L.D. ___, OAL DKT. EDU 7753-80 (June 24, 1981), adopted, Commissioner of Education (August 13, 1981), the NJSIAA Eligibility Committee has considered waivers of Article V, Section 4-J, in 58 cases and has granted 12 waivers. In the remaining 46 cases, 14 appeals were taken to its Executive Committee, which reversed the waiver denials in only three instances. Thus, the cases in which waivers were granted by either the Eligibility or Executive Committees involved a student who indeed was absent from school because of personal or family illness, requiring repeating a semester or more; involved a student who was required to repeat a semester because of absence resulting from a juvenile court referral; or involved a handicapped student who was not absent from school but who was required to continue his or her education beyond the normal eight semesters as a result of directives from local school authorities.[2]

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[2] There was one additional case in which a student had apparently been erroneously placed in the eleventh grade and not the tenth grade; the improper placement was corrected and the student was placed back into the tenth grade and thus was granted three, rather than two, years of eligibility.

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The summary sheet of waiver requests for the years 1981-82 and 1982-83 appears to substantiate significantly the position of Mr. Kanaby as well as the argument of counsel that indeed where waivers have been granted from the eight semester rule, the student was compelled to extend his high school career because of circumstances beyond his control. It is uncontested that Kirk Snyder has remained in school for what will be five consecutive years and the commencement of his ninth consecutive semester in September 1983, that the football injury which he suffered in the school year 1980-81 did not curtail the continuation of his high school education, and that the only reason why he was compelled to attend high school for more than four years was because he repeated his freshman year at Lawrenceville School for academic reasons. I accept for purposes of this decision that for the past several years NJSIAA has never granted a waiver of the eight semester rule to a student under the circumstances presented by this petitioner.

Further, based upon recent decisional authority, it is also my judgment that the Commissioner of Education has adopted a position in respect to the eight semester rule which is unambiguously consistent with the policy taken by respondent in respect to the denial of the waiver in the matter currently under consideration. In the recent decision of Gordon F. Van Note v. New Jersey State Interscholastic Athletic Association, OAL DKT. EDU 10260-82, decided March 8, 1983, aff'd and modified, Commissioner of Education, April 22, 1983, the Commissioner of Education has upheld the eight semester eligibility rule as well as the manner of its application so clearly and so unequivocally that it is apparent to me that a similar determination would sustain the application of the rule by NJSIAA in the matter currently being considered.

The petitioner in Van Note, like Kirk Snyder, repeated one year of high school for academic reasons. During two of his first four years of high school, he participated in interscholastic sports. During the two years in which he did not compete, he attended a school which did not offer an athletic program in golf — one of the sports in which he participated. He sought to compete in interscholastic golf in the second semester of his fifth year of secondary school—his tenth semester. He was denied eligibility by NJSIAA and the denial was ultimately affirmed by the administrative law judge and by the Commissioner of Education. The Commissioner, in affirming that aspect of the initial decision which upholds and supports the salutary objectives of the eight semester eligibility rule, indicates in part as follows:

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> The Commissioner observes that the application of the rule herein [Article V, Section 4-J] is clear and unequivocal with no mitigating circumstances offered by petitioner as to why such rules should be set aside. In the Commissioner's judgment, this matter is to be distinguished from other cases in which the Commissioner set aside eligibility rulings of the NJSIAA in that those matters denied waivers for seemingly the exact reasons for which waivers had previously been granted without providing distinguishing reasons or rationale. [citations omitted]
>
> In the opinion of the Commissioner, the Eight Semester Rule herein described is a laudable one and its enforcement in this instance is based on obvious, self sufficient reasons that require no further statement and explanation for the decision forming the basis of this matter. [Gordon F. Van Note v. New Jersey Interscholastic Athletic Association, Commissioner's Decision, p. 13-14.]

In Van Note and the matter currently under consideration, the petitioner students attended high school beyond the eight consecutive semesters permitted by the rule, both sought eligibility to participate in interscholastic athletics in either their ninth or tenth consecutive semesters of high school, and both chose to repeat a year of high school because of academic deficiencies. Under the circumstances and notwithstanding the efforts on behalf of counsel for petitioner to distinguish the case at bar from Van Note, it is my judgment that based upon an examination of the Commissioner's final decision in Van Note as well as other factors to be discussed hereinafter, whatever distinctions the petitioner seeks to draw are without a difference and that as a consequence the Commissioner of Education would arrive at the same conclusion here that he did in Van Note.

Accordingly, it is my judgment that I have an obligation to view the final administrative determination in Van Note as highly persuasive on whether the petitioner in the current matter is likely to prevail. Indeed, the Commissioner in the Van Note determination takes an even more constrictive view of the responsibilities of NJSIAA to waive the eligibility rule based upon equitable consideration than would even be necessary in the current matter. In Van Note, the administrative law judge, after determining that the petitioner was not entitled to a waiver, went on to conclude that NJSIAA had an affirmative obligation to advise an unsuccessful applicant for a waiver of the reasons of its denial. The Commissioner of Education in Van Note expressly reversed the administrative law judge in this regard and held that his finding which required a statement of reasons why the waiver was denied be set aside. It should be indicated, however, that notwithstanding the Commissioner's judgment that NJSIAA need not provide reasons for denial of a waiver of the eight semester requirement, NJSIAA has

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apparently determined to issue a written explanation for its determination and on its own initiative has done so in the current matter. To this end, the respondent should be commended for its decision. Whether it is or it is not a legal requirement for it to issue such written explanations, it would appear that in the interests of fairness, a student is entitled to know why he is ruled ineligible for further interscholastic athletic participation when his ineligibility is premised upon the eight semester rule.

It would appear that prior to the Van Note determination and in the not too distant past, the procedures employed by respondent in respect to denial of waiver applications differed from its current posture. This change is highlighted in the decision of Smith, Supra.

In Smith, the Commissioner of Education affirmed the administrative law judge's decision which reversed NJSIAA and granted the student petitioner a waiver from the eligibility requirements of the eight semester rule. Central to the administrative law judge's determination was his finding:

> [T]he NJSIAA has historically recognized a variety of different exceptions which have never been adequately publicized so that all those who potentially qualify may take advantage of the same opportunity afforded to others. Criteria used to determine entitlement to a waiver do not fit into any readily-ascertainable pattern, but appear to depend to a large extent on the personal attitudes of decision-makers. For the sake of basic fairness, the NJSIAA has an obligation to ". . . let the standard be generally known as to assure that it is being applied consistently and so as to avoid both the reality and appearance of arbitrary denial of benefits to potential beneficiaries." [citation omitted] [Smith v. New Jersey State Interscholastic Athletic Association, Initial Decision, page 11]

In Smith, the administrative law judge made findings of fact which indicated that waivers to the application of the eight semester rule were granted to other students who in his judgment were no more deserving of special treatment than the petitioner student was. Accordingly, he ruled that absent any rational distinction between the petitioner in Smith and other students who were similarily situated, the actions of the respondent could be characterized as arbitrary and capricious.

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Since the determination in Smith, counsel for respondent represents, no waiver to the eligibility requirement embraced by the eight semester rule has been granted by the respondent except in those cases previously discussed in which the student has been prevented from continuously attending school because of medical or other disabilities. Further, as has already been indicated, it has been represented that the respondent's policy in respect to waiver has been well publicized and promulgated through various materials disseminated amongst its participating schools. It would appear therefore that for perhaps the last two years the respondent has remedied the procedural and substantive deficiencies that might have existed which were manifested in the Smith decision. It is my judgment that those deficiencies have been cured as they relate to the denial of the waiver request made by Mr. Snyder.

The eight semester rule and the NJSIAA policy which allows for waiver when the student is prevented from completing an academic semester or year because of circumstances beyond his control are reasonably related to the potential evils sought to be proscribed. The various public policy considerations which have prompted the enactment of the eight semester rule are explicitly set forth in the affidavit submitted by the Executive Director of NJSIAA. He indicates at paragraph 7:

> In conjunction with the other eligibility rules, the "eight semester rule" serves the following purposes:
>
> a. It prevents "red shirting" whereby parents or coaches have promising athletes repeat a grade so as to assure another year of athletic eligibility.
>
> b. It prevents students who are not as athletically gifted from being deprived of an opportunity to compete in interscholastic sports by being replaced by a more athletically gifted student who is repeating a semester or more of secondary school.
>
> c. It promotes uniformity of eligibility throughout the State, so that no member obtains an unfair advantage.
>
> d. It provides a motivation for athletes to observe appropriate academic standards. To allow a student to fail or repeat a semester or more of secondary school, and to be benefited by continuing eligibility in interscholastic sports would make a mockery of the principal goal of the Association in maintaining and reinforcing high academic standards.

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e. As with the 49 other members of the National Federation of State High School Associations, the athletic eligibility rules are intended to correlate with a secondary school student's academic progression. In other words, the four year athletic eligibility of a student is intended to correlate with the traditional four year secondary academic program. To do otherwise would subordinate the academic program of secondary schools to athletic endeavor.

It is my judgment that the eight semester rule is clearly and reasonably related to the various salutary objectives which it was designed to achieve. While there is no suggestion of "red shirting" here--petitioner is not an exceptional athlete (of course, he is exceptional to the extent that he is good enough to play for his school team)--under the circumstances of this case several of the fundamental public policy considerations which support the rule would be disrupted were a waiver to be granted. Petitioner would indeed be permitted to pursue a fifth consecutive year (and ninth and tenth semester) of athletic participation which would by necessity deny other students the opportunity to do so. It would also derail the concurrent academic and athletic tracks which NJSIAA views as an important aspect of the traditional secondary school career a student should pursue. Most importantly, in my judgment, however, to grant Mr. Snyder a waiver in the current matter could very well dilute the motivation which NJSIAA seeks to instill in athletes to observe appropriate academic standards. It will be recalled that Mr. Synder repeated his freshman year in high school exclusively for academic reasons. In my judgment such decision sould be commended. One would hope that in retrospect Mr. Synder will recognize the benefits which he has derived from that decision separate and distinct from his athletic participation. No one is suggesting that he was motivated in any sense by a desire to participate athletically for more than four years because it will also be recalled that the decision to repeat his freshman year preceded his injury. However, had he not repeated his freshman year for academic reasons this matter would never have been brought about since Mr. Synder would have been graduated from school in June 1983. But for the need to repeat a year of high school so that he could achieve academic standards which were satisfactory, his participation in high school generally and in high school athletics specifically would never have extended beyond eight consecutive semesters. As a consequence, the determination by NJSIAA to deny his waiver was reasonable; to do otherwise would be inconsistent with several of the very purposes for which the eight semester rule was promulgated. The decision is reasonable on its face and I will not substitute my judgment for the collective judgment of either the Eligibility or Executive Committees of NJSIAA.

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Separate and distinct from the legal issues involved in this case, one cannot help but sympathize with Kirk Synder as an athlete and as a student. It was unfortunate that because of a serious football injury he was unable to participate on the team in his third (sophomore) year. It is hoped that whatever satisfaction he would have derived from further participation in organized athletic activities can at least be partially realized from other endeavors. It is further hoped that should he pursue a college education whether as a team member or as an intramural participant, he can once again experience the very unique and special satisfaction that comes with team play.

Accordingly and based upon the foregoing, it is **CONCLUDED** that the determination of NJSIAA denying the petitioner, Kirk Synder, a waiver from the eligibility requirements of the eight semester rule, Article V, Section 4-J, of the bylaws of NJSIAA was reasonable, fair, and should not be overturned. Accordingly, it is **ORDERED** that petitioner's appeal be and is hereby **DISMISSED.**

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

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OAL DKT. NO. EDU 5143-83

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

August 18, 1983
DATE

Steven C. Reback
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

August 19, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 24, 1983
DATE

Ronald L. Parker/sh
OFFICE OF ADMINISTRATIVE LAW

ij

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KIRK SNYDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record in this matter as well as the initial decision rendered by Judge Reback.

The Commissioner notes that each of the parties has agreed to rely upon the papers submitted below in lieu of exceptions to the initial decision herein. By way of clarifying the record, the Commissioner notes that the instant matter was opened before him through a Petition of Appeal on June 30, 1983. Said Petition further sought an order granting emergency relief restraining NJSIAA from interfering with petitioner's participation in high school football. On July 21, 1983 an order was signed by Judge Reback denying the emergent relief sought by petitioner whereupon petitioner on August 22, 1983 served upon the Commissioner a Notice of Leave to Appeal For Temporary Restraint and Emergent Relief seeking the Commissioner's review of the judge's interim order. On August 23, 1983 the Commissioner's representative notified counsel for petitioner that the Commissioner would not review the interim order of the judge, said determination being based upon the Commissioner's receipt of the initial decision on August 19, 1983.

The Commissioner notes that he has thoroughly reviewed all the arguments presented by the parties in their written briefs and in oral testimony presented before the judge. Upon such review the Commissioner finds and determines that the arguments raised by petitioner have been more than thoroughly considered and discussed by the judge in the initial decision. The Commissioner finds no reason to further address them in his decision and hereby incorporates said analysis herein by reference. (See also Todd Lauster v. NJSIAA, decided by the Commissioner September 7, 1983.)

Consequently, pursuant to the above, the Commissioner affirms the findings and determination of the judge and adopts them as his own.

COMMISSIONER OF EDUCATION

OCTOBER 3, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 0430-83
AGENCY DKT. NO. 3-1/83A

SALVATORE SCHIFANO,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CITY OF JERSEY CITY,
Respondent.

APPEARANCES:

Philip Feintuch, Esq., for petitioner

William A. Massa, Esq., for respondent

Record Closed: June 10, 1983 Decided: August 19, 1983

BEFORE KEN R. SPRINGER, ALJ:

Procedural History

This is an appeal by a tenured school administrator who was involuntarily transferred from the position of principal to the position of assistant principal for the 1982-83 school year. It raises the issue of what is the "specific category" in which petitioner's seniority accrued under N.J.A.C. 6:3-1.10. On January 5, 1983, petitioner

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Salvatore Schifano filed a verified petition with the Commissioner of Education alleging that his "demotion" from the principalship of a primary school violated his tenure and seniority rights. He asked for reinstatement to his prior job title of principal and an award of any difference in salary. Respondent Jersey City Board of Education filed its answer on January 17, 1983. While admitting all of the underlying facts alleged in the petition, the Board denied that Schifano was entitled to seniority in the category of "elementary principal." Instead, it maintained that his seniority was limited to the narrower category of "primary school principal" as set forth in the current agreement between the Board and the collective negotiating unit of which Schifano is a member.

Subsequently, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A hearing was held on June 10, 1983. Witnesses who testified at the hearing and documents considered in deciding this case are listed in the appendix. Time for completion of the initial decision has been extended to August 19, 1983. N.J.S.A. 52:14B-10(c).

Findings of Fact

All of the material facts are undisputed. I **FIND:**

Salvatore Schifano has been continuously employed by the Board for a total of 23 years. At or about the time of his initial employment, he held an instructional certificate issued by the State Board of Education authorizing him to teach elementary school. From October 1960 to January 1970, Schifano served as a classroom teacher, first as a substitute and later as a regular teaching staff member. In 1967 he obtained a separate certificate from the State qualifying him to become a principal. Between January 1970 and September 1976, Schifano was assigned to the position of assistant principal. Thereafter, in September 1976, he was promoted to the position of principal of a primary school, which he held until September 30, 1982.

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Less than one month after commencement of the 1982-83 school year, on September 22, 1982, the Board transferred Schifano to the position of assistant principal for the remainder of the term. His salary was reduced from $34,192 to $31,898 retroactive to the beginning of September. Until the reassignment, Schifano's duties as principal involved complete responsibility for the operation of a school building, including: supervision and evaluation of teachers; discipline of students; and maintenance of plant and equipment. After his transfer to assistant principal, Schifano's duties remained virtually the same, except that he now reports to a principal in another building rather than directly to the superintendent of schools. Schifano is still the highest ranking administrator in the particular building to which he is assigned. Only the name of Schifano's job title and the amount of his salary has been changed.

To appreciate the Board's argument, it is necessary to understand the structure of the school system existing at the elementary level. Jersey City is unique in that it makes a distinction between "primary schools" and "elementary schools." Primary schools are restricted to grades Kindergarten through fourth. Elementary schools extend to eighth grade. Some of the teachers at the primary school hold certifications endorsed only for nursery school (which allows them to teach Kindergarten) as distinguished from the usual elementary endorsement. Since primary schools have smaller enrollments and fewer numbers of teachers, the position of "primary school principal" is generally regarded as having less responsibility than the corresponding position in an elementary school. Because of this perception, shared by both the Board and the collective negotiating representative, the salary in the negotiated agreement contains lower salary ranges for employees assigned to a primary school than for those assigned to an elementary school.

Schifano's transfer came about as the result of the closing of Primary School No. 35 to which he had previously been assigned as principal. If one compares him to all elementary principals in the district, it is clear that Schifano's six years of service entitle him to preference for the remaining jobs in that category. There are presently, the Board concedes, at least 11 other elementary principals who are either untenured or have less years of service than Schifano. Looking only at primary school principals, however,

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one must reach the opposite conclusion. Of the three primary schools remaining open in the district, each is headed by a principal with more years of service in that position than Schifano.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Schifano's seniority was accumulated in the category of "elementary principal" and, therefore, that he is entitled to reinstatement to the position of principal.

N.J.S.A. 18A:28-5 provides that "all teaching staff members including all ... principals [and] assistant principals" shall acquire tenure after service in the district for the appropriate three-year probationary period. Thereafter, they "shall not be dismissed or reduced in compensation except for efficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause." The next statutory section, N.J.S.A. 18:26-6, goes on to add that any staff member under tenure "who is transferred or promoted with his consent to another position" obtains tenure "in the new position" after a two year period of employment. The board does not deny that Schifano acquired tenure in the position of principal in which he served for six years.

Once an administrator has achieved tenure in the position of principal, he cannot be transferred to the subordinate position of assistant principal or reduced in compensation without following the procedural safeguards guaranteed by the tenure law. Such transfer constitutes a "dismissal" within the meaning of N.J.S.A. 18A:28-5. Recently, the Commissioner of Education squarely held that "an individual tenured in the position of principal, such as petitioner, cannot be transferred to any other position, such as vice-principal, without her consent," the bringing of tenure charges, or a reduction in force. Colella v. Elmwood Park Bd. of Ed., 1983 S.L.D. ___ (March 10, 1983), aff'd, St. Bd. (July 8, 1983). Current thinking at the Department of Education is best illustrated by the following example given in the leading case of Howley v. Ewing Bd. of Ed., 1982 S.L.D. ___ (Dec. 20, 1982), aff'd, St. Bd. (June 1, 1983) (slip op. at 20-21):

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> ...a hypothetical tenured principal who holds an Administrative and Supervisory Certificate with a "Principal" endorsement ... may be transferred by the Board within the scope of his tenured position (principal) to any other principal's assignment in the district; e.g., principal of the elementary school; he may not be transferred to another position in the district even though it is within the scope of his endorsement; e.g., assistant superintendent of schools or vice principal, whatever the specific assignment, without his consent.

Absent the institution of any tenure charges, the Board cannot defend its action on the theory that Schifano was removed for cause. Rather, it seeks to justify the dismissal by reference to the statutory provisions governing cutbacks for reasons of economy and efficiency. N.J.S.A. 18A:28-9 et seq. Under N.J.S.A. 18A:28-10, dismissals resulting from a reduction in force "shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." Further, N.J.S.A. 18A:18-13 directs the Commissioner to establish seniority standards "upon the basis of years of service and experience within ... fields or categories of service." Pursuant to the statutory grant of authority, the Commissioner has promulgated N.J.A.C. 6:3-1.10, which provides for the determination of seniority based on the number of years of employment "in specific categories." These "specific categories" are enumerated in the seniority regulation.

Turning to the regulations themselves, the "specific category" which best describes the nature of Schifano's service is "elementary principal" set forth at N.J.A.C. 6:3-1.10(k)(9).* Parties to a contract cannot by agreement alter the standards established by statute, even should they wish to do so. Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Ass'n, 79 N.J. 311, 323 (1979); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 79-80 (1978). Whatever the value of the concept "primary school principal" for purposes of

*New seniority rules scheduled to become operative on September 1, 1983 will make significant changes in the determination of seniority rights, but will not have any effect upon the classification of Schifano's service in the category of elementary principal. 15 N.J.R. 1017(a).

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collective negotiations and the setting of salary scales, that term has no recognized meaning in the context of the seniority rules. None of the seniority rules makes mention of "primary school principal." Nor is there any certification or endorsement of the State Board of Examiners designated "primary school principal." When a person's title of employment cannot be found in either the seniority or certification rules, "the holder of the employment shall be classified as nearly as may be according to the duties performed." N.J.A.C. 6:3-1.10(f). Here the closest existing category is that of "elementary principal." Given the Board's admission that other employees who kept their jobs have less years of seniority in the same category, it necessarily follows that the Board acted improperly when it demoted Schifano to assistant principal and reduced his salary.

Order

It is **ORDERED** that the Board immediately reinstate Schifano to the position of principal of one of its schools and pay him the difference in salary between principal and assistant principal during the period of his dismissal.

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

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OAL DKT. NO. EDU 0430-83

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

August 19, 1983
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

August 22, 1983
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 24, 1983
DATE

Ronald L. Parker, Jr.
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Salvatore Schifano

2. James J. Jencarelli

List of Exhibits

No.	Description
R-1	Copy of a resolution adopted by the Jersey City Board of Education on September 2, 1982

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SALVATORE SCHIFANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of the instant matter including the initial decision rendered by the Office of Administrative Law, Ken R. Springer, ALJ.

It is noted that no exceptions to the initial decision were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner finds and determines that the facts of the matter herein controverted are controlled by Howley, supra, and Colella, supra, which render the outcome of this matter stare decisis for those reasons set down by the judge in the initial decision.

Accordingly, the Commissioner concurs with the findings and conclusions in the initial decision of this matter and hereby adopts them as his own.

The Board is hereby directed to immediately reinstate petitioner to the position of principal of one of its school and pay him the difference in salary between principal and assistant principal denied to him during the period of his dismissal from his position as principal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 6, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 9036-82
AGENCY DKT. NO. 358-9/82A

JUDITH ELSIE MEYER ,
Petitioner

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Respondent

APPEARANCES:

Robert M. Schwartz, Esq., for petitioner

Stephen R. Fogarty, Esq., for respondent
(Aron, Till & Salsberg, attorneys)

Record Closed: July 5, 1983 Decided: August 19, 1983

BEFORE **JAMES A. OSPENSON**, ALJ:

Judith Elsie Meyer, a tenured, certified (K-12) principal first so employed by the Board of Education of the Township of Wayne, Passaic County, in 1968, served in an elementary principalship category until an elementary school closure for 1980-81 occasioned a reduction in force pursuant to N.J.S.A. 18A:28-9, her seniority then being

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insufficient to avoid her loss of employment. For 1981-82 she was designated acting principal in place of another principal who was disabled, and she so served. Alleging the Board employed another principal in a middle school (6-8) for 1982-83 whose categorical certification is secondary principal (7-12) and who is junior to petitioner in seniority, petitioner claimed abridgement of her tenure and seniority rights under N.J.S.A. 18A:28-5, 9, and 12 and N.J.A.C. 6:3-1.10, and sought reinstatement and back pay. In Count II petitioner claimed differential back pay for her acting principal service in 1981-82 at a level below that at which she was compensated as principal in 1979-80. In Count III petitioner sought judgment that her service as acting principal in 1981-82 added one year to her seniority, a calculation denied by the Board under the language of N.J.S.A. 18A:16-1.1.

The Board denied petitioner's claims generally and contended (1) that petitioner has least seniority in her elementary principalship category, and therefore no rights to employment for 1982-83 under N.J.S.A. 18A:29-10 and N.J.A.C. 6:3-1.10(h); (2) that petitioner's claims are barred by equitable doctrines of laches and estoppel and by the bar of the limiting period of N.J.A.C. 6:24-1.2; (3) that since under N.J.S.A. 18A:16-1.1 no tenure can be acquired by those serving in acting positions, so too petitioner here acquired no additional seniority while serving as acting principal in 1981-82; and (4) that the service of another principal certified (7-12) in a middle school (6-8) is proper under N.J.A.C. 6:11-3.24(a).

The petition of appeal was filed in the Bureau of Controversy and Disputes of the Department of Education on September 8, 1982. The Board's answer was filed there on September 24, 1982. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on September 30, 1982 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. On notice to the parties the matter came on for prehearing conference in the Office of Administrative Law on January 28, 1983 and an order was entered establishing, inter alia, the parties were to confer and fashion stipulations of all relevant and material facts in chronological and sequential order and were to file them in the cause. Thereafter the matter was to be addressed and disposed of as if on cross-motions for summary decision

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pursuant to N.J.A.C. 1:1-13.1 et seq. on pleadings, admissions, stipulations, documentation and memoranda of law, examination and cross-examination of witnesses having been waived.

On March 14, 1983 petitioner moved to amend the petition of appeal by adding a Count IV, in which petitioner alleged generally the Board inaccurately and illegally calculated the seniority of two other elementary principals in the district, whom the Board continued to employ in preference to petitioner, who sought reinstatement to either such position together with back pay from July 1, 1980, date of a reduction in force by which petitioner's own position was terminated. The motion was denied by the administrative law judge on May 18, 1983, pursuant to discretionary powers established in N.J.A.C. 1:1-6.3. On June 6, 1983, the Commissioner declined to review the order of May 18, 1983.

Stipulations and memoranda of law having been filed by the parties, the record closed July 5, 1983.

STIPULATIONS AND FINDINGS OF FACT

The parties having so stipulated, I made the following findings of fact:

1. Petitioner is a tenured principal (October 17, 1971) in the Wayne Township School District. She received her elementary principal certification in June 1966.

2. Petitioner served as an elementary principal continuously from October 1968 until June 30, 1980.

3. During the 1979-80 term, petitioner was advised by the Board an

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elementary school principalship was to be abolished effective July 1, 1980. She was also advised she had the least amount of seniority in the category of elementary school principal and, as a result, would not be reemployed for the 1980-81 school term, but would be placed on a preferred eligibility list for the position of elementary school principal.

4. During the 1980-81 term, petitioner was not employed in the Wayne Township School District.

5. On June 29, 1981 petitioner was advised the Board had appointed her to serve as acting elementary principal for the 1981-82 school year with service to begin September 1, 1981. In her capacity as acting elementary school principal during that year, petitioner received a salary of $23,500, approximately $7,000 less than that which she received the last year in which she served as principal.

6. During the 1981-82 school term, petitioner learned the person she was replacing would return for the 1982-83 term. Accordingly, she completed her service as acting elementary principal on June 30, 1982. At present petitioner is not employed by the Wayne Township School District. She remains on a preferred eligibility list in the category of elementary school principal.

7. The current principal of Schuyler-Colfax Middle School, William Megnin, holds a secondary principal certificate. He was issued a limited secondary school principals' certificate authorizing him to serve as a principal of any secondary school on September 5, 1957. J-2C. He was issued a permanent secondary school principal certificate on June 8, 1981. J-2B. He served as principal of Schuyler-Colfax Middle School from 1965 to the present time. J-2. His seniority was 21 years in the category of principal as of March 10, 1983. J-3. In the years 1963-66 Schuyler-Colfax School

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contained grades 7-8-9. A reorganized configuration in 1966-67 put grades 6, 7, and 8 in Schuyler-Colfax Middle School. The system has remained so organized from then to the present. J-4.

8. Schuyler-Colfax Middle School at present is self-contained.

9. Petitioner's record of service in the position of elementary school principal includes service in that position for 11.85 years. A seniority table (J-3) carries her ranking in the category of elementary school principal.

10. The following documents are admitted into evidence by stipulation:

    a. List of principals and vice-principals for the 1982-83 school year. (J-1);

    b. Personnel card and certifications of William Megnin (J-2a-d);

    c. Seniority lists for principals and vice-principals (J-3);

    d. Grade break down in schools operated by the Board from 1949-50 through 1981-82, showing reorganization in Schuyler-Colfax Middle School beginning 1966-67 to date (J-4); and

    e. Petitioner's personnel card (J-5).

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DISCUSSION I

Petitioner's claim in Count I of her petition, as originally put and as narrowed in at prehearing conference and in her brief, is that her tenure and seniority rights to the position of Schuyler-Colfax Middle School principalship were violated when the encumbent in that position, William Megnin, was continued in employment after petitioner's position as elementary school principal was terminated for 1980-81 in a reduction in force. Her claim is that she then had greater seniority than he because his prior service was, as she said, without proper certification as elementary principal, and therefore, could not be counted to increase his seniority beyond hers. She sought reinstatement and back pay from 1981 for the allegedly improper noncontinuation in employment.

Her petition of appeal, however, was not filed until September 8, 1982. At threshold here, therefore, is the Board's affirmative defense that her claims are barred by equitable doctrines of laches and estoppel and by the bar of the limiting period of N.J.A.C. 6:24-1.2, the latter providing:

> . . . Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested. . . .

The reason for delay in filing, petitioner said (petitioner's brief at 6), is that she at no time contested the prerogative of the Board to follow through on a reduction in force. She took at face value, she said, the Board's determination of her having least seniority among principals, and in particular, for the Schuyler-Colfax Middle School position. It is my view that despite petitioner's ostensible unseasonable filing for relief, the legal basis for her claims to entitlement to the questioned position derives from rights given her by statute and, therefore, are rights the presumptive violation of which is continuing in nature. Thus, there is no reason why petitioner may not vindicate those

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rights whenever she chooses. The more important question, however, is secondary, specifically, whether, if petitioner's claims are remediable, she is entitled to relief by way of back pay for the years before she saw fit to file a petition to vindicate those rights. To that extent, her situation is akin to the situation in Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), in which the Supreme Court allowed a teacher's claim for employment credit for military service made more than nine years after her employment commenced, such claim being based upon a statutory entitlement under N.J.S.A. 18A:29-11, but allowed her, nevertheless, no retroactive recovery of past due sums and only, instead, prospective application of her military credit from date of filing her petition of appeal. And thus here, the Board's defense of the bar of laches or the 90-day limiting period of N.J.A.C. 6:24-1.2 will not bar petitioner's long standing claim of continuing violation of tenure and seniority rights founded in N.J.S.A. 18A:28-11, 12 generally. But her claims will remain subject, nevertheless, to rights, if any, to prospective relief only. Id. at 150-155.

The primary issue raised by Count I of the petition implicates a challenge to the comparative seniority of Megnin as principal of Schuyler-Colfax Middle School. Petitioner alleged his secondary principal certification precludes accrual of seniority in the position. Petitioner argued the Middle School is a self-contained school with grades 6-8 and, as such, must be considered an elementary under the definition in N.J.A.C. 6:3-1.10(k), which provides:

> 27. . . The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools and grades 7-8 in elementary schools having departmental instruction. . . .

N.J.A.C. 6:3-1.10(k), conversely, provides:

> 28. . . The word "elementary" shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools.

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With the Middle School included in the elementary category and with its principal having secondary certification, petitioner argued, it is evident he serves in such position without proper certification.

Stipulated facts, however, show Megnin received a limited secondary school principal certification on September 5, 1957. J-2C. He received permanent secondary school principal certification on June 8, 1981. J-2B. From 1961 to 1965, Megnin was principal at Anthony Wayne Junior High School. From 1965 to date, with the exception of one year on special assignment, he was principal at Schuyler-Colfax School. J-2. In 1965-66 Schuyler-Colfax was a junior high school with grades 7-8-9. A reorganization for 1966-67, to date, changed configuration of the school to grades 6-7-8. J-4. Thus, it would appear, Megnin held pre-1969 secondary principal endorsement followed by a permanent endorsement as such in 1981. To that extent, his presumptive accrual of seniority in the secondary principal category resulted. Saad v. Bd. of Ed., Borough of Dumont, Bergen County, 1982 S.L.D. — (Comm'r dec., May 10, 1982, slip opinion at 11-13).

It further seems clear that when Megnin served as principal of Schuyler-Colfax School, from at least the years 1965-66 to date (with the exception of one year on special assignment), his service and seniority in the position is entitled to the benefit of provisions in N.J.A.C. 6:11-3.24(a):

> When school reorganization results in the inclusion of elementary grades in combination with higher grades, the elementary or secondary principal certificate issued under previous (pre 1969) rules, will be recognized as valid for this reorganized school.

Petitioner's challenge to Megnin's seniority, moreover, is precluded by stare decisis. In Liggett v. Bd. of Ed. Township of Wayne, Passaic County, 1983 S.L.D. — (Comm'r dec., March 31, 1983) Liggett, tenured as an elementary principal, contended the Wayne Township Board improperly assigned him to a teaching position while permitting other less senior principals to retain their positions. One of those other principals and one of those other positions was that of William Megnin at Schuyler-Colfax Middle School.

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The Commissioner held:

> Conversely, when the above-named individuals [including Megnin] with secondary principal's certificates served as principal or vice-principal in those school reorganized as middle schools, the provisions of N.J.A.C. 6:11-3.24(a) must be applied. In construing what is meant by "higher grades" in combination with "elementary grades" according to the above-cited regulations, "higher grades" are determined to be any grades in the school so organized containing 7th, 8th, or 9th grades or any combination thereof. It is clear from Exhibit C that schools A.W., Schuyler-Colfax, and G.W. at all times contained one or more of the above designated grade levels to qualify said schools as elementary schools. [J-22 in Liggett is identical to J-4 here.]
>
> It is also true that, by virtue of the provisions of N.J.A.C. 6:11-3.24, Megnin [and the others] were eligible to serve in the capacities of principal, vice-principal or assistant principal of said schools while possessing a secondary principal's certificate and thereby become eligible to accrue seniority in the categories of elementary principal, vice-principal or assistant principal. (Id., slip opinion at 22-23).

Based on the foregoing, therefore, I **FIND** and **DETERMINE** that the secondary school principal certification held by Megnin during his service as middle school principal at Schuyler-Colfax Middle School containing a configuration of grades 6-8 is due and sufficient for his accrual of seniority credit in that position during the time of his service, despite his certification only as secondary school principal and despite lack of specific pre-1969 elementary principal certification. I **FIND** and **DETERMINE** further his total seniority as calculated at 18.5[1] years is superior to that of petitioner here as calculated by the Board at 11.85 years. Petitioner's claim of entitlement to that position under N.J.A.C. 6:3-1.10(b), therefore, fails.

Accordingly, I **CONCLUDE** Count I of the petition of appeal should be, and it is hereby, **DISMISSED.**

---

1 See, Liggett v. Bd. of Ed., Township of Wayne, OAL DKT. EDU 2537 (August 5, 1983) at 5.

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DISCUSSION II

In Count II of the petition, petitioner alleged her employment for the year 1981-82 in the position of acting principal at a salary of $23,500 per annum, approximately $7,000 less than that which she had received in a previous year when employed as a principal, was employment at reduced salary in violation of her tenure rights under N.J.S.A. 18A:28-5, 6-10 et seq.

The Board's answer alleged petitioner's claim in that respect is barred by equitable doctrines of laches and estoppel and by the bar of the limiting period of N.J.A.C. 6:24-1.2, in that her employment obviously began in 1981 while Count II of her petition of appeal was not filed with the Commissioner until the following year on September 8, 1982.

Petitioner's claim is for back pay of $7,000 for the alleged improper underpayment.

No explanation is offered by petitioner for her unaccountable unseasonable late filing.

In my view, laches and N.J.A.C. 6:24-1.2 bar petitioner's recovery of such sum allegedly due retroactively before filing of petition. Cf. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145, 151-155 (1982). Time for petitioner's resort to the controversies and disputes jurisdiction of the Commissioner of Education for vindication of any such claim obviously was at time of her first employment in 1981 and not, as she has attempted here, more than a year after completing such employment. It would seem clear the Board here would not have budgeted for the expense of remediation of any such claim beyond at least a 90-day period beyond date of petitioner's employment. Any retrospective relief granted petitioner after that period, therefore, would seem to have potential for impairment of the Board's financial requirements and to have consequence unfair to taxpayers within the district if it were allowed. Cf. Lavin, at 153-4.

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Accordingly, based on the foregoing, I hereby **FIND** and **DETERMINE** Count II of the petition of appeal herein should be, and it is hereby, **DISMISSED** as untimely. Cf. also Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109, 112-14 (App. Div. 1980).

DISCUSION III

Petitioner's final claim in Count III of the petition is that the Board improperly has determined not to add the one year in which she served in the position of acting principal during the 1981-82 year to her overall seniority in the position of principal.

In its sixth affirmative defense, the Board alleged no seniority rights accrued for service in positions in an acting capacity.

N.J.S.A. 18A:28-10 provides that dismissal resulting from reduction in force shall be made on the basis of seniority according to standards established by the Commissioner with the approval of the State Board of Education. Such rules, in N.J.A.C. 6:3-1.10(b) provide:

> Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.

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N.J.S.A. 18A:16-1.1 provides:

> In each district the board of education may designate some person to act in place of any other officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of §18A:17-13.
>
> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

Petitioner argued the latter statute precludes merely the acquisition of tenure in acting positions but is silent, and therefore not preclusive, of accrual of seniority in the position when fulfilled by an already - tenured officer or employee. I **AGREE.** There is no suggestion in this evidential record, nor indeed any inference available from school law, that petitioner when so employed in an acting position was anything less than a full-fledged principal, nor that, except in this case as to salary, that the categorical employment position was any the less in terms of duties or powers encumbent upon and available to the occupant of it.

Accordingly, based on the foregoing, I **FIND** and **DETERMINE** petitioner's seniority entitlement should be re-calculated by the Board so as to reflect her additional one year service as principal, even though in an acting capacity, for the years 1981-82, if such seniority entitlement is not already so incorporated in petitioner's admitted 11.85 years seniority as reflected on the Board's seniority list dated March 1, 1983 in J-3.

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OAL DKT. NO. EDU 9036-82

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

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

August 19, 1983
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

8/22/83
DATE

Seymour Glass
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 25, 1983
DATE

Ronald L. Lauber/jak
FOR OFFICE OF ADMINISTRATIVE LAW

js

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JUDITH ELSIE MEYER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSIAC COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the instant matter including the initial decision rendered by the Office of Administrative Law, James A. Ospenson, ALJ.

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

It is apparent that petitioner, by way of her exceptions, is seeking to persuade the Commissioner that the judge's findings and conclusions regarding her seniority claim, as well as his determination to deny her permission to amend her Petition, are in error. Petitioner's arguments, however, are not sufficient to convince the Commissioner that a determination contrary to that which has been rendered by the judge in the instant matter is warranted. The Commissioner incorporates by reference herein petitioner's exceptions.

The determination made by the Commissioner herein with regard to petitioner's seniority claim is rendered on the ground that the instant matter is stare decisis in light of his recent decision in Liggett v. Board of Education of the Township of Wayne, Passaic County, decided March 31, 1983. In Liggett, a tenured middle school principal, whose school was closed, alleged that the board improperly assigned him under a reduction in force to an elementary teaching position while retaining vice principals and principals with less seniority. The judge therein found that pre-1969 secondary principal endorsements held by those vice principals and principals who were retained were appropriate for middle school assignments. During all years of service they were properly certificated and therefore seniority accrued in those positions and Liggett, therefore, was not entitled to relief. The board was directed to revise its seniority standings. The Commissioner affirmed the finding that those individuals possessing secondary principal's certificates were eligible to serve as elementary principal, vice principal, or assistant principal and to accrue seniority in those categories. The Commissioner reversed the premise upon which the judge calculated the seniority entitlements and remanded the matter for further determination.

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Consequently, the above-cited decision establishes the seniority status of Mr. Megnin who was one of the principals retaining a seniority status as an elementary principal while possessing a secondary principal's certificate.

The instant matter is also premised upon the challenge to Mr. Megnin's seniority status as an elementary principal and must fail for the very same reasons enunciated by the Commissioner in Liggett.

Similarly the Commissioner finds petitioner's exceptions regarding the judge's denial of her application to belatedly amend her Petition to be without merit.

Accordingly, the Commissioner affirms the findings and conclusions set forth in the initial decision and hereby adopts them as his own.

The relief to be granted petitioner herein is limited to the recalculation of her seniority entitlement by the Board to reflect her one year's service as an elementary principal in an acting capacity during the 1981-82 school year.

In all other respects, the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

OCTOBER 7, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 4856-81

AGENCY DKT. NO. 257-7/81A

MANSFIELD TOWNSHIP,
SPRINGFIELD TOWNSHIP,
CHESTERFIELD TOWNSHIP AND
ALL PROPERTY OWNERS AND
RESIDENTS SITUATED THEREIN,
Petitioners

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
Respondent.

APPEARANCES:

Thomas M. Barron, Esq., representing petitioners

Regina Murray Mahoney, Deputy Attorney General, representing respondent, State of New Jersey, Department of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Brian M. Guest, Esq., representing the intervenor respondent, North Hanover Township (Bookbinder and Guest, attorneys)

Record Closed: July 13, 1983 Decided: August 26, 1983

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OAL DKT. NO. EDU 4856-81

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioners, the municipalities of Mansfield Township, Springfield Township and Chesterfield Township, contest the action of the Commissioner of Education who would not exclude military dependent pupils when determining the allocation of equalized valuations apportioned to the four constituent municipalities of the Northern Burlington School District.

This matter was filed with the Commissioner on July 2, 1981, and thereafter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on December 15, 1981, after the earlier conference scheduled for October 9, 1981, was adjourned.

The municipality of North Hanover was permitted to intervene as a party respondent and a third prehearing conference was held on April 21, 1983.

In the intervening time, the litigants were awaiting the outcome of an identical controversy between the city of Cape May and the State Department of Education (Exhibit A). Two Orders of Inactivity were entered for three months each -- one on March 11, 1982, and one on June 21, 1982. After the final prehearing conference, the litigants agreed to submit the matter for adjudication on petitioners' Motion for Summary Decision. Letter briefs were filed by petitioners on June 23, 1983, and by respondents Department of Education and North Hanover on July 12 and 13, 1983, respectively.

The facts are not in dispute and are set forth directly from petitioners' brief as follows.

STATEMENT OF FACTS

This matter generally concerns the apportionment of appropriations for regional school districts and their constituent municipalities pursuant to N.J.S.A. 18A:13-23, and related statutes, and, more specifically, deals with the treatment to be afforded so-called "3A students" in determining the allocation of equalized valuations

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among constituent municipalities of a regional school district. It is sufficient for the purposes of this Motion to state simply that equalized valuation of a municipality controls the amount of tax revenue it must contribute to the regional school district and is therefor of major concern to each governing body.

The petitioners in this matter are the Townships of Mansfield, Springfield and Chesterfield, who comprise three of the four constituent municipalities of the Northern Burlington Regional School District, a limited purpose regional school district [high school district] created pursuant to N.J.S.A. 18A:13-1 et seq. The fourth constituent municipality, the township of North Hanover, has been joined by way of intervention as a respondent. The original respondent is the Department of Education (State) which was responsible for the change in the treatment of 3A students in determining the municipal percentage shares of regional school district tax levies in 1981.

Until quite recently, the federal government has provided Federal Impact Financial Assistance to local school districts under the "Federal Financial Assistance Act," 20 U.S.C., § 238 et seq. (P.L. 81-874). When a federal military facility is located within the geographical confines of a New Jersey school district, the federal government under subsection 3A of Title I of P.L. 874 provides 3A Impact Aid (hence the term "3A students") to the school district directly in order to compensate the district for the cost of educating the military dependents attending the district's schools. This 3A Impact Aid was presumably intended to ameliorate the fact that federal lands are exempt from local and state taxation pursuant to the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI. In the case at hand, portions of McGuire Air Force Base lie within the boundaries of North Hanover Township, and as a result, a significant portion of this township is exempt from local or state revenue raising efforts. However, as of September 28, 1979, 532 of the 897.8 students enrolled in the regional school district from North Hanover Township were 3A students.

To place this controversy in the proper light, it is necessary to return to July 1, 1976, the effective date of N.J.S.A. 18A:13-23, which deals with the apportionment of appropriations for regional school districts. This statute was passed as part of the "Public School Education Act of 1975," N.J.S.A. 18A:7A-1 et seq. (L. 1975, c. 212, § 1), which was the legislative response to the Supreme Court of New Jersey's

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determination that a "per pupil" method of funding public education resulted in a departure from the constitutionally mandated thorough and efficient system of free public schools. Robinson v. Cahill, 70 N.J. 155 (1976). N.J.S.A. 18A:13-23 states in pertinent part:

> The annual or special appropriations of regional districts . . . shall be apportioned among the municipalities included within the regional district upon the basis of the portion of each municipality's equalized valuation allocated to the regional district, calculated as described in the definition of equalized valuation in Section 3 of this 1974 Amendatory and Supplementary Act.

The definition of "equalized valuation" is contained in N.J.S.A. 18A:7A-3, which states as follows:

> 'Equalized valuations' means the equalized valuation of the taxing district or taxing districts as certified by the Director of the Division of Taxation on October 1 of the prebudgeted year.
>
> With respect to regional districts and their constituent districts, however, the equalized valuations described above shall be allocated among the regional and constituent districts in proportion to the number of pupils in each of them.

In order to lessen the impact of this dramatic change in public school financing, the Legislature developed a "phase-in" scheme which was contained in N.J.S.A. 18A:13.23.1. During the fiscal school year 1976-1977, 80 per cent of funding was to be on a per pupil basis. During the fiscal school year 1979-1980, only 20 per cent of funding was to be on a per pupil basis and by fiscal school year 1980-1981, all funding was to be based on the equalized valuation standard. The Legislature did not ignore the receipt of 3A Impact Aid during this phase-in period. N.J.S.A. 18A:13-24.3(a) stated that any impact funds received by a regional school district

> . . . shall be applied in the proportions set forth hereinafter as a tax credit to offset any amounts due to that regional school district from the municipality in which is located the Federal land for which such payments are made.

The statute then set forth the credit to be given for each school fiscal year, with the credit declining at the same rate and at the same time as the "per pupil" method of funding education declined. For a number of years, including the five years in which this phase-in procedure was utilized, the State has excluded 3A students in determining a

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municipality's percentage share of regional district school tax levies. However, on February 27, 1981, the City of Cape May, a constituent municipality in the Lower Cape May Regional School District, contacted Vincent Calabrese, Assistant Commissioner of Education, and requested a recalculation of the tax levy percentage shares assessed to the constituent members of the Lower Cape May Regional School District (Exhibit A).

Mr. Calabrese subsequently determined that the practice of excluding 3A students in determining the percentage shares of regional district school tax levies was incorrect and in a letter dated April 3, 1981, he informed Samuel O. Paglione, County Tax Administrator for Burlington County, that adjustments were to be made to the 1980 levies for the 1980-1981 school year for the Northern Burlington Regional School District. The adjustments were as follows:

NORTHERN BURLINGTON REGIONAL SCHOOL DISTRICT

Chesterfield Township	+ 15,216.81
Mansfield Township	+ 21,262.40
North Hanover Township	- 53,346.44
Springfield Township	+ 16,867.23
	[Exhibit B]

Similar letters were sent to the respective county tax administrators concerning the four other regional school districts attended by 3A students. Exhibit C shows the calculation of municipal percentage shares of regional school district tax levies for the year 1980-1981 when the 3A students are excluded from the calculations. Exhibit D shows the same calculations with the 3A students included.

The petitioners sought to have the State reconsider its position, but they were unsuccessful. Consequently, on July 2, 1981, the present petition was filed before the Commissioner of Education of New Jersey and was assigned to the Office of Administrative Law for its review, findings of facts, and recommendations.

Petitioners submit that the decision of the State not to exclude 3A students from the calculation of percentage shares of constituent municipalities school tax levies was in error. Petitioners contend that the practical effects of the exclusion of 3A students, considering the economic realities of federal military reservations within the

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boundaries of regional school districts, the failure of the State to alter its treatment of 3A students after the passage of the Public School Education Act of 1975, the lack of clarity of the Act itself, and related expressions of legislative intent all call for the conclusion that the prior course of action of the State was correct and the State was in error in changing the practice to include 3A students in the aforementioned calculations.

CONCLUSIONS OF LAW

The State argues that its determination not to exclude 3A students in the calculation of percentage shares in the regional school district tax levy is compelled by law. (N.J.S.A. 18A:7A-3; 18A:13-23 and 18A:13-23.1).

Petitioners concede that the Department of Education is a principal department in the executive branch of state government (N.J.S.A. 18A:4-1) and that the Commissioner is the chief executive and administrative officer of the department (N.J.S.A. 18A:4-22). As such, the Commissioner has supervisory power over all schools in the state receiving support or state aid (except institutions of higher education). (N.J.S.A. 18A:4-23). In accordance with his statutory authority, one of the Commissioner's duties is to "apportion state aid to local districts" (N.J.A.C. 6:5-1.2(a)(2)). In consideration of this authority of the Commissioner, petitioners attack the validity of a decision of the Commissioner to include 3A students in the calculation of percentage shares in the regional district tax levy pursuant to the statutes. When the State exercises its statutorily delegated responsibility through its department's agents, there is a presumption of reasonableness in its actions. City of Newark v. Natural Resources Council, 82 N.J. 530, 539, cert. den., 449 U.S. 903, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980). So long as administrative action is statutorily authorized it should be upheld absent any showing that such action is arbitrary or unreasonable (New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562-63 (1978). A 1976 amendment to the Act (N.J.S.A. 18A:13-23) provided that budget allocations for constituent districts of regional school districts would be apportioned according to equalized evaluations in each constituent district, Tp. of Princeton v. New Jersey Dep't. of Ed., 163 N.J. Super. 389, 392-393 (App. Div. 1978).

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N.J.S.A. 18A:23.1 provided for a gradual phase-in period over five years as a method of lessening the impact of the change in the funding of regional school districts. The change established equalized valuation as the basis for funding rather than the per pupil basis which had been the earlier practice, and the change was fully implemented at the close of the 1979-1980 school year.

There is nothing submitted in the record by petitioners to show that the state's action in this matter is arbitrary, unreasonable or inconsistent with any statutory provision or court decision. What is asserted by petitioners is their belief that the present method of apportionment is not equitable and that the Legislature did not intend to include 3A students in the formula utilized to calculate equalized valuations.

Petitioners cite several decisions and other authority which comment about the long-standing practice of state agencies and the expectations of municipalities to rely on that practice in interpreting statutory provisions. However, there is no legal precedent cited which would lead to a conclusion that the state's interpretation and administration of the afore-cited statutes is arbitrary, unreasonable or an abuse of its authority.

As respondent North Hanover has stated succinctly in its brief at p. 2:

> The statutory scheme adopted is simple and direct. There is no differentiation in the statute between military dependents (3A students) and other students within the district. Furthermore, N.J.S.A. 18A:13-23.1 clearly indicates legislative intent to alter the treatment of such military dependent students from the previous treatment where they were not included in the calculations. Why else would there be the need for the phase in? Clearly when the Legislature uses the term "pupils" in N.J.S.A. 18A:7A-3, it means all pupils since there is no differentiation contained in the statutory language. The statute is clear and provides no room for the interpretation sought to be imposed by the Petitioner.

Based on my review of this record, and the litigants' letter briefs, I **CONCLUDE** that the Commissioner of Education was properly exercising his statutory authority when he included military dependents (3A students) in calculating the apportionment of each constituent district's equalized valuation allocation to the regional school district.

Consequently, the Petition of Appeal is **DISMISSED**.

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OAL DKT. NO. EDU 4856-81

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

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

August 26, 1983
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

August 29, 1983
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 30, 1983
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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DOCUMENTS IN EVIDENCE

Exhibits A, B, C & D	Attached to petitioners' letter brief. (Statements of equalized evaluation adjustments).

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MANSFIELD, SPRINGFIELD and CHESTERFIELD TOWNSHIPS et al., BURLINGTON COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

OCTOBER 13, 1983

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5148-83
AGENCY DKT. NO. 212-6/83A

EDISON SCHOOL PARENTS-TEACHERS ASSOCIATION, et al.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN et al.,
Respondents.

APPEARANCES:

Robert H. Greenwood, Esq., and **Monica E. Olszewski,** Esq., for petitioners
(Greenwood and Sayovitz, attorneys)

Reginald F. Hopkinson, Esq., for respondents
(Jeffer, Hopkinson & Vogel)

Record Closed: August 19, 1983 Decided: September 6, 1983

BEFORE **SYBIL R. MOSES,** ALJ

This matter comes before the Office of Administrative Law as the result of the above-named petitioners filing a verified petition on June 29, 1983 with the Commissioner

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of Education asking for both interim and permanent relief, in that the action of the Fair Lawn Board of Education, in determining to close the Edison School, be set aside, that individual respondents, Ballan, Klotz and Zerowin be directed to abstain from voting on any future resolutions regarding school closings where the Radburn School is one of the candidates for closing and that respondents be enjoined from any actions which would adversely affect the opening of the Edison School for the 1983-84 school year. The entire petition, as well as the motion for interim emergent restraints, was forwarded to the Office of Administrative Law on July 11, 1983 for determination as a contested case. On July 19, 1983, oral argument was heard on short notice on the motion for interim relief, which relief was denied.

The formal answer of respondents to the verified petition was filed on July 20, 1983, arguing that the facts, even if true, would not state any cause of action with respect to a recognizable and viable conflict of interest allegation. The defense also asserted that the petitioners, Parents-Teachers Organization, failed to set forth the proper authorization to institute suit, that petitioners failed to state any irreparable harm entitling them to the issuance of an interim restraint and that the Board of Education exercised reasonable discretion in its function in operating the elementary schools in the district. On July 29, I signed an Order in this matter concluding that petitioners failed to present the probability of prevailing in this cause of action and that petitioners failed to show they would incur irreparable harm, and therefore denying the request of petitioners for a restraint and permitting respondents to continue to generate interest in the future lease or sale of the Edison School. The Order directed that the Board of Education not be permitted to enter into a lease, contract of sale or any other legal document with binding effect until this Initial Decision was rendered on the entire case. Said Order is attached to this Initial Decision and is incorporated herein as if set forth at length.

A prehearing conference was held on July 19, and it was determined there was but one legal issue: Whether the vote authorizing the closing of the Edison School should be invalidated because three Board of Education members who voted for the closing school had conflicts of interest?

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A hearing in this matter was scheduled for August 11 and 12, 1983. On August 10, 1983 counsel filed a fully executed stipulation of facts which obviated the need for live testimony in the hearing. However, oral argument on the legal issue involved was heard on August 11, 1983 as was argument on the admission of exhibits into evidence.

The following exhibits were moved into evidence:

J-1	Minutes of Board of Education meeting, March 17, 1983
J-2	Minutes of Board of Education meeting, April 13, 1983
J-2A	Minutes of Board of Education work session, May 5, 1983
J-3	Minutes of Board of Education meeting, May 19, 1983
J-4	Deed of Conveyance from City Housing Corporation to Board of Education of the Borough Fair Lawn, May 25, 1930
J-5	Deed of Conveyance from Raymond S. Strehl, et al., to Board of Education of the Borough of Fair Lawn, March 18, 1957
J-6	Radburn Association Declaration of Restrictions, March 15, 1929
J-10	Letter dated November 8, 1982 from Reginald F. Hopkinson, Esq., to Thomas J. Cannito. (This exhibit is introduced for the limited purpose of showing the knowledge of the Board as of November 8, 1982)
J-13	Memorandum dated October 15, 1982 from Thomas J. Cannito to all Board Members
J-14	Memorandum dated October 13, 1982 from Thomas J. Cannito to all Board Members
J-15	Memorandum dated October 26, 1981 from Thomas J. Cannito to all Board Members
J-16	Memorandum dated December 7, 1979 from Thomas J. Cannito to all Board Members
J-17	National Register Data Sheets dated April 16, 1975. (This exhibit is admitted for the limited purpose to show the self-view of the Radburn Association)
J-18	Minutes of June 18, 1981 meeting of the Committee for Future School Use submitted by Ruth Ann Ball
J-19	Letter dated July 16, 1981 from E. F. Greening to Committee for Future School Use

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J-21 Letter dated March 28, 1983 from Michael J. Ferro, Esq., to Reginald F. Hopkinson, Esq. (This exhibit is admitted for the limited purpose of showing the active position or posture of Radburn Association's attorney)

J-22 Letter dated April 11, 1983 from Anton Frederic Borst, Esq., to Donald A. Fusco

J-23 Includes what had been marked J-25 through J-41, 18 letters that the Radburn Association solicited and received from the Education and Planning Communities in support of the continued existence of the Radburn School. (See supplemental stipulation No. 6)

J-24 One paragraph in regard to the Radburn School from the following minutes of the Radburn Association Board of Trustees' meetings:

(a) March 15, 1983
(c) January 11, 1982
(d) December 7, 1981
(f) October 12, 1981
(g) September 14, 1981
(h) August 10, 1981
(i) July 13, 1981
(j) June 8, 1981
(k) April 13, 1981
(m) February 9, 1981
(n) December 8, 1980
(o) November 10, 1980
(p) May 12, 1980
(q) December 3, 1979
(r) November 12, 1979
(s) September 10, 1979
(t) December 4, 1978

J-42 One paragraph in regard to the Radburn School from the following editions of the Radburn Bulletin:

(a) August 31, 1978
(b) March 22, 1979
(c) March 26, 1981
(d) June 25, 1981
(e) November 19, 1981
(f) May 19, 1983

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The following items were marked for identification only:

J-7	Master plan for educational facilities
J-8	Report of the Committee for Future School Use
J-9	Educational and safety evaluation of facilities
J-43	Resolution, September 4, 1974 of the Bergen County Board of Chosen Freeholders

I adopt the stipulation of facts executed by both counsel as the relevant facts in this case and incorporate them in this decision as if set forth at length.

It is petitioners' position that the vote on the closing of the Edison School was, in reality, a choice between closing the Edison School or closing the Radburn School and, therefore, a vote to close the Edison School can be seen as a vote in favor of keeping the Radburn School open. Petitioners are not contending that the Board was without authorization to close the school. They agree that there is no reversion to the Radburn Association should the Board decide to close the Edison School and sell it. Petitioners argue that the Superintendent's recommendation in regard to the educational efficacy of closing the Edison School has no bearing on the conflict of interest allegation. Petitioners are urging the theory that because the Radburn area, recently chosen as a national historic district, is unique and because the respondents' property is subject to certain deed restrictions and because two of the individual respondents pay dues to the Radburn Association and have the right to vote, these individual respondents have an appreciable self-interest in keeping the Radburn School open, which disqualifies them from voting on the closing of the Edison School. Counsel argues that because the Radburn Association took a strong position in favor of keeping the Radburn School open and because the Association has a unique position in the community, it must be distinguished from a normal parent-teachers association. Counsel urges that the individual repondents who voted to close the Edison School did so in the context of great emotional and psychological peer pressure in favor of keeping the Radburn School open. Petitioners argue that they do not have to prove direct self-interest, but only have to show a non-pecuniary, indirect interest in keeping the Radburn School open. Once that interest is

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shown, petitioners argue that a clear conflict of interest existed when the individual respondents voted to close the Edison School.

Respondents argue that the threshold question has not been answered in favor of petitioners' position. It is the Board's position that the vote on the Edison School was solely on the Edison School and was not an "either/or" situation. Counsel argues that even if, in 1979, the Superintendent of Schools considered the question in the context of whether to close the Radburn School or the Edison School, it is clear that from 1979 on, he always recommended closing the Edison School and never recommended closing the Radburn School. Counsel argues that a conflict can only exist if there is a choice and that, in the instant case, there was never a choice at the Board level, even if the Superintendent made a choice in 1979 between the two schools.

The Board argues that even if the Board vote would have been a choice between the two schools or even if the vote would have been only on closing the Radburn School, every one of the individual respondent Board of Education members was entitled to vote. Counsel argues that the facts are determinative of whether a conflict exists and that, in this case, the relationship between the individual respondents and the Radburn Association is extremely tenuous. All three live in the Radburn School district, which district is not coterminous with the Radburn Historic District. The Board argues, as a matter of fact, that 45 per cent of the children who attend the Radburn School do not live in homes which are subject to the deed restrictions applicable to homes located in the Radburn Historic District, as the Radburn school district cuts through the middle of the Radburn Historic District. The only other relationship is that property of two of the three respondents is subject to assessment by the Radburn Association for common facilities and therefore, two of the three respondents are entitled to vote for two of nine trustees of the Association.

The Board also argues that there is no nexus between the closing and opening of any public school and the conflict of interest charge herein. The Radburn Association is in the same position as any other PTA trying to keep its neighborhood school open. Counsel argues that there is no concrete evidence to prove the existence of the alleged

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psychological and emotional pressure upon the individual respondents, other than evidence of activities of the Radburn Association as a group, an Association to which none of the individual respondents belong.

After reviewing and considering the Stipulation of Facts and all the evidence in this matter, and after reviewing and considering the cogent briefs and memoranda filed by both attorneys, and after reviewing and considering the applicable law to conflicts of interests allegations, I have determined that the instant petition, asking me to invalidate the vote authorizing the closing of the Edison School because three Board of Education members who voted for the closing of school had conflicts of interest, asking me to prevent those three Board of Education members from voting on future resolutions regarding school closings where the Radburn School is one of the schools that might be closed and asking me to enjoin any actions of the Board of Education which would adversely affect the opening of the Edison School for the 1983-84 school year, should be dismissed.

A review of the cases cited by both attorneys indicates that a determination of whether a conflict of interest exists is a very fact-dependent decision. "The decision as to whether a particular interest is sufficient to disqualify a municipal official is necessarily a factual one and depends on the circumstances of the particular case." Aldom v. Borough of Roseland, 42 N.J. Super. 495, 503 (App. Div. 1956). In Aldom, a corporation had applied to the City Council to rezone its property. One of the councilmen who voted for the change had been employed by the corporate property owner for 23 years in a managerial capacity, and another councilman had a substantial contract with the corporate applicant to package the produce of that applicant. In that factual situation, the Appellate Division found that there was a clear conflict of interest because each of the two councilmen had pecuniary interests in the zoning change at issue. This situation is not the same as the facts in the case at bar. Petitioners' reliance on S. & L. Associates, Inc. v. Washington Township, 61 N.J. Super. 312 (App. Div. 1960), Griggs v. Princeton Borough, 33 N.J. 207 (1960) and Zell v. Borough of Roseland, 42 N.J. Super. 75 App. Div. 1956) is similarly misplaced. Each of those cases dealt with municipal officials who had substantial pecuniary and personal interests in the issues in question. In

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S.& L., the court held that two members of a planning commission could not vote to rezone their own property. In Griggs, the Supreme Court held that two councilmen who were also professors at Princeton University were disqualified from voting on a blight determination where the university held a controlling interest in the property of the blighted area. The Griggs court relied on Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258 (1958), where the court said, "The decision as to whether a particular interest is sufficient to disqualify is necessarily . . . factual . . . and depends upon the circumstances of a particular case . . . [citation omitted] No definitive test can be devised." Id. at 268. In applying the fact-dependent test to the situation in Griggs, the Supreme Court concluded that its holding in Pyatt v. Mayor and Council of Borough of Dunellen, 9 N.J. 548, 557 (1952) was applicable. "It is most doubtful that participation by a councilman in a municipal action of particular benefit to his employer can be proper in any case. [citation omitted] The question is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it." Griggs v. Princeton Borough, 33 N.J. at 219. Applying that standard, the Griggs Court held that it was their long-standing association which gave the professors, who were also councilmen, security in their positions as professors at the university, which would also tend to bind their loyalties to the university in such a manner that they would be interested in all matters affecting that institution. Id. at 220. Again, the facts in Griggs are vastly different from the instant facts.

Petitioners urge that Zell is most appropriate and applicable because the court disqualified a planning board member from voting on the transfer of a liquor license because he was a member of a church which vigorously opposed the transfer of said license. Zell held that a member of a planning board, who was also a member of a church located on property which was going to be rezoned from residential to commercial, would be disqualified when one of the prime purposes of the reclassification of that particular portion of property was to enable his church to sell its property to a bank. The Appellate Division found that N.J.S.A. 40:55-1.4 prohibits a planning board member from acting on any matter in which he has, either directly or indirectly, a personal or financial interest. The court then held that the planning board member's church had a direct interest in the application itself since the bank moved for the adoption of the zoning amendment in order

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that the church be allowed to sell its property to the bank. The court then concluded that a member of a nonpecuniary organization has the same interest in that organization as a stockholder has in a corporation, and a trustee of an organization has no more interest than any other member. Zell v. Borough of Roseland, 42 N.J. Super at 81. The Zell holding is clearly distinguishable from the case at bar, as there is no direct personal interest involved here. None of the three respondents are members of the Radburn Association, the vote in question did not involve the Radburn Association, and it was not a vote on the Radburn School.

The controlling cases in this matter are Wilson v. Long Branch, 27 N.J. 360 (1958) and Van Itallie v. Franklin Lakes, 28 N.J. 258. In Wilson the governing body and the planning board of Long Branch adopted a resolution, declaring an area in the community to be blighted and authorizing the city to acquire real property in that blighted area. Members of the planning board who voted on the declaration of blight included the chairman of the board, who was president, director and stockholder of a bank holding mortgages on property in the blighted area, a member of the board who was a stockholder of the same bank, a member of the board who was a health officer of city-owned premises within 300 feet of the blighted area and the mayor of Long Branch, who was a director and stockholder of a savings and loan association which held mortgages in the blighted area. All the persons voting for the designation of the area as blighted had indirect, but clear monetary interest, in addition to personal interest, in the declaration of blight. The Supreme Court found that ". . . the interest of these persons is so remote and contingent as not to warrant disqualification." Wilson, 27 N.J. at 395, holding Zell and Aldom not to the contrary. In Van Itallie, the Supreme Court considered an allegation of a disqualifying interest of councilmen who voted in favor of an ordinance establishing a cemetery area within municipal boundaries. In Van Itallie, the Supreme Court found that the conflict charges were speculative, and declared,

> Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of

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> corruption or favoritism. But in doing so, they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust creates universal incompetency." [Citations omitted], Id. at 269.

Keeping the teaching of Van Itallie in mind, I have reviewed the circumstances of this case. When focusing on the three individual respondents, it is clear to me that although these three members live in the geographic area of Fair Lawn known as the "Radburn" section of Fair Lawn and although two of the three members have children attending the Radburn elementary school, none of these respondents, neither Ballan, Klotz or Zerowin, have anywhere near the minimum connection with the Radburn Association, which could elevate such a connection to a level where the Zell standard of great interest in an organization's affairs and well-being has been met and a conflict has to be found. For example, while Sally Ballan lives in the Radburn Historic District in a home which was constructed as part of a private, planned community and which is subject to common deed restrictions of the Radburn Association, she is not a member of the Radburn Association. Her sole connection with the Association, in addition to the common deed restrictions, is a right to cast a vote for two of nine trustees of the Radburn Association, which trustees are nominated by former trustees, who are all members of the Association. Ms. Ballan has no children presently attending the Radburn School. Ms. Klotz is similarly situated, except she has two children presently attending the Radburn School.

Mr. Zerowin has children attending the Radburn School, but is neither a resident of the Radburn area nor an owner of property subject to the deed restrictions of the Radburn Association. Accordingly, he cannot vote for trustees in the Association nor does he pay dues to the Association. By that very feature, Mr. Zerowin cannot be accused of a conflict since the allegation of conflict here does not arise from having children attending the Radburn School, but arises from what petitioners call the unique, social, pecuniary and administrative ties of persons who reside in property subject to the deed restrictions of the Radburn Association to that Association.

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In regard to the Radburn Association itself, it is uncontroverted that the Board of Education is the sole and exclusive owner of the property on which the Radburn School sits and there is no restriction whatsoever as to the right of the Board to sell or lease the property. There is no reversion provision in the deed of conveyance to the Board. The only provision applicable to the property owned by the Board is applicable to all property originally owned by the developer of the planned community; that should the property no longer be used for educational purposes, the new owners may only use it for residential, recreational or educational purposes.

The Radburn Association took an active position in support of keeping the Radburn School open. The Association made a presentation, via its president, executive director and attorney to the Committee for Future School Use, urging the Committee to find that the Radburn School should stay open. The Association solicited letters from professinal educators and community planners in support of the continued viability of the school. The minutes of the Association reflect that the trustees were concerned about keeping the school open. The bulletins of the Association indicate that members of the Association were urged to support the continued maintenance of an open Radburn School. However, there is no evidence whatsoever that the Association did anything other than what any other self-help association; whether political, charitable or community, would do. It presented its views, openly and publicly, and encouraged its members to support its position and pursue its goals in every legitimate fashion. I cannot, and will not, draw the inference that the individual respondents who live in and own property in the Radburn Historic District, or who live in the Radburn School district, were the subject of such emotional and psychological pressure, as the result of the legitimate utilization by a group of citizens of their right to speak out on an issue, that the individual respondents voted in a way other than pursuant to their sworn duty as members of the Board of Education. Such an inference flies in the face of the teaching of Wilson and Van Itallie, and such a decision would prevent boards of education from acting pursuant to their sworn duties. The connection of respondents Ballan and Klotz to the Radburn Association, which, concededly, strongly desires that its neighborhood school remain open for educational as well as community and historic reasons, is tenuous in the extreme. The connection is owning property subject to deed restrictions and paying the dues required by the deed

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restrictions. This is not a sufficient connection to the Association's activites which leads to a conflict of interest. If I were to find that the Ballan and Klotz connection amounted to a conflict of interest, it would be the equivalent of holding that a board of education member could never vote on a school closing if that board member belonged to any sort of political, community or charitable organization which was legitimately lobbying to keep a particular school open. I cannot so conclude. Mr. Zerowin is not a resident of the area subject to the deed restrictions, and therefore has no connection whatsoever with the Radburn Association, which connection is at the very heart of the instant conflict charges.

I do not agree with counsel that the crucial issue is whether a vote to close the Edison School was, in reality, a vote to keep the Radburn School open. Even assuming that the vote to close the Edison School was an "either/or" situation, in that every member of the Board of Education was convinced that if they voted to close the Edison School, it would be the equivalent of voting to keep the Radburn School open, or, to put it contrary, if they voted to keep the Edison School open, the Radburn School would have to be closed, petitioners have not established a sufficient connection here to find a conflict. Neither the fact that children of two of the three respondents attend the Radburn School, nor the fact that two of the three respondents live in property subject to deed restrictions of the Radburn Association and pay dues and vote for two of nine trustees of the Radburn Association, is sufficient to hold that a conflict existed which would bar these three respondents from voting on the closing of the Edison School. But I do not find that the vote was an "either/or" situation. I find that the vote in question was a vote on a motion to close the Edison School, and not a vote taken to close the Edison or the Radburn School. I have reviewed the minutes of the Board of Education as well as the Stipulations. I cannot find any evidence to support a finding that any member of the Board of Education, either informally or formally, expressed an intention to close the Radburn School. The Superintendent of Schools never recommended that the Radburn School be closed. From 1979 on, he consistently recommended that the Board vote to close the Edison School. The only recommendation to close the Radburn School came from the Citizens' Committee for Future School Use, which recommended, in August 1981, that no schools be closed during the 1982-83 school year, but should the Board determine to close

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a school, it be the Radburn School. While the Board members were all aware that the Superintendent's recommendation to close the Edison School had been originally made after comparing the Edison School to the Radburn School and the Committe for Future School Use recommended the closing of the Radburn School in August 1981, I cannot conclude from these two facts that a vote to close the Edison School was also a statement by the Board that if it did not vote to close the Edison School, it would vote to close the Radburn School.

All of the foregoing indicates that any connection of the individual respondents with the Radburn Historic District and with the Radburn Association is of no moment in regard to a vote on the closing of the Edison School. But, even if members of the Board and members of the public perceived the vote to close the Edison School to be an "either/or" situation, in that the Board would then vote to close the Radburn School if the vote to close the Edison School did not pass, I have concluded that the connections between the individual respondents and the Radburn Association and the Radburn Historical District are so tenuous and so lacking in unique, social, pecuniary and administrative ties, as well as clearly lacking in any kind of employee/employer or active membership consideration, that they do not give rise to any basis for finding a conflict of interest in the instant matter. Cf., Mountainview Residents Association, et al. v. Board of Education of the Township of Wayne, 1977 S.L.D. 59, where the Commissioner of Education ruled that where a board of education voted to close a school and one of the board members who voted for the closing was an officer of a private school in the area, his vote could not be challenged on the basis of conflict because any interest was so speculative as to be nonexistent. Similiarly, any self-interest of respondents Klotz and Ballan is too farfetched, remote and speculative for me to conclude that they engaged in a conflict situation when they voted to close the Edison school. I have no evidence whatsoever before me that the value of the property owned by the individual respondents who live in the Radburn Historic District would decrease if the Radburn school were closed. (It is the theory of petitioners that respondents voted to to close the Edison School, because if the vote had gone the other way, it might have led to a vote to close the Radburn School, which closing would lower property values in the Radburn area.)

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I also conclude that the fact that respondents Klotz and Zerowin had children attending the Radburn School is as equally unsustainable as is the residency argument in establishing a disqualifying conflict. Zerowin and Klotz were voting on the Edison School, a school their children did not attend. To draw the inference that they are in conflict because they knew by voting to close the Edison School they would keep the Radburn School open is to say that every member of a board of education who has a child attending one of the schools in that school district can never vote on a school closing. To so interpret the conflict of interest cases would lead to an absurd result and, in smaller districts, could halt the Board's functioning on pending school closings. I cannot presume, given the stipulated facts herein and given the minimum connections established herein, that any of the individually named respondents engaged in a conflict situation and should have been disqualified from voting on the Edison School closing. As the Commissioner has held, "A school board member, by the very nature of his qualifications as a member, may never be totally free of potential conflict of interest. The board member must be a resident. In this capacity he is called upon to vote on school referenda and budgets that will affect the property tax or rent that he must pay. A board member who is the head of a family must vote to approve a school calendar that may affect the family's vacation schedule. Such conflicts of interest do not preclude a board member from serving." Sweeney v. Komorowski, 1974 S.L.D. 740, 743-44. Similarly here, a school board member residing in a specific area of a community is not precluded from voting on the closing of a school which does not serve the particular area where he resides even if the closing of that school was recommended by the superintendent after consideration of that school in comparison with the school that does serve the district within which he resides.

I note that it has not been asserted that the Board was without power to carry out its action or that the closing was not an educationally sound decision. Since I have concluded that three members of the Board did not act improperly, and were not in a conflict position when they voted to close the Edison School, I also conclude that the Board did not act in an arbitrary, unreasonable and capricious manner, and that there is no reason at all to reverse the vote of the Board to close the Edison School. See Engle, et al. v. Board of Education of the Township of Cranford, 1974 S.L.D. 787 as well as Coffrey, et al. v. Board of Education of Millburn, 1975 S.L.D. 630.

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Therefore, based on the foregoing discussion, I conclude that the petition asking that the action of the Fair Lawn Board of Education taken to close the Edison School be set aside, asking that respondents Ballan, Klotz and Zerowin be directed to abstain from voting on any future resolutions regarding school closings where the Radburn School is one of the candidates for closing and asking that respondents be enjoined from any actions which would adversely affect the opening of the Edison School for the 1983-84 school year should be dismissed.

Accordingly, it is **ORDERED** that the within petition be, and is hereby, dismissed; and

It is further **ORDERED** that the restraint upon the Board of Education from entering into a lease, contract of sale or any legal document with binding effect upon the Board is no longer in effect because the Initial Decision of the court has been rendered.

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OAL DKT. NO. EDU 5148-83

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

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

Sept. 6, 1983
DATE

Sybil R. Moses
SYBIL R. MOSES, ALJ

Receipt Acknowledged:

DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 9, 1983
DATE

Ronald L. Lakewski
FOR OFFICE OF ADMINISTRATIVE LAW

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EDISON SCHOOL PARENTS-TEACHERS ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN ET AL.,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the instant matter including the initial decision rendered by the Office of Administrative Law, Sybil R. Moses, ALJ.

It is observed that petitioners' exceptions to the initial decision and the Board's reply exceptions have been filed pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that petitioners argue by way of their exceptions to the initial decision that the judge erred in finding and concluding that the facts and circumstances giving rise to the matter herein controverted are not analogous and subject to those prior rulings of the courts in Aldom, Griggs and S. and L. Associates, Inc., supra. It is petitioners' contention that the facts of this matter clearly establish that Ballan, Klotz and Zerowin had obtained an appreciable advantage in using their positions as Board members to effect the closing of the Edison School. Petitioners' legal analysis of the above-cited cases included in their exceptions are incorporated by reference herein.

The Board in its reply exceptions rejects the arguments advanced by petitioners in seeking a reversal of the initial decision before the Commissioner. It is noted that the Board's position is essentially that which has been set down in detail by the judge in the initial decision.

In the Commissioner's view, petitioners' exceptions to the initial decision are deemed to be without merit for precisely those reasons enunciated by the judge herein. The Commissioner so holds and hereby adopts as his own the findings and conclusions in the initial decision.

Accordingly, the instant Petition of Appeal may be and is hereby dismissed.

COMMISSIONER OF EDUCATION

OCTOBER 21, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 4416-83
AGENCY REF. NO. 150-5/83A

PAUL GORDON,
Petitioner
v.
PASSAIC TOWNSHIP
BOARD OF EDUCATION,
Respondent

APPEARANCES:

James F. Schwerin, Esq., for petitioner
(Greenberg, Kelley & Prior, attorneys)

Robert Goldsmith, Esq., for respondent
(Wiley, Malehorn & Sirota, attorneys)

Record Closed: August 22, 1983 Decided: September 12, 1983

BEFORE WARD R. YOUNG, ALJ:

Paul Gordon, a tenured teacher, seeks reinstatement to his teaching position for 1983-84 and back pay for 1982-83 due to the Board's alleged violations of his tenure and seniority rights. The Board asserts it acted properly at all times and also seeks dismissal of the Petition through application of the doctrines of laches and estoppel and petitioner's violation of N.J.A.C. 6:24-1.2.

The Petition of Appeal was filed with the Commissioner of Education on May 17, 1983 and transmitted to the Office of Administrative Law on June 15, 1983 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on July 6,

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1983, and a plenary hearing held at the Office of Administrative Law in Newark on August 9, 1983. The matter was briefed and the record closed on August 22, 1983 upon receipt of petitioner's reply brief.

The following Stipulation of Facts are adopted herein as FINDINGS OF FACT:

1. Gordon was employed as a teacher of instrumental music in the Passaic Township School District from 1968 until 1980.

2. From 1968 through 1976 the position held by Gordon was full time.

3. The position of instrumental music teacher, and Gordon's employment, was reduced to part-time during the 1976-77 school year.

4. The position of instrumental music teacher, and Gordon's employment, was restored to full-time status for the 1977-78 and 1978-79 school years.

5. The position of instrumental music teacher, and Gordon's employment, was again reduced to part-time for the 1979-80 school year.

6. The Board of Education (Board) abolished the Instrumental Music program for the 1980-81 and 1981-82 school years.

7. The Board created a position of Instrumental/Vocal Music for the 1982-83 school year.

8. Gordon was issued the certificate of Teacher of Instrumental Music in August 1971, and the certificate of Elementary School Teacher in May 1980.

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TESTIMONIAL EVIDENCE

Gordon testified that he did not become aware of the Board's creation of the Instrumental and Vocal music program for the 1982-83 school year until December 1982. At that time Gordon retained an attorney, who wrote to the Board under date of December 16, 1982 seeking Gordon's reinstatement. (See R-5). The Board's counsel responded under date of January 10, 1983 and denied any violation of Gordon's tenure or seniority rights. (See R-6). Gordon then contacted the New Jersey Education Association, who assigned an attorney to the case, and this Petition was filed on May 17, 1983.

Gordon also testified that he was eligible for the comprehensive music certificate at the time he received the instrumental certificate in August 1971, but never applied for it until early 1983 because he didn't think he needed it. The Teacher of Music certificate was issued to him in March 1983.

Gordon further testified that he did not receive any communication, oral or written, concerning placement on a preferred eligibility list at the time the Board abolished instrumental music for the 1980-81 and 1981-82 school years, nor was he noticed when the Board created the instrumental and vocal program for 1982-83.

The Superintendent of Schools testified that he conferred with Gordon at the time of the Board's abolishment of the instrumental music program, and advised Gordon that he would advise him if the Board reinstituted the instrument program. He also testified that he did not advise Gordon of the Board's creation of the instrumental and vocal program because he had no reason to believe that Gordon was eligible for the comprehensive music certification.

The Superintendent also testified that the abolishment of the instrumental program was triggered by a decline in total pupil enrollment and particularly a decline in pupil participation in instrumental music. He also testified that consideration was given to the employment of one teacher versus two teachers when the Board created the instrumental and vocal program.

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The Superintendent further testified that he surveys his staff for updating the filing of all certificates held, and should have known that Gordon was issued the elementary certificate in May 1980, and was also aware that said certificate enables its possessor to devote up to but no more than one-half time to teaching in such areas as art, music, physical education, etc., in elementary grades pursuant to N.J.A.C. 6:11-6.2(b) and 6:11-8.3(c).

DOCUMENTARY EVIDENCE

All of petitioner's exhibits clearly reveals his eligibility for the comprehensive music certificate at least no later than August 1971 when he was issued the instrumental certificate.

Respondent's exhibits reveals that the 1982-83 schedule of the instrumental/vocal music teacher consisted of 25 weekly instrumental periods and six vocal periods, exclusive of preschool vocal lessons. (See R-3.) The letter written by Gordon's counsel to the Board established the date of December 16, 1982 as the latest date that could be attributed to Gordon's knowledge of a cause of action. (See R-5.)

The following additional FINDING OF FACTS results from a review of all relevant testimonial and documentary evidence:

1. Gordon was clearly eligible for the Comprehensive Music certificate at the time he was issued the Instrumental Music certificate, which neither he nor the Superintendent knew until May 1983. (See P-5.)

2. The Superintendent knew or should have known that Gordon was issued the elementary certificate in May 1980.

3. The Superintendent knew that he could assign Gordon to teach vocal music for no more than one-half of his total schedule under his elementary certificate, pursuant to N.J.A.C. 6:11-8.3(c).

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4. The instrumental/vocal music assignments for 1982-83 consisted of 25 periods of instrumental music and six periods of vocal music, weekly, exclusive of preschool vocal lessons.

5. Gordon filed this Petition of Appeal on May 17, 1983, which was 152 days after his attorney wrote to the Board under date of December 16, 1982 seeking reinstatement.

6. Gordon was not noticed by the Board of the Superintendent when the Instrumental/Vocal music position was created by the Board for the 1982-83 school year.

DISCUSSION

It cannot be disputed that Gordon filed his Petition of Appeal at least 62 days late in violation of N.J.A.C. 6:24-1.2 which states that "Such petition must be filed within 90 days after receipt of the notice by the petitioner of the Order, ruling or other action concerning which the hearing is requested." [emphasis added]. Relaxation of this rule pursuant to N.J.A.C. 6:24-1.19 is not warranted in this matter, and pursuit of an amicable resolution of an alleged dispute does not toll the 90 day filing period. See Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (1980).

Riely was a nonrenewed, nontenured teacher who was not protected by statute. The legal principle therein does bar Gordon from retroactive relief but does not negate his tenure right for prospective relief. See Contardo v. Bd. of Ed. of City of Trenton, 1982 S.L.D. _____ (decided, State Board of Education, March 3, 1982) and North Plainfield Ed. Assoc. v. Bd. of Ed. of Boro of North Plainfield, (App. Div., Docket No. A-4583-81T3).

The Board argues for dismissal in reliance on the doctrine of laches. However, the application of laches depends upon a balancing of equities under the peculiar facts and circumstances of each case. See Donnelly v. Ritzendollar, 14 N.J. 96, 107 (1953); Auciello v. Stauffer, 58 N.J. Super. 552, 529 (App. Div. 1959); Flammia v. Moller, 66 N.J. Super. 440, 453 (App. Div. 1961).

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In the instant matter, the Board failed to notice Gordon of the reinstitution of the instrumental music program, albeit some vocal instruction was included in the position. An element of bad faith is introduced by the Superintendent's own testimony that two separate teachers were considered for the instrumental and vocal instructional responsibilities. As a matter of law, Gordon would be the only teacher considered for the instrumental position. The Board chose to ignore Gordon's statutory right to the instrumental position and employed a nontenured teacher for both instrumental and vocal instruction. The doctrine of laches was never intended to shield the Board from an improper act. If the Board is dissatisfied with Gordon's performance as a teacher, relief can only be sought through the filing and certification of tenure charges.

The fact that a teacher need not possess, but must be eligible for, a certificate to teach is well established in case law. See Kane v. Bd. of Ed. of the City of Hoboken, 1975 S.L.D. 12; Fulton v. Bd. of Ed. of the City of Long Branch, 1980 S.L.D. _____ (devoted February 4, 1981); Givens v. Bd. of Ed. of the City of Newark, 1974 S.L.D. 906; and Reinish v. Bd. of Ed. of Cliffside Park, 1965 S.L.D. 50, wherein the Commissioner said:

> Nor is there any merit in the argument that even though petitioner may have been eligible for the issuance of a certificate to teach Social Studies, none was issued to him. This also is consistent with usual practice. Application for a certificate is made when employment is obtained and for the particular license needed. Petitioner, having no need of a Social Studies certificate, could not be expected to apply for its issuance until he had need for it. The fact that he qualified for such a certificate is enough (at 54).

Also, in this matter, Gordon could indeed teach the vocal portion of the music teacher's schedule under his elementary certificate.

In summary, I **FIND** that Gordon's delay, in filing this Petition of Appeal in violation of N.J.A.C. 6:24-1.2, bars him from retrospective relief for the 1982-83 school year. I ALSO **FIND** that his tenure status entitled him to prospective relief, and **CONCLUDE** that he is entitled to reemployment for the 1983-84 school year.

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The Board is therefore **ORDERED** to reinstate Gordon consistent with the determination herein.

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

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

12 September 1983
DATE

Ward R. Young
WARD R. YOUNG, A.L.J.

Receipt Acknowledged:

Sept. 15, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

September 19, 1983
DATE

Ronald J. Parker, J.S.
FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES

Paul Gordon, petitioner

Anthony F. Gonnella, Superintendent of Schools

EVIDENTIARY DOCUMENTS

P-1	March 8, 1983 letter, Gordon - State Department of Eucation (Dr. Whitney)
P-2	March 9, 1983 letter, Whitney to Gordon
P-3	Course ratings and Certificate of Accuracy
P-4	April 5, 1983, Rorro to Gordon letter
P-5	May 17, 1983, Rorro to Gordon letter
P-6	April 22, 1983, Carey letter to State Department
P-7	April 20, 1983 letter, Ghezzo to Carey
R-2	June 29, 1981, Superintendent - To Whom It May Concern letter
R-3	1982-83 music schedule
R-4	April 28, 1983, Board Secretary to Ms. Arnold letter
R-5	December 16, 1982, Weinblatt to Board letter
R-6	October 10, 1983, Malehorn to Weinblatt letter

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PAUL GORDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that each party filed reply exceptions in a timely fashion. The Commissioner notes, however, that a reply to reply exceptions was not considered, there being no provision in law for same.

Petitioner excepts to that portion of the initial decision by Judge Young finding that he is barred from receiving relief for the 1982-83 school year. Petitioner relies on Perrotti v. Board of Education of the City of Newark, decided by the Commissioner May 11, 1981, aff'd State Board of Education September 2, 1981. The Board in reply exceptions refutes petitioner's argument, stating that there is no basis to relax the 90-day rule in the present case and further stating that Perrotti is inapplicable herein.

In primary exceptions the Board argues that the judge's reliance on Contardo, supra, and North Plainfield Education Association, supra, was misplaced, involving only issues of salary not arising each year. Further, the Board contends that the judge's conclusion of bad faith on the part of the Board was erroneous and argues that the Board acted within the parameters of its authority. The Board argues that petitioner should be barred by the doctrines of laches and estoppel. The Board contends that petitioner has no tenure or seniority rights with respect to the instrumental/vocal music position. Finally, the Board argues that, although petitioner had the educational qualification for the comprehensive music certificate, he did not possess, nor was he eligible for, the certificate until May 1983. The Board contends that petitioner's elementary certificate is not relevant herein and pleads that the relief sought by him be denied.

Petitioner in reply exceptions argues that he is a tenured teacher and must be given preference over a nontenured teacher for the music position. Petitioner cites Miller v. Mendham Board of Education, decided by the Commissioner May 17, 1982, rev'd/rem'd

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Board of Education February 1, 1983 and Kane, supra, wherein eligibility for a necessary certificate may be deemed sufficient for appointment to the position in question. Petitioner submits that the 90-day rule should not apply herein nor should the doctrine of laches. Petitioner claims entitlement to the entire scope of relief sought herein.

The Commissioner cannot agree in entirety with the exceptions filed by either party.

An examination of the documents in evidence and the testimony of witnesses reveals to the Commissioner petitioner's eligibility for the comprehensive music certificate. The Commissioner finds the Board's argument that petitioner was educationally qualified for such a certificate without being eligible for it to be a distinction without a difference, having no merit. The Board did not notice Gordon when the instrumental/vocal music position was established by the Board for the 1982-83 school year.

Petitioner's filing of an appeal with the Commissioner was significantly in violation of N.J.A.C. 6:24-1.2 barring him from retroactive relief but not prospective relief.

The Commissioner observes that for reasons of its own, the Board chose not to consider petitioner's eligibility as a tenured teacher for the instrumental position and hired a nontenured teacher in the combined position. Nor is the claim by the Board that petitioner did not possess a comprehensive music certificate when the position was created, one that convinces the Commissioner of the propriety of the Board in not considering petitioner for the position. On any hand, petitioner can teach vocal music under his elementary certificate up to one half of his total schedule. N.J.A.C. 6:11-8.3(c)

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Board shall reemploy petitioner in the music position for the 1983-84 school year.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

OCTOBER 31, 1983

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 992-83
AGENCY DKT. NO. 16-1/83A

KEANSBURG BOARD OF EDUCATION,
Petitioner,
v.
SAMUEL C. CAPALBO,
Respondent.

APPEARANCES:

JOHN O. BENNETT, III, Esq., for petitoner
(Dittmer& Bennett, attorneys)

Michael D. Schottland, Esq., for respondent
(Chamlin, Schottland, Rosen, Cavanaugh & Uliano, attorneys)

Kenneth I, Nowak, Esq., for complainant teachers intervenors
(Zazzali, Zazzali & Kroll, attorneys)

Record Closed: August 23, 1983 Decided: September 1, 1983

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OAL DKT. NO. EDU 992-83

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

The Board of Education of Keansburg (Board) certified tenure charges against Samuel C. Capalbo, a tenured principal, pursuant to N.J.S.A. 18A:6-10 et seq. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Procedural History

Since respondent seeks to preserve certain procedural issues for appeal and petitioner seeks an evidentiary ruling which requires reference to the history of the case, it is necessary to relate the procedural history at length. There is no dispute of fact as to procedural history; the following are therefore **FINDINGS.**

Four female teachers submitted affidavits to the Board on December 3, 1981 requesting that charges which sounded in sex harassment and unbecoming conduct be certified against respondent. After submitting the evidence to respondent, who filed an answering affidavit, the Board voted 5 to 4 rejecting certification of charges. The teachers filed a petition with the Commissioner appealing the Board's refusal to certify and additional affidavits were filed. The Commissioner transmitted the matter to the Office of Administrative Law and Administrative Law Judge Glickman was assigned to hear it. While the matter was pending, the Board and complaining teachers moved for a remand to reconsider certification of charges. Judge Glickman ordered a remand to the Board on October 8, 1982. Respondent appealed the order to the Commissioner and the Office of Administrative Law placed the case on the inactive list. The Commissioner affirmed the remand. Respondent then sought a stay of the remand from the Commissioner, the State Board and ultimately, the Appellate Division. On December 30, 1982 a single appellate judge granted a stay, but the full panel dissolved the stay on January 5, 1983.

On remand, the Keansburg Board certified charges on January 11, 1983 by a vote of 7 to 1.

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Meanwhile, on November 14, 1981, three female teachers, affiants before the Keansburg Board, had filed complaints of sexually harassing, offensive or abusive work environment with the Division on Civil Rights. That case was assigned to Judge Glickman and proceeded to hearing in December 1982. When the Keansburg Board's certified charges reached the Office of Administrative Law for hearing, Judge Glickman was assigned to it as a related case. Respondent successfully moved for recusal and the Office of Administrative Law reassigned the case to Naomi Dower-LaBastille. At the prehearing on April 8, 1983, counsel for the complaining teachers moved to intervene, but represented that such intervention was for the purpose of preserving a right to appeal, should the Keansburg Board subsequently decline to appeal. Counsel for the teachers represented he would take no active role in the case. On May 4, 1983 I granted intervention on a law-of-the-case basis in light of the fact that the complainant teachers had been implicitly accepted as parties prior to my assignment and I declined to disturb that status.

On May 5, 1983, Judge Glickman rendered an initial decision in the Civil Rights matter. I concluded the instant case on July 21, 1983 after eight days of hearings. A list of exhibits introduced at the hearings is attached to this decision. Petitioner requested that Judge Glickman's opinion be received into evidence. Upon objection, I denied the request, but stated I would take notice of the decision of the Division on Civil Rights if it issued while I was deliberating in the instant case. The Division of Civil Rights issued its decision on July 28, 1982.

On August 18, 1983, together with his reply brief, respondent filed a motion requesting that the Commissioner defer to the alleged primary jurisdiction of the Division of Civil Rights. The Board responded to the motion on August 23, 1983. Respondent objects to inclusion of a "surreply" in the record. The Board has a right to reply to the motion, which was new material, and such portion of its memorandum as deals with this subject is accepted into the record.

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Conclusions of Law - Procedural

Neither of the parties reiterated their legal arguments concerning the remand and subsequent Board certification of charges in their posthearing briefs, presumably because with respect to the remand, the Commissioner reviewed that order prior to the assignment of this case to me. In any event, the subsequent certification of charges, after consideration of evidence including supplementary affidavits, made a new case. The petition originally filed by complaining teachers was essentially grounded upon a claim of arbitrary Board action in denying certification. I **CONCLUDE** there was nothing improper in the Board's certification upon review of new material. The certification of charges pursuant to N.J.S.A 18A:6-11 is a probable cause action analogous to indictment by a grand jury. An indictment subsequent to a "no bill" is unremarkable. New evidence may always be brought to the attention of the certifying body.

Petitioner offers the determination of the Division of Civil Rights in evidence for the facts contained therein. Counsel cites In the Matter of the Tenure Hearing of John Orr, School District of Township of Wyckoff, 1973 S.L.D. 40, 49 wherein the Commissioner held that "when such proofs are offered in a court of proper jurisdiction and when an adversary hearing results, the Court's findings may be considered for use as properly admissible before the Commissioner." In that case, an uncontested civil judgment of divorce grounded in adultery was offered to prove conduct unbecoming. The Commissioner declined to consider the judgment under the circumstances. In the instant case and the Civil Rights Docket, CRT 5680-82, there was considerable overlap of testimony, since many of the same actions under consideration here as conduct unbecoming were the basis of claims of sexual harassment.

The Commissioner's evidentiary ruling in Orr is best understood through the following example: if a teacher were convicted after a trial by jury of sale of narcotics to a certain school child, and if the same transaction were recited in support of a tenure charge of conduct unbecoming, the judgment of conviction would be admissible and would suffice to prove the charge. One would not need to repeat the criminal trial. The conviction proves the fact of sale to a school child, the fact proven clearly constitutes conduct unbecoming and the conduct warrants dismissal of a tenured teaching staff member.

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conduct unbecoming and the conduct warrants dismissal of a tenured teaching staff member.

In the civil rights case, the teacher complainants alleged sex discrimination by the Board and Principal Capalbo in that Capalbo created a sexually harassing, offensive or abusive work environment. In the instant case, the Board certified three charges of conduct unbecoming a teacher:

1. Public expression of anti-Semitic remarks.
2. Improper touching of female bodies of both students and teachers.
3. Use of his administrative position to make improper sexual and insulting remarks to teaching staff members.

The only conduct relevant in the civil rights case was that concerning three specific teachers: Diane Roberts, Judith Reynolds and Karen Brown. While the same testimony is relevant to certain of the tenure act charges, the testimony in the instant case is broader because the charges are both different and not restricted to conduct concerning three teachers. The interests vindicated by administrative proceedings before the Division of Civil Rights and the Commissioner of Education are also quite different. The remedies are different.

It would have been possible to consolidate both cases for hearing before the same administrative law judge, but it would have been difficult. In any event, respondent moved successfully to have the administrative law judge hearing the civil rights matter recuse himself. Clearly respondent did not favor consolidation. This is not a case where both hearings were addressed to the same issue as was true in City of Hackensack v. Winner, 82 N.J. 1 (1980). There is no "primary" jurisdiction in Civil Rights within the meaning of Winner as to the questions before me. Sex discrimination is not the gravamen of the Board's case before the Commissioner. The Commissioner has a duty to determine fitness for employment in the public schools. No other agency has concurrent jurisdiction over that question. The issues are unlike those calling for deference of one agency to another under the holding of Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514, 531 (1978).

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It is now too late to obtain the benefits of a single hearing under N.J.A.C. 1:1-14.4. In fact, it has been respondent's trial strategy to avoid consolidation, as can be seen by his recusal motion and by his stated intention to use evidence from the instant proceeding to bolster a rehearing request in the civil rights matter. He now seeks to defer the Commissioner's determination by requesting that the Commissioner await a final judgment in the civil rights matter. I have already heard all the evidence in this case. N.J.S.A. 52:14B-10(d), the Administrative Procedure Act, requires that my findings be based only upon the evidence of record at the hearing. There is no necessity for my consideration of the findings of another administrative law judge and agency based upon a different record.

I CONCLUDE the Commissioner has sole jurisdiction to determine fitness for employment under the Tenure Act and that Hinfey and Winner do not require that the Commissioner defer to the Division of Civil Rights. I therefore **DENY** respondent's motion requesting such deference.

I CONCLUDE that in all the circumstances the probative value of the civil rights determination is substantially outweighed by the risk that its admission will create substantial danger of undue prejudice and confusion of issues. N.J.S.A. 52:14b-10(a). See also Phillips v. Erie Lac. RR Co., et al, 107 N.J. Super. 590 (App. Div. 1969) certif. den. 55 N.J. 444 (1970) on inadmissibility of factual conclusion of hearing examiner and agency decision when same facts are required to be found in civil case. **I SUSTAIN** respondent's objection to entering the civil rights determination as evidence. I take judicial notice only of the fact that a civil rights complaint has been heard and determined. I decline to take notice of the results in that companion case for any purpose. In this way, my initial decision remains completely independent and, should the companion case be reopened or appealed, its procedural vicissitudes will not preclude the Commissioner, if he adopts the procedural conclusions here, from exercising his jurisdicton expeditiously in conformance with the intent of the Legislature in adopting N.J.S.A. 18A:6-16. (The Tenure Act's prompt hearing rule).

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It should also be noted that one of the charges in the instant docket was dismissed at the end of the petitioner's case. I **DISMISSED** the charge of improper touching of students because there was no admissible factual testimony to support it. The only testimony proffered was hearsay or hearsay within hearsay which could not have served as a basis for any findings of fact.

Discussion of Testimony

Because of the length of the hearing and number of witnesses, I will not attempt to relate all the testimony of each witness. Quite a bit was irrelevant to the charges or of little probative value. Placing the incidents in context does require certain findings which are not themselves operative facts, but which explain actions or inactions of the witnesses, who are or were all teaching staff members in the District.

I observed that the Board's witnesses showed greater candor than those of respondent or respondent himself. They exhibited varying degrees of recall and not infrequently their memory of detail at the time of the civil rights hearing in December 1982 differed from their memory at these hearings in July 1983. One, Jane Pukstas, remembered much more in July and her explanation for this phenomenon was not only logical but eminently believable. During the earlier period, she was beset with personal and familial crises. In response to cross-examination she recited a litany of illnesses and deaths in her family which had occurred in the year prior to hearing. She is extremely close to her family, dutiful and religious. I credit her testimony completely. I also found Diane Roberts a very credible witness.

Another outstandingly credible witness was Henry Trzeszkowski; his credibility stemmed from his accurate, detailed recall of conversations, physical circumstances and time frames. On cross-examination, counsel attempted to show this witness as one who stood to benefit from the dismissal of respondent since he holds a principal and supervisor certification and could thus be considered for any vacant principalship. I do not find that Trzeszkowski's testimony was motivated by desire for a promotion. Counsel also attempted to tar this witness with the same brush, that is, to suggest that he expressed offensive views about certain kinds of people analogous to respondent's views. I found it

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improper to question the witness concerning an alleged recent parental complaint because it had no relevance or probative value with respect to his testimony concerning respondent. I would not permit an offer of proof in which the question included irrelevant, offensive allegations. There was cross examination of many of the witnesses touching intensely personal aspects of their lives. While such tactics are common in criminal trials to raise a reasonable doubt, in administrative proceedings where witnesses appear under subpoena, they should not be embarrassed, harassed or smeared unless such questioning is clearly essential to the case. Other than a few instances such as the one described above, which I would not allow, counsel did exhibit sensitivity to these concerns.

One of the defense theories was that the teacher witnesses conspired to get respondent because he proved to be a tough administrator who placed the welfare of the system above that of his former friends and colleagues and refused to give them preferential treatment. To that end, counsel cross examined the witnesses exhaustively concerning all the meetings each attended and discussions each had with the others. Eventually it became obvious, however, that most of the meetings held by the teachers were held in response to the suggestions of Nida Thomas, a State Equal Educational Opportunity Director, who advised them on gathering and writing up evidence for a civil rights complaint. I found no basis for the "conspiracy" theory and believe its principal purpose was to create sufficient factual confusion to support a reopening of the civil rights proceeding based upon disparity in the testimony of the companion proceedings. Such disparities are inevitable and are largely meaningless, since most witnesses do not recall exactly the same details when testifiying or affidaviting at different times over a period of several years. Additionally, some witnesses understood the questions differently from others: some believed they were to reply only with respect to one kind of meeting, for example. Others considered "meetings" not to include social meetings between two teachers, for example, but only meetings of a group called for a particular purpose. Some considered "meetings" not to include seeing each other in the ladies room or the lunch room. The variations between points of view, definitions, and recollection in different time frames were endless. I found that any disparity in the testimony concerning meetings was unreliable for impeachment purposes. The witnesses were telling the truth to the best of their ability at the time they testified.

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While most of the direct testimony of Karen Brown was reliable (indeed, it was often corroborated by one or more other teachers), there were parts of the cross examination which elicited somewhat less candid replies. The witness, while understandably tense and stressed by having to reveal once again unpleasant and intensely private matters, was given to histrionics. This was particularly apparent in her statement that she remembered respondent always talking about "the ovens, the ovens." I also cannot believe that an educated person such as a teacher is incapable of following the court's directives to answer the question and not volunteer additional material. No matter how often she was admonished in this manner during cross examination, she invariably continued the proscribed conduct. Except for the above problems with the testimony of Karen Brown, I found all the Board's witnesses to be entirely credible.

Of the witnesses called by respondent, Mrs. Koumanoff, was completely credible. Linda Bartok's boyfriend once resided with respondent and she was not even asked to supply information for the civil rights case because she was considered to be friendly with respondent. Miss Bartok had a peculiarly selective memory. She was not in the lunch period at which many of the episodes occurred and was present generally on fewer of the occasions testified to and, as to the incidents Pukstas testified occurred at in service math meetings, she sat in front of the men so that she could only have observed them if she turned around. Brenda Coanshock was also not present in the lunch room at releveant times; she was never there in the morning when much of the conversation with Karen Brown occurred.

William Boyington had a friendly social relationship with respondent. His testimony seemed carefullly planned rather than candid. He also was not in the faculty room at lunch time, when many of the controversial actions occurred. He referred to respondent's conduct as "busting" people. He stated that Diane Roberts went to Christies (a bar) with respondent and one or two other staff members. I found Roberts wholly credible and she stated she never went there. Boyington had a planned speech on "skinetics" which he worked into the testimony. The term is a pseudo-scientific name for touching people to establish personal contact. From his demeanor, I also believe this witness did not answer completely truthfully when asked if he ever heard respondent call Bruce Nissenbaum an

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anti-semitic name (Brown said respondent called this teacher "the jew" and vowed to get rid of him). Every other witness remembered respondent's reply to Mrs. Koumanoff with reference to discipline except this witness. In short, I did not find his testimony credible.

As to respondent himself, he remembered most events testified to by other witnesses and admitted that he had made a number of statements substantially similar or identical to those he had been charged with. He testimony was artful in that he tended not to remember the most offensive language attributable to him; he denied making any anti-semitic remarks and denied having a "hit list" of teachers. He claimed that he made many statements just for shock value, to get a reaction or rise out of the others. He stated he never meant some of the offensive statements he made. He testified that Karen Brown's husband was nicknamed "jackass" at his place of employment. "We always called him jackass," Capalbo testified. He claimed he learned this name when he played baseball with coworkers of Mr. Brown. Capalbo stated that he touched everybody and if the women told him to go away, "The more they said it, the more I stayed there to bother them" (at the women's table in the faculty room).

A number of witnesses recalled statements made by Capalbo in the faculty room during or after "The Holocaust" appeared on television. The reported comment, which allegedly was made more than once in some form, was, "Hitler was right. All special ed students should be gassed," or, "should be put in the ovens." Respondent claims little or no recall of these statements although several of the teachers remembered at least some similar comment. (Noe, Brown, Barbara and Henry Trzeszkowski). On this point, Mr. Trzeszkowski's testimony is the most reliable. He remembers because he was particularly outraged; he has a sister with Down's syndrome and felt Capalbo's remark intensely and personally. While Brown's memory of "the ovens, the ovens" was histrionic, as was quite a bit of her testimony on cross examination, she was once a very close friend of Capalbo and when her testimony was unequivocal, certain and concerned the type of statement one would tend to make only with a friendly group, I found her quite credible.

Capalbo denies saying publicly (in the faculty room) "I'm going to get rid of the Jew"

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referring to a teacher named Bruce Nissenbaum. Noe recalled such a statement, as did Brown. Capalbo claims that he called the teacher "Cousin Brucie." He admits this teacher was not his friend and that he made up a schedule for the teacher which the teacher would not like. Brown testified that during this period, before Nissenbaum left the school, "Bruce Nissenbaum completely lost his identity." Capalbo referred to him as "the Jew" or "that Jew" and said "wait until that Jew bastard sees his schedule." Both Brown and Henry Trzeszkowski testified that Capalbo used the term "jew bastard" on one occasion. Capalbo denied it. Mr. Nissenbaum, who was not a witness, was one of the teachers allegedly on Capalbo's "hit list" of teachers he wanted to get rid of.

One other incident relates to the charge of anti-semitism. One of the teachers in the faculty room mentioned that she would not be working on the "Jewish holidays" (Rosh Hashanah and Yom Kippur in September). Capalbo remarked "You shouldn't get those days off," or the like, with reference to the fact that the teacher in question had converted to the Jewish faith rather than being born into it. Another witness (Noe) recalled the verbal exchange but believed Capalbo stated, "Jews shouldn't get days off."

Although it is not possible to detail all the testimony here, a failure to mention other specific incidents does not mean that I have not considered them. Some testimony is not mentioned because I did not find it sufficient to prove or support logical inferences to prove the charges. For example, Mrs. Warrick, a very heavy set woman, testified that Capalbo was always telling her to hurry up and, as a result of what another teacher told her, she believed Capalbo was harassing her because of her weight and the fact that she was Italian. She was told he hated fat Italian women. Since there was another reasonable explanation for Capalbo's "hurry up" comments, namely, that this teacher was sometimes late to class, I decline to find that his statements to her were insulting in the absence of any prima facie verbal impropriety.

FINDINGS OF FACT

1. Samuel C. Capalbo began employment with the Board as a business

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education teacher in 1968; he was appointed principal of the Keansburg Junior-Senior High School on July 1, 1979 and served in that capacity during the 1979-80 and 1980-81 school years, during which most of the conduct discussed herein took place.

2. Prior to his official appointment, Capalbo told the other teachers that he would be the new principal. Not long after, he bragged that he would soon be superintendent. He said he had a plan to attain this position and to make a friend principal at the high school.

3. Capalbo stated that he was favored by the Board of Education because he was able to get rid of teachers without hearings. He had a "hit list" and one way he forced teachers, such as Bruce Nissenbaum, to leave was by assigning them difficult schedules, denying them supplies they needed, or otherwise making their lives difficult. (H. Trzeszkowksi, Warrick, Brown, Reynolds).

4. Since Capalbo was granted tenure in May 1980, after only ten months of service, since the teachers he disliked left or were fired, since he was an evaluator of teachers thus controlling tenure and increment recommendations, since he was also KTA President, since he was seen in the company of Board members, apparently on a friendly basis, and since he was the superior to whom teachers would have to apply for a grievance hearing or discrimination complaint, the teachers who were petitioner's witnesses herein were convinced that he wielded considerable power and they were fearful of making complaints concerning his conduct. In fact, it was not until January 1981 that several teachers met with the superintendent to complain about Capalbo's conduct.

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5. When Capalbo began his first year as principal in 1979-80, he was also president of the Keansburg Teachers Association (KTA). Associations represent or assist teachers in bringing contract grievances. A principal is usually required to sit as management on the first level of a grievance proceeding. Capalbo was apparently blind to this conflict due to his ambition to become president of the N.J.E.A. and it was not until complaint was made to the county association that he resigned. His dual position added to an aura of power and contributed to the oppressiveness of his conduct.

6. At one of the first, if not the first, faculty meetings Capablo held as principal, a teacher named Mrs. Koumanoff, who was known as a strict disciplinarian, asked Capalbo what his disciplinary policy would be with respect to female students. Capalbo replied, "Well, that depends on the size of their . . .," finishing the sentence with a gesture of cupping imaginary breasts. Some teachers laughed, some shook their heads, some were open-mouthed. A number of witnesses corroborated this incident. Capalbo testified that he then said, "Now let's get serious," and commenced the meeting.

7. Capalbo publicly referred to a teacher named Reon Swain as "the fag" or "that fag." He routinely omitted Swain's name most of the time in the faculty room. Mr. Swain raised the subject of conflict of interest at a KTA meeting in the fall of 1979. While Capalbo chaired the meeting, and absent any action on his part to stop it, certain male teachers commenced kissing sounds and yelled in high pitched effeminate voices, "Reon, Reon, Reon."

8. According to the teachers who knew Capalbo for years, it was not until after he became principal that he indulged in the conduct detailed below. Although some aspects of the conduct appeared earlier, the level of offensiveness and incidences escalated after his appointment.

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Before he was principal, he said "breasts," afterward he said "tits!" (Mr. Trzeszkowski).

9. The conduct complained of took place in the mornings or at lunch time in the faculty room where there were always a number of teachers present. Additional sites of events were teachers meetings, both regular and in-service. Occasionally incidences of humiliating or inappropriate conduct occurred in the classroom or halls with students present.

10. Diane Roberts began her employment at the high school at age 24 in September 1980 as a teacher of home economics. At the end of her first day, Capalbo called her into his office because he had seen her talking to Miss Reynolds, the other home economics teacher.

11. Capalbo directed Roberts not to associate with Reynolds. He said he had to let the last home economics teacher go because she was "antisocial" having picked up a lot of "bad habits" from Reynolds. Capalbo told her she had better be in the faculty room every day and mingle with the other teachers.

12. Roberts had the C lunch at which were also present Mrs. Brown, Miss Pukstas, Mrs. Petit, Mr. Lasko, Miss Bartok, Mr. Stewart King, Mr. Harrington, Mr. Stickland and Miss Janson. Roberts is 5'9," thin, and with no bust.

13. Three of four days a week, for varying periods of time, from five seconds to fifteen minutes, from September 1980 to January 1981, Capalbo visited the faculty lunch period and repeatedly made the following comments concerning Roberts to the male faculty members:

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"Look, guys, no meat;"

"I'm going to have to take you out and fatten you up."

"Men don't like thin women, men like women with more meat on them."

14. Associated with the above remarks and otherwise, Capalbo would come up behind Roberts, massage her shoulders and place his face next to hers, cheek to cheek. On one occasion, he pulled his chair up to hers, where there was no room for two persons, to get as close as possible.

15. Roberts intensely disliked being touched by Capalbo and on one occasion during a PTA conference when he took his usual stance, she grabbed his tie to pull him away from her.

16. In October 1980, at the end of the day, Capalbo told Roberts he was appointing her to a committee and they would have a special meeting at Christie's. She replied she wouldn't go all the way down there for a drink. In fact, there was such a committee to pick a site for a prom, but Capalbo made the statement in such a way that she believed he was asking her for a date.

17. During the same period, October 1980, Capalbo called Roberts into his office and said, "Do you like working here?" Upon a positive reply, he said, "Then get your sister to collect signatures for me." When they came out, Capalbo grabbed her around the waist and lifted her off the ground. Her feet left the floor and his grip physically hurt her.

18. Capalbo was petitioning to become N.J.E.A. President and knew Roberts' sister taught in another district. Though she knew her sister would not want to take his petition, both being new in their districts,

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Roberts felt compelled to accede to the demand. Capalbo kept after her, in a rude manner, to get the signatures, saying, "Where are those petitions you were supposed to get signed for me?" He said this in the hall. (Corroborated by Mr. Trzeszkowski).

19. On one occasion, while she was in the hall on monitoring duty, Capalbo said Roberts should gain 10 (or 20) pounds before leaving her key in her plan book. Capalbo checked Roberts' daily lesson plans, having declared himself (with Board approval) department chairman of home economics; the inference was that she gave her house key for him after she gained weight.

20. Capalbo's conduct to her during faculty lunch was so upsetting to Roberts that she often put her lunch down and could not eat it. She often said, "Stop it," or "Cut it out" or pulled away, but she was afraid to complain since it was her first year of teaching and Capalbo had told her he "had to let [the prior home ec teacher] go" for being antisocial.

21. On two occasions, Roberts called upon Capalbo to discipline students and she found his responses humiliating. Concerning B.P., the girl complained that the cooking class was on cake decorating. Without recognition of the fact that this particular class was scheduled in the sewing room, Capalbo came to Roberts in the hall and asked, "When are you going to make a meal? None of the women I know bake cakes." The next day the student gave Roberts a recommended menu including a main course clearly suggested by Capalbo. (Comments corroborated by Mr. Trzeszkowski.

22. At an in-service program for home economics and industrial arts teachers in the fall of 1980, after a state evaluation team including Olga Kupczak visited the school, Capalbo came in chanting, "Olga,

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Olga, Olga, Olga . . ." and bragged to Mr. Harrington that he was going to get a date with Olga. Miss Kupczak became their high school prinicpal in 1981-1982.

23. Roberts spoke to Judy Reynolds, the other home economics teacher, in fall 1980 to work up a budget for their programs. The women were upset because there were no needles, pins or thread in the sewing room. Subsequently, Roberts spoke to Capalbo. In reply to her inquiry as to why Reynolds disliked him, Capalbo said "She's shit. She won't make it through December."

24. On another occasion, Roberts asked Capalbo if she could rearrange the cooking room. She was not getting along with Reynolds because she had been trying to follow Capalbo's directives. Capalbo told her, "If she [Reynolds] gives you any trouble, I'll come right up her ass."

25. In 1980-81, Brown, Pukstas and Janson, among others, had the same lunch period as Roberts. Brown related some of the following facts, since Capalbo was behind Roberts and Roberts could not always see his gestures. Capalbo would force himself into a space at the women's table next to Roberts, massage her shoulders, or put his arm around her. He once spread his legs around the chair, panted and made an obscene gesture. Once he stood behind Roberts, panted, and ran his tongue rapidly in and out of his lips, and swiveled his hips while looking over at the men's table.

26. In response to Capalbo's actions, Brown would say, "You're crude," "You're disgusting," "why don't you leave her alone?" Brown would intervene because she observed Roberts shrink into herself, hugging herself inward with her arms rocking back and forth and shaking. Capalbo would constantly check on Roberts' lunch, saying, "What are you eating? You need to gain weight," as she tried to eat.

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Brown observed Roberts pick up her sandwich and put it in the garbage after such an incident. The more Brown spoke in this manner to Capalbo, the more he laughed and carried on.

27. Karen Brown is a business education teacher; both she and Capalbo, who taught in the same subject area, had been assigned to the high school for about 14 years.

28. Capalbo constantly touched Karen Brown when she was present in the faculty room at school in 1979-80 and 1980 to 1981 (early spring), exclusive of time she was on maternity leave. He rubbed her shoulders, nuzzled her neck, commented on her perfume, pulled her blouse as if to look down it, touched her posterior and legs (on occasion) and pulled at her skirt a little as if to pull it up (on occasion). These incidents occurred before many teachers daily, all year and anytime Brown was in the room with Capalbo. Eventually Brown became nauseous at his presence, but she smoked cigarettes and the faculty room was the only place in the school other than the toilet she could have a smoke.

29. Capalbo's constant remarks to Brown in 1979-80 in front of the other teachers, especially male teachers, included:

> "Why are your tits so big?" (She replied she was still nursing her baby).
>
> "Gee, you're looking good. You should keep nursing, kid. "Do you go flat if you quit nursing?"
>
> "What happened? Did you get stuck with a pin?" (Said after she stopped nursing; this comment was accompanied by an apparent attempt to look down her blouse.)

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"I'd like to jump on your back."

"Look at that backside; look at those long legs."

"Nice ass, Brownie." (accompanied by a pat).

"I'd like five minutes in bed with you."

"I'd like to wrap my legs around you."

"I'd like to put my face between your legs."

These facts were corroborated by a number of witnesses and generally admitted by respondent.

30. Brown would sometimes reply flippantly in 1979-80:

"You wouldn't last two minutes with me;"

I'd probably kill you with my legs."

"Shut up you half-pint," (Brown was six feet tall).

But upon the face between the legs comment, she was at first speechless and did not respond. She did not initiate either touching or sexual conversations.

31. Karen Brown sometimes wore a pair of black boots. Capalbo commented: "Where's your whip and chains?" At first, Brown thought the comment must have some reference to horses and riding. But, as the male teachers took up the questioning and it was repeated each time she wore the boots, she came to realize he had reference to sado-masochistic sexual activity. She could only wear the boots "if she felt up to it," knowing that each time she wore them, the men would comment.

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32. In June 1980, Brown discovered she was again pregnant despite a tubal ligation. Capalbo couldn't get over this and until she went on maternity leave in the fall of 1981, he commented publicly a number of times:

> "You're too old to have a baby. You ought to have an abortion. You can't afford the kids you have now."
>
> "Look at her, she's almost 40 years old and she's knocked up."
>
> "The jackass must have been the size of a horse to get you pregnant with your tubes tied." He would make comments about the size of Mr. Brown's genitals: "must be built like a stallion."
>
> "You should have kept your mouth open and your legs crossed and you wouldn't have gotten yourself knocked up."

A number of witnesses heard these remarks.

Both Mr. and Mrs. Trzeszkowski had explicit memories of some of the above remarks mentioned by Brown.

33. Capalbo constantly referred to Brown's husband as "Jackass." In the fall of 1980, prior to her maternity leave, Capalbo would make the following comments in the faculty room at breakfast time:

> "Someone else has done the damage. It's a free ride now."
>
> "Who'd want to go to bed with you. Look at the shape she's in."
>
> "That jackass isn't out hunting. He's out screwing. He's not hunting four-legged animals; he's hunting two legged animals."

34. Just before she left for maternity leave, around Thanksgiving 1980, with reference to Brown's eight months pregnant figure, Capalbo would make the following comments in the faculty room:

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"Who gets on top? Do you have to get on top now? Does your husband go in the back door? Can you still have sex?"

35. Capalbo's comments often left Brown trembling (literally), nauseous and on the verge of tears. She could not stop smoking and would get hives. Several witnesses corroborated and objectively described the effect of Capalbo's comments.

36. Brown wanted to teach as long as possible before her maternity leave in the fall of 1980; she needed the money because her husband was unemployed. She eventually took leave in November, but after school began in September, Capalbo called on the intercom while Brown was teaching a business education class. He said: "Brown, where's your letter? I want your letter, the letter about when you're leaving." Five minutes later he rushed into the classroom, saying, "Brown, I want the letter." Mrs. Brown replied, "I told you I don't have it ready yet." "I want the letter. I need the letter," said Capalbo. Brown replied, "I haven't decided when I'm leaving yet." Capalbo said, "I don't care if you die having this kid. I just want the letter." The students responded, "Leave her alone. Get out of here. You're a jerk." Capalbo left and Brown had to settle the class down.

37. Either just before or just after the above incident during Brown's pregnancy, Capalbo came up to Mrs. Brown in the faculty room in the morning, saying, "Where's the letter?" He picked at Brown's dress as if to look under it, looked down the neck of her blouse and then riffled through her pocketbook. Brown slapped his hand. Barbara Trzeszkowski, who saw the incident, reported feeling physically nauseated by it. On another occasion in the fall of 1980, Capalbo made a gesture of looking down Brown's blouse while she was eating lunch, "I see your boobs are getting bigger," he commented.

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38. In school year 1979-80, in the fall, Brown also had to settle her class down as a result of the following incident. Capalbo had brought a very attractive blonde "ladyfriend" to visit the classroom. Shortly thereafter, he returned to Brown's class of senior girls. Capalbo asked, "How did you like her? Don't you wish you looked like her?" and similar remarks to the girls of all sizes and shapes. After he left the students began calling out "Who does he think he is? I don't think she's pretty! She has bleached hair!" Brown tried to make light of the incident.

39. On one other occasion, after her earlier pregnancy, in February 1980, Capalbo laughingly said, "Your baby should have died," after Brown had been out of school for four days due to the hospitalization of her son.

40. When Capalbo made remarks like the one above or urged Brown to have an abortion, she did not regard them as amusing in any respect. At first, her response concerning abortion was a serious, "It's none of your business." Subsequently, the repeated emphasis on abortion was highly disturbing to Brown who held religious beliefs against abortion. Brown's reaction was corroborated by Barbara Trzeszkowski, to whom Brown privately confided her belief that her last baby was a gift from God, since it was a miracle that the child had been conceived. She felt that maybe God meant for someone great to come into the world in this manner.

41. Frances Ciuba taught business education in the high school in 1979-80 and 1980-81; she recalled most of the comments Capalbo made to Brown in the faculty room in addition to others. Capalbo also said, "If you put your hair up and wear two inch heels, I'll take you to dinner." When Brown was pregnant: "Brown and I could have nice looking babies.

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White babies go for $20,000 on the black market;" "Look at Karen. She can't get anything at home. If you think the jackass is hunting four legged animals, you're mistaken."

42. In the fall of 1980, when Capalbo talked this way to Brown every day, Ciuba would find Karen Brown standing outside the lunchroom door, not wanting to go in. She would say, "Just walk in, Karen. Just ignore it." Ciuba observed Brown turn red; her hands would tremble. She could hardly light her cigarette after Capalbo's remarks. Brown told Ciuba she felt humiliated and degraded by Principal Capalbo.

43. Ciuba saw Capalbo put his hands on Brown almost daily in 1979-80. He would grab her leg as she went past, pat her posterior, come up behind her and massage her shoulders. He continued this in the fall of 1980. Ciuba also corroborated Capalbo's comments to, and physical touching of Diane Roberts, who would "turn red; her hands would shake; she stopped eating; her whole body would tremble."

44. Capalbo did not touch or make remarks to Ciuba. Ciuba described the touching. Capalbo grabbed, nuzzled up or massaged whereas one or two others touched. For example, Mr. Colman, a supervisor, might put his hand on a shoulder and Mrs. Brown might touch a teacher's arm while speaking. The nature of Capalbo's touching was different.

45. In October or November 1980, Brown was called into Capalbo's office to meet the teacher hired to substitute for her during her leave. Brown did not know the woman. Capalbo introduced Brown to the teacher as follows: "Here she is. This is Mrs. Brown. She's 37 years old and pregnant. She should have had an abortion." Brown's knees turned weak, she sat down in confusion and "just wanted to get out of that room."

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46. In addition to working while being eight months pregnant, Brown had serious financial problems which caused her to be concerned about who would be hired to replace her: she expected a day-to-day substitute which might enable her to continue to receive the difference between her salary and a substitute's pay. Capalbo recommended hiring an experienced teacher as a long term substitute, however. Capalbo's action caused intensification of the emotional climate between him and Brown, even though the Board eventually gave Brown what she requested.

47. Not long before she left on maternity leave, in November 1980, a climactic incident occurred. Brown and four other teachers were holding their in-service program for the business education department and awaiting the arrival of a supervisor, Mr. Colman. Several students appeared and said, "You teachers have to get out of here. We have to type for the year book." Brown replied, "We're having a meeting here. You can't come in." The students persisted in a brash manner: "We have a pass from Mr. Capalbo to be in here." One teacher got on the intercom and called Capalbo. "We are not moving," she said. Capalbo thought the caller was Brown and soon appeared, trailing students behind him. His face was red and the veins were pulsating in his forehead. After a verbal exchange with Mrs. Brown, who attempted to explain the situation, Capalbo said, "I've had enough of your shit, Brown. You'll do as I say or else." Capalbo's attitude appeared physically confrontational; two women teachers took Brown's arms to lead her out, saying to ward off Capalbo, "She's pregnant," and to Brown, "You can't get so upset," or words to that effect. The students must have heard this exchange.

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48. Brown subsequently called Capalbo at home and tried to reason with him. She said, "You owe me an apology" and told him it was not she who called on the intercom, but Linda (another teacher.) Capalbo said, "I'll get her tomorrow morning." Brown dissuaded him. He did apologize. Brown went on to tell Capalbo that the women faculty members were getting upset "at what's going on in this school," such as the conduct of male teachers in the faculty room and that students were coming to her about the conduct of a male faculty member who attended a football game with a woman not his wife. Capalbo said, "It's none of my business." Brown tried to convince him that, as the principal, such things were his concern.

49. Brown thought the climate would improve because of Capalbo's apology, but, instead, his conduct toward her deteriorated. It was after this call, at the end of November that Capalbo commenced his references to the hunting season, "Jackass" and the size of her belly.

50. Several teachers, including Brown, determined that they would complain about Capalbo's "sexual harassment" in January 1981. When Brown came back to school after her maternity leave in March 1981, Capalbo said, "You're looking good, Brown," and subsequently did not continue his prior conduct.

51. Jane Pukstas has taught mathematics at the high school since 1972; in 1980-81, she had the same lunch period as Karen Brown and Diane Roberts. In 1979-80, she also had lunch with Karen Brown.

52. About 80% of the time, when Capalbo came into the lunch room, he addressed Pukstas as "plain Jane," "My strong pollock" or words to that effect. He would say, "Here comes Jane. Good big Polish girl. Broad back. I like big girls."

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53. On numerous occasions, in the faculty room at lunch Capalbo came up behind Pukstas, massaged her shoulders, nuzzled up to her neck and made panting noises or remarks as described above whereupon her face would turn red, she might giggle nervously and, if particularly distressed, a tear would come to the corner of her eyes. At such times, Brown would come to her rescue and say, "Sam, leave her alone" or "why don't you go sit with the men and leave her alone." Most of the time, Pukstas was "flabbergasted" and could not herself speak in response. Occasionally she would say "Oh, knock it off."

54. Pukstas was the moderator of the Friday afternoon in-service mathematics programs attended sometimes by two other women (Bartok, Egan) and by four male teachers (Selecky, Kochman, Murray, Trzeszkowski). As moderator she sat or stood facing the group.

55. In 1979-80, at about 85 percent of these meetings, Capalbo would drop in, come up behind Jane Pukstas, massage her shoulders, nuzzle her neck and make panting or heavy breathing noises which instigated response from Kochman and Murray and disrupted the meeting. Pukstas would try to shrug his hands off and she would turn red. When Capalbo walked in, he sometimes said, "How's this shit going?"

56. On at least two occasions, toward the end of 1979-80, when the weather was warm, Capalbo accompanied his hands-on activity with comments: "How good are Polish girls? Are they as good as they say they are?" Once he opened his mouth and wiggled his tongue back and forth. This gesticulation was reported by Henry Trzeszkowski; Pukstas could not see it because he was behind her.

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57. In response to Capalbo's questioning, Kochman put his legs up on a desk, spread them apart and made gyrating motions with his fist simulating sexual intercourse and Murray shouted, "They're good. Go for it, Sam. Okay Sam." Capalbo smiled and laughed during this episode.

58. When Capalbo was there, the men would also make comments to Karen Egan, the only other woman teacher usually present. (Bartok did not regularly attend these meetings). These comments were sexual in nature, making reference to "going for it" or "doing it."

59. In the spring of 1980, Pukstas went to Capalbo's office and told him she was tired of being the group moderator because of the sexual abuse directed at her in that role, mentioning Kochman's and Murray's conduct. Capalbo told her that if she didn't stay in that role, she should resign or be charged with insubordination. She did not complain again because she felt her job was in jeopardy. Capalbo's conduct continued without change into the 1980-81 school year.

60. Jane Pukstas had a steady boyfriend, a fact known by her friends Karen Brown and Carole Noe. In the cafeteria one day in 1980-81, Capalbo bragged to Mrs. Noe that he could get any woman to go out with him. Noe indicated he couldn't get Pukstas to go out with him. Capalbo bet her $50 that he could get a date with Pukstas. He wanted to double the bet if he "scored."

61. Capalbo asked Jane out about eight times. She always said no. Shortly after Capalbo made the bet and asked Pukstas the first or second time, Pukstas learned about the bet from Noe or Brown and was quite upset about it. Henry Trzeszkowski corroborated Pukstas' testimony, having heard Capalbo ask her out on once occasion. Diane Janson heard him ask and also was present when Pukstas learned about the bet.

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62. On one occasion, at the end of May 1980, Jane Pukstas was in the main office working on scheduling when Capalbo was conferring with the parents of a student. He introduced Pukstas as his wife. She was "flabbergasted" but did not complain then or at any time subsequent to the time earlier in the year when Capalbo threatened to charge her with insubordination and loss of her job. Additionally, in 1982, she "couldn't handle it" because of family problems.

63. When counsel attempted to impeach Pukstas' testimony by comparing it with testimony in the transcript of the civil rights hearing, she admitted that she had partially read it two days earlier, but that she remembered much more today (July 1983) than she did previously because her mind then was on her family: during 1981 to 1982, her brother had a heart attack and triple bypass operation; she had two operations; other family members died and she was taking care of her uncle, who was terminally ill.

64. Jane Pukstas is a very serious minded, dutiful, religious and family oriented person; she is the kind of person who would not regard any of the above described conduct of her supervisor as humorous. Capalbo was well aware of Pukstas' nature. This observation derives from the hearer's assessment of Pukstas' demeanor and all her testimony.

65. In September or October 1979, during the Holocaust series on television, Capalbo constantly made remarks in the faculty room which a number of teachers, particularly the Trzeszkowskis' found offensive. He would say, "Did you see them dig their own graves last night? Let's get Bruce [Nissenbaum] a shovel. Let's get the Jew a shovel." "Hitler had the right idea. They belong in the ovens. Let's get that Jew", [referring to the teacher named Nissenbaum.] "The retards belong in the ovens. Hitler had the right idea." Henry Trzeszkowski had to leave

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the room after Capalbo's reference to retards, because he thought of his sister who had Down's syndrome, and he was both "mortified" and sick.

66. When speaking with Mrs. Brown, whom he regarded as a close friend, Capalbo routinely referred to Nissenbaum as "the Jew," but such conversations with Brown were not general public ones and serve only to illuminate the animus which came to public notice in the Holocaust related faculty room comments.

67. In June 1979, just prior to being officially appointed principal, Capalbo said to Bruce Nissenbaum at a KTA meeting, "Shut up and sit down, you Jew-bastard." He then took over the meeting.

68. Around the same time period as the Holocaust related remarks, Capalbo commented concerning a student he suspended for three days, but whom he told would be suspended for five days: "That retard wouldn't know the difference. You should have seen his face when I asked him where he was the extra days."

69. On one occasion in the student cafeteria, Mrs. Greszner, who was on cafeteria duty, was positioned near a deaf child who could not hear Capalbo's orders. Capalbo shoved the student down and when Mrs. Greszner remonstrated with him, Capalbo said, "I hate all handicapped kids." She replied, "And you are a principal?" and walked away.

70. Capalbo considered the Trzeszkowskis "straight" and indulged in certain offensive verbal fancies only when Barbara Trzeszkowski was present with her husband. He called them, "Mr. & Mrs. Keansburg." He would say to Henry, "Do you want to go to the Strand? We have to wear

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raincoats and dark glasses." (The Strand showed only pornograhic movies). Capalbo would say to Henry, "How about going in on an apartment with me? The bedroom will be on a timed basis. Some men will need more time than others. Caruso is in on it." [Caruso was the Superintendent.] "All men cheat on their wives. Divorce is where its at."

71. Barbara Trzeszkowski became furious when listening to this type of comment. She believed that Capalbo actually had such an apartment. She did not answer back since she felt it would be regarded as a sign of weakness and she felt trapped in that she could not show her true feeling. Her husband testified, "It was a form of ridicule for me and the institution of marriage. He knew I would never consider it." (cheating on his wife).

72. The Trzeszkowskis were fearful of Capablo because he assigned duties and scheduled classes. He had said he would soon be superintendent and they believed he had been influential in pushing several teachers to resign. In the spring of 1979, the high school had received such a poor report from the State that the teachers feared it might not open in September. Capalbo organized a painting party with teacher "volunteers." The Trzeszkowskis attended, even though their child had been born only one week earlier. They were afraid not to show up. During 1979-81, they saw Capalbo ten to fifteen times in the company of certain members of the Board and heard him speak quite often about three teachers he wanted to get rid of. These teachers had all resigned by 1981.

73. Diane Janson, who was employed in the district since 1974, taught at the high school in 1979-80 through April 1981 when she went on maternity leave; she avoided the faculty room after she observed Capalbo picking on people.

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74. While Janson had her neck rubbed by Capalbo a few times ("Whoever was there got a neck rubbing"), she was not subjected to offensive comments until the spring of 1980 when her husband was in the hospital. At that time there was gossip in the school that a certain male teacher was seeing a girl on the side while his wife was pregnant. Capalbo kept track of the days Janson's husband was hospitalized. He would comment in this vein, "It's ten days now. Don't you think she's ready? (said to male teachers). "Two weeks. Look at her. She must be getting it somewhere," or "she's getting ready for it." Janson accepted a position with another school district in 1982-83.

75. Janson heard Capalbo's remarks to Brown: "The women married bums. They have to support them." (With reference to Brown and another whose husbands were unemployed). "She was stupid. She married a bum. She was stupid to get pregnant. She should have had an abortion."

76. Janson also heard Capalbo ask Pukstas, "Why don't you let me take you out to _____ [naming a place]? Why don't we go out to dinner?" Janson was present when Pukstas learned of the $50 bet and observed Pukstas "was very upset."

77. Diane Janson, who had been a Catholic, converted to the Jewish faith upon her marriage. In September just before the Jewish holidays, Capalbo commented about Janson in the faculty room, "She's even beginning to look Jewish." "She's not really Jewish. I don't think she should get the day off."

78. Jeanette Grogan was a special education teacher. Capalbo remembered saying to her in the hall in 1979, "Hitler had the right idea. All special ed students should be gassed," just to see her reaction. Grogan said, "You don't mean that, do you, Sam?" Capalbo replied, "I do." Capalbo testified, "I didn't mean it."

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79. Grogan also corroborated testimony concerning Capalbo's comments made to Brown. Since she herself was pregnant with an unemployed husband, she sympathized with Brown when she was told, "You should have an abortion."

80. Carole Noe taught for nine years in the high school and prior to 1980-81, she considered herself Capalbo's friend and supported him in KTA politics.

81. Capalbo changed after he became principal. He frequently reminded the teachers he "could have your jobs." He was arbitrary and the "antics in the teacher's room became difficult for women to deal with." Capalbo told Noe on a number of occasions that if she came to him for a job he probably wouldn't hire her since he "did not like my type, short fat Italian women" because when they get older they have beards and moustaches. Mrs. Warrick learned this from Noe and believed she was being treated insultingly by Capalbo because she felt that she was exactly the type Capalbo described.

82. By 1980-81, Noe no longer enjoyed going to work. There were nights she could not sleep. She felt like throwing up. Capalbo's conduct interfered with her teaching. In February of 1981, Noe applied for a leave of absence to help out in her husband's business; she never went back, resigning in April 1982.

83. When Capalbo offered to bet Noe $50 he could date Pukstas she wasn't offended because she thought he was joking. A few days later, she learned Capalbo had asked Pukstas for a date. Then, she realized he was serious.

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84. Noe and Brown were close friends. Virginia Greszner, who was not tenured, was another close friend of Brown's. When Brown went on maternity leave after November 1980, she kept in touch with Noe by telephone. Brown told Noe, "If things aren't any different, I don't know how I can take it. I don't want to go back but I need the job. I need the money."

85. Noe learned from Brown in November that Capalbo was going to get rid of Greszner allegedly because he did not find her physically attractive. Noe did not at first credit this hearsay, but just before Brown left, Capalbo, with reference to his professional observation and evaluation of Greszner, said to Brown, "Your friend is going to be gone."

88. Since the reason why most of the female teachers who were subjected to Capalbo's conduct had not complained was because they wanted to keep their jobs, when they came to believe that some might lose their jobs or increments anyway, a group including Noe and Reynolds went to see the Superintendent in about mid-January 1981.

89. Capalbo testified that he disapproved of Judith Reynolds, a home economics teacher, because the State's report singled out the home ec facilities in the high school for poor housekeeping practices which Capalbo attributed in considerable part to Reynolds.

90. Judith Reynolds had been a home ec teacher for eleven years before Capalbo became principal. Capalbo placed on her Professional Improvement Plan (PIP) in March 1980, that she needed to communicate with professional staff and participate in extra-curricular activities.

91. When Reynolds asked about the PIP comments, Capalbo said, "You're antisocial; no one likes you. You don't go to the faculty room. You don't go to KTA parties." Reynolds offered to be advisor for the

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National Honor Society, which she had done for five years and dropped due to attending graduate school, which she concluded in August 1979. Capalbo said, "You'll never get it back. Treszka did a good job. Whatever you did in prior administrations doesn't count in my office."

92. Reynolds asked why she and Marilyn Montiville [sic] received some negative comments on their observations. Capalbo told her she and Marilyn walked out at a KTA meeting when he was president and she was not his supporter.

93. Capalbo told Reynolds, "Take an extra-curricular activity or else." He suggested she coach cheerleading, but Reynolds laughed. "How can I do that? I don't know anything about it." He told her she could learn. "Take it or else. Teachers have been fired because they won't take [an assignment.] You better watch your ass. Next year, I'll be Superintendent. Marilyn is on probation until December because she associates with you," Capalbo concluded the conference.

94. In December 1980, Reynolds discussed Capalbo's conduct with Noe and for the first time realized that she "was not alone," she wasn't the only one who "had problems" with Capalbo. They determined to pursue the matter with the Superintendent in January, and, upon his suggestion, contacted Nida Thomas, Director of the Office of Equal Educational Opportunity in the Department of Education in Trenton.

95. Capalbo's conduct on becoming principal included several other incidents which Reynolds found disturbing, unprofessional and demeaning. On one occasion between January and June 1980, Capalbo came into her child development class and told her students, "Marry for money, not for love." In September 1979, 42 students wanted to take child development with Reynolds. Reynolds asked Capalbo if she could split the class in half and drop one home ec class. Capalbo said he

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didn't consider child development a valid subject area. "Child development is not important in this town anyway. If it was, I would have the men phys ed teachers teach it. They would do a better job."

96. Reynolds had specialized in family life and sex education curriculum planning in her master's program and worked on the State's guide for this subject field. At a T&E meeting in January 1981, Reynolds told Capalbo she would need enough textbooks for the new course, noting that the State had reported a deficiency in this area. She asked who would be teaching the new area. Capalbo replied, "It'll never be you. I've discussed this with Colman and decided it will go through the men phys ed teachers." Capalbo's view was inconsistent with the State guidelines which advised that preplanning was needed and that teachers with whom students feel comfortable should be assigned to family life courses.

97. Linda Bartok, who sometimes attended the in-service mathematics program, sat toward the front of the classroom; the male teachers sat at the back. She did not observe sexual gestures on the part of Capalbo or the male teachers. On one occasion when Capalbo rubbed Pukstas' shoulders, she said "Move it over this way. That feels good."

98. Bartok's steady boyfriend, Mr. Lasko, once lived with Capalbo. She was not in the same lunch period with most of the complaining teachers, and was not asked for her input for the civil rights suit, probably because she was regarded as friendly with Capalbo.

99. Bartok testified that there were occasions when Brown made an off-color reply to Capalbo or appeared to join in a verbal exchange in a joking manner. She also described Capalbo's frequent use of nicknames such as "Scarneck," "Dead Man," "Grim Reaper" and "Olive Oyl," which names she claimed were generally known and used in the school.

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100. Capalbo called his friend William Boyington "Pillsbury Doughboy" or "Poppin Fresh" which he picked up from the students; their reference was to Boyington's weight, which was then 200 pounds.

101. Boyington has a close social relationship with Capalbo. This teacher had multiracial children whom Capalbo liked and visited; Boyington felt that his family relationship was illustrative that ethnic or religious comments of Capalbo were simply his kind of humor. He personally heard the "Jewish holidays" exchange with Janson and observed that she was not offended.

102. Although Boyington testified Diane Roberts accompanied the "prom committee" to Christie's, Roberts and Capalbo said she did not. The inconsistency is unimportant because whether she went or not is largely irrelevant to the issues here.

103. Boyington characterized Capalbo's constant comments to Brown as "busting" her; he observed that they started several years before Capalbo became prinicpal. He heard Capalbo say the "put my head between your legs remark;" Brown replied: "Is that the only thing you can do? Is that why your wife left you?" Boyington characterized Capalbo's remarks about Brown's husband as implying that Capalbo thought she was too good for him rather than denigrating her. Boyington observed Capalbo's relationship with Brown for about 14 years.

104. Boyington described Capalbo's constant "hands on" actions with almost everyone as a way of physically establishing contact or making an impression on people to "put them at ease."

105. On one occasion seen by Boyington, after a meeting in his office, Capalbo massaged Pukstas shoulder. She said, "Oh, that feels good. A

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little lower, Sam." This was probably the same incident observed by Bartok whose memory was less clear than was Boyington's.

106. Bruce Nissenbaum was sometimes called "Cousin Brucie." Boyington claimed he never heard Capalbo refer to Nissenbaum as "the Jew." I do not accept that claim as a finding because of a change in Boyington's demeanor when he offered that answer.

107. Brenda Coanshock taught Spanish in the high school since 1971. She related that in the period of 1975 or 1976 she overheard a conversation beween Capalbo and Judy Reynolds, in which they discussed the results of his girfriend's silicone implant operation. On another occasion long before Capalbo became principal, Reynolds asked him when he was coming to her mother's house for dinner. "She likes you. I don't know why." Capalbo said he might. At another time, there was reference, with sexual innuendos to the song, "There he comes again."

108. Coanshock related that there was constant sexual banter between Capalbo and Karen Brown over the years which was initiated by Capalbo most of the time. He might say, "When are we going out, Wolfie?" (Her name prior to marriage to Brown was Wulff.) She might answer "Get out of here, you're not man enough."

109. Coanshock regarded Capalbo's "hands on" approach as a way of communication and saw no difference in the way Capalbo touched males and females. She did not observe any serious objections and she herself was not offended when he called her "Perth Amboy low-life" and "spic."

110. Coanshock was not often present in the faculty room in the mornings or in the lunch period attended by the complaining teachers after Capalbo became principal, therefore, she was not familiar with much that

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occurred during these periods before Brown left during September through November 1980.

111. Alice Koumanoff, a German teacher who had been in the high school since 1967 and knew Capalbo since 1977, did not recall her question about discipline at the first teacher's meeting of 1979-80. She had been born in Europe and recalled blunt language used in the faculty room. She "learned to accept it as simply the American way."

112. Koumanoff is sensitive to anti-Semitic remarks because her father was Czech and her mother German. Capalbo made no such remarks that she recalled, although she heard two of the women teachers discuss another as a "Jewish princess," referring to a former teacher no one liked.

113. Capalbo put his hand on Koumanoff's shoulder two or three times to calm her down and she saw him touch Janson, Pukstas, Brown and Noe. The last two asked Koumanoff to support Capalbo for principal because he would stand behind the teachers. Subsequently, Noe was upset because of an evaluation in which she felt Capalbo had followed her department chairman's views rather than hers. "More than once she talked about this. This came up again and again."

114. Koumanoff's experience with another faculty room (Monmouth Regional) was that it was not like this one (Keansburg) with relaxed "American" language. She knew Capalbo was joking, however, and was not offended when he referred to her as "head of the concentration camp" and saluted, since he was alluding to her reputation as a strict disciplinarian.

115. Koumanoff described Capalbo's "hands on" conduct: "He's the typical Italian. He likes to touch people." He once made a remark to her

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which could have been interpreted as double-entendre, but when she looked at him, he said, "I'm just kidding."

116. Capalbo admitted making a majority of the remarks attributed to him or similar remarks, as well as his habit of touching people. He described the faculty and his relationship with them as like a family, having all been together many years.

117. Capalbo viewed his task as principal as difficult because the school received one of the worst facilities reports he had ever seen. He got the teachers together and they all worked on the school so that school could open in September of 1979. All were glad to have their jobs.

118. Capalbo confided in Brown and Noe, regarding them as good friends. He would therefore say things to them he would not say to others. For example, Noe was short and Italian but not fat. He would say to her, "I don't like short fat Italian women," to which she might reply, "I wouldn't marry an Italian fellow. They all fool around."

119. Capalbo was particularly concerned with physical conditions in the home ec rooms since the State report noted the most deficiencies there, a number of which he felt could have been prevented or cured by the home economics teachers. Nevertheless, he did not recommend firing the non-tenured teachers (Montiville) who preceded Diane Roberts; when she resigned in August 1980 he recommended her to a prospective employer. As for Reynolds, he felt she wasn't doing her job properly.

120. Capalbo denied having a "hit list" but admitted he said to Karen Brown with reference to Mrs. Greszner, "If she doesn't improve, I won't recommend her," since he didn't like the job Greszner was doing. He

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also admitted deliberately saying in a loud voice, "The Board will give me a bonus for every tenured teacher I get rid of." He said that the teachers smiled, recognizing this was a joke.

121. Capalbo walked into rooms regularly and always walked the halls to prevent vandalism. He promised to restore order to the student cafeteria and did so by concerted personal effort.

122. Having learned that the women teachers were upset about his conduct, which he described as joking, trying to shock, getting a reaction or calming the staff down in stressful situations, Capalbo refrained from most of the conduct complained of after January 1981.

123. Capalbo was aware that some of his "supporters" made signs for certain candidates in the 1980 school board elections; two of them won and subsequent to that election in 1980, the Board voted Capalbo tenure within a year of his appointment as principal.

CONCLUSIONS AND DISCUSSION OF LAW

The charges of unprofessional or unbecoming conduct certified by the Board, as set forth in the prehearing order encompassed three general categories:

A. Touching bodies of female teachers (the charge with respect to touching bodies of students was dismissed for a complete lack of admissible evidence).

B. Public expression of anti-Semitic remarks.

C. Attempts to use his administrative position to sexually harass employees (including insulting remarks.).

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The defense was a denial to B, and an admission that much of the conduct charged in A and C occurred but that no impropriety or denigration was intended, and that the conduct was a long-standing and accepted mode of behavior among teaching colleagues. Respondent also defended with a First Amendment protected speech claim. An additional defense argument was that the teacher witnesses supported their colleague, Capalbo, for the position of principal, expecting special favors, and turned against him when he proved a strong administrator who accorded them no special treatment.

Because a related civil rights case brought by three of the women teachers and encompassing much of the same testimony was heard prior to the hearings in this matter, the witnesses tended to emphasize aspects of the testimony which had significance in determining whether Capalbo's conduct constituted the creation and maintenance of a sexually offensive or hostile work environment. Such issue would be vitiated by findings that the subjects of the principal's remarks and other conduct regarded them as joking or meant only to shock. The intent of the speaker as perceived by the subject assumes some significance under that standard. The civil rights standard is applicable to the relation of employer (per supervisor) and employee inter sese. The more stringent standard here is fitness to continue as a teaching staff member. Redcay v. State Bd. of Ed, 130 N.J.L 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944).

"Unfitness for a position under a school system is best evidenced by a series of incidents." Redcay, 130 N.J.L. at 371. "The privotal question to be determined in this matter is the fitness of respondent to continue as a teaching staff member." In re tenure hearing of Henry P. Karsen, 1979 S.L.D. 617.

> ***[T]eachers of this state *** are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach

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> do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.*** [In re Tenure hearing of Jacque L. Sammons, 1972 S.L.D. 302 at 321]
>
> ***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully *** violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.*** [In re Tenure hearing of Ernest Tordo, 1974 S.L.D. 97 at 98, 99]

The public utterance of profane, abusive, and slanderous remarks to officials, and to children ("I'm sick of this _____; tell her to pound salt; I'm really _____ off") have been held to be conduct unbecoming a teacher, being "a series of displays of lack of restraint constituting unprofessional conduct." Karson, supra at 612, 613.

Under the above standards long recognized by the Commissioner, the continuous stream of salacious comments publicly addressed to Karen Brown in and of themselves constitute unprofessional conduct sufficient to support a tenure charge and a dismissal. This would be so even if the subject herself regarded them as a joke and even if she subsequently had a falling out with the instigator of the obscenities and determined to get even by revealing evidence of unfitness. In short, if the testimony is true, and I have found it to be true, then Capalbo's intent when publicly making the remarks and touching the women is irrelevant for all purposes. The conspiracy theory would only be useful if it detracted from the credibility of the witnesses. It did not. There were too many candid and believable witnesses to Capalbo's conduct. He could not even deny that most of it occurred. Testimony concerning Principal Capalbo's handling of disciplinary complaints concerning specific students in an arguably discriminatory way if they were referred by women teachers and the incident when Capalbo tutored a student and changed his grade were of little weight. Due to the length of the required findings, I did not include a number of incidents which I felt to have little or no legal import. The fact that teachers disagree with a supervisor's disciplinary methods does not ordinarily show unfitness for a

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position. There were insulting remarks to teachers in the presence or hearing of students which added to the picture, however. Several such unseemly displays were directed at Brown, particularly the maternity leave letter incident and the incident wherein Capalbo forced the teachers to leave their meeting room ("I've had enough of your shit, Brown"). Surely such incidents create "conditions under which the proper operation of the school is adversely affected. "In re tenure hearing of Joseph A. Maratea, 1966 S.L.D. 106, aff'd, Docket No.A-515-66 New Jersey Superior Court, Appellate Division, December 1, 1976 (1967 S.L.D. 351).

Apropos of the Maratea language above, the continual touching of Pukstas while she was engaged in leading the in-service math program, coupled with salacious remarks and gestures, overtly illustrated adverse effects on proper operation of the schools. The principal's example and approbation encouraged certain male teachers to act in a sexually offensive manner. Similarly, the principal's use of insulting or degrading names for staff both male and female (Plain Jane, Pollock, Olive Oyl, the fag, the Jew) targeted the subjects for hostile acts and led logically to actions such as the making of kissing sounds and falsetto shrieks at teachers' meetings. Capalbo was the leader whom the others followed. Brown finally tried her best to explain this to him. Capalbo either failed to understand or was unable to control himself. Friendly touching progressed to a a "pat on the fanny," to a slap on the behind, to peeping down blouses and lifting up skirts. Restraint was wholly lacking.

Respondent claims that he made no anti-Semitic remarks and though he admits saying, "Hitler was right. All special ed kids should be gassed at birth" or words to that effect, he argues that his statement cannot be characterized as anti-Semitic. Rather, he claims a First Amendment right to state an opinion, albeit an unpopular one, on euthanasia and at the same time claims that he does not hold that opinion. A teaching staff member has a right to speak [in a letter to a newspaper, at meetings] on issues of public importance in the absence of proof of false statements knowingly and recklessly made. Pickering v. Bd. of Ed., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811. One must look not only at the words spoken, however, "but also descriptions of the accompanying colorations, the circumstances and the other pertinent factors." Winston v. Bd. of Ed.of S. Plainfield, 64 N.J. 582, 588 (1974).

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I CONCLUDE that respondent cannot claim First Amendment protection for the above-cited statement because he had no belief in the opinion expressed, by his own admission. He falsely represented his opinions; he did not espouse an unpopular philosophy and exercise his freedom of speech in proselytizing his colleagues. On the contrary, he was merely using his "freedom of speech" to make statements which he knew to be offensive to most of the hearers for the purpose of shocking and disturbing them, particularly the special ed teachers such as Grogan. Since Federal and State laws place a duty upon the schools to work specially to educate handicapped children, such expressions on the part of the leadership are "uncontrolled expressions which are internally destructive of the proper functioning of the instituion" and "conduct which impedes the teacher's proper and competent performance of his daily duties." Winston, supra, at p. 588. Capalbo made such students targets for hostility and scapegoating much as he made certain teachers targets. Such speech is not protected.

Capalbo's comments were anti-Semitic, despite their reference to euthanasia rather than genocide. The proof of that was the fact that they were initiated and repeated daily during the showing of "The Holocaust" on television and were made in the context of targeting a Jewish teacher, Bruce Nissenbaum, who subsequently soon resigned. Additionally, certain teachers had heard Capalbo refer to "the Jew" and others had heard that he did so. Racism was inferred and tacitly understood by the hearers of the statements. I do not believe Capalbo told the whole truth when he denied ever referring to Nissenbaum as "the Jew" or "that Jew." Not only did two witnesses report hearing it, but Brown characterized the circumstances as "He [Nissenbaum] completely lost his identity;" she stated that for a period before the teacher left, Capalbo always referred to him as "the Jew." Henry Trzeszkowski also testified to such references and even to the use of "Jew bastard" on one occasion at a faculity meeting. In addition to this specific testimony, such appellations were shown to be a part of Capalbo's style of speech.

While the few public incidences of anti-Semitic remarks, standing by themselves, might warrant only a minor penalty, they do play a part in finding Capalbo unfit for his position, because they are a part of the leadership's targeting behavior which, as has been shown, results in corresponding behavior by subordinates. In our pluralistic society, such conduct in a school detracts from its mission as an educational institution. Since teaching

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staff members "mold habits and attitudes and influence her opinion of their pupils," any public expressions of anti-Semitism or ethnic slurs show unfitness and constitute conduct unbecoming of a principal or teacher.

The statutory procedure required for bringing tenure charges includes a mandate that the board supply the charged employee with a copy of "a written statement of evidence under oath" which supports the charge so that the employee may file his defensive statement under oath with the board for consideration prior to a vote to certify the charges. There is no claim in this case that the above requirement was not followed. Certification by the local board is a probable cause phase of the proceeding for the statute says the board shall determine "whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction in salary." N.J.A.C. 18A:6-11. An issue here is whether or not every incident of conduct unbecoming of the type charged must be stated in the initiating affidavits or else be barred from evidence and from the consideraiton of the Commissioner. Because of the type of conduct, its pervasiveness and the number of persons who witnessed it, aspects or incidences of the conduct charged which had not been specifically affidavited prior to certification came to light through the testimony. Since there was full discovery, and I delayed the onset of hearings several times to assure such discovery and preparation time for counsel, everything was done to hold surprise to a minimum. If there was any surprise, it occurred despite the efforts of counsel and the court. For example, a witness might remember something while testifying which had not previously been revealed.

In these circumstances, where the two principal charges of conduct unbecoming a teaching staff member relate to a continuing course of conduct, namely sexually harassing and insulting remarks and offensive touching of the female teachers, I **CONCLUDE** all the testimony supporting these charges can be considered by the Commissioner in determining fitness for the position and penalty to be imposed. Much of the testimony not affidavited is corroborative. Other such testimony reveals the circumstances surrounding the actions complained of, such as the reasons why teachers refrained from making complaints to higher authorities for 18 months and the personal circumstances which increased the

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oppressiveness of the conduct. Because of the charge relating to anti-semitic remarks and the First Amendment defense, full testimony concerning all of the circumstances was required, for the courts have held that these must be considered.

I CONCLUDE that the Board has proved unprofessional conduct or conduct unbecoming a teacher on the part of respondent, namely, his engaging in sexually harassing and insulting remarks and offensive touching of bodies of the female teachers. **I CONCLUDE** that the numbers of incidents found to have occurred and their character clearly show respondent to be unfit for the position of principal or for any position in the public shcools under the standards of Tordo, Maratea, Sammons, Karsen and Redcay, supra. **I CONCLUDE** that respondent also made anti-Semitic remarks and that such conduct added to a conclusion of unfitness although, standing alone, they might not support dismissal. Respondent cannot be permitted to "teach, inform and mold habits and attitudes and influence the opinions of . . . pupils." The ill effects of his exemplar upon the faculty have already been demonstrated.

The level of professional conduct expected of a principal is particularly high due to the sensitive nature of his position. While I find the following quotation cited by the Board to be consistent with recent Commissioner's decisions and believe it instructive, I am unable to confirm its existence:

> "The Board of Education may reasonably require of one holding the important position of principal of its high school conduct in conformity with commonly accepted ethical standards. He is, in a measure, guide and pattern for the adolescent boys and girls under his charge. He should teach by example as well as by precept. The inculcation of those qualities and attributes which we call 'character' is a responsibility of our schools. George R. Good vs. the Board of Education of the Township of Union, Union County, 1938 S.L.D. 354, 359 (1935).

I CONCLUDE that the conduct proved warrants dismissal.

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REQUEST FOR HEARING ON PENALTY

Penalty Procedure

At the end of his brief, respondent states, "If the Court concludes that Capalbo has violated the Act, we respectfully would like the right to submit evidence in mitigation prior to submission of the recommendation as to punishment to the Commissioner of Education. In re Polk License Revocation, 90 N.J. 538, 580, Footnote 3 (1982)." I am unaware of any policy or practice of the Commissioner providing for bifurcation of tenure hearings into guilt and penalty phases. Indeed, the Legislative intent as expressed in N.J.S.A. 18A:6-16 is that tenure proceedings be heard and concluded with dispatch. Facts in mitigation of penalty must be introduced at the hearing. Such facts were elicited, for the respondent's testimony of not having an intent to harm or disparage the subjects to whom he addressed his remarks, of having an intent to joke or shock those present, and of ceasing such conduct upon complaint was mitigatory testimony. There was also testimony that respondent served the Board for about 11 years without incident as a teacher of business education. The hearing was complete in all respects and included facts concerning respondent's employment before and after certification of charges.

Arguments concerning the appropriate penalty which could result upon proof of the charges must be set forth in the briefs. I may even have mentioned to counsel that I wished to have penalty discusssed in the briefs, there being several possibilities ranging from dismissal from all positions in the district to suspension without pay for a specific term. Respondent, as a matter of trial strategy, chose not to address penalty in his brief. As a result of that choice he cannot now be heard to claim a right to an extension of the proceeding to address that question.

In re Polk License Revocation, 90 N.J. 538, 580, Footnote 3 (1983), cited by respondent, is not on point. That case dealt with revocation of a physician's license to practice. Our highest court applies different burdens and factors to a physician licensing issue than to loss of tenure and dismissal from a specific position in one school district. The court's remand for penalty consideration in that case resulted from peculiar

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procedural facts not found here. In Polk, respondent's counsel was advised that he could comment on mitigation of penalty orally before the Board, but before he had the opportunity promised him, the Board voted to revoke. After the vote, respondent was granted the opportunity to plead for an alternative penalty and offered newly submitted information on that point. The Board took a five minute recess and reaffirmed the earlier vote. Under these circumstances, four justices felt that the unfairness of the above described hearing called for a remand.

Whatever the procedures and practice of the Board of Medical Examiners may be, it is certain that the bifurcation of tenure proceedings is not the practice of the Commissioner of Education. Nor did the undersigned administrative law judge ever suggest that a Phase II penalty hearing was possible. Indeed, had the question been raised before me at the hearing, I would have stated unequivocally that the hearing must set forth all facts, including those relating to mitigation and the briefing must relate all arguments, including a discussion of penalty. Respondent's request for a penalty proceeding in the last line of his post-hearing brief must be regarded as the well-chosen strategy of an assiduous trial counsel to delay determination and thus permit his client to retain his position as long as possible. **I CONCLUDE** that no unfairness has occurred in the hearing process, that the Commissioner is not obligated to provide a penalty phase hearing and that it is not in the public interest or consistent with the intent of the Legislature as expressed in N.J.S.A. 18A:6-16 to do so.

It is, therefore, **ORDERED** that respondent be **DISMISSED** from his tenured position of employment.

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

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OAL DKT. NO. EDU 992-83

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

September 1, 1983
DATE

Naomi Dower LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

9/6/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept 8, 1983
DATE

Ronald L. Lauenstein
FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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APPENDIX

List of Exhibits

P-1 (identification only) Discipline Record of W. P.

P-2 (identification only) Discipline Record of W.P., dated February 27, 1981

P-3 Letter from Monmouth County Teachers Association dated September 12, 1979.

R-1 (identification only) Memo page labeled "Comments to Brown"

R-2 (identification only) Nine other memo pages

R-3 (identification only) Affidavit of witness

R-4 (identification only) Personal note of Mrs. Trzeszkowski

R-5 (identification only) Personal note of the Trezezskowskis

R-6 (identification only) Mrs. Brown's notes

R-7 (identification only) Warrick letter dated January 15, 1981

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IN THE MATTER OF THE TENURE :
HEARING OF SAMUEL V. CAPALBO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH : DECISION
OF KEANSBURG, MONMOUTH COUNTY. :
:

The Commissioner has reviewed the entire record of this matter including the initial decision rendered by the Office of Administrative Law, Naomi Dower-LaBastille, ALJ.

The Commissioner observes that respondent's exceptions to the initial decision and the Board's reply exceptions were filed pursuant to N.J.A.C. 1:1-16.4a, b and c. Additionally, it is noted that both parties rely on their post-hearing briefs filed with the judge to buttress their respective positions taken in their exceptions. These arguments have been reviewed by the Commissioner and are incorporated by reference herein.

Essentially, respondent's exceptions to the initial decision are best summarized in pertinent part as follows:

> "***[W]e respectfully submit that Judge LaBastille was offended by many of the comments attributed to Capalbo. As a result we believe that she honestly had her opinion tainted and therefore her recommendation should not be followed by the Commissioner. The Teacher Tenure Act is not a punitive statute. It is not intended to punish people for past transgressions. Instead, it is intended to try to insure the delivery of a thorough and efficient education system to our children. We believe school administrators should be allowed considerable freedom of expression and conduct in administering the districts which have the many problems which are prevalent in today's society. There are no talismanic phrases which must be avoided. While Capalbo could certainly be criticised (sic) for many of his comments to Mrs. Brown, and perhaps for the manner in which he treated certain of the teachers, there is no indication in this record that the image he portrayed in the faculty room was the same image portrayed to the children. Absent that finding, we respectfully submit that there has been nothing shown of such a serious nature as justifies the extreme recommendation of Judge LaBastille that respondent is not fit to be employed in the public school system in a Dis-

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> trict in the State of New Jersey. The tenure charges were made against him as acting as a Principal. The Board of Education has demonstrated its continuing confidence in Capalbo by not suspending him pending these charges. We respectfully suggest that a public criticism is certainly warranted with respect to certain of his comments and actions.
>
> "A careful analysis of Judge LaBastille's opinion will reveal that it was carefully constructed to avoid effective review. She tried to insulate review by her comments regarding demeanor or credibility. However, this effort went too far.
>
> ***
>
> "As was noted by Judge LaBastille, the climactic incident of November, 1980 ended Capalbo's offensive conduct and statements. With his resignation as K.T.A. President, that signalled the end of the confusion of roles which produced much of the offensive statements and conduct. Over the past two and a half years it appears that he has succeeded in modifying his personality. The shock effect approach has ended. The touching has ended and the offensive remarks have ended. As the petitions accompanying this Statement show, many people want to see Capalbo remain as a principal in the Keansburg District.***"
>
> (Respondent's Exceptions, at pp. 8-9)

The Board in its reply exceptions, rejects respondent's efforts to criticize the judge's lack of objectivity with respect to her findings of fact leading up to her recommendation that he be dismissed from his tenured position as a principal in the Keansburg School District. The Board urges the Commissioner to affirm those findings and conclusions of the judge as his own for the reasons set forth in the initial decision.

The Commissioner has carefully considered the opposing arguments of the parties. He has also reviewed the testimony of the witnesses contained in the transcripts of the several days of hearings held in the instant matter.

In the Commissioner's judgment respondent has failed to establish that the findings of fact and conclusions rendered by the judge in her initial decision were not based upon a preponderance of credible evidence in support of the Board's tenure charges against him.

Contrary to those contentions of respondent that the judge's findings of fact were tainted by the testimony adduced from the Board witnesses who testified against him, the Commissioner

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finds and determines that the judge exhibited a considerable amount of patience and restraint during the conduct of these proceedings in order to ensure that irrelevant subjective testimony would not be prejudicial to respondent.

The Commissioner, in affirming the judge's finding that respondent is guilty of the Board's tenure charges of unbecoming conduct against him, also concurs with the judge's determination denying respondent, if found guilty, an opportunity to be heard for the purpose of mitigating the penalty recommended to be imposed upon him. The Commissioner so holds. What remains for the Commissioner to determine is whether the recommended penalty of respondent's dismissal from his tenured position of principal is warranted.

It is clear from the record of this matter that respondent by his own conduct and behavior toward certain teaching staff members at the Keansburg Junior-Senior High School demonstrated a deep lack of understanding and awareness of their personal and professional commitment and sensibilities. Many of respondent's remarks, coupled with his insensitive behavior, served to discredit him in the eyes and minds of his subordinates.

It is without question that respondent's deportment toward certain female members of his teaching staff constituted sexual harassment and caused them embarrassment in the eyes of their colleagues which, in turn, fostered a deep sense of personal and professional resentment against him and severely compromised his effectiveness as a school administrator in gaining their confidence and respect.

The record further establishes that respondent's selective behavior and comments toward those female members of his teaching staff diminished their status and thereby made it more difficult for them to carry out their professional responsibilities with other male co-workers.

It is further evident that the incidents of respondent's repugnant behavior toward certain female teachers pandered to those male teachers on his staff who sought to emulate his behavior on those occasions when he visited departmental meetings chaired by female members of his staff.

In engaging in such reprehensible behavior, respondent selectively exploited and intimidated those teachers whom he felt either lacked the resolve to challenge his conduct on a professional basis or to express their dissatisfaction with anti-Semitic remarks which respondent used in referring to another teaching staff member, as well as his statements of a similar nature made with regard to handicapped pupils.

The Commissioner is being urged by respondent to view these remarks as an attempt by him as a high school principal to evince a sense of "shock" from his teaching staff which would be instructive, as well as constructive, in terms of their reactions. In the Com-

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missioner's judgment the record of this matter fails to establish that this was so. Were the Commissioner to be persuaded by respondent's contentions regarding the innocuous nature of those anti-Semitic remarks he has been found guilty of making, it would also have to be concluded that respondent's failure to convey this message to his teaching staff remains one of the best-kept secrets, known only to respondent himself. The Commissioner therefore rejects such tortured logic advanced by respondent for the precise reasons set forth herein.

Accordingly, the Commissioner finds and determines that respon nt, having been found guilty of unbecoming conduct as a teachi staff member as charged by the Board, has forfeited his right , remain in the Board's employ as a tenured principal.

The foregoing determination rendered by the Commissioner is based upon those findings and recommendations set forth in the initial decision and supplemented in the Commissioner's decision above.

The Board is hereby directed to terminate respondent's employment as a tenured principal in the Keansburg School District as of the date of the Commissioner's decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 31, 1983

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8504-82
AGENCY DKT. NO. 324-8/82A

MICHAEL S. COLAVITA,
Petitioner
v.
HILLSBOROUGH TOWNSHIP
BOARD OF EDUCATION,
Respondent.

APPEARANCES:

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

Donald C. Chase, Esq., for respondent

Record Closed: August 3, 1983 Decided: September 19, 1983

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

This case presents the question whether Michael S. Colavita (petitioner), a teacher with a tenure status in the employ of the Hillsborough Township Board of Education (Board), established by a preponderance of credible evidence that the Board did not have a reasonable basis for its factual conclusion to withhold his salary increment for 1982-83. After the pleadings were joined, the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. After a prehearing conference was conducted in the matter, and after the Board's motion for summary decision was denied by written ruling, the matter proceeded to a full plenary hearing. After the parties filed briefs in support of their respective positions, the record was declared closed on August 3, 1983.

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BACKGROUND FACTS

During January 1982 the parents of one of petitioner's pupils complained that petitioner was using inappropriate language to their child as well as to other pupils in his classroom. Petitioner, it is noted, has been employed by the Board for 14 years, and is presently assigned as a teacher of reading of ninth grade pupils who function on third to fifth grade levels of reading. Subsequent to the parental complaint being made to the superintendent, the superintendent directed the principal to conduct an investigation into the matter. The inappropriate language petitioner was to have directed towards his pupils included terms such as "idiot," "queer bait" and other four letter words that need not be repeated here but are slang for the act of sexual intercourse, and, in its verb sense, the expulsion of human animal excrement.

The principal conducted his investigation by speaking first with other teachers who had the pupil whose parents made this complaint. The principal testified that he recorded the statements of the two teachers in writing, Mary Jane Kauffman and Lucille Ronchetti, and produced them at hearing, notwithstanding that one of the teachers, at hearing, testified that both statements are not accurate. In respect of the first statement, that of Kauffman's, the principal recorded that the other teacher, Lucille Ronchetti, complained to her that petitioner was making inappropriate comments to his pupils in class. Ronchetti at hearing denied the truth of that report. The principal also produced what purports to be the statement of Lucille Ronchetti, unsigned by Ronchetti, which states that other teachers say things more inappropriate than what petitioner allegedly does to his pupils. That purported statement (R-8) closes as follows: " [Ronchetti] know that 'damns' and 'hells' are being said not only by [petitioner] bu others. The kids did not specifically complain about [petitioner]." At hearing a secon statement (P-3) signed by Ronchetti and produced at hearing reports as follows:

> On May 12, 1982 I had the opportunity to read [the principal's] statement regarding my comments from the previous date. These statements were totally different from my original remarks. He had omitted key words, changed the context of several comments and swayed the general interpretation. By neglecting to record my words verbatim, they appeared extremely damaging. His account is an inaccurate record and a complete fabrication of the facts. After reading this statement, I approached [the principal] regarding my concern. He became very indignant and vowed to swear to his action in a court of law.

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Subsequent to the superintendent directing the principal to conduct an investigation into the parental complaint, principal informed petitioner of the parental complaint on January 15, 1982. (R-12) The principal advised petitioner that the parental complaint consisted of his using inappropriate language as stated above. Petitioner denied that allegation to the principal on January 15, 1982 and advised that the pupil was probably scheming against him because of a prior reprimand he received in class. It is clear that upon hearing the denial, the principal determined that he would then talk with the pupils involved and other teachers as noted above. The principal, based on his meeting with Kauffman, prepared his recollection of that meeting (R-7). Next, he testified he had a 20 minute meeting with Ronchetti during which he took notes and subsequent to which he prepared his recollection of that meeting. (R-8). Over the next several weeks the principal met privately with each of the ten pupils in petitioner's class in respect of the complaint. The principal began each meeting with each pupil by stating the following:

> I have received a parent complaint that [petitioner] has used curse words and other inappropriate words, such as 'idiot,' 'jerk, 'bumb' (sic), etc. Have you ever heard any of these words said by [petitioner].

At hearing, the principal testified he did identify the pupil and the pupil's parents who made the complaint against petitioner. As the result of those interviews spread out over a period of several weeks, the principal received statements from B.S. (P-1), R.W. (R-4), K.B. (R-5), J.A. (R-6), R.M. (R-9), T.L. (R-10), R.E. (R-11) and J.C. (R-14). B.S. purportedly states that he never heard petitioner call anyone stupid, dumb, or queerbait. (P-1). R.W. purportedly states that she never heard petitioner use "bad" words in his classroom. R.W. does report that petitioner states to his pupils that he does not get angry, he gets even and that he tries to get even by lowering their grades. (R-4). K.B. purportedly reports that petitioner called him a "'jerk'", "'idiot'", "*** and things like that when I misbehaved***." (R-5.) In addition, K.B. purportedly reports that petitioner did tell B.S. that he, petitioner, did not want any "bullshit" and that he called R. "'a pain in the ass'" (R-5). J.A. reports that petitioner, in an attempt to stop pupils from running in the corridors, said "'hey you fags, stop running'". R.M. purportedly reports that petitioner had been heard by him saying "'shit'", "'idiot'" and "'stupid'". R.M. reports that petitioner told him directly that "***he had enough of my "'shit'" and said to go to the office." (R-9). T.L. purportedly reports that while she heard petitioner use profantiy on prior occasions, he had not done so recently. T.L. further reports that she heard petitioner say to his pupils that "***they are acting like "'assholes'" (R-10). T.L. purportedly reports that petitioner directed his pupils to stop acting like a bunch of idiots and that she, T.L.,

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felt that in those circumstances the pupils were behaving as infants and "stupid". R-10. R.E. purportedly reports that petitioner called him a "clown," "fag," and that he, R.E. belonged in a circus. (R-11). It is noted that this latter statement was taken by the vice-principal, as opposed to the principal. J.C. purportedly stated that petitioner tells her to "shut-up," that he hates her because her name is "J", and that he was "tired of your shit." (R-14)

The principal, on or about March 11, 1982, gave petitioner a copy of the written complaint filed against him by the parents. The principal, in the section of the written complaint form which asks for the disposition of the complaint, states that

> On the basis of an investigation conducted by this writer [the principal and his meeting with the two teachers and his meetings with the pupils] it has been concluded the complaint has merit. As a result, a recommendation will be made to the superintendent that this matter be pursued formally (R-3).

This report, it should be noted, was submitted by the principal to petitioner at a meeting conducted on March 11, 1982 in the presence of an assistant superintendent together with petitioner and a representative of the Hillsborough Education Association. The principal testified that when petitioner saw the actual complaint, in writing, on March 11, 1983 he again denied the substantive allegations and is quoted by the principal as having said "I'd have to be an asshole to do this."

The principal testified that each of the pupil statements was given independent of each other and that he found a sufficient basis to believe there was merit to the complaint. The principal did not, at any time, give to petitioner the purported statements of any of the pupils. The principal did submit the complaint form, together with the purported statements of the pupils, and of the teachers, to the superintendent. The superintendent asked the principal whether he believed the pupils, to which the principal responded in the affirmative.

The superintendent met with petitioner sometime in March 1982 after having reviewed the investigative report of the principal in respect of the purported pupil statements and the statements of the teachers. In addition, petitioner submitted to the superintendent his written position in respect of the allegations against him. There, petitioner asserts that he

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> Find[s] these accusations, in light of my background and the past history of my accusers and the circumstances surrounding this incident, to be totally ludicrous. I have never in 17 years of teaching used such language in a classroom. The language *** is totally out of character for this writer. My reputation and integrity speak for themselves *** It is highly suspicious, indeed, that after 17 years teaching, my character would change so drastically that this language would become commonplace enough in a classroom to be noticed by my students. To be noticed this year in one particular class. To be noticed after the son of my accuser was disciplined by me and detained after school. This accusation, at first, totally confused and appaled me. However, my confusion was abated when, upon further investigation into the background of my accusers, I have found a noticable pattern of defilement and defamation*** [petitioner proceeds to attack the integrity of the complaining parents] ***

On or about May 10, 1982 Board counsel advised petitioner of a scheduled Board meeting for May 17, 1982 at which the superintendent, based upon the results of the principal's investigation into the parental complaint, would recommend to the Board that his increment for 1982-83 be withheld. (R-15) Board counsel also advised that

> Based upon the Administrative hearing you were afforded before the Superintendent of Schools, the superintendent has voiced dissatisfaction with your explanations and is, therefore, recommending that the increment be withheld on the following formula: that your employment increment for the 1982-83 school year shall be permanently withheld.

It appears that the Board did discuss the matter of the complaint against the petitioner at its meeting on May 17, 1982. The matter of petitioner's increment withholding was placed on the Board's agenda for a meeting scheduled June 16, 1982. The superintendent testified that he believes he informed petitioner of that pending action, though is positive he informed petitioner's representative of that action. There is no real dispute in respect of petitioner receiving proper notice for the Board meeting held June 16, 1982. In any event, the superintendent did advise petitioner, in writing, on June 17, 1982 that the Board "***voted to deny your annual increment for the school year 1982-83. This denial is to be permanent in the subsequent years of employment in the Hillsborough Township public school system." (R-2).

The superintendent testified that petitioner was not affirmatively given an opportunity to respond to the pupil statements, nor did he see the pupil statements, prior to the time the Board first reviewed them on May 17, 1982.

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A Ms. Gartlen, who is assigned to teach in the same school as is petitioner, testified that the pupil whose parents complained of petitioner, had on a prior occasion, accused her of taking him outside the classroom to the corridor, slapping him, and calling him a "motherfucker." That accusation, it appears, had no basis in fact and the vice-principal took appropriate measures to resolve the matter to at least Ms. Gartlen's satisfaction. B.S., a pupil who testified on behalf of petitioner, and who was to have reported to the principal that he never heard petitioner call anyone stupid, dumb, or queerbate, (P-1) and whose father happens to be a principal in the Board's employ assigned to another school, upon being released from the hearing after giving his testimony, was to return to his classes. Rather, B.S. cut those two classes and then subsequently was not truthful about that behavior when he was returned to the witness stand.

Petitioner's testimony in support of his complaint against the Board essentially goes to the characteristics of his assigned pupils in respect of their deficiencies in reading and behavior problems. Petitioner confirms that prior to May 1982 he was not shown the pupil statements by the principal nor was he allowed to read them. In respect of Ronchotti, petitioner explained that when he first saw her statement in May 1982 he was shocked. He asked her why she would say such a thing and, after her having read the purported statement, she began to cry. Petitioner testified that she then denied ever making such a statment and that she immediately went to talk with the principal.

The Board, in attacking the credibility of petitioner, produced an assistant superintendent who during December 1977 was the acting superintendent. The assistant superintendent explained that during the 1978 winter, the Board found it necessary to close school for seven days but that only three of those seven days were considered snow days. As a result, the Board had to shorten the otherwise planned Easter vacation to make up the other four days. Petitioner was absent those four rescheduled days of school plus an additional day. The assistant superintendent inquired of petitioner, upon his return to school, who explained that he had flown to Florida but that upon his return he became ill. Petitioner explained that during his illness, his child became ill. Petitioner was to have explained that he remained at home with his child and he produced a physician's note to the effect of his illness. (R-16) The assistant superintendent explained that the physician whose note was produced by petitioner at that time was petitioner's cousin. During petitioner's absence, the assistant superintendent attempted to contact petitioner at his home by telephone and was unsuccessful. The assistant superintendent reports that a school principal went to petitioner's home and nobody was there. A neighbor was to

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have reported that petitioner was still on vacation. As a result, the assistant superintendent and the Board considered that petitioner was absent from school without authorization on March 28, 29, 30, 31, and April 3, 1978 and petitioner had five days salary deducted together with being issued a formal reprimand. (R-17).

These background facts, essentially undisputed, except as otherwise noted, form the basis upon which the Board acted on June 16, 1982. Obviously, the factual issues in dispute are whether petitioner used inappropriate language as heretofore described, to his pupils; whether Ronchetti articulated the words in January 1982 as recorded by the principal (R-8), or, as she testified at hearing, whether the principal prepared an inaccurate record and a complete fabrication of the facts as she related them to him (P-3). But, the ultimate issue is whether upon the facts as presented here, the Board had a reasonable basis upon which to find good cause for the withholding of petitioner's salary increment for 1982-83.

DISCUSSION

The applicable statute in respect of a board of education withholding a salary increment is N.J.S.A. 18A:29-14 which states:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment *** of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within ten days, to give written notice of such action, together with the reasons therefore, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him***

Initially, it is noted that the ten day period for a board to provide an deffected member with reasons was addressed by the Commissioner in James Martin v. Northern Highlands Regional Bd. of Ed., 1977 S.L.D. 886, aff'd State Board 1978 S.L.D. 1031; rev'd Superior Court of New Jersey, App. Div. Dkt. No. A2119-77, March 13, 1979 (unp.). The Commissioner restored an increment for the reason that the board had exceeded by several months the ten day period for giving reasons. The State Board affirmed that decision. On appeal. the appellate court, in reversing the decisions below, stated:

> The Commissioner of Education set aside the school board's action for failure of strict compliance with N.J.S.A. 18A:29-14 which requires a 'recorded roll call majority vote of the full membership

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> of the board of education' for a withholding of an increment and the giving of written notice of the action and the reasons therefor to the person concerned within ten days.
>
> We conclude that the Commissioner's determination was hypertechnical and that the substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual affected is informed of the reasons for the action, whether before or after the public roll call vote. We regard the intent of the statutory requirement of notice within ten days as being to assure that the individual is apprised of the reasons for the action no later than ten days after the official action.
>
> Under all the attendant circumstances, the notice of reasons in March sufficies. (1979 S.L.D. 852, at 853)

Here, petitioner knew the allegation against him by the pupil's parents went to his asserted inappropriate use of language in the classroom. Petitioner knew, or had reason to know, that the action to withhold his increment on June 16, 1982, as reported to him by the superintendent on June 17, 1982, was predicated upon that complaint and the subsequent investigation by the principal. However, that leads to the question of whether the Board had a reasonable basis for its factual conclusion that petitioner did, in fact, use inappropriate language in his classroom.

In Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 295-296 (App. Div. 1960), the court stated

> Under this view of the substantive law, the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion ***

Accordingly, the issue before me is whether the Board had a reasonable basis upon which to believe that petitioner did, in fact, use inappropriate language in his classroom, to pupils, and, accordingly, did not earn a salary increment for 1982-83. It is clear that, at best, the Board had the hearsay reports of pupils, of teachers, of the principal, and a synthesis of all that information as provided it by the superintendent. It is apparent that the Board relied upon the superintendent's conviction that the principal accurately recorded what the pupils said to him, as well as Ronchetti in the original meeting, and it is also clear that the superintendent was persuaded by the principal's conclusion that the pupils should be believed more so than petitioner. The superintendent clearly was not persuaded by petitioner's denial that he did not use language alleged.

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Petitioner contends that the fatal error of the Board was its failure to base its factual conclusion upon a residum of legal and competent evidence. Petitioner contends that the sole basis upon which the Board acted to withhold his increment for 1982-83 is, at best, hearsay and that as such Weston v. State of New Jersey, 60 N.J. 36 (1972) commands that the board's controverted action be set aside. Petitioner also relies upon In re Toth, 175 N.J. Super. 255 (1980) and Tibbs v. Franklin Twp. Bd. of Ed., 114 N.J. Super. 287 (App. Div. 1971), aff'd 59 N.J. 506 (1971) and Brody v. Elmwood Park Bd. of Education, 1980 S.L.D. 13 for the proposition that because the Board's determination in this matter is predicated solely upon hearsay that its controverted action must be set aside.

It must be kept in mind that the nature of the case is whether the Board had a reasonable basis upon which it determined good cause existed for petitioner to be seen as not having earned an increment. A person affected through the application of N.J.S.A. 18A:29-14 by the employing board has no legal entitlement to a hearing before that board prior to the withholding action taking place. Bernards Township Board of Ed. v. Bernards Township Education Ass'n, 79 N.J. 311 (1979). Quite unlike a tenure case where a board carries the burden of proof in respect of tenure charges it brings against an employee, the burden here is on petitioner. Petitioner's reliance upon Tibbs is misplaced for the proposition that he was entitled to confront his "accusers." Tibbs was a pupil in the Franklin Township schools. She was expelled from continued school attendance based solely on the hearsay reports of other pupils without Tibbs being given the opportunity to confront those other pupils. The difference between the Tibbs case and this case is that in Tibbs, a constitutional right was implicated by the board taking action to deprive Tibbs of her right to continued attendance in a public school. Such a constitutional right does not exist for a teacher to lay claim to a salary increment. It is well established that salary increments by teachers must be earned and that there is no entitlement to such a salary increment until the teacher's performance is such that the teacher may be seen to have earned such increment.

The Board contends that under the rule of Weston v. State of New Jersey, 60 N.J. 36 (1972), as applied in In re Application of Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976), it has clearly met its burden, in these administrative proceedings in respect of its basis upon which it took its controverted action. The Board contends that under the In re Application of Howard rule, petitioner could have called the pupils involved to testify at hearing to disprove his use of inappropriate language. The Board

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reasons that his failure to call such students leads to a logical inference that the testimony of the students would be harmful to petitioner.

It must be borne in mind that the standard of review on an increment withholding matter is as articulated by the court in Kopera, supra. There, quite clearly, the standard is whether, upon such review, it is determined that the Board, in the first instance, had a reasonable basis for its factual conclusion. To the extent that the Board did not have the opportunity of seeing and hearing the pupils who purportedly made statements in respect of petitioner's use of language, there is no need for petitioner to call such pupils at hearing. Accordingly, no inference, as argued by the Board, is drawn adverse to petitioner because of the absence of pupils testifying before me. The question is whether the Board, in the circumstances of the information it had before it, acted reasonably to conclude petitioner used inappropriate language.

In Weston, the Court noted that

> It is not possible to state a hard and fast rule as to the extent hearsay may be utilized in evaluating the sufficiency of the evidentiary basis of a particular administrative determination. Suffice it to say that much may be left to the discretion of the administrative official who should be aware of the principle which warrants reception of hearsay, as well as the qualification thereon that the decision should not be predicated on hearsay alone. On judicial review, in deciding whether the evidence in its totality sustained the administrative conclusion, naturally the same rule of admissibility would apply. Of course, more sensitive awareness should be expected of a court weighing the combined probative force of the relevant hearsay and the relevant competent evidence. 60 N.J. at 50-52.

The rule of In re Howard does not apply in this case. There, the Howard Savings Bank was initially applying for a license before the Department of Banking to operate a branch location. Several persons objected. The Bank's application form contained hearsay. Objectors refused to accept the truth of the contents the application, and the Bank refused to call the persons who prepared the doc nt as witnesses. The court ruled that to the extent objectors knew the individuals whose statements were included within the application, they, the objectors, could have called those persons as their witnesses before the administrative hearing before the Department of Banking. Because the objectors did not call such persons, the court ruled that "***objectors had ample opportunity to test the disclosed evidence for trustworthiness and accuracy, but failed to do so. Their voluntary failure to avail themselves of existing

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avenues of inquiry cannot serve as a ground for claiming a violation of procedural due process ***" at p. 6. In the instant case, petitioner, as already noted, is not legally entitled to a hearing before the Board prior to an increment withholding action. Accordingly, the Board may, as part of its managerial prerogative, make determinations whether teaching staff members have "earned" a salary increment for the subsequent school year. An appeal by a teacher from an adverse decision by a board in this regard is limited to whether or not the Board itself had a reasonable basis upon which to make such a determination. The Board here did not provide petitioner with a "hearing." Consequently, there was no opportunity before the Board for petitioner to have called such adverse witnesses as the pupils.

The facts in this case disclose that during the early part of January 1982 the parents of a pupil enrolled in petitioner's class complained to the superintendent that petitioner was using inappropriate language. After the superintendent directed the principal to conduct an investigation, the principal informed petitioner of the nature of the charge against him. Petitioner denied the allegation, though not having the opportunity of seeing anything in writing. The principal talked with two co-teachers of petitioner and recorded what he believed to be their statements in respect of inappropriate language used by petitioner. I am not persuaded by Ronchetti's repudiation at hearing that she did not state that other teachers use language worse than petitioner or that she knows that "damns" and "hells" are being said by petitioner and others. According to the principal, he recorded that statement, after a 20 minute meeting with petitioner. Petitioner, of course, did not see that purported statement until sometime in May 1982 when petitioner himself confronted her. I believe that under the circumstances, it is more probable than not, that at the time of the incident in January 1982 Ronchetti did make such statements to the principal. I arrive at that conclusion after considering the relative interests of the principal, Ronchetti and petitioner in the matter. The principal does not appear to have any interest in this litigation other than performing his duties as the school leader. Ronchetti is a co-teacher of petitioner and, when confronted by petitioner in May 1982, it is more probable than not that Ronchetti would, in a sense of loyalty, disclaim having said anything that in any way could be seen to support the allegations against petitioner. Ronchetti's demeanor on the stand while she testified was such that I had the sense she was forcing her testimony.

In any event, the principal conducted an investigation, over several weeks, by speaking with the pupils in petitioner's one classroom. Petitioner's complaint that the

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allegation against him is curious in that it stems only from one classroom, is without merit. The only complaint lodged against petitioner in respect of his language comes from that one classroom. Keeping in mind that petitioner has already denied the use of inappropriate language to the principal on January 15, 1982, the principal, having spoken with each of ten youngsters in petitioner's class, recorded what he describes in a forthright manner the statements made by those pupils. It is curious that petitioner, on the one hand, denies the use of inappropriate language in the classroom while simultaneously at a meeting conducted in March 1982, at which he, his representative, the principal, and the assistant superintendent were present, would reply to the allegation that he would have to be an "asshole" to use such language. Petitioner did not dispute that that was his reaction at that meeting. True, the Board, more probably than not was not aware of that reaction by petitioner at the time it withheld its salary increment. That reaction, in light of his denial, does go to his credibility in respect of the use of language in his classroom.

This action, quite unlike other increment withholding actions, is unique in that the entire basis for the Board's action is hearsay. I am aware of the residum rule requiring a residum of legally competent evidence at N.J.A.C. 1:1-15.8 which provides at (b)

> Notwithstanding in the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

The rule, it seems to me, must be applied in this circumstance in a reasonable fashion. Public schools exist to serve the pupils of our state. A school principal is charged with the responsibility for administering the school in his charge. When the principal receives a complaint from a parent that a teacher is using inappropriate language in a classroom, the principal must, in large measure, seek to talk with pupils in the particular class. Surely, no reasonable teacher would use language other than appropriate language in the presence of a supervisor or, in this case, a principal. To the extent that the principal acts in good faith, without bias, or improper influence the principal's findings as the result of his investigation may be afforded deference. This is not an unusual event in the day to day operation of public schools. It may be noted that principals are called upon to investigate complaints from parents, from pupils, from other teachers, and from their superiors in respect of either teachers, pupils or other employees of the board.

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The superintendent, in his reliance upon the judgment of his principal, concluded that the principal conducted his investigation in a good faith manner, without bias or improper influence. The superintendent also had the opportunity of confronting petitioner in respect of the allegations made against him. At that time, the superintendent, attaching weight to the principal's investigative reports based on pupil interviews, saw that while petitioner did not use four letter words connoting sexual intercourse in the classroom, the principal believed that he did use words such as "jerk", "idiot," "a pain in the ass," "fags," "stupid," "shit," and "assholes." The superintendent, deferring to the judgment of the principal, concluded that petitioner more probably than not used such words in his classroom, notwithstanding petitioner's denial. To the extent the Board of Education placed reliance upon the superintendent's judgment of the principal's good faith investigation, it acted to withhold petitioner's salary increment ostensibly on the basis that he did not earn such increment.

Though the allegations of inappropriate language by petitioner is supported solely by hearsay, the reason for an increment withholding action need only be supported by a showing that the Board had a reasonable basis to take the controverted action. There is no need to prove, by a preponderance of credible evidence, that the allegations against petitioner are true. To do so, would convert an increment withholding action into a tenure case and, accordingly, shift the burden of proof to the Board. Such is not the purpose of an appeal to the Commissioner under the provisions of N.J.S.A. 18A:29-14. The Board accorded weight to the judgment of the superintendent and to its principal and it concluded reason existed to believe petitioner did, in fact, use such language. The underlying support for the principal's judgment is his investigation of the matter in respect of the pupil interviews he conducted, together with the original statement of Ronchetti and Kauffman. Under these circumstances, and upon the principle that the Board need not prove the truth of the allegations against petitioner while petitioner must show that he earned the withheld salary increment, I find that petitioner failed to show that he earned the controverted salary increment and I further find that the Board had, in all the circumstances, a reasonable basis to take this controverted action.

I **CONCLUDE** that petitioner failed in his proofs to show that the Board violated the provisions of N.J.S.A. 18A:29-14 upon the finding that petitioner failed in his proof to show that the Board did not have a reasonable basis upon which to take its controverted action. The petition of appeal is **DISMISSED.**

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

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

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

Sept. 17, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept 21, 1983
DATE

Ronald L Parkerfeld
OFFICE OF ADMINISTRATIVE LAW

bm

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MICHAEL S. COLAVITA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions to the initial decision herein by Judge McKeown contends that the judge's conclusion miscomprehends the legal requirement for the burden of proof. Petitioner states that he bore the burden of proof of his claim by producing the only competent legal evidence herein as testimony from himself and W.S., Jr., a pupil testifying on his behalf pursuant to subpoena. Petitioner relies on Tibbs, supra, contending that he was not accorded his right to face witnesses and question them. Petitioner argues that the statements of the children involved are all hearsay and that their accuracy and validity are seriously in question and challenges the credibility findings of the judge.

The Board in reply exceptions agrees with the judge that there is no law that gives any person the right to a hearing before a board of education in an increment withholding case. The Board agrees with the judge of the inapplicability to this matter of the principles enunciated in Tibbs, supra. The Board affirms the credibility determination made by the judge herein as the trier of fact. So, too, does the Commissioner. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) The Commissioner finds merit in the arguments of the Board and adopts them as his own.

In the opinion of the Commissioner, petitioner's attack on the veracity of the children involved herein whose statements were deemed to be opposed to petitioner is inappropriate, petitioner having failed to subpoena them as witnesses. Further, petitioner's stance in support of the testimony of the pupil, W.S., Jr., as legally competent evidence is misplaced. The record shows clearly that the pupil twice lied under oath. (Tr. II-7, 14)

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The Commissioner is constrained to question the legality of the exact phraseology of the action taken by the Board herein set down in full:

> "At the special public Board meeting held on Wednesday, June 16, 1982, the Board voted to deny your annual increment for the school year 1982-83. This denial is to be permanent in the subsequent years of employment in the Hillsborough Township Public School System." (R-2)

By so doing the Commissioner stresses that the right of the Board to withhold an increment is not questioned. However, the action of the Board purporting to bind future boards in this matter is improper; each board must reach its own determination. The Commissioner so holds.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

NOVEMBER 3, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1369-83
AGENCY DKT. NO. 41-2/83A

BOARD OF EDUCATION OF THE NORTH ARLINGTON SCHOOL DISTRICT, NORTH ARLINGTON HIGH SCHOOL, HARRY STEINER, SUPERINTENDENT OF SCHOOLS AND ANTHONY BLANCO, AS PRINCIPAL OF NORTH ARLINGTON HIGH SCHOOL AND INDIVIDUALLY AS A RESIDENT, CITIZEN AND TAXPAYER OF THE BOROUGH OF NORTH ARLINGTON,
Petitioners,

v.

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION AND ROBERT F. KANABY,
Respondents.

APPEARANCES:

Glenn T. Leonard, Esq., for Petitioners
(Checki and Politan, attorneys)

Michael J. Herbert, Esq., for Respondents
(Stern, Herbert and Weinroth, attorneys)

Record Closed: August 26, 1983 Decided: September 26, 1983

BEFORE JAMES A. OSPENSON, ALJ:

When North Arlington High School, an accredited secondary school of the Borough of North Arlington, Bergen County, and a member of the New Jersey State

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Interscholastic Athletic Association (NJSIAA) and the Bergen County Scholastic League Olympic Division, received a resident student on September 8, 1982 on transfer from a parochial high school located within the Borough and allowed him immediately to play on its interscholastic high school football team, in particular in a league game on September 25, 1982 less than 30 days from date school opened on September 8, 1982, NJSIAA, after a hearing, determined and declared forfeit North Arlington High School's league game on September 25, 1982 by reason of the resident transfer student's ineligibility under Article V, §4K(2) of the Bylaws of the NJSIAA, Constitution, Bylaws, and Rules and Regulations, governing member schools, which requires for student eligibility "expiration of 30 calendar days during the school year. . ." Alleging Article V, §4K(2) to be arbitrary and unconstitutional facially and as applied, and alleging further any 30 day "school year" eligibility should have been measured not from September 8, 1982 but from July 1, 1982, beginning of the school year as defined under N.J.S.A. 18A:36-1, North Arlington sought judgment of the Commissioner of the Department of Education under N.J.S.A. 18A:11-3 so declaring, reinstatement of eligibility, and reversal of game forfeiture. NJSIAA denied allegations of the petition of appeal.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on February 14, 1983. An answer was filed there on February 24, 1983. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on March 1, 1983 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference scheduled in the Office of Administrative Law on April 21, 1983 was adjourned at request and/or with consent of the parties. On notice thereafter, a prehearing conference was held in the Office of Administrative Law on May 10, 1983 and an Order entered. It was noted therein §7, 8, 10, 12, and 13 of Count I of the petition were admitted. Exhibits marked by the parties as J-1 through J-9 were stipulated as part of the evidential record. It was noted the resident transfer student (D.S.) registered for admission to North Arlington High School on August 1, 1982. It was determined all matters at issue should be addressed and resolved as if on cross motions for summary decision pursuant to N.J.A.C. 1:1-13.1 et seq. on pleadings, admissions, stipulated documentation and memoranda of law, examination and cross-examination of witnesses having been

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waived. The parties were to file and serve initial proposed findings, conclusions, memoranda of law and replies thereto by June 30, 1983. Thereafter, all such submissions having been completed by August 29, 1983, the record closed.

As established at prehearing, at issue in the matter were the following:

a. Whether Article V, §4K2 of the Bylaws is arbitrary or unconstitutional facially and/or as applied;

b. Whether the phrase "school year" therein shall be construed and/or applied herein to mean July 1, 1982 (and July 1 annually) under N.J.S.A. 18A:36-1; or, instead, to mean the time the academic year opened after general summer vacation on September 8, 1982 (and annually as established by the district) under N.J.S.A. 18A:1-1 and N.J.S.A. 18A:36-2; and

c. If then appropriate, whether relief shall be given as sought.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and stipulated, I make the following findings of fact:

1. Petitioner Board of Education of North Arlington is a duly constituted school district whose boundaries are coterminous with the Borough of North Arlington.

2. North Arlington High School is a duly accredited secondary school and is a member of NJSIAA and the Bergen County Scholastic League Olympic Division.

3. Petitioner Harry Steiner is Superintendent of the North Arlington public school system. (T14-L-13-14).

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4. Petitioner Anthony Blanco is principal of the high school and a resident, citizen and taxpayer of the Borough of North Arlington (T14-L-15-16 and T17-L-25, T18-L-1-5).

5. A student, D.S., registered with the school on August 1, 1982 as a transfer student from Queen of Peace High School, a parochial secondary school also located in the Borough of North Arlington, and commenced class on September 8, 1982 in Grade 12 (T18-L-6-15).

6. There is no evidence of recruitment and D.S. was in fact not recruited. The required waiver form indicating there was no recruitment was signed by principals and athletic directors of both schools and as required by NJSIAA rules was filed (T18-L-16-23, J-3).

7. D.S. participated in football practice with the high school's varsity football team since September 1, 1982 (T18-L-23-25).

8. D.S. resided at all times relevant herein in the Borough of North Arlington and is not emancipated (T19-L-1-2).

9. A member school (St. Mary's) brought to the attention of NJSIAA that D.S. played before October 8, 1982, a date 30 days after the first day of schoo' attendance by D.S. (T19-L-1-7).

10. NJSIAA, by letter dated October 29, 1982, advised the high school that D.S. was not eligible until 30-calendar days after the first day of classes; to wit: October 8, 1982, relying upon Article V of the Bylaws of NJSIAA, §4K(2). (T19-L-8-14).

11. D.S. was properly enrolled in school and otherwise eligible except for expiration of the 30-day period. (T19-L-15-18).

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12. D.S. played in a varsity football game for the high school against St. Mary's on September 25, 1982. He played in no other games prior to October 8, 1982, sitting out the next game after the high school received notice the position of NJSIAA was he was ineligible during that period of 30 days. He sat out the second game against Emerson. (T19-L-15-25, T20-L-1).

13. The NJSIAA Executive Director advised the high school in writing it must forfeit any interscholastic athletic event in which D.S. participated before October 8, 1982. (T20-L-1-5, J-6).

14. A hearing was held before the NJSIAA Executive Committee in which petitioners participated. By letter dated November 24, 1982, Robert F. Kanaby, Executive Director of NJSIAA, advised the high school the Executive Committee had denied its appeal. Denial of its appeal affected the varsity football team's record and its standing in the Bergen County Scholastic League Olympic League Division Conference. (T20-L-6-8, J-9). Its record went from 6-1-1 to 5-2-1.

15. The 30 day ineligibility period was imposed pursuant to Bylaw because NJSIAA determined D.S. transferred from one secondary school to another without a change of residence of his parents and without assignment by the board of education. See Article V, §4K(1) and (2).

DISCUSSION I

The full text of Article V, §4K of NJSIAA Bylaws concerning transfers is as follows:

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Transfers - After his/her initial enrollment in a secondary school, as provided for in Article V §4G(2) of the Bylaws, a student is subject to the following transfer rules:

(1) A student who transfers from one secondary school to another because of a bona fide change of residence by his/her parents or guardians, or through assignment by the Board of Education, becomes eligible to represent his/her new school immediately upon entrance. A student who becomes emancipated shall be deemed not to have made a bona fide change of residence absent proof that the change of residence was compelled by circumstances beyond his/her control.

(2) A student transferring from one secondary school to another, except for the cases provided for in Paragraph (1) of these transfer provisions shall be eligible after the expiration of 30 calendar days during the school year provided that both principals and athletic directors sign an appropriate waiver form indicating that there has been no recruitment.

(3) A student whose parents move to another school district maintaining a secondary school of equal grade or higher shall remain eligible to represent his/her present school provided he/she remains properly enrolled; any subsequent transfer will be subject to Paragraph (2) of this section.

(4) The fact that a student is expelled from one high school because of academic or disciplinary reasons may not exempt him/her from any of the transfer provisions of this section.

(5) Any evidence of recruitment by a member school shall subject the athlete to a prompt determination of eligibility by the Eligibility Committee and may subject the athlete and the school to appropriate disciplinary proceedings as set forth in Article X herein.

(6) Any evidence of a transfer for athletic advantage shall subject the athlete to a prompt determination of eligibility by the Eligibility Committee and may subject the school and the athlete to appropriate disciplinary proceedings as set forth in Article X herein. A transfer for athletic advantage is defined as, but not limited to,

(a) seeking a superior athletic team:

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(b) seeking relief due to a conflict with the philosophy or action of an administrator, teacher or coach relating to sports;

(c) seeking a team consistent with a student's athletic abilities; or

(d) seeking a means to nullify punitive action by the previous school.

Sanction of forfeiture here, it is clear, was imposed by NJSIAA because the transfer student was permitted by North Arlington to participate in interscholastic athletics before expiration of 30 days from the day school opened on September 8, 1982. In so doing, NJSIAA interpreted the phrase "school year" in Article 5, §4K(2) to signify a 30-day ineligibility period beginning not July 1, 1982 but September 8, 1982, date when school opened. Petitioners argued, primarily, such construction and interpretation of its own Bylaw by NJSIAA contravenes definition of the phrase "school year" in N.J.S.A. 18A:36-1, which provides:

> The school year for all schools in the public school system shall begin on July 1 and end on June 30.

But it does not necessarily follow, in my view, that use of the phrase "school year" in a Bylaw by NJSIAA necessarily and sufficiently imports the definition in school law generally in N.J.S.A. 18A:36-1. General school law, after all, for example in N.J.S.A. 18A:1-1, defines the phrase "academic year" to mean the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation. Rules of the State Board of Education, in N.J.A.C. 6:27-1.13, define the phrase "school year" to mean not less than 180 school days. And general school law, in N.J.S.A. 18A:36-2, empowers and requires local school boards annually to determine dates between which schools of the district shall be opened. In a series of questions and explanatory answers annexed to its own Constitution and Bylaws, on the other hand, NJSIAA has interpreted its own rulings on athletic eligibility to define that part of "school year" as a semester, the first semester beginning

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with opening day of school in September and closing on January 31 and the second semester beginning February 1 and closing with the last day of school in June of each year. See, Question 21, Constitution, Bylaws and Rules and Regulations, at 73; see also, Questions 15, 24 and 35. And eligibility requirements on enrollment note the term "entrance" as used in §4 and elsewhere in the Bylaws means "registration plus actual attendance at a school." Article V, §4G(1).

NJSIAA argued the interpretation the 30-day ineligibility period dated from date school opened, and here on September 8, 1982, is one with rational relationship to policies of its Constitution and Bylaws. First, it was urged, the interpretation discouraged athletic recruitment by precluding transferring students from immediate eligibility at recruiting schools. Secondly, it discouraged students from transferring for athletic advantage, by precluding immediate eligibility. Thirdly, the period allowed receiving schools to verify academic qualifications, age and other transfer criteria. And fourthly, it discouraged movement of students from one school to another within the same district or among schools within geographic area for reasons of personal athletic advantage. All told, NJSIAA urged, stability of enrollment among member schools of the association was encouraged.

In interpretation and construction of phrases in language of associational constitutions and bylaws, it is both helpful and necessary, one is told,[1] to read the entire four-corners of the instrument. In general, Article V, §4K purports to deal with two

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1 See generally concerning intrinsic aids Sutherland, Statutory Construction, (4th ed. 1973, Vol. 2A, §47.01 et seq., at 70 ("One of the common techniques of statutory construction, besides being always a starting point, is to read and examine the text of the act and draw inferences concerning meaning from its composition and structure"); Id.,Vol. 1A., §31.06 at 360 ("When a[n administrative] regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning"); and see In re Plainfield - Union Water Co., 57 N.J. Super 158, 177 (App. Div. 1959).

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classes of student transferees: one class that transfers because of bona fide change of residence by parents (1) and another class transferring for all other reasons (2). In the second class, as here, D.S.'s transfer was not by reason of parental residence change and he thus remained subject to imposition of the 30-day ineligibility period, unlike residence change transfers whose eligibility is immediate upon entrance. Subsection (6) of the eligibility Bylaw, however, deals with the aim of NJSIAA to inhibit and deter transfers for purpose of athletic advantage only. Athletic advantage is defined in the subsection as seeking a superior athletic team, seeking relief due to conflict with philosophy or action of an administrator, teacher or coach, seeking a team consistent with a student's athletic abilities, or seeking a means to nullify punitive action at a previous school. It may be reasoned readily, it seems to me, that athletic advantage in such instances might well be subjective in nature, difficult of proof yet worthy of regulation for the general good of student and school. Automatic imposition of 30-day ineligibility period dating from date school opens, one suspects, would have a reasonable inhibitory and deterrent effect against unfair athletic advantage even in those cases where no recruitment by school officials existed. That is to say, under the general sense of the eligibility rule, unfair athletic advantage ought to be deterred and inhibited to avoid (for want of a better phrase) high school free-agentry, that is, peripatetic team-shopping by students or parents whose subjective aim might be to secure athletic advantage of superior team membership for themselves even without the vice of recruitment by school officials. That effectiveness of such inhibition and deterrence in a 30-day ineligibility period would diminish should the period be construed to begin and perhaps expire before actual opening of district schools in September seems likely. The force of the safeguard, that is to say, would lessen.

On a presumption of rationality, therefore, in absence of evidence in the record that NJSIAA interpretation here was not consistent with its own past practice, and despite a differing definition under general school law in N.J.S.A. 18A:36-1, one cannot say the interpretation is wrong as a matter of law or is arbitrary or unreasonable and may not stand.

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DISCUSSION II

Is Article V, §4K(2) of the Bylaws arbitrary or unconstitutional facially and/or as applied? It may be worthy of remark the Legislature in enacting L. 1979, c. 172 granted statutory authority for local boards of education to join voluntary associations such as NJSIAA (N.J.S.A. 18A:11-3) gave the Commissioner of Education oversight authority to disapprove of amendments to an association's charter, constitution, bylaws, rules or regulations that are contrary to the public interest or intent of the legislature (N.J.S.A. 18A:11-4, 5). Thus, it seems apparent the activities of NJSIAA in sponsoring, administering, regulating and supervising interscholastic athletics in New Jersey constitute state action within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution. Bd. of Ed. of Greater Egg Harbor Regional High School v. NJSIAA, 1983 S.L.D. — Comm'r dec., (August 12, 1983) at 19. The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New Jersey Constitution of 1947 in Article I, Paragraph 1 has been construed to provide analogous or superior protections to New Jersey citizens. See, Peper v. Princeton University Board of Trustees, 77 N.J. 55, 79 (1978). In New Jersey the right to a free public education, while not thus far recognized under the Fourteenth Amendment of the United States Constitution, is nevertheless a fundamental right protected by State Constitution. Piscataway Tp. Bd. of Ed. v. Caffiero, 86 N.J. 308, 323 (1981). And, it would seem, New Jersey public school students have a protected property interest in participation in general in interscholastic athletics under Constitution, statute (N.J.S.A. 18A:11-3,4,5) and regulations of the State Board of Education (N.J.A.C. 6:4-1.5, N.J.A.C. 6:8-3.5, and N.J.A.C. 6:11-3.12). See, Greater Egg Harbor, supra, at 20-23.

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With such principles in mind, and on an unconceded assumption that Article V, §4K(2) is properly construed to mean a 30-day ineligibility period from date school opened on September 8, 1982 until October 8, 1982, petitioners challenge the constitutional sufficiency of the bylaw on equal protection grounds. They argue that upon its face it creates an irrebuttable presumption a student transfer for other than bona fide change of residence is improper and thus arbitrary. They argue Article V, §4K(2) arbitrarily and unconstitutionally discriminates between parochial or private school transfer students and public school transfer students without rational basis, since the former class will more likely have transfer students who transfer for reasons other than change of residence. They argue it fails to distinguish between school districts that have two secondary schools within their boundaries, especially a parochial school and a public school. They argue it discriminates on the basis of wealth since it penalizes students transferring because their parents cannot afford to pay tuition at parochial or private schools and must resort to public school education. They argue the bylaw as applied serves no valid purpose, is unrelated to evils of recruitment and transfer for athletic advantage and is therefore arbitrary.

In A.D.A. Financial Service Corp. v. State, 174 N.J. Super. 337, (App. Div. 1979), the Court said;

> The essence of the Equal Protection Clause under the Fourteenth Amendment of the Federal Constitution, as well as the sometimes even more demanding equal protection guarantees implied in our State Constitution, is that persons situated alike shall be treated alike. Both the state and federal guarantees seek to insure of right equality by forbidding arbitrary discrimination between persons similarly situated. . . These equal protection guarantees do not require the State to treat all persons identically. . . It is, of course, recognized that the Legislature has some leeway in making classification, that mathematical precision is not required, and that policy decisions as to the need for and wisdom of the legislation are properly left to that body and not to the courts. However, equal protection does mandate that differences in treatment not be arbitrary or invidious; that those distinctions which are made be justified by an appropriate state interest, and that they bear a real and substantial relationship to furthering governmental [or associational] ends. [text added in brackets].

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> In equal protection analysis, "courts must reach and determine the question whether the classifications drawn in a statute [or associational bylaw] are reasonable in light of its purpose". . . . In determining whether a classification is reasonably related to the basic objective of the legislation [or associational bylaw] or to some relevant consideration of public policy, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. This determination as to the reasonableness of the classification must be made even when no suspect classifications have been drawn and no fundamental interests have been infringed. [text added in brackets] [citations omitted] at 347,348.

Statutory waiting periods as pre-conditions for welfare eligibility were attacked on federal equal protection grounds in Shapiro v. Thompson, 394 U.S. 619, 89 Sup. Ct. 1322, 22 L. Ed. 2d 600, 612-19 (1969). In that case, the United States Supreme Court struck down three state statutes restricting delivery of welfare assistance only to families with one year prior state residency, saying such statutes created two classes of potential recipients, an invidious discrimination against those of the class without it. The result, it was held, was abridgment of equal protection and due process clauses of the United States Constitution because of, among other things, a chilling effect on liberty to travel, a fundamental constitutional right. The classifications simply were not shown to be necessary, the Court said, to promote compelling governmental interests.

Article V, §k(1-6), the full bylaw here at issue, seems on analysis to create and treat differently two classes of transfer students. The first, those who transfer because of a bona fide change of residence by parents, are eligible to participate in interscholastic athletics immediately upon entrance to the transfer school. The second, those not so transferring because of residence change, must await expiration of a 30-day eligibility period and must file appropriate recruitment waiver forms. The discernible purpose for the differentiation, one may suggest, is avoidance of transfer for "athletic advantage", as defined in Article V, §4K(6), that is to say (for want of a better phrase), high school free-agentry as suggested above. It is reasonable to conclude the authors of the eligibility bylaw deemed parental residence change transfers to be those not likely to be made for such athletic advantage. The ineligibility period imposed is but 30 days and is thus disqualifying for less than all of the usual full seasons of fall interscholastic sports.

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Inhibition and deterrence of transfers for athletic advantage, moreover, one may suggest, is reasonably consistent with associational objects as recited in Article II, §1-5 of the NJSIAA Constitution (at 21).[2] And thus distinction between the two classes created may be said to further appropriate associational interests and, to that extent, is not arbitrary. The effect on New Jersey interscholastic athletics of construction and application of the Bylaw here, lastly, one may venture, while presumably inhibitory of unfair athletic advantage, cannot reasonably be said to have a chilling effect on any underlying or fundamental rights of transfer or rights to immediate eligibility upon entrance for participation in interscholastic athletics. In short, Shapiro criteria have not been met here, nor, indeed, in my view, does the bylaw facially or on the evidence otherwise invidiously discriminate against them as petitioners have argued.

CONCLUSION

Accordingly, based on the foregoing, having considered findings, admissions, stipulations and documentary evidence of record, as well as memoranda of law by the parties, I hereby **CONCLUDE** as follows:

1. Article V, §4K(2) of the Bylaws of NJSIAA is not unconstitutional facially or as applied;

---

[2] Article II, OBJECTS, provides:

Section 1. To foster and develop amateur athletics among the secondary schools of the State.

Section 2. To equalize athletic opportunities by standardizing rules of eligibility for individuals, and classifying for competitive purposes the institutions which are members of the Association.

Section 3. To supplement the physical education program of the secondary schools of New Jersey by making a practical application of the theories of physical activity.

Section 4. To promote uniformity in the arrangement and control of contests.

Section 5. To protect the mutual interests of the members of the Association through the cultivation of ideals of clean sport in their relation to the development of character and good citizenship.

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2. The phrase "school year" therein was properly construed and/or applied herein to mean the time the academic year opened in the North Arlington school district on September 8, 1982 (and annually thereafter as established by the district);

3. Such construction and application is reasonable and consistent with associational objects as contained in Article II of the NJSIAA Constitution;

4. The action of NJSIAA in its determination that D.S. was ineligible under the Bylaw and its determination that North Arlington High School should forfeit any athletic event or contest in which D.S. appeared prior to October 8, 1982 was reasonable and proper and should be **AFFIRMED**;

5. The petition herein seeking reversal of such action, reinstatement of eligibility of D.S. and reinstatement of game forfeiture should be, and is hereby, **DENIED**;

6. The petition herein, therefore, should be, and is hereby, **DISMISSED**.

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

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OAL DKT. NO. EDU 1369-83

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

September 26, 1983
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

9/28/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 29, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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LIST OF EXHIBITS

J-1 New Jersey State Interscholastic Athletic Association Constitution, Bylaws, and Rules and Regulations, 1982-83

J-2 Transcript of proceedings before NJSIAA Executive Committee conducted on November 15, 1982

J-3 Transfer Waiver Form for student D.S. as executed by school officials of North Arlington High School and Queen of Peace High School on September 30, 1982

J-4 Letter of Robert F. Kanaby, Executive Director of NJSIAA, to principal of North Arlington High School, dated October 15, 1982, asking report of findings on participation of D.S. in varsity football game prior to October 8, 1982

J-5 Letter of principal of North Arlington High School to NJSIAA, dated October 19, 1982, containing findings and reporting as requested

J-6 Letter of NJSIAA to principal of North Arlington High School, dated October 29, 1982 declaring ineligibility of D.S. to participate prior to October 8, 1982 in interscholastic game and declaring event forfeit

J-7 Letter of North Arlington High School principal to NJSIAA requesting appeal of declaration of forfeiture of interscholastic game on September 25, 1982

J-8 Letter of NJSIAA to North Arlington High School principal, dated November 9, 1982 advising appeal on agenda of Executive Committee meeting of November 15, 1982

J-9 Letter of NJSIAA to North Arlington High School principal, dated November 24, 1982, advising Executive Committee at their meeting on November 15, 1982 after hearing all testimony in appeal of forfeiture of football game against St. Mary's High School of Rutherford, denied the appeal

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BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON ET AL., BERGEN COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the instant matter as well as the initial decision rendered by the administrative law judge. The Commissioner notes that petitioners submitted exceptions pursuant to N.J.A.C. 1:1-16.4(a) and respondent submitted reply exceptions pursuant to N.J.A.C. 1:1-16.4(c). The Commissioner further notes that petitioners submitted a rebuttal to respondent's reply exceptions for which there is no basis in the rules. Consequently, said reply to the reply exceptions shall not be considered herein.

Petitioners object to the finding of the ALJ that the term "school year" as utilized by the NJSIAA in its bylaws may be defined in such a manner as to be considered synonymous with the academic year for purposes of defining the 30 day period of time in which a pupil who transfers from a parochial school to a public school must remain ineligible. Petitioners contend that "school year" may not be defined in any way other than it is defined in N.J.S.A. 18A:36-1, namely as beginning on July 1 and ending on June 30. Petitioners further challenge the judge's application of a presumption of rationality to said bylaw contending that the judge's determination that said application was consistent with the past practice of the NJSIAA. Petitioners contend that the past practices of NJSIAA were not part of the record in the instant matter and therefore should not be subject to such interpretation by the judge. Petitioners further contend that notwithstanding the interpretation that may be placed upon the term "school year," the judge's finding that Article V, Sec. 4K(2) of the NJSIAA's Constitution and Bylaws serves to discourage athletic recruitment and transfers for athletic advantages is without basis in fact.

In summary, petitioners' further exceptions argue that the above-cited article is unconstitutional since it inhibits free participation in interscholastic athletics which are part of the right to a free public education as guaranteed by the New Jersey Constitution. Said article claim petitioners, is also discriminating and without a rational basis since it discriminates against transfers of parochial and private school students who transfer for reasons other than parental change of residence.

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Petitioners contend that the above-cited bylaw also discriminates on the basis of wealth since it penalizes pupils who transfer from private to public schools because the parents cannot afford to pay tuition particularly as it relates to such tranfers from parochial or private schools within the confines of the same municipality, as was the case herein.

Petitioners also argue that the judge erred in not recognizing that by merely electing to attend the public school of his residence, D.S. was in fact being "assigned" by the Board to such school as a matter of right and therefore was not required to wait the 30 day period before being eligible for participation in interscholastic competition.

Finally, petitioners challenge the assumption made by the judge that transfers because of changes of residency on the part of parents are less likely to be motivated for reasons of securing athletic advantages while transfers without change of residence are more prone to be made for such purpose. Petitioners challenge the rationality of said assumption and further contend that the NJSIAA rule in question lacks a rational and valid basis and merely operates to deny a pupil his or her fundamental right to participate in interscholastic athletics.

In rebuttal to petitioners' exceptions, respondent urges adoption of the judge's reasoning contending that the conclusions reached by the judge relating to the meaning of "school year" as utilized in Article V, Sec. 4K(2) are not inconsistent with existing statute and regulation. Further, respondent urges the Commissioner to find that the 30 day waiting period required by NJSIAA is not arbitrary or capricious and is designed to achieve a legitimate end, nor is it considered to be discriminatory in nature. Finally, respondent urges rejection of the argument presented by petitioners that attendance by D.S. at the public high school of his residence does not constitute a transfer as contemplated by the NJSIAA rule herein controverted but, instead, constitutes assignment by the board making the 30 day waiting period as required by Article V, Sec. 4K(2) inapplicable. In support of such rejection, respondent cites the Commissioner's decision in Northern Highlands Regional High School District v. NJSIAA, decided January 20, 1983.

In reviewing petitioners' exceptions herein and the reply exceptions entered by respondent, the Commissioner notes that each of the arguments raised by petitioners, except such argument as relates to the issue of whether D.S.'s enrollment in the school district of his residence constitutes an "assignment" by the local board of education, was clearly and more than adequately addressed by the judge. Consequently the Commissioner affirms the findings of the judge and adopts them as his own. The Commissioner further finds the argument raised by respondent relative to the Commissioner's findings in Northern Highlands, supra, to be convincing and likewise adopts the same in the instant matter.

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Petitioners' requested relief is hereby denied and the Petition of Appeal herein is accordingly dismissed.

COMMISSIONER OF EDUCATION

NOVEMBER 14, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 9697-82
AGENCY DKT. NO. 380-9/82A

JAMES D. HANSEN,
Petitioner
v.
RUNNEMEDE BOARD OF EDUCATION,
Respondent.

APPEARANCES:

John E. Collins, Esq., for petitioner (Selikoff & Cohen, attorneys)

Kenneth D. Roth, Esq., for respondent (Davis & Reberkenny, attorneys)

Record Closed: August 15, 1983 Decided: September 29, 1983

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

The ultimate issue in this case is whether petitioner established his claim of tenure of employment under N.J.S.A. 18A:28-5, notwithstanding the lack of an appropriate certificate, by the invocation of the doctrine of equitable estoppel. Petitioner contends that under the facts of this case, he has acquired a tenure status and that the Board is estopped from justifying its improper termination of his employment on the grounds he did not possess an appropriate certificate. The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A hearing was conducted in the matter on July 11, 1983 at the Runnemede Borough Municipal Building, Runnemede. The record closed August 15, 1983.

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BACKGROUND

During 1971, petitioner received a bachelor of arts degree in psychology from Kutztown State College and, in 1972 Kutztown awarded him a master's degree in counselling. While he was working on his master's program, petitioner applied for and received from the Pennsylvania Department of Education a provisional certificate as a secondary guidance counsellor (P-1). That certificate, issued November 1972, was valid for three years. On the strength of that Pennsylvania certificate he applied for and was appointed as a guidance counsellor with the Kennett Consolidated school district, Kennett Square, Pennsylvania for 1972-73 and 1973-74.

After two years with the Kennett Square schools, petitioner was appointed as guidance counsellor for 1974-75 by the Black Horse Pike Regional Board of Education. After he was employed at Black Horse Pike, he subsequently moved his residence at some uncertain date from Kennett Square to West Deptford. Petitioner applied for a New Jersey student personnel service certificate, N.J.A.C. 6:11-12.13, in September 1974 which would authorize him to serve as guidance counsellor. The Bureau of Teacher Education and Academic Credentials (Bureau), New Jersey Department of Education, which reviews and approves applications for certificates, issued petitioner a provisional student personnel services certificate during March 1975. (P-3) A provisional certificate is a substandard certificate issued to persons who, but for some deficiency in academic training or experience, are qualified to teach in the area stated on the certificate. The Bureau, the evidence shows, does not submit certificates to individual applicants. Rather, the practice is that when the Bureau approves an application for a specific certificate, it sends the certificate to the local superintendent of schools, together with a notice to the county superintendent of schools in which the specific school is located. If the certificate the Bureau issues is substandard, as here, the Bureau will notify the local superintendent in writing of the specific deficiencies, together with submitting to the local superintendent a copy to be sent by him, the local superintendent, to the affected applicant.

In petitioner's case, the Bureau sent his approved provisional student personnel services certificate to the local superintendent at Black Horse Pike Regional, together with a notice of deficiency, which petitioner was required to correct before he would be eligible for a regular student personnel services certificate (P-4). It should be noted that a provisional certificate is valid only for a specific period of time, while a regular

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certificate is valid without time limit. The Bureau determined, and so advised the Black Horse Pike Regional superintendent, that petitioner

> *** is eligible for a provisional student personnel services certificate which we are issuing.
>
> For the regular certificate, he will need to complete a course in the area of methods of teaching to complete the professional course work for a teacher's certificate. In addition, he will need to serve one year satisfactorily under the provisional student personnel services certificate, in order to satisfy the required year of teaching experience. (P-4)

Petitioner's employment at Black Horse Pike Regional ended on or about April 15, 1975 when he submitted his resignation to the Board. The Black Horse Pike principal, by petitioner's own admission, informed him that if he remained as guidance counsellor through the conclusion of the 1974-75 year he would be eligible for a regular student personnel service certificate so long as he completed a course in methods of teaching. Petitioner apparently was not persuaded by the Black Horse Pike principal, for he left that Board's employ on April 15, 1975.

Subsequent to petitioner's departure from the Black Horse Pike schools, the Black Horse superintendent sent, by regular mail to petitioner's then last known address in West Deptford, his

> *** original Provisional Student Personnel Certificate which was received by my office. Also enclosed are the instructions [P-4] for holders of sub-standard certificates.
>
> The evaluation attached [P-4] to the certificate will explain what course work you will need to complete for a regular certificate in Student Personnel work. (P-2)

Petitioner explained that he did not receive the foregoing correspondence because he had moved from his West Deptford address to a Philadelphia address and, consequently, the correspondence was mailed to the wrong address. Curiously, petitioner did not notify either the Bureau of Academic Credentials, nor the Black Horse Pike officials, nor the Camden County superintendent of schools, nor did he advise the post office of a forwarding address.

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When petitioner resigned the employ of the Black Horse Pike board, he continued teaching at the Camden County Community College where he had been simultaneously employed. Petitioner says he discovered the correspondence from the Black Horse superintendent when, in preparation for this hearing, he returned to the Black Horse schools and reviewed his personnel file. He discovered that that communication was returned to the Black Horse schools from the post office as undeliverable.

Between 1975 through 1977, petitioner was employed in Pennsylvania as a psychologist, counsellor, and therapist, in addition to employment at the Camden County Community College. On July 13, 1977 petitioner submitted an application to the Board for employment as guidance counsellor. Petitioner was interviewed by the principal and the superintendent on August 23, 1977. It is noted that on petitioner's application, he failed to mention the fact of his prior experience with the Black Horse Pike Regional Board during 1974-75. Petitioner explained that he deliberately omitted reference to that employment because he felt it was a negative experience. Though petitioner testified it was he who finally explained to the principal his Black Horse Pike experience the principal testified that after petitioner was employed by the Board, he happened to learn of that prior experience during an unrelated conversation with the Black Horse Pike Regional principal. In any event, it is clear that as the result of petitioner's application, together with his interview with the principal and superintendent, petitioner was employed as guidance counsellor by this Board for 1977-78. The superintendent explained that in respect of offering petitioner employment as guidance counselor, he considered petitioner's experience, his training and his Pennsylvania certificate (P-1) which he believed would be the basis for the issuance of a New Jersey certificate. Petitioner did advise the superintendent that he did not have a New Jersey teacher certificate. The superintendent advised him to secure his New Jersey certificate as quickly as possible. Note that petitioner claimed he was unaware that he had been issued a provisional certificate which was earlier received by the Black Horse Pike Regional superintendent.

The superintendent explained that his secretary performs the ministerial task of assisting teachers, to the extent possible, of securing certificates for the employment positions they hold. In this regard, upon petitioner's employment by the Board the superintendent advised petitioner, by letter dated August 26, 1977, (R-6) of "***various forms to be completed for local, County or State requirements as follows: a. Certification with directions as to procedure***." (R-6)

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Petitioner submitted his credentials to the superintendent's secretary who, in turn, submitted to the superintendent the credentials for his signature as the employing official. The evidence shows that petitioner submitted to the secretary unofficial transcripts of grades received from Kutztown State. Some time in November 1977 the secretary informed petitioner that official transcripts of grades received was necessary. By the time petitioner collected and submitted to the secretary all his credentials, including his Pennsylvania certificate, his official college transcripts, and the application for certification, six months of the 1977-78 school year expired. The superintendent signed, as the employing official, petitioner's application for certification on February 13, 1978.

On March 27, 1978 an evaluator from the Bureau advised the superintendent, and the Camden County superintendent of schools, in respect of petitioner's application for certification that

> Before taking any further action in this case, can the applicant present a valid certificate in the field of guidance for the State of Pennsylvania, and can he present official evidence of three years of guidance experience completed under that certificate? (R-3, P-13)

Petitioner denies ever being advised of the existence of that request, or of the contents of that notice. The superintendent, to the contrary, testified that he did bring the contents of the notice to petitioner's attention; that he explained to petitioner the deficiencies noted; and, that he instructed petitioner to take corrective action. However, the superintendent cannot recall specific details of that conversation other than he is positive he did inform petitioner of the contents of the notice. The superintendent's secretary testified that as a matter of practice, she submits all such notices to the superintendent and subsequently files the matter in the teacher's file. The secretary gives the teacher his/her copy of such notice by hand delivery, regular mail box, or teachers' mail box delivery.

It is noted that petitioner and the Board each submitted a copy of the Bureau evaluator's memorandum of March 27, 1978. The Board's submission (R-3), in the lower left hand corner of the document, states "(local district)". Petitioner's submission (P-13) states in the lower left hand corner, "(applicant)." Obviously if petitioner had possession of the Bureau evaluator's memorandum to submit at hearing than such possession, absent

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explanation to the contrary, implies he knew of the existence of the Bureau's request as far back as 1978. That being so, his testimony at hearing by which he denies being advised of the request would be inaccurate. Petitioner's explanation in this regard is that in preparation for the hearing, he was granted permission by the superintendent to review his personnel file. That review was made in the presence of an administrative assistant. Petitioner's position is that he discovered the memorandum (P-13) in his file with an envelope attached to it. He asked the administrative assistant to make a copy of the document and that he received from the administrative assistant a copy of the document with the insertion "applicant" on it. Petitioner testified he wrote on the copy received "copy from personnel file." He did not, however, receive a copy of the envelope. Ostensibly, the envelope was incorrectly addressed to a former place of petitioner's residence, and not to his then current address. To the contrary, the administrative assistant testified that the copy of the document he made and gave to petitioner was the document R-3, with the notation "local district" in the lower left hand corner. The administrative assistant, in fact, wrote "copy given to Mr. Hansen 5-14-83" on the document, R-3, he copied for petitioner. Finally, the administrative assistant testified that he recalls no envelope attached to the document, nor is there such an envelope presently in his file.

Petitioner successfully completed the 1977-78 year as a guidance counsellor in the Board's employ. He was reemployed for 1978-79 and, upon his return in September 1978, he testified he inquired of the secretary the status of his certificate. The secretary advised petitioner not to worry about his certificate, and that she will check with the county superintendent of schools. However, petitioner testified the secretary never got back to him. The secretary explained that she can recall speaking with petitioner of his certification and that she did explain to him that from time to time delays in the processing of applications occur. However, the secretary cannot recall how many times petitioner inquired of her as to the status of his certificate. Petitioner, to the contrary, specifically testified that during September 1978 he inquired of her at least three time as to the status of his certificate and that he was always reassured by her that if a problem existed, either the county superintendent of schools or the Bureau would advise him. Petitioner successfully completed the 1978-79 year as a guidance counsellor in the Board's employ and he was reemployed for 1979-80. No mention was made to him by anyone of his certificate, or the lack thereof, during 1979-80, nor in 1980-81.

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Petitioner was reemployed by the Board as guidance counsellor for 1981-82. Simultaneously, petitioner was taking courses at Glassboro State College. He testified that he determined he wanted to acquire a master's degree in supervision. A Glassboro College counsellor told petitioner he needed a regular certificate as a prerequisite to be enrolled in that program. Petitioner explained that because he wanted to enroll in that master's program, he looked further into the matter of why he did not have his certificate in his possession. Petitioner contacted not his local superintendent, but the Camden County Superintendent of Schools office. There, he spoke with a Ms. Urban who said she would look into the matter for him. Ms. Urban advised petitioner, in writing, on January 19, 1982, that for him to receive his New Jersey certificate he was required to submit official evidence of three years experience and a copy of his Pennsylvania certificate. Petitioner testified that when he received this writing, he contacted the superintendent and his secretary, both of whom informed him they did not have a copy of his certificate. Furthermore, the superintendent, in response to petitioner's query, advised petitioner that whatever problems may exist with his certificate was solely his problem to correct.

Petitioner advised Ms. Urban, who in turn advised the Bureau, that he had already submitted a copy of his Pennsylvania certificate. In response, the Bureau advised the superintendent and the county superintendent, on March 25, 1982, as follows:

> Please be advised that the March 27, 1978 evaluation [of petitioner's credentials P-13] asked for a valid certificate in guidance from the State of Pennsylvania and three years of guidance experience completed under that Pennsylvania certificate.
>
> The certificate currently on file is no longer valid, also, the experience submitted was completed under a provisional New Jersey Student Personnel Services certificate. This does not permit for any change in the evaluation. *** (P-6)

As the result of that advice, petitioner contacted Ms. Urban, who in turn contacted a Bureau examiner. It appears petitioner was disputing whether his experience acquired under the New Jersey provisional certificate and/or under the Pennsylvania certificate was countable towards the experience requirement for a New Jersey regular certificate. The Bureau examiner, on May 12, 1982, advised the superintendent and the county superintendent of schools, as follows:

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> Based on information now on file, [petitioner] will need to satisfy the professional course work requirement for a teacher certificate and present official evidence of one year of successful experience under the provisional certificate which was issued to him, to qualify for a regular Student Personnel Services certificate.
>
> For the professional course work requirement for a teacher certificate under the present rules, he will need to present the following:
>
> A course in methods of teaching
> Six credits or two courses in reading
>
> If one of the reading courses in taken in methods of teaching reading, it will also satisfy the methods requirement. He should present a statement from the school district in which he served under a provisional student personnel services certificate for the experience requirement.*** (P-7)

At the suggestion of the Camden County Superintendent of Schools office, petitioner contacted a Bureau examiner, other than the one who declared that petitioner's "certificate currently on file is no longer valid" (P-6). This second examiner advised petitioner on May 12, 1982 as follows

> Based on information now on file, [petitioner] will need to satisfy the professional course work requirement for a teacher certificate and present official evidence of one year of successful experience under the provisional certificate which was issued to him, to qualify for a regular Student Personnel Services certificate.
>
> [Here this second examiner advises petitioner he must take "a course in methods of teaching" and "six credits or two courses in reading" and, if "one of the reading courses is taken in methods of teaching reading, it will also satisfy the methods requirement."] (P-7)

In the meantime, however, the superintendent, sometime during April 1982, distributed employment contracts in school for 1982-83. Petitioner contends he was then advised by the superintendent that unless he secured his regular certificate, he would not receive an employment contract for 1982-83. Petitioner did enroll at Glassboro State College on June 1, 1982 for the courses he was told by the Bureau he had to complete in order to receive a regular certificate.

The superintendent brought petitioner's lack of certificate to the attention of the Board. Upon proper notice to petitioner, (P-15) (P-16) the Board considered

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petitioner's reemployment for 1982-83 on June 30, 1982. In the meantime, the superintendent, with Board counsel assistance, submitted a report to the Board dated June 25, 1982 in respect of petitioner's history in its employ. (R-5) That report recounts that petitioner failed to reveal on his application the fact of his employment at Black Horse Pike Regional, and that petitioner was issued a New Jersey provisional certificate during 1974-75 which he did not report on his employment application form. In conclusion, the report advises the Board as follows:

> Mr. Hansen's file includes several letters and evaluations over the past four years from the State Board of Examiners that inform him that he has not properly complied with certification requirements. These communications were usually presented along with verbal advice from me to get the problem corrected.
>
> At present I have withheld his letter of intent for the coming year and have informed him that re-employment is in jeopardy.
>
> The latest evaluation from the State dated June 8, 1982, indicates that he has satisfied the experience requirement but must take two additional courses in reading to finally qualify for Student Personnel Services Certificate. Mr. Hansen has submitted a letter from Glassboro State College confirming his registration for the courses this summer ***

By letter dated July 1, 1982 the Board advised petitioner that "***your employment has been terminated as of September 1, 1982***" (P-17). The underlying resolution by which the Board terminated petitioner's employment proffers the basis for such action that petitioner has not acquired the proper certificate for his position as guidance counsellor in its employ. Petitioner was issued his regular Student Personnel Services certificate during September 1982 subsequent to the successful completion of the course requirements (P-18).

DISCUSSION

Petitioner anchors his claim of tenure, and violation thereof by the Board, on the grounds that he, at no time, had knowledge he was not in possession of an appropriate certificate. However, his own testimony shows that as early as 1975 the Black Horse Pike principal, in an effort to dissuade him from resigning, told him that if he finished the academic year he would receive full certification with only one additional course.

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Next, the evidence shows that petitioner changed his residence several times between 1975 and 1979 without notifying the post office of a forwarding address. To the extent the Black Horse Pike superintendent sent petitioner his certificate through the mail to his last known address, but the United States Postal Service returned it as undeliverable, that superintendent met his obligation. Fault, if fault is to be fixed, rests with petitioner for not having received the actual provisional certificate which was issued him in 1975 by virtue of his failure to notify respective authorities of his change of address.

Petitioner's credibility is found lacking based on his prior withholding of relevant information on his application for employment to this Board in respect of his prior experience at Black Horse Pike Regional. That that experience was, as he says, "negative" and that he resigned prior to the completion of the contract year, makes that information more relevant on an application for employment to another Board. And, the principal's version that he discovered that fact through an unrelated conversation with the Black Horse Pike principal is more persuasive than petitioner's testimony that he brought that fact to this principal's attention.

Petitioner, upon initial employment with this Board, was advised by the Superintendent of the need to secure certification as soon as possible. Curiously, petitioner, in response, initially submitted unofficial transcripts of grades received, as opposed to official transcripts. It is difficult to discern why petitioner, a well-educated person with a master's degree, would attempt to submit to State authorities an unofficial document in an attempt to secure an official document. No evidence exists to persuade me to believe that the superintendent, or superintendent's secretary, led petitioner to believe he could rely on unofficial transcripts.

In respect of the Bureau's notice of deficiency dated March 28, 1978 (P-13; R-3), if petitioner, in fact, discovered his copy in his personnel file during his review in 1983 prior to hearing, it is curious that all he did was to ask the administrative assistant to make him a copy nor did petitioner ask for a copy of the envelope. A more direct approach, in the circumstances which petitioner describes, would have been to immediately confront the superintendent and his secretary to inquiry why his copy, marked "applicant," was not given him in 1978. There is no evidence that such an inquiry was made by petitioner.

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This case is remarkable in that petitioner was employed by this Board from 1977-78 through 1981-82 without once having been required by the superintendent to produce an appropriate certificate for the position he held. The superintendent apparently was content to rely upon petitioner's submission of an application for certification in February 1978. Even the Bureau's advice in March 1978 that additional documenation was necessary did not cause the superintendent to demand of petitioner production of an appropriate certificate. That the then required additional documentation has since been declared no longer necessary does not erase the fact that as early as March 1978 the superintendent was signaled that additional documentation had to be submitted by petitioner in order to be properly certificated. There is no evidence that the superintendent ever followed up with petitioner in respect of whether petitioner complied with that demand. The evidence does suggest that whenever certification was brought up by petitioner, he received assurances that his application was probably being subject to delay. Yet, petitioner served as guidance counsellor with this Board for five years without being in possession of an appropriate certificate.

FINDINGS OF FACT

I find the following facts established by a preponderance of credible evidence:

1. Petitioner has been employed by the Runnemede Board as guidance counsellor between 1977-78 through 1981-82 without having been in possession of an appropriate certificate. Petitioner knew in the spring 1975 that he was deficient in course work for a regular certificate because he admits the Black Horse Pike principal told him so.

2. Petitioner knew as early as March 1978 that the Bureau was requesting additional documentation from him. I find that petitioner did, in fact, receive a copy of the Bureau's notice of deficiency, 13, on or about March 1978. I am persuaded by the administrative assistant's testimony that he gave petitioner a copy of that memorandum, identified as R-3, which is the "local district" copy. Petitioner, not having acquired the document from the administrative assistant, had to have possession of that document on a prior occasion.

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3. Petitioner's efforts to ensure that he possessed the appropriate certificate for the position he held consisted of his inquiries to the superintendent's secretary. Not until some time in 1981-82 when he decided to acquire a master's degree in supervision from Glassboro State College did petitioner earnestly attempt to determine the status of his application for a certificate.

4. The superintendent failed to ensure that petitioner possessed an appropriate certificate in respect of his continued employment for 1978-79, 1979-80, 1980-81, and 1981-82.

5. Upon petitioner making direct contact to the Bureau, through the Camden County Superintendent of Schools, in respect of his application for a certificate, he learned of the precise deficiencies which prevented a regular certificate being issued him. Those precise deficiencies were finally determined to be education courses he was required to complete.

6. The superintendent, having learned during the spring 1982 that petitioner was not eligible for certification, determined that the matter was sufficiently serious to bring it to the attention to the full Board.

7. Though petitioner enrolled at Glassboro State College for courses in which he was deficient for a certificate, and the superintendent knew of that enrollment, he brought the matter to the attention of the Board in late June 1982.

8. As the result of the superintendent's report to the Board, the Board took action to terminate his employment effective September 1, 1982.

9. Petitioner successfully completed his courses at Glassboro and was awarded his certificate sometime during September 1982.

10. Petitioner, whenever he inquired of the superintendent secretary as to the status of his application for certificate during all relevant times herein, was advised that his application was probably being subject to delay and that he should not be concerned over that delay.

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DISCUSSION OF LAW

Petitioner contends that within the facts of this case he has acquired a tenure status in the employ of the Board and that the Board violated that tenure protection contrary to the provisions of N.J.S.A. 18A:6-10.

N.J.S.A. 18A:28-5 provides, in pertinent part, as follows:

> The services of all teaching staff members *** and such other employees as are in positions which require them to hold appropriate certificates issued by the Board of Examiners *** shall be under tenure during good behavior and efficiency *** after employment in such district or by such board for:
>
> ***
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year***

N.J.S.A. 18A:6-10 states:

> No person shall be dismissed or reduced in compensation,
>
> (a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of this state ***

Though petitioner admits he was not in possession of a regular certificate for the position he held with the Board until September 1982, he asserts that the Board, by the actions and conduct of its agent, officer and employee, is estopped from terminating his employment on the grounds he failed to possess such a certificate at any time prior thereto. Petitioner contends that the very fact the superintendent and the superintendent's secretary, by their failure to bring to his attention deficiencies in respect of his application for a certificate, induced him to believe that he was properly certificated. Petitioner further contends that by the superintendent's silence, together with the silence of the superintendent's secretary, the Board is equitably estopped from failing to reemploy him for 1982-83.

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Petitioner cites a series of decisions by the Commissioner of Education which announce the rule that eligibility for, not actual possession of, a certificate is sufficient for employment as a teaching staff member. The cases cited by petitioner include Fulton v. Bd. of Ed. of the City of Long Branch, 1980 S.L.D. ____ (Oct. 17, 1980) aff'd St. Bd. (Feb. 4, 1980); Kane v. Bd. of Ed. of the City of Hoboken, 1975 S.L.D. 12; and, Givens v. Bd. of Ed. of Newark, 1974 S.L.D. 906.

It is well established that the right of tenure does not come into being until the precise conditions laid done in the tenure statute have been met. Zimmerman v. Bd. of Ed. of City of Newark, 38 N.J. 65 (1962); Ahrensfield v. State Board of Education, 126 N.J.L. 543 (1941). It is also established that teachers without proper teaching certificates in full force effect are not entitled to tenure. Schulz v. State Bd. of Ed., 132 N.J.L. 345 (1945). More recently, it has been held that a substantial qualification for tenure as a teaching staff member, which petitioner as guidance counsellor is considered, is that the position require a teaching certificate issued by the Board of Examiners. Hamilton Tp. Supplemental Teachers Ass'n v. Hamilton Tp. Bd. of Ed., 18 N.J. Super. 321 (1981), aff'd and remanded 90 N.J. 63.

N.J.S.A. 18A:27-2 prohibits the employment of any teaching staff member who is not, or has ceased to be, the holder of an appropriate certificate required for such employment. The State Board of Education, pursuant to its rule making authority at N.J.S.A. 18A:4-15, adopted N.J.A.C. 6:11-3.2 which provides:

> Any contract or engagement between a board of education and a teacher shall cease and determine and be of no effect against said board whenever said board shall ascertain by notice in writing received from the county or local superintendent, or otherwise, that said teacher is not in possession of a proper teacher's certificate in full force and effect ***

Clearly, one of the precise conditions required to be met by those who claim a tenure status is the possession of an appropriate certificate. It is also clear that petitioner did not possess an appropriate certificate during his years of employment with this Board and that he did not acquire such a certificate until September 1982 after his termination of employment was effective. I recognize that the Commissioner has held on prior occasions that eligibility for a certificate is the essential ingredient in respect of possessing an appropriate certificate, as oposed to the actual physical possesion of such certificate. However, in this case, petitioner did not become eligible for a certificate

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until he successfully completed the courses at Glassboro State College sometime during the summer 1982. The question then emerges whether his prior service with the Board between 1977-78 through 1981-82 is countable towards his claim of tenure. I conclude that such service may not be counted for tenure accrual.

In Sydnor v. Englewood Bd. of Ed., 76 S.L.D. 113 it was stated that

> The procuring of certification is the primary responsibility of a teacher. It is also the responsibility of the Superintendent to insure that all teaching staff members are either certified or apply in timely fashion for appropriate certificates. Such delay as exhibited herein encompassing a period of years, contrary as it is to the statute and rules of the State Board, is abhorent to the Commissioner. Nevertheless, such inexcusable delay does not create for petitioner a valid claim to tenure. Id. at p. 117.

The doctrine of equitable estoppel is simply not applicable. Petitioner knew as early as the spring 1975 that he was deficient in course work for regular certification. Recall that petitioner testified that the Black Horse Pike principal attempted to dissuade him from resigning and encouraged him to finish the year so that with two more courses he would be eligible for full certification. Consequently, petitioner had knowledge prior to his commencement of employment with this Board that his application for a certificate was deficient. When the deficiency was originally noted, by way of successful teaching experience under a valid certificate, during March 1978 by the Bureau examiner, and it has already been found that petitioner received notice of that deficiency, petitioner then was charged with the responsibility of taking whatever steps were necessary to acquire a regular certificate. It is unreasonable to believe that petitioner, having the knowledge of his deficiency in respect of a certificate, would rely upon the superintendent's secretary's words of assurance that his application was probably being subject to delay. The delay, if inaction by the Bureau can be characterized as delay, was the direct result of petitioner failing to comply with the Bureau examiner's March 1978 notice of additional documentation necessary. As noted by the Board, estoppel should only be invoked where the conduct of the party against whom it is to be used reasonably mislead another to his prejudice. Miller v. Bd. of Trustees of the Teachers Pension and Annuity Fund, 179 N.J. Super. 473 (App. Div. 1981). It is clear in this record that the superintendent took the position with petitioner that petitioner was responsible to secure his certificate. Petitioner seeks to find comfort in the secretary's advice to him that his application was being subject to delay. Petitioner knew, however, at the time the secretary was stating

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the application was subject to delay that the delay was caused by the deficiencies in the documentation petitioner himself submitted to the Bureau. Such facts do not give rise to the application of the doctrine of equitable estoppel. But, that is not to say that in proper circumstances an estoppel against the Board may not be applied. These are not proper circumstances.

In sum, I find petitioner has not met the statutory requirements for the acqusition of a tenure status in the Board's employ by virtue of his failure to possess an appropriate certificate during any period of his employment with the Board and I further find that the doctrine of equitable estoppel is not applicable to the Board in this case. The petition of appeal is DISMISSED.

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

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

9/29/83
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

9/29/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

October 3, 1983
DATE

Ronald L. Lankenau
OFFICE OF ADMINISTRATIVE LAW

fms

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JAMES HANSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUNNEMEDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions to the initial decision by Judge McKeown contends that the judge erred in finding that petitioner knew of his certification deficiencies as early as the spring of 1975 and, further, on March 1978. Petitioner claims that he did not enroll in the course which the Black Horse Pike principal (Cappelli) told him he would need because he no longer wished to pursue New Jersey employment and certification. Upon his employment in Runnemede petitioner claims to have received continued reassurance from the Superintendent's secretary that he had no worry about his certification. Petitioner argues that the judge unfairly found his credibility to be lacking due to his failure to list experience in the Black Horse Pike District on his application for employment in Runnemede. Petitioner claims that this information was never kept secret by him and was never a problem to the Board and its administrators. Petitioner claims never to have received a copy of the State Board of Examiners' deficiency notice (P-13). Petitioner contends that the judge erred in not finding the equitable doctrine of estoppel to be applicable herein.

The Board in reply exceptions argues that petitioner knew in the Spring of 1975 of his course work deficiency for a regular certificate. Further, the Board states that petitioner by his own testimony on cross-examination knew he needed the course, Foundations of Education. The Board refutes petitioner's argument that his credibility was unfairly attacked by the judge because he failed to list his prior New Jersey experience on his resume. The Board claims that petitioner deliberately omitted the experience on his resume and such experience was inadvertently discovered by the Runnemede principal. The Board states there is ample testimony and evidence that petitioner received a copy of the State Board of Examiners' deficiency notice (P-13). The Board points to the conflicting appearance of R-3 and P-13 supported by the testimony of the administrative assistant. The Board affirms the judge's finding

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that the equitable doctrine of estoppel was not applicable to the instant case. The Board points to the fact that petitioner held no certificate nor was he eligible for one during his period of employment or until he completed the courses necessary to meet the4requirements at the end of the summer of 1982. The Board states that accordingly when petitioner was terminated, its action was a proper one. The Board states that at no time did it or its administrators attempt to mislead petitioner or refuse to give his credentials proper consideration. The Commissioner finds merit in the Board's arguments and adopts them as his own.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

NOVEMBER 14, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 11079-82
(OAL DKT. NO. EDU 6467-82 ON REMAND)
AGENCY DKT. NO. 226-6/82A

KENNETH GRIECO,
Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWN OF NUTLEY, ESSEX COUNTY,
Respondent.

APPEARANCES:

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

Rodney T. Hara, Esq., for respondent
(Aron, Till & Salsberg, attorneys)

Record Closed: July 13, 1983 Decided: October 5, 1983

BEFORE JAMES A. OSPENSON, ALJ:

Kenneth Grieco, a tenured mathematics teacher employed by the Board of Education of the Town of Nutley, Essex County, filed suit against the Board in 1980 to determine legality of his 1980-81 Professional Improvement Plan (PIP) and his 1980-81 summary evaluation and, further, to compel the Board to remove from his personnel file

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the PIP and the summary evaluation, to provide a proper PIP and summary evaluation and to reassign him to teach classes having a variety of student learning levels. The Board filed an answer in general denial with affirmative defenses.

The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law in the usual manner for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Under OAL Dkt. No. EDU 5620-80, the matter was settled by the parties before an administrative law judge, who approved the settlement, and it was in turn approved by the Commissioner on December 21, 1981.

Thereafter, petitioner filed a second petition of appeal before the Commissioner alleging the Board failed to honor terms of the settlement and seeking enforcement of it by the Commissioner. That matter was transmitted to the Office of Administrative Law for hearing and determination as a contested case, which under OAL Dkt. No. EDU 6467-82 resulted in a determination by an administrative law judge that the settlement agreement, being the product of an error as to a material fact, should be set aside and the parties restored to status quo ante. The original petition, as amended, together with the Board's answer, was ordered reinstated for hearing. The Commissioner affirmed the findings and determination of reinstatement of petition on December 15, 1982. Accordingly, the entire matter as originally instituted was transmitted to the Office of Administrative Law by the Commissioner on December 23, 1982 for hearing and determination in the usual way under OAL Dkt. No. EDU 11079-82.

On notice to the parties a prehearing conference was conducted in the Office of Administrative Law on January 17, 1983 and an order entered establishing, inter alia, hearing dates for April 28, and 29, 1983. The matter proceeded to hearing and was concluded. Post-hearing submissions and transcripts of testimony having been completed by July 13, 1983, the record closed then.

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EVIDENCE AT HEARING

Testifying for the Board, Max Kletter said he has been employed by the Nutley Board and has been chairman of its mathematics department at the high school since 1961-62. He holds the B.S. degree in mathematics from Brooklyn College and the M.A. in guidance from Rutgers University. He has the standard secondary instructional certificate issued in 1953 and the supervisors' and principals' certificates issued in 1960.

Guidelines for submitting professional improvement plans in the Nutley district, he said, were developed with teacher input for the 1980-81 school year. R-3. Under the guidelines, it is said, teachers who choose to submit professional improvement plans for consideration may do so but the principal or supervisory officer shall "judge the merit of teacher-initiated plans and may accept or reject them." After a second plan rejection, teachers who have exhausted reconsideration rights through the building principal may request the principal take all responsibility for writing the plan. The principal's decision, however, as to nature and purpose of the plan and as to its evaluation was to be final as provided by law, and professional improvement plans would become part of a teacher's annual evaluation. Before adoption of the guidelines, Kletter said, a model plan including provision for professional "needs" and "improvement action" was submitted to teachers for their consideration.

According to Kletter, petitioner submitted his proposed PIP on March 11, 1980. P-12. Hand-written by petitioner, its text was as follows:

> I shall continue to participate in professional development activities provided by the district under the terms and conditions of the collective bargaining agreement applicable to my position.

Kletter found it, and so endorsed it, as "unacceptable." He said he felt petitioner's plan fell short of guidelines on every count. Kletter pointed to other examples of teacher-initiated PIP's as acceptable to him, for example, R-5. Kletter

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said he talked to petitioner after rejection of petitioner's PIP between March and April 1980. Kletter said he again outlined what was needed and told petitioner he was looking for self-criticisms and constructive remedial suggestions. Kletter said petitioner made no response and neither agreed to resubmit a plan nor say he refused to resubmit one. By April 15, 1980, Kletter said, he decided he must submit his own PIP for petitioner. P-13. Its opening statement observed petitioner had, at times, undergraded his students. It noted that in an effort to help petitioner formulate a more realistic grading policy consistent with that of the Nutley High School math department, it was suggested petitioner consult with his supervisor on a regular basis until tangible improvement became indicated. It was recommended petitioner submit all tests and scales to Kletter as department supervisor for examination at least three days prior to administration. It was recommended petitioner submit all raw score distributions by subject to Kletter for analysis before translating into numerical grades. It was finally recommended petitioner consult with Kletter prior to completion of each marking period grade distribution. Petitioner's own PIP for the following year, 1981-82 (P-16), duplicated that for 1980-81 (P-12). Kletter felt it too was unacceptable. At a meeting held March 5, 1981 with petitioner and Kletter, the 1981-82 PIP submitted by petitioner was said to have been found unacceptable. P-18.

Kletter said he drafted and submitted a "Point of View" (P-4), some twenty years ago, explaining the purpose of the track system in the mathematics department. The five-track mathematics program allows for sequences custom-made for college-bound students down through groups of students with no college plans. All students in all groups, the plan noted, would be provided with learning experiences suitable to their own needs, interests and abilities. Program flexibility permitted rectification by transfer to other tracks when necessary. Otherwise, homogenous grouping and therefore relative benefit to students, was fostered through individual selection and correction. In higher tracks, Kletter said, there should be a greater distribution of higher grades while in lower tracks there was to be expected a greater distribution of lower grades. Grading philosophy throughout the department, Kletter said, was that when all grades or tracks were totaled together, there should result a bell-shaped curve. All courses in a single-track, however, he said, would not show such a bell-curve because of various levels of skill.

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Kletter said he advised petitioner of grading policy and had done so in the department since the 1960's. Since 1976 Kletter said, he used petitioner's evaluations to communicate such policies to him. R-1a through e.

Exhibit P-6, Kletter said, was a study he made in 1977-78 to illustrate to petitioner his grade distributions were out of line with departmental philosophy. He took all of petitioner's geometry class students and compared their grades to a previous teacher's grades. Kletter's conclusions were there was likelihood petitioner's students would get 55 percent lower grades in geometry and 52 percent lower grades in basic geometry courses. Petitioner's course assignments for 1978 were changed because of Kletter's dissatisfaction with petitioner's performance in grading.

Exhibit P-5, said Kletter, was petitioner's grade distributions for the third quarter 1979-80. In that year petitioner taught a regular mix of basic Algebra and Algebra II courses. Grade distributions in the third quarter showed 70 percent D's and 40 percent E's, that is, 50 percent D's and E's. Kletter said that performance upset him because he thought he had had an agreement with petitioner for more realistic grading. Kletter had said petitioner would be reassigned into a regular mix of track if grading distribution was improved. The observed result, Kletter said, was higher than other teachers. Kletter expected a 20-30 percent grade distribution of D's and E's, with a 75 percent distribution of A's, B's and C's. In petitioner's class, Kletter concluded, a student was twice as likely to get an E.

In R-12, petitioner's grade distribution for 1981-82 showed general acceptable distribution and an improvement over similar statistics in 1979-80.

In Kletter's opinion, petitioner's reactions to criticism were surly. Petitioner had had two stock reactions, Kletter said, to grade distribution criticisms or other criticisms such as transfer problems: (1) the problems did not exist; or (2) the statistics supporting the criticisms were invalid.

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Kletter said over the years there were numerous parents' requests for student transfers from petitioner's classes, usually for reasons of students' nervousness about petitioner's tough grading policies. Ultimately, said Kletter, he felt petitioner's grade distribution policy was indefensible. Petitioner had more requests for transfer of students from his classes than all other teachers in the department put together. Those concerns were referred to in petitioner's summary evaluations over the years. R-1a through e. To those criticisms, however, Kletter said, petitioner never responsibly responded.

Kletter said it was the responsibility of a department chairman to assign teachers to classes. There was no Board policy. Kletter said he tried to assign teachers in his department to a mix of classes best suited for them but with final criterion being what was best for the students. He would try to satisfy students' needs first of all and then teacher preference.

In his teaching assignments for petitioner for 1980-81, Kletter said, which involved a 1-4 mix of one general math course, two basic Algebra I courses, and two basic Algebra II courses, Kletter considered the problem of his dissatisfaction with petitioner's grade distributions. As a result, he said, he was unable to assign petitioner to Algebra II, in order to protect students from lower grades, lower that is, than what other teachers might likely give such students. He took into consideration that in the previous school year petitioner had failed, in his judgment, to live up to an agreement he and petitioner had that grade distribution remained unimproved in the third quarter of the 1979-80 school year.

Responding to what petitioner charged was Kletter's "selective analysis" of grade distributions by the petitioner, Kletter said he was of the opinion statistical analysis showed the chances of students' getting D's or E's were twice as high for petitioner's students as for students in other classes. Kletter felt petitioner was too blithe in

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accepting fail rates of 60 to 70 per cent. His purpose in monitoring petitioner's testing for 1980-81, Kletter said, was to help petitioner to see this shortcoming himself.

In response to the monitoring request of Kletter, petitioner submitted on March 12, 1981 a distribution of basic Algebra I grades for the quarter showing 60 percent of 45 students received grades of D and E while only 40 percent received grades of A, B or C. When Kletter asked why, petitioner responded "Why not?" R-9.

Petitioner, Kenneth Grieco, testified he is tenured and has been employed by the Nutley Board of Education as a math teacher since 1959. He holds a standard instructional secondary certificate and a principal's certificate. He holds the B.A. in mathematics from Montclair State College 1958, and received an M.A. in mathematics 1964.

Petitioner said he submitted to Kletter, his department chairman, his PIP on March 11, 1980. P-12. As indicated above, the one sentence submission was petitioner's undertaking "to continue to participate in professional development activities provided by the district under the terms and conditions of the collective bargaining agreement applicable to my position." It was returned to him by Kletter as "unacceptable." Subsequently, petitioner said he received Kletter's PIP prepared for him. P-13. Petitioner disagreed with the prepared PIP and referred it to his attorney. The result was petitioner's letter in rebuttal in which he asked it be attached to the PIP. P-14. It set forth the substance of petitioner's disagreement with Kletter's conclusions. Petitioner said he recalled no talks with Kletter regarding his PIP as disagreed to. He said he had the right to have it added to his PIP. He said he did not seek Kletter out to discuss the action because of N.J.E.A. rules and regulations. Concerning the asserted unusually high percentage of low grades, petitioner said he never had any talks with Kletter concerning the percentage of low grades. He denied knowing any standards used by Kletter to arrive at his judgment. He said Kletter never explained his rationale in 1980-81. In April or May of 1980, petitioner said, he asked Kletter to discuss his assignments for 1980-81. Kletter told him then, petitioner said, his grades were out of line. Because of low grades, it was said, some students were not getting into colleges of their choice. Petitioner said Kletter

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said he would never teach Algebra II again. Petitioner said he suggested waiting until the fourth marking period to determine final grades, since the fourth marking period grades were usually higher, as was distribution of A, B, C and D, because final examination grades helped quarterly grades.

Referring to the five-track policy in P-4, petitioner said it accommodated students depending on what they were preparing themselves for. The first track was for general math students with no expectation of college attendance. The upper tracks, on the other hand, were designed for more difficult courses for college-bound students. Petitioner understood that in track I there would be few A's and B's, in the middle tracks there would be more C's, D's and E's, and in the upper tracks normal grade distribution would see very few C's and almost all A's and B's.

In 1979-80, petitioner said, his class assignments were in three tracks in a 2-2-1 ratio. In 1980-81, he was assigned four courses from track II and one course from track I. Exhibits P-7 through 10 showed grade distributions for the years 1978-79. Exhibit P-10 showed petitioner's final grade distributions during 1978-79. Exhibit P-5 showed petitioner's third quarter grade distributions for 1979-80. Countering Kletter's analysis of petitioner's grade distributions, petitioner submitted his own chart analysis of the various courses he taught from 1978-80. Exhibits P-21 through 30. In petitioner's analysis, petitioner's grade distribution of D's and E's were in the middle of the group of math teachers whose records were contrasted. The course was basic Algebra I for 1978-79. In P-23, covering general math for 1978-79, according to petitioner, the same was true. In Exhibit P-30 covering Algebra II final grade distributions of D's and E's for 1979-80, according to petitioner, his percentage was below department average. Under petitioner's analysis, he said, it was shown that 90 percent of the time for 1979-80 he gave a grade equal to or higher than the final grades in the department. P-31.

Concerning his proposed PIP submitted to Kletter on March 11, 1980, petitioner said, its text was on recommendation of N.J.E.A. Petitioner admitted knowledge, however, of the definition of a Professional Improvement Program in N.J.A.C. 6:3-1.21(h)3:

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> Individual professional improvement plan is a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timeliness for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan.

Concerning mix of classes assigned, petitioner said the normal mix from the five-track system would involve a 1-2-2 ratio of class assignments. Generally, teacher preparations would be needed for lesson plans for each course. Until 1980-81, petitioner said he had only three such preparations. For 1980-81, he said, his assignment was 1-4, that is one general math class from track I and two basic Algebra I and two basic Algebra II courses from track II. That assignment involved three preparations. For 1982-83, he said, his class assignments involved four preparations for assignment to one general math course in track I, two basic Algebra II courses in track II, two regular Algebra II courses in track III and one accelerated Geometry class in track V.

Exhibit P-15 was petitioner's performance evaluation of March 13, 1981. Petitioner's rebuttal to his February 13, 1981 PIP submission (P-16) was P-19, dated March 26, 1981, which was submitted after consultation with his attorney. Petitioner said the adverse criticism contained in his March 13, 1981 performance evaluation (P-15) in that he was "surly" was issued after petitioner's petition of appeal was filed and pending before the Commissioner. He said it was a retaliation.

As set forth in P-18, Kletter made an analysis of the questioned grade distribution of D's and E's in petitioner's courses. Petitioner's response that Kletter invalidly compared all courses instead of comparing sections of the same course.

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Article XV of the negotiated agreement in force in the district for the periods in question between Nutley Education Association and the Nutley Board of Education, which concerns complaint procedure, was marked as Exhibit P-32. Petitioner insisted he was never told of any complaints against him concerning transfers, as for example in P-15, and never had discussion with the principal about transfers except on one occasion.

Concerning petitioner's response to Kletter's query on March 12, 1981 why 60 percent of petitioner's students' basic Algebra I classes received D's and E's, to which petitioner responded "Why not?", the following cross-examination developed at hearing on April 29, 1983 (2T19-9 to 21-24):

Q. Looking at the 3/12/81 document, is it not true that the percentage is 60 percent?

A. Yes.

Q. And 60 percent - -

THE COURT: Of what?

MR. HARA: D's and E's.

Q. Is it not true that the 60 percent firgure caused Mr. Kletter some concern?

A. Yes, it did.

Q. Is it not true that the document seeks an explanation of why 60 percent?

A. That's correct, and I responded to it.

Q. And how did you respond?

A. I said there are many reasons.

Q. What else did you say?

A. I put, "Why not," and I expected an answer from him of what are the reasons and to delve into, which he never did.

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Q. But since Mr. Kletter has asked you pursuant to the PIP to compile these documents for the purpose of monitoring your grades and he perceived that this number, in his opinion, was higher than it should be and he asks you why, didn't you feel an obligation to say why and set forth specifically the reason?

A. I didn't know in what detail he wanted me to go into it, and I thought if he really wanted to pursue it, he would have contacted me and I would have told him why.

Q. So you feel "many reasons" was adequate to respond to?

A. Unless he wanted to pursue it further, I didn't know how much detail to go into.

Q. What did you attribute the reason for saying "why not," on the document?

A. Because it's not unusual. We have 50 percent E's in the basic course.

Now we have a combination of D's and E's, and we only have 60 percent.

Q. So if you felt there was nothing unusual and Mr. Kletter raised a concern, why did you not then set forth to substantiate why you had 60 percent D's and E's?

A. Because I did not know what detail he wanted it in.

Q. I would --

THE COURT: You don't think that's an impertinent answer?

THE WITNESS: I didn't--

THE COURT: To a supervisor?

THE WITNESS: I didn't mean it to be impertinent. I just meant there were many reasons why this would occur, and if he wanted to, we could discuss it. If I were to write a paragraph on it, I wouldn't know how long to go on.

I mean, for one reason, there's subject matter. Subject matter is factoring. Students have a lot of difficulty with factoring.

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I honestly thought he would respond to that and we would get together and talk about it. That's my honest opinion. I'm under oath here.

THE COURT: That's right, you are.

THE WITNESS: I do mean it, Judge. I thought he would follow this "why not" and have a discussion with me.

THE COURT: Okay.

DISCUSSION

In the prehearing conference order in this matter, issues were (1) whether the 1980-81 PIP and/or the 1980-81 summary evaluation developed for petitioner were violative of N.J.S.A. 18A:7A-1 et seq. and/or N.J.A.C. 6:3-1.21 et seq. and/or arbitrary, capricious, unreasonable or retaliatory; (2) whether petitioner's 1980-81 class assignments were violative of Board policy or any of his rights under school laws; (3) if so, whether petitioner is entitled to appropriate relief. In post-hearing arguments, petitioner more specifically argued the 1980-81 PIP was violative of N.J.A.C. 6:3-1.21(f), and should therefore be stricken because it was not mutually developed by him and supervisor Kletter. Petitioner argued further his grade distribution percentages were in all respects proper, that Kletter's departmental grading policies were anachronistic and basically flawed and that, finally, petitioner was improperly criticized by Kletter on the basis of "unsubstantiated parental complaints and difficulties in accepting criticism."

In Douma v. Bd. of Ed. of East Brunswick, 1981 S.L.D. —(Comm'r dec. April 22, 1981), a teaching staff member alleged his annual performance had been evaluated contrary to Board policy and to provisions of N.J.A.C. 6:3-1.21 through untimely imposition of objectives on his performance done without his agreement, for which he

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sought their expungement from his personnel records. Petitioner's original PIP submission, in which he undertook to participate in professional development activities provided by district under the terms and conditions of his contract and under which he undertook to continue to participate to the extent it was to him personally desirable and feasible in activities of the New Jersey Association of School Social Workers, was rejected by his supervisor. After conferences and additional resubmissions that did not materially alter petitioner's initial submission, the supervisor rejected it, imposed his own written statement of objectives as petitioner's PIP and petitioner was, thereafter, evaluated in terms of those imposed objectives. The petition of appeal was dismissed, an administrative law judge having said (Id., at 15):

> While it is recognized that boards of education have wide discretionary authority to establish their own rules and regulations under N.J.S.A. 18A:11-1, and that its administrators to a large degree enjoy similar latitude in the day-to-day operation of the schools, administrators may not act with disregard for the honest beliefs of others. While I am not of the view that individual teachers have veto power of individual objectives established for evaluation of their performance, neither I am of the view that individual objectives may be administratively established without an honest consideration of the teacher's view. In either case, the objectives finally selected by which a teacher's performance is to be measured must be reasonably related to the stated purposes of the rule. N.J.A.C. 6:3-1.21 expresses the State Board of Education's policy goal with respect to improvement of instruction afforded pupils. The State Board has specific standards of conduct for administrators and teachers in order to achieve that goal. Petitioner asks relief on the grounds that that specific standard of conduct requires his approval when, in fact, I find that it does not. Petitioner asks the removal from his file of his evaluation in December 1979 because he had not approved his established objectives. Finding there is no requirement for his approval of the objectives, I find no basis upon which to order removal of that evaluation.

From all of the evidence here, I am satisfied petitioner's proposed PIP submission on March 11, 1980 (P-12) was deficient under the spirit if not also the letter of the State Board rule in N.J.A.C. 6:3-1.21(b), (h)3. It is self-evident, it seems to me, that an undertaking "to continue to participate in professional development activities provided by

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the district under terms and conditions of the collective bargaining agreement applicable to my position" hardly qualifies as "a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timeliness for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the [individual professional improvement] plan." N.J.A.C. 6:3-1.21(h)3. Petitioner's avowed disinclination to meet with Kletter after rejection of his PIP, moreover, seems to me to be an abdication of petitioner's professional right of cooperative PIP development. Under the circumstances, petitioner can hardly be heard to complain of administrative imposition of a PIP nor, it follows by extension, can petitioner be heard to complain that his annual summary evaluation proceeded and was conducted using administratively imposed PIP criteria. Such imposition and use would seem entirely consistent with the district's own policy guidelines concerning finality of PIP's being a responsibility of administration: "while it is expected that plans will be developed cooperatively between the teacher and the [department chairman], the [latter's] decision will be final as to the nature and purpose of the plan and the evaluation of the plan (except as noted in the appeal process above)." R-3.

In sum, therefore, I **FIND** petitioner's 1980-81 PIP and the subsequent 1980-81 summary evaluation developed for petitioner not violative of N.J.A.C. 6:3-1.21 or district policy and, on the evidence here, neither arbitrary nor unreasonable.

Importance of grading policies was the subject of an appeal to the Commissioner by a nontenured teacher whose employment contract was not renewed for 1976-77. In Fox v. Bd. of Ed. of Watchung Hills Regional High School, 1980 S.L.D. —(Comm'r dec. July 11, 1980), the Commissioner dismissed a petition in which the teacher sought reinstatement on the ground the Board's action not to renew her contract because of assigning poor or failing grades to 40 percent of college preparatory pupils was arbitrary and capricious. The Board's reasons for non-reemployment were two-fold: concern about large percentage of low and failing grades to pupils, and abnormal patterns of pupil

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requests to transfer from her classes. A comparison of grades assigned by the teacher with those assigned by three other teachers in the science department to college preparatory pupils demonstrated that large percentage. Grade disparities were discussed on numerous occasion with her, but she challenged their statistical validity. The Commissioner held the Board in determining not to renew her employment because of concern about a large percentage of low and failing grades was only constrained to demonstrate such action represented a reasonable exercise of its discretionary authority to reemploy or not to reemploy a probationary teacher. Id., at 12. It was further observed, however, "that a rate of over 40 percent D's and F's among college preparatory biology students over each of two academic years represents sufficient basis for the determination reached by the Board, without regard to the grades assigned by other teachers." Id. at 12. See also Martin v. Bd. of Ed., Borough of Keyport, 1981 S.L.D. — (Comm's dec. April 23, 1981, at 8).

Here, petitioner laid great stress in argument that Kletter's statistical analysis of petitioner's grading distribution was invalid and that only his, petitioner's, in turn was valid. But the totality of evidence in the matter here showed petitioner's grading distributions were consistently the subject of performance evaluations for the years 1976 through 1981. R-1a through R-1e. I do not believe it necessary for decision in this case that an explicit finding be made as to which statistical analysis, Kletter's or petitioner's, is the only intrinsically valid one. Certainly petitioner was not the only teacher whose performance was subjected to Kletter's analysis. See, e.g., R-7. It is sufficient to say, as I do, that there readily appears sufficient statistical basis by the supervisor of the mathematics department to demonstrate petitioner's grade distribution practices for those years were out of synchronization with departmental policy generally and that such non-synchronization had been readily brought to petitioner's attention over the years with no demonstrable or palpable resulting improvement. It seems clear, moreover, that such grade distribution non-synchronization resulted in inordinate requests for pupil transfers from petitioner's classes, particularly those classes for college-bound pupils. It is my view, there was sufficient reasonable basis for administrative concern and that action taken on petitioner's summary evaluations by way of criticism was reasonably justified under the circumstances. The Commission's adjudicatory powers of review need not, in

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my view, nor, indeed, may not, proceed beyond that parameter since in so doing the Commissioner would be required to substitute his judgment for that of an administrative arm of the local board, namely, the mathematics department of the high school. Cf. Fox, supra, (at 14-15).

Based upon the foregoing, I **FIND** and **CONCLUDE** petitioner has not demonstrated departmental criticism of his grade distribution practices or any action taken in remediation thereof was arbitrary or unreasonable. I **FIND** on the evidence here petitioner was not improperly criticized for such grade distribution practices, for excessive complaints about them, or for excessive requests for pupil transfers. And that would be so whether one views petitioner's celebrated "Why not?" response as impertinent or merely insouciant. I **FIND** neither occasion nor basis for expungement or modification of his personnel records.

As to petitioner's claim he received negative evaluations of his ability to accept constructive criticism because he filed a petition with the Commissioner of Education, I **FIND** no credible evidence in the record herein adduced by petitioner that any such administrative criticism was an administrative or Board-generated retaliation against him.

CONCLUSION

Accordingly, based on the foregoing, having heard the witnesses in testimony, having reviewed the exhibits marked in evidence, and having considered the parties' memoranda of law, I **CONCLUDE** the petition of appeal herein should be, and it is hereby, **DISMISSED**.

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

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OAL DKT. NO. EDU 11079-82

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

October 5, 1983
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

10/6/83
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

October 6, 1983
DATE

Ronald L. Parker /ssh
FOR OFFICE OF ADMINISTRATIVE LAW

js

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LIST OF EXHIBITS

P-1 Teaching Staff Schedules - Mathematics Department - 1978-79; 3 pages.

P-2 Teaching Staff Schedules - Mathematics Department - 1979-80; 3 pages.

P-3 Teaching Staff Schedules - Mathematics Department - 1980-81; 3 pages

P-4 "A Point of View" (Nutley H.S. Multi-Track Mathematics Program); 6 pages.

P-5 Third Quarter Grade Distribution - 1979-80 - Grieco; 1 page.

P-6 (a) Geometry Final Grades 1976-77; 1 page.
(b) Basic Geometry Final Grades 1976-77; 1 page.

P-7 Math Department Final Grade Distributions 1978-79; 14 pages.

P-8 Math Department Third Quarter Distribution - 1979-80; 15 pages.

P-9 Math Department Final Grade Distributions - 1979-80; 15 pages.

P-10 Final Grade Distribution - 1978-79 Grieco; 1 page.

P-11 Final Grade Distribution - 1979-80 Grieco; 1 page.

P-12 Grieco Proposed PIP; dated 3/11/80 for 1980-81; 1 page.

P-13 Grieco PIP prepared by Kletter for 1980-81; 1 page.

P-14 Grieco's Rebuttal to PIP prepared by Kletter for 1980-81; 1 page.

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P-15 Performance Evaluation, dated March 13, 1981; 6 pages.

P-16 Grieco Proposed PIP for 1981-82; 1 page.

P-17 Personnel Report, dated January 27, 1981; 2 pages.

P-18 Memo dated March 5, 1981; 3 pages.

P-19 Rebuttal to March 13, 1981, Evaluation; dated March 26, 1981.

P-20 Test and Scale Approvals 1980-81; 85 pages.

P-21 Petitioner's analysis of grade distribution. Basic Algebra II

P-22 Petitioner's analysis of grade distribution. Basic Algebra I

P-23 Petitioner's analysis of grade distribution. General Math

P-24 Petitioner's analysis of grade distribution. Basic Geometry

P-25 Petitioner's analysis of grade distribution. Algebra II

P-26 Petitioner's analysis of grade distribution. Algebra I

P-27 Petitioner's analysis of grade distribution. General Math

P-28 Petitioner's analysis of grade distribution. General Math

P-29 Petitioner's analysis of grade distribution. Basic Algebra

P-30 Petitioner's analysis of grade distribution. Algebra II

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P-31 Petitioner's analysis of grade distribution, Final grade v. exam grade.

P-32 Complaint procedures, Art. XV, Agreement between Nutley Educatin Association and respondent.

R-1a Petitioner's Performance Evaluation for the 1976-77 school year; 1 page.

R-1b Petitioner's Performance Evaluation for the 1977-78 school year: 1 page.

R-1c Petitioner's Performance Evaluation for the 1978-79 school year; 1 page.

R-1d Petitioner's Performance Evaluation for the 1979-80 school year; 3 pages.

R-1e Petitioner's Performance Evaluation for the 1980-81 school year; 4 pages.

R-3 Professional Improvement Plan Guidelines; 1 page.

R-4 Professional Improvement Plan Model; 1 page.

R-5 1980-81 Professional Improvement Plans for teachers in the Nutley High School Mathematics Department, exclusive of Petitioner; 14 pages.

R-6 Analysis of Mr. D'Ambola's Grade Distribution; 4 pages.

R-7 Mr. D'Ambola's Performance Evaluations; 5 pages.

R-8 Evaluation Guidelines; 2 pages.

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R-9 Petitioner's Comments Re: Evaluation of Test Scores; 1 page.

R-10 Petitioner's 1977-78 Schedule of Classes; 1 page.

R-11 Nutley High School Mathematics Course Description; 5 pages.

R-12 Petitioner's 1981-82 Grade Distribution; 2 pages.

R-13 Petitioner's 1982-83 Grade Distribution; 2 pages.

R-14 Petitioner's 1976-77 Schedule of Classes; 1 page.

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KENNETH GRIECO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NUTLEY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the initial decision by Judge Ospenson and requests reversal of Judge Ospenson's findings and conclusions on every issue raised. Petitioner cites N.J.A.C. 6:3-1.21(f):

> "The annual written performance report shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member and shall include but not be limited to:
>
> ***
>
> 3. An individual professional improvement plan developed by the supervisor and the teaching staff member ***." (Emphasis added.)

Further, N.J.A.C. 6:3-1.21(h)3:

> "Individual professional improvement plan is a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timelines for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan***." (Emphasis added.)

Petitioner states "clearly the cited regulations establish system in which all PIPs are to be developed as a concerted action by the supervisor and teaching staff member." Exceptions, at p.2 Petitioner cites Law v. Board of Education of the Township of Parsippany-Troy Hills, decided October 21, 1981 as a case wherein the Commissioner condemned the unilateral creation of a PIP for a

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teacher by a supervisor. Petitioner states that in the present matter his supervisor, Kletter, made no attempt to determine Grieco's views relative to the PIP. (at p.3) Petitioner contends that Kletter's method of grade analysis is wrong. (at p.4) Petitioner alleges that he has the only obviously correct and logical statistical analysis compared with the fallacious and unreasonable approach taken by Kletter. (at p.6). Petitioner accuses the judge of making only conclusional statements in violation of N.J.A.C. 1:1-16.3 and closes with his own conclusional statement, "Kletter issued the statement [that petitioner had a continuing problem] in retaliation for Grieco's petition [with the Commissioner]***." (at p.9)

The Board in reply exceptions notes that the judge did not find as a fact that "no meeting or discussion of any kind ever took place between petitioner and his supervisor, Kletter." (at p.1) The Board argues that petitioner's reliance on Law, supra, is misplaced wherein the department chairperson did not make any attempt to meet with the teacher and likens the instant matter to Douma, supra, where a PIP was drafted when the teacher refused to resubmit an acceptable PIP. The Board contends that the judge properly determined that there existed sufficient statistical basis for concluding that Grieco needed to formulate a more realistic grading policy. The Board rejects any connection between the criticism of petitioner and the filing of his petition, stating that no evidence was ever presented to tie the two events together. The Board affirms the initial decision and pleads for its acceptance. The Commissioner looks with favor on the Board's arguments.

The Commissioner observes that much stress is laid by petitioner on N.J.A.C. 6:3-1.21 (f) and (h) wherein is stated that an individual PIP must be developed by the supervisor and the teaching staff member. The Commissioner is constrained to observe that petitioner condemns Kletter for the unilateral PIP which, it is alleged, was produced by the supervisor. The Commissioner finds such argument to be hypocritical in nature, in view of petitioner's own testimony concerning the PIP initially filed by him which was not even couched in his own words:

> "THE COURT: Okay.
>
> I'll show you P-12 which appears to be your submission as your professional improvement plan on the date of March 11, 1980.
>
> THE WITNESS: Right.
>
> THE COURT: Was your submission of this PIP on that date which we're calling P-12 as an exhibit done with your knowledge of the definition as contained in the administrative code?

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THE WITNESS: That was done with the -- no. It was done with the recommendation of NJEA. That was what was suggested that we write. In fact, the wording is theirs.

THE COURT: And not yours?

THE WITNESS: Right." (Tr. I - 103-104)

Petitioner cannot have it both ways by arguing for standards in creating a PIP that apply to his supervisor but not to him.

A review of the record herein, the documents in evidence and the testimony of witnesses convinces the Commissioner that the judge considered a sufficiency of the evidence and properly interpreted and applied the law relevant thereto. The Commissioner so holds.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

NOVEMBER 21, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 227-83
AGENCY DKT. NO. 471-11/82A

DAVID BRYAN AND THE
MAINLAND TEACHERS' ASSOCIATION,
Petitioners
v.
BOARD OF EDUCATION OF THE
MAINLAND REGIONAL HIGH SCHOOL
DISTRICT, ATLANTIC COUNTY,
Respondent.

APPEARANCES:

Steven R. Cohen, Esq., for petitioners (Selikoff and Cohen, attorneys)

Louis J. Greco, Esq., for respondent (Donio and Greco, attorneys)

Record Closed: August 25, 1983 Decided: October 11, 1983

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

David Bryan, a full-time teaching staff member who has acquired a tenure status in the employ of the Board of Education of the Mainland Regional High School District (Mainland Board), alleges, among other things, that the Mainland Board acted arbitrarily and capriciously when it denied him permission to be employed by the Board of Education of the City of Pleasantville, Atlantic County (Pleasantville Board), as a part-time assistant football coach for the 1982 football season. Petitioner seeks relief in the form of a restraint against the Mainland Board from its interference with his prospective

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economic advantage, together with reimbursement for the entire annual salary, of which he alleges he was wrongfully deprived. The Mainland Board answered petitioners' complaint, setting forth seven affirmative defenses and a counter-petition alleging that the herein Petition of Appeal constitutes a frivolous and vexatious statement of appeal which is baseless and which entitles petitioners no form of relief.

The Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was held on June 7 and 8, 1983, at the Mullica, New Jersey Township Municipal Court, subsequent to which the parties filed post-hearing briefs in support of their respective positions. The record was closed on August 25, 1983, the date of the last brief having been received.

At a prehearing conference held on March 22, 1983, the issues to be determined were agreed upon by the parties and are set forth hereinbelow:

ISSUES:

1. Whether the Board's refusal to permit petitioner Bryan to serve as assistant football coach in the Pleasantville School District was arbitrary, capricious and ultra vires?

2. Did the action of the Board, taken under color of N.J.A.C. 6:29-6.3, constitute arbitrary interference with petitioner Bryan's liberty of contract respecting his own labor and property rights respecting same are violative of N.J. Const. Art. I, paragraphs 1 and 21, and deprive petitioner Bryan of substantive due process under N.J. Const. Art. I, paragraphs 5 and 21 and the First and Fourteenth Amendments to the United States Constitution?

3. Is petitioner precluded from bringing this action under the doctrine of "unclean hands?"

COUNTER PETITION OF RESPONDENT

ISSUES:

1. Whether petitioner's Petition of Appeal constitutes a frivolous and vexatious statement is baseless and entitles petitioner to no relief?

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UNCONTESTED FACTS

The following facts are neither contested nor disputed and, therefore, are hereby adopted, by reference, as Findings of Fact:

1. Bryan is employed by the Mainland Board as a tenured teaching staff member. He is also a member of the bargaining unit represented by the Mainland Teachers' Association.

2. Prior to becoming employed by the Mainland Board, Bryan had served as a head football coach at the high school level in various Pennsylvania and New Jersey school districts and for one year at the collegiate level.

3. Bryan served as head football coach for the Mainland Board for five consecutive football seasons commencing with the 1972 season. Bryan was dismissed from the position of head football coach at the end of the 1976 football season, by an action of the Mainland Board, following the third recommendation by the Athletic Director not to reappoint him.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

The testimony, summarized herein, offered on petitioners' behalf, demonstrated that subsequent to his removal as head varsity football coach, Bryan applied for the position of assistant coach under the then head varsity football coach, Mr. George Landis. Landis rejected Bryan's application and, instead, selected a Mr. Steven Cassel for the position of assistant football coach. At the time of his appointment as assistant football coach at Mainland, Cassel was a teaching staff member employed by the Board of Education of the City of Northfield.

Bryan's employment as the Mainland Board's head varsity football coach was subject to criticism and controversy within the school community and among the Mainland Board's administrators. As the uncontested facts demonstrate, the Mainland Board's athletic director recommended Bryan's removal as head football coach in three consecutive years, commencing with the 1974-75 school year. As a consequence of

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the Board's administrative staff's dissatisfaction with Bryan, the administration recommended to the Mainland Board that Bryan not be reemployed as coach and teacher for the 1975-76 school year. Such an action would have deprived Bryan tenure as a teacher. The Board rejected the administrative recommendations and by a vote of six to three reemployed Bryan as head varsity football coach and as an industrial arts teacher, thus, conferring a tenure status to Bryan as a teaching staff member subsequent to his first day of teaching in September 1975. Bryan continued as a teacher-coach for the 1975-76 and 1976-77 school years and was removed as head varsity football coach at the end of the 1976-77 school year. Bryan has remained as a teacher with the Mainland Board subsequent to his removal but has not coached football in any capacity since his removal. However, he has since been employed by the Mainland Board as an assistant basketball coach (junior varsity) and has assisted the wrestling team at competition away from the Mainland home school.

During the 1981-82 school year, in or about December 1981, Mr. Kenneth Williams, the current head varsity football coach, offered Bryan a position as assistant football coach for the 1982-83 season. Williams formerly had served as an assistant football coach under Bryan when Bryan served as head varsity football coach. Bryan testified that he declined Williams' offer based upon his prior difficulties in coaching football for the Mainland Board. Bryan testified that Williams acknowledged and understood Bryan's reasons for refusing the offer to coach. Bryan, the President of the Mainland Teachers' Association (Association) and the Mainland Board's current basketball coach, all testified that during Bryan's assignment as the Mainland Board's head football coach his performance and conduct with the varsity football team were the subject of discussion and controversy within the school community. Bryan asserted that the discussions and controversy concerning his involvement with the football program, both private and public, caused an extreme emotional strain upon him and his family. For these reasons, together with his rejection by the former head football coach to accept his offer to assist the varsity football program subsequent to his removal as head football coach, Bryan asserted that he did not wish to participate in the Mainland football activities.

Mr. Ronald Anderson, head varsity football coach for the Pleasantville Board, had, on several occasions, inquired of Bryan as to his interest in assisting in coaching football at the Pleasantville High School. In August 1982, Anderson offered Bryan the assistant football coaching position at Pleasantville for the 1982 season. Anderson

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testified that he discussed Bryan with the Pleasantville athletic director and the Pleasantville High School principal, both of whom expressed positive reactions with regard to Bryan's capacity to fulfill the assignment. Anderson asserted that he was advised by the Pleasantville principal that Bryan needed the approval of the Pleasantville Board, approval of the Mainland Board, and a letter from the Mainland Board to the Atlantic County Superintendent releasing Bryan from the Mainland Board to the Pleasantville Board for the limited purpose of coaching. The Pleasantville principal advised Anderson that there would be no problem employing Bryan and the Pleasantville Board was ready to do so, so long as the Mainland Board forwarded the release letter to the Atlantic County Superintendent of Schools for his approval. Anderson testified that the Pleasantville Board approved Bryan's appointment and salary of $1,100 for the part-time coaching position; however, there was no release letter from the Mainland Board to the Atlantic County Superintendent.

Bryan testified that subsequent to Anderson's offer in August 1982, Bryan telephoned the Mainland Superintendent and requested permission to coach at Pleasantville. The Superintendent asked Bryan if he wished to coach football at Mainland, to which Bryan responded in the negative. Bryan testified that the Mainland Superintendent indicated that he understood why Bryan did not wish to coach at Mainland and, notwithstanding that the Superintendent might be subject to criticism for permitting Bryan's release, the Superintendent nonetheless would permit Bryan to accept the coaching position at Pleasantville. One or two days thereafter, Bryan placed a second telephone call to the Superintendent, who assured Bryan that there would be no difficulty with Bryan's acceptance of the coaching position with Pleasantville.

On September 1, 1982, Bryan commenced coaching duties at Pleasantville on an interim basis. On or about September 7, 1982, the Mainland Superintendent requested a meeting with Bryan at which, Bryan testified, the Superintendent informed Bryan that he had a change of mind and would not approve or permit Bryan to coach at Pleasantville. The Superintendent represented to Bryan that football coaching vacancies existed at Mainland and that Bryan's release to Pleasantville under such circumstances would be inappropriate. Bryan testified that subsequent to his telephone conversation with the Superintendent, he spoke with the Mainland head football coach and athletic director, both of whom represented to Bryan that all football coaching positions at Mainland had been filled. Bryan did not coach football subsequent to September 7, 1982, and was not compensated for the previous days he performed as an interim coach at Pleasantville.

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On September 9, 1982, the President of the Association addressed a letter to the President of the Mainland Board, Mr. Daniel Bryan (not related to petitioner herein), requesting the Board to furnish reasons for its determination to deny Bryan permission to coach football at Pleasantville (P-10). Neither the Association nor Bryan received a written response to this request.

Subsequently, on September 13, 1982, by way of letter, Bryan requested a meeting with the Mainland Board to present his position as to his reasons for accepting the coaching responsibilities at Pleasantville (P-7). The Board granted Bryan's request (P-8) and, on September 15, 1982, Bryan and an Association representative met with the Personnel Committee of the Mainland Board. Both Bryan and the Association representative testified at the herein hearing that subsequent to Bryan's presentation to the Board's Personnel Committee, the Personnel Committee articulated two reasons for its denial to permit Bryan to coach at Pleasantville: to wit, (1) that Pleasantville and Mainland high schools enjoy a long-standing rivalry, both competing in football in the Cape-Atlantic League; and (2) that it would not be appropriate for Bryan to coach football at Pleasantville because some members of the Mainland basketball team, which Bryan coached as an assistant, were also members of the Mainland football team and would see Bryan "on the other side of the field." By letter dated September 20, 1982 (P-9), the President of the Mainland Board advised Bryan of the following:

> The Personnel Committee, after meeting with you on Wednesday, September 15, 1982, recommended that the Superintendent's decision be sustained relative to your coaching at Pleasantville. They further recommended that the Board of Education be polled telephonically.
>
> Subsequent, to a telephone polling of the Board, the Superintendent's position has been sustained and your appeal to coach at Pleasantville is denied.
>
> [P-9]

Bryan testified that the Mainland Board had employed coaches or accepted volunteers to assist the coaching staff, who were from outside the Mainland school district and were not members of the Mainland Board's teaching staff. Bryan identified such out-of-district coaches by individual name and number of athletic activities. For the purposes of this record, the names of the individuals are not set forth; however, the number of out-of-district coaches and the sports activity to which they were assigned are, according to Bryan's testimony, as follows: football-6; basketball-2; wrestling-1;

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swimming-3; girls basketball-1; girls softball-1; baseball-4; golf-1; girls track-1. Similarly, Bryan testified that the Mainland Board had granted permission to Mainland teaching staff members to coach out-of-district as follows: football-1 at Atlantic City High School; basketball-2, one at Stockton State College and one at Atlantic County Community College; crew-1 at Holy Spirit High School; and, petitioner Bryan for football at St. Joseph's High School.

The Mainland Board presented no direct testimony, nor nor did it offer any exhibits in its defense of petitioners' allegations or pursuant to its counter-position.

FINDINGS OF FACT

Having carefully reviewed and considered the entire record in this matter, including the testimony and exhibits proffered, and having given fair weight thereto, and having observed the demeanor of the witnesses as they testified before this tribunal and having assessed their credibility, I **FIND** the following together with those uncontested facts set forth hereinbefore to be true, in fact:

Petitioner Bryan served as the head varsity football coach at Mainland Regional High School commencing with the 1972 football season and ending with the 1976 season. On three separate occasions, the administrator at Mainland recommended to the Mainland Board that Bryan's contract as head coach not be renewed. One such recommendation also included the recommendation that Bryan not be reemployed as a teaching staff member for the 1975-76 school year, which, if adopted by the Mainland Board, would have denied Bryan tenure as a teaching staff member in the Mainland School District. The Mainland Board, by a vote of six to three, renewed Bryan's teaching contract for the ensuing school year. During Bryan's employment as head football coach, his performance was the subject to much controversy in the school community and to such an extent that it affected his family and home life. It is also apparent from the record that there was a conflict between Bryan and the then athletic director. Bryan was removed as head varsity football coach after the close of the 1976 football season.

Subsequent to his removal as head football coach, Bryan applied for the position as assistant football coach at Mainland for the 1977-78 school year. The then

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head coach, who had replaced Bryan, rejected Bryan's application and, in Bryan's stead, selected an out-of-district person to serve as assistant football coach. Bryan has, since his removal as head football coach, served the Mainland Board in other athletic endeavors, assisting the wrestling team at away competition and currently as assistant basketball coach.

During the 1981-82 school year, the Mainland head football coach offered Bryan a position as assistant football coach for the 1982 football season. Considering his past controversial experience with the Mainland football program, together with the rejection of his application for an assistant coaching position subsequent to his removal as head football coach, Bryan declined the offer. Under such circumstances, the Mainland head football coach, who had served as an assistant coach under Bryan prior to Bryan's removal, understood Bryan's underlying reasons to decline the offer to serve as an assistant coach for the 1982 football season.

Thereafter, Bryan was offered the position of assistant football coach at the Pleasantville High School. Pleasantville and Mainland are members of the Cape-Atlantic League, competing annually in, among other sports, football. Bryan advised the Mainland Superintendent of the Pleasantville offer and the Mainland Superintendent gave Bryan his oral approval to accept the Pleasantville position. The Pleasantville Board approved Bryan's employment as assistant football coach at an annual salary of $1,100. Bryan later contacted the Mainland Superintendent about the Pleasantville position and was assured by the Mainland Superintendent that Bryan could accept the Pleasantville position.

On September 1, 1982, Bryan commenced his coaching duties with Pleasantville. Subsequently, Bryan was advised by the Mainland Superintendent that the Board would not approve Bryan's release to coach at Pleasantville asserting, among other things, that vacant assistant coaching positions remained unfilled at Mainland. Bryan thereupon contacted the Mainland athletic director and head football coach, both of whom advised Bryan that all vacant positions had been filled. Bryan ceased coaching at Pleasantville on September 7, 1982.

On September 9, 1982, the President of the Association addressed a letter to the President of the Mainland Board, requesting reasons for its determination to deny Bryan the opportunity to coach at Pleasantville (P-10). The Board and/or its President

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either failed or neglected to respond to the Association's request. On September 13, 1982, Bryan addressed a letter to the Mainland Board President, requesting a meeting with the Board to discuss Bryan's reasons as to why he wished to coach at Pleasantville and the reasons the Mainland Board denied him the opportunity to do so (P-7). The Board responded (P-8) and on September 15, 1982, Bryan and his representative met with members of the Personnel Committee of the Board. Bryan and his representative testified at the herein hearing that the two reasons for the Board's denial of Bryan's request to coach at Pleasantville were: (1) that Pleasantville and Mainland enjoyed a long-standing rivalry, both participating in the Cape-Atlantic League; and (2) that it would be inappropriate for Bryan to coach football at Pleasantville because some members of the Mainland basketball team, which Bryan had coached, were also members of the Mainland football team and would observe Bryan "on the other side of the field." By way of letter, dated September 20, 1982, the Mainland Board President informed Bryan that the Board's Personnel Committee, subsequent to the September 15, 1982 meeting with Bryan and his representative, recommended that the Superintendent's decision to deny Bryan the opportunity to coach at Pleasantville be sustained; that the Board's Personnel Committee recommended that the Board members be polled telephonically; and subsequent to a telephone polling of the Board members, the Superintendent's position had been sustained and Bryan's appeal to coach at Pleasantville was denied (P-9).

This concludes the recitation of the findings of fact.

LEGAL ARGUMENTS

The Mainland Board contends, among other things, that under N.J.A.C. 6:29-6.3 of the Administrative Code, a school district such as Pleasantville is permitted to employ teaching staff members of other New Jersey school districts to serve as athletic coaches provided that both Boards of Education are in agreement regarding the employment. Thus, in the instant matter, the Mainland Board of Education is empowered with the authority to either grant or withhold approval of Bryan's request to coach at Pleasantville. Such power, according to the Code, rests within the discretion of the local boards of education. It asserts that generally "the powers of the boards of education in the management and control of school districts are broad." Fiore v. Bd. of Ed. of the City of Jersey City, 1965 S.L.D. 177, 178. See also, Downs v. Bd. of Ed., Hoboken, 12 N.J. Misc. 345 (1934), and Michener v. Bd. of Ed. of the Tp. of Passaic, Morris Cty., 1972

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S.L.D. 179, 194. Where a board in the exercise of its discretion acts within the authority granted to it by law, the courts will not interfere absent a clear showing of abuse. See, Boult v. Bd. of Ed. of Passaic, 1939-49 S.L.D. 7, 13, affirmed, 135 N.J.L. 329 (1947), and Michener, supra.

The Mainland Board further asserts that all board actions are entitled to a "presumption of correctness." See, Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327, 332, (App. Div. 1965), affirmed, 46 N.J. 581 (1966). Some courts have gone so far as to say:

> It is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their affairs unless they violate the law, act in bad faith, or abuse their discretion in a shocking manner . . . It is not the function of the Commissioner in the judicial decision to substitute his judgment for that of the board members . . . Boards of Education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.
>
> [Boult, 1939-49 S.L.D. 7, 13]

This entire excerpt is cited approvingly in Wassmer v. Bd. of Ed. of the Borough of Wharton, Morris Cty., 1967 S.L.D. 125, 127.

In the present case, argues the Mainland Board, petitioner has failed to prove that the Mainland Board of Education has acted unreasonably or beyond the scope of its discretionary authority. As previously noted, such authority is broad and entitled to a presumption of correctness. Absent absolute proof that the Board has acted in bad faith or violation of the law, respondent is entitled to have this petition dismissed. It is clear from the record in this proceeding that such proof is indeed lacking. What petitioner has shown by his own witnesses is that the respondent has dealt with Bryan in a fair and consistent manner. Bryan testified that the reasons for the Board's refusal to release Bryan to Pleasantville were fully communicated to him. Individually, each of those stated reasons was related to the goal of providing Mainland students with a thorough and efficient education; combined, such concerns served as a compelling motive in the Board's decision not to release Bryan to Pleasantville.

The Mainland Board avers that petitioner has also proven by his own witnesses that the respondent granted Bryan rights even beyond those afforded by law. Bryan admits that the Board provided him the opportunity to meet with its Personnel Committee

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to discuss Bryan's reasons for preferring to coach at Pleasantville. Bryan further concedes that he was permitted a representative of his choosing at this meeting, and that he was encouraged to view all of his personal feelings, reactions, and concerns. Bryan additionally testified that all representatives of the Mainland Board, as well as the administration and staff at Mainland, were empathetic to his hesitancy at coaching at Mainland. There is absolutely no showing that dealings were in any way hostile, or bereft of the highest standard of professional courtesy.

The Mainland Board asserts that without such a showing of wrongdoing, judicial action is unwarranted:

> As has been stated, absent a clear showing that the Board has acted unreasonably, . . . in bad faith, in violation of the law or in any other illegal manner, the Commissioner is without authority to interven . . . . [Such intervention] would constitute an attempt to substitute his independent judgment for that of the elected representatives of the community.
>
> [Wassmer, supra at 128]

DISCUSSION AND CONCLUSIONS

The unrebutted facts adduced in this matter demonstrate that petitioner Bryan sought the approval of the Mainland Superintendent to coach at Pleasantville prior to Bryan's making a committment and/or accepting the Pleasantville position. Upon an oral request by Bryan, the Mainland Superintendent granted his oral approval to Bryan to apply for and accept the offered Pleasantville contract. Bryan, in good faith, relied upon the Superintendent's oral release from the Mainland Board and, therefore, committed himself to coach for the Pleasantville Board. Thereafter, the Pleasantville Board approved Bryan's employment as a part-time assistant coach at an annual salary of $1,110 with Bryan's accepting and commencing his duties, relying on the pending release from the Mainland Board as promised by the Mainland Superintendent.

Subsequently, the Mainland Superintendent repudiated his oral promise to Bryan, asserting that coaching vacancies remained unfilled at Mainland. Bryan's subsequent inquiry to the Mainland High School principal and athletic director proved the Superintendent's assertion of vacant coaching positions to be unfounded, all coaching positions having been filled on or before September 1, 1982.

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I **FIND** and **CONCLUDE,** therefore, that petitioner Bryan's testimony with respect to the absence of vacant football coaching positions at the Mainland High School for the 1982 football season to be believeable and credible. Close v. Kordulak, 44 N.J. 589 (1965); Jackson v. Concord Co., 5 N.J. 113 (1969); Garden State Farms v. Mathis, 61 N.J. 406 (1972).

Accordingly, I **CONCLUDE** there was no basis in fact that vacant coaching positions remained open at Mainland for the period in 1982 that Bryan was to be employed as assistant football coach by the Pleasantville Board. Therefore, the Board's refusal to permit Bryan to assume his contractual duties with the Pleasantville Board was not rationally related to a need to fill a vacant coaching position at Mainland.

The facts further demonstrate that Bryan was rejected in his efforts to apply for an assistant football coaching position which was open for the 1977 football season. In his stead, the Board employed an out-of-district individual to perform the assistant coaching duties which should have been afforded to Bryan. The Board had the opportunity to avail itself of Bryan's services when a need for his services was extant. The Board and/or its agents rejected Bryan's offer in favor of an out-of-district person to fill a position as assistant football coach. Such a decision by the Board raises serious doubts about its legitimate use of the pertinent regulations wherein the Board must "demonstrate . . . to the county superintendent that an emergency situation exists," N.J.A.C. 6:29-6.3(d) and (e)1, in order to employ an out-of-district coach. The Board's rejection of Bryan's good faith offer when, in fact, no emergency actually existed, effectively released Bryan from future consideration.

The Mainland Board has developed a consistent pattern and practice of employing out-of-district personnel in order to provide coaching assistance to its athletic programs. Similarly, the Mainland Board has released its teaching staff members to assume coaching duties out of the Mainland School District. In the instant circumstances, the Mainland Board had no need of Bryan's services as an assistant football coach while, conversely, Pleasantville had such a need. In the Matter of Robert Livingston v. Bd. of Ed. of Tp. of Wall, 1980 S.L.D. 1321, Administrative Law Judge Daniel B. McKeown set forth a well reasoned 2nd comprehensive analysis of the relationship between interscholastic sports activities and the constitutionally mandated thorough and efficient program of education. Judge McKeown observed, among other things, that when necessary, the Legislature has provided statutory provisions for the cooperation between

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and among boards of education to achieve the constitutionally required goal of a thorough and efficient program of education for all pupils of this State. Judge McKeown also observed that: "The State Board in similar fashion has recognized the need for cooperation between and among boards of education to serve the interests of pupils in regard to interscholastic activities at N.J.A.C. 6:29-6.3." It is apparent, from the facts herein, that the Mainland Board has failed to cooperate with the Pleasantville Board and to grant Bryan's release when there existed no need for Bryan's services at Mainland. Notwithstanding the Mainland Board's argument that it did not want its pupils to see Bryan on the opposing teams' side of the playing field, the facts demonstrate that the Board's treatment of Bryan was uneven and not fair or equitable with regard to his requested release.

Pursuant to the statutory provisions embodied in Title 18A, local boards of education are endowed with broad powers and discretionary authority in the governance and management of its public schools, N.J.S.A. 18A:11-1. Its decisions within the ambit of such statutory and other regulatory provisions is afforded a presumption of correctness. Thomas v. Morris Tp. Bd. of Ed., supra; Schinck v. Bd. of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448, 476. Such a presumption is not, however, without limitations. Our courts have held that public bodies may not act under the color of law and abuse its authority by acting in a fashion which might be construed to be arbitrary, capricious or unreasonable. Under the circumstances of this matter, the Mainland Board has committed no violation to the statutes or administrative regulations. The facts clearly show, however, that its actions resulted from bias, bad faith and arbitrariness. The bias is demonstrated by the Board's rejection of Bryan's offer to assume the assistant coaching position in 1977 subsequent to his removal as head football coach. The bad faith is shown by the Superintendent's oral approval to coach at Pleasantville, upon which Bryan relied, and the Superintendent's subsequent revocation of his promise, to Bryan's detriment. Arbitrariness is shown by the uneven treatment extended to Bryan in view of the fact that the Mainland Board had permitted its teaching staff members to accept and assume coaching duties out of the Mainland School District.

I **CONCLUDE,** therefore, that the Mainland Board's denial to approve petitioner Bryan's request to coach part-time at Pleasantville was wholly arbitrary and an abuse of its discretionary power and authority.

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Accordingly, it is **ORDERED** that the Mainland Board refrain from arbitrarily denying David Bryan its consent for him to coach part-time at Pleasantville or at any other school district in this State.

Having hereby found for petitioner grounded upon the facts at issue in this matter, it is not necessary for this court to consider the constitutional issues raised by petitioner. Accordingly, those issues are not addressed herein.

With respect to petitioner's request for reimbursement of the $1,100 he would have received had he not been denied the opportunity to coach at Pleasantville, this court resorts to the Commissioner's decision in Livingston, supra, which holds that no contractual relationship existed between petitioner and the Board of Education of Pleasantville, nor is petitioner eligible for any recompense for coaching duties not performed. I **CONCLUDE**, therefore, that petitioner's request for relief in the form of $1,100 reimbursement from the Mainland Board is **DENIED**.

Finally, the Mainland Board failed to pursue its counter-petition against petitioner, which is, accordingly, **DISMISSED**.

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

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OAL DKT. NO. EDU 227-83

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

11 October 1983
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10/11/83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

October 13, 1983
DATE

Ronald L. Parker/pb
OFFICE OF ADMINISTRATIVE LAW

fms/ee

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DOCUMENTS IN EVIDENCE

P-1 Statement of Grievance

P-2 Evaluation Form for Coaches in the Department of Athletics

P-2B Memorandum to Mr. Sacco from D.W. Bryan

P-3 Memorandum dated January 14, 1975

P-4 Newspaper article, The [Atlantic City] Press, dated May 13, 1975

P-5 Newspaper article, The [Philadelphia] Evening Bulletin, dated July 15, 1975

P-6 Letter, dated September 7, 1982, to Mr. David Bryan from David Myers (Stipulated)

P-7 Letter, dated September 13, 1982, to Mr. Daniel Bryan, President, Mainland Board of Education from David Bryan (Stipulated)

P-8 Letter, dated September 14, 1982, to Mr. Daniel [sic] Bryan from David Myers (Stipulated with corrections)

P-9 Letter, dated September 20, 1982, to David Bryan from Daniel Bryan, President, Mainland Board of Education (Stipulated)

P-10 Letter, dated September 9, 1982, to Daniel Bryan from Mary W. Loper, President, Mainland Teachers' Association

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DAVID BRYAN AND THE MAINLAND TEACHERS' ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner Bryan excepts selectively to the initial decision by Judge Law; petitioner agrees with the conclusion by the judge that the Board's failure to release him to coach football in the Pleasantville district "resulted from bias, bad faith and arbitrariness," ante, while he contests the denial of his monetary relief, ante. Claim is made by petitioner that Livingston, supra, is bad law and pleads for the award of $1,100, his lost earnings. The Commissioner cannot agree in entirety with the arguments advanced by petitioner herein.

An examination of the circumstances surrounding the instant matter causes the Commissioner to decide that petitioner should be accorded the monetary relief sought of $1,100, but for reasons other than those stated. The Commissioner finds Livingston, supra, to be inapposite to the present matter. In Livingston, the Commissioner stated clearly:

> "***The principal of the high school has no authority to hire coaches which can only be done by the Board.***"
>
> "***No contractual relationship ever existed between petitioner and the Board of Education of Asbury Park nor is petitioner eligible for any recompense for coaching duties not performed.***"
> (at 1334)

In the present matter it is clearly shown that:

> "***Thereafter, Bryan was offered the position of assistant football coach at the Pleasantville High School. Pleasantville and Mainland are

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> members of the Cape-Atlantic League, competing annually in, among other sports, football. Bryan advised the Mainland Superintendent of the Pleasantville offer and the Mainland Superintendent gave Bryan his oral approval to accept the Pleasantville position. The Pleasantville Board approved Bryan's employment as assistant football coach at an annual salary of $1,100. Bryan later contacted the Mainland Superintendent about the Pleasantville position, and was assured by the Mainland Superintendent that Bryan could accept the Pleasantville position.
>
> On September 1, 1982, Bryan commenced his coaching duties with Pleasantville. Subsequently, Bryan was advised by the Mainland Superintendent that the Board would not approve Bryan's release to coach at Pleasantville asserting, among other things, that vacant assistant coaching positions remained unfilled at Mainland. Bryan thereupon contacted the Mainland athletic director and head football coach, both of whom advised Bryan that all vacant positions had been filled. Bryan ceased coaching at Pleasantville on September 7, 1982."
>
> (Emphasis supplied.) (at p. 8)

The Commissioner notes the good will action by Bryan in reporting his plans for coaching to his Superintendent, notes further the action of the Pleasantville Board to approve Bryan as a football coach at a salary of $1,100 and his assumption of those duties on September 1, 1982. The Commissioner finds such facts more than enough to set this present matter apart from Livingston, supra.

Accordingly, in view of and in agreement with the conclusion, ante, that

> "***the Mainland Board's denial to approve petitioner Bryan's request to coach part-time at Pleasantville was wholly arbitrary and an abuse of its discretionary power and authority"

and observing the positive action of the Pleasantville Board to employ Bryan for the duties of assistant football coach with Bryan's assumption of those duties, the Commissioner holds that Bryan is entitled to the $1,100 denied him by the arbitrary action of the Mainland Board which shall accord petitioner such monetary relief forthwith.

It is so determined.

COMMISSIONER OF EDUCATION

NOVEMBER 28, 1983

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 2855-83
AGENCY DKT. NO. 81-4/83A

S.P. and J.P., INDIVIDUALLY
AND AS GUARDIANS FOR P.P., ET AL.,
Petitioners
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF JACKSON, OCEAN COUNTY,
Respondent.

APPEARANCES:

Steven Pfeffer, Esq., for the petitioners (Matthews, Levin, Shea & Pfeffer, attorneys)

James P. Courtney, Jr., Esq., for the respondent (Russo, Courtney & Foster, attorneys)

Record Closed: September 9, 1983 Decided: October 14, 1983

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

The petitioners allege that the respondent improperly terminated the transportation of students residing in Jackson Township who attend the Lakewood Hebrew Day School. The respondent denied the allegation and the matter was referred to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held on June 6, 1983. At that time the parties agreed that a hearing was not necessary, that they would enter into a stipulation of facts and submit briefs. Upon receipt of the briefs, the record in this matter closed on September 9, 1983.

I **FIND** that the undisputed facts in this matter are as stated hereinafter.

In the Jackson Township School District (hereinafter referred to as the "District") there are 854 students who attend private schools. Of that number 744 are provided with transportation to and from the school. Six of those students receive transportation to a school in the morning and receive compensation for transportation home in the afternoon. The balance of 104 students receive reimbursement for transportation for both to and from their schools. The six students who receive only partial reimbursement and morning transportation are the students who are members of the Hebrew Day School.

The private school schedule is for 180 days per year and the cost is determined at $.83 per mile and at $8.02 per hour per driver. The schools that are provided with transportation or partial transportation are as follows: St. Mary's of Lakewood, St. Veronica's in Howell, St. Joseph's in Toms River, Holy Family School and Calvary School, and Hebrew Day School.

The starting time for all schools is 8:30 a.m. The release time for all schools, except the Hebrew Day School, is 2:30 p.m. The Hebrew Day School dismisses at 3:30 except on Fridays when the students are dismissed at 2:30.

The following is a breakdown on costs per student for each school involved:

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NAME OF SCHOOL	STARTING TIME	DEPARTURE TIME	NUMBER OF STUDENTS	TOTAL COST	COST PER PUPIL
St. Mary's	8:30 a.m.	2:30 p.m.	212	$51,228.20	$241.64
St. Veronica's	8:30 a.m.	2:30 p.m.	263	$60,339.60	$229.43
St. Joseph's	8:30 a.m.	2:30 p.m.	206	$66,940.20	$324.95
*Holy Family-Calvary	8:30 a.m.	2:30 p.m.	69	$35,384.76	$512.82
Hebrew Day School	8:30 a.m. (except Fri. at 2:30)	3:30 p.m.	06	a.m. costs transportation on school buses containing St. Mary's students cost driver per contract $8.02/hr. x 180 days or $1,443.60--Afternoon van at .68 mile $3,060 + driver's salary $8.02/hr. x 180 or $1,443 for a total of $5,917.20 or cost of pupil of $986.20.	

*both schools share 2 buses

THE BREAKDOWN FOR COSTS PER BUS IS AS FOLLOWS:

ST. MARY'S

Kdg. Bus #85 33.67 miles at .83/mile x 180 days	=	$ 5,031.00
(bring home) wages 2 hrs. at $8.02/hour x 180 days	=	2,887.20
Bus #85 18.58 miles at .83/mile x 180 days	=	2,775.00
50 students - wages 2 hrs. at $8.02/hour x 180 days	=	2,887.20

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Bus #84 30.26 miles at .83/mile x 180 days	=	4,521.60
40 students -wages 2 hrs. at $8.02/hour x 180 days	=	2,887.20
Bus #73 59.32 miles at .83/mile x 180 days	=	8,863.20
45 students - wages 2 hrs. at $8.02/hour x 180 days	=	2,887.20
Bus #40 51.74 miles at .83/mile x 180 days	=	7,729.20
27 students - wages 2 hrs. at $8.02/hour x 180 days	=	2,887.20
Bus #36 33.36 miles at .83/mile x 180 days	=	4,984.20
50 students - wages 2 hrs. at $8.02 hour x 180 days	=	2,887.20

ST. JOSEPH'S

Bus #55 54.34 miles at .83/mile x 180 days	=	$ 8,118.00
54 students - wages 4 hours at $8.02 hour x 180 days	=	5,774.40
Bus #56 90.0 miles at .83/mile x 180 days	=	13,446.00
48 students - wages 4 hours at $8.02/mile x 180 days	=	5,774.40
Bus #59 94.06 miles at .83/mile x 180 days	=	14,052.60
54 students - wages 4 hours at $8.02/hour x 180 days	=	5,774.40
Bus #80 55.06 miles at .83/mile x 180 days	=	8,226.00
50 students - wages 4 hours at $8.02/hour x 180 days	=	5,774.40

ST. VERONICA'S

Bus #33 37.21 miles at .83 mile x 180 days	=	5,558.40
(Kdg. take in) wages 2 hours at $8.02/hour x 180 days	=	2,887.20
Bus #18 32.16 miles at .83/mile x 180 days	=	4,804.20
49 students - wages 2 hours at $8.02/hour 180 days	=	2,887.20

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Bus #22 13.82 miles at .83/mile x 180 days	=	2,064.60
47 students - wages 2 hours at $8.02/hour x 180 days	=	2,887.20
Bus #26 15.74 miles at .83/mile x 180 days	=	2,350.80
41 students - wages 2 hours at $8.02/hour x 180 days	=	2,887.26
Bus #37 21.58 miles at .83/mile x 180 days	=	3,223.80
39 students -wages 2 hours at $8.02/hour x 180 days	=	2,887.20
Bus #31 33.30 miles at .83/mile x 180 days	=	4.975.20
55 students - wages 2 hours at $8.02/hour x 180 days	=	2,887.20
Bus #76 95.48 miles at .83/mile x 180 days	=	14,265.00
32 students - wages 4 hours at $8.02/hour x 180 days	=	5,774.50

HOLY FAMILY/CALVARY

Bus #78 52.18 miles at .83/mile x 180 days	=	7,790.40
38 students - wages 4 hours at $8.02/hour x 180 days	=	5,774.40
Bus #81 107.4 miles at .83/mile x 180 days	=	36,045.56
31 students - wages 4 hours at $8.02/hour x 180 days	=	5,774.40

In the past, the Jackson Township Board of Education (hereinafter referred to as the "Board") provided transportation to students attending the Lakewood Hebrew Day School, and there was a bus for these students and students attending St. Mary's Academy in Lakewood. The schools had a starting time of 8:30 a.m. as well as a release time of 2:30 p.m. The Lakewood Hebrew Day School then changed its release time to 3:30 p.m. except for Fridays when the students are dismissed at 2:30 p.m. After this change, the Board could not use the same bus for the afternoon transportation of the Lakewood Hebrew Day School students and provided a van to transport these students home at 3:30 p.m.

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The Board was advised by representatives of the New Jersey Department of Education that the cost of said van, as well as the early morning transportation costs, exceeded the statutory limits and that any monies expended by the Board for this purpose would not be included in the State Aid Formula. Thereafter, the Board terminated the arrangement for the van to convey the Lakewood Hebrew Day School students in the afternoon, and after March 18, 1983, the Board provided the petitioners with their statutory reimbursement for the remainder of the school year.

The issue in this matter is whether the decision of the Board as to the transportation of students to the Lakewood Hebrew Day School is consistent with the provisions of N.J.S.A. 18A:39-1.

On behalf of the petitioners, Mr. Pfeffer argued that N.J.S.A. 18A:39-1 provides that all students attending private schools who reside in Jackson Township should be used for multiplication purposes in order to arrive at the per pupil cost, and he cites the Appellate Division decision in Lepis v. Wall Tp. of Ed. of Education, (N.J. App. Div., March 12, 1981, A-4-68-9).

Mr. Courtney argued that the Board's decision in this matter is consistent with the provisions of N.J.S.A. 18A:39-1 and with the Appellate Division decision in the Lepis case.

The pertinent portion of N.J.S.A. 18A:39-1 provides:

> Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil; provided the per pupil cost of the lowest bid received does not exceed $325.00 and if such bid shall exceed said cost then the parent, guardian or other person having legal custody of the pupil

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> shall be eligible to receive said amount toward the cost of his transportation to a qualified school other than a public school regardless of whether such transportation is along established public school routes.

In the Lepis case, the Appellate Division rejected the lower court's decision in favor of the petitioner, after a finding that the average cost of transportation per student was $142.32 and that the cost for the transportation of the student involved in the matter was more than $3,000. In its decision, the Appellate Division questioned whether the term "per pupil cost" as used in N.J.S.A. 18A:39-1 meant "per pupil per bus route" or "per pupil in the system, per bussed pupils or per specially bussed pupils," Lepis supra, at 3. Since the Appellate Division concluded that the statutory language was not clear, the matter was remanded to the Commissioner of Education who has expertise in the area of school busing.

This decision is consistent with other court rulings in which the courts have recognized that the head of a department empowered to administrate a law is also empowered to adopt a reasonable interpretation of the provision of the act if there is an ambiguity, see, Boller Beverages v. Davis, 38 N.J. 138 (1962), and that such an interpretation is to be given great weight by the court, State v. Council of State College Locals, 153 N.J. Super. 91 (App. Div. 1977) certif. den. 78 N.J. 326 (1978).

Based on my reading of the Lepis decision, I **CONCLUDE** that it does not support the petitioners' position. In this matter the Board was advised by representatives of the New Jersey Department of Education that the cost of transportation of the Lakewood Hebrew Day School students after the school changed its release hour exceeded the statutory limits. Therefore, it appears clear that the New Jersey Department of Education has construed "per pupil cost" as used in N.J.S.A. 18A:39-1 to mean the cost per pupil per bus. Based on the facts presented, I **CONCLUDE** that the petitioners have not shown that it is an unreasonable interpretation of N.J.S.A. 18A:39-1 and, therefore, I **ORDER** that this matter be **DISMISSED WITH PREJUDICE.**

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

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OAL DKT. NO. EDU 2855-83

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

October 14, 1983
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Oct. 14, 1983
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

October 18, 1983
DATE

Ronald L. Lankenau
OFFICE OF ADMINISTRATIVE LAW

fms/ee

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S.P. AND J.P., individually and as guardians for P.P., ET AL.,

PETITIONERS,

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, : DECISION

RESPONDENT.

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

The Commissioner observes that exceptions were filed by petitioners in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners filed exceptions to the initial decision by Judge Tylutki wherein claim is made that all Jackson Township pupils attending private schools outside of Jackson Township within a twenty-mile radius should be provided transportation unless the per pupil cost exceeds $325 per pupil. Further, petitioners state that nowhere in N.J.S.A. 18A:39-1 is there an indication that the decision to provide transportation therein should be made on a bus-by-bus or route-by-route basis. The Commissioner finds no merit in such argument.

Petitioners seem to be contending that the transportation costs of all pupils to private schools be averaged for the entire district to determine a per pupil cost. The Commissioner finds such argument to be entirely without merit obviating as it would the meaning and purpose of N.J.S.A. 18A:39-1, ante, wherein is said in pertinent part:

> "***located within the State not more than 20 miles from the residence of the pupil.***"
> (Emphasis supplied.)

The Commissioner further finds that the Court in Lepis, supra, by virtue of its remand has placed the matter of how the ambiguity of N.J.S.A. 18A:39-1 shall be resolved in the jurisdiction of the Commissioner who has in the instant matter determined that "per pupil cost" as used in said statute shall mean the cost per pupil per bus.

The Commissioner finds and determines that the judge properly concluded the per pupil cost to mean the cost per pupil per bus.

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The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

NOVEMBER 28, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2854-83
AGENCY DKT. NO. 76-3/83A

SHERI ZORFASS,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,
Respondent
v.
JANET MIKLOS,
Third party respondent.

APPEARANCES:

Stephen B. Hunter, Esq., for the petitioner (Klausner & Hunter, attorneys)

William C. Davis, Esq., for the respondent (Davis & Reberkenny, attorneys)

Steven Cohen, Esq., for the third party respondent (Selikoff & Cohen, attorneys)

Record Closed: October 5, 1983 Decided: October 14, 1983

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

The petitioner alleged that the Board of Education of the Township of Cherry Hill (hereinafter referred to as "Board") improperly determined that Janet Miklos had greater seniority entitlement to a full-time guidance counselor position at the Brainard School for the 1982-83 school year. The respondent denied the allegation and the

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matter was referred to the Office of Administrative Law for a decision as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

Prior to the prehearing conference, the respondent filed a motion to join Janet Miklos as a third party respondent. After oral argument at the prehearing conference, I ORDERED that Janet Miklos be a third party respondent in this matter. Also at the prehearing conference, it was decided that the parties would enter into a stipulation of facts and submit legal memoranda as to the issue in this matter. The stipulation and briefs having been received, the record in this matter closed on October 5, 1983.

I FIND that the undisputed facts as stipulated to by the parties are:

(1) Petitioner was first employed by the Board effective September 1, 1974.

(2) Petitioner possesses the following certificates: July 1975—Student Personnel Services (J-1), September 1976—Regular Elementary Teacher and Regular Teacher of the Handicapped (J-2).

(3) Ms. Zorfass was eligible for her Student Personnel Services' certificate as of the start of her employment with the Board (J-3), but did not receive this certificate until July 1975.

(4) During the course of the 1974-75 school year, petitioner was employed as a guidance counselor for the handicapped on a full-time basis, and was assigned to the Administration Building within the Cherry Hill School District (hereinafter referred to as "District").

(5) During the course of the 1975-76 school year, petitioner was employed as a guidance counselor for the handicapped on a full-time basis, and was assigned to the Administration Building within the District.

(6) During the course of the 1976-77 school year, petitioner was employed as a guidance counselor for the handicapped on a full-time basis, and was assigned to the Administration Building within the District.

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(7) Petitioner held the position of a full-time guidance counselor for the handicapped assigned to the Administration Building during the period between September 1977 and January 3, 1978. During the period between January 3, 1978 and January 19, 1978, petitioner was on a medical leave with pay. During the period between January 20, 1978 and March 31, 1978, petitioner was on a medical leave without pay. During the period between April 1, 1978 to June 30, 1978, petitioner was on a child rearing leave, without pay.

(8) During the 1978-79 and 1979-80 school years, petitioner was employed on a part-time, one-half day, five days per week basis as a guidance counselor for the handicapped at the Coles School.

(9) Petitioner for the 1980-81 school year was employed on a part-time, one-half day, five days per week basis as a guidance counselor for the handicapped at the Coles School during the period between September 1980 and December 1, 1980 and during the period between February 8, 1981 and June 30, 1981. During the period between December 1, 1980 and January 12, 1981, petitioner was on a paid medical leave of absence. During the period between January 13, 1981 and February 9, 1981, petitioner was on an unpaid child rearing leave of absence.

(10) During the 1981-82 school year, petitioner was employed on a full-time basis as an elementary guidance counselor at the Paine and Hinchman schools within the District.

(11) During the 1982-83 school year, petitioner was assigned, on a full-time basis, at the Heritage School, as a 4/10 guidance counselor and as a 6/10 English teacher.

(12) The third party respondent was hired by the Board of Education effective September 1, 1972.

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(13) Janet Miklos' certificates are as follows: May 1972—Regular Junior High School Teacher, May 1975—Student Personnel Services.

(14) Janet Miklos was employed on a full-time basis as a junior high school math teacher, assigned to the Heritage School during the 1972-73, 1973-74, 1974-75, and 1975-76 school years.

(15) During the 1976-77 school year, Janet Miklos was assigned on a full-time basis as a guidance counselor at the Beck School.

(16) During the 1977-78 and 1978-79 school years, Ms. Miklos was assigned, on a full-time basis, as a guidance counselor at Cherry Hill East High School.

(17) During the 1979-80 school year, Janet Miklos was assigned, on a full-time basis, as a math teacher at the Cherry Hill East High School.

(18) During the 1980-81 and 1981-82 school years, Janet Miklos was assigned, on a full-time basis, as a guidance counselor at the Cherry Hill East High School.

(19) During the 1982-83 school year, Janet Miklos was assigned, on a full-time basis, as a guidance counselor at the Brainard School.

(20) Petitioner maintains that she had a greater seniority entitlement than Ms. Miklos had to the full-time guidance counselor position at the Brainard School, which was given to Janet Miklos for the 1982-83 school year.

(21) Chart of the employment records of Sheri Zorfass and Janet Miklos is as follows:

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JANET MIKLOS

SCHOOL YEAR	ASSIGNED SCHOOL	POSITION	TYPE OF EMPLOYMENT
1972-73	Heritage	Math	Full-Time
1973-74	Heritage	Math	Full-Time
1974-75	Heritage	Math	Full-Time
1975-76	Heritage	Math	Full-Time
1976-77	Beck	Guidance	Full-Time
1977-78	East	Guidance	Full-Time
1978-79	East	Guidance	Full-Time
1979-80	East	Math	Full-Time
1980-81	East	Guidance	Full-Time
1981-82	East	Guidance	Full-Time
1982-83	Brainard	Guidance	Full-Time

SHERI ZORFASS

SCHOOL YEAR	ASSIGNED SCHOOL	POSITION	TYPE OF EMPLOYMENT
1974-75	Ad. Bldg.	Guid. Coun. for Handic.	Full-Time
1975-76	Ad. Bldg.	Guid. Coun. for Handic.	Full-Time
1976-77	Ad. Bldg.	Guid. Coun. for Handic.	Full-Time
1977-78	Ad. Bldg.	Guid. Coun. for Handic.	Full-Time, except 1/3/78 to 1/19/78— medical leave w/pay; 1/20/78 to 3/31/78— medical leave

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			without pay; 4/1/78 to 6/30/78 child rearing leave without pay.
1978-79	Coles	Guid. Coun. for Handic.	*Part-Time
1979-80	Coles	Guid. Coun. for Handic.	*Part-Time
1980-81	Coles	Guid. Coun. for Handic.	*Part-Time except 12/1/80 to 1/12/81—medical leave with pay; 1/13/81 to 2/8/81 child rearing leave without pay.
1981-82	Paine/Hinchman	Elementary Guidance Counselor	Full-Time
1982-83	Heritage	4/10 Guidance Counselor 6/10 English	Full-Time

*Part-Time means worked a half day for five days per week.

In his initial brief, dated July 8, 1983, and by letter dated August 9, 1983, Mr. Hunter presented certain additional facts which are hereinafter set forth.

All transcripts and other materials (J-3) regarding Ms. Zorfass' eligibility for the student personnel services' certification were submitted to representatives of the Board, prior to the start of the 1974-75 school year. The application for this certificate was executed on October 29, 1974. On November 15, 1974, the Board filed the application with the county superintendent's office. In December 1974, the application was forwarded

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to Trenton. On March 3, 1974, Trenton requested proof of one year's teaching experience for Ms. Zorfass. On April 16, 1975, proof of prior teaching experience was sent to Trenton referring to Ms. Zorfass' prior employment at Burlington County College. In July 1975, a student personnel services certificate was issued to Ms. Zorfass (J-1).

As to the reduction in the number of guidance counselors in the District, there was a loss of three and one-half guidance counselor positions within the District from the 1981-81 school year to the 1982-83 school year. The number of elementary counselors was reduced from seven and one-half counselors to six counselors and the number of special education counselors was reduced from four counselors to two counselors.

By letter dated April 28, 1982, William Laub, Administrative Assistant for Personnel, informed Ms. Zorfass that the Board decided not to reemploy her for the 1982-83 school year and that her name would be placed on the preferred eligibility list for reemployment in order of seniority.

By letter dated August 12, 1983, Mr. Davis informed me that Ms. Zorfass was hired for the 1983-84 school year as a full-time employee, 4/10 guidance counselor and 6/10 English teacher, at the Heritage Junior School.

Since these additional facts have not been disputed by the other parties, I am accepting them as part of the findings of fact in this matter.

I will first consider the argument presented by Mr. Davis, on behalf of the Board, that there is no seniority question in this matter since Ms. Zorfass is still employed by the Board. Mr. Davis stated that Ms. Zorfass and Ms. Miklos have appropriate certificates for their assigned positions for the 1982-83 school year, and he argued that the Board has the right and authority to transfer a teaching staff member to any position within that teacher's certifications, pursuant to N.J.S.A. 18A:25-1, and cited the decision in O'Hara v. Bd. of Ed. of Vocational School of Camden County, (N.J. App. Div., December 30, 1982, A-1827-81T2) (unreported).

It is not disputed that Ms. Zorfass acquired tenure status as a guidance counselor in the District as of her first day of employment during the 1977-78 school year. Pursuant to N.J.S.A. 18A:28-5, tenure can be obtained in one of the specifically

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enumerated positions or in any other position for which a person is required to have an appropriate certificate. Once a teaching staff member acquires tenure in such a position, the person may be assigned to another school but not transferred to another position without his/her consent, Childs v. Union Township Board of Education, (N.J. App. Div., July 19, 1983, A-3603-801) (unreported); Horun v. Board of Education of Watchung Hills Regional High School District, OAL DKT. EDU 3312-80 (Feb. 6, 1981), adopted, Commissioner of Education, 1981 S.L.D. _____ (March 23, 1981), aff'd, State Board of Education, 1982 S.L.D. _____ (February 3, 1982), aff'd, (N.J. App. Div., May 26, 1983, A-2743-81-T2); Howley v. Ewing Township Board of Education, OAL DKT. EDU 3664-82 (Oct. 21, 1982), adopted, Commissioner of Education, 1982 S.L.D. _____ (Dec. 20, 1982); Williams v. Plainfield Board of Education, 1979 S.L.D. 220, aff'd, 176 N.J. Super. 154 (App. Div. 1980), certif. den. 87 N.J. 300 (1981).

Additionally, N.J.A.C. 6:3-1.10(h) provides that:

> Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority.

The position of guidance counselor has been recognized as a separate category for purposes of seniority, N.J.A.C. 6:3-1.10(k), 6:11-12.13.

As to the O'Hara case cited by Mr. Hunter, I **CONCLUDE** that it is factually distinguishable from this matter, See, Neidhart v. Ewing Township Board of Education, 1983 S.L.D. _____ (May 3, 1983).

Therefore, I **CONCLUDE** that Ms. Zorfass should have been given the position of full-time guidance counselor at the Brainard School if she was entitled to the position by seniority. In his brief, Mr. Davis relied on Mr. Cohen's position as to the respective seniority credits of Ms. Miklos and Ms. Zorfass.

As to the seniority issue, Mr. Cohen argued that Ms. Miklos was entitled to 60 months of seniority credit as a guidance counselor as of the end of the 1981-82 school year. Mr. Cohen arrived at this amount by adding the 50 months of actual service as a Guidance Counselor and the 10 months (1979-80 school year) that Ms. Miklos was assigned as a math teacher inbetween her service as a guidance counselor. Mr. Cohen argued that Ms. Miklos was entitled to have guidance counselor seniority credit for the 1979-80 school

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year, pursuant to N.J.A.C. 6:3-1.10(g). According to Mr. Cohen, Ms. Miklos might be entitled to 100 months of seniority as a guidance counselor by counting her full ten years of employment with the Board either as a math teacher or as guidance counselor, pursuant to N.J.A.C. 6:3-1.10(g).

In his brief, Mr. Hunter disagreed and argued that Ms. Miklos has 50 months of seniority as a guidance counselor based on her five school years of actual service as a guidance counselor.

Mr. Hunter argued that to give Ms. Miklos seniority credit as a guidance counselor for the one year she served as a math teacher inbetween her employment as a guidance counselor, pursuant to N.J.A.C. 6:3-1.10(g), would be inconsisent with the interpretation of the tenure and seniority statutes and regulations as set forth in Horun, supra, Childs, supra, Bierman v. Glen Rock Board of Education, 1980 S.L.D. 809, aff'd, State Board of Education, 1981 S.L.D. _____ (Dec. 2, 1981), aff'd, (N.J. App. Div., A-2231-81-T3) (unreported).

N.J.A.C. 6:3-1.10(g) states:

> Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment.

Based on my reading of this regulation, I CONCLUDE that at the end of the 1981-82 school year, Ms. Miklos had 60 months of seniority credit as a guidance counselor.

There is also a dispute between Mr. Cohen and Mr. Hunter as to the amount of seniority credit as a guidance counselor Ms. Zorfass had at the end of the 1981-82 school year. The following chart shows the respective positions of Mr. Hunter and Mr. Cohen relating to Ms. Zorfass' seniority credit.

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Mr. Hunter Months of Seniority	School Year	Mr. Cohen Months of Seniority
10	1974-75	10
10	1975-76	10
10	1976-77	10
7	1977-78	4.5
5	1978-79	5
5	1979-80	5
4.5	1980-81	4.625
10	1981-82	10
61.5		59.25

The major period in dispute relates to the 1977-78 school year. Mr. Cohen argued that Ms. Zorfass was not entitled to seniority credit for the period of time from January 20, 1978 to June 30, 1978 (5.5 months). During that period of time, Ms. Zorfass was on a medical leave without pay from January 20, 1978 to March 31, 1978 (2.5 months), and on a child rearing leave without pay from April 1, 1978 to June 30, 1978 (3 months). Mr. Hunter agreed that Ms. Zorfass was not entitled to seniority credit for the period she was out on a child rearing leave, Berkowicz v. Scotch Plains-Fanwood Board of Education, 1980 S.L.D. _____ (July 29, 1980); Comaskay v. Fort Lee Board of Education, 1981 S.L.D. _____ (January 8, 1981), but argued that she was entitled to 2.5 months' seniority credit for the period she was on a medical leave without pay (January 20, 1978 to March 31, 1978). According to Mr. Hunter, the Commissioner of Education (hereinafter referred to as "Commissioner") has clearly established in Miccichi v. Mount Holly Board of Education 1981 S.L.D. _____ (December 1, 1981) that paid or unpaid disability leaves, either before or after the birth of a child, are creditable for seniority. Mr. Hunter argued that when the State Board of Education reversed the Commissioner in Miccichi, 1982 S.L.D. _____ (June 3, 1982), it did not overrule the principles enunciated by the Commissioner but simply disagreed with the Commissioner's conclusion that the three-month period after Ms. Miccichi's child was born should be considered to be a disability leave. The State Board of Education noted that Ms. Miccichi included the three-month period in her request for a maternity leave of absence and did not make a timely assertion that she was disabled for the three-month period. In this matter, Ms. Hunter pointed out that the Board was initially aware that Ms. Zorfass was on a medical leave without pay from January 20, 1978 to March 31, 1978 (2.5 months).

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Mr. Cohen argued that it was established by the decision of the State Board of Education in the Miccichi case that seniority credit is not to be given for unpaid leaves of absence following childbirth and, therefore, Ms. Zorfass was not entitled to credit for the period of January 20, 1978 to March 31, 1978.

After reviewing the arguments, I agree with Mr. Hunter's interpretation of the decisions of the Commissioner and the State Board of Education in the Miccichi case. The State Board of Education in Miccichi clearly rejected the Commissioner's decision that the three-month period should be treated as a medical leave and held that as part of the child rearing leave of absence, the three-month period should not be counted toward seniority, citing the Comissioner's decision in Berkowicz, supra.

By the decision in the Miccichi case, a distinction has been drawn between medical leaves of absences and voluntary leaves of absences for any purpose. If a Board employee elects to be out for a substantial period of time on an authorized leave of absence, that employee is not entitled to seniority credit for that period of time, Berkowicz, supra; Comaskay, supra; In re: Fidek, 76 N.J. 340, 344 (1975).

Based on the decisions cited as well as the arguments presented by the parties, I **CONCLUDE** that Ms. Zorfass is entitled to seniority credit for the period from January 20, 1978 to March 31, 1978 (2.5 months).

The second time period in dispute relates to the 1980-81 school year. As to that school year, Mr. Cohen calculated that Ms. Zorfass is entitled to 4.625 months of seniority credit and Mr. Hunter represented that she is entitled to 4.5 months of credit. It would appear that there is no dispute as to the time periods, and the difference resulted from the calculations. Since my own calculations concur with those of Mr. Cohen, I **CONCLUDE** that Ms. Zorfass is entitled to 4.625 months of seniority credit for the 1980-81 school year. Further, I **CONCLUDE** that Ms. Zorfass had a total of 61.625 months of seniority credit as a guidance counselor at the end of the 1981-82 school year.

In this initial decision, I have not considered the arguments presented by Mr. Hunter that Ms. Zorfass was entitled to seniority credit for the 1974-75 school year even though her student personnel services certificate was not issued until July 1975 or his argument that her full-time service could be commingled with her part-time employment for seniority since there was no dispute as to her entitlement to such credits.

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Finally, I **CONCLUDE** that the determination of the Board to give the full-time guidance counselor position at Brainard School to Ms. Miklos for the 1982-83 school year was incorrect and that Ms. Zorfass was entitled to this position on the basis of seniority and I **ORDER** that the Board transfer Ms. Zorfass to a full-time guidance counselor position in the District.

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

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

October 14, 1983
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Oct 17, 1983
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

October 19, 1983
DATE

Ronald J. Parks/xs.
OFFICE OF ADMINISTRATIVE LAW

fms/ee

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EXHIBITS

ADMITTED INTO EVIDENCE BY STIPULATION:

J-1 State Board of Examiners' Certification issued to Sheri Zorfass for student personnel services

J-2 State Board of Examiners' Certification issued to Sheri Zorfass for Teacher of the Handicapped and Elementary School Teacher

J-3 Certain school records of Sheri Zorfass

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SHERI ZORFASS,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
V.	:	
JANET MIKLOS,	:	
THIRD PARTY RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board and Third Party Respondent Miklos filed primary exceptions to the initial decision by Judge Tylutki. Petitioner filed reply exceptions to those filed by both respondents.

The Board argues that the judge erred in concluding that petitioner had entitlement by seniority to the position of full-time guidance counselor. The Board, relying on O'Hara, supra, contends that it has the right to transfer a teaching staff member to any position within the teacher's certification and that the matter does not involve seniority.

Miklos contends that the judge erred in according petitioner 2.5 months' seniority credit for a medical leave without pay. Miklos relies on Berkowicz et al., supra, in which claim is made that a leave of absence for personal illness was not counted towards seniority. Miklos therefore pleads for modification of the seniority of petitioner to 59.125 months, thus giving her no seniority entitlement to the full-time guidance counselor position.

Petitioner in reply exceptions to those of the Board states that the argument by the Board that this matter does not involve seniority was advanced before the judge who considered and rejected it. Petitioner, relying on Childs, supra, argues that an involuntary transfer from an educational services position to a teaching position constitutes a dismissal in violation of tenure rights. Petitioner distinguishes O'Hara from the present matter.

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Petitioner in reply to Miklos' exceptions repeats much of the argument centered around Micciche, supra, and contends that the initial decision should be affirmed in all respects. The Commissioner finds merit in petitioner's arguments.

Based on a thorough reading of the manifold arguments advanced by the parties and in view of the thorough analysis made by the judge, the Commissioner is convinced that she properly determined the seniority of petitioner herein. In particular the Commissioner notes with approval the differentiation made by the judge between Berkowicz, and Micciche as applied to the instant matter.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Board shall transfer Sheri Zorfass to a full-time guidance counselor position in the district.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

DECEMBER 2, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8595-82
AGENCY DKT. NO. 337-8/82A

MATAWAN REGIONAL TEACHERS ASSOCIATION,
AND RUSSELL L. THOMAS, CHARLENE CANZANO,
JUDITH ANN HOLMES, RICHARD POST
AND HELEN L. KOSTYK,
Petitioners
v.
BOARD OF EDUCATION OF THE
MATAWAN-ABERDEEN REGIONAL
SCHOOL DISTRICT,
Respondent.

APPEARANCES:

Mark J. Blunda, Esq., for the petitioners (Rothbard, Harris & Oxfeld, attorneys)

Vincent C. DeMaio, Esq., for the respondent

Record Closed: August 30, 1983 Decided: October 14, 1983

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

The petitioners alleged that the Board of Education of the Matawan-Aberdeen Regional School District (hereinafter referred to as "Board") improperly and arbitrarily denied the requests for additional sick days with pay, pursuant to N.J.S.A. 18A:30-6, submitted by Russell L. Thomas, Charlene Canzano, Judith Ann Holmes, Richard Post and Helen L. Kostyk. The respondent denied the allegations and the matter was referred to

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the Office of Administrative Law for a decision as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on January 11, 1983, and the hearing in this matter took place on April 6, 1983. After receipt of briefs, the record closed on August 30, 1983.

The undisputed facts in this matter are:

(1) Russell L. Thomas was employed by the respondent for 19 years and his last working day was May 4, 1982 (T 6).

(2) At the start of the 1981-82 school year, Mr. Thomas had 56 accumulated sick days, all of which he used during that school year because of his illness.

(3) By letter to Dr. Kenneth Hall, Superintendent of Schools, dated May 12, 1982, Mr. Thomas informed the respondent that he was unable to return to work for the remainder of the school year because of his heart condition and that he would use all of his sick days by June 22, 1982, and requested additional sick days with pay, pursuant to N.J.S.A. 18A:30-6, from June 23, 1982 to the end of the school year, June 30, 1982 (P-1, T 8). Also by this letter, Mr. Thomas authorized Dr. Hall to speak to his physician, Dr. Yen.

(4) Mr. Thomas was informed by his doctor that he could no longer work in May 1982, but he hoped to resume teaching after a one year leave of absence (T 7). Thereafter, he recognized that he could no longer work (T 7-8).

(5) Mr. Thomas has congestive myeocardiopathy with congestive heart failure and hyperthyroidism (T 7). Mr. Thomas indicated that his red blood cells are getting progressively smaller and he suffers from a lack of oxygen (T 7).

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(6) By letter to Edward Scullion, Board Secretary-Business Administrator, dated May 17, 1982, Mr. Thomas informed the respondent that he had applied to the Teachers' Pension and Annuity Fund for an ordinary disability pension as of July 1, 1982, and that until he had received a notification regarding his disability pension, he wanted an official leave of absence for illness starting on July 1, 1982 (P-2).

(7) By letter dated May 19, 1982, Dr. Dario Valcarcel, Deputy Superintendent of Schools, requested information from Dr. Yen regarding Mr. Thomas' condition (P-21).

(8) In preparing the agenda for the May 25, 1982 Board meeting, Dr. Valcarcel listed the retirement of Russell Thomas (T 93) and, by oversight, he failed to list Mr. Thomas' request for paid sick days from June 23, 1982 to June 30, 1982 (T 105, 108).

(9) At its May 25, 1982 meeting, the Board approved a sick leave of absence without pay for Russell L. Thomas, starting on June 23, 1982 and ending on June 30, 1982 (P-3, P-4, P-18).

(10) Mr. Thomas had not applied for a sick leave of absence without pay from June 23, 1982 to June 30, 1982 (T 15-6).

(11) On May 27, 1982, Dr. Valcarcel received a letter from Dr. Yen stating that Mr. Thomas could not work for the remainder of the school year (P-22, T 114). This information was not presented to the Board (T 114, 118).

(12) On June 2, 1982, the Board of Trustees of the Teachers' Pension and Annuity Fund approved a disability pension for Mr. Thomas starting on July 1, 1982 (T 11).

(13) At its June 17, 1982 meeting, the Board accepted Mr. Thomas' retirement as of July 1, 1982 (R-1, T 10-11, 110).

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(14) A grievance was filed with Dr. Valcarcel regarding the denial of Mr. Thomas' request for additional sick days with pay as well as the requests filed by the other named petitioners. By letter dated June 24, 1982, Dr. Valcarcel stated that the grievance was being forwarded to the Board (P-24, T 109) and by letter dated August 12, 1982, Marie Panos, President of the Matawan Regional Teachers Association (hereinafter referred to as "MRTA") was advised that the grievance was denied by the Board (P-25, T 112).

(15) Charlene Canzano has been employed by the respondent since 1970 (T 29). At the start of the 1981-82 school year, Ms. Canzano had about 30 accumulated sick days and she used them all during that school year (T 26).

(16) By letter dated June 14, 1982, Ms. Canzano requested, pursuant to N.J.S.A. 18A:30-6, five additional sick days with pay because she was ill due to complications during her pregnancy (P-5) and she submitted a note regarding her medical condition from Dr. Steven Feld, a maternal-fetal specialist (P-6, T 26).

(17) Ms. Canzano was not asked by a representative of the Board to supply any additional information regarding her request for additional sick days with pay (T 29).

(18) At its June 17, 1982 meeting, the Board approved a leave of absence without pay for Ms. Canzano starting on June 24, 1982 and ending on June 28, 1982 (P-7, P-19). Ms. Canzano did not ask for a leave of absence without pay (T 28).

(19) Judith Ann Holmes has been employed by the respondent since 1976 (T 39). At the start of the 1981-82 school year, Ms. Holmes had 1 or 2 accumulated sick days (T 36).

(20) Ms. Holmes has chronic bronchitis and asthma, and was in the hospital twice in May 1982 because this condition was complicated by her pregnancy (P-8. T 36).

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(21) By letter dated June 1, 1982, Ms. Holmes requested three additional sick days with pay pursuant to N.J.S.A. 18A:30-6 (P-8).

(22) At its June 17, 1982 meeting, the Board denied Ms. Holmes' request for three additional paid sick days (P-9, P-19).

(23) Ms. Holmes was never requested to give any information regarding her request for three additional paid sick days, nor was she given any reason for the denial of this request (T 37-8).

(24) A representative of the MRTA suggested that Ms. Holmes refer to N.J.S.A. 18A:30-6 in her June 1, 1982 letter (T 40).

(25) Helen L. Kostyk has been employed by the Board since November 1973 (T 42). At the start of the 1982-83 school year, Ms. Kostyk had no accumulated sick days (T 43).

(26) By letter dated September 16, 1982, Ms. Kostyk applied for a sick leave of absence with pay for a period of 6 to 8 weeks (P-10) and submitted a note from her doctor (P-11). Ms. Kostyk was scheduled for a hysterectomy operation and wanted the extra paid sick days for the period that would not be covered by the paid sick days she received for the 1982-83 school year (T 42, 46).

(27) At its October 18, 1982 meeting, the Board approved a leave of absence without pay for Ms. Kostyk (P-12, P-20).

(28) Ms. Kostyk never asked for a leave of absence without pay, was never contacted by a representative of the Board regarding her request for additional sick days and was never given a reason for the denial of her request (T 44-45).

(29) Richard H. Post has been employed by the Board since September 1980 (T 50). At the start of the 1982-83 school year, Mr. Post had 8 accumulated sick days (T 50, 52-3).

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(30) By letter dated June 8, 1982, Mr. Post requested 6 additional paid sick days pursuant to N.J.S.A. 18A:30-6 (P-13). Mr. Post had been injured in an automobile accident (P-13, T 48).

(31) By letter dated June 18, 1982, Mr. Post was informed that the Board had denied his request for additional sick days pursuant to N.J.S.A. 18A:30-6 (P-14, P-19).

(32) Mr. Post was never contacted by a representative of the Board regarding his request for additional paid sick days, nor was he given an explanation for the denial of his request (T 49-50).

(33) By letter to Dr. Kenneth Hall, dated April 14, 1982, Sonia C. Levine informed the respondent that her husband was in the hospital with a serious heart condition and that he was to retire on May 1, 1982 (P-15, T 55). Also by this letter, Ms. Levine stated that her husband's accumulated sick days would be exhausted before May 1, 1982 and requested additional sick days with pay until the effective date of his retirement (P-15).

(34) At its April 26, 1982 meeting, the Board gave Albert Levine 4 additional sick days with pay, pursuant to N.J.S.A. 18A:30-6 (P-16, P-17).

(35) Mr. Levine had been employed by the Board for more than thirty years.

(36) Thomas Feqetie (sometimes referred to as Mr. Saxton by the witnesses) was employed by the Board as a custodian and he had a heart attack while at work during the 1981-82 school year (T 102). Without taking formal action, the Board paid Mr. Feqetie his full salary while he was not at work and before he retired (T 67, 68-9, 75). No information was given as to Mr. Feqetie's length of service and it was estimated that he was paid for four months (T 69, 85-6, 102).

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At the hearing, Marie Panos testified that she attends almost all Board meetings and was present when the Board approved the request for additional paid sick days for Albert Levine and when it denied the named petitioners' requests for additional sick days with pay.

Ms. Panos stated that during the October 18, 1982 Board meeting, Ms. Kostyk's request for a sick leave of absence with pay was discussed and denied. The minutes for that Board meeting state: "Ms. Panos requested that the record state that Ms. Kostyk requested Board's consideration for extended sick leave of absence with pay. Dr. Valcarcel and the Board explained that their position was to grant sick leave of absence without pay when an employee's sick leave days have been exhausted" (P-20). According to Ms. Panos, she was told that this statement represented the Board's policy; however, she never saw a written policy setting forth the Board's position as to N.J.S.A. 18A:30-6 benefits (T 61).

During the hearing, the recording of that portion of the May 25, 1982 Board meeting which related to Mr. Thomas' request for additional sick days with pay was played. The recorded discussion clearly shows that there was confusion regarding whether Mr. Thomas planned to retire or to ask for a leave of absence for the following school year. During this meeting it was suggested that the Board table the matter until there was a clarification regarding Mr. Thomas' plans; however, the Board decided to take a vote on Mr. Thomas' request and denied his request for additional sick days with pay.

John Comerford, the President of the Board, testified that he was in favor of giving additional sick days with pay to Mr. Levine and Mr. Feqetie and that he voted against the requests for additional sick days with pay submitted by Mr. Thomas, Ms. Canzano, Ms. Holmes, Ms. Kostyk and Mr. Post. Mr. Comerford stated that he is not aware of any Board policy relating to N.J.S.A. 18A:30-6 benefits (T 67). According to Mr. Comerford, the Board has the discretionary right to decide whether or not to authorize additional sick days with pay (T 75). Mr. Comerford felt that the Board did consider certain factors in deciding whether or not to grant additional sick days with pay; however, he did not identify these factors (T 67). As to his vote, Mr. Comerford considered the length of service and whether the employee was about to retire (T 67), and he mentioned these factors to the other members of the Board when they discussed Mr. Levine's application (T 68).

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According to Mr. Comerford, Mr. Feqetie presented a different situation because he had a heart attack while at work. Rather than have Mr. Feqetie return to work and possibly have another heart attack at work, the Board decided to give him an extended sick leave with pay (T 69).

Mr. Comerford voted against Mr. Thomas' request for additional sick days with pay since it was his understanding that Mr. Thomas was not going to retire (T 70-71). At the time of the vote, Mr. Comerford was aware that Mr. Thomas had a serious heart condition (T 70).

After the Board approved Mr. Levine's request for additional sick days with pay, there was an article in the newsletter published by MRTA notifying its membership of the possibility of obtaining additional sick days with pay (T 76). Mr. Comerford was concerned that this article would result in the Board's being inundated with such requests and that the teachers would have the tendency to use up their regular sick days if they thought they could get additional sick days with pay, and this concern was a factor Mr. Comerford considered when he voted against the requests for additional sick days with pay of Ms. Canzano, Ms. Holmes, Ms. Kostyk and Mr. Post. Mr. Comerford stated that the severity of the injury or illness was not a factor he considered before he voted on the requests for additional sick days with pay (T 77).

Dr. Dario Valcarcel was present when the Board considered Mr. Levine's request for additional sick days with pay and he felt that the Board approved these days because Mr. Levine had been employed for approximately 30 years and was about to retire (T 89-90). According to Dr. Valcarcel, there was confusion at the Board meeting as to whether Mr. Thomas planned to retire or wanted a leave of absence for the next school year (T 90-1, 104-5). Dr. Valcarcel admitted that, when the grievance was filed on behalf of Mr. Thomas, he was aware that Mr. Thomas was planning to retire and that the Board accepted Mr. Thomas' retirement prior to the time it denied his grievance regarding the denial of the additional sick days with pay (T 108-111).

According to Dr. Valcarcel, the Board has no formal written policy regarding N.J.S.A. 18A:30-6 benefits and he denied that the statement contained in the October 18, 1982 minutes reflected a policy decision as to such benefits (T 96). According to Dr. Valcarcel, the Board has no written criteria for determining who should be given N.J.S.A. 18A:30-6 benefits; however, based on the Board's past actions, Dr. Valcarcel felt that the

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factors considered by the Board included, in order of importance, the number of years of service, whether the applicant is about to retire, the nature of the illness and the number of sick days with pay requested (P-23, T 96-9).

Based on the testimony, I **FIND** that the additional pertinent facts are:

(1) The Board has not adopted a written policy and has not established written criteria as to N.J.S.A. 18A:30-6 benefits.

(2) The four criteria presented by Dr. Valcarcel, namely, number of years of service, whether the applicant is about to retire, nature of illness and number of sick days requested, were never presented to or adopted by the Board.

(3) The Board's decision as to Mr. Feqetie was based, at least in part, on the Board's concern that Mr. Feqetie could have another heart attack at work.

(4) As to Mr. Levine's request, the Board's decision to give him four paid sick days was apparently based on the fact that Mr. Levine had a serious heart condition, that he had worked for the Board for 30 years and that he would use all of his accumulated sick days prior to the effective date of his retirement.

(5) When considering Mr. Thomas' request for additional sick days with pay, the Board did not have all the relevant facts, such as the letter from Mr. Thomas' doctor as to his condition and the information regarding Mr. Thomas' request for a disability pension.

(6) When considering the requests made by Ms. Canzano, Ms. Holmes, Ms. Kostyk and Mr. Post, the Board did not have all pertinent facts relative to their illnesses or injuries.

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(7) Mr. Comerford's vote on the requests of Ms.Canzano, Ms. Holmes, Ms. Kostyk and Mr. Post was based, at least in part, on his concern regarding the number of such requests and whether the giving of such benefits would result in the excess use of sick days by employees.

The issues in this matter are:

(1) Whether the Board has a policy regarding the granting of extended sick leaves of absence with pay.

(a) If so, whether this policy violates the provisions of N.J.S.A. 18A:30-6.

(b) Whether the Board violated its own policy in granting or denying extended sick leave of absence with pay.

(2) If the Board does not have a policy regarding this matter, did the Board arbitrarily deny an extended sick leave of absence with pay to the named petitioners in this matter.

N.J.S.A. 18A:30-6 provides:

> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

The case law has clearly established that although a board is not obligated to give extra paid sick days, if the board determines to do so, it must make its determination based on the circumstances in each individual case, Piscataway Township Board of Education v. Piscataway Maintenance and Custodial Association, 152 N.J. Super. 235 (App. Div. 1977); Hutchinson v. Totowa Board of Education, 1971 S.L.D. 512, aff'd, State Board of Education, 1972 S.L.D. 670; Marriott v. Hamilton Township Board of Education, 1949-50 S.L.D. 57, aff'd, State Board of Education, 1950-51 S.L.D. 60.

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In Piscataway, supra, the court stated:

> . . . N.J.S.A. 18A:30-6, plainly leaves the matter to the discretion of the local board of education, which may pay any such person each day's salary, less the pay or estimated cost of a substitute, for such length of time as may be determined by the board of education in each individual case. [emphasis supplied] [p. 246]

Although the decisions clearly establish that a Board cannot establish a blanket policy regarding N.J.S.A. 18A:30-6 benefits, there has been a recognition that a board may establish guidelines for the exercise of its discretion, Molina v. East Orange Board of Education OAL DKT. EDU 7276-82 (March 21, 1983), aff'd, Commissioner of Education (May 3, 1983).

The facts in this matter clearly show that the Board has not established any criteria for deciding whether or not to grant N.J.S.A. 18A:30-6 benefits. During the 1981-82 school year, the Board was presented with a number of requests for such benefits and made determinations without any consideration of the need for consistency or for the need to make a determination in each case based on all pertinent facts.

Having taken affirmative action as to the request of Mr. Levine, the Board should have established criteria governing any other requests for N.J.S.A. 18A:30-6 benefits.

The facts as to Mr. Thomas' request for additional paid sick days are similar to the facts regarding Mr. Levine's request. The two guidelines considered by Mr. Comerford, namely, long length of service and pending retirement, were present in both cases. Additionally, during the hearing, Mr. Valcarcel set forth what he considered to be the appropriate criteria for N.J.S.A. 18A:30-6 benefits. Applying these four criteria, both Mr. Levine and Mr. Thomas appear to qualify for N.J.S.A. 18A:30-6 benefits. Based on the facts in this matter as to Mr. Feqetie, there is insufficient information to determine whether or not he also qualified for such benefits under these criteria. Although I recognize there was some confusion when the Board initially considered Mr. Thomas' request, the Board had ample opportunity to reconsider the matter once it became known that Mr. Thomas was going to retire.

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As to the requests of Ms. Canzano, Ms. Holmes, Ms. Kostyk and Mr. Post, the Board denied these requests with little or no information as to the nature of the injury or illness which had prompted the request and without a thorough review of the individual requests. Based on the testimony of Mr. Comerford, it would appear that the Board's action on these requests was motivated, at least in part, by the concern that it might be flooded with similar requests.

Therefore, I **CONCLUDE** that once the Board granted benefits to any employee pursuant to N.J.S.A. 18A:30-6, it was under an obligation to review each subsequent request carefully and to act in a consistent manner. Further, I **CONCLUDE** that based on the precedent established by its decision as to Mr. Levine, the Board acted in an arbitrary and unreasonable manner when it denied Mr. Thomas' request for additional sick days with pay, and I **ORDER** that the Board pay Mr. Thomas an amount equal to what he would have received if he were given paid sick day benefits from June 23, 1982 to June 30, 1982. As to the requests of Ms. Canzano, Ms. Holmes, Ms. Kostyk and Mr. Post, I **CONCLUDE** that the Board did not make a determination based on a thorough review of the facts and I **ORDER** that the requests of Ms. Canzano, Ms. Holmes, Ms. Kostyk and Mr. Post be remanded to the Board for further consideration in accordance with the Final Decision in this matter.

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

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OAL DKT. NO. EDU 8595-82

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

October 14, 1983
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

10/17/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

October 19, 1983
DATE

Ronald L. Parker/sko
OFFICE OF ADMINISTRATIVE LAW

fms/ee

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EXHIBITS ADMITTED INTO EVIDENCE

FOR THE PETITIONER:

P-1 Letter from Russell L. Thomas to Dr. Kenneth D. Hall, dated May 12, 1982
P-2 Letter from Russell L. Thomas to Edward Scullion, dated May 17, 1982
P-3 Letter from Dario Valcarcel to the Teachers' Pension and Annuity Fund, dated May 26, 1982
P-4 Letter from Dario Valcarcel to Russell L. Thomas, dated May 26, 1982
P-5 Letter from Charlene Canzano to the Board of Education, dated June 14, 1982
P-6 Memorandum from Dr. Steven Feld
P-7 Letter from Dario Valcarcel to Charlene Canzano, dated June 18, 1982
P-8 Letter from Judith Holmes to Dr. Hall, dated June 1, 1982
P-9 Letter from Dario Valcarcel to Judith Holmes, dated June 18, 1982
P-10 Letter from Helen L. Kostyk to Dario Valsarcel [sic], dated September 16, 1982
P-11 Letter from Dr. George M. Massell, dated September 24, 1982
P-12 Letter from Dario Valcarcel to Helen Kostyk, dated October 19, 1982
P-13 Letter from Richard H. Post to Dario Valcarcel, dated June 8, 1982
P-14 Letter from Dario Valcarcel to Richard Post, dated June 18, 1982
P-15 Letter from Sonia C. Levine to Dr. Kenneth Hall, dated April 14, 1982
P-16 Part of the minutes of the April 26, 1982 meeting of the Matawan-Aberdeen Regional Board of Education
P-17 Letter from Dario Valcarcel to Sonia C. Levine, dated April 29, 1982
P-18 Part of the minutes of the May 25, 1982 meeting of the Matawan-Aberdeen Regional Board of Education
P-19 Part of the minutes of the June 17, 1982 meeting of the Matawan-Aberdeen Regional Board of Education
P-20 Part of the minutes of the October 18, 1982 meeting of the Matawan-Aberdeen Regional Board of Education
P-21 Letter from Dario Valcarcel to Dr. Yen, dated May 19, 1982
P-22 Letter from Dr. Yen to Dario Valcarcel, dated May 25, 1982
P-23 Interrogatories of petitioners and the answers and supplemental answers submitted by the respondent
P-24 Letter from Dario Valcarcel to Marie Panos, dated June 24, 1982
P-25 Letter from Vincent C. DeMaio to Marie Panos, dated August 12, 1982

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OAL DKT. NO. EDU 8595-82

FOR THE RESPONDENT:

R-1 Letter from Dario Valcarcel to Russell Thomas, dated June 18, 1982

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WITNESSES

FOR THE PETITIONER:

Russell L. Thomas

Charlene Canzano

Judith Ann Holmes

Helen L. Kostyk

Richard H. Post

Marie Panos

John Comerford

FOR THE RESPONDENT:

Dr. Dario Valcarcel

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MATAWAN REGIONAL TEACHERS ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the Board in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board pleads for rejection of the initial decision by Judge Tylutki and dismissal of the Petition. The Board argues that it must decide each request under N.J.S.A 18A:30-6 on the particular circumstances of each individual case. Piscataway Township, supra The Board asserts that under Molina, supra, it is determined that the Board has the right to establish guidelines for the award of such benefits but that nowhere is it established that such guidelines are mandatory. The Board alleges that the judge erred in ordering the Board to pay sick leave benefits to Petitioner Thomas thus usurping the statutory discretion vested in the Board through N.J.S.A. 18A:30-6. The Board disputes the finding by the judge that it did not have all the relevant facts with respect to Petitioners Canzano, Holmes, Kostyk and Post. The Board notes that no request for further information was forthcoming and, additionally, petitioners have the burden of proof in the proceedings. The Commissioner looks with favor on the Board's arguments and adopts them as his own.

A close reading of N.J.S.A. 18A:30-6, the circumstances of this matter and the decisions cited herein convinces the Commissioner that the judge erred in ordering sick day benefits to Petitioner Thomas. The Commissioner finds and determines that the statute of reference herein and all prior decisions pertinent thereto clearly show that each sick leave benefit request must be considered on an individual basis. The Board may not establish identical procedures and benefit awards for each different request generated through N.J.S.A. 18A:30-6. The Commissioner so holds.

The sick day benefits herein awarded to Petitioner Thomas are accordingly set aside. The Commissioner does not take from the Board its statutory discretion to determine sick leave benefits on

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an individual basis but finds it appropriate that the Board carefully re-examine and consider its action to petitioner's request herein. The Petition of Appeal is dismissed herewith.

COMMISSIONER OF EDUCATION

DECEMBER 1, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1304-82
AGENCY DKT.NO.10-1/82A

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
Petitioner
v.
DONALD MARTIN,
Respondent.

and

DONALD MARTIN,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
Respondent.

OAL DKT. NO. EDU 216-83
AGENCY DKT. NO. 472-12/82A

and

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK
Petitioner
v.
DONALD MARTIN,
Respondent.

OAL DKT. NO. EDU 928-83
AGENCY DKT. NO. 1-1/83A

CONSOLIDATED CASES

APPEARANCES:

J. Peter Sokol, Esq., for Board of Education of the City of Asbury Park (McOmber & McOmber, attorneys)

Mark J. Blunda, Esq., for Donald Martin (Rothbard, Harris & Oxfeld, attorneys)

Record Closed: August 23, 1983 Decided: October 18, 1983*

BEFORE **M. KATHLEEN DUNCAN, ALJ:**

*Extension of time to file initial decision requested and granted.

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This matter involves two separate sets of tenure charges filed against Donald Martin, a tenured teaching staff member employed by the Board of Education of the City of Asbury Park, and also a petition filed by Donald Martin seeking a determination that the Board of Education of the City of Asbury Park had wrongfully withheld his salary increment for the 1982-83 school year in violation of N.J.S.A. 18A:29-14. Hereinafter the Board of Education of the City of Asbury Park shall be referred to as "petitioner" and Donald Martin shall be referred to as "respondent," although, as a technical matter, Mr. Martin is actually the petitioner in the increment withholding case.

EDU 1304-82 was commenced on January 6, 1982, when petitioner, in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. certified to the Commissioner charges of unbecoming conduct against respondent. An Answer on behalf of respondent was filed on February 3, 1982. Thereafter, pursuant to N.J.S.A. 18A:6-16 and N.J.S.A. 52:14F-1 et seq., the matter was transmitted to the Office of Administrative Law for determination as a contested case.

A Prehearing Conference was held on April 19, 1982, wherein it was determined, inter alia, that the plenary hearing on the charges would take place on June 28, 29, and 30, 1982, in Freehold, New Jersey. Those dates were subsequently adjourned because petitioner was unable to comply with respondent's discovery request since evidence necessary for the hearing was in the possession of the United States Attorney's Office and the Monmouth County Prosecutor's Office, neither of which was willing to make the evidence available. By Order dated May 27, 1982, the matter was rescheduled for August 9, 10, and 11, 1982. Thereafter the matter was again adjourned by Order providing as follows:

> This matter having been opened before the Office of Administrative Law by Mark J. Blunda, Esq. (Rothbard, Harris & Oxfeld, attorneys) on respondent's motion to suppress all material not provided by petitioner in response to discovery requests and to suppress all references thereto in petitioner's pleadings and affidavits, and the judge having reviewed the moving papers and the responding papers and having heard oral argument of counsel by telephone conference call on July 26, 1982, and it appearing that petitioner has been unable to produce those items requested by respondent because they are currently in possession of the United States Attorney's Office, and it further appearing that the United States Attorney's Office has been unwilling to cooperate voluntarily with petitioner by making the items available for

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> inspection prior to such time as the grand jury acts on respondent's case, and it further appearing that the United States Attorney's Office has refused to make certain federal witnesses available and has indicated an intention to move to quash any subpoenas served on such witnesses pending a possible grand jury indictment;
>
> It is, therefore, on this 30th day of July, 1982 **ORDERED** as follows:
>
> 1. Respondent's motion to suppress is hereby denied;
>
> 2. Petitioner's oral request for an adjournment of the scheduled hearing dates in this matter, August 9, 10, and 11, 1982, is hereby granted over respondent's objection;
>
> 3. This matter is hereby placed on the inactive list for a period not to exceed three months. Petitioner will notify OAL immediately upon learning of the grand jury action or upon learning that the items and witnesses will be made available, whichever is sooner, and the case will then be removed from the inactive list and rescheduled for hearing.

On or about August 18, 1982, petitioner filed a Notice of Motion and supporting papers for leave to amend the charges previously certified. Respondent filed a letter memorandum dated September 28, 1982, in opposition to the motion to amend the tenure charges. This motion was denied by Order entered November 4, 1982, which provided as follows:

> This matter having been opened before M. Kathleen Duncan, Administrative Law Judge, on petitioner's motion for an order permitting amendment of the tenure charges and the statement of evidence previously filed herein and the judge having reviewed the moving papers and the responding papers, and having heard oral arugment of counsel by telephone conference call on October 8, 1982, and it appearing that petitioner seeks to amend the statement of charges to incorporate an additional, separate charge based on evidence of conduct unbecoming a teacher, which evidence petitioner asserts was discovered on July 27, 1982, and it further appearing that the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq., specifically sets forth the procedure required for dismissal or reduction in compensation of persons under tenure in the public school system and requires that the charges must be "filed and proceeded upon as in this subarticle provided," and it further appearing that N.J.S.A. 18A:6-16 requires the Commissioner to make an independent determination prior to hearing concerning the sufficiency of the charges, and it further appearing that neither the legislative scheme nor the regulatory provisions adopted pursuant to N.J.S.A. 18A:6-17 make any provision for amendment of the charges without full complinace with all of the statutory and regulatory requirements;

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> Now, therefore, it is on this 4th day of November, 1982, ORDERED that petitioner's motion to amend the charges previously filed herein is hereby denied, and if petitioner wishes to certify additional charges against respondent it is directed to follow the legislative prescription for the filing and processing of such charges. If the Commissioner decides to transmit the matter involving the new charges to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq., a motion to consolidate the additional charges with those in the pending action can then be made, when and if appropriate.
>
> It is further ORDERED that all copies of material referred to in paragraph 9 of the August 19, 1982 affidavit of R. Thomas Jannarone, Jr. entitled "Amendment to the Statement of Evidence to Support Charges Made Against Donald Martin" submitted with petitioner's moving papers will be removed from the file in this matter and returned to petitioner's attorney with his copy of this Order.

EDU 216-73, the Petition concerning withholding of the increment, was filed by respondent on December 1, 1982. An Answer was filed on behalf of petitioner on January 7, 1983, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

EDU 928-83, the second set of tenure charges, was filed with the Commissioner on December 23, 1982. On February 10, 1983, the Commissioner transmitted the matter to the Office of Administrative Law, without first having received an Answer, in order that the case might be consolidated with the other cases already pending. An Answer to the charges was filed on behalf of respondent on February 22, 1983, with the Office of Administative Law.

The United States Attorney's Office transferred their investigation to the Monmouth County Prosecutor's Office, and on November 5, 1982, the Monmouth County Grand Jury issued a sixteen count indictment against respondent. During a conference call between counsel and the undersigned administrative law judge on November 12, 1982, EDU 1304-82 was removed from the inactive list and rescheduled for hearing for February 15, 16, 17, and 18, in Freehold, New Jersey. Thereafter followed a series of correspondence between counsel. On November 22, 1982, counsel for respondent wrote to counsel for petitioner requesting advice as to the dates and times when the tangible items in the possession of the Monmouth County Prosecutor's Office which would be used as

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evidence against respondent would be available for inspection. By letter dated December 7, 1982, counsel for petitioner replied stating that he had received assurances from the Monmouth County Prosecutor's Office that the evidence would be available for the tenure hearing in February and suggesting that respondent's counsel provide proposed times and dates for review of the items in the Prosecutor's office prior to that time. A copy of counsel's December 7, 1982 letter was sent to the Monmouth County Prosecutor's Office. By letter dated December 20, 1982, respondent's counsel provided to petitioner's counsel a list of dates that he and respondent would be available to inspect the evidence at the Monmouth County Prosecutor's Office. By letter dated December 21, 1982, petitioner's counsel wrote to respondent's counsel as follows:

> I am in receipt of your letter dated December 20, 1982, itemizing dates when you and Mr. Martin will be available to inspect evidence at the Monmouth County Prosecutors' Office. I have been instructed by the Monmouth County Prosecutor that it will be possible for you to view the evidence after the January 17, 1982, hearing date. In addition, Mr. Martin will have to obtain direct clearance from the Prosecutor's Office in order to view the evidence against him. Accordingly, please submit a list of prospective dates after January 20, 1983.
>
> Thank you for your courtesy and cooperation.

Respondent's counsel's reply was dated December 23, 1982, and provided as follows:

> I am in receipt of your letter of December 21, 1982, indicating that the examination of evidence in the above-captioned matter will have to be after January 17, 1983.
>
> Please be advised that Mr. Martin and I will be available to view these items on any of the following dates: January 18, 19, 20, 21, 24, 25, 28, and 31, 1983.
>
> Needless to say Mr. Martin is guaranteed the right to discovery of the prospective evidence against him. However, pursuant to your direction, I am by copy of this letter formally requesting from the Monmouth County Prosecutor's Office clearance for Mr. Martin to view the subject material.
>
> Since the tenure hearing is scheduled to commence February 15, 1983, and Respondent has yet to be given the discovery which he demanded in March of 1982, I am herewith transmitting to the Honorable M. Kathleen Duncan, A.L.J. copies of our most recent correspondence on the discovery issue.

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A carbon copy of this letter was also sent to Linda B. Kenney, Assistant Prosecutor. This line of correspondence was terminated following December 23, 1982, when the Monmouth County Prosecutor apparently changed his mind about permitting the parties to have access to the evidence. A copy of a letter written by Linda B. Kenney, Assistant Prosecutor, to petitioner's counsel, dated December 23, 1982, was received by the undersigned administrative law judge which provided as follows:

> I am in receipt of your letter, dated December 21, 1982. Please be advised that the Monmouth County Prosecutor's Office will not allow defendant or his civil attorney in to view the evidence until the criminal proceedings are finished.
>
> Therefore, I would suggest to you that you not make arrangements, at this point, for dates to view the evidence.
>
> Please also be advised that, at the present time, only defendant's criminal attorney has the right to see the evidence. This remains true, in the case of a conviction, until after a defendent is sentenced.

Under cover letter dated January 28, 1983, petitioner filed a Notice of Motion for Summary Judgment without hearing, asserting that respondent had forfeited his position as a matter of law pursuant to N.J.S.A. 2C:51-2 when he entered a guilty plea on January 20, 1983, to the second degree crime of endangering the welfare of children. Petitioner's Notice of Motion also sought an Order requiring respondent to reimburse petitioner for all salary which had been paid to him pending the resolution of the criminal charges. The February hearing dates were consequently adjourned. Respondent filed a brief in opposition to the Motion for Summary Judgment and Reimbursement on February 22, 1983, wherein he pointed out that pursuant to N.J.S.A. 2C:51-2, forfeiture of public employment is contingent upon the event of sentencing and not upon the event of a guilty plea unless the court specifically orders such forfeiture in the event of a guilty plea. Respondent also asserted that he was entitled to a hearing with respect to the second set of tenure charges and with respect to his petition concerning his increment withholding. In reply to respondent's brief, petitioner's counsel filed a letter memorandum dated March 3, 1983.

During a Supplemental Prehearing Conference held on April 4, 1983, the three cases were consolidated, and the Prehearing Order which was issued on April 6, 1983, set forth the nature of the proceedings and identification of issues as follows:

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EDU 1304-82 will be resolved on or about April 8, 1983, when Donald Martin is sentenced in Superior Court pursuant to his guilty plea to the fifth count of indictment number 186-82, returned by the Monmouth Grand Jury on November 5, 1982. Mr. Sokol will submit a certified copy of the Judgment of Conviction which will be incorporated by reference in the Initial Decision in this matter.

Issues remaining for determination in these consolidated cases are as follows:

1) Is the Board of Education of the City of Asbury Park (hereinafter Board) entitled to reimbursement of any or all salaries paid to Donald Martin (hereinafter teacher) after May 14, 1982?

2) Do the charges set forth in EDU 928-83 constitute conduct unbecoming a teacher such as to warrant removal pursuant to N.J.S.A. 18A:6-10 et seq.?

3) If the answer to the previous question is in the negative, is teacher entitled to payment of salary for period December 17, 1982 up to date of sentencing?

4) Was Board justified in withholding teacher's increment for academic year 82-83?

5) If the answer to the previous question is in the negative, is teacher entitled to payment of any additional salary?

6) (Possibly) Is teacher entitled to reimbursement for unused sick days?

A hearing was scheduled to take place on May 17, 1983, in Red Bank, New Jersey.

The hearing commenced as scheduled on May 17, 1983, in Red Bank, New Jersey, continued on June 23, 1983, at the Trenton office of the Office of Administrative Law, and concluded on July 26, 1983, at the Municipal Building in Little Silver, New Jersey. The parties requested that the record remain open for receipt of additional submissions. Respondent submitted a brief in opposition to the withholding of his increment dated July 29, 1983, which was received on August 2, 1983, to which petitioner replied by letter dated August 3, 1983, received on August 9, 1983. Petitioner submitted an additional brief dated July 15, 1983, and a supplemental brief in support of its position, dated July 26, 1983, both of which were received on August 2, 1983. Respondent's brief in opposition to the tenure charges and reimbursement was received on August 23, 1983, whereupon the record closed.

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FINDINGS OF FACT

Some of the relevant facts in this matter are not in dispute and I, therefore, **FIND** the facts set forth in the following summary as uncontested facts.

EDU 1304-82

Respondent was a tenured teaching staff member employed as a guidance counselor in petitioner's school system for a period in excess of 14 years. On November 23, 1981, law enforcement authorities, including the Federal postal authorities and the Monmouth County Prosecutor's Office, participated in a search and seizure of respondent's home and the arrest of respondent. On November 30, 1981, petitioner's superintendent of schools, R. Thomas Jannarone, Jr., suspended respondent with pay based upon the arrest. On December 9, 1981, Superintendent Jannarone submitted a statement of charges and supporting evidence to petitioner. On December 28, 1981, petitioner voted to certify the tenure charges against respondent to the Commissioner of Education and to suspend him without pay effective January 1, 1982. The following were the charges which were filed against respondent with the Commissioner on January 6, 1982:

CHARGE ONE

Donald Martin, a tenured employee of the Board of Education of the City of Asbury Park has engaged in conduct unbecoming a teacher in that he has sold and/or distributed literature, audiotapes and photographs involving the sexual exploitation of minors.

CHARGE TWO

Donald Martin, a tenured employee of the Board of Education of the City of Asbury Park, in selling and/or distributing literature, audio tapes and photographs which involve the sexual exploitation of minors has engaged in unbecoming conduct that is contrary to the rights and duties of a teaching staff member so as to render the teaching staff member unfit for professional responsibilities.

CHARGE THREE

The conduct of Donald Martin, a tenured employee of the Board of Education of the City of Asbury Park, as set forth in Charges One and Two as well as in the written statement of evidence, constitutes just cause for his dismissal as an employee of the Board of Education of the City of Asbury Park.

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Respondent was suspended without pay pursuant to N.J.S.A. 18A:6-14 until April 30, 1982. He began receiving paychecks again on May 14, 1982.

Because petitioner was unsuccessful in obtaining from the United States Attorney's Office and the Monmouth County Prosecutor's Office the evidence which it needed to prosecute its charges against respondent, the several hearing dates referred to in the procedural history hereinabove were necessarily adjourned. The Monmouth County Prosecutor's Office set forth its justification for its failure to cooperate with petitioner in a letter dated May 16, 1983, J-1 in evidence, which states:

> This letter is in response to a request made on behalf of the Asbury Park Board of Education for release of the evidence seized by the Monmouth County Prosecutor's Office and the Federal Government in the above-captioned matter. Please be advised that the position that this office has taken from the time of the seizure of the evidence, in November of 1981, is that the same evidence cannot be released to anyone during the pendency of the criminal trial.
>
> This period of time runs from the date of the seizure through the end of the time for appeal of the sentence. Donald Martin has until June 17, 1983 to file such an appeal. Until such date, the Monmouth County Prosecutor's Office will not release the evidence. The reason for this is clear in criminal law. The State if it ever had to proceed to trial against Mr. Martin must show that it had possession of the evidence from the time it was seized until the time of trial, and must further show that the evidence is in the same condition as it was when it was taken from the defendant.
>
> Please be advised that our position in this matter has not changed, nor can it be changed until after the appeal time has run.
>
> If we can be of any further assistance, please do not hesitate to call.

On January 20, 1983, respondent entered a guilty plea to the fifth count of indictment number 186-82 which had been returned by the Monmouth County Grand Jury on November 5, 1982. The fifth count of the indictment stated:

> ENDANGER WELFARE OF CHILDREN - SECOND DEGREE CRIME
>
> The Grand Jurors of the State of New Jersey, for the County of Monmouth upon their oaths present that DONALD MARTIN and CAROL MARTIN, on divers dates between January, 1981, and the 23rd day of November, 1981, in the City of Asbury Park, County of Monmouth and within the jurisdiction of this Court, did commit the

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> crime of endangering the welfare of a child in that they did sell photographs which depict and present the appearance of children, ages 6 through 14, engaging in a prohibited sexual act, to wit: sadism and/or masochism and/or nudity as defined by N.J.S. 2C:24-4b.(2), contrary to the provisions of N.J.S. 2C:24-4b.(5), and against the peace of this State, the Government, and dignity of the same.

Respondent was sentenced on April 15, 1983, purusant to a Judgment of Conviction entered by Alvin Yale Milburg, J.J.D.R.C.t/a. Judge Milburg also signed an "Order to Forfeit Public Office" on May 2, 1983, which provided that respondent forfeit his position of employment with petitioner and further ordered that respondent" forever be disqualified from holding any office or position of honor, trust, or profit under this State or any of its administrative or policital subdivisions."

EDU 216-83

On September 22, 1982, petitioner voted to withhold respondent's increment for the 1982-83 school year. By letter dated September 24, 1982, Allen B. Weissberger, Business Manager and Board Secretary for petitioner, advised respondent of petitioner's action and provided him with a copy of the resolution passed by the Board which provided as follows:

> WHEREAS, the Board of Education of the City of Asbury Park in the County of Monmouth, hereinafter referred to as the "Board of Education", has in its employ Donald Martin, a tenured guidance counsellor who served in the Middle School; and
>
> WHEREAS, the Superintendent of Schools R. Thomas Jannarone, Jr., suspended Donald Martin effective November 30, 1981; and
>
> WHEREAS, the Board of Education did by Resolution on December 9, 1981, ratify and confirm the action of the Superintendent of Schools in suspending Donald Martin; and
>
> WHEREAS, the Statement of Charges and Statement of Evidence are presently pending before the Commissioner of Education; and
>
> WHEREAS, Donald Martin is presently suspended until a final determination by the Commissioner of Education; and
>
> WHEREAS, N.J.S.A. 18A:6-14 provides inter alia that if the Commissioner of Education has not made a determination within 120 calendar days after the certification of charges, then the full

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salary shall be paid to the employee beginning on the 121st day until such determination is made; and

WHEREAS, no determination was made by the Commissioner within 120 days; and

WHEREAS, the full salary is being paid to Donald Martin as required; and

WHEREAS, the Board of Education has received a recommendation from the Superintendent of Schools to withhold the increment of Donald Martin for the 1982-1983 school year because of the Statement of Charges and Statement of Evidence, as amended; and

WHEREAS, the full membership of the Board of Education has met, carefully reviewed the recommendation of the Superintendent of Schools, is satisfied with the reasons given by the Superintendent of Schools, and has conducted a recorded roll call majority vote of the full membership of the Board of Education.

NOW, THEREFORE BE IT RESOLVED the increment of Donald Martin shall be withheld for the 1982-83 school year; and

BE IT FURTHER RESOLVED that the Superintendent of Schools or his designee is hereby directed to notify Donald Martin within ten (10) days of the date hereof to give written notice of the aforesaid action together with the reasons expressed herein. (R-3 in evidence)

EDU 928-83

At its regular meeting on December 16, 1982, petitioner adopted a resolution, inter alia, suspending respondent without pay for a period not to exceed 120 days and certified to the Commissioner of Education a second set of tenure charges arising out of separate and independent facts from the charges previously filed. The charges, which were filed with the Commissioner of Education on December 23, 1982, provided as follows:

CHARGE ONE

Donald Martin, a tenured employee of the Board of Education of the City of Asbury Park, has engaged in conduct unbecoming a teacher in that he has caused sexually oriented pornographic material to be present or to be placed on property belonging to the Board of Education of the City of Asbury Park, located specifically in the office of the guidance counselor in the Middle chool on school premises.

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CHARGE TWO

The conduct of Donald Martin, a tenured employee of the Board of Education of the City of Asbury Park, as set forth in Charge One, as well as in the written Statement of Evidence, constitutes conduct unbecoming a teacher and just cause for his dismissal from his tenured employment with the Board of Education of the City of Asbury Park.

CHARGE THREE

Donald Martin, a tenured employee of the Board of Education of the City of Asbury Park, has without authorization used school property in the conduct of a business which is wholly unassociated with the Board of Education of the City of Asbury Park, and specifically, his position as guidance counselor in the Middle School.

CHARGE FOUR

Donald Martin, a tenured employee of the Board of Education of the City of Asbury Park, has without authorization used school property in conducting a business selling pornography and sexually oriented material, which business is wholly unassociated with the Board of Education of the City of Asbury Park, and specifically, his position as guidance counselor in the Middle School.

Having had an opportunity to hear the testimony of all the witnesses and to observe their demeanor, I **FIND** the following facts with respect to the second set of tenure charges.

In early January, 1982, respondent was permitted access to his office at school for purposes of cleaning out his office and desk. Respondent put personal items into a duffle bag and took them home; he put school related materials which he found into the box which was marked as P-5 in evidence at the hearing. He wrote "Don Martin" on top of the box and placed the box in Mamie Moon's closet because his office had no closet. Mrs. Moon is another guidance counselor employed by petitioner; she is the only one who has an office with a closet, and the closet is available for use by other staff members. When respondent placed his box in the closet, there were several other boxes in the closet. After respondent left the school that evening, he did not return.

On July 27, 1982, Mrs. Moon was cleaning out her closet. Mrs. Moon was being assisted by a 13-year-old student. Mrs. Moon and the student were going through some of the boxes in the closet when the student, who had been looking through P-5, said, "Look at

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this, Mrs. Moon." The student then handed Mrs. Moon a printed brochure advertising an adult, sexually-oriented, private party to be held in New York City on July 18, 1981. The headline on the brochure was entitled, "Come, let's have an affair!" The brochure also advertised a "new release" from Bizarre Video Productions featuring "Sulka," a man who became a women after a sex change operation. The brochure featured photographs of a nearly-nude Sulka before and after the operation. The brochure also advertised five new films entitled, "Magda Sade's Smotherly Restraint," "Smothered, Humiliated, and Flogged," "Transformed and Disciplined," "Slavegirl's Double Suspension," and "Sasha's Enema Spanking." A photograph from each film was accompanied by an explicit description of the sado-masochistic plot. Finally, the brochure described another "new release" from Bizarre Video Productions entitled, "Mistress Candy, A Story of She-Male Domination." See P-3 in evidence. Mrs. Moon took the brochure away from the student and sent the student home. Mrs. Moon then searched through the contents of P-5 herself and discovered, among various guidance department materials bearing Donald Martin's name, a white envelope addressed "Sexually Oriented Material, Open with Discretion" (P-4 in evidence), another brochure entitled "Sock It To Me" picturing a semiclothed woman and advertising membership in the "Erotic Art Book Society" (P-1 in evidence) and a sixteen-page newsletter of the Society of Janice dated June, 1981, entitled "Growing Pains." The sketch on the cover of the newsletter was of a nude female with lash marks on her back and buttocks; she was chained between two posts. (P-2 in evidence) Mrs. Moon called the principal, Sidney Wells, who then came into Mrs. Moon's office and observed P-1 through P-5. P-1 through P-4 were replaced in P-5 and Mr. Wells took the box into his office and called Superintendent Jannarone. Mr. Wells wrote July 27, 1982, on the top of the box in magic marker and transmitted the box with all of its original contents, including P-1 through P-4, to Superintendent Jannarone who then caused the second set of tenure charges to be filed against respondent.

Respondent denies that P-1 through P-4 ever belonged to him. He also denies ever having seen P-1 through P-4 prior to the filing of the second set of tenure charges. Respondent suggests that since the closet was easily accessible to other teaching staff members and school custodians and since material such as P-1 through P-4 is readily available to the general public that someone else placed the materials in P-5.

In resolving a question of credibility, the choice of accepting or rejecting the testimony of a witness rests with the finder of facts. Atkinson v. Parsekian, 37 N.J. 143 (1962). See also Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960). To be believed,

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testimony must come not only from the mouth of a credible witness, but must also be credible itself. It must be such as common experience and observation can approve as probable under the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954) Respondent's suggested explanation for the presence of P-1 through P-4 in the box which he placed in Mrs. Moon's closet is simply not credible. Of course, it is possible that someone else placed the materials in the box after respondent placed it in the closet; anything is possible, however, and that is simply not probable. Given the nature of the materials P-1 through P-4 and the nature of the pornography mail order business in which respondent was engaged and which was the subject of his criminal conviction, I **FIND** that the materials, P-1 through P-4 in fact belonged to respondent and that he placed them into the box, undoubtedly inadvertently, when he was cleaning out his desk and office in January 1982.*

With respect to that portion of the second set of tenure charges which asserts that respondent engaged in the unauthorized use of school property in conducting his business selling pornography and sexually oriented material, I **FIND** that there is insufficient evidence to connect the Rheem tape recorder, AV-80, which belonged to petitioner and which was seized by Federal Postal authorities from respondent's home during the execution of their search warrant on November 23, 1981, with respondent's child poronography mail-order business. Testimony offered by petitioner established that the tape recorder was the property of the school district and that the recorder had been seized from respondent's home by the Federal authorities. P-14 in evidence, a photograph of one wall area in respondent's bedroom, shows several tape recorders plugged into wall outlets and lined up on the floor next to the bed. The photograph was introduced into evidence through the testimony of Barbara Coleman, an investigator with the Monmouth County Prosecutor's Office, who testifed that she observed the tape recorders as they appeared in the picture on the morning of November 23, 1981. Ms. Coleman was unable to testify that the tape recorders as they appear in the picture appeared exactly that way prior to the Federal autorities entering the house to execute the search warrant, however, since she arrived approximately one hour after the first law enforcement officials arrived. Carol Martin, wife of respondent, who was also convicted on criminal

*Interspersed throughout the materials in the box (P-5 in evidence), the undersigned administrative law judge also found various articles, cartoons, and newspaper clippings about beatings, whippings, floggings, and spankings of both adults and children.

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charges involving the child pornography business, testified that prior to the arrival of Federal authorities the Rheem tape recorder was not plugged into the wall outlet and it was located underneath the bed. Respondent testified that he had borrowed the Rheem recorder from the audio-visual department at school with the permission of the audio-visual director and that it was used by him in connection with taping lessons for his school baseball team and also by his wife, a school teacher in another district, in connection with her teaching responsibilities. He denied that the recorder belonging to petitioner was used for any illegal purposes.

The burden of establishing each element of the tenure charges is upon petitioner; with respect to this portion of the charge, I **FIND** that petitioner has failed to establish by a preponderance of the competent and credible evidence that the tape recorder which respondent borrowed from the school was used in connection with his business selling pornography and sexually oriented material. I also **FIND** that if there was a specific procedure for borrowing school materials, the procedure was not well known to staff members. Petitioner offered some testimony that a written authorization form was required before any materials could be borrowed from the school; the preponderance of the testimony in this regard, however, was that there was no formal procedure for borrowing materials and that, in fact, such borrowing, with oral permission from the audio-visual department, was fairly common.

Finally, I **FIND** that the evidence which was offered with respect to certain wooden paddles, which respondent acknowledged he had ordered from the school shop teacher, is unrelated to any specific accusation in the tenure charges. R-1 and R-2 in evidence are photographs of a wooden paddle bearing the initials RJM, undoubtedly the initials of Raymond J. Mack, the postal inspector who seized the paddles from respondent's home. The paddles were, therefore, not included in P-5 in evidence, the box which was found in Mrs. Moon's closet, and the statement of evidence to support the charges, filed by Superintendent Jannarone on November 19, 1982, makes no reference to the paddles; the sum and substance of the statement of evidence relates to the Rheem tape recorder.

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APPLICABLE LAW AND DISCUSSION

EDU 1304-82

The issues involved in the first set of tenure charges were resolved by operation of the provisions of N.J.S.A. 2C:51-2 which states in pertinent part:

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if commited in this State, would be such an offense or crime;
>
> . . . .
>
> b. The foreteiture set forth in subsection a. shall take effect:
>
> (1) Upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders; or
>
> (2) Upon sentencing unless the court, for good cause shown, orders a stay of such forfeiture. If the conviction be reversed, he shall be restored, if feasible, to his office, position or employment with all rights, emoluments and salary thereof from the date of forfeiture. . .

Count Five of indictment number 186-82, to which respondent pleaded guilty, indisputably sets forth a crime of the second degree. The Judgment of Conviction which was entered on April 15, 1983, makes no reference to any stay of the forfeiture of respondent's public teaching position. Accordingly, by operation of law, on April 15, 1983, respondent forfeited his position as guidance counselor in petitioner's school district. Why the Monmouth County Prosecutor's Office felt that it was necessary for a separate Order to Forfeit Public Office to be entered is not evident from the record herein; the language of the statute is clear, however, and upon sentencing of respondent nothing further was necessary in order for the forfeiture of his position to take place pursuant to the statute.

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Accordingly, any right to payment of salary which respondent might otherwise have had was terminated on April 15, 1983. In fact, no payment of salary was made to respondent by petitioner on or after that date.

Petitioner argues that respondent should now be required to reimburse it for all salary which was paid to respondent during the pendency of the criminal proceeding. Petitioner's argument in this regard is set forth in its brief dated July 15, 1983, as follows:

> Although the Board and Superintendent knew of the criminal activites from the newspapers and the Federal Postal Inspector, the law enforcement authorities refused to relinquish any of the evidence which the Board needed to prosecute its tenure charges against Mr. Martin. As a result, the Board was denied possession of the evidence to prove its tenure charges from the time of the search and seizure of the Martin home on November 23, 1981, until June 17, 1983, the date set forth in J-1.
>
> Thus if the Board could not use the criminal evidence to prove its tenure charge, as set forth in its statement of Charges and Statement and Evidence (EDU 1304-82), then the Commissioner of Education could not dispose of the original charge in a tenure hearing. Since the Commissioner could not dispose of the tenure charges filed by the Board, Mr. Martin received additional salary payments which he would not have been entitled to, but for his voluntary criminal activities.
>
> . . . .
>
> Mr. Martin's own criminal activities and wrongdoing prevented the Board from obtaining the evidence with which to prove its tenure charges against him. After using his criminal activities to his own benefit, he then proceeded to wait the required 120 days and receive his salary. As a result, the words as set forth in the Ott* decision also apply to the proceeding at hand:
>
> > In view of this expression of legislative intent and the application of basic equitable principles, we conclude that plaintiff's application for the restraint of the disciplinary process for his own purposes and protection bars him from entitlement to the continued receipt of his salary in the meantime. Since his action has produced the delay the board should not be compelled to continue to pay his salary while unemployed. A contrary conclusion would reward him with receipt of salary without service during the

*Ott v. Board of Education of Hamilton Township, 160 N.J. Super. 333 (App. Div. 1978)

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> pendency of the criminal charge and the potential extensive delay in its disposition. In the absence of such criminal involvement, on the other hand, the board could suspend his salary for 120 days within which the Commissioner would be able to dispose of the charge. Plaintiff should not be in a better position because the infraction involves a crime than that which would obtain if the charge were non-criminal. Since the delay is brought about by him and his interest, the board should not be burdened with interim salary payments. Of course, in the ultimate, if plaintiff is cleared of the disciplinary charges, he will be entitled to reinstatement with full back salary.
>
> (Emphasis added by petitioner)

> In the case at hand, Mr. Martin's own criminal activities prevented the Board from having available the evidence necessary for the tenure hearing. Since Mr. Martin's criminal actions produced the delay, the Board should be entitled to reimbursement of any salary which the Board was required to pay pursuant to N.J.S.A. 18A:6-14.
>
> (Petitioner's Brief, pp 4 through 10

Petitioner also cites Fridy v. Board of Education of Long Branch, an unreported Appellate Division decision, Docket No. A-4470-80T3, decided January 26, 1983, for the proposition that the Appellate Division now permits the suspension of a tenured teaching staff member without pay after an arrest and release on bail.

Finally, in support of its position, petitioner cites N.J.S.A. 18A:6-8.3 which provides:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

Petitioner argues that since the delay in resolving the tenure charges in this matter is really attributable to respondent's criminal conduct and since the Fridy decision which was handed down on January 26, 1983, would, in petitioner's view, now permit the suspension of a respondent without pay after an arrest, without the necessity of filing tenure charges, and since N.J.S.A. 18A:6-8.3 permits the suspension of employees and

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officers of a board of education without pay after an indictment on criminal charges, respondent should be required to return the money which he received solely as a result of his wrongdoing.

Respondent argues that he has an absolute right to retain the monies paid to him after April 30, 1982, pursuant to the provision of N.J.S.A. 18A:6-14 which provides:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

Respondent argues that no abatement of payment is warranted pursuant to the theory expressed in Ott because, unlike Ott who requested the proceedings be stayed pending the outcome of the criminal matter, he was at all times ready, willing and able to proceed with the proceeding herein. Respondent also correctly points out that nowhere in the statute is there a provision requiring an employee whose removal is ultimately upheld to repay monies paid to him following the 120th day.

Having carefully reviewed all of the agruments of both parties, I **CONCLUDE** that petitioner's reliance upon Fridy v. Board of Education of the City of Long Branch, supra is misplaced. The teacher in that case was arrested, indicted and subsequently convicted on criminal charges arising from pedophilic activities. The school board suspended Fridy, without pay, the day after his arrest. His suspension without pay continued until forfeiture of his public office pursuant to operation of the statutes then in

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effect, N.J.S.A. 2A:135-9. The Appellate Division rejected Fridy's contention that he was entitled to back pay from the date of suspension to the entry of his guilty plea. The State Board of Education had ruled that he was entitled to back pay from the date of his suspension to the date of his indictment, pursuant to N.J.S.A. 18A:6-8.3. The Appellate Division's reversal of the State Board decision was not based upon any determination that it was permissible to suspend a teaching staff member without pay from the date of arrest, but rather upon application of the bar of the statute of limitations in N.J.A.C. 6:24-1.2. The Appellate Division articulated the reason for its decision at page 10 of the slip opinion:

> We further conclude that appellant in this case is entitled to no backpay because his claim was initiated in an untimely fashion. N.J.A.C. 6:24-1.2 states:
>
> > To initiate a proceeding before the commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.
>
> Fridy did not formally assert his claim for backpay until June 27, 1979 when he filed his answer and counterclaim to the Board's petition, 315 days after the resolution of removal and 516 days after the actual suspension.

Accordingly, the Appellate Division's holding in Fridy, supra, is not relevant to a determination in this matter.

Although respondent asserts that the general provisions of N.J.S.A. 18A:6-8.3 cannot and do not alter the specific and comprehensive suspension provisions of N.J.S.A. 18A:6-14, this position fails to consider the fact that both statutes were adopted on the same day and as part of the same chapter of the 1971 Session Laws. Accordingly, the legislature was fully cognizant of the language of N.J.S.A. 18A:6-8.3 when it provided for the reinstatement of the teacher's salary on the 121st day, and the statutes must be read in pari materia to discern their true intention. When read together, the two statutory provisions require that a suspended employee, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during the suspension; there

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are two exceptions to this provision: 1) if the reason for the suspension was a criminal indictment, the employee is not entitled to receive his full pay; and 2) if charges have been filed in accordance with the Tenure Law, the suspension may be without pay to the extent permitted by the Tenure Law. Petitioner apparently views the two exceptions to be mutally exclusive to the extent that if charges have been filed and a subsequent indictment is issued, a board is nevertheless required to continue paying the employee if the indictment is rendered after the 121st day. I **CONCLUDE** that this is a misinterpretation of the law on petitioner's part. As the Court pointed out in Romanowski v. Board of Education of Jersey City, 89 N.J. Super. 38 (App. Div. 1965), once an indictment has been handed down the Tenure Laws become inapplicable to the situation since an employee if convicted would forfeit his office automatically and there would be no purpose for a departmental hearing pursuant to the Tenure Laws. What happened in the present case is a perfect example. The school board which attempts to expedite the removal of an employee who has been arrested for criminal conduct by filing tenure charges should not be penalized for making this effort by being required to continue to pay that employee once an indictment is rendered. The language of the statute is quite clear; it requires payment only for employees who are under suspension "other than by reason of indictment;" if the legislature had wished to provide for suspension without pay by reason of arrest on criminal charges it could have done so. Considering the difficulties petitioner encountered in prosecuting its case in this matter, perhaps an amendment to the statute would be appropriate. That is a matter for consideration by the legislature, however. At present, the statute reads "indictment," not "arrest." Accordingly, I **CONCLUDE** that after respondent herein was indicted on November 5, 1982, his right to receive his full pay pending resolution of the charges terminated.

Although the general rule is that monies paid as a result of a mistake of law cannot be recouped, there is a specific exception for payments which have been made by a municipal corporation or subdivision thereof. In Board of Education of Passaic v. Board of Education of Wayne, 120 N.J. Super. 155 (Law Div. 1972), the court held that the boards of education were entitled to recover payments made under a mistake of law: "The reasoning behind such a decision is that this court does not feel that a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpertation of the law by the authorities in charge." Id. at 163-164. Accordingly, petitioner may recover monies paid to respondent on or after November 5, 1982.

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EDU 216-83

N.J.S.A. 18A:29-14 permits a board of education to withhold the employment or adjustment increment of an employee "for inefficiency or other good cause." The Commissioner's scope of review of a board's action withholding an increment is set forth in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960):

> [T] he scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a resonable basis for their conclusions. Id. at 296.

Respondent argues that petitioner's withholding of his 1982-83 salary increment was without good cause because petitioner conducted no evaluations of respondent's teaching performance during the 1981-82 school term, and he asserts that since "there is not a single shred of evidence of unsatisfactory job performance," no reasonable basis for petitioner's action can be established.

Respondent's position in this regard is without merit. The resolution adopted by petitioner denying respondent's salary increment noted the fact that respondent was suspended beginning November 30, 1981, as a result of his arrest on criminal charges. Respondent's teaching performance could not be evaluated for the vast majority of 1981-82 school term since by virtue of his criminal involvment he was suspended from his teaching duties. In effect, respondent deprived petitioner of the opportunity to evaluate him.

The burden of proving the unreasonableness of petitioner's action is upon respondent. I **CONCLUDE** that respondent has failed to establish that there was anything unreasonable about petitioner's action withholding his increment, and accordingly, petitioner's action is hereby **AFFIRMED.**

Respondent also asserts that he should be reimbursed for 173 unused sick days which he accumulated over the course of his employment with petitioner. Respondent acknowledges that there is no contractual basis for his assertion and he cites no past practice of such reimbursement by petitioner. He simply asserts that since he would have been guaranteed payment for the unused sick days if he had continued teaching until his voluntary retirement, equity requires reimbursement under the circumstances herein.

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Respondent has demonstrated no legal right or entitlement to the payment which he seeks; if anything, the "equities" require denial of the payment. Accordingly, that portion of his petition seeking reimbursement for 173 unused sick days is hereby **DENIED.**

EDU 928-83

I have found, as a matter of fact, that petitioner has established by a preponderance of the competent and credible evidence the charges set forth in Charge One and Charge Two of the second Statement of Charges herein. It is unnecessary to determine whether respondent's unbecoming conduct is of a nature severe enough to warrant removal under the Tenure Employees Hearing Law, since respondent's removal was accomplished by operation of law on April 15, 1983. It is also unnecessary to determine whether respondent would be entitled to any award of back pay for the salary which was withheld for the 120 days commencing with the certification of of the second set of charges on December 17, 1982, since I have already concluded that any right to payment was terminated when the indictment was issued on November 5, 1982. Even in the absence of the foregoing determinations, respondent's conduct in permitting P-1 through P-4, totally disgusting, pornographic, sado-masochist materials, to remain on school property at the very least would warrant a 120-day suspension, without pay. The danger presented by respondent's conduct was in fact realized when a 13-year old student inadvertently viewed these materials. The Commissioner imposed a 120-day suspension without pay in The Tenure Matter of Arlene Dusel, School District of the Borough of Sayerville, 1979 S.L.D. 153 wherein the charge established was merely possession of marijuana. Respondent's conduct herein was far more serious than Dusel's and accordingly, under any circumstances, respondent would not be entitled to any payment for his period of suspension without pay pursuant to the second set of tenure charges.

For all of the foregoing reasons, it is hereby **ORDERED** that the first set of tenure charges herein, EDU 1304-82, is **DISMISSED** as **MOOT;** the relief which respondent seeks in EDU 216-83 is hereby **DENIED,** and the petition therein is hereby **DISMISSED;** Charge Three and Charge Four of the second set of tenure charges, EDU 928-83, are hereby **DISMISSED** for the reasons set forth hereinabove; and Charge One and Charge Two of the second set of tenure charges, EDU 928-83, are hereby **SUSTAINED.**

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It is further **ORDERED** that respondent reimburse to petitioner all monies paid to him by petitioner on or after November 5, 1982. Such reimbursement shall include all monies deducted from respondent's gross wages for pension contributions, professional dues, loans, credit union (car payment), contributory insurance, and federal and state withholding tax, since those monies were paid on respondent's behalf to satisfy respondent's obligations and/or are monies recoverable by respondent.

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

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

October 18, 1983
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

October 18, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

October 20, 1983
DATE

Ronald L. Parker/jeb
OFFICE OF ADMINISTRATIVE LAW

fms

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WITNESSES

For Petitioner:

Mamie H. Moon

Sidney Leon Wells

R. Thomas Jannarone

Barbara A. Coleman

For Respondent:

Russell Leidy

Donald Martin

Carol Martin

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EXHIBITS IN EVIDENCE

J-1 Letter of May 16, 1983, from Linda B. Kenney of Monmouth County Prosecutor's Office to R. Thomas Jannarone, Jr., Superintendent of Schools of City of Asbury Park (2 pages)

J-2 Letter of October 6, 1982, from Linda B. Kenney to Richard D. McOmber

J-3 Letter of December 8, 1982, from Linda B. Kenney to J. Peter Sokol

J-4 Letter of December 23, 1982, from Linda B. Kenney to J. Peter Sokol

J-5 Letter of December 23, 1982, from Mark J. Blunda to J. Peter Sokol (2 pages)

J-6 Letter of June 14, 1982, from Mark J. Blunda to Hon. M. Kathleen Duncan

J-7 Letter of June 17, 1982, from J. Peter Sokol to Hon. M. Kathleen Duncan (2 pages)

J-8 Timeline Stipulations of Donald Martin and Board of Education of City of Asbury Park

J-9 Ledger of Wages concerning Donald Martin paid by Board of Education of City of Asbury Park

J-10 Judgement of Conviction, Superior Court of New Jersey, Monmouth County, Indictment No. 186-82, dated April 15, 1983

J-11 Order to Forfeit Public Office, Superior Court of New Jersey, Law Division (Criminal) Monmouth County, Indictment No. 186-82, dated May 2, 1983

J-12 Negotiated Agreement Asbury Park Board of Education and Asbury Park Education Association for 1981-1982 and 1982-1983

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P-1, P-2, & P-3 Sexually oriented, sadomasochistic, pornographic material and advertisements

P-4 Envelope addressed, "Sexually Oriented Material Open With Discretion"

P-5 Box containing various guidance and miscellaneous school materials

P-6 Consent Order for Entry of Judgment for Forefeiture entered January 19, 1983 (6 pages)

P-8 List of items taken from respondent's home on November 23, 1981 (3 pages)

P-9 Affidavit completed by R. Thomas Jannarone, Jr., on behalf of Board dated, January 18, 1983 (2 pages)

P-10 Califone-Rheem Tape Recorder, Model No. AV-80

P-11 Inventory Card on Califone Tape Recorder, AV-80

P-12 Computer Printout of Instructional Material Center Inventory Report for Asbury Park Middle School

P-13 Property Receipt of Monmouth County Prosecutor's Office relinquishing tape recorder to Board of Education of City of Asbury Park, dated May 19, 1983

P-14 Photograph of respondent's bedroom

R-1 Photograph of paddle

R-2 Photograph of paddle

R-3 Letter of September 24, 1982, from Allen B. Weissberger to Donald Martin with Resolution attached (4 pages)

R-4 Box for Califone tape recorder, Model No. 3530

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R-6 Sales receipt for tape recorder (Califone Model number 3530)

R-7 Copy of Service record for Californe AV-80

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EXHIBITS FOR IDENTIFICATION ONLY

P-7 Interrogatories answered by Donald Martin

R-5 Written instructions for baseball

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IN THE MATTER OF THE TENURE HEARING OF DONALD MARTIN, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY AND DONALD MARTIN V. BOARD OF EDUCATION OF OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

The Commissioner observes that no exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Commissioner deems it proper that he now take note of the complexity of the matter presently controverted involving as it does two separate sets of tenure charges filed with the Commissioner of Education against Donald Martin, a tenured teaching staff member employed by the Board of Education of the City of Asbury Park and a Petition filed by the teacher alleging that the Board improperly withheld his salary increment for the 1982-83 school year.

Further, the Commissioner notes Indictment No. 186-82 returned by the Monmouth County Grand Jury on November 5, 1982 to which Martin entered a guilty plea on January 20, 1983 with subsequent sentencing on April 15, 1983 by a Judgment of Conviction entered by Alvin Yale Milburg, J.J.D.R. t/a who also signed an "Order to Forfeit Public Office" on May 2, 1983 which provided that Martin forfeit his position of employment with the Board and be forever barred from holding any office or position of trust under this State or any of its subdivisions.

A thorough reading of the judge's initial decision convinces the Commissioner that her decision is a cogent, thoughtful analysis of the manifold issues herein, with appropriate conclusions with which the Commissioner agrees and espouses as his own.

IT IS SO DETERMINED.

DECEMBER 16, 1983
PENDING STATE BOARD

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2379-83
AGENCY DKT. NO. 22-1/83A

GARY E. DEUTSCH,

Petitioner

v.

BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS,

Respondent

APPEARANCES:

Sanford R. Oxfeld, Esq., for petitioner
(Rothbard, Harris & Oxfeld, attorneys)

Frank DeStefano, Esq., for respondent
(Schumann, Hession, Kennelly & Dorment, attorneys)

Record Closed: October 19, 1983 Decided: November 4, 1983

BEFORE ROBERT P. GLICKMAN, ALJ:

Petitioner brings an action as the former Hudson County Area Vocational-Technical Schools (AVTS) Project Director, Transportation, challenging the respondent's action of November 1982 which purported to abolish his position. Petitioner argues alternatively that if the position was abolished properly, he would be entitled to other positions in the district based on his "bumping" rights. Respondent asserts that petitioner's former position was abolished for proper reasons and that petitioner is not entitled to any othe position in the district based on his "bumping" rights.

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On January 19, 1983, petitioner filed an appeal with the Commissioner of Education. On March 31, 1983, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference before Adminstrative Law Judge Stephen G. Weiss on July 6, 1983, the following issues were identified:

1. Did tenure attach to the position of Hudson County AVTS Project Director, Transportation, and, if so, did petitioner obtain tenure in that position?

2. Was the position held by petitioner abolished in good faith and for reasons of economy and efficiency?

3. If the abolition of petitioner's position was taken in good faith, did petitioner then have "bumping" rights to any other position in the district?

4. Was petitioner entitled to be appointed to the position of Job Placement Coordinator?

On September 22, 1983, a hearing was conducted at the Office of Administrative Law, Newark, New Jersey. Posthearing proposed findings of fact and conclusions of law were submitted on October 19, 1983, on which date the record was closed. The witnesses who testified and the exhibits marked into evidence are set forth in the attached appendix.

DISCUSSION OF FACTS

Effective November 28, 1978 (P-1), petitioner was hired by respondent as a supervisor to supervise the implementation of a pilot program involving the computerizing and administering of all special-needs pupil-transportation routes in Hudson County. Deutsch was hired at a salary of $28,000 per year. In August 1981, at a special meeting of the Board of Education of the Vocational Schools in the County of Hudson (P-3), the Board

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approved the job description for the position of Hudson County AVTS Project Director, Transportation. Deutsch served in the position of supervisor and next as Director of the Hudson County AVTS Project, Transportation, from his appointment in November 1978 until November 29, 1982 when the latter position was abolished by Board action (P-7).

The abolished position was originally established to bring about a more economical way of providing transportation for special education students in Hudson County. The individual school districts could not economically run transportation for their special-education students transported outside their own districts. To ameliorate this problem, a consortium concept was created and developed to provide more economical ways of transporting youngsters throughout the county. Whereas before the development of this pilot program, each individual district would transport its special-education children outside the district, possibly one student to a bus, after the development of the system buses and routes were used in a more economic fashion. A computer system was developed which came up with the most effective route for the individual student. This system was run at no cost to respondent. Each district was charged an amount which would not only pay for the cost of transportation, but would also pay for the cost of the position of the Hudson County AVTS Project Director and other costs in connection with the staffing and running of that position. It should be noted what is obvious, namely, that the position of project director is a noninstructional position, having nothing to do with classroom teaching.

Routes were bid upon by different bus transportation companies. While petitioner was project director, he prepared the routes and forwarded the bids to the Board of Education. All companies were paid one-tenth of the contract amount every month for ten months. After petitioner's job was abolished, all bus companies dealt with Sandy Corso who prepared the routes and accepted bids.

Deutsch testified that his initial function in his position as project director was collecting data on those students requiring transportation, advertising for bids, and recommending to the Board the awarding of contracts. In addition to the aforementioned

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functions, Deutsch represented the Board at conferences, was part of a data processing network, represented the superintendent at meetings, wrote grants and proposals, was involved with the training of staff, taught defensive driving, was involved with "T. & E.", and was involved with the public relations aspect of the project. All of Deutsch's salary and the cost of running his office, including payment for his secretary, equipment, staff, mechanics, space, telephones, and so forth, were paid for from the collection of funds from the consortium. Toward the end of his job, Deutsch was only spending 50 percent of his time on bus transportation work.

Petitioner never heard any complaints of any nature prior to September 1982. No one told him that the project was uneconomical. To his knowledge, there was no investigation by anyone with regard to his position. Deutsch received a letter, dated September 29, 1982 (P-7), advising him that his position would be abolished effective November 29, 1982. As a result of receiving the letter, petitioner asked to assert his "bumping" rights and sought the job of Job Placement Coordinator. This position contains no certification requirements (P-9). Deutsch received no response to his letter applying for this job nor was he interviewed for it. Deutsch applied for, and was interviewed for, the job of Board Secretary/Business Administrator and applied for, and was not interviewed for, the position of Director of Special Services. Deutsch was not hired for either position. Additionally, petitioner has applied outside of the district for positions in many districts as board secretary, superintendent, principal, business administrator, and supervisor of instruction, obtaining no jobs anywhere. He is presently working for Archie Schwartz, Real Estate, having commenced employment approximately three weeks ago. From November 1982 until September 1983, Deutsch was unemployed.

Deutsch has functioned in no position in the district other than as project director. The job of Supervisor of Special Education was abolished.

Earl W. Byrd is presently superintendent of Hudson County Area Vocational-Technical Schools. He is familiar with the consortium and what it did prior to its abolishment. Transporation in the district is now handled by Sandy Corso, who is pupil transporation supervisor or director. Byrd testified that the consortium was a one-million

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dollar-a-year operation. Flow-through funds would come into the district, meaning that other districts would pay for the transportation and that no costs were incurred by the district itself. If the consortium were to go out of business, the district would still be responsible for transporting its own students. Part of Corso's salary is paid for by the consortium. Although the overall number of bus runs did not decrease, the number of runs staffed by the district's own people did decrease.

Byrd testified that Deutsch held no other position in the district other than project director. There was no prior discussion with Deutsch of the pending abolition of the position. A committee of the Board decided to abolish the position. Byrd opined that the Board was reducing Corso's salary by one half since half of it was being picked up by the consortium. The Board still continues with the consortium today. Part of the savings is that part of Corso's salary is paid by the consortium. Thus, there is a savings of about $16,000 to the Board, plus part of Corso's secretary's salary, as well as a part of an assistant's salary which is also paid by the consortium, amounting to a total savings of approximately $35,000. In a document in existence at the time that the position was abolished (R-1), the New Jersey State Department of Education, Division of Finance and Regulatory Services, Report on Fiscal Monitoring raises a question on page 16 of the report:

> Can the board continue to afford the present degree of transportation supervision? Is there still a need for a director of transportation, a transportation project director, an assistant director of transportation, two (2) transportation foremen, two (2) bus inspectors and one (1) fuel manager, or could some of these positions be eliminated by creating a district wide transportation service?

FINDINGS OF FACT

Based on a careful consideration of the testimony and evidence, I **FIND:**

1. The position of supervisor to administer and implement the pilot program dealing with transportation of special-education youngsters was established effective November 28, 1978.

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2. Deutsch was appointed to that position.

3. A job description for the position of Hudson County AVTS Project Director was adopted by the Board on August 18, 1981.

4. The position of Hudson County AVTS Project Director was abolished as of November 29, 1982.

5. No reasons were ever communicated to Deutsch prior to September 28, 1982 that the position was not economical and was to be abolished for reasons of economy and efficiency.

6. Immediately prior to the abolition of the position, Deutsch was spending approximately 50 percent of his time on bus transporation work and other time on other activities in the district.

7. The economic savings brought about by the abolition of the position, since the consortium pays half of Corso's salary, half of Corso's secretary's salary, and half of Corso's assistant's salary, amounts to $35,000.

8. In a report (R-1) from the New Jersey State Department of Education, Division of Finance and Regulatory Services, it was pointed out that there was too much supervision in the area of transportation and the question was raised whether a transportation project director is needed.

9. The Board acted in good faith and for reasons of economy and efficiency when it abolished the position of Hudson County AVTS Project Director.

10. There is no evidence before me indicating that the Board engaged in any subterfuge or acted in bad faith in terms of abolishing the position.

11. Petitioner did not hold any other position in the district other than project director.

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CONCLUSIONS OF LAW

The two threshold issues which must be addressed are:

1) Did the Board act arbitrarily, capriciously or unreasonably in abolishing the position of Hudson County AVTS Project Director?

2) If the aforementioned question is answered in the affirmative, did petitioner have any "bumping" rights to any other position in the district?

In a sense, it is irrelevant whether or not petitioner had tenure in the position of project director since the Board had the statutory right to abolish the position irrespective of the tenure status of petitioner. N.J.S.A. 18A:28-9 states:

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

At a meeting on September 28, 1982, the Board abolished the position of Project Director effective November 29, 1982 (P-7). Clearly, such an abolishment of a position falls within the purview of N.J.S.A. 18A:28-9. Additionally, the law is clear that a board of education is cloaked with a presumption of correctness when it passes a resolution to abolish a position. Quinlan v. Bd. of Ed. of North Bergen Tp., 73 N.J. Super. 40 (App. Div. 1962); Boney v. Bd. of Ed. of the City of Pleasantville, 1971 S.L.D. 579. In order to overcome this presumption of correctness, a petitioner must prove by a preponderance of the credible evidence that a board acted arbitrarily, capriciously or unreasonably. See, Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327 (App. Div. 1965), affirm'd 46 N.J. 581 (1966). It is not my function to substitute my judgment for that of the board of

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education. See, Boult & Harris v. Bd. of Ed. of Passaic, 1939-40 S.L.D. 7, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948).

As stated in Boult, supra,

> It is not a proper exercise of judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to local boards...

There is no evidence before me which would indicate that the Board in the instant matter acted in bad faith. I have nothing before me to demonstrate that the actions of the Board were a subterfuge to get rid of Deutsch. As a matter of fact, Deutsch did not testify that anyone had "it in for him." Although the Board could have acted differently by conducting a complete investigation or coming up with a greater analysis of cost savings as a result of abolishing the position, I **CONCLUDE**, nevertheless, that the Board did have a factual basis for arriving at its decision. There was a cost savings of some amount associated with abolishing the position. It was clear that Deutsch was working only one half of his time in connection with the bus-transportation job, whereas, previously, he had been working full time at it. Thus, the Board knew that the project director was no longer a full-time position. Additionally, the Board knew that the State Department of Education, Division of Finance and Regulatory Services, had recommended the elimination of the position. Petitioner's argument as set forth in his brief, that the Board should have gotten rid of Corso rather than Deutsch, was a decision for the Board to make and, under the law, I cannot substitute my judgment for that of the Board. The Board clearly comes within the statutory language that it abolished the position for "reasons of economy...or of change in the administrative or supervisory organization of the district or for other good cause..."

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I **CONCLUDE** that petitioner has failed to overcome the presumption of correctness of the Board's decision and has failed to show by a preponderance of the credible evidence that the Board acted in bad faith. Moreoever, I **CONCLUDE** that the Board, in abolishing the position of project director, acted in good faith and pursuant to the requirement set forth in N.J.S.A. 18A:28-9.

With regard to the question of petitioner's "bumping" rights, an examination of N.J.A.C. 6:3-1.10(b) and (k) is instructive. N.J.A.C. 6:3-1.10(b) states:

> Seniority pursuant to N.J.S.A. 18A:28-9 et seq. shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.

N.J.A.C. 6:3-1.10(k) sets forth specific categories. I **FIND** and **CONCLUDE** that petitioner has not achieved seniority in any of the categories set forth thereunder. Petitioner argues that he achieved seniority as a general supervisor pursuant to N.J.A.C. 6:3-1.10(k)10. This argument is without merit. Pursuant to N.J.A.C. 6:11-10.4(c), supervisor is discussed:

> Supervisor: This endorsement is required for supervisors of instruction who do not have a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.

Clearly, Deutsch had nothing at all to do with instructional personnel, curriculum or instruction. He, more or less, ran a bus company working with computers and bus routes, bids and contracts. His position was in no way related to giving direction or guidance to instructional personnel or in any way involved with curriculum and/or instruction.

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Accordingly, I **CONCLUDE** that petitioner has no "bumping" rights to any of the positions he applied for in the district such as Job Placement Coordinator, Supervisor of Special Education, or Board Secretary/Business Administrator.

Based on what has just been enunciated, it is **CONCLUDED** that petitioner's petition be **DISMISSED WITH PREJUDICE.** All other issues are deemed to be without merit.

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

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

11-4-83
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

Nov. 9, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

November 14, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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APPENDIX

WITNESSES

Samuel Winning
William V. Pasquale
John Powers
Gary E. Deutsch
Earl W. Byrd
Joseph P. Sirangelo

EXHIBITS

P-1	Resolution to hire Deutsch
P-2	Job Description, AVTS Project Director
P-3	Board Meeting, August 18, 1981
P-4	Job Description, Supervisor of Vocational Education
P-5	Letter, September 24, 1982
P-6	Draft Resolution, November 29, 1982
P-7	Letter to Deutsch, September 29, 1982
P-8	Letter, November 29, 1982
P-9	Job Description, Job Placement Coordinator
P-10	Letter to Deutsch, November 30, 1982
P-11	Job Description, Supervisor of Special Education
R-1	Report on Fiscal Monitoring

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GARY E. DEUTSCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions to the initial decision by Judge Glickman argues that the judge is in total error, warranting reversal of his decision with restoral of petitioner to his position with full back pay. The Commissioner cannot agree with this sweeping contention. Petitioner contests the judge's conclusion that his position had nothing to do with classroom teaching pointing to Finding of Fact No. 2; the Commissioner notes, however, that the job description is referenced in item 3. Petitioner argues that his position required certification for the position of job placement coordinator. (Petitioner's Exceptions, at p. 3) The Commissioner notes that no code reference is made to sustain such argument.

Petitioner complains that the Board showed bad faith by not interviewing him for every position for which he made application. (Id. pp. 4-5) The Commissioner knows of no law or rule that compels a board to interview every candidate for every position for which application is made. Petitioner asserts that the judge erred by allowing into evidence document R-1, Report on Fiscal Monitoring from the New Jersey State Department of Education, Division of Finance and Regulatory Services which points out that there was too much supervision in the area of transportation. Petitioner impugns the integrity of the person who wrote the report, yet cites the report in his favor. (Id. at pp. 11-12) Petitioner cannot have it both ways. There is nothing in the record to reveal to the Commissioner that petitioner contemplated or attempted to contest the judge's admission of R-1 by interlocutory appeal as provided by law. The Commissioner cannot agree with petitioner's continued assertion that he has acquired tenure and seniority rights as a general supervisor. N.J.A.C. 6:11-40.4(c) Nothing therein supports petitioner's claim; further, the Commissioner finds nothing to show that the Board acted in bad faith in abolishing the position.

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The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

DECEMBER 20, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9457-82

AGENCY DKT. NO. 286-7/82A

EDISON TOWNSHIP EDUCATION ASSOCIATION, JUDITH MAYER, MARY JANE JAMES, BARBARA YESALAVICH, MARTHA HELLER, NINA SILBERBERG, GAIL BERGSTEIN, JOAN GIBSON, LINDA LEVINE, ANNA MILLER, and BRENDA MAXWELL,

Petitioners

v.

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

Respondent.

APPEARANCES:

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

R. Joseph Ferenczi, Esq., for respondent

Record Closed: September 28, 1983 Decided: November 14, 1983

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OAL DKT. NO. EDU 9457-82

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

The procedural history in this matter is set forth in the Order Granting Partial Summary Decision, dated May 20, 1983; that Order is attached hereto and fully incorporated as if set forth herein at length.* Following issuance of the aforementioned Order, by letter dated June 17, 1983, the Commissioner advised the parties pursuant to the provisions of N.J.A.C. 1:1-9.7(a), (b), and (c), that he had determined not to review the Order. Thereafter, the July 8, 1983 hearing date which had been set for the purpose of resolving the remaining issues was adjourned at the request of the parties. The hearing was rescheduled and was conducted on July 12, 1983, at the Edison Municipal Complex, Edison, New Jersey. Because of scheduled summer vacations, counsel requested and were granted an extended period of time to file post-hearing written submissions; petitioners' letter memorandum dated August 22, 1983, was received on August 25, 1983, and respondent's letter brief dated September 24, 1983, was received on September 28, 1983, whereupon the record closed.

FINDINGS OF FACT

Only five of the named petitioners seek relief beyond that which has been afforded by the determinations set forth in the Order Granting Partial Summary Decision. The facts relevant to each of the five petitioners' claims will be addressed separately hereinafter. Most of the facts are not in dispute, and I therefore **FIND** the following as uncontested facts in this matter.

---

* The new seniority regulations which were referred to in the Order were adopted on June 20, 1983, but pursuant to their explicit provisions are applicable only to future seniority determinations as of the operative date of the rule, September 1, 1983. It is an undisputed fact that respondent's grades 7 and 8 are departmentalized, but pursuant to the terms of the regulation prior to amendment this fact is not relevant; under N.J.A.C. 6:3-1.10k(28), elementary seniority included grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools.

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Martha Heller

By memorandum dated May 17, 1982, respondent advised petitioner Heller concerning her 1982-83 employment as follows:

> As you know, you are one of the 31 tenured elementary teachers who have been notified that they will not have a position for the 1982-83 school year. We have now completed staffing of all full-time elementary positions and I regret to inform you that, as of the present, we have no full-time vacancies remaining to be filled. As, and if, additional vacancies are created as a result of resignations, pregnancy disability leaves, etc., we will reassign tenured riffed elementary teachers in seniority order, as the law requires.
>
> There are now available 10 half-time positions in grades 3 through 6. The purpose of this memo is to inquire as to whether or not you would be willing to accept one of these half-time positions. If you have been a full-time teacher, your refusal to indicate your willingness to accept a half-time position would have no effect on your standing on the RIF list waiting for reemployment on a full-time basis. For those few teachers who have never worked more than half-time a refusal to accept a half-time position would be tantamount to a resignation, in that it would nullify all seniority rights.
>
> While the salary for a half-time position is obviously only 50% of a full-time position, a halftime position would add to your seniority and pension benefits, as well as providing you with full health benefits, etc. If you have been a full-time teacher, and you agreed to accept a half-time position, we would continue to monitor your status through the summer. In the event you became eligible for a full-time opening prior to the start of the 1982-83 school year, we would be happy to offer you a full-time contract. Once the school year was under way, however, we would expect you to remain in the half-time position for the remainder of the 1982-83 school year, in order to maintain continuity of instruction for students.
>
> I should inform you that if you refuse a half-time position, we would have to provide that information to the New Jersey State Unemployment Service should we receive an inquiry from them relative to your employment status for 1982-83.
>
> Please notify me either by telephone or in writing no later than Friday, May 28th if you are willing to accept a half-time position. We will begin to fill theses vacancies starting in early June. Positions will be filled based on seniority rank for half-time positions (as required by the Appellate Court decision in Aslanian vs. Fort Lee).

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Petitioner Heller replied to respondent by letter dated May 24, 1982, wherein she advised that she was accepting a part-time position, but added, "However, in the event that a full-time position, within my certification, becomes available during the school year, I expect to be notified immediately."

On August 27, 1982, petitioner Heller wrote to Dr. Thomas J. Bradshaw, Director of Personnel for respondent, as follows:

> I have reconsidered my acceptance of a part-time position in Piscataway Town School, Grade 2.
>
> Since no part-time position as a Kindergarten teacher has been offered - upon reflection, I most respectfully must reject the second grade position. I understand by so doing, that I have relinquished part-time tenure in Edison.
>
> By this letter I am not relinquishing any claim I may have to a full-time position whether through my litigation or attrition.
>
> Please submit this to the Board of Education.

On September 16, 1982, Dr. Bradshaw placed a telephone call to petitioner Heller; petitioner Heller was not at home. When she returned the call on September 17, 1982, Dr. Bradshaw offered her a full-time position teaching third grade at the Martin Luther King School to commence immediately. Petitioner Heller advised Dr. Bradshaw that she had, the previous day, enrolled in and paid for a graduate course in New York and that her counsel had advised her that she could have a leave of absence for the 1982-83 school year. Dr. Bradshaw advised her that unless she accepted the position, he would consider her to have resigned. After petitioner Heller spoke with Dr. Bradshaw, she called Mr. Robinson, the building principal at the Martin Luther King School, and made an appointment to see him that afternoon. When she returned home from her appointment at about 2:30 p.m., she contacted her attorney who assured her that she would have a leave of absence. She then telephone Dr. Bradshaw and declined to accept the position.

On September 23, 1982, she wrote to respondent as follows:

> I am writing to request a leave of absence for the school year 1982-83 based upon the following circumstances.
>
> I was riffed as a full-time teacher effective June 30, 1982. During the course of the summer, I actively sought employment but to no avail. After school commenced, I registered for school and began

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> classes on Tuesday, September 14, 1982. On Thursday evening Dr. Bradshaw telephoned my home advising me that a full-time position had opened up and that I was to take it reporting to work on Friday and go on the payroll on Monday or be deemed to have resigned.
>
> My attorney, Stephen Klausner, spoke to Dr. Bradshaw on September 17, requesting a leave of absence due to the impossibility of reporting to work on short notice and my prior committment to school. Dr. Bradshaw indicated that no leave would be granted.
>
> I am writing to the Board of Education to request a leave of absence. In good faith I relied upon the lack of a job in Edison. Please consider my outstanding reputation as a teacher and my dedication and willingness to return next year.
>
> Thank you very much for your consideration.

Respondent advised petitioner Heller of its determination by letter dated October 8, 1982:

> During the privileged portion of its caucus meeting on the evening of October 7, 1982, the Board of Education took under advisement your letter of September 23, 1982, in which you requested a leave of absence for the 1982-83 school year.
>
> After full consideration of the circumstances surrounding this request, the Board determined not to honor your request. This determination was based on the late receipt of your request for leave after a position had been offered to you.
>
> In view of the Board's denial of your request for leave, we will consider that your employment relationship with the Board was terminated on September 17, 1982, the date on which you refused the position that we offered to you at the Martin Luther King School.

Petitioner Heller filed a grievance concerning the Board's denial of her leave of absence. That matter is proceeding separately before the American Arbitration Association. By Order dated September 20, 1983, the Public Employment Relations Commission restrained the proceedings therein pending a determination by the Commissioner in the present matter.

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In assuming that a leave would be granted, petitioner Heller apparently relied upon her understanding of an agreement between the Edison Education Association and respondent. Aurora Bernard-Sallit, Association President, testified concerning that agreement:

> A. Well, we talked about what would happen if there were people -- there was a lot of concern, "Are we going to be called back? Are we not going to be called back," on the part of the member. The question was well, what happens if these people who are on the RIF list take other jobs, in the form of employment, either teaching or whatever. And our (are) subsequently being called back after the start of the school year. Then what would happen then.
>
> Then I believe Dr. Bradshaw said something to the effect we would have to notify them to come back here. They would have to come back here. I believe at that point Parice said something to effectuate an opinion, if they were teaching they would be under contract wouldn't they have a 60-day notice. They're like in a catch 22, and we spruced that out a bit and then we talked about, I guess, the continuity of education with regard to calling them back. If a person hadn't taken a job, was just still on the RIF list or had taken the part-time job and a full-time job opened up, when would you call them back. When would be the first time you called them back. That's when we started talking about natural breaks and continuity, perhaps.
>
> Q. Were there any agreements about people who took positions or (were) otherwise unavailable to go back to Edison after the school year began?
>
> A. Well, yes. I would say that the agreement was once they started employment elsewhere and committed themselves some place else that the agreement would be that they should be given a leave.
>
> Q. Was that your understanding?
>
> A. Yes, I would say in honesty that was my understanding.
>
> * * * *
>
> JUDGE DUNCAN: When you were talking about the agreement, the July 1982 meeting concerning if they had started work elsewhere. If a person accepted a job elsewhere, is that what that agreement was limited to?
>
> THE WITNESS: No. No, it was -- well what brought it up -- what brought up the whole idea of this is what would happen if they were employed. And that, of course, you know the question was, if they couldn't break the contract, if the employment was teaching -- and

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that evening there was a lot of discussion that went back and forth, but we finally came to agreement. It was not limited that you had to be teaching employment. It was a fight where they were otherwise bound, otherwise tied up, where it wouldn't be reasonable to get them unbound without a liability. What you do then? Under those conditions it would seem reasonable to give them a leave, because we do have a lot of them to fill up. That was the general consensus.

JUDGE DUNCAN: Did someone at the meeting summarize what the agreement was before the conclusion of the meeting?

THE WITNESS: I would say — I would say probably the two counsels came to agreement. I don't think somebody — no one stood up and made a declaration. It was kind of as the conversation went around and that was what, you know, someone made a statement and another person didn't agree with or wanted clarification on. He or she would so give it, and it would be agreed if there wasn't any more discussion.

JUDGE DUNCAN: Was the statement that if a person were otherwise bound they would be given a leave, made by someone who was a Board representative?

THE WITNESS: You're asking for a quote?

JUDGE DUNCAN: Try to remember. It's important when you're trying to figure out what an agreement is, that you know who said what?

THE WITNESS: I think I could say that they conceded to that. That idea was consented to by both parties. (T142-T143 & T154 T155).

Dr. Bradshaw speculated as to what might have been said at the meeting, but he did not really dispute the substance of the conversation as reported by the association president, and I **FIND** that there was an understanding between respondent and the association concerning the granting of leaves and that the testimony of Ms. Bernard-Sallit accurately sets forth that understanding.

NINA SILBERBERG

Sometime between 4 p.m. and 5 p.m. on September 17, 1982, Dr. Bradshaw called petitioner Silberberg and offered her the full-time, third grade position at the Martin Luther King School. The substance of the conversation is basically undisputed; petitioner Silbergerg testified as follows:

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A. Yes. He told me that there was a position that just opened in the Martin Luther King School. It would have to be taken Monday morning or if I couldn't come then he sees no other way for me but to resign. He also did say if I did take the position I would have to meet with the principal probably Sunday night to just get myself straightened out. And it was over a holiday, religious holiday, for me where I was about to leave to go away with family and it was virtually impossible for me to do anything that weekend towards getting child care.

Q. Did you articulate this to Dr. Bradshaw?

A. Yes. I don't know if I told him about going away with the family but I did mention that it was impossible over that weekend.

* * * * *

Q. Now, when you spoke to Dr. Bradshaw on September 17, did you make the determination at that time not to accept the position?

A. Well, I told him I would try over the weekend, but I really did not see how I could have gotten anyone because it was a very religious holiday for me.

* * * * *

Q. Did you advise him that the notice was short at that time?

A. Yes.

Q. Did you ask him for any additional days to make arrangements?

A. Yes, definitely. I wanted to know if I could have a little more time. But according to what he said he was apologetic, but he said they needed someone Monday morning, and he felt compelled to tell me that I have (sic) would have to resign if I could not be there.

* * * * *

A. No, I would have look(sic) elsewhere for someone, I did have a few people in mind, unfortunately, it was not the weekend to find out.

Q. This letter (R-2) is dated September the 20th. Is that a Monday?

A. Yes.

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Q. And that was after the weekend?

A. Yes.

Q. And why did you write the letter?

A. I thought I had no choice but to resign. I could not take the job without child care at that moment.

Q. Have you sought a position in any other district since then?

A. No.

* * * * *

Q. Mrs. Silberberg, if the judge were to order you (sic) reinstatement today would you be able to find child care for September?

A. I feel I have adequate time right now to do that. (T48, T50 to 53).

Dr. Bradshaw confirmed the accuracy of petitioner Silberberg's testimony:

A. I heard her testimony, and there's none of it that I could disagree with.

Q. Did she ever ask you for additional time to consider taking the position?

A. I don't remember. I honestly don't remember. If she said she did, she did. I can only say that I was under pressure. Yes, we needed to get a teacher and that over the previous half-dozen years we had had situations occur similar to that, and when you called people up I had been able to get them and maybe I wasn't you know, totally sympathetic because there was no history of needing to be. (T55).

Petitioner Silberberg explained that prior to September 1, her mother had been available to care for her child but that her mother needed to work and had accepted another position over the Labor Day weekend.

The letter to which petitioner Silberberg referred in her testimony was marked as part of R-2 in evidence and provided:

> I was not able to accept the position offered to me on such short notice over a holiday weekend. Therefore I will resign from the teaching staff of Edison Township.

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GAIL BERGSTEIN

Prior to the close of the 1981-82 school year, petitioner Bergstein wrote a series of letters to Dr. Bradshaw concerning her teaching assignment for 1982-83; those letters read as follows:

April 14, 1982

I would like to continue on as a half-day teacher for the school year 1982-83. I prefer morning hours. Also, I prefer the south side of Edison.

I realize that I may not be rehired for September because of lay-offs, but I thought it best to write just in case I am rehired.

I just want to say thank you to you for putting me back at John Marshall School this year. I've had another wonderful year there. Mr. Mannello and I have gotten along just fine.

April 22, 1982

After learning about the full-time and part-time seniority lists that are going into effect immediately, I've decided to change what I had written to you on April 14, 1982.

If I am offered a full-time first grade, before being offered a part-time position, I will accept it.

Otherwise, I would like to be considered just for a part-time position.

May 12, 1982

This letter is in regard to my conversation with Mrs. Nurnberger, on May 11, 1982.

I have been told that the half-day 6th at John Marshall wasn't filled as of yet. I thought that it would be nice to stay on there since I enjoy being there.

On the other hand, I've had half-day 1st grade for two years now, and I adore it. Mr. Mannello feels that I've found my special place in teaching.

So, after thinking this over, I've decided to tell you that if there is a half-day 1st available in south Edison, mornings, I would like that. (not Washington School)

Otherwise I would like the half-day 6th at Marshall, if it is a morning job.

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I know that I'm not the one who chooses where I go, but I thought I'd let you know what I've been thinking.

Dr. Bradshaw replied by letter dated August 6, 1982:

We are pleased to be able to offer you a half-time position for the 1982-83 school year. Your assignment will be: 4th grade, .5 time, at the James Madison Intermediate School.

As indicated in my previous correspondence with you, should a full-time position become available for a person of your seniority between now and the start of the school year, we will be happy to make such a position available to you. Once the school year has started, you would be eligible for transfer to a full-time position, in seniority order, should one become available at a "natural break" in the school year, i.e., at the end of a marking period or during the Christmas break.

A reappointment slip will be sent to you as soon to you as soon as a salary guide for 1982-83 is adopted.

If this assignment involves a transfer from your previous school, please contact your new building principal to discuss details of your new assignment and prepare for a smooth transition.

After petitioner Bergstein discovered that she had not been offered the full-time third grade position at the Martin Luther King School, she again wrote to Dr. Bradshaw:

October 4, 1982

This letter concerns our phone conversation on September 22, 1982.

I am now waiting to be placed in a full-time teaching position. In our phone conversation, you stated that I was now number one on the full-time list.

October 28, 1982

This letter pertains to our telephone conversation on September 22, 1982.

You stated that I was now number one on the list to be placed in a full-time position.

I understand that a person who was after me on the full-time list has already been placed in a full-time position.

When I spoke to you in your office in August, 1982, you said that when a person's number came up for a job, they would be offered it. I was never given any choice. I would like to know what you plan on doing about this situation.

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In mid-January, two weeks after the Christmas recess and two weeks before the end of the marking period, two full-time positions became available; neither of the positions was offered to petitioner Bergstein.

LINDA LEVINE

Commencing with September 1982, Petitioner Levine was assigned as a Supplemental Instructor, an eight-tenths time position. When the two full-time positions opened up in mid-January, Dr. Bradshaw called petitioner Levine to inform her that she would not be reassigned to one of those positions because they were not becoming available at the end of the marking period or at a natural break such as Christmas vacation. She continued in the part-time position for the full school year.

ANNA MILLER

Petitioner Miller received the same letter concerning half-time positions, dated May 17, 1982, which is set forth hereinabove in the discussion of facts relevant to petitioner Heller. She also received a letter from Dr. Bradshaw, dated August 19, 1982 which advised:

> This district will have available for the 1982-83 school year three positions, at .6 time in the elementary talented program.
>
> This letter is being sent to all tenured, riffed elementary teachers who have district seniority of more than 2 years and 8 months for a position at .6 time (including those who have already received .5 assignments). We intend to fill these positions from among this group of teachers in seniority order as required by law. If you are not interested in this program, your indication of lack of interest would not affect your seniority rights to either a full-time or a half-time position.
>
> As you may know, the district program for the academically talented requires teachers who have a demonstrated aptitude for, and/or successful experience in, working with academically talented elementary students in the middle grades. To insure that candidates of this program are thoroughly familiar with its requirements, and to assist candidates in determining their suitability for this program, elementary supervisor Gretchen Tress, who serves as coordinator for this program, would like to meet with candidates during the week of August 30th — September 3rd, 1982.

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> Would you please complete the tear-off slip below and return it to my office to arrive no later than Friday, August 27th, 1982. Those who wish to meet with Miss Tress will be notified by telephone of a specific day and time.

Mrs. Miller lived in Lodi, New Jersey at the time and felt that anything less than a full-time position was financially not worth the long commute, so she indicated to Dr. Bradshaw, by returning the tear-slip on August 23, 1982, that she was not interested in being considered for a position in the academically talented program.

Sometime prior to January 20, 1983, Dr. Bradshaw called petitioner Miller and offered her a full-time position commencing February 7, 1983. Because petitioner Miller was expecting the birth of a child on or about February 25, 1983, she indicated to Dr. Bradshaw that she would accept the position to protect her status, but would simultaneously request a maternity disability leave. On January 20, 1983, Dr. Bradshaw received the following letter from petitioner Miller:

> As per our recent telephone conversation, this is to confirm that I will accept the full time teaching position at the James Madison Primary School.
>
> As provided for in the BOE/ETEA Agreement, I would like to request a Maternity Disability Leave from February 7, 1983 through April 25, 1983. My expected date of delivery is February 25, 1983, as confirmed in the attached statement from my physican (sic). It is my understanding that all health benefits will be continued for sixty days after my date of delivery, and these will be continued beyond that date if my physical condition should so warrant.
>
> Following the expiration of my Maternity Disability Leave, I wish to request an Infant Care Leave from April 26, 1983 until June 30, 1983.
>
> Should this pregnancy result in miscarrage or still birth, it is my understanding that I may return to work upon request within two weeks after written notification of same.
>
> Thank you for your time and cooperation in this matter.

Respondent granted petitioner Miller's request for leave.

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APPLICABLE LAW AND DISCUSSION

It is undisputed that if a seniority list had been prepared as indicated in the Order Granting Partial Summary Decision herein, each petitioner's seniority would have entitled her to a full-time position for 1982-83 school year; since those teachers with less seniority than petitioners were assigned in grades 7 and 8, the positions to which petitioners would have been assigned were in grades 7 and 8. Respondent makes a variety of arguments by way of mitigation of damages with respect to the five named petitioners discussed hereinabove.

MARTHA HELLER

Respondent argues that petitioner Heller relinquished all of her tenure and seniority rights when, by letter dated August 27, 1982, she declined to accept a part-time position. In support of its position, respondent cites Lois Mishkin, Petitioner v. Board of Education of the Borough of Mountainside, Union County, Respondent, OAL DKT. NO. EDU 1262-81, decided by the Commissioner of Education on March 4, 1983. In that case, the Commissioner of Education, reversing the determination of the administrative law judge, determined that when Mishkin, a tenured speech correctionist, resigned from her part-time employment in 1979, that she effectively terminated any rights she had to any full-time position as well. Respondent also cites Debra Cerra, Petitioner v. Board of Education of the North Hunterdon Regional High School District, Hunterdon County, Respondent, OAL DKT. NO. EDU 5764-82, decided by the Commissioner of Education on May 6, 1983. In that case, the Commissioner, adopting the conclusions of the administrative law judge, concluded that when petitioner declined to accept part-time employment, the Board had every reason to believe that her declination was for the entire 1981-82 school year, and consequently, petitioner's seniority did not entitle her to bump a nontenured teacher with whom the Board had contracted from his two-fifths position during the school year.

I do not view either the administrative law judge's decision or the Commissioner's decision in Cerra as a determination that Cerra's tenure and seniority rights were terminated; the holding in that decision simply applies to the second semester of the 1981-82 school year and the 1982-83 school years and holds with respect thereto

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that petitioner did not demonstrate that she was legally entitled by reason of her seniority and tenure rights to be appointed to a full-time position for those periods. Accordingly, I find that Cerra is not relevant to a determination of the issue herein. The facts in Mishkin, are somewhat distinquishable from the facts herein, in that Mishkin had accepted and was functioning in a part-time position which she then resigned. Petitioner Heller, on the other hand, simply declined to accept a part-time position. It may well be that the Supreme Court's determination in Lichtman v. Board of Education of the Village of Ridgewood, 93 N.J. 362 (1983) will be interpreted as necessarily obliterating any distinction between any part-time tenure and full-time tenure. It is not, however, necessary to make that determination herein; nor is it necessary to consider whether Mishkin is sufficiently distinquishable from the facts in the present matter to bar its application, since in declining to accept a part-time position, petitioner Heller was specifically relying upon the respresentations of respondent in its May 17, 1982 letter to her:

> If you have been a full-time teacher, you refusal to indicate your willingness to accept a half-time position would have no effect on your standing on the RIF list waiting for reemployment on a full-time basis. For those few teachers who have never worked more than half-time, a refusal to accept a half-time position would be tanamount to a resignation, in that it would nullify all seniority rights.

In view of the specific representations of respondent, respondent must be estopped from claiming that petitioner Heller resigned and relinquished all tenure and seniority rights in both part-time and full-time positions when she declined to accept a half-time position.

The only other issue remaining for determination with respect to petitioner Heller relates to respondent's October 7, 1982 determination wherein it denied petitioner's request for a leave of absence for the 1982-83 school year. It is clear that where the issue is one involving exercise of a local board's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 296 (App. Div. 1960) The burden of proving unreasonableness is upon petitioner. Id., at 296-297. Under all the circumstances of the present matter, I am unable to conclude that respondent acted in an arbitrary, capricious or unreasonable manner in denying petitioner Heller's request. Although I have found as a matter of fact that respondent had agreed with the Edison Township Education

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Association that a leave would be granted to a teacher who had unalterably committed himself or herself to other employment or had made a commitment which would have resulted in a financial liability, petitioner Heller has not demonstrated that withdrawing from the course in which she had enrolled would have resulted in a financial liability. She testified that she had not consulted the school about withdrawing from the course and obtaining a refund. Furthermore, since enrolling in school was an option which Ms. Heller must have been considering for some period of time prior to actually enrolling on September 16, 1982, unlike a situation where she might have been offered other employment and have been compelled to make a quick determinaton, she certainly could have and should have made application for the leave of absence prior to enrolling in school.

Certainly, respondent could have granted petitioner Heller's untimely request for a leave of absence; its decision not to do so, however, is not one which the Commissioner may reverse simply because he would have made a different determination had the decision been his to make. Accordingly, petitioner Heller's tenure and seniority rights terminated on September 20, 1982, the beginning date of the employment she refused. In accordance with this determination and the Order Granting Partial Summary Decision, she is entitled to whatever compensation she would have otherwise received prior to that date; she is not entitled to any further relief.

NINA SILBERBERG

Respondent asserts that petitioner Silberberg's tenure and seniority rights terminated upon the Board's receipt of her September 20, 1982 letter which stated:

> "I was not able to accept the position offered to me on such short notice over a holiday weekend. Therefore I will resign from the teaching staff of Edison Township."

Petitioner Silberberg asserts that she submitted the letter of resignation only because she felt she had no choice but to do so. She argues that it was totally unreasonable for the Board to expect her to "drop everything and appear for work on a moments notice." (Petitioner's letter brief, p. 9) She asserts that she is entitled to be reinstated to the 1983-84 recall list.

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It is not clear from the record whether petitioner Silberberg would have been entitled to an additional child care leave if she had asked for it; the facts herein show that she did not ask for a leave. In view of the circumstances concerning petitioner Silberberg's situation, the Board's position with respect to her cannot be considered so arbitrary, capricious or unreasonable as to require reversal by the Commissioner. Petitioner Silberberg certainly knew that her name was near the top of the seniority list and that she might be called back at any time. After September 6, 1982, she was fully aware that her mother was not available to care for her child in the event that she should be called back to work, and she apparently made no back-up arrangements. Like the determination of the Board with respect to petitioner Heller, its determination with respect to petitioner Silberberg is not one which the Commissioner may reverse simply because he would have made a different determination. Accordingly, petitioner Silberberg is entitled to compensation which she otherwise would have received prior to September 20, 1982, the effective date of her resignation from the system.

GAIL BERGSTEIN

With respect to petitioner Bergstein, respondent points to paragraph 2 of Dr. Bradshaw's August 6, 1982 letter to her which stated:

> As indicated in my previous correspondence with you, should a full-time position become available for a person of your seniority between now and the start of the school year, we will be happy to make such a position available to you. Once the school year as started, you would be eligible for transfer to a full-time position, in seniority order, should one become available at a 'natural break' in the school year, i.e., at the end of a marking period or or during the Christmas break.

Respondent argues that petitioner Bergstein waived her rights to full-time damages:

> Paragraph 2 of the letter clearly states that if a full-time position becomes available during the school year for which she is eligible, it would have to be at a 'natural break' in the school year, i.e., at the end of a marking period or during Christmas break. The testimony was clear that there was no full-time position available to Mrs. Bergstein during the school year at what has been considered a 'natural break.' Mrs. Bergstein first solicited a part-time position for her own convenience, which was granted, and then in the Petition before the Court makes a claim for fulltime salary. She acted at her own peril as the Board relied upon her request and she is precluded from now asserting rights that she voluntarily waived. (Respondent's letter brief pp. 3-4)

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Petitioner Bergstein replies:

> It is anticipated that Respondent will argue that Ms. Bergstein's letter of April 14, 1982 (R-3) in which she requested a half-time position for the 1982-83 school year, was a waiver of any claim she might have for full-time damages. This argument, if asserted, is erroneous and must be rejected. That letter was specifically amended by letter dated April 22, 1982 (R-3), wherein she states that she will accept a full-time position, if available. This was the Board's understanding as well (T62), as well as Ms. Bergstein's testimony (T115-116, 118). Further, whenever during school year 1982-83 a full-time position became available, Ms. Bergstein asserted her claim to same (T116, 120).

With respect to petitioner Bergstein, I **CONCLUDE** that although it was not necessary for her to accept a part-time position, once she did so, she relinquished any right to a full-time position for that school year except one which might become available at a "natural break." Respondent clearly defines "natural break" as one occurring within a day or two of the end of a marking period or within a day or two of Christmas vacation. Respondent's determination in this regard was a reasonable exercise of its discretion and was in furtherance of its responsibility to provide continuity of education to all students in the district. Petitioner Bergstein was aware of respondent's position in this regard when she accepted the part-time employment; no full-time employment became available during the school year within a day or two of a natural break. Respondent's determination to limit its flexibility with respect to the natural break to one or two days was a reasonable determination; respondent had to draw the line somewhere, and accordingly, Ms. Bergstein had no right to the full-time position which became available September 17, the full-time positions which became available in mid-January, or the full-time position which became available in February. Accordingly, Ms. Bergstein's claim to full-time damages is hereby **DISMISSED.**

LINDA LEVINE

Although petitioner Levine actively sought a full-time position during the school year in question, no full-time position became available at a "natural break" to which she could be assigned, and for the reasons set forth hereinabove with respect to petitioner Bergstein, Ms. Levine's claim to full-time damages is also **DISMISSED.**

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ANNA MILLER

Respondent argues that petitioner Miller's refusal of a part-time position effectively terminated her tenure and seniority rights in the district in accordance with Mishkin, supra. For the reasons set forth hereinabove with respect to petitioner Heller, I **CONCLUDE** that petitioner Miller did not relinquish her tenure and seniority rights to a full-time position when she declined to accept a part-time position. Since petitioner Miller, like petitoner Heller, relied upon respondent's specifically articulated advice in this regard, it would be most inequitable to allow respondent to prevail in its present position.

Petitioner Miller was recalled from the RIF list for a position commencing February 7, 1983, which she accepted and simultaneously sought and was granted a maternity disability leave. Accordingly, petitioner Miller is entitled to compensation for the period commencing September 1982 up to February 7, 1983, five months and seven days salary for school year 1982-83 which amounts to $8418.75, five months and seven days of additional seniority and such other rights and emoluments of office to which she would have been entitled had she been actively employed during that period.

For the reasons set forth in the foregoing opinion, respondent is directed to revise its seniority calculations in accordance with the attached Opinion Granting Partial Summary Decision with respect to all seniority determinations prior to September 1, 1983. With respect to seniority determinations as of September 1, 1983 and thereafter, N.J.A.C. 6:3-1.10(l)16 as amended on June 20, 1983 must govern. It is further **ORDERED** that the damage claims of petitioners Heller, Silberberg, Bergstein and Levine are **DISMISSED** for the reasons set forth hereinabove and respondent is directed to compensate petitioner Miller in accordance with the foregoing opinion.

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

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

November 14, 1983
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

11/14/83
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

November 16, 1983
DATE

Ronald J. Parke/xs
OFFICE OF ADMINISTRATIVE LAW

ij

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EXHIBITS IN EVIDENCE

R-1 Package of documents re: Martha Heller
R-2 Package of documents re: Nina Silberberg
R-3 Package of documents re: Gail Bergstein
R-4 Package of documents re: Linda Levine
R-5 Package of documents re: Anna Miller

WITNESSES

For Petitioners

Nina Silberberg
Linda Levine
Gail Bergstein
Anna Miller
Martha Heller
Aurora Bernard-Sallit

For Respondent

Thomas J. Bradshaw

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 9457-82
AGENCY DKT. NO. 286-7/82A

EDISON TOWNSHIP EDUCATION ASSOCIATION, JUDITH MAYER, MARY JANE JAMES, BARBARA YESALAVICH, MARTHA HELLER, NINA SILBERBERG, GAIL BERGSTEIN, JOAN GIBSON, LINDA LEVINE, ANNA MILLER, and BRENDA MAXWELL,
Petitioners
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

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

R. Joseph Ferenczi, Esq., for respondent

Record Closed: April 5, 1983 Decided: May 20, 1983

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OAL DKT. NO. EDU 9457-82

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was commenced on July 19, 1982, with the filing of a Petition of Appeal seeking, inter alia, a determination of the proper application of the standards for determining seniority, pursuant to N.J.A.C. 6:3-1.10, for petitioners with respect to grades 7 and 8 in respondent's educational structure. An Answer to the Petition was filed on behalf of respondent on September 29, 1982, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held in this matter on February 8, 1983, at which time petitioners' motion to sever this matter from Mary Jane James, et al. v. Board of Education of the Township of Edison, EDU 850-83, and Linda DeGeronimo v. Board of Education of the Township of Edison, EDU 949-83, was granted, since it appeared that the three cases had been improvidently, administratively consolidated without proper notice to the various parties, without any of the required findings pursuant to N.J.A.C. 1:1-14.3, and without entry of any order. At that time petitioners' motion for leave to file an amendment to the Petition adding a Twelfth Count was also granted. Respondent was directed to file an Answer to the Twelfth Count on or before February 18, 1983. Finally, it was determined that petitioners would file a motion for summary decision with supporting papers on or before February 14, 1983; respondent would file a responding brief on or before March 7, 1983; and the reply brief, if any, would be filed within seven days of receipt of respondent's brief. A Prehearing Order setting forth the foregoing determinations was entered on February 18, 1983. Thereafter, by letter dated February 24, 1983, an Answer to the Amendment to the Petition was filed on behalf of respondent; petitioners' notice of motion for partial summary decision and brief in support of same was received on February 15, 1983; respondents' brief in support of cross-motion for summary decision and in opposition to petitioners' motion for summary decision was received on March 22, 1983, and a letter in lieu of formal brief replying to respondent's brief was received on April 5, 1983, whereupon the record closed.

The Prehearing Order set forth as the issue for determination herein:

> What is the proper method for calculation of seniority credit for teachers with respect to grades 7 and 8 in the following educational structure:

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Elementary Schools-K through 6
Jr. High Schools-7 through 9
Sr. High Schools-10 through 12

Following receipt of the briefs in this matter, it appeared that there were factual issues remaining for determination, and pursuant to a conference call between counsel for the parties and the undersigned administrative law judge, it was determined that a hearing would be conducted on July 8, 1983, following issuance of the Order on the partial summary decision motion, for purposes of resolving the remaining fact issues.

FINDINGS OF FACT

The facts relevant to determination of the issue for partial summary decision have been stipulated by the parties. I, therefore, **FIND** the following as uncontested facts in this matter.

On April 12, 1982, each petitioner herein was tenured as a full-time teacher in respondent's school system. Each petitioner holds a standard New Jersey Instructional Certificate with an elementary education endorsement. Petitioner Maxwell also has a mathematics endorsement and another nonrelated endorsement. At all times relevant to the issue herein respondent's educational structure has been organized as follows:

Elementary schools-grades K through 6;
Jr. High Schools-grades 7 through 9;
and High Schools-grades 10 through 12.

Prior to April 12, 1982, all of petitioners' teaching assignments had been in the elementary schools.

By notice dated April 12, 1982, respondent advised each petitioner that her full-time position was abolished, for reasons of economy or because of reduction in the number of pupils. Each petitioner was advised of her full-time seniority calculations as follows:

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	Years	Months	Days
Judith Mayer	5	7	22
Mary Jane James	5	5	4
Barbara Yesalavich	5	2	
Martha Heller	5		
Nina Silberberg	4	8	21
Gail Bergstein	4	8	4
Joan Gibson	4	4	25
Linda Levine	4	2	23
Anna Miller	4	1	13
Brenda Maxwell	3		

Following the April 1982 RIF, petitioners attempted to exercise their seniority rights by claiming full time positions teaching common branch subjects in grades 7 or 8, but were not permitted to do so by respondent.

It is petitioners' position that both teachers with seniority rights in the elementary category and teachers with seniority rights in the secondary category may exercise bumping rights against teachers with less seniority teaching grades 7 or 8. Although petitioners state at p. 20 of their brief "that the employee with greater length of service in the district remains if one of two employees need be riffed," it is clear from the cases cited by petitioners and petitioners' discussion of those cases that what they really assert, and seek partial summary decision declaring, is that the employee with the greater amount of seniority in either category may exercise bumping rights to teach grades 7 or 8.

Respondent's position is that teachers such as petitioners who have accrued seniority only in the elementary category and who have never taught in grades 7 or 8 are not entitled to "bump" teachers assigned to teach grades 7 or 8: 1) because respondents educational grade structure is such that its junior high schools are grades 7 through 9, not grades 7 through 8; 2) because proposed changes in the seniority regulations are currently being considered which would eliminate the present controversey and make it moot; and 3) because petitioners are really seeking transfers to grade 7 or 8 assignments and teachers

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have no right to any particular assignment, the right to transfer a teacher between assignments within a position belonging exclusively to the Board. Respondent also raises an issue concerning whether some of petitioners abandoned their tenure rights by refusing "properly offered" employment within respondent's district subsequent to the RIF, but that issue will remain for determination following the hearing on the disputed facts on July 8, 1983.

APPLICABLE LAW AND DISCUSSION

Seniority is a concept which only applies to certain rights of tenured personnel and only has meaning when a reduction in the employment force is necessary. The source of the concept is in the tenure law, specifically:

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

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

N.J.S.A.:28-10:

> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.

N.J.S.A. 18A:28-13:

> The Commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both.

Such standards have been promulgated and are set forth at N.J.A.C. 6:3-1.10 et seq. and provide in pertinent part:

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. . . .

(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.

. . . .

Of the varous categories which the Commissioner has established in which seniority may be accrued and which are set forth in subsection (k) of N.J.A.C. 6:3-1.10, only two are relevant to the issues herein:

27. Secondary. The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has or shall be required by the State Board of Education. However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate.

28. Elementary. The word "elementary" shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in juior high schools.

Since seniority is accrued only by actual teaching service within a category, it is obvious that a teacher must hold a valid certificate with an endorsement appropriate for the assignment; certificates or endorsements are not otherwise relevant to the determination of the issue herein and need not be discussed further.

As indicated in Howley and Bookholdt vs. Ewing Township Board of Education, EDU 3664-82, decided by the Commissioner December 20, 1982, categories are nothing more than what the Commissioner has said they are, and their only purpose is for determining a tenured teaching staff member's rights in a RIF. The specific question for

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resolution herein, therefore, is did petitioners or any of them as tenured teaching staff members, have a right following the April 1982 RIF to claim entitlement to teaching positions in grades 7 or 8 in the junior high schools for the 1982-83 academic year.

Under the language of the foregoing regulations, when petitioners were riffed, respondent was obligated to give each petitioner employment in their same category, according to seniority. By definition, the elementary category includes grades 7-8 in junior high schools. Respondent's argument that the regulation does not encompass junior high schools which are established as grades 7-9, but rather is restricted solely to junior high schools which are established as grades 7-8, is merely a bald assertion by respondent, unsupported in case law or in logic. The language of the regulation as it currently stands is clear: the elementary category includes any grade 7 and any grade 8.

Accordingly, following the RIF respondent was required to give each petitioner employment within the elementary category. It is, of course, true, as respondent asserts, that petitioners cannot insist on any particular assignment within the elementary category. Undoubtedly the issue with respect to 7-8 grade assignments arose because these particular petitioners had less elementary seniority than other teachers already teaching in K-6 assignments, and that being the case, if there were teachers assigned in grades 7-8 with less seniority than petitioners, then respondent was obligated to give petitioners employment in those 7 or 8 grade assignments.

Nor does it matter whether the teachers with less seniority who were holding employment in the 7-8 grade assignments had accrued seniority in the elementary category or the secondary category. As petitioners aptly illustrated with a Venn diagram at p. 11 of their brief, the two categories overlap, so that 7-8 is a sub-set of each category. Therefore, either teachers with elementary seniority or teachers with secondary seniority may claim bumping rights against teachers with less seniority (whether elementary or secondary) holding employment in grades 7-8. See Prysiazny v. Sayreville Board of Education, 1980 S.L.D. _____, (May 5, 1980), Jarrett v. Watchung Borough Board of Education, 1981 S.L.D. _____, slip pp. 10-12, (10-5-81), and other cases cited by petitioners.

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Since the Board has the right to transfer employees to various assignments within their tenured positions, if another position should open up following the RIF, and respondent then wished to transfer a petitioner from grade 7 or 8 to another assignment in K-6, it would, of course, be privileged to do so. But if, at the time of the RIF, the only employees with less seniority than petitioners are those in the 7-8 assignments, petitioners' seniority entitlements to those positions are greater than those who are currently holding those assignments, and petitioners must be given the employment.

Respondent argues that the proposed revisions in the seniority regulations will change all this, and that will be the case if the proposals are adopted.* Until such time as the law is changed, however, the current seniority regulations must govern the rights of the parties.

Accordingly, petitioners' motion for partial summary judgement is granted; determinations of specific rights and remedies will await the conclusion of the factual hearing on July 8, 1983.

This order granting partial summary decision shall not be effective until a final agency decision has been rendered on this issue either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case pursuant to N.J.A.C. 1:1-16.5.

May 20th, 1983
DATE

M. KATHLEEN DUNCAN, ALJ

* As petitioner has pointed out, N.J.A.C. 6:3-1.10(m) of the proposed revisions states "This section shall apply prospectively to all future seniority determinations as of the effective date of this rule." Retrospective rights will not, therefore, be affected, in any event.

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EDISON TOWNSHIP EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that primary exceptions of petitioners and the Board and reply exceptions of petitioners were all filed in a timely fashion.

Petitioners in response to the Order Granting Partial Summary Decision dated May 20, 1983 by Judge Duncan take no exceptions thereto. Petitioners, however, take exception to the initial decision of November 14, 1983. On behalf of Petitioner Heller, plea is made that the Commissioner take official notice of the importance of the Jewish Holiday, Rosh Hashanah. Secondly, exception is taken on behalf of Petitioner Silberberg to the statement that she knew that her name was near the top of the seniority list and that she might be called back at any time. Petitioners Bergstein and Levine appeal from the conclusion of the judge denying them the "make whole remedy" because each accepted less than full-time positions. Each pleads that she must be made whole for seniority credit, pension credit and all other emoluments as though employed for a full year.

The Board in primary exceptions contends that the judge improperly ignored the fact that the Board's Junior High School grades 7 through 9 were departmentalized and that assignments thereto were made on a grade 7-9 basis and not just grades 7-8. The Board excepts to the application by the judge of the wording of N.J.A.C. 6:3-1.10 et seq. as amended. The Board contends that the judge improperly applied the law in Mishkin, supra, and Cerra, supra.

Petitioners in reply exceptions to those filed by the Board in connection with the Partial Summary Decision of May 20, 1983 affirm the conclusion by the judge as to the bumping rights of

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teachers with elementary certification to teach grades 7-8. The Commissioner cannot agree in entirety with the exceptions filed herein by either party.

The Commissioner observes that in the circumstances surrounding this matter the Board has insisted on immediate responses from two teachers in a most precipitate manner. Such insistence, where there is no showing of a true emergency establishing the need thereof, the Commissioner finds to be of an arbitrary nature. Further, the Commissioner notes that Petitioners Heller and Silberberg so involved are of the Jewish faith and the action of the Board or its agent Bradshaw required an instant answer at the time of the religious holiday Rosh Hashanah, important to a practicing Jew. Absent such a true emergency, the Commissioner finds such insistence of an immediate teacher response to be most inopportune and unjustifiable and is accordingly set aside.

Additionally, the Commissioner notes the creation by the Board, with affirmation by the judge, of artificial strictures in the school year called a "natural break" when applying the availability of position to those teachers on an established seniority list. The Commissioner knows of no such limitations. Seniority is a right established by law and is not limited by such artificial division. When a position becomes available, teachers on a seniority list are to be so placed immediately, as determined by such list. The Commissioner so holds.

The Commissioner affirms the bumping rights of teachers with elementary certification to teach grades 7-8; see Joan Jarrett v. Board of Education of the Borough of Watchung, decided by the Commissioner October 5, 1981.

Accordingly, the determination by the court concerning Petitioners Heller, Silberberg, Bergstein and Levine is set aside. For the reasons stated above, the aforementioned petitioners shall be reinstated to full-time tenured positions in accordance with their tenure and seniority rights. Reimbursement of the difference in salary, if any, as mitigated, shall be accorded petitioners with appropriate benefits and emoluments.

The Commissioner affirms the findings and determination as modified in the initial decision in this matter and adopts them as his own.

The Commissioner concurs with the compensability of Petitioner Miller for the period commencing September 1982 to February 7, 1983 as to salary, seniority and other emoluments as though actually employed during that period. The Board shall revise its seniority calculations with respect to all seniority determinations prior to September 1, 1983 pursuant to the Opinion Granting

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Partial Summary Decision. With respect to seniority determinations, as of September 1, 1983 and thereafter, they shall be governed by N.J.A.C. 6:3-1.10(1)16 as amended June 20, 1983.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

DECEMBER 29, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0311-82
AGENCY DKT. NO. 484-12/81A

PETER FISCHBACH,
Petitioner,
v.
BOARD OF EDUCATION
OF NORTH BERGEN,
Respondent.

APPEARANCES:

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Morton R. Covitz, Esq., for respondent
(Greenberg & Covitz, attorneys)

Record Closed: August 15, 1983 Decided: November 15, 1983

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is an appeal by a former school administrator who claims that his assignment to a teaching position constitutes a violation of his tenure and seniority rights.

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Although the factual background of this case is extremely convoluted, the legal theory on which petitioner relies is relatively simple: petitioner contends that he should be allowed "to credit his actual employment experience for purposes of tenure and seniority, regardless of the titles or labels assigned to him by the [North Bergen Board of Education]." Analysis of petitioner's rights is further complicated by the fact that at times he assumed duties for which he either lacked the appropriate certificate or possessed a certificate subsequently declared to be invalid. As shall be seen, both sides are equally at fault for the confusion caused by their mutual disregard of the certification requirements and use of unrecognized job titles. What follows is an effort to give petitioner the benefit of his years of service for the Board in various administrative capacities, without permitting him to profit from his appointment to any position for which he was uncertified or improperly certified.

Procedural History

The present matter is the third case involving the employment status of Peter Fischbach. In Fischbach v. North Bergen, 1980 S.L.D. ____ (April 14, 1980), appeal dismissed 1980 S.L.D. ____ (August 7, 1980), the same petitioner alleged that his transfer on June 15, 1979 from the position of superintendent of schools to elementary vice principal violated his tenure rights. Finding that Fischbach had performed all the functions and duties of a superintendent of schools between September 1, 1976 and June 15, 1979, the Commissioner of Education held that he had acquired tenure in that position and that his removal was illegal. Because the charge of fraud in the procurement of Fischbach's school administrator's certificate had not been properly framed in the pleadings, the Commissioner found it unnecessary to address that issue raised by the Board for the first time during the course of the hearing.

Instead of complying with the Commissioner's order, however, the Board continued Fischbach as an elementary vice principal. In September 1980, it demoted him to the position of classroom teacher, where he is presently still assigned. Meanwhile, the Board joined the teachers' bargaining representative in a separate action attacking the

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underlying validity of Fischbach's school administrator's certificate. On September 17, 1981, the State Board of Examiners ruled that improprieties attributable to Fischbach in his application for this certificate amounted to "a reckless disregard for the integrity of the certification process." Consequently, the State Board of Examiners revoked Fischbach's school administrator's certificate. North Bergen Fed'n of Teachers, Local 1060 v. Fischbach, OAL Dkt. No. EDU 4454-80 (June 6, 1981), adopted, State Bd. of Examiners (Sept. 17, 1981).

Thereafter, on December 15, 1981, Fischbach instituted the present action in which he seeks assignment "to an appropriate administrative position" and retroactive compensation.[1] In its answer, the Board denied that Fischbach is entitled to any credit for past service as an elementary vice principal or an assistant superintendent. Rather, the Board contended that Fischbach never genuinely performed the duties associated with those positions. Furthermore, the Board alleged that Fischbach's prior administrative experience was limited to service in unrecognized positions created for him through improper political influence.

Subsequently, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Hearings were held on March 7 through 11 and April 19, 1983. Upon receipt of briefs submitted by the parties, the record closed on August 15, 1983. Time for preparation of the initial decision has been extended to November 15, 1983. N.J.S.A. 52:14B-10(c).

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[1]Fischbach failed to appeal his demotion to teaching duties at the time it occurred. But the Board never raised the affirmative defense of failure to comply with the requirement of N.J.A.C. 6:24-1.2 that a petitioner must initiate a proceeding with the Commissioner by filing "within 90 days after receipt of notice by the petitioner of the ... action concerning which the hearing is requested." While neglecting to bring his appeal within 90 days of his demotion, Fischbach did file his petition within 90 days of the date on which the State Board of Examiners issued its decision invalidating his school administrator's certificate.

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Undisputed Facts

Some of the background facts are undisputed or established as a result of prior litigation between the identical parties involved in the present case. Fischbach, who holds a limited teacher's certificate issued in December 1960 and a permanent certificate issued in July 1963, has been employed by the Board for 23 years. From September 1960 to March 1973, he was assigned to regular classroom teaching duties. Beginning in April 1973, he was assigned to other duties which are the subject of the factual controversy in this case. The parties differ on the capacity in which Fischbach was employed by the Board during the period of April 1, 1973 to August 31, 1976.

It was previously settled that Fischbach occupied the position of superintendent of schools from September 1, 1976 to June 15, 1979. Despite the Board's unwillingness to accept the result, the Commissioner of Education made an express finding to that effect in the first Fischbach case. Fischbach was dismissed from the superintendent's position effective June 15, 1979, giving rise to the initial litigation before the Commissioner. Several days after his dismissal, the Board demoted Fischbach to the position of elementary vice principal, a job which he performed from June 20, 1979 to June 30, 1980. His annual salary was reduced from a high of $38,000 as superintendent to $29,300 as elementary vice principal. After one year, the Board demoted Fischbach again to a teaching position for the 1980-81 school year at a still lower salary of $27,300. Since September 1980, Fischbach has remained assigned to teaching duties. For the 1981-82 school year, his salary was $29,000. At the time of the present hearing, Fischbach was on sabbatical leave for the 1982-83 school year and earning a salary of $32,722.

The parties were also able to agree on the years of service accrued by other employees over whom Fischbach claims seniority. Board records show that one Leo Gattoni was assigned to be assistant superintendent on August 1, 1979, two months after Fischbach had been removed from the superintendent's position and demoted to elementary vice principal. Before then, Gattoni had no prior years of service in the category of assistant superintendent. Similarly, Board records reflect that one Robert

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Dandorph was assigned to elementary vice principal for the first time in 1977-78; and, further, that one Joanne Colello was assigned to elementary vice principal for the first time on October 1, 1979. Thus, when Fischbach was demoted from elementary vice principal to teacher in September 1980, Dandorph had only three years of service and Colello had less than one year of service in the category of elementary vice principal.

Summary of the Evidence

Debate over the nature of Fischbach's employment relates to two distinct periods of time. First, Fischbach insists that between April 1, 1973 and February 17, 1974 he was performing the actual functions of an elementary vice principal. On the other hand, the Board maintains that Fischbach was an "administrative assistant" whose duties were not equivalent to those of a vice principal. Second, Fischbach contends that from February 18, 1974 to August 31, 1976 he served in the role of assistant superintendent for personnel and curriculum. The Board contends that Fischbach was nothing more than a "vice principal assigned to the superintendent's office."

Much of the difficulty in this case arises from the intentionally misleading job titles and blurred lines of responsibility in which both parties acquiesced during the course of their dealings. By resolution adopted March 14, 1973, the Board appointed Fischbach as a vice principal commencing on April 1, 1973. Soon thereafter, on April 11, 1973, the Board rescinded its prior resolution and appointed Fischbach as "administrative assistant" at the same salary. Unlike the title of vice principal, the title of "administrative assistant" did not have a written job description. Nor did the Board ever submit the unusual job title of "administrative assistant" to the County Superintendent for approval.

Both sides admit that what happened to cause the Board to change Fischbach's title was the intervening discovery by the Board that Fischbach did not possess the principal/supervisor certificate needed to occupy the position of vice principal. The parties engaged in finger-pointing as to who had originated the idea for the change in title. Fischbach proclaimed his innocence of any intent to deceive the Board about his

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qualifications. One of his witnesses, former Board president Dr. Nino Falcone, recalled that the new job title had been suggested by Dr. Herman Klein, who was then superintendent of schools. Dr. Klein, however, accused Dr. Falcone himself of being the one who invented the title.

A considerable amount of testimony was devoted to the circumstances surrounding Fischbach's efforts to obtain his principal/supervisor certificate. Fischbach's main point was that issuance of the certificate was a mere formality because he had completed all course work leading to certification prior to his becoming a vice principal. He relied on a letter from the Bureau of Teacher Education and Academic Credentials verifying that he had been eligible for a principal certificate since completion of his master's degree program in 1968. Nonetheless, Fischbach took great pains to point out that sometime in December 1972 or January 1973 (before taking on the duties of vice principal in April) he had ordered a transcript of his courses from Montclair State College and filled out the form to apply for certification.

For reasons never fully explained by Fischbach, the college has no record of this transaction and the secretary who processes such papers for the Board has no recollection of it ever having occurred. Fischbach claimed that the delay in the issuance of his principal/supervisor certificate was due to clerical error by the Board or the college which "lost" his earlier application papers. Nearly one year after assuming the duties of vice principal, Fischbach, who still did not have his principal/supervisor certificate, completed what he described as his second application form. This form, signed by Fischbach on February 1, 1974, was received in the County Superintendent's office on February 4, 1974. Witnesses for the Board insisted that this form was the only application for a principal/supervisor certificate which Fischbach ever submitted. Ultimately, the certificate was issued by the State Board of Examiners in April 1974.[2]

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[2]In North Bergen Fed'n of Teachers, the State Board of Examiners upheld the validity of Fischbach's principal/supervisor certificate against charges that it, like his school administrator's certificate, had been procured by fraud. Therefore, it is no longer open to question that Fischbach held a valid principal/supervisor certificate from April 1974 onward.

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Irrespective of the change in his title from vice principal to "administrative assistant," Fischbach maintains that he continued to perform the duties of a vice principal. According to Fischbach, he was stationed at the Robert Fulton School where he assisted the principal in charge of the building. Among his other duties, Fischbach observed and evaluated nontenured teachers in a classroom setting; participated in the disciplining of students; helped to plan the curriculum for reading and mathematics; took part in the receipt and distribution of school supplies; handled the scheduling of classes and the assignment of teachers; attended PTA meetings and other community functions; and, substituted for the principal in his absence. Several witnesses, including a teacher who worked at Robert Fulton School during the period in question, corroborated the accuracy of Fischbach's description of his duties. In April 1973, Fischbach joined the Council of Administrators and Supervisors, the bargaining unit which represents principals and supervisors. Previously, he had been a member of the Federation of Teachers, which represents teachers in the district. Now that he was no longer a teacher, Fischbach worked a full 12-month year. Initially, his salary remained at $16,300, the same amount which he had received as a teacher. Around July 1983, Fischbach was put on the administrator's salary guide at the elementary vice principal level.

As noted above, the parties are also in disagreement about what position Fischbach occupied from February 18, 1974 to August 31, 1976. On February 18, 1974, the Board adopted a resolution stating that:

> Peter Fischbach, Vice Principal in the North Bergen Public School System, is hereby transferred and assigned to the office of the Superintendent of Schools, to perform administrative duties ...

Although Fischbach testified that the reason for the transfer was that Dr. Klein needed assistance at the central office, Dr. Klein denied that he requested or desired Fischbach's help. Again, the awkward title of "vice principal assigned to assist the superintendent" was neither approved by the County Superintendent nor formalized in any written job description adopted by the Board. Fischbach produced what purported to be a

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memorandum of his job duties prepared by the superintendent, but Dr. Klein did not remember ever having seen the document prior to the hearing. Starting in June 1875, graduation exercise booklets for the various elementary schools in the district began to identify Fischbach simply as an employee of the "Superintendent's Office." It was not until June 16, 1977, however, that the Board passed a resolution officially appointing Fischbach as assistant superintendent of schools. By that time, as we have seen, Fischbach had already assumed the full duties of superintendent of schools due to Dr. Klein's declining health.

Fischbach maintains that the duties he performed while "vice principal assigned to assist the superintendent" were equal to the duties of an assistant superintendent. Undoubtedly, Fischbach had substantial responsibilities in the area of evaluating nontenured teachers and making recommendations to the Board on whom to reemploy. Indeed, the present Board contends that Fischbach's primary function was to dispense political patronage for the Macco organization which was allegedly in control of the school system. According to Dr. Klein, virtually everyone hired or appointed in the district during this period received his job as a reward for political support of the existing regime. After Fischbach's arrival in the central office, Dr. Klein complained, the superintendent was no longer consulted about the hiring of teachers or other staff.

Besides his deep involvement in evaluation of nontenured personnel, Fischbach took over many duties traditionally associated with the position of assistant superintendent. For example, Fischbach and his witnesses said that he was put in charge of verifying teacher certifications and maintaining personnel records for the entire district. Additionally, Fischbach supervised the provision of home instruction for students unable to attend school. Occasionally, Fischbach would visit school buildings to inspect the physical plant or to investigate incidents of vandalism. Another of Fischbach's jobs was the preparation of various state-mandated reports for the superintendent's signature. Other duties which Fischbach performed include arranging for substitute teachers, mailing assignment notices, ordering supplies and materials, preparing salary guides, and attending meetings as the superintendent's representative. In the temporary absence of the superintendent, Fischbach assumed the duties of chief school administrator.

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When Fischbach was originally transferred from Robert Fulton School to the central office, he continued to be paid on the salary guide for an elementary vice principal, which at that time was approximately $18,000. Sometime in the 1975-76 school year, he was moved to the salary level of a high school vice principal, which placed him in a range of $24,000 to $27,000. None of the testimony indicates that he was ever paid as an assistant superintendent. Throughout the period in question, Fischbach maintained his membership in the Council of Administrators and Supervisors, an organization whose contract with the Board expressly excluded membership by an assistant superintendent. At some point in time, Fischbach became engaged in labor negotiations with the Council on behalf of the Board. This may raise a question of a potential conflict of interest on Fischbach's part, but has no direct bearing on the type of job duties he was performing.

Findings of Fact

Review of the record clearly demonstrates that both Fischbach and the Board were willing to bend or break the rules when it suited their purpose to do so. Neither side comes to this case with completely "clean hands" or an entirely credible story. Each party acted in what was felt to be its own best interest, without undue concern for legal niceties. Keeping the parties' motives and objectives in mind, I **FIND** the following facts:

Fischbach must have known that he lacked the appropriate certificate to become a vice principal in April 1973, but he failed to inform the Board of that deficiency. His claim that he first applied for a principal/supervisor certificate in December 1972 or January 1973 is unworthy of belief. Apart from his own self-serving testimony, there is no corroborating proof that Fischbach made such application. It is highly unlikely that both Montclair State College and the Board would have lost any record of his application. More importantly, the state authorities have no record of receipt of Fischbach's application at that time. While a local board of education may assist in processing papers, the basic responsibility of gathering the necessary information rests with the applicant for certification. There is no convincing evidence that Fischbach presented the state authority with sufficient documentation of his eligibility for the certificate until February 4, 1974. Any supervisory services rendered by Fischbach prior to that date were performed while he was uncertified.

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Whatever the title it gave him, the Board obviously wanted Fischbach to serve as elementary vice principal of Fulton School. In fact, the very reason for the change in job titles was so that Fischbach could do just that. Uncontradicted testimony established that at Fulton School Fischbach handled assignments characteristic of the job of vice principal, such as observation and evaluation of teachers, student discipline, curriculum planning, and community relations. Certified or not, Fischbach actually performed the duties of an elementary vice principal from April 1, 1973 to February 17, 1974.

Though retaining the title and salary of vice principal, Fischbach's duties were significantly expanded when he was transferred from Fulton School to the central office on February 18, 1974. No longer confined to a single school, he now functioned on a district-wide basis, with increased responsibilities in the area of teacher evaluation and assignment, personnel record-keeping, supervision of home instruction, maintenance of physical plant, public relations and labor negotiations. Almost all witnesses agreed that Fischbach was second in command to the superintendent. Of all the recognized positions in the educational hierarchy, the job most closely approximating what Fischbach was actually doing is assistant superintendent. Therefore, Fischbach must be regarded as having served in the capacity of assistant superintendent from February 18, 1974 to August 31, 1976, at which time he took over the duties of superintendent of schools.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Fischbach has achieved tenure in the position of assistant superintendent and was illegally denied an assignment to that position at the time of his removal from superintendent of schools.

Teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years are eligible for tenure. N.J.S.A. 18A:28-5. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 81. Initially, Fischbach argues that he attained tenure in the position of superintendent, as

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determined by the Commissioner of Education in Fischbach v. North Brunswick Bd. of Ed., supra, and, therefore, that he is entitled to back pay as a superintendent from his removal on June 15, 1979 to September 17, 1981 when the State Board of Examiners revoked his administrator's certificate. The fallacy in Fischbach's argument is his assumption that his administrator's certificate remained valid until the date of the decision by the State Board of Examiners. Although it is true that order of revocation in North Bergen Fed'n of Teachers, Local 1060 v. Fischbach, supra, was not entered until September 17, 1981, the reasoning of the case makes clear that the administrator's certificate had been issued in reliance on false representations made on behalf of Fischbach. It follows that the administrator's certificate was void ab initio because it had been obtained under false pretenses. Otherwise Fischbach would be able to benefit from his own wrongdoing by taking advantage of an improperly-issued certificate. No person may be employed in the public schools in this State unless he is the holder of an appropriate certificate. N.J.S.A. 18A:26-2; N.J.S.A. 18A:27-2. A school administrator's certificate is required in order to qualify for the position of superintendent of schools. N.J.A.C. 6:11-10.4(a). Having obtained such a certificate by misrepresentation, Fischbach may not recover the difference in salary for a position he should never have occupied in the first place.

Turning to petitioner's entitlement to tenure as an assistant superintendent, Fischbach's tenure rights cannot arise until he became the holder of a proper certificate "in full force and effect." N.J.S.A. 18A:28-5. Regulations provide that a principal or supervisor certificate is required in order to be an assistant superintendent. N.J.A.C. 6:11-10.4(b) and (c). Citing Kane v. Hoboken Bd. of Ed., 1975 S.L.D. 12, Fischbach urges that eligibility alone is sufficient to satisfy the certification requirement, even if a teaching staff member does not have the actual certificate in his possession. In Kane, the Commissioner approved the appointment of a junior high principal who was certified as a secondary principal but not as an elementary principal. Since the appointee was eligible for issuance of an elementary principal certificate, the Commissioner held that to deny him the appointment would be to elevate "form over substance." 1975 S.L.D. at 17. Recent cases limit that result to situations where the delay in acquiring the necessary certificate was "not of [one's] own doing," Givens v. Newark Bd. of Ed., 1974 S.L.D. 906,

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908, or "not attributable to any wrongdoing on anyone's part." Saad v. Dumont Bd. of Ed., 1982 S.L.D. ___ (May 10, 1982). Illustratively, in Givens, a teacher "had applied in a timely fashion for the required certification prior to reporting to work." 1974 S.L.D. at 907. Her lack of proper certification was the result of administrative delay beyond her personal control.

Here, on the contrary, Fischbach was fully aware that he did not have a principal/supervisor certificate, yet participated in a scheme to change his job title in order to circumvent the certification requirement. Not until February 4, 1974 did he get around to applying for the necessary certificate. Delay in the issuance of his certificate was not caused by the slowness of others, but rather by Fischbach's own willingness to cut corners and ignore regulations. Under these circumstances, Fischbach has only himself to blame if his certification as a principal/supervisor is measured from February 4, 1974.

Pursuant to N.J.S.A. 18A:28-5(a), any teaching staff member "who is transferred or promoted with his consent to another position" gains tenure in the new position upon "the expiration of two consecutive calendar years in the new position." Using February 4, 1974 as the date of his certification, Fischbach possessed a valid principal/supervisor certificate when he began working as an assistant superintendent in the central office on February 18, 1974. Even using the actual date of issuance, Fischbach was appropriately certified no later than April 1974. Thereafter, he performed the duties of an assistant superintendent for more than two consecutive calendar years. Credit must be given for the actual duties Fischbach performed, regardless of the name or label the Board attached to those duties. School districts are supposed to use recognized administrative and supervisory titles, or obtain the approval of the County Superintendent for an unorthodox title in advance of any appointment to the job. As the Commissioner of Education has observed in an analagous context, he "cannot condone this designation of a bona fide administrative position by an unappropriate title, which would result in relegating petitioner's service to an amorphous limbo." Boeshore v. North Brunswick, 1974 S.L.D. 805, 817.

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Fischbach worked in a position for which certification was required, held a valid certificate, and worked the requisite number of years. Consequently, he cannot be deprived of his statutory tenure rights. Spiewak, supra. Absent the bringing of tenure charges against him, Fischbach should have been returned to the position of assistant superintendent at the time of his dismissal from the position of superintendent.

In addition to violating his tenure rights, Fischbach also contends that the Board's action contravened his seniority rights. Seniority standards are applicable in the event of a dismissal resulting from a "reduction in force." N.J.S.A. 18A:28-10. Because Fischbach's dismissal did not come about as a result of a reduction in force, it is doubtful whether the seniority rules are at all relevant to this case. Even if they are, the outcome would be the same. N.J.A.C. 6:3-1.10 provides for the determination of seniority based on the number of years of employment "in specific categories" including assistant superintendent.[3] Subsection (f) of N.J.A.C. 6:3-1.10, as it then existed, further provides:

> Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with duties performed and not by title. Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed.

If one looks at Fischbach's actual service in the capacity of assistant superintendent, he has accumulated two and a half years of seniority in that category. Subsection (g) provides if a person moves from or reverts to a category, "all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment." Whether or not Fischbach accrued any seniority credit in the category of superintendent, his subsequent service in that position does count toward his total years of seniority in the category of assistant superintendent. Adding the two years and nine months of Fischbach's service in the category of superintendent of schools, one arrives at

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[3]As of September 1, 1983, certain amendments to the standards for determining seniority took effect. 15 N.J.R. 1017. These amendments are inapplicable to this case.

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a total of five years and three months, all of which counts toward Fischbach's seniority in the category of assistant superintendent. By comparison, Leo Gattoni, who became an assistant superintendent less than two months after Fischbach's dismissal from the superintendent's position, had no seniority whatsoever in the category of assistant superintendent.

Insofar as Fischbach's claim to tenure as a vice principal is concerned, the answer is implicit in what has already been said. At the time of Fischbach's service in that capacity, he did not possess the requisite certificate through no one's fault other than his own. Hence, his service as a vice principal prior to February 4, 1974 cannot be counted toward either tenure in the position of vice principal or seniority in the category of elementary vice principal.

Lastly, our attention must be given to the remedy to which Fischbach is entitled. Tenure protects the holder against dismissal from his position or reduction in compensation, except on proven charges. Certainly Fischbach is entitled to immediate reinstatement as an assistant superintendent. With respect to back pay, Fischbach concedes that assistant superintendents in the district are not placed on the negotiated salary guide and suggests that an appropriate measure of damages would be the salary which Leo Gattoni earned as assistant superintendent in 1981-82. When last he performed the duties of assistant superintendent, however, Fischbach's salary was pegged at the same level as a high school vice principal. Protection against any reduction in compensation would be adequately accomplished by making certain that Fischbach continues to receive at least that amount.

Order

It is **ORDERED** that the Board forthwith reinstate Fischbach to the position of assistant superintendent in the district.

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And further **ORDERED** that the Board promptly pay to Fischbach the difference, if any, between the salary on the negotiated guide for a high school vice principal and the amount actually earned by Fischbach for the period from June 15, 1979 to the date of reinstatement.

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

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

November 15, 1983
DATE

Kenneth R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/17/83
DATE

Seymour Wilson
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 18, 1983
DATE

Ronald L. Parker/sh
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Peter Fischbach
2. Nino Falcone
3. Salvatore Donato
4. Christine Sorge
5. Robert dandorph
6. Nicholas Sacco
7. Joseph Lepore
8. Herman G. Klein
9. Katherine Plenkovich

List of Exhibits

No.	Description
J-1	Copy of Board resolution, adopted June 30, 1980
J-2 (a)	Copy of teachers certificate of Peter Fischbach, issued December 27, 1960

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(b) Copy of teachers certificate of Peter Fischbach, issued July 1, 1963

(c) Copy of principal/supervisor certificate of Peter Fischbach, issued April 1974

J-3 Copy of principal certificate of Raymond P. Farley, issued March 1973

J-4 Copy of school administrator's certificate of Rosemary Farley, issued April 1975

J-5 Copy of principal certificate of Mildred Piano, issued April 1969

J-6 Copy of secondary school principal certificate of Joseph LePore, issued October 1969

J-7 Copy of principal/supervisor certificate of Raymond F. Dalton, Jr., issued February 1978

J-8 Copy of principal/supervisor certificate of Henry Helstoski, issued July 1982

J-9 Copy of school administrator's certificate of Leo G. Gattoni, Jr., issued April 1975

J-10 Copy of school business administrator's certificate of Vincent F. Ascolese, issued May 1976

J-11 Copy of elementary school principal certificate of Albert J. Matash, issued May 12, 1967

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J-12 Copy of school administrator's certificate of Albert J. Matash, issued December 1981

J-13 Copy of principal/supervisor's certificate of Robert J. Dandorph, issued August 1977

J-14 Copy of school administrator's certificate of Robert J. Dandorph, issued November 1981

J-15 Copy of secondary school principal certificate of Thomas J. Muir, issued January 1967

J-16 Copy of principal/supervisor certificate of Patrick Capotorto, issued August 1979

J-17 Copy of school administrator certificate of Paschal Tennaro, issued November 1977

J-18 Copy of principal certificate of Paschal Tennaro, issued March 1970

J-19 Copy of principal/supervisor certificate of Joanne M. Colello, issued August 1977

J-20 Copy of school administrator certificate of Nicholas J. Sacco, issued February 1978

J-21 Copy of principal/supervisor certificate of Peter J. Clark, issued May 1977

J-22 Copy of personnel record of Leo C. Gattoni, Jr.

J-23 Copy of personnel record of Albert J. Matash

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J-24	Copy of personnel record of Robert Dandorph
J-25	Copy of personnel record of Thomas J. Muir, Jr.
J-26	Copy of personnel record of Patrick Capotorto
J-27	Copy of personnel record of Paschal H. Tennaro
J-28	Copy of personnel record of Nicholas J. Sacco
J-29	Copy of personnel record of Joanne Colello
J-30	Copy of personnel record of Peter Clark
J-31	Copy of personnel record of Raymond P. Farley
J-32	Copy of personnel record of Rosemary M. Farley
J-33	Copy of personnel record of Raymond F. Dalton, Jr.
J-34	Copy of personnel record of Joseph Lepore
J-35	Copy of personnel record of Mildred D. Piano
J-36	Copy of personnel record of Vincent Ascolese
J-37	Copy of personnel record of Henry Helstoski
J-38	Copy of personnel record of Peter Fischbach

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P-1 Joint stipulation of facts, dated November 30, 1979

P-2 Copy of Board Resolution, adopted March 14, 1973

P-3 Copy of job description of vice-principal

P-4 Copy of Board Resolution, adopted April 11, 1973

P-5 for id. Copy of letter from Herman G. Klein, dated September 18, 1973

P-6 Copy of official transcript from Montclair State College

P-7 Copy of school administrator evaluation sheet from the Hudson County Superintendent of Schools, dated December 21, 1973

P-8 Copy of a letter to Dr. John E. Mongon from Herman G. Klein, dated February 1, 1974

P-9 Copy of a letter to Dr. John E. Mongon from Herman G. Klein, dated February 1, 1974

P-10 (a) Copy of an application of Peter Fischbach for a principal/supervisor certificate, dated February 1, 1974

(b) Copy of an application of Peter Fischbach for principal/supervisor certification, dated February 1, 1974

P-11 Copy of letter to Peter J. Fischbach from the Hudson County Superintendent of Schools, dated May 6, 1974

P-12 Copy of a teacher evaluation of S. Donato, dated November 9, 1973

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P-13 Copy of a board resolution, adopted February 18, 1974

P-14 Copy of a job description of vice principal assigned to assist the superintendent, dated March 5, 1974

P-15 Copy of a teacher evaluation of W. S., dated March 5, 1974

P-16 Copy of a teacher evaluation of R. M., dated March 19, 1974

P-17 Copy of a teacher evaluation of R. M., dated April 8, 1974

P-18 Copy of a commencement exercise booklet for North Bergen High School, dated June 19, 1974

P-19 Copy of a graduation exercises booklet for Horace Mann School, dated June 1974

P-20 Copy of a graduation exercises booklet for McKinley School, dated June 20, 1974

P-21 Copy of a teacher evaluation of L. H., dated January 14, 1975

P-22 Copy of a teacher evaluation of T. A., dated January 14, 1975

P-23 Copy of a teacher evaluation of C. G., dated January 14, 1975

P-24 Copy of a teacher evaluation of J. K., dated January 14, 1975

P-25 Copy of a teacher evaluation of M. H., dated April 8, 1975

P-26 Copy of a teacher evaluation of V. L., dated January 21, 1975

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PETER FISCHBACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions agrees selectively with most of the essential findings of the court in this controverted matter, particularly all aspects of the affirmative order for relief as set forth, ante, in the initial decision. Petitioner objects to the finding by Judge Springer that denied him seniority credit for services as an elementary vice principal because he was not properly certified. Petitioner asks the Commissioner to vacate that portion of the judge's decision which declares petitioner's School Administrator's certificate be void ab initio. Petitioner pleads that he lost his certificate prospectively as punishment for carelessly listing even more supervisory service on his application than he had. Petitioner states that, having lost his certificate prospectively as punishment for being careless in completing his application, no further punishment is warranted. Finally, petitioner claims that the testimony of Herman Klein should be striken from the record due to that individual's death prior to the completion of cross-examination. Petitioner states that Klein's testimony was extremely hostile to him and, further, that the Board had access to dozens of people who were employed at the time and its decision to rely on Dr. Klein almost exclusively was by choice and not an unalterable circumstance. The Commissioner, in turn, agrees selectively with certain of petitioner's exceptions.

The Commissioner finds the judge's determination, ante, with respect to petitioner's claim to tenure as a vice principal to be a proper one and adopts it as his own:

> "Insofar as Fischbach's claim to tenure as a vice principal is concerned, the answer is implicit in what has already been said. At the time of Fischbach's service in that capacity, he did not possess the requisite certificate through no

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> one's fault other than his own. Hence, his service as a vice principal prior to February 4, 1974 cannot be counted toward either tenure in the position of vice principal or seniority in the category of elementary vice principal."

Petitioner's arguments that the Commissioner be asked to vacate that portion of the initial decision whch declares petitioner's School Administrator's certificate to be void ab initio has no merit. Simply phrased, the Commissioner finds totally unbelieveable petitioner's argument that he attributes his listing of even more supervisory service than he possessed on his application to his carelessness. Such argument is incredible, the Commissioner so holds.

Finally, petitioner contends that the allegedly hostile testimony of Herman Klein should have been stricken by the court due to Klein's death prior to the completion of cross-examination. Petitioner pleads that the Board had access to dozens of people and that its decision to rely on Dr. Klein was by its choice and not an unalterable circumstance. The Commissioner finds such argument without merit. Petitioner by his own statement knew of other witnesses whom he could have used to refute Klein's testimony. The Commissioner points only to the power of the subpoena which would have made any or all of these witnesses available to petitioner.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Commissioner concurs with the order of the court reinstating petitioner to the position of assistant superintendent in the district with remuneration as designated therein.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

December 29, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8569-82
AGENCY DKT. NO. 322-8/82A

GVD, JVD and TVD,
Petitioners,
v.
RAMAPO-INDIAN HILLS REGIONAL
HIGH SCOOL BOARD OF EDUCATION;
DR. SYD SALT, SUPERINTENDENT OF SCHOOLS;
MR. ARNOLD SACKMARY, DIRECTOR OF
SPECIAL SERVICES,
Respondents.

APPEARANCES:

JVD, Pro Se
Joyce Opperlee, Lay Advocate for JVD, GVD and TVD
Allan Dzwileski, Esq., (Green and Dzwileski) attorney for respondent

Record Closed: October 19, 1983 Decided: November 10, 1983

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BEFORE **STEVEN L. LEFELT**, ALJ:

TVD, a young person who has graduated from respondents' high school and his parents, JVD and GVD, assert that respondents failed to comply with certain regulations governing pupil records. During TVD's tenure in the respondents' high school, numerous documents were collected, received and maintained by the school system. Petitioners seek an order requiring respondents to specify all of the pupil records they have maintained on TVD. Petitioners further seek destruction of TVD's pupil records, except those required to be maintained in perpetuity.

Respondents, among other defenses, contend that many if not all of petitioners allegations have previously been raised and settled between the parties and that the records petitioners seem most concerned about are not pupil records.

PROCEDURAL HISTORY

On August 13, 1982, JVD, TVD and GVD filed this petition with the Commissioner of Education. After respondents answered, the Commissioner of Education on September 13, 1982, requested that the Office of Administrative Law (OAL) conduct a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

After the petition was amended and an answer to the amended petition received, Administrative Law Judge Ward Young determined on January 12, 1983 that "substantially similar" cases were pending between these parties before the Superior Court, Appellate Division and the OAL. Accordingly, he placed this matter on the inactive list to await the appellate division and/or the OAL resolution. After petitioners appealed Judge Young's action, the Commissioner of Education on February 25, 1983 reversed it. The Commissioner directed an administrative law judge to determine "whether the documents sought from the Board are 'pupil records' pursuant to regulation and whether such documents are within the purview of the Commissioner's decision of June 23, 1981, affirmed by the State Board of Education on February 4, 1982."

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This matter then proceeded before the undersigned through prehearings, settlement conferences and, finally, 14 days of evidentiary hearings with the last hearing day occurring on September 20, 1983. The record closed on October 19, 1983 when petitioners' reply to respondents' letter brief was received by the OAL.

PRIOR LITIGATION

In order to understand the Commissioner's February 19, 1983 direction to the OAL, and some of the legal issues presented herein, it is necessary to detail briefly the prior litigation conducted by these parties against each other.

Problems between these parties began in June 1979, toward the end of TVD's first year at the respondents' high school, when the Ramapo-Indian Hills Board of Education told JVD and GVD that it intended to reduce certain services which had been provided their son, TVD, who was classified perceptually impaired. The Board first began a State review to establish TVD's program and in October 1979 requested a formal hearing before the Bureau of Special Education and Pupil Personnel Services. This hearing was conducted by Chief Classification Officer Koehly between March 1980 and June 24, 1980. Mr. Koehly's decision was rendered on September 12, 1980. Respondents appealed and on June 23, 1981 the Commissioner of Education affirmed and on February 3, 1982 the State Board of Education affirmed. In March 1982, the respondent Board approved an appeal of the State Board's affirmance to the appellate division.

During the Koehly conducted hearings, but before the petitioners received Koehly's decision, they joined with two other families who had special education children in a superior court action against the Board of Education, individual Board members and respondent Salt, claiming problems with obtaining public information and speaking at Board meetings. After the Koehly decision, petitioners amended their superior court

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complaint to add certain allegations based upon Koehly's findings. Upon respondents' motion, the superior court separated this complaint into two actions: one retained in superior court for damages and the other to be pursued administratively for prospective injunctive relief. The administrative matter, after being processed in the normal way, was transmitted to the OAL and, finally, assigned to Administrative Law Judge Elinor Reiner.

On April 29, 1982, Judge Reiner presided over a settlement of both the administrative action and the pending superior court action. This settlement (contained in R-1) provided that for a sum of money "Plaintiffs hereby agree to withdraw and/or dismiss with prejudice all claims for prospective, declaratory and/or injunctive relief which were asserted in the Petition herein or in the Superior Court action. Plaintiffs agree to release defendants from all claims for prospective, declaratory and/or injunctive relief which could have been raised in the Petition herein or in the Superior Court action as of the date of the Stipulation . . .." A few of the claims that were not settled were retained by Judge Reiner for later disposition.

Thus, it was the Reiner settlement and the remaining issues, together with the pending appellate division appeal of the Koehly decision, that Judge Young considered in rendering his January 12, 1983 inactivity ruling. Furthermore, it is the Commissioner and State Board affirmance of the Koehly decision which the Commissioner on February 25, 1983 directed the OAL to consider.

It is important to note that Judge Young's inactivity ruling did not specify the issues presented in this latest dispute he believed had already been litigated or settled. The gist of his ruling was essentially to await the appellate division and OAL rulings which he hoped would shed more light on whether any of the remaining issues required further evidentiary hearing. Consequently, the Commissioner in his decision rejecting Judge Young's placement of this on the inactive list merely decided that petitioners have the

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right to a determination, as to whether, the specific documents in question fall within the purview of the previous decision rendered by the Commissioner and the State Board of Education (in the Koehly matter). No precise ruling was made by either Judge Young or the Commissioner concerning whether any of petitioners' current issues were encompassed by the Reiner settlement.

Furthermore, it is now clear that none of the issues retained by Judge Reiner for later disposition are related to the issues presented in this proceeding. In addition, the appellate division has recently decided the "Koehly" appeal. Ramapo Indian Hills Regional H.S. v. GVD, JVD on behalf of TVD, A-2601-81T2 (App. Div. Sept. 29, 1983) (unreported). The court made the following pregnant comments:

> Regrettably, the determination under review is such that we are able neither to discern the basis upon which the Commissioner decided the appeal before him nor, indeed, just what it was that he actually decided. . . .
>
> The action of the agency under review with its great potential for mischief as precedent for further cases must be reversed. While in the ordinary case we would undoubtedly remand for clarification and correction of the serious deficiencies which we have noted, we find here that TVD graduated from high school in June 1982. There are, therefore, among the issues raised in this case, none which are any longer of practical significance to the parties or which are of momentous public import. In the Matter of Claire C. Conroy, N.J. Super. —— (App. Div. 1983), Slip Opinion at 6. We have, therefore, determined not to order any further expenditure of administrative or judicial resources in the resolution of the controversy which is now essentially moot.

Whereupon the appellate division reversed the State Board's February 4, 1982 decision and vacated the Commissioner's June 23, 1981 decision.

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FACTS

Approximately one month after the Reiner settlement, JVD, TVD's mother, sought an appointment with Dr. Salt on May 21, 1982 to see all of TVD's student records before TVD graduated in June 1982. JVD believed that she would have trouble seeing Dr. Salt's file because of the way JVD discovered Dr. Salt's file.

Apparently, Dr. Salt's file (P-95) was produced upon Mr. Koehly's order at the Koehly hearing after Dr. Salt had claimed repeatedly that he had brought all of TVD's records to the hearing. Mr. Koehly in his decision denominated this file which was then labelled with TVD's name, a pupil records file, and referred to it as Dr. Salt's "clandestine file." Later Dr. Salt referred to the file as a "correspondence file" and when he testified in this present matter he called it the "district file," explaining that others besides himself used it. Dr. Salt claimed that this file was prepared by his secretary without his knowledge. According to Dr. Salt, his secretary prior to the Koehly hearing kept copies of certain documents when they were transferred to Mr. DiFalco who was the administrator responsible for some of the problems being raised by the VDs. .

On May 21, 1982 JVD did not meet with Dr. Salt, but she did review the file. After the review, JDV wrote Dr. Salt and requested a meeting noting that a number of documents were missing and that she had some questions about certain of the documents. On June 10, 1982, Dr. Salt wrote JVD and stated that the Reiner settlement closed the entire matter and that he saw no reason to reopen it. Dr. Salt suggested that the procedure for graduating students should now be followed. Dr. Salt contended further that the documents were largely irrelevant and if not for the litigation would have been discarded long ago. Dr. Salt further told JVD that he was transferring his file along with Assistant Superintendant DiFalco's file (P-93 and 94) to respondent Sackmary, the Director of Special Services, and that JVD should meet with him.

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While JVD would have preferred to meet with Dr. Salt, she met with Mr. Sackmary in her home on Saturday, June 19, 1982. At this meeting, JVD raised all of her concerns over the Salt and DiFalco files and Mr. Sackmary took notes recording virtually each question. These questions included: (a) What happened to Dr. Kernan, the principal's file? (b) Who has seen the files (P-93, 94 and 95)? (c) Why were various documents missing? (d) What various notes and erasures on the documents meant? (e) Who wrote some of the documents? Because of the nature of the previous litigation and access she had previously received, JVD had knowledge of the general content of these files and she had already obtained copies of many of the documents she discovered were missing from the official files in May-June 1982.

After this meeting, JVD believed that Mr. Sackmary was to obtain answers to her questions and report back to JVD. Sackmary, according to his testimony, felt that that was not his function. Mr. Sackmary believed that as the district's representative he was to investigate and resolve her concerns and need not report back to the VDs. In testimony, Mr. Sackmary claimed that he spoke with Dr. Salt and Mr. DiFalco about JVD's concerns. However, Mr. DiFalco did not remember Mr. Sackmary asking about JVD's questions. Mr. Sackmary believed, according to his testimony, that JVD's questions were petty, and in most cases concerned notes made on the side of papers. He testified that no one could remember what these notes meant and that no one could locate any of the missing documents. Mr. Sackmary claimed that Mr. DiFalco and Dr. Salt assured him that he had all the documents pertaining to TVD.

On June 24, 1982 Sackmary wrote to JVD stating that he had discussed her questions with Dr. Salt. Mr. Sackmary explained that "as each question and concern was raised, Dr. Salt asked me if it was relevant to (T's) current educational needs and I indicated that in my opinion it was not." Mr. Sackmary further informed JVD that Dr. Salt "would not pursue the matter." He enclosed a copy of N.J.A.C. 6:3-2.8 and concluded by stating that he would be happy "to meet to review (T's) records so that we can destroy that information which is not educationally relevant." The VDs never received any of the answers to their questions, except from Mr. DiFalco while testifying in this proceeding. Dr. Salt in testimony maintained that perhaps no one could answer JVD's questions.

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On July 2, 1982, JVD wrote to the Board of Education and after explaining her current problem appealed to the Board of Education's "sense of fairness" and requested that they intervene. JVD had hoped for a hearing before the Board. Instead, after over a month without an answer from the Board, JVD on August 13, 1982 filed the petition in this case.

After the petition was filed in this case, JVD again obtained access to P-95 and P-93, 94 in March and April 1983 when JVD, with the assistance of Dr. Waller, a consultant with the Bureau of Special Education, met with Mr. Sackmary and again reviewed the contents of the district files. At these 1983 meetings, JVD wrote detailed lists of the files contents and received copies of certain documents. Dr. Waller in his March 23, 1983 report to Dr. Adler, Bergen County Superintendent, indicated about the March meeting that "some documents were not made available for review. These items the district has categorized as either client/attorney privileged communication, notes or memory aids not available for second-party review, or communication irrelevant to the current education of Mrs. (VD's) son."

ISSUES

At the May 6, 1983 prehearing in this matter the following issues were specified:

(a) Whether the documents the VDs sought to obtain from respondents after April 1982 were pupil records.

(b) Whether the respondent after April 1982 prevented the VDs from obtaining access to pupil records.

(c) Whether the Board after April 1982 had or should have had a list of all files and records relating to TVD.

(d) Whether the Board after April 1982 had or should have had a list of those persons who had been given access to TVD's files and records.

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(e) Whether after April 1982 the Board had or should have had a list of persons entitled to access to TVD's files and records.

(f) Whether the Board after April 1982 provided or should have provided to the VDs in a timely fashion the laws, rules and regulations governing pupil records.

(g) Whether the Board after April 1982 handled pupil records in a manner consistent with the law, including, but not limited to, confidentiality.

(h) Whether after April 1982 petitioners were entitled to a hearing before the Board of Education concerning their record dispute; and if so, whether respondents deprived petitioners of this hearing.

(i) Whether the petition states a controversy or dispute under the school law.

(j) Whether petitioners are barred from litigating this action by reason of the Board of Education of Ramapo-Indian Hills High School District v. Van Decker, 275-1981 S.L.D. - decided June 23, 1983, affirmed State Board of Education 1982 School Law Decision, dated February 3, 1982.

(k) Whether the petition is moot because TVD is no longer a student in respondent school distrct.

(l) Whether the petition should be dismissed because petitioners have failed to specify the existence of another action involving similar issues pursuant to N.J.A.C. 6:24-1.3(a).

(m) Whether petitioners GVD and JVD are proper parties to this action, insofar as it involves pupil records, under N.J.A.C. 6:3-2.5(d)(3).

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THE EFFECT OF JUDGE REINER'S SETTLEMENT

The issues specified assert a number of recordkeeping problems with regard to TVD's files. The proofs presented establish that some of these alleged recordkeeping defects involving TVD existed at the time of the Koehly hearing and continued to be unchanged. For example, there was and is confusion over who maintained TVD's central files. Was it Guidance or Special Services? Whichever file was central, neither contained a reference to the other or to any of the other pupil record files such as the nurse's. See, N.J.A.C. 6:3-2.4. Similarly, respondents did not and do not now maintain a complete list of persons who had obtained access to each of TVD's files. The proof shows that the access lists maintained by respondent Sackmary are kept in a central location not in the student's files and contain only the reviewer's name, the student's name and the month and day of the access. Mr. Sackmary contended that only persons with educational responsibility have had access, but this was not verified. The access lists do not contain the year, the reason for access, and the particular record which was studied. Petitioners also contend that various lawyers including, the Board attorney and the Board's insurance attorneys improperly obtained access to pupil records. The proof shows that these lawyers did, after the Koehly decision, review some documents relating to the VDs, frequently to determine whether JVD was entitled to see a particular document. Furthermore, petitioners asserted and the proof indicates that respondents did not and do not now maintain a current list of all persons entitled to access to TVD's files. The only list provided JVD was prepared specially by respondents to answer interrogatories.

While some of petitioners' recordkeeping practices relating to TVD may be defective, I do not believe that petitioners may properly pursue these defects in this forum at this time, since I believe that they waived their right to do so in the Reiner settlement.

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All of the contentions listed above were raised in the OAL matter that was settled before Judge Reiner. Count VI of the superior court Amended Complaint alleged improper maintenance of records. The petition before the Commissioner in the Judge Reiner matter specifically raised all of the recordkeeping defects detailed above. The Prehearing Order listed as issues: "5. Access to pupil information; 7. Access to pupil records; and 12. Improper maintenance of records." A perusal of these documents (R-1) leads inexorably to the conclusion that petitioners sought in the superior court and thereafter before Judge Reiner to enforce the Koehly determination dealing with records. The petitioners before Judge Reiner even specifically named Mr. Dzwileski (the attorney for respondents in this case) and Ms. Harrison as two Board attorneys who were granted improper access to the files.

In the settlement agreement, petitioners agreed to forgive these alleged defects for monetary compensation. In my opinion, a new cause of action was not created solely because petitioners made a new request to see the documents. Respondents record practices with regard to TVD existed before the settlement and apparently continued thereafter. There is nothing in the settlement which required respondents to change their practices. If petitioners wished respondents to comply with the Koehly determination after the Reiner settlement, that should have been specified in the agreement. There is nothing in the settlement transcript or the agreement which details what is to happen with regard to the record practices criticized by Mr. Koehly.

In addition, the Koehly decision itself contains no clear order directing specific remedies and therefore a stay pending an apppeal might not have been necessary. Koehly ordered no specific remedy for the record abuses. Koehly made only "findings," which respondents eventually appealed to the apellate division with the result detailed above.

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Perhaps some of respondents' record practices should be corrected to conform with the law, separate and apart from the Koehly determination, however, under the terms of the settlement, it cannot be petitioners who reassert these defects and attempt to reform respondents. Petitioners contracted away that right in the settlement. An agreement to settle a lawsuit is a contract which absent fraud or other compelling instances should be honored and enforced. E.g., Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974). The fact that the Reiner settlement, because of the issues she retained has not as yet been approved by the Commissioner as argued by petitioners, is irrelevant to my conclusion. In essence, I have concluded that I must enforce the settlement as a contract and not as a final agency decision.

Petitioners argue that the settlement defense was not set forth in the Prehearing Order, however, petitioners own proofs demonstrated that respondents contended from June 1982 that the settlement closed the matter (e.g. P-13). The issue was fully tried and all parties presented argument. A legal theory not contained in the Prehearing Order but which is fully tried and argued may be considered in deciding a case. 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 (Law Div. 1976) aff'd a.b., 150 N.J. Super. 47 (App. Div. 1977).

Consequently, the following issues in the May 6, 1983 Prehearing Order are dismissed:

> (c), (d), (e), and that portion of (g) relating to whether lawyer access to the records was inconsistent with the law.

Respondents also argue that Judge Reiner's settlement bars the entire petition. They contend that the settlement was designed to end all records complaints. However, the settlement excluded new wrongs committed by either party. Parents' rights regarding pupil records continue during the student's presence in school. N.J.A.C.6:3-2.2 and 2.8.

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Upon graduation of the student, the parents under N.J.A.C. 6:3-2.8 obtain additional rights. The parents upon the student's graduation are entitled to be "notified in writing that a copy of the entire pupil record will be provided to them upon request." N.J.A.C. 6:3-2.8(a). Except for certain information to be kept "in perpetuity," N.J.A.C. 6:3-.2.8(c), pupil records "may be destroyed after the information is no longer necessary to provide educational services to a pupil. Such destruction shall be accomplished only after written parental . . . notification and written parental . . . permission as [sic] been granted or after reasonable attempts . . . to secure parental permission have been unsuccessful." N.J.A.C. 6:3-2.8(d).

I CONCLUDE from the testimony that JVD's purpose in seeking to meet with Dr. Salt and view all of TVD's records in May 1982, a short time before TVD's graduation, was to assess TVD's records to determine which should be destroyed. N.J.A.C. 6:3-2.8 permits and sanctions JVD's actions. The nature of parental rights, under N.J.A.C 6:3-2.8, require follow-up action after the student has graduated. Parents' rights under N.J.A.C. 6:3-2.8 do not necessarily end promptly upon the student's graduation. JVD's request and respondents' responses thereto generated a new cause of action under N.J.A.C. 6:3-2.8, neither controlled by the settlement nor mooted by the appellate division decision which dealt solely with a time prior to April 1982. The appellate division merely concluded that it did not understand the Commissioner's review of the Koehly decision. Their dismissal of the appeal, left the Koehly determination without an appellate court's rejection or affirmance. Under the circumstances, I must consider whether the parties' actions after April 1982 complied with N.J.A.C. 6:3-2.8.

PUPIL RECORDS

Respondents contend that all of petitioners' record complaints relating to Dr. Salt's and Mr. DiFalco's file, whether they flow from N.J.A.C. 6:3-2.8 or elsewhere, are non-actionable because these files are not "pupil record files." They contend that the documents do not deal with the "actual educational services and programs" provided TVD and therefore are not pupil records

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Pursuant to the authority of N.J.S.A. 18A:36-19, the Commissioner of Education and the State Board of Education has issued regulations outlining the policy and procedure with regard to pupil records. N.J.A.C. 6:3-2.1 et seq. "Pupil record" is defined in N.J.A.C. 6:3-2.1 to mean:

> [I]nformation related to an individual pupil gathered within or without the school system and maintained within the school system, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record. Therefore, information recorded by any certified school personnel solely as a memory aid, not for the use of a second party, is excluded from this definition.

No helpful administrative or court decisions construing the New Jersey definition of pupil records contained in N.J.A.C.6:3-2.1 have been found. However, pupil records are also defined by the Buckley amendment, the Family Educational Rights and Privacy Act of 1974 (FERPA) 20 U.S.C. 1232 g. FERPA defines pupil records (or "education records" as it calls them) as:

> those records, files, documents and other materials which —
>
> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. (emphasis added)
>
> 20 U.S.C. 1232 g(a)(4)(A).
>
> Excluded from the definition are:
>
> (i) records of instructional, supervisory and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;
>
> 20 U.S.C 132g(a)(4)(B).

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There appears to be facial distinctions between the FERPA definition and the N.J.A.C. definition. Among those most relevant to this controversy, firstly FERPA makes clear that an entire file maintained by a school may be a pupil record if it contains certain "information." New Jersey's definition, however, does not mention files and seems focused on the singular "information." Secondly, FERPA emphasizes maintenance of a pupil record as the only action required to be taken by a school to qualify information as a pupil record. New Jersey's definition refers to a school gathering and maintaining pupil records. Thirdly, under FERPA a pupil record needs to relate directly to a student while New Jersey requires that it relate to an individual student.

A review of the rulemaking history on N.J.A.C. 6:3-2.1 reveals that on May 7, 1975 the pupil record definition was amended to clarify that notes and memory aids not meant for second party review were excluded. The articulated reason for this modification was to render New Jersey's definition "consistent with the Federal Buckley Amendments." 7 N.J.R. 251 (1975). In addition, when a student is classified as handicapped, the provisions of the Education for All Handicapped Children Act (EAHCA) apply. PL 94-142, 20 U.S.C. §1401 et seq. The federal regulations implementing the EAHCA incorporate the Buckley amendment pupil record definition. 34 C.F.R. §300.560 (1982). In order to continue receiving federal funds under the EAHCA, New Jersey must conform its procedures to the EAHCA and may not conflict with the federal requirements. Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (N.J.D Ct. 1982). Thus, it seems clear that both the original intent of the drafters of New Jersey's pupil record definition as well as the controlling federal law requires New Jersey's definition to be harmonized with FERPA's, if possible.

Preliminarily, a literal application of New Jersey's regulation would require my reviewing separately each document in Dr. Salt's and Mr. DiFalco's files to determine whether each piece of information meets the definition of pupil records. The Buckley amendment, however, speaks of records and files which contain information. New Jersey's regulation does not preclude an entire file from being denominated a pupil record.

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N.J.A.C. 6:3-2.1 simply does not deal with this contingency. If a school system can within one file maintain pupil records and non-pupil records, practical problems will be created. Once a document is declared to be a pupil record, a variety of rights and responsibilities accrue. Among other consequences, pupil records must be physically secured, procedures controlling access must be developed, and an annual review accorded. It would be practially impossible to keep one document in a file secure and restricted while access to other documents is freely permitted. Furthermore, providing parental access to only limited portions of a file will breed excessive suspicion on the part of parents which may cause increased litigation, a result not in anyone's best interest.

The Buckley amendment is remedial legislation in favor of pupils and their parents. The ambiguity concerning a school's intentions which is created under New Jersey regulations when pupil records are commingled with other information should be resolved in favor of the parents. An administrative agency may effectuate its regulatory responsibilities through either rulemaking or adjudication. Texter v. Dept. of Human Services, 88 N.J. 376, 383, 385 (1982). Accordingly, I conclude that an entire file may become a pupil record, depending upon its content and the manner in which it was maintained. If a school intentionally maintains pupil records within a file containing documents that do not meet the pupil records definition the school must treat the entire file as a pupil record file.

Continuing with the applicable distinctions between FERPA and New Jersey, one must note that the Buckley amendment does not use the word "gathered." New Jersey's definition speaks of gathering "within or without the school system" which indicates that school officials must affirmatively seek to acquire the information. Accepting this meaning of "gathered" could make the State definition narrower than the Buckley amendment since unsolicited letters by parents and others might be excluded from the definition of pupil records.

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Gathered, however, should be read together with maintained in New Jersey's definition because it is well accepted that associated words explain and limit each other. The meaning of a doubtful word may be determined by consideration of the context in which it is found. Boileau v. DeCecco, 125 N.J. Super. 263 (App. Div. 1973) affd. 65 N.J. 234 (1974). Information related to an individual pupil that is gathered by the school system must also be maintained by the system to qualify as a pupil record under N.J.A.C. 6:3-2.1. Thus, certain documents which are paid for or contracted for (such as medical evaluation) if maintained may be pupil records. Similarly, if unsolicited documents relating to a pupil are received and purposely maintained for a period of time, the school's preservation of the documents seems tantamount to gathering the information. The act of maintenance should render the method of acquiring the document irrelevant. This construction of gathered and maintained again harmonizes New Jersey's practice with the Buckley amendment and is also supported by the EAHCA regulations interpreting the Buckley amendment. The regulations permit access to records "which are collected, maintained or used by the" school. 34 C.F.R. §300.562(a).

Finally, the last significant facial distinction between FERPA and New Jersey's regulation is that FERPA focuses on records maintained by a school containing information directly related to a student. New Jersey omits "directly" and arguably requires an unlimited relationship. This distinction is particularly important to this case since respondents contend that the only relation to TVD that many of the documents bear is that his parents wrote them. Such a relationship would seem indirect and outside the FERPA definition.

The law and regulations governing pupil records were designed to provide students and parents with procedural protection against school systems which maintained a variety of information on individual pupils. See joint statement in explanation of Buckley/Pell Amendment, Cong. Rec. at 21488, (daily ed. Dec. 17, 1974). The regulations were not designed as traps for unwary school administrators or as a license for parents to rummage through every file maintained by a school that tangentially or indirectly may relate to a pupil. Such broad application would unduly hamper school systems in the provision of

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educational services, which is and must remain their main function. Nevertheless, I do not believe that to qualify as a pupil record a document must relate to "actual educational services and programs." FERPA requires that pupil records directly relate to a student and New Jersey requires that pupil records relate to an individual student. I believe that both FERPA and the N.J.A.C. definition are substantially similar. FERPA and New Jersey's definition require only that the information relates to a particular student or pupil. Nothing is contained in the definitions about educational services or programs. Therefore, pupil record information must relate to an individual as a pupil or student in the school. If a document refers merely to complaints a parent may have concerning the accessiblity of public information for example, that document is not rendered a pupil record solely because a student's parent has written it. For any document to be a pupil record, the document must relate to an individual in his/her status as a pupil in the school which has maintained the document.

New Jersey's regulations on pupil records contain many references to the content of pupil records. Respondents' argument on the meaning of the pupil records definition under N.J.A.C. 6:3-2.1 comes from these provisions. For example, N.J.A.C. 6:3-2.2(c) provides that pupil records "shall contain only such information as is relevant to the education of the pupil." Also, N.J.A.C. 6:3-2.2(i) requires that an annual review be conducted "to determine the educational relevance of the material contained therein" and to delete "data no longer descriptive of the pupil or educational situation." N.J.A.C. 6:3-2.3(a)2 defines permitted pupil records as those useful "to promote the educational welfare of the pupil." Thus, under these sections pupil records consist of information related to the provision of an educational program. Furthermore, those documents which are mandated or permitted to be maintained by a school system also relate to the provision of educational services. N.J.A.C. 6:3-2.3(a).

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When construing a regulation, however, the entire regulation must be read together in light of its general intent. Febbi v. Div. of Employment Sec., 35 N.J. 601 (1961). The definition of pupil records, contained in N.J.A.C. 6:3-2.1 and necessary to trigger the student and parental procedural protections under the law and regulations, is purposely broader than the definition of those records which may or shall be maintained by the school system. The regulatory framework seeks to protect a student's right to privacy without unduly hampering a school system. The school must only maintain records that are necessary to provide educational services. Thus, the regulatory provisions, N.J.A.C. 6:3-2.2(c),(i), and 2.3(a)2 etc. are related to the provision of educational services. If a school system follows the regulations it will maintain only necessary or helpful information and the procedural rights accorded students and parents should neither be threatening nor overly burdensome. However, if a school maintains records that are unnecessary to provide educational services, the regulations provide some parental access to these records as a safeguard for a student's privacy right. Limiting the definition of pupil records to precisely what a school should maintain provides less protection for parents and students than was intended by New Jersey's regulations. Permitting access to records which relate to an individual as a pupil in the school seems ideally suited to affording greater privacy protection without unduly hampering school systems with unlimited parental access. This discussion is of course restricted to pupil records and I am expressing no opinion on any rights parents may have to public information under N.J.S.A. 47:1A-1 et seq. See D.H. v. Closter Board of Education, 1974 S.L.D. 1332 and Robinson v. Runnemede Board of Education, 1975 S.L.D. 6 which hold that the Right To Know Law is not generally applicable to education records.

Therefore, in conclusion, under New Jersey's pupil records regulations, an entire file may be considered a pupil record if the school intentionally maintains within the file information meeting the definition of pupil records. In addition, a document is a pupil record if it is received and maintained by the school and relates to an individual as a pupil or student in the school.

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My review of P-93 and 95 indicates that Dr. Salt's file consists of 87 documents and Mr. DiFalco's file contains 137 documents. The documents are largely either letters produced in 1979 and 1980 between the superintendent of schools/assistant superintendent and the parents or correspondence between the superintendent/assistant superintendent and various other parties, such as the high school principal, the Child Study Team (CST), and officials of the Department of Education. Dr. Salt's file and Mr. DiFalco's file contain a confidential memo from the CST listing what the CST proposed for TVD in response to the VD hearing. (item 32 in P-95 and item 31 in P-93). This document contains statements like "The team has taken the position that TVD has largely compensated for learning problems if and when they existed." Dr. Salt's file included a copy of the 1979 Administrative Review Report on TVD. (item 33). This report included in its findings "that the personnel at the high school should have addressed the emotional factors in a more specific manner." A CST memo to the VDs dealing with testing was included in both Dr. Salt's file and Mr. DiFalco's file (item 46 in Dr. Salt and item 62 in Mr. DiFalco). This memo included advice that the CST had been advised to notify JVD that she was "interferring with the total educational process ..." Dr. Salt's item 44 and Mr. DiFalco's item 57 was a November 16, 1979 letter by Principal Kernan, to the County Superintendent of Schools which explained in detail "the most recent incident concerning the VD case." The letter goes on to explain the problems the CST had in administering to TVD the Peabody Individual Achievement Test. Dr. Salt's file also included the Koehly decision (item 78). This decision dealt in part with TVD's IEP. Item 84 in Dr. Salt's file was the special services case notes on TVD from June 1978 until September 21, 1979. This document contains among other observations the following for 9/20/79 "Then, the subject of typing was brought up. Mrs. Levin had informed me that T. does not like typing ... I explained to her that a child with any degree of perceptual deficit would probably have difficulty mastering the keyboard." No explanation was provided by Dr. Salt as to why these notes were contained in his file. Mr. DiFalco's file contained a note on the bottom of item 16 which records a conversation he had with a county official questioning whether TVD was properly classified. Item 57 in Dr. Salt's file and 94 in Mr. DiFalco's file was a December 14, 1979 recitation of occurrences at a prehearing conference in the Koehly matter. This document states that TVD "is being evaluated by the Cedar Hills Learning Disabilities Center at the expense of his parents."

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Furthermore, items 65 and 86 from Dr. Salt's file were missing when JVD reviewed the files with Mr. Sackmary. Item 86 was an unsigned and undated memo which seemed to reject someone's question whether a "request for information (by the VDs) could be extended to Child Abuse." Item 65 was observations by Dr. Salt on TVD which apparently among other things indicated that he believed the VDs were not concerned with TVD's educational needs. Based on the evidence presented, if these documents currently existed, I would not be convinced that they were "solely" memory aids under N.J.A.C. 6:3-2.1. At least two secretaries had access to these files, which under both FERPA and N.J.A.C. 6:3-2.1 would disqualify the documents as memory aids.

In addition, both files contain letters discussing the problems involving TVD's IEP (Salt: items 3,4,5, and DiFalco: items 2 and 4). The files also contain letters concerned with the procedures to be followed at TVD's administrative review (Salt: items 14,15,20,29 and 33; and DiFalco: items 9,10,14 and 32). A few letters dealt with allegations that TVD's records were inaccurate, irrelevant or improperly maintained (Salt: items 35 and 38; DiFalco: items 35 nd 46).

While many of the documents in Dr. Salt's and Mr. DiFalco's file seem unrelated to TVD as a pupil, I believe that the documents referred to above are sufficient in number to render both files pupil records. The information detailed above was intentionally maintained by the school system from TVD's first high school year in 1978-79 until some time into the 1980-81 school year. According to Dr. Salt, P-95 which had been maintained in TVD's name was a district file, used by many. Additionally, he contends it was a correspondence file maintained by his secretary for duplicates of letters sent to Mr. DiFalco. However, no one explained how 85 documents, including the Child Abuse memo, the Administrative Review Report, the Koehly decision, the observation by Dr. Salt and the special services case notes found their way into Dr. Salt's file but were not maintained by Mr. DiFalco. In fact, from the proof presented I am uncertain how, when or why each document in these files was numbered and indexed by respondent. Presumably, respondents made a tactical decision to leave petitioner to her proof. The documents detailed above, however, all deal with TVD as a pupil in respondent's school and not just JVD's son. In addition, many deal with TVD's educational program or the manner in which

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TVD's educational services were to be provided. It is not necessary for petitioner's parents to prove that the documents contained in these files were in fact used to provide or used to reject educational services or programs to TVD. Such a requirement would emasculate the pupil records regulations and is not necessary. In addition, it makes no difference who wrote any of the letters or whether the information is verifiable, accurate or totally ridiculous. Documents which are maintained by the school and which facially relate to an individual as a pupil in the school are pupil records under N.J.A.C. 6:3-2.1 and accessible to the pupil's parents.

Under N.J.A.C. 6:3-2.8 pupil records may be destroyed after the information is no longer necessary to provide educational service, but the destruction may not be accomplished without attempting to obtain written parental permission. N.J.A.C. 6:3-2.8(d). Since a district must attempt to obtain parental consent before it may destroy pupil records, it follows that a parent is entitled to an explanation of the pupil records maintained by the district. School districts have an obligation upon the graduation of a student to explain to that student's parents the records it maintained on that student. The parents are entitled to a full explanation of all reasonable questions. Cf. 34 C.F.R. §300.562(b)(1). The object of the discussion to be conducted under N.J.A.C. 6:3-2.8 is to obtain parental consent to destroy the records. Parents of a handicapped child may be legitimately concerned about stigma attaching to the child in later life and may also be concerned with the role particular documents played in the district's provision of a special educational program. Parents are entitled to an explanation of how a particular document was relevant to the provision of a pupil's educational program. It is insufficient for a school, after a pupil's graduation, to refuse to answer such questions because the document is no longer needed by the school.

For the parents permission to destroy records under N.J.A.C. 6:3-2.8(d) to be meaningful, they must receive answers to their reasonable questions. If a school believes that a parent's questions are unreasonable or impossible or impracticable to answer, the school administrators under N.J.A.C. 6:3-2.8(d) must at least explain why the answers cannot be provided. N.J.A.C. 6:3-2.8(d) contemplates a mutual discussion that hopefully will result in the parents knowingly consenting to the destruction of the records. Here,

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the respondents made no explanation to petitioners. Unilaterally because they believed the questions were petty, frivolous, excessively time consuming or disappointing, none of JVD's questions were answered. In adopting this approach, respondents did not make a resonable attempt at securing the VDs permission to destroy TVD's records under N.J.A.C. 6:3-2.8(d).

Access to Pupil Record

Besides being deprived of the answers to questions, JVD also contends that she was denied access to a variety of records because they were missing. Under N.J.A.C. 6:3-2.8(d) the VDs are entitled to a copy of TVD's entire pupil record. In this case the VDs have copies of almost all of the documents JVD found were missing at her conference with Mr. Sackmary (see P-101). In fact the testimony is clear that the VDs were provided ample access to the files maintained by respondents on TVD. Numerous and frequent visits were made by JVD to review the files. Except for allegations that respondents made some of JVD's access visits uncomfortable, only the missing documents are cited to support petitioners contentions that they were deprived of access to TVD's records. The fact that JVD may not have been welcomed with open arms by school personnel does not constitute a deprivation of access. Since JVD either has copies of these documents or has not proven that the originals still exist I will not order that a copy be provided under N.J.A.C. 6:3-2.8. Application of the pupil records policy was not intended to be a game by which each side holds the other to every technicality no matter how diminimus.

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Other Files and Documents

At the hearing in this matter, however, it was established that the district has destroyed TVD's guidance file. This file apparently had as of September 28, 1981, 55 separate items concerning TVD. Obviously, this file consisting of student progress reports, marking reports, program change requests; rating and registration cards, activity card, drop-take cards, and report cards, etc. was a pupil record. While the district has the mandatory data required by N.J.A.C. 6:3-2.8(c), the destruction of this file without attempting to obtain parental permission is a violation of N.J.A.C. 6:3-2.8.

In addition, it was proved that at the time of the Koehly hearing the VDs provided to respondent Board 240 assorted documents. In addition, eight letters or reports were also provided and were considered by the VDs to be highly confidential. For an unexplained reason, Dr. Salt promised in writing to return these eight documents to the VDs upon TVD's graduation (P-63a). All 240 documents and each of the eight documents were stamped in red with the VD's name. None of the 240 documents have been located by JVD. One of the eight, a 1978 letter from a psychiatrist or VD to Dr. Salt was also missing. The proof is inadequate to determine the precise content of these documents. I can assume that the letter probably related to TVD as a pupil, but I cannot make a finding on an assumption. No proof at all was presented concerning the content of the 240 sheets of information. In addition, the 240 sheets of information were to be introduced as evidence in the Koehly case. I cannot conclude whether they were ever maintained by the school. Thus, on the basis of the proofs, I cannot conclude that these items are pupil records.

The VDs also contend that an Affirmative Action file is missing; that Dr. Kernan's file is missing; and that Mr. DiFalco's daily log is missing. Apparently, Mr. DiFalco's daily log file simply recorded his contacts with petitioners. Based solely on this description, I cannot conclude whether this file was a pupil record file. No testimony was presented concerning the content of the Affirmative Action file and therefore I am unable

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to conclude whether or not this file is a pupil record. Some of the contents of Dr. Kernan's file was admitted into evidence. As an example, P-71 is a January 17, 1980 letter from the County Superintendent of Schools to Dr. Kernan talking about not testing TVD while a formal hearing is being conducted. Such a letter is a pupil record and the file contained other documents meeting the pupil record definition. Therefore, if the Kernan file has been destroyed without attempting to obtain the consent of JVD, respondents violated N.J.A.C. 6:3-2.8.

In addition to the questions asked by JVD and recorded by Mr. Sackmary, I also find that JVD asked whether she could receive a copy of the Karpati Vocational Study. This was a study of TVD paid for by the Board and conducted by Mr. Karpati who discussed his findings with JVD, but never provided her with a copy of that report. There is some question about whether this failing is the Board's or Mr. Karpati's. However, petitioners have not established that this report was maintained by the district and therefore I must conclude that petitioners failed to prove that it is a pupil record under N.J.A.C. 6:3-2.1.

Petitioners also contended that the following other files maintained by respondents were pupil records: (a) P-106 entitled "Petition to the Commissioner of Education re: Pupil Records (filed by [VD])." This file contains letters and interrogatories relating to the current dispute. At the time these documents were maintained, TVD was no longer in attendance at respondent high school and therefore nothing in his file relates to TVD as a pupil under N.J.A.C. 6:3-2.1. Thus, this file is not a pupil record. (b) P-109 entitled "Litigation - Due Process Appeal" includes the State Board and the Commissioner's decision in the Koehly case and a two page analysis of the Koehly decision. TVD was a student in respondents high school at the time of the analysis. The analysis refers to TVD and his program and therefore P-109 is a pupil record. (c) P-111 is entitled "Supboena." This file contains information on TVD's administrative review and also contains information relating to the subpoena issued to Mr. DiFalco and Dr. Salt in connection with

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the Koehly case. The file seems equally divided between these two items. If the file only included the subpoena information it would not be a pupil record. But, since the file includes the administrative review information it is a pupil record. (d) P-102, the special services file entitled with TVD's name. Petitioners and respondents both agree that this file is a pupil record and I agree. It is interesting to note that many of the documents contained in this file were also present in Dr. Salt's and Mr. DiFalco's files. JVD had no concerns over P-102. Besides objecting to respondent's contentions that P-106, 109 and 111 were not pupil records, the VDs assert no further complaint against respondents involving these files.

COPIES OF RULES AND REGULATIONS

N.J.A.C. 6:3-2.2(d) provides that the local school district "shall make copies of the applicable State and Federal laws and local policies available upon request." Petitioners contend that respondents violated this regulation because these requested items were not made available promptly. In some cases it might be important for parents to have these rules and regulations promptly, because of emergency concerns involving educational decisions. In this case, however, petitioners did not prove whether there was an educational need for these rules and regulations. In fact, the VDs had been litigating over these policies since 1980 and complained in the petition before Judge Reiner of an alleged prior similar failing by the Board. I cannot conclude under these facts that a new violation of these regulations occurred because the requested items were not provided within days but instead were provided within two months or within many, many months after the request. I refuse to set an arbitrary time frame in which such copies are to be provided. Whether a violation results should depend upon why the parents needed the rules and regulations and what happened to either the parents or the pupil during any delay in providing them. In certain cases, a delay of a few weeks which causes adverse consequences to parents might be serious. In this case, however, I cannot conclude that N.J.A.C 6:3-2.2(d) was violated solely on the basis of the delay without any proof of

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damage to the petitioners. If a specific time frame is to be added it should be accomplished through a rulemaking proceeding and not an adjudication. N.J.S.A. 52:14B-2(e). Thus, the prehearing issue (f) is also dismissed.

BOARD HEARING

By June 24, 1982, it was clear that the VDs were not going to obtain answers to their questions about the files and documents. It was also clear that their meeting with Mr. Sackmary had not resulted in answers to their questions. Therefore, on July 2, 1982, JVD wrote to the Board of Education highlighting the two years of litigation and her concern over the missing records and her need for an explanation. In the letter she appealed to their "sense of fairness." She also requested that the Board "review the actions taken by Dr. Salt." The Board members who testified claimed they understood that JVD was having a problem with Dr. Salt, but that since the word "hearing" was not used in her letter, they did not understand that she wanted a hearing. They testified that they did nothing except possibly forward the request to Dr. Salt.

JVD contends that Board Policy #5130J was violated by the Board's refusal to provide a hearing. The Board policy provides that "records are subject to challenge by parents and adult pupils on grounds of inaccuracy, irrelevancy, disclosure or denial of access to individuals, organizations or agencies; or violative of the privacy or other rights of a pupil." This policy appears based upon N.J.A.C. 6:3-2.7. JVD's concerns, as I understand them, were more preliminary than the subjects for which the Board policy provides a hearing. JVD needed answers to her questions before she could determine, for example, whether a disclosure or privacy problem had occurred. I believe that the Board should not interpret its policy too technically, thereby forcing parents into a more costly due process remedy. Rather a common sense approach should prevail and parents who fit within the Board policy should receive a Board hearing whether or not they specifically use the term "hearing." However, I do not find that the VD's concerns fit clearly within

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the Board policy, particularly since at the time of the request, TVD had graduated and the Board policy as well as N.J.A.C. 6:3-2.7(a) seems directed at "correcting" pupil records and preventing future access problems. Because VD's concerns did not appear clearly within the Board policy, I cannot in fairness conclude that her letter must be interpreted as requesting a hearing under the Board policy, even though she did not use the word hearing. Cf. Bihler v. The Singer Co., No. 82-5439 (3rd Cir. 1983). I also cannot find in N.J.A.C. 6:3-2.8 a right to a Board hearing. Consequently, I must conclude that neither a violation of the Board policy nor N.J.A.C. 6:3-2.7 has occurred and that issue (h) in the May 6, 1983 Prehearing Order should be dismissed.

CONFIDENTIALITY

The VDs are contending that respondent Sackmary breached TVD's record confidentiality requirements. They assert that Mr. Sackmary must have divulged TVD's name to a Wyckoff News reporter. Petitioners base this contention on the Wyckoff News article containing TVD's name, the reporter's comments as testified to by JVD, and Mr. Sackmary's testimony where he admitted speaking to a reporter when his interrogatories denied any such contact. I find that petitioners have not proved that confidentiality was breached by Mr. Sackmary who denied mentioning TVD by name or discussing any of the case specifics. The reporter did not testify and JVD's account of what the reporter told her is hearsay. In addition, I observed Mr. Sackmary's demeanor when he was testifying on this point and I believed that he was telling the truth. My belief is corroborated by the fact that a previous article appeared in the "Record" containing much of the same information which subsequently appeared in the Wyckoff News article. It is just as likely that the offending information in the Wyckoff News article came from the Record as from Mr. Sackmary. Accordingly, I dismiss that part of issue (g) in the Prehearing Order pertaining to Mr. Sackmary breaching TVD's confidentiality.

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The handling of pupil records in accordance with the law was clearly one of the major issues settled in the Judge Reiner matter. No other allegation besides attorney access and Mr. Sackmary's alleged breach of confidentiality has been made by petitioners on this issue. Accordingly, because of the Reiner settlement and my refusal to find a breach of confidentiality involving Mr. Sackmary, the balance of issue (g) must now be dismissed.

THE BOARD ATTORNEYS AND PUPIL RECORDS

Under N.J.A.C. 6:3-2.8 the VDs are entitled to a complete copy of TVD's pupil record. Much testimony was presented attempting to prove that some of TVD's pupil records have been transferred to the Board attorney. I suppose the VDs are concerned that some records were either extremely damaging or embarrassing to the Board and therefore they were transferred to the attorney to avoid parental access. Based on Dr. Salt's secretary's testimony, I can CONCLUDE that the Board attorney has a copy of Dr. Salt's file. The proof is insufficient for me to determine whether any other lawyers representing the individually named respondents in the superior court action have received pupil records.

Neither the Buckley amendment nor the EACHA prohibits a school district from providing its attorney in the course of representing the district with pupil records. Office for Civil Rights, Letter of Finding, 257 E.H.L.R. 311. Policy inquiries to the Office of Special Education (OSE) have asked whether regulations concerning the destruction of pupil records apply to records held by an attorney. The OSE has responded that if the attorney "is regarded as an agent of the Board, those records held by the attorney would be considered school district records and would have to be destroyed on parental request." OSE, Policy Letter, 211 E.H.L.R. 230 (July 10, 1980). "It would clearly be defeating to the regulation if a school district which was required to destroy records could simply pass those records on to an agent and, thereby, circumvent the regulation." OSE, Policy Letter, 211 E.H.L.R. 231 (response to letter of March 7, 1980).

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Furthermore, the attorney-client privilege does not serve to insulate any pupil record held by the attorney from parental access. McCormick Evidence, §87 at 175 (1954). It has been uniformly held that the privilege does not apply to documents transferred to an attorney which could have been obtained by a third party when the client was in possession of them. Fisher v. United States, 425 U.S. 391 (1976); Palatini v. Sarian, 15 N.J. Super. 34 (App. Div. 1951). Thus, since parents have a right of access to the records under N.J.A.C. 6:3-2.5 while they were in the school board's hands, the mere transfer of them to the board's attorney does not allow the board to assert the attorney-client privilege.

Thus, when an attorney receives pupil records, the document does not lose its pupil record character. At the conclusion of any litigation for which the attorney had a professional need to use the document, the document must be returned to the school and directed to the proper record custodian. If pupil records are maintained by the Board attorney, then his files must be noted on the central file as an additional file location pertaining to a pupil. Documents generated by the Board attorney and not maintained by the school system; however, can not be considered pupil records. Similarly, documents prepared by the Board attorney and forwarded to the school do not become pupil records in the possession of the Board attorney, even though copies maintained by the school may be pupil records. FERPA and N.J.A.C. 6:3-2.1 concern school records and not attorney records. Attorney records are controlled by the Disciplinary Rules of the Code of Professional Responsibility and the New Jersey Supreme Court. See R.1:20-1 et seq. Documents that had been or would have been maintained by the school system but were transferred to the Board attorney for any reason may meet the definition. Thus, litigation documents, complaints, answers, interrogatories, depositions, etc which were never maintained by the school system are not pupil records. If a student's grade transcript, however, is attached to an interrogatory, that transcript is a pupil record. Similarly, if the Board attorney has copies of Dr. Salt's and Mr. DiFalco's files, these are pupil records under this opinion.

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In this case a number of the documents alleged by petitioners to be pupil records were claimed by respondents to be subject to the lawyer-client privilege. Evid. R. 26 (1983). Communications between a lawyer and his client in the course of that relationship and in professional confidence are privileged. I made a number of attorney-client privilege rulings orally during the course of the evidentiary hearings in this case. I believe that in all instances I articulated the reasons on the record for either affirming or rejecting the assertion and believe that there is nothing further that I care to add. If either party wishes those rulings reviewed an exception, specifying the precise ruling and your arguments thereto must be taken at the same time you except to any part of this opinion.

I recognize that Dr. Waller's March 23, 1983 report (P-56) indicates that attorney-client privilege may have been asserted over some of the documents claimed "missing" by JVD. The circumstances surrounding those claims, if any, have not been proved and I cannot speculate on what those circumstances may have been. In short, the proof is inadequate for me to determine, at this time, whether the pupil record doctrine must be subordinated to the attorney-client privilege.

I add only that should an attorney-client privilege be asserted over a particular pupil record the specific document must be detailed with sufficient identification to permit a parent to contest the assertion of attorney-client privilege. Such assertions of privilege cannot be self-executing or impossible to contest.

TRANSCRIPTS

Petitioners during this lengthy proceeding complained about their inability to control the production, dissemination and reproduction of the transcripts from the Koehly case. Petitioners believed the transcripts were pupil records and therefore under the law subject to certain parental rights. Petitioners apparently were concerned that these transcirpts may have been disseminated very broadly to members of the Board of Education, school officials and all lawyers in the superior court action.

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Chief Classification Officer Koehly expressed concern over his ability to maintain the transcripts of TVD's special education hearing confidential because of the presence of numerous parents, a reporter, and another tape machine all permitted into the hearing by the parents. Koehly's concern, however, does not render the transcript public. In special education matters, the parents have the right to divulge or not to divulge the information elicited at a special education hearing. The Board of Education has no such rights. 34 C.F.R. §300.508(b)(2).

If sufficient information is in fact divulged by the parents, then the transcript could conceivably be rendered public. However, no proof was presented concerning the release of information about TVD's hearing. It is clear that even the reporter who was given special permission by the VDs to be present and who agreed not to divulge the confidential information, never made any of the information public. Therefore, the transcripts of the Keohly case remain confidential.

However, this does not make the transcripts pupil records. The transcripts was obtained by the Board attorney to appeal the Koehly decision to the appellate division. The production of the transcript was required by Pressler, Current N.J. Court Rules, Comment R.2:5-3 (1984). Their distribution is required by Id. R.2:6-12(d). Transcripts of special education hearings are required to be kept confidential because the regulations pertaining to the EAHCA create the need for confidentiality. See 34 C.F.R. §300.508(b)(2) and §300.560 to §300.576. A transcript if properly prepared, using initials for example, will be as protective of a pupil's privacy as this decision. See, N.J.A.C. 1:6A-5.2. Handicapped children's parents rights with regard to transcripts are not detailed in N.J.A.C. 6:3-2.1 et seq., unless the transcript of a special education hearing is maintained by the school district. See Family Educational Rights and Privacy Act Office, Policy Letter 121 E.H.L.R. 12. Once such a transcript is maintained by the school, the dictates of N.J.A.C. 6:3-2.1 et seq. must be followed.

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Based on the proof presented, **I CONCLUDE** that there are no transcripts maintained by the school district and that petitioners have a transcript copy. Petitioners received this copy from their lawyer in the Reiner case. Based on the testimony which did not highlight the tranascript contents, **I MUST CONCLUDE** that I am unable to determine whether the transcripts contain within them any pupil records. I am, however, able to **CONCLUDE** that petitioners did not prove that the transcripts were maintained by respondents and transferred to their attorneys to frustrate parental access.

RESPONDENT'S DEFENSES

Respondents contend that petitioners have not set forth a controversy under the school law. As I have indicated, petitioners have presented a cause of action under N.J.A.C. 6:3-2.8. Such a dispute clearly falls within the school law.

All parties knew about the appeal in the Koehly matter well before commencing the evidentiary hearing in this case. Assuming that there is some requirement for petitioners to plead this fact, and they failed to do so, such was harmless error at best.

GVD and JVD are the parents of TVD. Under N.J.A.C. 6:3-2.8 they have specific rights upon TVD's graduation. Thus, they are clearly proper parties to this case.

While on the record I declared that this current dispute is a special education case, I have decided that such a declaration was erroneous. This dispute concerns a pupil's records. That pupil happens to have been classified. This case does not involve TVD's identification, evaluation, educational placement, or the provision of a free and appropriate education to TVD. EAHCA §1415(b)(1)(D) and (E). In fact, one of the serious problems with this case is that the dispute between JVD and GVD and respondents has taken on a life of its own. Except for the alleged breach of TVD's confidentiality, not a scintilla of evidence was presented concerning how the record defects alleged by

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petitioners affected TVD or his education. It is obvious to me that JVD and GVD simply and clearly distrust and feel oppressed by respondents. Similarly, respondents distrust and feel oppressed by JVD and GVD. This mutual acrimony in my opinion, caused both parties to this litigation to lose perspective. TVD and his needs and concerns should have been the focus of this case. If TVD's needs and concerns were actually considered, I doubt that they would merit the vast sums expended in this case.

CONCLUSION

For the reasons explained above I have dismissed issues (c), (d), (e), (f), (g) and (h) listed in the May 6, 1983 Prehearing Order, and have ruled that issues (a) and (b) should be resolved by considering petitioners' rights under N.J.A.C. 6:3-2.8.

I FURTHER CONCLUDE that the district violated N.J.A.C. 6:3-2.8:

(a) by not answering any of JVD's questions about Dr. Salt's and Mr. DiFalco's files;
(b) by destroying the guidance file without attempting to obtain parental permission; and
(c) by failing to safeguard the Kernan file.

I FURTHER CONCLUDE that while the VDs are entitled to a complete copy of TVD's pupil records under N.J.A.C. 6:3-2.8 the respondents need not provide JVD with copies of any of the items she noted as missing at her conference with Mr. Sackmary (See P-101).

I FURTHER CONCLUDE that the district has not violated N.J.A.C. 6:3-2.8 by failing to produce a copy of Mr. Karpati's report, the Affirmative Action file, the DiFalco daily log file, the 1978 letter (one of the eight), the 240 assorted documents, and the Koehly transcripts since petitioners failed to prove that these were pupil records.

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I FURTHER CONCLUDE that respondents did not breach TVD's confidentiality rights.

I FURTHER CONCLUDE that it would be best for these parties to resolve this last dispute as rapidly as possible. TVD has left respondents high school, and this dispute which has festered in one form or another for more than four years should be ended once and for all. Consequently, **I ORDER** that immediately respondents shall:

(a) Search all pertinent offices and files including those of the Board attorney for TVD's pupil records;

(b) Forward to the VDs a copy of any pupil records discovered during the search, unless the VDs already have a copy of the record;

(c) Inform the VDs which pupil records the Board attorney is holding for litigation purposes and advise as to when destruction of these documents can be expected; and

(d) After performing (a) (b) and (c) but not later than 10 days after the final agency determination in this case, destroy all of TVD's pupil records unless needed by the Board attorney or required to be maintained in perpetuity under N.J.A.C. 6:3-2.8(c).

Because of the nature of this case and my belief that there are already too many records and copies of records relating to TVD, I have instructed the Clerk of the OAL not to reproduce a copy of the record in this case. OAL will only maintain a copy of this decision and copies of its administrative forms and notices which were generated in this case.

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OAL DKT. NO. EDU 8569-82

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

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

11/10/83
DATE

STEVEN L. LEFELT, ALJ

Receipt Acknowledged:

Nov. 15, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 18, 1983
DATE

Ronald L. Parker/sbb
FOR OFFICE OF ADMINISTRATIVE LAW

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EVIDENCE LIST

P-1 (Ev.)	Board Pupil Record Policy
P-2 (Ev.)	File Index #16 (Dr. Salt's VD Correspondence File)
P-3 (Ev.)	File Index #17 VD Correspondence
P-4 (Ev.)	File Index #18 Guidance File for TVD
P-5 (Ev.)	File Index #19 Mr. DiFalco's File on Subpoena Correspondence
P-6 (Ev.)	File Index #20 Litigation EDU 3421-81 (items 1-17)
P-7 (Ev.)	File Index #21 Petition to the Commissioner of Education Re: Pupil Records (Filed by VD)
P-8 (Ev.)	File Index #22 Litigation D.P. Appeal (Items 1-9)
P-9 (Ev.)	File Index #23 TVD Special Services
P-10 (Ev.)	4/29/82 OAL Transcript Before ALJ Reiner
P-11 (Ev.)	5/21/82 VD to Dr. Salt
P-12 (Ev.)	6/8/82 VD to Dr. Salt
P-13 (Ev.)	6/10/82 Dr. Salt to VD
P-14 (Ev.)	6/14/82 VD to Dr. Salt
P-15(a/b)(Ev.)	6/24/82 Mr. Arnold Sackmary to VD - 2 pages
P-16 (Ev.)	7/2/82 VD to Mr. Arnold Sackmary
P-17 (Ev.)	7/2/82 VD to Board
P-19 (Ev.)	7/12/82 Board Minutes
P-20 (Ev.)	Draft Board to VD (Response to 7/2/82 letter)
P-22 (Ev.)	VD request to inspect records
P-23(a)(Ev.)	8/19/82 Wyckoff News article
P-23(b)(Ev.)	8/3/83 Bergen Record article
P-24 (Ev.)	8/20/82 Request to inspect record
P-25 (Ev.)	8/27/82 Board response
P-27 (Ev.)	9/14/82 Linton's Brief to appellate division

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P-29 (Ev.) 10/8/82 VD to Dr. Salt
P-36 (Ev.) 11/10/82 Linton to VD
P-37 (Ev.) 11/15/82 VD to Linton
P-38 (Ev.) 11/17/82 Linton to VD
P-40 (Ev.) 12/8/82 VD to Adler
P-41 (Ev.) 12/7/82 Linton to VD re: Fed. Regs. etc.
P-45 (Ev.) 12/20/82 Mr. Arnold Sackmary to McGowan
P-47 (Ev.) 1/10/83 Board Meeting Minutes
P-56 (Ev.) 3/23/83 Waller to Adler
P-57 (Ev.) 4/7/83 Adler to Waller
P-59 (Ev.) 3/1/80 VD to Richardson
P-60 (Ev.) 3/28/80 Richardson to VD
P-62(a,b,c)(Ev.) 5/18/83 Richardson to VD
P-63 (Ev.) 3/25/80 VD to Dr. Salt
P-64 (Ev.) 3/31/80 Transcript excerpt from Koehly Hearing
P-67 (Ev.) 12/7/79 Memo from DiFalco to Dzwilewski with 11/6/79 Kernan letter to Adler.
P-68 (Ev.) Case Notes TVD
P-69 (Ev.) Time Logs
P-70 (Ev.) Time Logs (8 pages)
P-71 (Ev.) 12/3/79 Adler to Havrilesky and 1/17/80 Adler to Kernan letter.
P-72 (Ev.) 6 pages with first 11/19/79 Memo re TVD.
P-73 (Ev.) 12/11/79 Report on TVD's Attendance.
P-75 (Ev.) Annual Program Plans
P-76 (Ev.) R28 job description
P-77 (Ev.) 24 pages with first undated, unsigned "Child Abuse" Memo.
P-81 (Ev.) 9/29/80 Order to Show Cause
P-82 (Ev.) 9/29/80 VD Certification

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P-83 (Ev.)	10/2/80 Green to Schwartz
P-85 (Ev.)	Fifteen pages (two ruled inadmissible) first page VD Corresondence Index.
P-89 (Ev.)	7/22/81 Harrison to Fessler
P-90 (Ev.)	Tape A (6/19/82)
P-93 (Ev.)	DiFalco's file
P-94 (Ev.)	Correspondence removed from DiFalco file
P-95 (Ev.)	VD correspondence Dr. Salt's file
P-96 (Ev.)	Board Policy - referred to by Dr. Salt and conflicting with P-1.
P-97 (Ev.)	Admissions and interrogatories of Dr. Salt
P-98 (Ev.)	7/15/82 Letter Green to Salt
P-99 (Ev.)	Draft letter undated attached to July 15, 1981 letter.
P-100 (Ev.)	5 yellow sheets/ Record of what was returned to Mrs. Fessler after Dr. Salt's file was returned from Koehly hearing.
P-101 (Ev.)	Xerox of notes made by Mr. Sackmary on questions asked by JVD at meeting with Mr. Sackmary in June 1982.
P-102 (Ev.)	CST file on TVD
P-103 (Ev.)	Level II monitoring results on pupil records
P-106 (Ev.)	Petitioner to Commissioner of Education re: Pupil records (filed by VD) #3.
P-109 (Ev.)	Litigation Due Process Appeal #96
P-111 (Ev.)	Subpoena #14

R-1 (Ev.)	Pleadings of preceding litigations between the VDs and the Board

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IDENTIFICATION LIST

J-1-29 (Id.)	Executive Session Minutes January
J-30 (Id.)	3/1/82 Executive Session Board Meeting
J-31 (Id.)	4/5/82 Executive Session Board Meeting
J-32 (Id.)	9/13/82 Executive Session Board Meeting
J-33 (Id.)	11/5/82 Executive Session Board Meeting
J-34 (Id.)	11/29/82 Executive Session Board Meeting
J-35 (Id.)	1/10/83 Short Minutes of Executive Session Meeting
J-36 (Id.)	1/10/83 Longer Minutes of Executive Session Meeting
P-91 (Id.)	Tape B, C (3/21/83)
P-92 (Id.)	10/20/82 letter from Mrs. M. addressed to Board of Education
P-104 (Id.)	Litigation file #1 EDU 3421-81
P-105 (Id.)	Litigation file #2 EDU 3421-81
P-107 (Id.)	Stipulation of Settlement EDU 3421-81 #5
P-108 (Id.)	Special Education Settlement #4
P-110 (Id.)	Litigation Right to Tape Question

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WITNESS LIST

Maria Pirozzi
Florence Urban
Virginia Haas
James DiPiazza
J. B. White
Carolyn Fessler
Gayle Oates
G.V.D.
Joyce Opperlee
A. Sackmary
George DiFalco
J.V.D.
Dr. Syd Salt
T.V.D.

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G.V.D., J.V.D. AND T.V.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT ET AL.,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Steven L. LeFelt, ALJ.

It is observed that timely exceptions to the initial decision were filed by petitioners and that reply exceptions were filed by respondents pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioners take exception to the findings and conclusions in the initial decision on the following grounds:

1. The judge erred in concluding that certain issues in the instant matter are moot by virtue of the earlier settlement reached between the parties and by virtue of T.V.D.'s graduation.

2. Petitioners contend that the judge erred in considering this matter to be a pupil records controversy instead of a special education appeal in accordance with N.J.A.C. 6:28-1.9.

3. It is petitioners' further contention that the judge ignored the issue in this matter regarding their right to a hearing before the Board pertaining to T.V.D.'s records.

4. Petitioners argue that they are not required to prove that an educational need exists as a condition for access to pupil records pursuant to N.J.A.C. 6:3-2.2(d).

5. The judge erred in refusing to allow petitioners to question Board counsel with respect to the manner in which they obtained access to the transcripts in T.V.D.'s pupil record file.

6. Contrary to those findings of the judge, petitioners maintain Exhibit P-106 is a pupil record file.

7. The record of this matter establishes that, during the earlier Koehly hearing, the Superintendent made false statements regarding the fact that he maintained a separate file on T.V.D.

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8. Petitioners claim that they have a right to question counsel for respondents in order to ascertain whether or not they have any of T.V.D.'s pupil records in their possession or to whom they have made such records available.

9. Petitioners argue that all of the records discovered in the search of the files regarding T.V.D. should be made available to them by respondents, including those files of Board counsel.

The Board in its reply to petitioners' exceptions rejects them out of hand and urges the Commissioner to affirm the findings and conclusion set forth in the initial decision.

The Commissioner has reviewed the respective positions advanced by the parties in their exceptions to the initial decision.

In the Commissioner's judgment relevant facts pertaining to the issues in this matter have been addressed in great detail by the judge. His findings and recommendations are well-reasoned and are considered by the Commissioner to be a conscientious and fair resolution of the matter controverted herein, thereby protecting the interests and rights of both parties.

The Commissioner cannot agree with petitioners' position that any useful purpose will be served in remanding this matter for further hearings for the reasons they rely upon in their exceptions.

Accordingly, the Commissioner hereby affirms the findings and conclusions in the initial decision and adopts them as his own.

The parties are hereby ordered to comply with those directives set forth in the initial decision in the manner prescribed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 30, 1983

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THE ARCHWAY SCHOOL, a non-profit corporation,	:	
APPELLANT,	:	
v.	:	SUPERIOR COURT
STATE OF NEW JERSEY, DIVISION OF FINANCE AND REGULATORY SERVICES OF THE NEW JERSEY DEPARTMENT OF EDUCATION AND FRED G. BURKE, COMMISSIONER,	:	APPELLATE DIVISION
RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, February 25, 1982.

Decided by the State Board of Education, June 2, 1982.

Argued December 13, 1982 -- Decided January 7, 1983.

Before Judges Bischoff, Morton I. Greenberg and Gaulkin.

On appeal from the State Board of Education.

David F. Norcross argued the cause for appellant (Myers, Matteo, Rabil & Norcross, attorneys; Marie E. Lihotz, on the brief).

Jaynee LaVecchia, Deputy Attorney General, argued the cause for respondents (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

PER CURIAM

Appellant The Archway School (Archway) filed a Petition for Appeal to the Commissioner of Education to challenge alleged "misstatements" in an audit of Archway's operations for the school years 1975-1976 and 1976-1977 conducted by the Division of Finance and Regulatory Services of the New Jersey Department of Education (Division). Archway asked that it "be accorded an administrative review to correct the misstatements" of the audit report, that the audit findings of "excess charges and overcharges and other incorrect statements" be "reversed and corrected," and that the Division be restrained from "publicly releasing any adverse report which emanates from the audit" and from "any and all attempts of confiscating or recouping monies alleged to be 'overcharges' in tuition rates."

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The matter was transferred to the Office of Administrative Law as a contested case (N.J.S.A. 52:14F-1 et seq.). Following a plenary hearing, the Administrative Law Judge issued his Initial Decision which recommended that the Petition of Appeal be dismissed. The Commissioner of Education affirmed the findings and determinations of the Initial Decision, and on Archway's appeal the State Board of Education affirmed the decision of the Commissioner. Archway now appeals from the final decision of the State Board of Education.

The operative facts are essentially undisputed. Archway is a non-public school for the handicapped which receives students referred by local public school districts for the special education services mandated by N.J.S.A. 18A:46-13. The tuition which Archway may charge to any sending district is limited under N.J.S.A. 18A:46-21:

> Any... private school which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education, but in no case shall the tuition rate in a nonpublic school exceed the maximum day class cost of education per pupil of children in similar special education classes in New Jersey public schools as determined according to a formula prescribed by the commissioner with the approval of the state board.

Regulations promulgated under the statute require each sending district to contract in writing with each receiving non-public school for each pupil it sends (N.J.A.C. 6:28-3.25(c), amended by N.J.A.C. 6:28-4.2(j)) and set forth the formula for calculation of the tuition rate:

> (a) The 85th percentile of the ranked per pupil cost for each class program in New Jersey public school in each category of handicap, shall be obtained from the figures reported to the Division of Business and Finance.
>
> (b) The amount obtained under (a) above shall be adjusted by an incremental difference to be determined by the Commissioner of Education for each year to which this formula is applied which is beyond the year of actual costs used in calculation.
>
> (c) The maximum tuition rate for each category of handicap shall be the amount which applies under (b) above.
>
> (d) Nonpublic schools will be required to provide information related to educational costs to determine their individual school's tuition rate.

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> (e) If the educational tuition rate is at the tuition rate determined by (b) above, it will become the tuition rate; if below, the lower rate governs. If their educational tuition rate exceeds the maximum as determined by (b) above, the school will be required to adhere to the established tuition rate. [N.J.A.C. 6:20-4.2]

Archway submitted its projected costs for each of the two years in question, on the basis of which the Division awarded tuition rates equal to "the maximum tuition rate for each category of handicap" as computed under N.J.A.C. 6:20-4.2. Archway used those rates in contracting with sending districts for those school years.

In early 1979, the Division undertook an audit of Archway's financial operations for 1975-1976 and 1976-1977. In their analysis of the expenses incurred by Archway the auditors concededly applied the same accounting principles and standards as the Division employs in auditing costs and expenditures of public school districts; indeed no guidelines or regulations had been promulgated governing costs or expenditures of non-public schools in determining tuitions to be charged. Utilizing those public school guidelines to determine an "actual cost" of education, the auditors "disallowed" expenditures of $716,863.68 for the two year period. That total reflected the auditors' determinations that 30% of the incurred "administrative" expenditures were "non-instructional" in nature and that particular expenditures were either inadequately documented or insufficiently shown to have been "educational" in nature. Following extensive conferences between the parties before and during the course of the administrative hearings, the Division substantially revised its audit in successive stages. The final audit as reviewed by the Administrative Law Judge reported disallowed expenditures of $188,953.19 for the two year period.

When the Division first submitted its audit report to Archway by letter of September 8, 1980, it advised that the report would be forwarded to all sending school districts with which Archway had contracted, accompanied by a "letter of notification." The proposed letter showed the tuition rates charged for each category of handicap and the tuition rates "per audit"; the difference between the two figures was computed and shown as the "tuition rate excess." The proposed letter also instructed the sending district how to compute "the total amount of excess charges." On December 31, 1980, Archway filed a complaint in the Chancery Division which alleged that the Division was about to send such letters to all of its sending districts and asked that any release of the audit be stayed until Archway had the opportunity to pursue its administrative remedies. A temporary restraining order thereupon was entered. After the Petition for Appeal was filed, a similar restraining order was entered by the Administrative Law Judge in the present proceeding; the Chancery Division order was then vacated and that action was dismissed.

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The scope of the administrative hearing was fixed in two prehearing orders entered by the Administrative Law Judge on March 31, 1981. The Prehearing Order (N.J.A.C. 1:1-10.1) described the "nature of proceedings and issues" as follows:

> A. Whether or not the computation of tuition using actual cost as a basis is a legal basis for determining tuition.
>
> B. Which of the disallowed costs given to Archway on September 8, 1980 were inappropriately disallowed or miscalculated?

The second order, entered on application of the Division and over the objection of Archway, directed that

> The issue of recoupment of funds by the State or local Boards of Education is determined not to be a justiciable issue before this Court and will not be further considered by the Court.

The ensuing plenary hearing eventuated in the issuance by the Administrative Law Judge of his Initial Decision on December 28, 1981 which determined

> (1) That "the Commissioner has the unfettered authority to audit petitioner's books to determine the authenticity of petitioner's projected cost figures used in setting tuition rates, as compared to the actual costs determined as a result of the audit."
>
> (2) That the "use of public school standards to check the accuracy of petitioner's tuition costs was reasonable" and that "in the absence of separate rules and regulations for setting and measuring private school tuition costs, there were no other audit standards which could reasonably be used."
>
> (3) That the Division accordingly "has a sound legal basis for determining tuition costs."
>
> (4) That application of public school accounting standards supported the expense disallowances reflected in the audit.
>
> (5) That "the final audit, as it now stands adjusted, accurately reflects what actual tuition costs were for the years in question."

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The Administrative Law Judge accordingly recommended that the Petition for Appeal be dismissed and that the restraint on respondent's issuance of its notification letter be rescinded. On March 2, 1982 the Commissioner of Education affirmed the findings and determination of the Initial Decision and on June 3, 1982 the State Board of Education affirmed the decision of the Commissioner. Archway's applications to this court and to the Supreme Court to stay the issuance of the notification letters pending the present appeal were denied. The letters were sent, supplemented to disclose that Archway contested the validity of the audit, that the Commissioner and the State Board of Education had "upheld the audit's validity" and that "the matter is currently pending before the Appellate Division."

Archway has now abandoned the position it took before the Administrative Law Judge that the Division is without any authority at all to conduct an audit of its financial operations. Archway urges, however, that in completing its audit the Division may not use "public school standards" to determine "the actual costs" of the special education services provided by Archway. In the setting in which it is raised, that objection is without substance.

The critical fact is that the present record discloses no present use, nor any specific intended use, of the audit by the Division or any other person or party. The Division does not contend that it is entitled to assert any recoupment claim on behalf of the State or any sending district. Nor does the Division urge here that sending districts are entitled to recoup any tuition monies paid for prior years, either on the basis of the audit or otherwise.[1] Moreover, there is no suggestion in the present record that the Division intends to utilize the audit figures to fix or adjust future tuition rates allowed to Archway.

---

[1]Not only did the Division successfully move the Administrative Law Judge to declare the issue of recoupment "not to be a justiciable issue before this Court" but in fact the Attorney General had issued an informal letter opinion to the Department of Education on September 18, 1978 which concluded that

> ...tuition charges for public school pupils attending special education classes conducted by private schools which charges are in excess of actual costs, but less than or equal to the maximum day class cost of education per pupil of children in similar special education classes in New Jersey public schools, may not be recovered by the State or by the local boards of education.

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The challenged audit represents, then, only a particular retrospective view of Archway's financial operations for the two years in question. It has not yet been utilized and is at present informational only. Accordingly the auditors' use of public school standards is not "binding" on anyone, as argued by the Division. Unless and until the audit is sought to be put to some use it exists as nothing more than a statement of the auditors' opinions. And the fact that the auditors' analysis has been found below to be "reasonable" does not determine that it may properly be applied in the resolution of any given future dispute. The validity and persuasiveness of the auditors' opinions can only be tested in the context of a dispute in which reliance is placed on the audit. The tribunal which hears that dispute would have to determine, and all parties thereto would have the opportunity to address, whether and to what extent "public school standards" can properly be used in determining Archway's costs or tuition rates.

The same reasoning requires us to reject Archway's challenge to the individual "disallowances" of expenses reflected in the audit. On the present record those disallowances again represent nothing more than the auditors' opinions. If and when any party seeks to rely on those opinions in any future litigation, Archway and any other interested party will be free to challenge and refute them.

We determine therefore that neither the audit as promulgated by the Division nor the findings made in the administrative proceedings below establish any rights or liabilities of Archway or any other party; and we hold that in any future proceedings in which such rights or liabilities are at issue, Archway and any other party shall be free to dispute in whole or in any part both the principles upon which the audit was conducted and the particular conclusions reflected therein. In light of those determinations, we do not find it necessary or appropriate to address further the particular factual findings and conclusions made below. For the reasons herein expressed we find that the State Board of Education properly dismissed the Petition for Appeal. That action is affirmed.

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BERGENFIELD EDUCATION ASSOCIATION, et al.,	:	
PETITIONERS-APPELLANTS/ CROSS-RESPONDENTS,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT/ CROSS-APPELLANT.	:	

Decided by the Commissioner of Education, May 18, 1981.

Decided by the State Board of Education, January 6, 1982.

Argued May 10, 1983--Decided May 19, 1983.

Before Judges Botter and Brody.

On appeal from State Board of Education.

Gregory T. Syrek argued the cause for appellants (Bucceri & Pincus, attorneys; Mr. Syrek, on the brief).

Sidney A. Sayovitz argued the cause for respondent, Bergenfield Board of Education (Greenwood & Sayovitz, attorneys; Mr. Sayovitz, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education, filed a statement in lieu of brief (Alfred E. Ramey, Jr., Deputy Attorney General, on the statement).

PER CURIAM

The major issues on this appeal have been recently resolved by the decision in Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63 (1982), holding that Title I teachers and supplemental teachers who provide remedial and supplemental instruction to educationally handicapped children could acquire tenure if they otherwise meet the criteria of N.J.S.A. 18A:28-5. Recognizing that Spiewak is controlling at least to some extent, we need only consider the appropriateness of a remedy to be afforded to the six teachers involved in this case.

Three of the teachers, namely, Elaine Nichols, Joan Moore, and Claire Kingsley, are still employed by respondent, Bergenfield Board of Education (Board). The other three teachers, Mary McEwan,

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Beverly Katz, and Helen Casazza, are no longer in the Board's employ. The termination of employment of Beverly Katz occurred in June 1981, after the hearings before the Office of Administrative Law had closed. With respect to the three teachers whose employment has been continued, the Board asserts that their tenure rights have been recognized and all adjustments in benefits have been made prospectively from the date after Spiewak was decided. The Board disputes the rights of all teachers to claim retroactive benefits.

The Supreme Court stated that the Spiewak holding would be applied in the following manner:

> Teachers not before the Court will therefore not be entitled to any back pay award. Similarly, teachers not involved in this case who were terminated prior to the date of this opinion are not entitled to be rehired. However, all currently employed supplemental and remedial teachers should have their tenure eligibility calculated on the basis of this opinion from the beginning of their employment.
>
> As to the teachers involved in this litigation, they are all entitled not only to tenure but also to retroactive payment of any benefits that they would have received if they had been awarded tenure properly. Further, Anderson is to be reinstated to her tenured position and to receive all retroactive benefits.
>
> [90 N.J. at 83, n.2]

In our view, the intention of the court was to give the benefit of the Spiewak holding to the teachers involved in that case, although such benefits would not be made available on a retroactive basis to teachers who had not litigated the issue. Had the case before us arrived in the Supreme Court before the Spiewak decision, the teachers litigating this issue would presumably have been given the benefits of the Supreme Court holding. The principle upon which a decision is made prospective only except for the litigants in a particular case is to give those litigants the benefit of the rule for which they fought. We do not think it was the intention of the Supreme Court to include within the scope of its holding only the teachers in the Spiewak case and not other teachers who were simultaneously litigating the same issue and had commenced their actions or proceedings prior to the announcement of the Spiewak decision. To hold otherwise would be to deprive some teachers of the benefit of their litigation simply because their case was not the first case to reach the Supreme Court. Thus, despite the literal language of footnote 2 in the Spiewak decision, we conclude that the teachers in the appeal before us who have been litigating this issue prior to the announcement of the Spiewak decision are entitled to the benefits of the Spiewak rule, retroactively and prospectively.

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One of the benefits claimed in this case is the right to salary adjustments. The Board takes the position that differentials in salary contained in collectively negotiated agreements can be maintained despite the holding in Spiewak. We were told at oral argument that since Spiewak was decided the Board entered into a collectively negotiated agreement that provided for salary differentials based, presumably, upon the nature of the work performed by various categories of teachers.

The record before us does not permit an adjudication of disputes between the parties that may remain. Obviously, disputes that may have arisen since Spiewak were not the subject of the petition filed with the Commissioner of Education in this case. With respect to the benefits still in dispute between the parties which were claimed in the petition filed with the Commissioner in this case on April 17, 1980, the matter will have to be remanded to the Commissioner for his consideration based upon such statutes and contracts as may apply.

The matter is remanded to the Commissioner of Education for further proceedings consistent with this opinion. We do not retain jurisdiction.

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BERNARDS TOWNSHIP EDUCATION ASSOCIATION, PATRICIA WOHLLEB, ELSIE DRAGONETTI, MARYANN MC ELVOGUE, IRIS WATTS AND CECILIA VALERI,	:	
PETITIONERS-RESPONDENTS,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	
APPELLANT.	:	

Decided by the Commissioner of Education, September 29, 1981.

Decided by the State Board of Education, April 7, 1982.

Submitted April 18, 1983 -- Decided May 18, 1983.

Before Judges Milmed and Morton I. Greenberg.

On appeal from the State Board of Education.

Lucid, Jabbour, Pinto & Rodgers, attorneys for appellant (Michael E. Rodgers, on the brief).

Ruhlman, Butrym and Friedman, attorneys for respondent Bernards Township Education Association (Richard A. Friedman, on the letter brief).

Irwin I. Kimmelman, Attorney General of the State of New Jersey, attorney for the State Board of Education, filed a Statement in Lieu of Brief on behalf of said State Board (Alfred E. Ramey, Jr., Deputy Attorney General, on the Statement).

David W. Carroll, General Counsel for the New Jersey School Boards Association, amicus curiae (Susan Galante, Assistant Counsel, on the brief).

PER CURIAM

The April 7, 1982 Decision of the State Board of Education (State Board) under review is affirmed substantially for the reasons expressed by the Commissioner of Education (Commissioner) in his Decision of September 29, 1981, which was affirmed by the State Board for the reasons stated therein.

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From our review of the record submitted on the appeal we are satisfied that the determination of the Commissioner and State Board is, in the circumstances, clearly not arbitrary, capricious or unreasonable, or violative of any legislative policy expressed or implicit in the laws governing the administration of schools or other educational institutions. We discern no sound reason or justification for disturbing that determination.

Affirmed.

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BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 26, 1981

For the Petitioner-Respondent, Blumberg, Rosenberg, Mullen & Blumberg (William B. Rosenberg, Esq., of Counsel)

For the Respondent-Appellant, Woolson, Guterl, Sutphen & Anderson (Mark S. Anderson, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

June 2, 1982

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BOARD OF EDUCATION, TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY, :

PETITIONER-RESPONDENT, : SUPERIOR COURT

V. : APPELLATE DIVISION

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BRANCHBURG, :

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, October 26, 1981

Decided by the State Board of Education, June 2, 1982

Argued: January 3, 1983 -- Decided January 18, 1983

Before Judges Bischoff, J.H. Coleman and Gaulkin.

On appeal from State Board of Education.

Mark S. Anderson argued the cause for appellant (Woolson, Gutterl, Sutphen & Anderson, attorneys).

William B. Rosenberg argued the cause for respondent (Blumberg & Rosenberg, attorneys).

No appearance was made on behalf of the State Board of Education. Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (Regina Murray Mahoney, Deputy Attorney General, on Statement in Lieu of Brief).

The opinion of the Court was delivered by

BISCHOFF, P.J.A.D.

The chief issue presented by this appeal is whether a Township Committee in its review of the proposed budget of a Board of Education after rejection of the budget by the electorate may reach and consider items of income anticipated by the Board. We hold that it may.

On April 7, 1981, the electorate of the Township of Branchburg rejected the school budget proposed by the Board of Education of the Township of Branchburg (Board). Pursuant to N.J.S.A. 18A:22-37, the Township Committee of the Township of Branchburg (Committee) consulted with the Board and 1) reduced line items in the budget, 2) increased the estimate of anticipated income, and 3) increased the estimate of the unappropriated balance on hand, thus reducing the amount to be raised by taxation.

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The Board filed a Petition of Appeal to the Commissioner of Education of the State of New Jersey (Commissioner). The matter was referred to an Administrative Law Judge (ALJ) for hearing and decision. Evidence presented at the hearing disclosed that the disputed reduction in line items related to the Board's library program.

The Committee contended the Board had understated its anticipated interest income by $32,000 and increased that item in the proposed budget. Evidence presented at the hearing indicated that the probable interest income for the years 1981-82 would be at least $76,000. Only $20,000 was reflected in the Board's proposed budget. At the hearing the Board took the position this additional revenue would be needed since they were aware that the budget underestimated expenses to be incurred for heat and pupil transportation.

The Committee also contended at the hearing that the Board had understated the unappropriated balance on hand (surplus) by $30,000 and it therefore increased that item in the budget by that amount. Evidence presented at the hearing indicated that $25,000 was being carried as a contingent fund to defray costs of a possible residential placement and a consequent transfer of liability from Division of Youth and Family Services to the Board.

The ALJ found and recommended 1) that cuts in the line items relating to the library be restored in full, 2) the Board did understate its anticipated interest income by $32,000 and that sum should be added to the budget thus increasing the miscellaneous revenues to $52,000, and 3) the additional amount of $30,000 should be added to the unappropriated expense balance and that course of action would not harm the standard of education to be delivered by the Board.

The Commissioner adopted the recommendations of the ALJ respecting the restoration of cuts in line items but rejected his recommendations respecting the items of anticipated income and the invasion of surplus because 1) fluctuation in economic conditions made anticipation of costs difficult, and 2) the Commissioner found no authority for the Committee to reach into the Board's source of revenues and unappropriated free balances so as to offset anticipated regular expenses.

The State Board of Education affirmed. This appeal by the Committee followed.

The Committee first argues that since there was testimony that the Committee's cuts in the line items "would not prevent the Board from providing the State-mandated thorough and efficient education, those cuts should have been upheld."

We disagree. There was ample evidence presented to demonstrate that the reduction would seriously affect a library program well into its third year of development. The Committee was not even aware that there was an existing developing library program when they made the cuts, and a Committee member testified it was the desire of all Committee members not to reduce any existing program. The reductions in the line items relating to the library made by the

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Committee were arbitrary and were properly restored by the Commissioner and the State Board. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94, 106-107 (1966).

The main thrust of this appeal is a challenge to the ruling of the Commissioner and the State Board that the action of the Committee in reviewing a proposed budget pursuant to N.J.S.A. 18A:22-37 is limited to a consideration of the line items contained in the current expense budget which was rejected by the voters. The Commissioner took the position that an increase in anticipated income or reduction in surplus by the Committee constitutes not a reduction in expenses as contemplated by N.J.S.A. 18A:22-37 but a reduction in revenue and that increase falls outside the authority conferred by the statute.

This view of the duty and power of a Committee when reviewing a proposed school budget that has been rejected by the voters is entirely too narrow. N.J.S.A. 18A:22-37 provides, in pertinent part, as follows:

> 18A:22-37. Determination by municipal governing body where items rejected at election; notice of intent to appeal.
>
> If the voters reject any of the items submitted at the annual school election, the board of education shall deliver the proposed school budget to the governing body of the municipality, or of each of the municipalities included in the district within 2 days thereafter. The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation with the board, and by April 18, determine the amount which, in the judgment of said body or bodies, is necessary to be appro- priated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district, and certify to the county board of taxation the totals of the amount so determined to be necessary for each of the following:
>
> a. Current expenses of schools;
> b. Vocational evening schools or classes;
> c. Evening schools or classes for foreign-born residents
> d. Appropriations to capital reserve fund; or
> e. Any capital project, the cost whereof is to be paid directly from taxes; which amounts shall be included in the taxes to be assessed, levied and collected in such municipality or municipalities for such purposes.

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The ultimate purpose of the certification to the County Board of Taxation is to provide for raising the net amount required to operate the schools for the ensuing year by means of taxation. Determination of that figure cannot be made by a simple addition of the approved current expense items. Such a review must also involve a consideration of funds available from other sources to defray the necessary costs. To hold otherwise would permit a Board that understates its income to spend public funds in excess of its approved budget.

The responsibility imposed upon a Committee to review a budget rejected by the electorate by N.J.S.A. 18A:22-37 and determine the amount which is necessary to be appropriate must, of necessity and by implication, N.J. Const. (1947), Art. IV, Sec. 7, Par. 11, include the power to consider the budget as a whole, not only the items of expense but also items of potential income. Lacking such power, the Committee could not possibly certify the amount required to be raised by taxation to operate the schools.

It is clear a Board has an obligation to account for surplus funds and investment income in planning its budget for the ensuing year. Cf. Bd. of Ed. Fair Lawn v. Mayor, Coun. Fair Lawn, 143 N.J. Super. 259, 273 (Law Div. 1976), aff'd o.b. 153 N.J. Super. 480 (App. Div. 1977). The determination to be made by the Committee mandated by N.J.S.A. 18A:22-37 is quite obviously to provide control over the expenditures to be made by a school board and the amount to be raised by taxation. Restricting the Committee's review to line items would not provide control over either.

What we have said with respect to items of anticipated income applies with equal force to the Board's allocation of its unappropriated free balance. We hold that in both instances the Committee may consider the items in its budget review and in reaching its determination as to the amount required to be raised by taxation. Its action is, of course, subject to review by the Commissioner and by the State Board for "procedural or substantive arbitrariness." Bd. of Ed., E. Brunswick Tp v. Tp. Council, E. Brunswick, supra, 48 N.J. 106-107.

Since the State Board and the Commissioner used the incorrect legal standard in reviewing the actions of the Committee, we find it necessary to remand the matter to the State Board for reconsideration and further proceedings consistent with this opinion. We observe that the issues before us related to the budget for years 1981-82 and they may very well be moot. We leave that determination to the parties and to the State Board of Education.

We do not retain jurisdiction.

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BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,	:	
PETITIONER-RESPONDENT.	:	
V.	:	STATE BOARD OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 26, 1981

Decision of the State Board of Education, June 2, 1982

Decision of the Superior Court of New Jersey, Appellate Division, January 18, 1983

For the Petitioner-Respondent, Blumberg, Rosenberg, Mullen & Blumberg (William B. Rosenberg, Esq., of Counsel)

For the Respondent-Appellant, Woolson, Guterl, Sutphen & Anderson (Mark S. Anderson, Esq., of Counsel)

The State Board of Education determines this matter is moot and dismisses the appeal.

Maud Dahme abstained.
September 7, 1983

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CEDARVILLE TEACHERS ASSOCIATION, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, CUMBERLAND COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, July 22, 1982

Decision on Motion, Commissioner of Education, October 13, 1982

Motion for Stay Granted by State Board of Education, December 1, 1982

For the Petitioner-Appellant, Selikoff & Cohen, (John E. Collins, Esq., of Counsel)

For the Respondent-Respondent, Barbour & Costa (John T. Barbour, Esq., of Counsel)

The Cedarville Teachers Association, hereinafter "Teachers Association," has challenged the legality of policy #4112.4 of the Board of Education of the Township of Lawrence, hereinafter "Lawrence Board." The policy requires all Lawrence Board employees to undergo an annual physical examination. (This case does not involve the instance where an individual employee shows evidence of deviation from normal physical or mental health and is directed to undergo a physical examination.) The statute involved is N.J.S.A. 18A:16-2 which reads as follows:

"18A:16-2. Physical examinations; requirement

Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.

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> Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data."

Pursuant to N.J.S.A. 18A:16-2, one implementing rule was promulgated by the State Board of Education; i.e., N.J.A.C. 6:29-4.2, Testing for Tuberculosis Infection.

The Teachers Association argues that the Lawrence Board has no authority, beyond the tuberculosis testing authority, to require physical examinations of all of its employees in the absence of State Board rules. It argues further that, in accordance with the statute, the State Board of Education "shall" determine the scope of the physical examination to be required; and, since the State Board has promulgated only a tuberculosis testing rule, no authorization exists for further physical examination.

The Lawrence Board contends that the tuberculosis testing rule implementing N.J.S.A. 18A:16-2 is a minimum requirement of examination and that boards of education may go beyond this minimum requirement. Indeed, the Lawrence Board argues that yearly physical examinations of all Board employees are mandated by the clear wording of the statute.

The Administrative Law Judge found that, in the absence of State Board of Education rules, the Lawrence Board had no authority to require its employees to undergo annual physical examinations under N.J.S.A. 18A:16-2. Such physical examinations were found to be beyond the scope of the State Board rule at N.J.A.C. 6:29-4.2. The Administrative Law Judge also found that the Lawrence Board's medical inspector may not determine the scope of the physical examination beyond that currently provided by the State Board at N.J.A.C. 6:29-4.2 - tuberculosis testing.

The Commissioner held that the State Board tuberculosis rule at N.J.A.C. 6:29-4.2 forms only a minimum basis for any local board of education in determining the scope of a physical examination. The Commissioner set aside the conclusions of the Administrative Law Judge and determined that:

1. The Lawrence Board has authority to require its employees to undergo an annual physical examination under N.J.S.A. 18A:16-2; and

2. The Lawrence Board shall determine as part of its policy the scope of a physical examination based on the advice and recommendations of its medical inspector.

The State Board affirms the Commissioner's determination holding that the tuberculosis testing rule, N.J.A.C. 6:29-4.2, is a minimum requirement of examination implementing

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N.J.S.A. 18A:16-2 and that the Lawrence Board may exceed this minimum and require physical examinations of all employees. The State Board does not recommend affirmance of the full text of the Lawrence Board's physical examination reporting form, including its post-grievance modification. This part of the controversy is remanded to the Lawrence Board for re-examination, bearing in mind that absent "evidence of deviation from normal physical or mental health," there is a need for imposition of limitations so as to avoid undue intrusions into private matters which do not concern or are unrelated to an employee's ability to function in the position for which employed. For this reason, the State Board suggests that part 1B of the reporting form appears overly intrusive and unnecessary for school health purposes. An opinion has not been reached as to the information requested in part 2 and the State Board sees nothing wrong with the remaining portions of the form. Whether or not a revised reporting form would pass muster must depend on the reasonableness and necessity of the information requested and whether it promotes the Lawrence Board's school health interests, without unduly infringing the privacy of its employees. The Commissioner shall exercise continuing jurisdiction over this remand to the Lawrence Board.

James H. Pagan and Robert J. Wolfenbarger opposed in the matter.

Attorney Exceptions are noted.
May 4, 1983

PENDING N.J. SUPERIOR COURT

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VICTOR R. CICCONETTI,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 28, 1982

For the Petitioner-Appellant, Chamlin, Schottland, Rosen, Cavanagh & Uliano (Thomas W. Cavanagh, Esq., of Counsel)

For the Respondent-Respondent, Kenney & McManus (Malachi J. Kenny, Esq., of Counsel)

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

March 2, 1983

PENDING N.J. SUPERIOR COURT

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MICHAEL J. COHEN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 30, 1982

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

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

The State Board of Education, after considering the three issues raised on appeal, including the two affidavits filed with the Exceptions to the Administrative Law Judge's Initial Decision, affirms the decision of the Commissioner of Education for the reasons expressed therein.

March 2, 1983

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D.S., :

PETITIONER-RESPONDENT, :
CROSS-APPELLANT,

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE : APPELLATE DIVISION
TOWNSHIP OF EAST BRUNSWICK,

RESPONDENT-APPELLANT, :
CROSS-RESPONDENT.

_____ :

Decided by the Commissioner of Education, November 13, 1980.

Decided by the State Board of Education, June 3, 1981.

Argued: December 6, 1982 - Decided: February 15, 1983.

Before Judges Ard, King and McElroy.

On appeal from the State Board of Education.

David B. Rubin argued the cause for appellant Bd. of Education of the Tp. of East Brunswick (Rubin, Lerner & Rubin, attorneys).

Theodore A. Sussan argued the cause for respondent, D.S.

Alfred E. Ramey, Jr., Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Deborah T. Poritz, Deputy Attorney General, of counsel).

The opinion of the court was delivered by

KING, J.A.D.

The sole issue remaining on this appeal is the validity of a regulation of the State Board of Education, N.J.A.C. 6:28-4.3(g). This regulation relates to payment of residential costs incurred by placement of a child in residence at a special education facility. The regulation states

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> (g) Residential costs shall be assumed by the public agency which places a pupil in a residential school. A local school district shall not be responsible for residential costs when reason for placement is due to home conditions or parental choice and a free and appropriate education can be made available in a nonresidential school. Placements of pupils in residential schools by public agencies other than local school districts shall be subject to regulations governing such agencies and these regulations. These provisions do not eliminate the responsibility of a local school district to pay the day school education cost portion of a handicapped pupil's special education in a residential program when the pupil has been placed under the authority of a public agency empowered to make such placement.

The child, D.S., and his parents moved to East Brunswick in 1975 when he was five years old. In September 1976 he entered a class for trainable mentally-retarded children in East Brunswick. Upon the recommendation of the school district's child study team, he was placed in the American Institute for Mental Studies (AIMS), a private residential school in Vineland, in January 1977. The East Brunswick School Board (Board) paid his tuition fees pursuant to N.J.S.A. 18A:46-14 from that date but refused to pay his residential costs.[1]

In July 1977 the parents of D.S. started an action against the Board in the Chancery Division seeking reimbursement for residential costs: room, board and the like. The questioned regulation, N.J.A.C. 6:28-4.3(g), became effective on August 11, 1978. In February 1978 the Chancery Division judge refused to entertain the action for failure to exhaust administrative remedies and transferred the case to the State Board of Education for a determination of the Board's challenge to the educational necessity of the placement.

A hearing in the Department of Education before a chief classification officer was held in the fall of 1978. In February 1979 the officer issued extensive findings of fact and conclusions of law. He concluded that the placement of D.S. at AIMS was educationally justified and not due to home conditions or parental choice. He said "D.S. shall remain in his current educational placement with both tuition and residential costs provided by respondent [Board] .... Reimbursement for residential costs shall be subject to current practices of the New Jersey Department of Education for pupils placed in residential settings from January 1977 to the present."

---

[1]The parties have advised us that they have adjusted their differences to date and that the effect of our decision will be prospective only. Collateral litigation in the United States District Court has been concluded.

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The board appealed to the Commissioner of Education claiming (1) the decision was against the weight of the evidence, (2) certain hearing procedures were defective and (3) residential costs were wrongfully imposed. On the issue before us the Commissioner rendered a decision holding the District responsible for residential costs from the effective date of N.J.A.C. 6:28-4.3(g)-August 11, 1978. The board appealed to the State Board, contending that subsection (g) was ultra vires and unenforceable. The State Board summarily affirmed the Commissioner and upheld its regulation.

Against this background we examine whether N.J.A.C. 6:28-4.3(g) is an ultra vires and unenforceable exercise of regulation by the State Board of Education. Administrative agencies have limited jurisdiction; actions of an agency beyond its jurisdiction are ultra vires and void. Swede v. Clifton, 22 N.J. 303, 312 (1956). In reviewing agency action this court's function is to determine whether the agency's decision is within legislatively delegated authority. Bergen Cty. Freeholders Bd. v. Bergen Cty. Prosecutor, 172 N.J. Super. 363, 369 (App. Div. 1980). The authority possessed by an administrative agency consists of powers expressly granted plus those which are reasonably necessary or appropriate to effectuate the specific delegation. N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978).

In New Jersey administrative regulations are accorded a rebuttable presumption of validity. A finding that a regulation is ultra vires is disfavored. Id. at 561. A grant of authority to an administrative agency is to be liberally construed to permit the agency to accomplish its statutory responsibilities. Sheeran v. Progressive Life Ins. Co., 182 N.J. Super. 237, 248 (App. Div. 1981). See United Bldg. & Constr. Trades Council v. Camden, 88 N.J. 317, 325 (1982), app. pending 51 U.S.L.W. 3024 (1982).

To determine whether statutory authorization for a particular administrative action exists, the reviewing court may look beyond the specific language of the delegating statute to the objective of the statute. We may examine the entire statute in light of its surroundings and objectives to ascertain whether authority is implicitly granted. N.J. Guild, supra, 75 N.J. at 562. Agency action is not precluded where it can be said to promote or advance policies and findings that served as the driving force for the legislation. A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't., 90 N.J. 666, 683-684 (1982). The delegated authority should be construed to permit the fullest realization of legislative intent. Cammarata v. Essex Cty. Park Comm., 26 N.J. 404, 411 (1958). A court may readily imply any incidental powers necessary to implement such legislative intent. Hillman/Kohan Eyeglasses, Inc. v. N.J. Optometrists Bd., 169 N.J. Super. 259, 266 (App. Div. 1979)

The liberal interpretation in which the court may engage is limited by a duty to restrain agency action where there is

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reasonable doubt that a particular power resides in an agency. Mastrangelo, supra, 90 N.J. at 684; In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980). The regulation must be within the fair contemplation of the delegation of the enabling statute. N.J. Guild, supra, 75 N.J. at 561-562.

N.J.A.C. 6:28-4.3(g) was promulgated by the New Jersey State Board effective on August 11, 1978. The State Board enjoys broad legislative rule-making powers. See In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 277 (1981). The Legislature has expressly delegated these broad powers to the State Board. N.J.S.A. 18A:4-15 provides

> The state board shall make and enforce, and may alter and repeal, rules for its own government and for implementing and carrying out the school laws of this state under which it has jurisdiction. [Emphasis supplied]

N.J.S.A. 18A:4-16 provides

> The state board shall have all powers, in addition to those specifically provided by law, requisite to the performance of its duties. [Emphasis supplied]

Its specific express duties include in pertinent part the general supervision of public education and the distribution of federal funds. N.J.S.A. 18A:4-10 provides

> The general supervision and control of public education in this state, except higher education, and of the state department of education shall be vested in the state board, which shall formulate plans and make recommendations for the unified, continuous and efficient development of public education, other than higher education, of people of all ages within the state. [Emphasis supplied]

N.J.S.A. 18A:59-1 provides

> Whenever moneys are made available for school purposes by any act of congress, except the act of congress referred to in article 2 of this chapter, or any agency of the federal government, or made available or deposited in any manner in accordance with any law enacted by the congress of the United States, such moneys shall be apportioned by the commissioner under plans approved by the state board, if said moneys are for use in the public school system, or by the chancellor, under plans approved by the board of

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> higher education, if said moneys are for use in higher education. Such moneys shall be distributed as aid to the several districts or in any other manner designated for any educational purpose defined in the federal statutes or in the regulations of federal agencies making allotments or in the laws of this state. [Emphasis supplied]

The State Board argues that its express power under N.J.S.A. 18A:59-1 to accept and allocate federal funds implies a mandate to take the necessary steps to qualify for such funding. The State Board also argues that the regulation falls within its general power to supervise and control public education under N.J.S.A. 18A:4-10. It contends that N.J.A.C. 6:28-4.3(g) was enacted to qualify this State for federal funding under the Education of the Handicapped Act of 1975, 20 U.S.C.A. sec. 1400 et seq. (Education Act).

The federal Education Act is a funding measure designed to assist states and local school districts in educating the handicapped.[2] 20 U.S.C.A. sec. 1400(c). The pertinent policies of the Education Act are well summarized in Kruelle v. New Castle School Dist., 642 F. 2d 687, 690-692 (3 Cir. 1981), as follows

> The Education Act embodies a strong federal policy to provide an appropriate education for every handicapped child. Three interrelated purposes underlay its passage. First, Congress sought to secure by legislation the right to a publicly-supported equal educational opportunity which it perceived to be mandated by Brown v. Board of Education, and explicitly guaranteed with respect to the handicapped by two seminal federal cases, Pennsylvania Ass'n for Retarded Children v. Pennsylvania and Mills v. Board of Education. Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of handicapped citizens. Third, Congress acknowledged the need for an expanded federal fiscal role to aid state compliance with the court decisions and to assure protection for the rights of handicapped children. A cost-benefit philosophy supported these interlocking goals. Instead of saddling public agencies and taxpayers with the enormous expenditures necessary to maintain the handicapped as lifelong dependents in a minimally acceptable institutionalized existence, Congress reasoned that the early injection of federal money and

[2] The State must distribute at least 75% of its allocation to local and intermediate agencies and is bound by federal guidelines and eligibility requirements in the use of the funds. 20 U.S.C.A. sec. 1411(c)(1)(B), sec. 1412(6).

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provision of educational services would remove this burden by creating productive citizens.

To a large extent the Education Act establishes only procedural guidelines and safeguards, leaving school officials and parents relatively unconstrained in creating individualized education programs (IEPs) for handicapped children. Recognizing the broad range of special needs presented by handicapped children, the lack of agreement within the medical and educational professions on what constitutes an appropriate education, and the tradition of state and local control over educational matters, Congress refrained from mandating overly detailed programs. The Education Act, however, is not silent on what qualifies as a free appropriate public education (FAPE). In fact, the 1975 statute and regulations promulgated thereunder, for the first time, give definitional content to the term "appropriate education" and its component parts, "special education" and "related services."

Theoretically, the scope and details of an appropriate education which the local educational agencies are obligated to provide as a condition to receiving federal grants under the statute, are left primarily to state definition. But the term "special education" is given specific content:

> The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. sec. 1401(16).

Similarly, "related services" is extensively defined:

> The term "related services" means transportation, and such developmental corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and

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> includes the early identification and assessment of handicapping conditions in children.
>
> 20 U.S.C. sec. 1401(17).

Moreover, the regulations promulgated under the Act explicitly contemplate residential placement:

> If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.
>
> [Emphasis supplied].
>
> Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.
>
> [Emphasis supplied].
>
> 45 C.F.R. sec. 121a.302. [at 690-692]

The language of N.J.A.C. 6:28-4.3(g) closely tracks the language of the federal regulation by requiring local districts to bear the costs of a residential placement required for educational purposes. The East Brunswick Board does not deny that the State Board enacted the regulation to become eligible for federal funding.

To qualify for funding under the Education Act a state had to develop a plan through the "state educational agency" which showed that a free and appropriate education would be available no later than September 1, 1978 to all handicapped children between the ages of 3 and 18. See 20 U.S.C.A. sec. 1412(2)(B). The plan had to show that the policy applied to all public agencies, including local boards, in the state. 45 C.F.R. sec. 121a.121. Local boards which desired funding had to submit a similar plan to the stated educational agency. 20 U.S.C.A. sec. 1414(a). The State Board tells us that, prior to enactment of the state regulation, responsibility for the maintenance of residentially-placed handicapped children was not clearly defined and varied by district and school. The legislative history of the Education Act supports this view. In S. Rep. No. 94-168, 94th Cong., 1st Sess. 24 (1975), reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1448, the Senate Labor and Public Welfare Committee announced

> ...Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee under-

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> stands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.

The regulation in question, N.J.A.C. 6:28-4.3(g), attempted to eliminate the uncertainty as to responsibility of the local boards and to ensure uniformity of treatment for children placed in residential schools.

In response, the East Brunswick Board contends that because this regulation conflicts with another state statute it is ultra vires. The local board argues that its responsibility in this case is limited to "tuition" and does not include room and board. This statute, in effect since 1954, N.J.S.A. 18A:46-14, in pertinent part provides

> Whenever any child shall be confined to a hospital, convalescent home, or other institution in New Jersey or in any other state in the United States and is enrolled in an education program approved under this article, or shall be placed in any other State facility as defined in section three of P.L. 1975, c. 212 (C. 18A:7A-3), the board of education of the district in which the child resides shall pay the tuition of said child. [L. 1954, c. 178, sec. 5, as amended]

To buttress its argument, the school district notes that N.J.S.A. 18A:7A-20(a) authorizes "categorical program" state support to local districts for the costs of special education classes for trainable, mentally retarded children, for approved private school tuition, and for classes in various residential state facilities. Further, N.J.S.A. 18A:7B-2 authorizes deductions from state aid to local districts for tuition for each child in a district, including sub-trainable, mentally retarded children, residing in a state facility. East Brunswick argues that the omission of any mention in the above statutes of the cost of care and maintenance at a private facility shows a legislative intent to excuse local boards from bearing those costs of residential placement for education purposes. It argues that the minutes of the State Board meeting considering the regulation recognized the need for additional legislation prior to enactment of the measure. At that meeting Deputy Commissioner Lataille stated:

> The Commissioner has directed the staff to develop procedures about residential costs incurred by local school boards with federal funds when such placement meets state and federal guidelines. There's no problem in doing that for

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the coming year and probably one more year, so it gives us some time to seek that legal clarification.

These procedures will remain in effect until the issue of local responsibility for residential costs is clarified. I think that will require legislation. There is some proposed legislation already drafted. It hasn't been entered but would be entered, as I understand, in September when the Legislature returns. [Emphasis supplied.]

*****

Vice-President of the Board and Chairman of the Legal Committee Brandt responded:

MR. (DAVID) BRANDT: I think something Dr. Lataille said needs to be clarified and emphasized before we hear from the speakers because they may be speaking to something that is no longer in issue. And I have talked to Dr. Winkler on the telephone just a couple days ago concerning this.

As I understand Dr. Lataille's remarks that residential costs according to the regulations must be borne by the local district, however, a process will be put in place for the forthcoming school year and for the subsequent school year by which a process will be available to each district which will be assuming residential cost to apply to the State Department of Education for reimbursement of those costs through the use of federal funds that are available to the Department under Public Law Title 6 and as a result, those hardship districts that I think many of us were concerned about, districts with a significant number of students who would require residential placement and so significant it could have program effects in that district which have an avenue of relief available to them as long as they comply with the guidelines of the Department which will be published shortly. And I think there has been a lot of discussion about that and I just want to emphasize that so that speakers will not be tilting windmills about something that will not be an issue for the next two years.

PRESIDENT RICCI: That has been one of the critical issues raised as the funding of the residential cost and I think that does help to clarify the situation.

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The State Board counters this argument by contending that the regulation is consistent with powers conferred by N.J.S.A. 18A:46-14, N.J.S.A. 18A:7A-20(a) and N.J.S.A. 18A:7B-2. It urges a generous construction of the term "tuition" to include "protection, care, or custody especially as exercised by a parent or guardian over a child or ward." Webster's Third International Dictionary, 2461 (unabridged 1966). In a similar context the federal court in Utah in Sakezzie v. Utah State Ind. Affairs Comm., 215 F. Supp. 12, 17 (D. Utah 1963), construed "tuition" for Indian children broadly to include books, room, board and transportation, saying

> The expenditures made in connection with school costs to date have been justified. But the defendants have suggested that the power to expend money for "tuition" of Indians in white schools may be restricted to the payment of enrollment charges assessed by the schools. I am of the opinion that the meaning of the term in context is also broad enough to encompass charges necessary or incidential [sic] to attendance, such as for books, board and room and traveling expense,[7] within the reasonable discretion of the Commission.
>
> [7]Webster's New International Dictionary, Second Edition, Unabridged defines tuition as "(1) protection; care, custody; esp., the care of a tutor or guardian over a pupil or ward; guardianship, now rare (2) the act or profession of teaching; the services of a teacher or teachers; instruction, as to give or seek tuition in latin; the fees for tuition, *** (3) the price or payment of instruction ***". [at 17]

To further support this construction, the State Board cites several statutes which attempt to define the concept of a thorough and efficient education. First, the Legislature has recognized that the sufficiency of education is a growing and evolving concept and that definition of a thorough and efficient education depends on the economic, historical, social and cultural context of education. N.J.S.A. 18A:7A-2(a)(4). Second, the Legislature established statutory guidelines for the implementation of a thorough and efficient education, including the provision of "programs and supportive services for all pupils, especially those who are educationally disadvantaged or who have special educational needs." N.J.S.A. 18A:7A-5(e). Third, N.J.S.A. 18A:46-13 provides:

> It shall be the duty of each board of education to provide suitable facilities and programs of education for all the children who are classified as handicapped under this chapter except those so mentally retarded as to be eligible for day training pursuant to N.J.S. 18A:46-9. The absence or unavailability of a special class

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> facility in any district shall not be construed as relieving a board of education of the responsibility for providing education for any child who qualifies under this chapter.

The State Board also argues that a narrow interpretation requiring local boards to pay only tuition would encourage them to send children outside the district rather than develop programs and facilities within the district.

East Brunswick contends that the Supreme Court's decision in Levine v. of Institutions & Agencies Dep't., 160 N.J. Super. 591, (App. Div. 1978), mod. and remanded 84 N.J. 234 (1980), rejects such a definition. There the Appellate Division wrote

> It is apparent from the complaint that plaintiffs' thesis equates the entire scope of the custodial care and maintenance provided to their child at Totowa with educational services and concludes that, in as much as he is entitled to a thorough and efficient education by the State, without direct charge therefor, neither the child nor the parents may be assessed and compelled to pay for such "educational services." The very statement of the proposition reveals its fallacious nature. Custodial care and maintenance of a child in an institution such as Totowa for a full 24 hours each day consists of considerably more in the way of services than administering to educational needs. The characterization by plaintiffs of the whole of their child's general 24 hour a day custodial care and maintenance as "educational services," at best is a perversion and utterly specious. We reject the contention out of hand.
>
> [160 N.J.Super. at 594]

The question raised by the instant case is difficult but in our opinion the State Board has the stronger argument. The broad delegations of power to the State Board must be read in light of New Jersey's constitutional mandate to provide a thorough and efficient system of free public education. See N.J. Const. (1947), Art. VIII, sec. IV, par. 1. The right of children to a thorough and efficient system of education is fundamental under our state constitution. Robinson v. Cahill, 69 N.J. 133, 147 (Robinson IV), cert. den. sub nom. Klein v. Robinson, 423 U.S. 913 (1975), injunction vacated 69 N.J. 449 (Robinson V), 70 N.J. 155 (Robinson VI) (enjoining expenditure of funds for public schools), amended 70 N.J. 464, injunction vacated 70 N.J. 465 (1976). The ultimate goal of a free public education as embodied in the provision is to equip children to function economically, socially, and politically in a democratic society. N.J.S.A. 18A:7A-4; Levine, supra, 84 N.J. at 247. The education of children classified as "trainable" promotes

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the purpose of that goal and the guarantee of a thorough and efficient free public education extends to such children. Id. at 252-253.

The obligation to fulfill the constitutional mandate falls on the Legislature which has delegated the obligation to the State Board and the Commissioner of Education. Freehold, supra, 86 N.J. at 278; Robinson V, supra, 69 N.J. at 460-461. In response to the Robinson saga, the Legislature has attempted to define the concept of a thorough and efficient education. See N.J.S.A. 18A:7A-5; Freehold, supra, 86 N.J. at 276. It accepted the responsibility of delegating appropriate authority to state and local agencies to establish goals and objectives consistent with the legislative guidelines, one of which calls for programs and support services for pupils with special educational needs. N.J.S.A. 18A:7A-2(b)(3); N.J.S.A. 18A:7A-5(e). Discussing the State Board's express power to order changes in local budgets under N.J.S.A. 18A:7A-14 et seq., the Supreme Court wrote:

> ... These provisions allocate to the Commissioner of Education and to the State Board of Education a two-fold continuing responsibility: first, to maintain a constant awareness of what elements at any particular time find place in a thorough and efficient system of education, as this concept evolves through the inevitably changing forms that it will take in the years to come; second, to insure that there be ever present, sufficiently competent and dedicated personnel, adequately equipped, to guarantee functional implementation, so that over the years and throughout the State each pupil shall be offered an equal opportunity to receive an education of such excellence as will meet the constitutional standard. [Robinson V, supra, 69 N.J. at 459-460; emphasis supplied]

The court characterized the Commissioner and State Board as "legislative agents" for the purpose of fulfilling this mandate. Id. at 461.

In delegating duties to the State Board the Legislature did not specifically direct the Board to create an eligible status for federal funding. It recognized, however, the responsibility to establish a funding structure to ensure adequate financial resources to enable a system of free public schools to operate throughout the State. N.J.S.A. 18A:7A-2(b)(4). Further, the Senate Education Committee Statement to A. No. 86, L.1979, c.207 (codified at N.J.S.A. 18A:7B-1 et seq.), suggests that the amendments adopted in 1979 increased the costs to be borne by districts to comply with the federal Education Act. It reads as follows

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Funding: Educational programs in State facilities are now funded through the appropriations process. In previous years, all education expenditures came out of the general appropriation to each facility; because of competing priorities, education was often insufficiently supported. The budget for the present fiscal year includes a separate line item for education in these facilities, but in most cases the appropriation remains insufficient to provide an education which meets State standards.

There is at least one lawsuit now pending to require State institutions to comply with the T & E law; in addition, there is some question whether some of the facilities can meet the requirements of a federal law (P.L. 94-142) which requires a free and appropriate education for all handicapped children. The bill should provide sufficient funds to enable compliance with both statutes.

School districts are now required by law (N.J.S. 18A:46-14) to pay tuition for any of their children who are in institutions. This law has never been enforced, chiefly because the tuition charges would have created a serious financial burden for some districts. Under Assembly No. 86, however, the tuition will be paid chiefly with State aid; the amount of tax levy needed to support any child will be limited to the difference between the equalization aid received by the district for the child and the State average net current expense budget per pupil. On the average, the amount of tax levy required for pupils in State facilities will be the same as that for pupils attending class in the local districts. Further the total cost of tuition will be offset by a general increase in equalization aid for the district; this will result from the added enrollment and the consequent lowering of the per pupil wealth of the district.

The bill will require school districts to pay tuition for all children in State facilities, including those classified as eligible for day training. The school districts presently have no obligation to provide facilities or programs for children eligible for day training nor do they have any responsibility to pay for their education. Tuition for them will therefore be an added burden for the districts, but once again

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> the cost in tax levy will be lessened by the State aid generated when these children are added to the rolls of the district.

The enactment of N.J.A.C. 6:28-4.3(g) may be interpreted as an exercise of the State Board's general rule-making power under N.J.S.A. 18A:4-15 to implement its constitutional mandate. The State Board is entrusted with the responsibility of determining the elements of a "thorough and efficient education" as the concept evolves. Part of that responsibility is to insure adequate funding for programs and facilities for the education of all educable children. See N.J.S.A. 18A:7A-2(b)(4). Cf. Freehold, supra, 86 N.J. at 278-279 (recognizing the Commissioner's power under N.J.S.A. 18A:7A-15 to authorize the issuance of bonds over local objection). The State Board could readily find that federal funds would ease the burden on the local districts and promote the goal of a thorough and efficient education. The legislative history suggests that this decision was ratified in 1979, when the Legislature appears to have taken measures to comply with the federal Education Act. At that time, after the enactment of the administrative regulation in question, the Legislature was concerned that some New Jersey facilities failed to comply with federal standards.

Against this backdrop N.J.S.A. 18A:46-14 and N.J.S.A. 18A:7A-20(a) should not be interpreted to exempt local districts from the payment of residential costs. Despite the argument of the State Board, the term "tuition" in N.J.S.A. 18A:46-14 must be accorded its customary meaning which does not include room and board. See 2A, Sutherland, Statutory Construction, sec. 46.01 at 48 (Sands, 4 ed. 1973). But, although the omission to mention residential costs might generally lead to the conclusion that they were excluded, see Sutherland, sec. 47.23 at 123, this conclusion does not necessarily follow in this case. Both of those sections were amended subsequent to the Levine decision, the enactment of the questioned regulation and the enactment of the Education Act. Neither amendment specifically disavowed the validity of the regulation. N.J.S.A. 18A:7A-20(a) enumerates the situations in which the state will assist local districts, it does not enumerate every cost which districts must bear. The statement accompanying the amendment in 1979 contemplated both state and federal funding but the statute was addressed only to state assistance. N.J.S.A. 18A:46-14 only mentions the cost of tuition. But the section taken as a whole is susceptible of the interpretation that the Legislature was primarily concerned with the location of facilities and services and with fixing the cost on the district placing the child. In this context, the failure to mention residential costs need not be interpreted to exclude them inferentially in the entire statutory and regulatory scheme when they are nowhere specifically excluded. The State Board's broad power includes the power to adapt the responsibilities of the districts to the evolving requirements of education. See Cammarata, supra, 26 N.J. at 413 (the essential object of delegating broad rule-making power is to encourage the adoption of regulations which are suited to the exigencies of unforeseen and changing circumstances).

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In its brief, the East Brunswick Board contends that "federal reimbursement funds have now dried up." This is no reason for us to negate the regulation or parsimoniously construe the State Board's implied powers to see to the appropriate education of the physically or intellectually disadvantaged. If a true economic dilemma exists, the remedy is through the normal political process, not through judicial emasculation of regulatory power. The allegedly impacted local boards may in concert petition the Executive, the State Board, and the Commissioner to amend or abolish N.J.A.C. 6:28-4.3(g) or create a fairer allocation of the residential costs incurred.

In conclusion, our decision that the State Board has implied power to place the costs of residential care incident to a thorough and efficient education of the mentally retarded on the local boards is fortified by the recent statements of our Supreme Court in N.J. Ass'n for Retarded Citizens v. Human Services, 89 N.J. 234 (1982):

> We have previously recognized the Legislature's strong moral and legal commitment to care for the handicapped. Levine v. Dept. of Institutions and Agencies of N.J., 84 N.J. 234, 249 (1980). It has not only enacted a bill of rights for the developmentally disabled, N.J.S.A. 30:6D-1 to -12, but has vigorously sought to improve the services offered to the mentally handicapped. The record in this case demonstrates that the Departments of Education and Human Services are sincerely attempting to carry out their statutory mandates. [at 249]
>
> * * * * *
>
> ...The Legislature has declared it the policy of this State to maximize the developmental potential of these citizens while affording them the maximum feasible personal liberty. Like all other citizens, the mentally retarded have the right to pursue happiness. Unlike other citizens, they have unique hurdles to overcome in doing so. Rather than exclude them from the pursuit of happiness, the Legislature has made an effort to include them in our civic community by providing them the special services they need to develop and grow. This public policy affirms our common humanity. Their concerns are our concerns. In this State, we do not set people adrift because they are the victims of misfortune. We take care of each other. [at 252]

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To place the residential costs exclusively on the parents would result not in equality but in advantage for the economic elite, a concept incompatible with our constitution, statutory and regulatory schemes and our Supreme Court's analysis of them.

The cross-appeal is dismissed as moot.

Affirmed.

[188 N.J. Super. 592 (App. Div. 1983) cert. den., 94 N.J. 529]

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IN THE MATTER OF THE TENURE	:	
HEARING OF CLAIRE DE KRAFFT,	:	
SCHOOL DISTRICT OF THE TOWN-	:	SUPERIOR COURT
SHIP OF CHERRY HILL, CAMDEN	:	APPELLATE DIVISION
COUNTY.	:	
	:	

Decided by the Commissioner of Education, December 4, 1981

Decided by the State Board of Education, May 5, 1982

Argued: April 25, 1983 -- Decided May 4, 1983

Before Judges Bischoff, J.H. Coleman and Gaulkin.

On appeal from decision of State Board of Education.

Steven R. Cohen argued the cause for appellant Claire DeKrafft (Selikoff & Cohen, attorneys).

Kenneth D. Roth argued the cause for respondent Board of Education of the Township of Cherry Hill (Davis & Reberkenny, attorneys).

No one appeared on behalf of the State Board of Education but a Statement in Lieu of Brief was filed on its behalf. Irwin I. Kimmelman, Attorney General of New Jersey, attorney (Jaynee LaVecchia, Deputy Attorney General, on the Statement).

PER CURIAM

In charges filed March 10, 1980, the Board of Education of the Township of Cherry Hill (Board) alleged that Claire DeKrafft, a tenured teacher, was guilty of conduct unbecoming a teacher, insubordination, and incapacity to carry out her professional responsibilities. Specifically, it was charged that DeKrafft 1) had been chronically and excessively absent which adversely affected her ability to conduct classes in the normal educational process of her students; 2) did not follow prescribed procedure when she was absent concerning arrangements for a substitute teacher; 3) was excessively tardy for classes; and 4) failed to provide emergency class plans to be used in her absence. The charges were referred to the Commissioner of Education for a hearing and, by him, transferred to the Office of Administrative Law for a hearing as a contested case. The hearing consumed eight days, at the close of which the Administrative Law Judge (ALJ) rendered an initial decision recommending dismissal of DeKrafft. The Commissioner adopted her decision, the

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State Board of Education affirmed and DeKrafft's further appeal to this Court followed.

The Board alleged that DeKrafft was absent from school a total of 274 days from September 1971 to March of 1979, an average of 34.3 days per 180 days school year. DeKrafft did not dispute this record of absenteeism but contended that her absenteeism and tardiness were due to her illness and the medication she was taking. Her illness was diagnosed in 1975 as a neurotic, depressive reaction in a schizoid personality structure. She contended that as a result of treatment she had received she had recovered from her illness and at the time of the hearing she contended she was able to function properly.

The ALJ found that in the 1977-78 school year DeKrafft's record of attendance did improve somewhat and that there was no medical reasons given to justify the increase in absenteeism and tardiness the next school year. She also found that since DeKrafft's suspension April 14, 1980, there was no showing of any improvement in her health and DeKrafft failed to show that if reinstated the pattern of absences and tardiness would not be repeated.

The appellant first argues the State Board of Education erred in 1) affirming the finding of the ALJ that DeKrafft's health had substantially improved by mid 1977, leading to the conclusion that her subsequent absences were without justification; 2) in failing to find a positive, affirmatory prognosis of respondent's future competence to teach in the Cherry Hill School District: and 3) in affirming the determination of the ALJ that she failed to have acceptable emergency lesson plans available.

The thoroughly established scope of judicial review of administrative adjudications is limited to determining whether the findings made could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge their credibility. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-83 (1973).

We have carefully and thoroughly examined the complete record of the hearing and considered the findings and conclusions of the ALJ. We are satisfied that there is sufficient credible evidence in the record to support the initial decision of the ALJ and the final determination of the State Board of Education. We therefore shall not disturb them.

DeKrafft's further contention relates to the report of Dr. Fox who had been engaged by the Board to conduct a physical examination of the appellant. That examination was conducted and a copy of the report furnished to appellant. Prior to the close of the hearings the Board notified appellant that it did not intend to call Dr. Fox as a witness. Appellant's offer of the report into evidence was rejected and appellant alleges it was error for the ALJ to refuse to receive and consider the report. Appellant also

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charges it was error for the State Board of Education to refuse to consider the report.

It is conceded that Dr. Fox was available to appear as a witness. Appellant did not call him and did not seek a continuance or adjournment to produce him. Our examination of the report satisfies us that it is inconclusive, ambiguous and would require explanation. It duplicates opinion evidence already in the record and its submission into evidence would result in undue consumption of time. The ruling of the ALJ excluding the report was a proper exercise of discretion. N.J.S.A. 52:14B-10(a); Flanders v. William Paterson College of N.J., 163 N.J. Super. 225, 231 (App. Div. 1976).

Affirmed.

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MARGARET B. DI NARDO, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, : DECISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, September 6, 1982

For Petitioner-Respondent, Rothbard, Harris & Oxfeld (Barry A. Aisenstock, Esq., of Counsel)

For the Respondent-Appellant, Connell, Foley & Geiser (Thomas S. Cosma, Esq., of Counsel)

At its meeting of July 21, 1981, the Jersey City Board of Education abolished seven Assistant Superintendent of Schools positions for reasons of economy and/or efficiency. Board member Smith placed the Motion to abolish on the floor; Board member Link seconded. The Motion carried with a vote of five (5) yes votes and two (2) no votes. (Transcript of Proceedings, July 21, 1981, at 121, 214-215)

Petitioner DiNardo held one of the abolished positions, that of Assistant Superintendent/Elementary. She claims the Board's abolishment action was arbitrary, capricious and politically motivated. She also alleges that her tenure and seniority rights were violated and that the resulting reduction in her salary was illegal.

The Administrative Law Judge made the following findings and conclusions:

1. That petitioner is a tenured assistant superintendent;

2. That the Board's abolishment action of July 21, 1981, was arbitrary, capricious and an abuse of its discretionary authority;

3. That the Board violated petitioner's tenure and seniority rights by assigning some of her duties to James Walling, a Principal assigned to the Superintendent.

DISCUSSION

Petitioner's tenure status was at issue early in these proceedings; subsequently, the Board stipulated as follows:

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> "Although the respondent originally raised claims of improper credentials and allegations of non-qualification, such allegations are deemed waived in that the respondent will stipulate that the petitioner was a tenured Assistant Superintendent at the time the position and title of Assistant Superintendent was abolished." (Letter by Board Attorney, March 26, 1982)

Since petitioner's tenure status as an assistant superintendent has been stipulated, this aspect of the controversy need not be addressed by the State Board.

Discussion of the remaining conclusions of the ALJ and the Commissioner of Education follows.

Based on his review of the July 21, 1981, transcript, the ALJ concluded that the Board's abolishment action was arbitrary, capricious and an abuse of its discretionary authority. In support of his conclusion, the ALJ quoted selected statements from the transcript, expressing the viewpoint of Board members in opposition to, or members of the audience requesting an explanation of, the Board's actions. Conflicting statements appearing in the transcript, expressing support of the abolishment action, were not addressed by the ALJ. For example, Board President Sheeran commented as follows:

> "***All I can tell you is I hope we are making a good decision. We have started at the top, we have done away with what we though (sic) were unnecessary jobs that could be done by someone else. We thought it was too expensive. Hopefully, the things we do in the coming months, hopefully you will be saying thank you.
>
> If you will just hear me out, I have taken your points very well. I really have. I have been in sympathy with you. We are here to do the very best job we can do for the children of Jersey City." (Transcript of Proceedings, July 21, 1981, at 135-136)

Board Member Link stated:

> "I would like to say before we get into the resolutions, I would like to say I view my appointment, I am not tied to any specific special interest group. (sic) I am a representative of the people who foot the bills, the taxpayers of Jersey City. Too long the people have been footing the bills and nobody

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> took into consideration the high taxes they were paying. All you had to do is say this is for senior citizens, this is okay, no matter how efficient it was. If it was for children, it was okay. The powers that be, the political institutions, political hacks, just padded the payrolls, making big jobs for their relatives and their families. What we represent with this new administration is we are concerned about the people that pay, the taxpayers of Jersey City who foot the bills and carry the loads on their backs. Enough is enough. This is going to be a new day in Jersey City." (Transcript of Proceedings, July 21, 1981, at 208-209)

Based on the conflicting views in the transcript, we cannot say which should prevail; nor can we say there was no reasonable basis for the Board's abolishment action. The ALJ has determined which view of the transcript he accepts, but without any explanation thereof. We find a genuine issue exists with regard to petitioner's claim that the Board's abolishment action was arbitrary, capricious and politically motivated. As the New Jersey Supreme Court has stated in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954), with regard to the summary judgment procedure:

> "It is designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> ***
>
> "The standards of decision governing the grant or denial of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.***"

Since we find a genuine issue exists, we do not believe a summary judgment procedure was appropriate.

In support of the finding that James Walling "***has been performing duties previously performed by petitioner***" and the conclusion that the Board violated petitioner's tenure and seniority rights by assigning some of her duties to Walling, the ALJ reviewed several job descriptions, as well as the employment

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record of Walling. We have examined Walling's Employment Record, and four job descriptions, the evidence upon which the ALJ relied. Copies are attached to this State Board decision and identified as follows:

Attachment 1 - Employment Record of James Walling.

Attachment 2 - Elementary Principal, Job Description Locator #2.06, dated 12/19/79, Exhibit P below.

Attachment 3 - Assistant Superintendent for Elementary Education, Job Description Locator #1.06, dated 12/19/79, amended 10/15/80, Exhibit E below, 2 pages.

Attachment 4 - Teacher Assigned to the Office of Superintendent/Curriculum and Planning (Basic Skills Coordinator), Job Description Locator #4.07, dated 12/19/79.

Attachment 5 - Principal Assigned to the Office of Assistant Superintendent/Personnel, dated 12/19/79.

We find no support from these job descriptions for the finding that Walling has been performing duties previously performed by petitioner. Indeed, we cannot discern just what duties Walling is currently performing in the Superintendent's office, limited as the record is in this regard. The record indicates that the job description, Elementary Principal, Attachment 2, is Walling's current job description. The job description's reference point is a "school," except for paragraphs 7 and 8 which refer to "schools" and "tasks assigned by the Assistant Superintendent in Charge." We fail to see how Attachments 1 through 5 provide a basis for the conclusion that petitioner's tenure and seniority rights were violated.

The Commissioner's affirmance of the findings and determination of the ALJ was supplemented by the observation that the abolishment recommendations and resolutions were "'submitted and approved' by the Board Secretary, bypassing in entirety the Superintendent of Schools." The Commissioner disapproved of the Board Secretary's role in this matter. We agree with the Commissioner in that we do not perceive a Board Secretary's role as one which includes the authority to determine the existence or non-existence of assistant superintendent positions; however, in this instance, the Board Secretary's comments may have been misconstrued. We note that, in addition to the quote cited from page 128 of the transcript, the Board Secretary commented further at page 199 as follows:

> "I work for the Board, the Board President requests specific actions be taken. I am that vehicle. Therefore, I am doing what is statutorily in my job specs. That is all." (Transcript of Proceedings, July 21, 1981, at 199)

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Although the Superintendent of Schools commented on matters from time to time during the Board meeting, at no time did he express approval or disapproval of the abolishment motions. Pursuant to N.J.S.A. 18A:17-20, the Superintendent of Schools

> "***shall have a seat on the board or boards of education employing him and the right to speak on all educational matters at meetings of the board or boards but shall have no vote."

That the Superintendent had the right to speak, and remained silent during the deliberations, suggests the need for further factfinding on this point.

HOLDING

Based on the foregoing and the present record in this matter, the State Board reverses and remands this matter for a hearing and a more complete development of the record. The State Board has concluded that there is an insufficient record to support the conclusion, on motion for summary judgment, that the Board's abolishment action was arbitrary, capricious and politically motivated, and that the Board violated petitioner's tenure and seniority rights.

Attorneys Exceptions are noted.

May 4, 1983

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MICHAEL DREHER, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, December 22, 1981

For the Petitioner-Appellant, Michael P. Dreher, Pro Se

For the Respondent-Respondent, Louis Serterides, Esq.

In this case a tenured assistant principal was appointed as principal of an elementary school effective September 1, 1976. By letter dated April 28, 1978, the Superintendent of Schools notified Petitioner that he would not receive tenure as principal. The Board of Education at its meeting of May 11, 1978 determined not to renew Petitioner's contract as principal, and the Superintendent so notified Petitioner shortly thereafter. At its meeting of August 28, 1978, the Board reassigned Petitioner to the position of assistant principal effective September 5, 1978. With regard to Petitioner's claims of tenure as a principal and of the invalidity of his transfer to the assistant principalship, the hearing examiner ruled:

(1) Petitioner was never offered reemployment in the position of principal at the beginning of the next academic year succeeding his second year as principal, and therefore he had not met the requirement of N.J.S.A. 18A:28-6 for obtaining tenure; his employment was on a ten-month basis only.

(2) The Board's action in transferring Petitioner to an assistant principalship "effective September 5, 1978," did not become a four-day extension of the contract covering his principalship, since there was no positive offer of reemployment as principal at any time after Petitioner received notice on April 28, 1978 that he would not be recommended for such reemployment.

(3) The Board of Education did not comply with N.J.S.A. 18A:27-10, requiring that if a nontenured teaching staff member is not to be reemployed, written notice to that effect must be given to him on or before April 30th. Therefore, under

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N.J.S.A. 18A:27-11, the Board was deemed to have offered Petitioner continued employment for the next succeeding school year upon the same terms and conditions.

(4) While the latter section thus entitled Petitioner to the benefits of a successor contract, such entitlement does not include tenure and is conditioned by any termination clause contained in the usual Board contract. The hearing examiner accordingly concluded that Petitioner was entitled to the salary and attendant emoluments he would have received had he been retained as principal, mitigated by the salary and other benefits he was actually paid as assistant principal, for a period corresponding to the termination clause of his last contract as principal, if one existed; and if no termination clause did exist, the Petitioner's contract rights as aforesaid would run for the entire 1978-79 school year.

The Commissioner did not follow the initial decision, but held that even though the Board failed to adhere strictly to N.J.S.A. 18A:27-10, its actions were not flawed to such an extent as to warrant the Commissioner's setting them aside, or granting the monetary relief recommended by the hearing examiner. He therefore dismissed the Petition.

We agree with the dismissal of the Petition in this matter, but not for the reasons expressed in the Commissioner's decision. In our judgment, the Board did not comply with the statute, N.J.S.A. 18A:27-10. There was, in effect, no board of education action pursuant to N.J.S.A. 18A:27-10. We agree with the hearing examiner that, under N.J.S.A. 18A:27-11, the Board was then deemed to have offered Petitioner continued employment for the next succeeding school year "upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education." The analysis does not end there, however, for Petitioner was under an affirmative obligation to comply with N.J.S.A. 18A:27-12, in order for the provisions of the article to be applicable.

> 18A:27-12. Notice of acceptance; deadline
>
> If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1 in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.

We find no evidence that Petitioner complied with the subsequent condition imposed by N.J.S.A. 18A:27-12 and is, therefore, not

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entitled to the monetary relief recommended by the hearing examiner.

For this reason, we affirm the decision of the Commissioner of Education.

Maud Dahme abstained in this matter.

Exceptions are noted.
July 6, 1983

PENDING N.J. SUPERIOR COURT

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CHARLES T. EPPS, JR.,	:	
APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	APPELLATE DIVISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, November 15, 1979.

Decided by the State Board of Education, April 8, 1980.

Submitted November 22, 1982 -- Decided January 3, 1983.

Before Judges Ard and McElroy

On appeal from decision of the State Board of Education.

Philip Feintuch, attorney for appellant
(Alan S. Porwich, on the brief).

William A. Massa, attorney for respondent.

A statement in lieu of brief was filed on behalf of New Jersey State Board of Education by Irwin I. Kimmelman, Attorney General, attorney (Mary Ann Burgess, Assistant Attorney General, of counsel and on the statement).

PER CURIAM

Charles T. Epps, Jr., an employee of the Board of Education of the City of Jersey City, appeals from the decision of the New Jersey State Board of Education, denying him tenure status in the position of supervisor and back pay which he claimed on the basis of his five-year supervisory service within the Title I program.

Epps filed a petition with the commissioner of education in February 1978 seeking tenure eligibility, appropriate salary adjustment and retroactive salary. The administrative law judge issued an initial decision on September 17, 1979. He dismissed the appeal holding that the petitioner had failed to establish his claim that he had acquired a tenure status of employment as a supervisor in the Board's employ. The commissioner of education affirmed the findings and determination as rendered in the initial decision. An appeal was made to the New Jersey State Board of Education. On April 8, 1980, the State Board of Education denied petitioner's request for

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oral argument and affirmed the decision of the commissioner. This appeal followed.

On June 23, 1982, our Supreme Court decided Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). In that case the Supreme Court ruled:

> . . .We hold that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1. [at 81].

Moreover, the Court went on to hold:

> . . .There is no reason to believe that the Legislature in fact intended to exclude Title I teachers from the scope of N.J.S.A. 18A:28-5. They are "teaching staff members" under N.J.S.A. 18A:28-5. We find no exception in the statute that would deny tenure to Title I teachers. [at 82].

We are satisfied the facts of this case are controlled by ruling in Spiewak, and accordingly, the determination below is reversed.

Epps was first employed by the Jersey City Board of Education in 1967 as a classroom teacher. In 1972 he was transferred to the Title I program, acquiring the title of Coordinator of Teachers' Aide Project. At that time his credentials consisted of a teaching certificate. His immediate supervisor was the director of the Title I program, Dr. James Y. Gaines. His duties encompassed responsibility over all the paraprofessional and professional teachers in the program. He supervised, evaluated and recommended teachers. The people under his direction were fully certified teachers called instructional assistants assigned to Title I. Epps supervised approximately 60 to 70 individuals in 17 schools.

In 1973 his title was changed from coordinator to supervisor. In 1975 his title changed once again to Coordinator of Supportive Services, and his responsibilities expanded to include the nurses, doctors and the psychologists. In 1977 a new title of Coordinator of Math was conferred upon him. At that point, his job description changed and all supervisory and evaluative functions ended.

Throughout the applicable period of time in which Epps served in a supervisory capacity, there was a classification of tenured personnel within the Board of Education known as supervisors. They were paid more than Epps. In 1978 Epps additionally

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received the administrator's certification from the State Board which requires two years of service under the supervisor and principal certificates.

In the hearing below, two former members of the Jersey City Board of Education testified to the Board's intention that supervisory personnel within Title I have duties, and qualifications commensurate with those of the supervisory personnel employed as "regular" staff members. Dr. Gaines substantiated the testimony of petitioner regarding his supervisory and evaluative functions.

In the initial hearing, the administrative law judge found the following facts:

> 1. Petitioner began his employment with the Board in September 1967 as a classroom teacher.
>
> 2. Petitioner was appointed to the position of coordinator of teacher aides in the Title One program.
>
> 3. Petitioner supervised and evaluated teacher assistants and teacher aides between 1972 and 1977.
>
> 4. Petitioner at all times material herein was in possession of a supervisor's certificate.
>
> 5. The Board did not direct nor assign petitioner to supervise and/or evaluate teaching staff members as defined at N.J.S.A. 18A:1-1.
>
> 6. Such supervision and evaluation of teacher assistants was performed solely on the basis of direction petitioner received from the Title One Director.

In denying Epps' tenure status as supervisor, the administrative law judge felt bound by Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E. & A. 1941) and Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962); however, we disagree with their application in the instant case.

In Spiewak v. Rutherford Bd. of Ed., supra, our Supreme Court stated:

> . . .The Tenure Act, N.J.S.A. 18A:28-1 to -18, specifically defines the conditions under which teachers are entitled to the security of tenure. The statute makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms. (Citations omitted). [90 N.J. at 72].

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In distilling the aforementioned statutes, the Court stated:

> . . .By the express terms of these statutes, an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time.
>
> There is no question that the teachers in this case fall within the express terms of the statute. They are therefore presumptively eligible for tenure unless a statutory exception applies. [90 N.J. at 74].

We find no statutory exception in the instant case. The controlling authority of Spiewak mandates reversal of the State Board's determination. Epps, a supervisor of remedial teachers and other professionals, has worked in a supervisory capacity for which a certificate is required, holds a valid supervisory certificate, and had been so employed from 1972 until the hearing date. The federal funding through Title I is of no significance. The very people Epps was supervising are now viewed as "teaching staff members" entitled to tenure. The administrative conclusion that "teacher assistants" cannot be equated with "teaching staff members" is erroneous in light of the Supreme Court's contrary holding that remedial and supplemental Title I teachers are considered "teaching staff members." Id. at 82. Furthermore, the determination that Epps' positions were not set forth in the statute nor deemed requisite of a specific certificate is clearly erroneous. The relevant provisions of N.J.S.A. 18A:28-5 state in pertinent part:

> The services of ... such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education ... shall be under tenure ....

Here, Epps was certified by the State Board of Examiners as a supervisor. He acted in the capacity of a supervisor, and his job specification prior to 1977 set forth supervisory and evaluative functions. In light of the court's determination in Spiewak that both Title I teachers and regular Board appointed teachers are entitled to full statutory benefits, the administrative finding that Epps was not appointed by the Board as a supervisor is not controlling. If Title I teachers cannot be arbitrarily denied the protection of the Tenure Act, neither may their supervisors. If the requisite conditions for tenure are met, it is irrelevant whether or not the Title I teachers are appointed by the Board itself or by the director of the Title I program.

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Moreover, Epps' claim is appropriately considered in the context of N.J.S.A. 18A:28-6 which states:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

Thus, an even shorter statutory period controls petitioner's claim based on his previously-acquired tenure as a classroom teacher. We are satisfied the statute provides Epps with tenure in the position of supervisor and find no exception in the statutes which would require a contrary holding.

In addition to seeking tenure, Epps also seeks retrospective damages. However, the holding in Spiewak specifically limited retrospective relief, only to the parties in Spiewak. In so ruling, the Court stated:

> ...We therefore conclude that this decision should have only prospective application to those parties who are not before the Court. [90 N.J. at 83; emphasis supplied].

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The aforementioned language allows retroactive relief only to the parties seeking relief in the consolidated action of Spiewak v. Rutherford Bd. of Ed., supra. Had the Supreme Court contemplated the inclusion of other similarly situated plaintiffs with tenure suits pending in the courts, it would have explicitly stated same and indicated a cut-off date as it expressly designated in Ramirez v. Amsted Industries, Inc., 86 N.J. 332, 357 (1981). We therefore conclude that Epps is not entitled to retroactive relief.

We hold that he is entitled to tenure and reverse the decision of the State Board of Education. We remand the case to the commissioner of education to determine when tenure accrued. We do not retain jurisdiction.

Reversed and remanded.

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JAMES J. FLANAGAN, :

PETITIONER-RESPONDENT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, : APPELLATE DIVISION

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, November 6 1980.

Decided by the State Board of Education, December 2, 1981.

Submitted January 11, 1983 - Decided January 24, 1983.

Before Judge Michels, Pressler and Trautwein.

On appeal from the State Board of Education.

Murray, Granello & Kenney, attorneys for the appellant (Malachi J. Kenny, of counsel; Russell P. Goldman on the brief).

Kaye & Davison, attorneys for the respondent (Duane O. Davison on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the statement).

PER CURIAM

Appellant Board of Education of the City of Camden appeals from a determination of the State Board of Education according petitioner James J. Flanagan seniority rights to all subject-area supervisory positions on the basis of his seniority as an audio-visual supervisor, a position eliminated for economy reasons.

It is the contention of the Board of Education that seniority in a supervisor's position should be based on length of service in supervising a specific subject area and that such experience should not be transferable to other subject areas. The Commissioner of Education disagreed with this contention and the State Board of Education affirmed the Commissioner despite a contrary opinion of its legal committee. We regard the question as close but nevertheless subject to the educational policy expertise

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of the State administrative officials and agencies charged with the administration of the school laws.

Accordingly, we affirm for the reasons set forth in the decision of the Commissioner of Education, which was affirmed by the State Board of Education.

Affirmed.

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MR. & MRS. G.L., on behalf of D.L.,

PETITIONERS-RESPONDENTS,

V.

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

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 22, 1982

G.L., on behalf of D.L., Petitioner-Respondent, Pro Se

For the Board, Kalac, Newman & Griffin (Peter P. Kalac, Esq., of Counsel)

D.L. contested her expulsion from school on the ground of insufficient evidence to support the charge of "selling a controlled dangerous substance on school premises." The Administrative Law Judge found the expulsion action must be set aside for the following reasons:

1. Lack of expulsion hearing within 21 days of suspension, in accordance with R.R. v. Board of Education of Shore Regional High School District, 109 N.J. Super. 337 (Ch. Div. 1979);

2. Failure of the Board to have afforded D.L. the opportunity to confront her accusers, in accordance with Tibbs v. Board of Education of Franklin Township, 59 N.J. 506 (1971);

3. Failure to establish the pills contained a controlled dangerous substance or to produce the actual pills.

The Commissioner found that the Administrative Law Judge properly weighed and evaluated the circumstances of D.L.'s expulsion, determined that the expulsion action must be set aside, and reinstated D.L.

The State Board Legal Committee agreed with the Administrative Law Judge, and the Commissioner of Education, that the Upper Freehold Board's expulsion action should be set aside. It submitted its Legal Committee Report to the parties.

The Legal Committee's determination was based upon the failure of the Upper Freehold Board to require and hear the testimony of accusing witnesses. The Legal Committee determined

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that the Upper Freehold Board's decision to expel D.L. was based on hearsay, including D.L.'s own statement executed in the presence of the vice principal, admitting the sale of nine pills which were characterized as "Christmas Trees." The nine pills were later explained to have been Dexatrim, weight-control pills sold over the counter. The Legal Committee stated that, while production of the actual pills was not essential to the charge, oral testimony supporting the charge was. Not one witness with direct knowledge of the transaction was produced to testify at the Board's expulsion hearing. Based on these reasons, the Legal Committee recommended that the expulsion be set aside; however, it did not recommend D.L.'s reinstatement. Because the sale of a controlled dangerous substance on school premises is a danger to the school community and should not be condoned, the Legal Committee recommended that the matter be remanded for a full evidentiary hearing.

In its exceptions to the Legal Committee Report, the Upper Freehold Board asserted that D.L.'s statement to the vice principal was admissible as an exception to the hearsay rule, R. 63(7). The State Board of Education agrees with the Upper Freehold Board and recognizes D.L.'s statement was admissible against her. Nevertheless, it is our position that hearsay evidence alone, even if admissible as an exception to the hearsay rule, is simply not enough to carry the burden of proof incumbent upon a board of education which is exercising the most severe sanction of expelling a student from school.

Therefore, based on the reasons expressed in the Legal Committee Report, and recognizing the exceptions which have been filed by the Upper Freehold Board, the State Board remands this matter to the Commissioner of Education with the direction that the Upper Freehold Board conduct a full evidentiary hearing. The State Board also directs that the Commissioner retain jurisdiction in this matter.

Maud Dahme abstained in this matter.

Attorney exceptions are noted.
July 6, 1983

(Withdrawn September 1, 1983)

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GLEN ROCK BOARD OF EDUCATION,	:	
RESPONDENT-APPELLANT,	:	
V.	:	SUPERIOR COURT
THOMAS BIERMAN,	:	APPELLATE DIVISION
PETITIONER-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, July 17, 1980.

Decided by the State Board of Education, December 2, 1981.

Argued February 23, 1983 - Decided May 12, 1983.

Before Judges Michels, Pressler and Trautwein.

On appeal from a Final Decision of the New Jersey State Board of Education.

Martin R. Pachman argued the cause for the appellant (William Wallen, on the brief).

Sheldon H. Pincus argued the cause for the respondent (Bucceri & Pincus, attorneys; Mr. Pincus on the brief).

PER CURIAM

The matter under review is affirmed substantially for the reasons expressed in the written decision of the Commissioner of Education dated July 17, 1980 and adopted by the State Board of Education on December 2, 1981.

Affirmed.

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IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH GUMA, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWN OF	:	DECISION
SECAUCUS, HUDSON COUNTY.	:	
	:	

Decided by the Commissioner of Education, October 25, 1982

For the Petitioner-Cross-Appellant, Marvin A. Stern, Esq.

For the Respondent-Appellant, Greenberg, Kelley & Prior (John B. Prior, Esq., of Counsel)

The decision of the Commissioner of Education, dismissing respondent from his employment with the Secaucus Board of Education, effective October 25, 1982, is affirmed for the reasons expressed therein.

May 4, 1983

PENDING N.J. SUPERIOR COURT

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PHILIP HOWLEY,	:	
PETITIONER-APPELLANT,	:	
AND	:	
DEWEY BOOKHOLDT, JR.,	:	
PETITIONER-CROSS-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 20, 1982

For the Petitioner-Appellant, O'Dwyer & Malone (John F. Malone, Esq., of Counsel)

For the Petitioner-Cross-Appellant, Sterns, Herbert & Weinroth (Mark D. Schorr, Esq., of Counsel)

For the Respondent-Respondent, Merlino, Rottkamp & Flacks (Robert B. Rottkamp, Jr., Esq., of Counsel)

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

June 1, 1983

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GEORGE HUFF AND THE RAMAPO-INDIAN HILLS EDUCATION ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, February 22, 1982.

Decided by the State Board of Education, July 7, 1982.

Argued: October 12, 1983 - Decided October 28, 1983.

Before Judges Michels and King.

On appeal from the New Jersey State Board of Education.

Sheldon H. Pincus argued the cause on behalf of appellants (Bucceri & Pincus, attorneys; Gregory T. Syrek, on the brief).

Jacob Green argued the cause on behalf of respondent (Green & Dzwilewski, attorneys; William J. Linton and Paul H. Green, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement on behalf of the State Board of Education (Regina Murray Mahoney, Deputy Attorney General, on the statement).

PER CURIAM

This appeal was taken from the final decision of the State Board of Education which affirmed the Commissioner of Education, who had rejected the administrative law judge's recommendations. The dispute involved tenure rights after a reduction in force. We agree with the State Board's decision and affirm for substantially the reasons given by the Commissioner in his decision of February 22, 1982.

These are the basic facts. Appellant Huff was hired by respondent-board as a social-studies teacher in February 1974. He achieved tenure in that position in February 1977. William

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Laufenberg was hired as social-studies subject supervisor in July 1978 and achieved tenure in that position in July 1981. As a matter of educational policy, the board chose to assign teaching duties to its subject supervisors. Accordingly, Laufenberg taught two social-studies classes during 1978-1979 school year, three in 1979-1980, and three in 1980-1981.

In April 1981, pursuant to a reduction in force (RIF), the board reduced appellant's employment from full-time to one-tenth time, a move which appellant rejected for financial reasons. As in the two previous years, Laufenberg was again assigned to teach three social-studies classes in 1981-1982. On September 21, 1981 the board abolished the one-tenth position and created an eight-tenths position, which it offered to appellant Huff, who accepted it and began working on October 1, 1981.

Meanwhile, in May 1981 appellant and his association filed a petition with the Commissioner of Education alleging that the board's reduction in Huff's employment together with its reappointment of Laufenberg, a non-tenured staff member, violated Huff's tenure and seniority rights to a social-studies teaching position. In its answer the board denied these allegations. Appellants moved before the administrative law judge for summary judgment; the board opposed the motion.

In January 1982 the administrative law judge ruled in Huff's favor, finding that in assigning Laufenberg, a subject supervisor, to teach classes, it effectively circumvented Huff's seniority rights to teach. The judge recommended that Huff be paid for the classes taught by Laufenberg in September 1981 (on an eight-tenths time basis) and that from October 1, 1981 he receive the differential two-tenths of his full-time salary.

The Commissioner rejected the administrative law judge's recommendation and ruled that Laufenberg's seniority was as a subject supervisor, not as a social-studies teacher, and that this seniority need not be compared to Huff's for the purposes of assessing Huff's entitlement. The State Board issued a final decision affirming the Commissioner for the reasons expressed by him.

Huff argues that the board's assignment of Laufenberg to teach three social-studies classes in 1981-1982, at the same time it reduced his load to one-tenth time (one-half of one class per day), violated his seniority rights. He notes that as of the end of the 1980-1981 year, he had 7.5 years of seniority as a social-studies teacher (he began in February 1974), whereas Laufenberg had at most one year's seniority in that position, assuming that his equal split of supervisory and teaching duties in 1980-81 can be counted toward seniority in the teaching category.

A reduction in force (RIF) is an exception to the prohibition against dismissing or reducing the compensation of tenured teachers without the protection of the tenure laws. N.J.S.A. 18A:6-10; N.J.S.A. 18A:28-5. N.J.S.A. 18A:28-9 reads

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

"Reduction in force (RIF), whether of tenured or nontenured teachers, if done for reasons of economy, is entirely within the authority of the board." In re Maywood Bd. of Educa., 168 N.J. Super. 45, 55 (App. Div.), certif. den., 81 N.J. 292 (1979). Accord Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 80 (1982). In effecting such reductions, a board must be guided by seniority

> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board. [N.J.S.A. 18A:28-10].

The parties on appeal assume that the term "dismissals" for RIF purposes must not be read literally but is broad enough to include the kind of demotion which occurred here and the Commissioner has uniformly held that a reduction in employment hours (here from full to part-time) constitutes a RIF. See, e.g., Popovich v. Bd. of Ed., 1975 S.L.D. 737, 745.

The "standards to be established," as mentioned in N.J.S.A. 18A:28-10, are clarified in N.J.S.A. 18A:28-13

> The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both.

The Commissioner's response to this statutory mandate was N.J.A.C. 6:3-1.10, which is the regulation crucial to this appeal. Seniority, for the purposes of a reduction in force, is determined by time of service "in the school district in specific categories as hereinafter provided." N.J.A.C. 6:3-1-10(b) (emphasis added). The

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categories are 30 in number and, pertinent to this case, include "subject supervisor" and "secondary" teacher. N.J.A.C. 6:3-1.10(k) 22 and 27. Under N.J.A.C. 6:3-1.10(b), therefore, it must be determined in which of those two categories Huff and Laufenberg had seniority. Only in that category may each assert a claim of entitlement. N.J.A.C. 6:3-1.10(h) sets forth the mechanics of a RIF

> Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him. [Emphasis added].

Huff's only seniority category was secondary teacher. After the RIF he was entitled to assert seniority only within that category. Since he held certification only in social-studies, his seniority entitlement was limited to a social-studies teaching position within the secondary category because N.J.A.C. 6:3-1.10(k)27 creates a separate seniority category where a secondary teacher has a subject-matter certification.

In deciding who goes and who stays in a RIF, the local board is required to "determine the seniority of the persons affected according to" the standards in N.J.A.C. 6:3-1.10. In this case, therefore, the board was required to look to the seniority category of secondary social-studies teacher and choose the least senior teacher in that category to be reduced to one-tenth time. Apparently, Huff was the only full-time social-studies teacher; hence, there was no one against whom he could compare his seniority.

The real issue is wheter Laufenberg somehow should be factored into the RIF as it affected Huff. The basis of Huff's argument is that because Laufenberg taught some social-studies classes as part of his supervisory duties, Huff should be able to compare his seniority as a teacher to Laufenberg's. Huff begins by noting that Laufenberg worked in two seniority categories - teacher and subject supervisor. Such a situation is addressed by N.J.A.C. 6:3-1.10(e)

> (e) Not more than one year of employment may be counted toward seniority in any one academic or calendar year. Whenever a person shall hold employment simultaneously in two or more categories, seniority shall be counted in the category in which he spends the greatest percentage of his time. If the percentage of time spent in two or more categories shall be equal, the person shall be permitted to elect in

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> which category his seniority shall be counted. Notwithstanding the provisions of this Section, the seniority of a principal who teaches shall be counted in the appropriate principal's category. [Emphasis added].

Laufenberg did work in two categories, which Huff sets forth in tabular form as follows

Year	Dept. Duty Periods	Teaching Periods
1978-1979	4	2
1979-1980	4	3
1980-1981	3	3

Thus in the first two years, by operation of N.J.A.C. 6:3-1.10(e), Laufenberg was in the "subject supervisor" category. But in the last year his duties were evenly split, in which case he could "elect in which category his seniority shall be counted." N.J.A.C. 6:3-1.10(e). Huff complains that the board never asked Laufenberg to make such an election, since it expressly left subject supervisors out of teacher seniority calculations. In any event, Huff reasons, even if Laufenberg had elected to be in the teacher category for 1980-81, Huff still had greater seniority as a teacher: 7.5 years to one year. And if Laufenberg elected the subject-supervisor category, Huff's margin would be even greater: 7.5 to zero. Concludes Huff: "On this basis, there is absolutely no way in which Laufenberg could be deemed to have a superior right on the basis of seniority to teach Social Studies."

Huff's argument is superficially appealing, and would be correct if Laufenberg were in the same seniority category as Huff. But Laufenberg was a subject-supervisor who also taught as part of his duties. As such, he was in a different seniority category; comparing his seniority to Huff's would be like comparing eggs and bananas. Regarding the 1980-81 year when Laufenberg's duties as supervisor and teacher were equal, we must assume that if allowed to elect, he would have elected to be in the subject-supervisor category, to avoid being lumped into the teaching category.

The board points out this flaw in Huff's theory and notes that it might effectively preclude or at least deter subject-supervisors from teaching, since they would always be subject to reduction in their duties whenever there was a RIF

> ... Applying appellant's logic, it would appear that a tenured subject supervisor, who teaches and supervises, could be reduced to a part-time status by the compelled removal of his teaching load in favor of a tenured teacher in order to keep the teacher's load full-time. Nothing in the statute or regulations creates such a preference for a tenured teacher over other

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> employees who may teach as a part of their duties in another category under N.J.A.C. 6:3-1.10(k).

Further, the board concedes Huff's point that it intentionally did not include Laufenberg, or any other subject supervisors, in the RIF calculations but properly asserts that it need not have done so because the RIF was in the category of social-studies teacher only, not in that of subject-supervisor of social-studies.

In this case the board abolished the only full-time social-studies teaching position, and created a single one-tenth time position. Thus there was no full-time position to which Huff could claim entitlement. The board did not simultaneously increase Laufenberg's teaching duties; rather, it kept him at the same rate of three classes per day (eight-tenths time). The board concisely summarizes why its action was proper

> In the case at bar, there is no allegation that Huff's teaching load continued to exist and was assigned to another. Rather, Huff's contention is that the local board was required to take the affirmative step of changing Laufenberg's duties upon his reappointment, to take away Laufenberg's previously existing teaching load and give it to Huff. The tenure laws do not require that a teacher's employment be continued by reaching across categories, in themselves presumptively educationally valid, in order to create or recreate employment for an individual whose employment is in the unchallenged judgment of the local board unnecessary for reasons of economy.

Before the Commissioner the board offered bona fide educational reasons for its policy that all subject-supervisors should teach. The district superintendent stated

*****

> 5. Subject Supervisors are expected to function as "Master Teachers"; they must demonstrate effective teaching techniques to their teachers, rather than simply describe them. They must provide an example to the members of the departments.
>
> 6. Subject Supervisors bear major responsibility for the in-service training of teaching staff members, for assisting department members in day-to-day problems of instruction, for the development of curriculum, and for the selection of textbooks and other materials.

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7. The District requires Subject Supervisors to devote part of their time to teaching in order to enhance their effectiveness as Subject Supervisors. They are expected to personally experience day-to-day problems of instruction and to personally teach the curriculum and use the textbooks in the classroom.

8. A decision to artificially sever the "teaching" from the "supervisory" functions of the Subject Supervisors would adversely affect the District's educational program by diminishing the effectiveness of the Subject Supervisors.

9. A decision requiring Subject Supervisors' employment to be reduced to part-time before reductions in force are conducted among their subordinates would also adversely affect the District's educational program.

As we said in Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354, 357 (App. Div. 1982), certif. den., 93 N.J. 277 (1983), "reduction in force is entirely within the authority of the board if done for reasons of economy." The form of educational policy which molds the manner of the RIF "is no concern of the courts," id. at 358, so long as a teacher was not treated unfairly within the applicable category for seniority purposes.

In view of the above we reject as clearly without merit Huff's argument that he held an absolute right to a teaching position because Laufenberg was not a tenured subject-supervisor at the time of the RIF. R. 2:11-3(e)(1)(E).

In conclusion, we note for completeness that the pertinent regulation, N.J.A.C. 6:3-1.10, has been substantially revised, effective September 1, 1983. This revision applies prospectively only; thus we make no comment upon its potential application to the issues in the present litigation.

Affirmed.

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LILLIAN HYNES,	:	
PETITIONER-RESPONDENT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 30, 1980.

Decided by the State Board of Education, December 3, 1980.

Argued October 26, 1982 - Decided June 6, 1983.

Before Judges Botter, Polow and Brody.

On appeal from State Board of Education.

John A. Errico argued the cause for appellant.

Sheldon H. Pincus argued the cause for respondent (Bucceri & Pincus, attorneys; Mr. Pincus on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent, filed a statement in lieu of brief (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the statement).

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

Petitioner, Lillian Hynes, is a tenured teacher in the Bloomfield Township school system. She applied for paid sick leave from December 1, 1978 until January 24, 1979 for maternity based upon a doctor's certificate indicating an expected date of confinement of December 27, 1978. Her child was born on December 19, 1978. Respondent, the local Board, denied petitioner's request for paid sick leave because she "did not provide sufficient evidence of disability...." The State Board of Education (State Board) on appeal ruled that sick leave was allowable to a pregnant teacher based upon presumptive periods of disability commencing one month before the expected date of childbirth and ending one month (20 working days) after childbirth. The local board appeals. We conclude that the determination by the State Board is a reasonable exercise of its administrative authority and affirm.

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Based upon her doctor's certification that she was pregnant and was expected to give with on December 27, 1978 without setting forth any other cause of disability. Upon receiving the application, the superintendent of schools requested that he be advised of the expected termination date for maternity leave. Subsequently, the superintendent asked petitioner to report for an examination by the school physician on December 19 "in order to determine any disability for sick leave which you have requested." Hynes failed to keep the appointment because on that date at 5:20 a.m. she delivered her child.

On March 27, 1979 the superintendent advised Hynes that her application for maternity leave had been granted through June 30, 1979, but that her application for sick leave was denied "since you did not provide sufficient evidence of disability and did not accede to our request to be examined by a board named physician." Hynes then explained the reason for not keeping the appointment with the school doctor. The superintendent responded that further consideration of her claim for sick leave would be given if her doctor certified (1) the actual date when the claimed disability or illness started, (2) the nature of the illness or disability, (3) whether such illness or disability prevented the performance of duties as a teacher during the time in question, (4) the treatment prescribed, and (5) the exact date of termination of such illness or disability. However, the certifications requested were not furnished.

When Hynes failed to provide the additional certifications, her application for sick leave was rejected. On her appeal to the Commissioner the matter was submitted to an Administrative Law Judge (ALJ). Relying on the ALJ's opinion and findings, the Commissioner of Education held that Hynes could use her accumulated sick leave credits for prenatal disability from December 1, to December 27, 1978, the anticipated date of her confinement, but that she would have to present an additional medical certificate for the period of postnatal disability.

The local Board appealed to the State Board which, in its decision, endeavored "to clarify the existing law for the future guidance of local boards." The State Board followed the Commissioner's earlier pronouncements in the Cinnaminson case.[1] The State Board said:

> To further elucidate the subject, we believe that in pregnancy cases, if the teaching staff member

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[1] Board of Educ. of Cinnaminson Tp. v. Silver, 1976 S.L.D. 738. This decision was affirmed by order of the State Board of Education under date of April 4, 1979.

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> is requesting no sick leave before the ninth month of pregnancy, the physician need only certify the date that birth is expected. The presumption will then arise that disability begins one month prior to the anticipated delivery. Likewise, if the teacher requests no sick leave beyond one month following delivery, the physician need only certify the date of the actual birth; the presumption of disability will cover the following month. If, however, the staff member wants to take sick leave either more than one month before anticipated delivery or more than one month after the birth, the Board may require a further physician's certificate as to the actual dates that the disability began or terminated, as the case may be. On the other hand, if the teacher continues to work during her ninth month of pregnancy (and the Board's physician does not find her unfit), the presumption of disability for that month is overcome pro tanto.

Thus, the State Board held that Hynes was entitled to sick leave for a period of postnatal disability ending on January 19, 1979, but that Hynes would have to provide a doctor's certificate if she wished to claim sick leave for the period beyond one month postpartum, namely, from January 19 to January 24.

Sick leave with full pay for a minimum of 10 school days per year, subject to accumulation, is provided by statute for all persons regularly employed by a board of education. N.J.S.A. 18A:30-2 and 3. Sick leave is defined as absence from work for "personal disability due to illness or injury" or exclusion on account of a contagious disease. N.J.S.A. 18A:30-1. Pregnancy is neither an "injury or illness," and so disability due to pregnancy is not within the literal terms of N.J.S.A. 18A:30-1. See Castellano v. Linden Bd. of Educ., 158 N.J. Super. 350, 360-362 (App. Div. 1978), aff'd 79 N.J. 407, 410 (1979). However, Castellano held that disallowing sick leave for disability caused by pregnancy discriminates against women, since sick leave is available for disabilities due to illness or injury.

> A woman giving birth to a child becomes physically disabled and unable to attend to her teaching duties for that reason. It is discriminatory not to allow her to use her accumulated sick leave during that period of temporary disability, when it can be used for any other period of absence due to physical disability. [79 N.J. at 412-413].

Thus, the provisions of N.J.S.A. 18A:30-1 et seq. govern sick leave for disability due to pregnancy as well as other causes.

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The State Board's determination establishes as a matter of policy a presumptive period of disability of four weeks before the projected delivery date and a like period following delivery. We are not told whether this decision is based upon common knowledge that can be judicially noticed, see Evid. R.9(1),[2] or was fashioned after a provision that was once part of our Temporary Disability Benefits Law, N.J.S.A. 43:21-29. Before its amendment by L.1980, c. 90, sec. 13, that statute provided: "For the purposes of this act, pregnancy may be deemed to be a sickness during the four weeks immediately preceding the expected birth of a child and the four weeks immediately following the termination of the pregnancy." This provision, however, was deleted in 1980, not long before the State Board's decision in this case. The Attorney General recommended the deletion, not because the presumption of disability for the period specified is unjustified but rather because the provision "restrict[ed] benefit eligibility for disability associated with normal pregnancy ..." to eight weeks while "all other claimants ... [may] collect benefits for up to 26 weeks." See N.J. Attorney General Formal Opinion No. 2, 1979, 103 N.J.L.J. at 198 (March 8, 1979). Thereafter, the Commissioner of Labor and Industry announced that benefits would not be limited to the four week periods before and after the delivery date. "Pregnancy Treated Like Other Temporary Disabilities" 103 N.J.L.J. at 435 (May 10, 1979).

N.J.S.A. 18A:30-4 provides:

> In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave.

The statute does not say what the physician's certificate must contain, if one is required. In this case, the State Board has established a presumption of disability based upon a physician's certification of expected and actual delivery dates. The local Board demanded a certificate specifying the nature of the disability and other related information.

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[2]There was no hearing in this case and no expert opinion in documentary form presented on the issue. A better record might have been developed had the agency followed rule-making procedures provided by the Administrative Practice and Procedure Act, N.J.S.A. 52:14B-1 et seq. This would have afforded "all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing" for full agency consideration. N.J.S.A. 52:14B-4. As the Supreme Court admonished in R.H. Macy & Co., Inc. v. Director, Div. of Taxation, 41 N.J. 3, 4 (1963), administrative agencies "shall always be alert to their rule-making powers ... to avoid the suggested burdens of individual quasi-judicial determinations." But see In re Uniform Admin. Procedure Rules, 90 N.J. 85, 93 (1982), on rule-making by adjudication of individual disputes. The State Board of Education is cloaked with general rule-making power. N.J.S.A. 18A:4-15 and 16.

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The State Board has ruled, in effect, that a teacher need not work during the presumptive periods of disability unless she desires to do so. The teacher's decision to work into the ninth month would be binding on the local board of education. Compare de Laurier v. San Diego Unified School Dist., 588 F. 2d 674 (9 Cir. 1978), where the court found substantial evidence to support the trial judge's conclusion that business necessity justified prohibiting a pregnant teacher from teaching during the ninth month. The trial judge had found that administrative and educational objectives were furthered by the rule in part because the ability of women to perform teaching duties in the ninth month is impaired by reduced mobility, imbalance, and increased fatigue, awkwardness and irritability. The teacher sought to work until the onset of labor and had presented medical experts who testified that "a normally pregnant woman should experience no particular handicap in her work." 588 F.2d at 680. See also Cleveland Board of Educ. v. LaFleur, 414 U.S. 632, 642 (1976), where the court invalidated mandatory rules requiring pregnant teachers to discontinue work at specific periods before the delivery date, even assuming some incapacity to perform teaching duties during the later states of pregnancy. The court also invalidated a rule that prohibited a teacher from returning to work until her child was three months of age.

Under contract with the U.S. Department of Health, Education and Welfare, the Public Health Service, and the National Institute for Occupational Safety and Health, the American College of Obstetricians and Gynecologists issued a research report in 1977 entitled, "Guidelines on Pregnancy and Work." That report states that, subject to "infrequent exceptions," the following "caveat" applies:

> The normal woman with an uncomplicated pregnancy and a normal fetus in a job that presents no greater potential hazards than those encountered in normal daily life in the community may continue to work without interruption until the onset of labor and may resume working several weeks after an uncomplicated delivery.
>
> [Id. at 12].

We cannot conclude that the demands of teaching are no greater than those encountered in normal daily life. Furthermore, in a previous "Statement of Policy on Pregnancy Disability," (1974) the American College of Obstetricians and Gynecologists said:

> In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and the puerperium. The usual duration of such disability is approximately six to eight weeks. [Emphasis added.]

We conclude that the policy determination of the State Board establishing a presumptive period of disability of four weeks before the expected birth and four weeks following the actual date

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of birth is not an unreasonable exercise of administrative authority to expedite the administration of disability benefits. See Campbell v. Dept. of Civil Service, 39 N.J. 556, 562 (1963). "Sick leave benefits are intended to alleviate economic losses resulting from inability to work because of disability. This salutary purpose would not be furthered by excluding pregnancy-related absences merely because the condition may not be an illness by strict definition." Castellano v. Linden Bd. of Ed., supra, 158 N.J. Super. at 362. It is not unreasonable to apply a presumption of disability in pregnancy cases for such limited periods. Thus, medical certification of the pregnancy establishing an expected date of childbirth and certification of the actual date of birth should be sufficient to satisfy the statute and to trigger the presumptive periods established by the State Board. A teacher who wants to work during those periods should be allowed to do so. And a teacher who applies for sick leave for a longer period of time should be required to provide medical certification of the specific nature of her disability.

Accordingly, we affirm the award of sick leave ordered by the State Board for the period of December 1, 1978 to January 19, 1979. If Hynes desires to pursue her claim for sick leave for the remaining five days up to January 24, 1979, she may do so by submitting additional medical certification to the local Board specifying the nature of her disability during that period.

Affirmed.

BOTTER, P.J.A.D., concurring in result only and dissenting.

I dissent from the rule of law established by the majority in this case although on the particular facts I concur in the result. Our difference results from contrary views about equating pregnancy with disability for fixed periods of time.

The issue is whether the State Board of Education (State Board) can prevent a local board of education from requiring a pregnant teacher to furnish a medical certificate of disability pursuant to statute, N.J.S.A. 18A:30-4,[1] as in other cases when sick leave is requested.[2] The error in the State Board's ruling, affirmed by the majority, is in equating pregnancy with disability for given periods of time, whether or not a woman is in fact able to work. I agree that it does not seem unreasonable for a woman to request sick leave for the four-week periods before and after giving birth. But I see no reason why pregnant teachers should be treated differently from other female and male employees who seek sick leave

[1]The statute is quoted in the majority's opinion. It says, "a board of education may require a physician's certificate...in order to obtain sick leave."

[2]No issue is raised on this appeal concerning maternity leave. Apparently the existing agreement with employees provided for maternity leave without pay for one year, with an extension on request of up to an additional year.

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and are required to furnish appropriate medical certificates to support the request. A certificate that merely says a teacher is pregnant does not certify that she is unable to work. Pregnancy is a natural condition, not an illness, although many physical symptoms associated with pregnancy may cause disability. See Castellano v. Linden Bd. of Educ., 158 N.J. Super. 350, 362 (App. Div. 1978), aff'd and modified, 79 N.J. 407 (1979). But pregnant women are not necessarily disabled for a given period of time except during delivery. Many teachers can and do work in their final month of pregnancy. See de Laurier v. San Diego Unified School Dist., 588 F. 2d 674, 680 (9 Cir. 1978). Pregnant employees ought to be treated the same as other employees; they ought not be given preferential treatment or discriminatory treatment. I would hold that for reasons of administrative efficiency and economy, local boards may utilize a presumption of disability for the four-week periods before and after delivery if they choose. See de Laurier v. San Diego Unified School Dist., supra. However, the State Board cannot compel local boards of education to accept a medical certificate of pregnancy as the equivalent of a certificate of disability.

Lacking a record of expert evidence on the issue, we turn to the literature to learn what we may not know from common knowledge of the relationship between pregnancy and disability. Because all women do not react alike during pregnancy and puerperium, fixed rules prohibiting teachers from working for specific time periods before and after giving birth were invalidated in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). The Court there observed:

> While the medical experts in these cases differed on many points, they unanimously agreed on one--the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter. [414 U.S. at 645, 94 S.Ct. at , 39 L.Ed. 2d at 63]

The foregoing statement is consistent with a "Statement on Policy and Pregnancy Disability," issued by the American College of Obstetricians and Gynecologists (1974). The policy statement recognized that pregnant women "have a variable degree of disability, on an individual basis," but concludes that, "[t]he onset, termination and cause of the disability as related to pregnancy can only be determined by a physician." Indeed, doctors may also differ in their opinions on the extent to which a woman should work before and after giving birth.[3]

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[3]Testimony before the House Education and Labor Committee concerning the Pregnancy Discrimination Act of 1978, 42 U.S.C. sec. 2000(e)(k), showed that barring medical complications, "in 95 percent of the cases, the time lost from work due to pregnancy [including childbirth and pregnancy related medical conditions] is 6 weeks or less...." H.R. Rep. No. 948, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. & Admin. News 4749, 4753.

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Since disabilities vary according to the woman involved, a local board of education has the right under N.J.S.A. 18A:30-4 to demand a physician's certificate specifying the need for sick leave as in other cases. Nevertheless, boards of education in their discretion may find it administratively efficient to accept the presumption of disability for the periods specified by the State Board. It may be necessary to make arrangements in advance for a substitute teacher. Moreover, attempting to refute such disability claims may be costly and impractical. Often physicians would be certifying to disabilities based largely on subjective symptoms reported by their patients. The ability to return to work within a reasonable time after illness or injury frequently depends upon subjective feelings that an independent doctor could not confirm or refute by examination. As with other sick leaves, the system depends largely on the good faith and integrity of workers and their doctors. There is no reason, therefore, to impose undue burdens of substantiation for administrative purposes. At the same time an employing agency has the right to require an employee to furnish a medical certificate of disability in support of the request for sick leave. As stated above, a certificate of pregnancy is not a certificate of disability.

In the case at hand the teacher's doctor certified that she would be "able to continue working only until" November 30, approximately one month before the anticipated delivery date. The doctor gave no reason except that Hynes was pregnant. The Bloomfield Board apparently was not satisfied and would not approve the prenatal leave without more proof. Hynes did not say she could not furnish a more detailed certificate; she simply asserted her right to sick leave without doing so. The State Board's decision upheld her position.

The Commissioner of Education and the Administrative Law Judge held that the doctor's pre-confinement certificates attesting that Hynes was pregnant and would be able to work only until November 30th, together with the Bloomfield Board's knowledge that she actually gave birth on December 19, constituted "reasonable compliance with N.J.S.A. 18A:30-4" for the prenatal period. The State Board also ruled that the certificates furnished before the delivery date "clearly established" the right to sick leave beginning December 1 up to the date of birth on December 19, 1978. The State Board held, however, that a doctor's certification of the date of birth would be sufficient to support a claim for sick leave for one month thereafter and that the certificate of postnatal disability called for by the Commissioner was not needed for that period. Pursuant to leave granted by the Commissioner, Hynes obtained a medical certificate from her treating doctor in May 1980 certifying the date of delivery and stating that Hynes "was unable to return to work until January 24, 1979."

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Appellant has challenged the sufficiency of the medical certificates in this case contending that they do not adequately describe the nature of Hynes' disability. I would hold that the certificates submitted by Hynes were sufficient affirmations of her disability for the four-week periods before the anticipated confinement date and after actual delivery. Because limited periods of disability may reasonably be predicted in pregnancy cases, medical certificates stating merely that a patient should not or cannot work for those periods ought to be accepted as presumptively valid. A teacher who can work during those periods should be allowed to do so. And a teacher who applies for sick leave longer than those periods may be required to furnish a medical certificate that justifies the request and more specifically describes the nature of the disability.

Accordingly, I would modify the State Board's rule by holding that it may serve as a guideline for local boards who find it administratively efficient to follow. But local boards cannot be prevented from requiring a medical certificate stating at least that the pregnant employee cannot or should not work during all or a portion of the four-week periods in question, according to her doctor's judgment. Since the medical certificates in this case complied with these requirements for the period up to January 19, 1979, I would affirm the award of sick leave to that date. I concur also in the majority's requirement of a medical certificate which more specifically describes Hynes' disability during the period from January 19, 1979 to January 24, 1979, after which her maternity leave commenced. See note 2 above.

[190 N.J. Super. 36 (App. Div. 1983)]

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IRVINGTON EDUCATION ASSOCIATION AND JEANNE DONADIO,

PETITIONERS-RESPONDENTS,

V.

BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 15, 1982

For the Petitioners-Respondents, Ruhlman, Butrym & Friedman (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Irvington Board, Miller & Kinney (William R. Miller, Esq., of Counsel)

For the Intervenor, Thomas M. McCormack, Esq.

For the Amicus Curiae, New Jersey School Boards Association, Paula Mullaly, Esq.

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

S. David Brandt and John T. Klaghola opposed in the matter.

May 4, 1983

PENDING N.J. SUPERIOR COURT

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LAWRENCE IVAN AND THOMAS MURRAY,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT AND DR. PAUL HOUSTON, SUPERINTENDENT OF SCHOOLS; JOHN SAKALA, PRINCIPAL OF PRINCETON HIGH SCHOOL; BOTH INDIVIDUALLY AND AS EMPLOYEES OF THE PRINCETON REGIONAL BOARD OF EDUCATION, MERCER COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, December 16, 1982

For the Petitioners-Appellants, Jamieson, McCardell, Moore, Peskin & Spicer (Melvin S. Narol, Esq., of Counsel)

For the Respondents-Respondents, McLaughlin & Cooper (William F. Hartigan, Jr., Esq., of Counsel)

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

C. David Prandt opposed in the matter. Robert J. Wolfenbarger abstained.

May 4, 1983

PENDING N.J. SUPERIOR COURT

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J.B.A. and A.M.A., Individually and as Guardian Ad Litem of A.H.A.,	:	
Petitioner-Respondents,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	
	:	

Decided by the Commissioner of Education, March 31, 1981

Decided by the State Board of Education, May 6, 1981

Argued April 19, 1983 -- Decided May 12, 1983

Before Judges Matthews, Antell and Francis.

On appeal from Final Decision of the State Board of Education.

Peter M. Burke argued the cause for appellant (Young, Rose & Millspaugh, attorneys; Mr. Burke on the brief).

Richard J. Schachter argued the cause for respondents (Schachter, Wohl, Cohn & Trombadore, attorneys; Mr. Schachter and John F. Bracaglia, Jr. on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, filed Statement in lieu of brief on behalf of the State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the Statement.

PER CURIAM.

Respondent, Board of Education of the Borough of Bernardsville, appeals from a final decision of the State Board of Education affirming a determination by the Acting Commissioner of Education which ordered the admission of A.H.A. into the Bernardsville chapter of the National Honor Society. This proceeding was brought on behalf of A.H.A., who is a minor, by her parents, J.B.A. and A.M.A.

During the spring of her junior year in Bernardsville High School A.H.A. applied for admission into the National Honor Society. There are 4 criteria for admission: scholarship, service, leadership and character. A.H.A.'s academic qualifications are not disputed. Applications are considered by a selection committee consisting of 16 members, and 10 favorable votes are required for election. Her application failed of approval by 3 votes, and A.H.A.

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requested a statement of the selection committee's reasons for her nonselection. The request was denied and this complaint was thereupon filed in the Chancery Division on July 28, 1980, seeking an order compelling A.H.A.'s admission or a statement of reasons for her nonadmission.

Recognizing that petitioners had not exhausted their administrative remedies the Chancery Division transferred the matter on August 15, 1980 to the Department of Education. After considering cross-motions the office of administrative law ordered respondent to furnish reasons for A.H.A.'s nonselection, and on November 13, 1980 the Commissioner of Education denied respondent's motion for relief from that order.

In the meantime, a hearing had commenced before an administrative law judge on November 5, 1980 to determine whether A.H.A's application had been arbitrarily denied. During this hearing, and after the Commissioner's action of November 13, 1980, the selection committee's statement of reasons was received into evidence over petitioners' objection. The statement consisted of adverse findings as to the candidate's character and leadership qualities and referred to unspecified instances of "rudeness, disrespect and arrogance towards teachers and disregard of school rules." According to the findings of the administrative law judge, which were accepted by the Acting Commissioner, A.H.A.'s parents had never been told during A.H.A.'s attendance at Bernardsville High School of these failings by any member of the faculty notwithstanding their "extensive inquiries of teachers, principal, guidance counselor, and the Board..." which were made after being told of A.H.A.'s nonselection. Testimony was received by the administrative law judge tending to establish A.H.A.'s favorable character and strong leadership qualities, and the school principal, who served on the selection committee, testified that he knew of no instance when A.H.A. was either accused by a faculty member or known by anyone to have broken a rule of conduct applicable to pupils.

The administrative law judge concluded from the evidence of her exceptional athletic, extracurricular and academic activities as well as her community related involvements that she was typically qualified for National Honor Society membership in the areas of leadership, character and service. He further found that the "nebulous" reasons given by the selection committee were not substantiated by a single instance in which A.H.A. exhibited the offensive characteristics which formed the basis for her nonselection. His findings also dealt testimony from A.H.A.'s father to the effect that he had been told by an unidentified member of the selection committee that A.H.A.'s application had failed of acceptance because of personal animosity attributed to a critical comment made by A.H.A.'s mother and repeated by A.H.A. about a grammatical error appearing in the English department's course of study. The evidence was clearly of a hearsay character, but the administrative law judge nevertheless credited it and concluded therefrom that the selection process was thereby "tainted." As the Acting Commissioner noted in his decision, the testimony was given as an attempt by petitioners to deal with the only incident of which

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they were aware which could possibly be construed as a display of "rudeness" or "arrogance" on the part of A.H.A.

In a lengthy opinion the Acting Commissioner of Education reviewed the findings and conclusions of the administrative law judge and expressed his unqualified support therefor. Concluding that A.H.A.'s application had not been fairly treated by the selection committee and that the committee's action was arbitrary and capricious, he ordered that A.H.A. be retroactively installed as a member of the National Honor Society. His action was affirmed by the State Board of Education by decision dated May 6, 1981.

Respondent's major contentions on this appeal are that the Acting Commissioner of Education exceeded his authority in ordering respondent to provide a statement of reasons for nonselection and in ordering the admission of A.H.A. into the National Honor Society.

As the Acting Commissioner acknowledged, his powers are not unlimited and ordinarily he may not substitute his judgment for that of a local board in the exercise of a discretionary function. However, in exercising jurisdiction over all disputes and controversies arising under the school laws, there can be no doubt as to "'the great breadth of the Commissioner's powers.'" Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 525 (1978). He is not expected to withhold action where bad faith is shown on the part of a local board or to remain silent in the face of patently arbitrary action. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 294 (App. Div. 1960); Boult v. Board of Education of Passaic, 135 N.J.L. 329, 330 (Sup. Ct.), aff'd 136 N.J.L. 521 (E. & A. 1947). In this case, as the Acting Commissioner explained, the guidelines for selection contained in the National Honor Society handbook specifically state that "(e)very effort should be made to explain...the reason(s) for non-election to dissatisfied students or parents." Nevertheless, in the face of this unmistakable directive respondent refused petitioners' request for a statement of reasons and persisted in its refusal until ordered to provide such a statement. A further showing of bad faith was found in respondent's eventual reliance upon A.H.A.'s alleged "rudeness, arrogance and disregard for school rules" when, as the administrative law judge found, this was not supported by "so much as a scintilla of evidence." In reaching his result, the Acting Commissioner reasoned that where nonselection depends upon deficiencies of character such as these, "principles of fundamental fairness placed a burden upon the Board to cite specific examples of such conduct, a burden which the Board utterly failed to meet."

Respondent argues that for it to provide a statement of reasons with greater specificity than it did would result in a breach of the confidentiality to which its sources of information are entitled. However, merely identifying the instance of misconduct does not necessarily require identification of an informant. Furthermore, we conclude that it lay within the policy making authority of the Acting Commissioner to weigh the utility of being able to gather derogatory information against the unfairness of relying upon anonymous sources of information in rejecting

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applications for membership. Membership in the National Honor Society, after all, is not to be equated with an honor conferred by an ordinary private group or association. To a significant degree it enjoys the sponsorship of the public educational establishment and it is therefore within the Commissioner's competence to decide that no applicant may be barred from membership therein on the basis of nonspecified instances of misconduct reported by unidentified informants.

Respondent also complains of the Acting Commissioner's reliance upon the hearsay evidence received from A.H.A.'s father as to the selection committee's covert reason for rejecting A.H.A.'s application for membership. The admission of hearsay is expressly permitted by N.J.A.C. 1:1-15.8, subject only to the existence of a residuum of competent evidence. The required "residuum" here is to be found in the evidence of bad faith heretofore mentioned. Furthermore, we see no greater impropriety in the receipt of hearsay testimony from A.H.A.'s father than in the receipt by the administrative law judge over petitioners' objection of the selection committee's vaguely worded unsworn statement of reasons drawn from unidentified sources.

While it is true that A.H.A. did not have a legal "right" to be received into the National Honor Society, it is equally true that she was entitled to have her application fairly considered on its merits. After carefully examining the record the Acting Commissioner determined that in all four areas of eligibility she was fully qualified for selection. If the Acting Commissioner had merely superimposed his judgment upon that of the selection committee his action could not be sustained. But his determination went further than this. Taking note of the selection committee's initial evasion of the National Honor Society's explicit recommendation that rejected applicants be given reasons for their nonselection and then, under constraint of an administrative order, producing reasons which the Acting Commissioner and the administrative law judge both regarded as spurious, the Acting Commissioner discerned in the committee's action motivations which were other than bona fide.

Finally, respondent argues that the Acting Commissioner should have interpreted the evidence differently than he did and arrived at a different result. We expressly refrain from expressing any views as to the correctness of the Acting Commissioner's result except to say that it was neither arbitrary nor capricious and therefore not subject to modification on judicial review. Our limited function is merely to determine whether the Acting Commissioner was empowered to act as he did, and we must defer to his unique insight and expertise in weighing and analyzing the appearance of events within this school community.

The determination of the State Board of Education is supported by sufficient credible evidence on the record as a whole. R. 2:11-3(e)(1)(D).

Affirmed.

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LEAH JACOBS,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 29, 1981

Decided by the State Board of Education, November 10, 1981

Submitted: November 15, 1983 - Decided: December 20, 1983

Before Judges Michels and King.

On appeal from the State Board of Education.

Garruto, Galex & Cantor, attorneys for appellant (Jane B. Cantor, on the brief).

William A. Massa, attorney for Board of Education of the City of Jersey City

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (James J. Ciancia, Assistant Attorney General, of counsel; Regina Murray Mahoney, Deputy Attorney General, on the brief).

PER CURIAM

This appeal is taken from a decision of the State Board of Education denying appellant Jacobs' application to file an appeal out of time and to intervene in another matter pending before the State Board. We agree with the State Board and affirm on both grounds.

This is the factual background. On September 19, 1960 Leah Jacobs was hired by the Jersey City Board of Education to serve as a full-time teaching staff member in its school system. During her first two years of employment, she was categorized by the Board as a "teacher in training" and was paid a reduced salary even though she was fully certified and was performing the duties of a regular teacher. From 1960 through June 1962 she received a salary of $3,700, an amount lower than the established teacher's salary guide of $4,400. During this time she was also denied the right to join the Teachers' Pension and Annuity Fund (TPAF). In September 1962 she was "appointed" to a teacher's position by the Board and paid

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$4,400, the "first step on the teacher's salary guide." She alleged that salary and pension deprivations persisted until 1973.

On February 27, 1978 Jacobs filed a petition of appeal before the Commissioner of Education claiming that she had been denied her proper salary level, title and benefits under the ruling in Yanowitz v. Bd. of Educa. of the City of Jersey City, 1973 S.L.D. 57. In her petition, she requested that the Commissioner enter judgment granting her the difference between the amount provided in the teacher's salary guide which she should have been paid and the amount she was actually paid between 1960 and 1973. She further requested that the Commissioner order an adjustment of her payments to the TPAF to reflect membership since 1960.

On May 1, 1979 a class action was instituted by Edward Lowicki and Bruce Thomas on behalf of other Jersey City teachers similarly situated to enforce their rights under the Yanowitz decision. An additional action was filed by the Jersey City Education Association (JCEA). On January 3, 1980 the Administrative Law Judge assigned to handle the JCEA petition transferred it to the judge assigned to hear the Lowicki-Thomas class action. These two cases were consolidated in Edward L. Lowicki v. Bd. of Educa. of Jersey City, OAL Dkt. No. Educ. 2902-79, Agency Docket No. 191-5/79. The consolidated class action required notice to all known potential members. Jacobs alleges that she met the criteria for class membership but was never notified and therefore did not request exclusion. In Lowicki-Thomas, the Commissioner upheld the hearing examiner's findings that full deference to Yanowitz was warranted but also found that the six-year statute of limitations would be a bar to certain aspects of relief.

Meanwhile, Jacobs pursued her claim individually, allegedly unaware of the contemporaneous class action. On December 1, 1980 the hearing examiner concluded that Jacobs had been wrongfully deprived of salary and pension benefits between September 1960 and June 1962 and recommended that she be awarded $1,600 for pay lost between 1960 and 1962. He further recommended that the local Board "buy back" Jacobs' membership in TPAF for the years 1960 through 1962 as she had been financially harmed not only because her pay during those two years was lower than the prevailing scale but also because TPAF was a service-oriented pension plan with benefits dependent upon a formula which placed a premium on length of membership. The amount "bought back", however, would be diminished by the amount Jacobs would have paid into TPAF as a member during the same two years. Finally, the hearing examiner recommended that Jacobs be denied her lost salary for the period between September 1962 to March 1972 as relief during that period was barred by the six-year statute of limitations but that her salary after 1972 should be adjusted upward to reflect the two steps in the salary guide which she was denied by not being "appointed" to a permanent position until September 1962.

On April 29, 1981 the Commissioner of Education modified the hearing examiner's recommendations, affirming the finding that Jacobs was entitled to recognition as a regular teacher between

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September 1960 and June 1962 but disagreeing with the recommendation that she be awarded $1,600 for salary lost between 1960 and 1962 as "such a claim for salary was barred by the statute of limitations (N.J.S.A. 2A:14-1) and that the application of the equitable doctrine of laches bars the entire claim except for the period commencing with the school year 1978-79." The Commissioner concluded that Jacobs would be "entitled to a salary credit based on the negotiated salary guide presently in force for the two years of employment by the Board of Education between 1960 and June 1962. Such credit [was] to be applied prospectively commencing with the 1978-79 school year."

On October 15, 1981 Jacobs filed a motion with the State Board of Education seeking to file an appeal out of time. Alternatively she sought to have the decision in her case vacated and permission given to her to intervene in the pending class action. On November 10, 1981 the State Board upheld the Commissioner's decision and denied Jacobs' motion to appeal out of time. She was also denied leave to intervene in the Lowicki-Thomas class action. This appeal is taken from these rulings.

I

The Commissioner's decision was filed and mailed on April 29, 1981. On October 15, 1981 Jacobs filed a motion with the State Board to appeal this decision. The State Board denied the motion to appeal out of time on November 10, 1981. She was more than three months late in filing her motion to appeal; both the statute and administrative code require an appeal to be filed within 30 days of the Commissioner's decision. N.J.S.A. 18A:6-28 specifies: "An appeal to the state board or the board of higher education shall be taken in the manner prescribed by rules of the respective board, within 30 days after the decision appealed from is filed, and such board shall have power to hear and determine any such appeal." N.J.A.C. 6:2-1.1 requires: "An appeal to the state board in a controversy arising under the school laws must be taken within 30 days after the Commissioner has filed his/her decision in said controversy." The language in both is mandatory.

The State Board was correct in denying Jacobs' appeal out of time. The time requirement for filing administrative appeals historically has been considered jurisdictional. Borough of Park Ridge v. Salimone, 21 N.J. 28 (1956). See also, Alfonso v. Bd. of Rev., 89 N.J. 41 (1982). In keeping with previous decisions on this issue and the mandatory language in both the statute and administrative code, we affirm the State Board's decision denying Jacobs' application to appeal out of time, especially since she offers no explanation for the time delay. See Hartford Ins. Co. v. All State Ins. Co., 68 N.J. 430, 434-435 (1975) on "the important policy that litigation must have an end."

II

Jacobs moved to intervene in the Lowicki-Thomas class action on October 15, 1981. The class action had been decided on March 16, 1981 by the Commissioner. It was pending before the State

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Board on appeal at the time of the application to intervene. The State Board reached its decision to deny Jacobs' motion to intervene on November 10, 1981. Jacobs did not file her appeal with the Appellate Division until June 21, 1982. A substantial amount of time had lapsed both between the Lowicki-Thomas decision, Jacobs' motion to intervene and the denial of her motion, and her appeal to the Appellate Division. We find no abuse of administrative discretion in the denial of intervention. Jacobs' case was fully heard and fairly decided in the first instance. She was not deprived of a forum. Absent a conclusion that agency discretion was exercised in an arbitrary and capricious fashion, we must affirm. Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980).

Affirmed.

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MARILYN KUEHN,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, November 25, 1981

For the Petitioner-Appellant, Aronsohn & Springstead (Harold N. Springstead, Esq., of Counsel)

For the Respondent-Respondent, Greenwood & Sayovitz (Sidney A. Sayovitz, Esq., of Counsel)

In accordance with an unwritten Teaneck Board of Education's practice, any staff member absent more than 90 school days in a school year is ineligible for an employment increment, or adjustment increment, or both, in the following school year. Exceptions to this practice are permitted for workmen's compensation cases and nonpaid leaves of absence. (Transcript, 9/24/81, pp. 12, 17, 18.) Because of serious illness, petitioner was absent more than 90 school days during the 1979-80 school year. By Board resolution of June 11, 1980, petitioner was denied an employment increment, and an adjustment increment, for the 1980-81 school year.

Petitioner appealed to the Commissioner of Education. She claimed a procedural violation of the statute governing the withholding of increments, N.J.S.A. 18A:29-14.

> "***Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or

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> direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.***"

In addition, petitioner asserted that the Teaneck Board's practice was arbitrary, capricious and unreasonable.

The Administrative Law Judge decided this case on the procedural issue and set aside the Board's increment-withholding action for failure to comply with the 10-day notice requirement of N.J.S.A. 18A:29-14. The Administrative Law Judge did not reach the substantive issue of whether the Board's policy of withholding an employment increment, an adjustment increment, or both, when a teacher has been absent more than 90 school days, is arbitrary, capricious, or unreasonable.

The Commissioner of Education reversed the Initial Decision of the Administrative Law Judge, relying on the notice provided to petitioner by Exhibit R-4, a letter from the Superintendent of Schools to petitioner, dated April 28, 1980, and repeated in part below:

> "***You must expect, in accordance with practice, to remain at the same salary for the 1980-1981 school year. Any staff member absent more than ninety school days is not eligible for increment or adjustment.***"

The Commissioner's decision did not reach the substantive issue as to the merits of the Board practice. The substantive issue was briefed below and additional briefing was requested by letter of the State Board Legal Committee, dated August 24, 1982. It is this issue which we, the Legal Committee, addressed in our deliberations and which we find to be arbitrary and unreasonable.

This unwritten personnel practice of the Teaneck Board has been in effect since at least 1975. (Transcript, 9/24/81, p. 11.) We are constrained to observe that board personnel policies should be carefully considered, prepared in written form, and publicly proposed and adopted by boards of education. Such was not the case with this practice, which had not existed in written form, nor had it been adopted by the Teaneck Board of Education. The Teaneck Board's practice applied without regard to the reason for or the cause of the absence (Transcript, 9/24/81, pp. 11 and 16.) except for workmen's compensation cases and nonpaid leaves of absence. Petitioner, who was seriously ill, was statutorily entitled to use her annual and accumulated sick leave under N.J.S.A. 18A:30-1 and 18A:30-3. Having exercised her statutory right, the Board's policy then obviated

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that statutory entitlement by withholding petitioner's employment increment and adjustment increment for the following school year.

Under N.J.S.A. 18A:29-14, a board of education shall provide reasons for the withholding. To simply state that a teacher by sheer number exceeds the 90-day maximum allowance for absence and forfeits an increment, without considering the particular circumstances for absence is not good cause for the withholding of increment as required by N.J.S.A. 18A:29-14. For the Teaneck Board to determine that petitioner's absence exceeding 90 days, in and of itself, is sufficient reason for the withholding of increment, without consideration of the particular circumstances for the absence, is arbitrary and without any demonstrated rational basis.

The State Board of Education reverses the decision of the Commissioner of Education, and restores petitioner to her proper position on the salary guide, and compensates petitioner for all moneys withheld as a result of the Board's action.

Attorney Exceptions are noted.
James Jones abstained in the matter.
S. David Brandt opposed in the matter.

February 1, 1983

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IN THE MATTER OF MICHAEL LAW,	:	
PETITIONER-RESPONDENT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS,	:	APPELLATE DIVISION
DEFENDANT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 26, 1981

Argued September 21, 1983 Decided October 25, 1983

Before Judges Furman and Deighan.

On appeal from final judgment of the State Board of Education.

Myles C. Morrison III argued the cause for appellant (Dillon, Bitar and Luther, attorneys; Henry N. Luther III, of counsel).

Sheldon H. Pincus argued the cause for respondent (Bucceri and Pincus, attorneys; Gregory T. Syrek, on the brief).

A Statement in Lieu of Brief was submitted on behalf of the State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Alfred E. Ramey, Jr., Deputy Attorney General, on the Statement).

PER CURIAM

This is an appeal from a determination of the State Board of Education reinstating a salary increment award to the petitioner, Michael Law, for the year 1980-81. The petitioner is a tenured teacher with the appellant, Board of Education of the Township of Parsippany-Troy Hills, and has been a science teacher for nine years. During the 1979-80 school year he was absent 20 times, spread from October 1979 to June 1980, as single day absences and has accumulated only 53 days over his nine years as a teacher. On April 10, 1980, pursuant to N.J.S.A. 18A:29-14, the Township Board voted to withhold his salary increment for 1980-81. The statute permits a local board of education to withhold a salary increment "for inefficiency or other good cause." The statute requires that the employee be given a written notice of the action within ten days. Although he was informed of the action he was not formally notified by letter until April 30, 1980. The reasons given were absenteeism resulting in discontinuity of instruction, questionable

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grading practices and lack of planning and implementation of course study.

Pursuant to N.J.S.A. 18A:6-9, Law filed a petition of appeal with the Commissioner of Education for a reconsideration of the determination by the Township Board. The Commissioner referred the matter to an Administrative Law Judge, who after a hearing reversed the determination of the Township Board, granted the salary increment and restored it with back pay. The ALJ found that the action of the Township Board was capricious. He further found as a fact that the chairman of the petitioner's department made generally commendable reports about the petitioner and the principal never observed the petitioner during class and never assessed petitioner's plan books. Further, there was no supporting evidence of grading difficulties other than one lab report and the principal admitted that he was unable to point to a single instance supporting the contention of discontinuity of instruction because of absenteeism.

The Township Board filed exceptions to the ALJ's decision with the Commissioner of Education. The Commissioner reversed the decision of the ALJ and ordered the salary increment to be set aside. The petitioner then appealed to the State Board of Education (State Board). The State Board found it persuasive that the school principal admitted that it was not possible to identify a particular instance of loss of continuity of instruction because of absences. Further the State Board was critical of the fact that the principal had no substantial grounds for overriding the department chairman's generally favorable recommendations. The State Board recognized that while a principal may properly override recommendations of those who actually observe teachers and may rely on reports prepared by them, the principal must show sufficient grounds for so doing. It concluded by determining that the petitioner's absences did not constitute excessive absenteeism since they were legitimate and did not lead to discontinuity of instruction. The determination of the ALJ was reinstated. Thereupon the Township Board appealed to this court. R. 2:2-3(a)(2).

The ultimate administrative decision maker for controversies arising under the school laws is the State Board of Education. N.J.S.A. 18A:6-27; Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982); Quinlan v. North Bergen Tp. Bd. of Ed., 73 N.J. Super. 40, 51 (App. Div. 1962). In passing upon matters on appeal, the State Board is not restricted to review issues of law. Dore v. South Plainfield Bd. of Ed., 125 N.J. Super. 131, 139-140 (App. Div. 1973), aff'd 64 N.J. 582 (1974); Quinlan v. North Bergen Tp. of Bd. of Ed., supra, at 51. It is well recognized that the State Board may make its own independent findings of fact. Ibid.

It is well settled that the appropriate standard of review to be applied by an appellate court reviewing the final decision of an administrative agency is for the court to examine the record to determine whether sufficient or substantial credible evidence exists therein to support the agency decision. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Dore v. Bedminster Tp. Bd. of Ed., supra, at

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453; In re Silberman License Suspension, 169 N.J. Super. 243, 255-256 (App. Div. 1979), aff'd 84 N.J. 303 (1980). The agency determination is not to be vacated in the absence of a showing that the decision is arbitrary or capricious, that it lacks support in the record or that it violates legislative policies expressed or fairly to be implied in the statutory scheme administered by the agency. See Campbell v. Civil Service Dep't, 39 N.J. 556, 562 (1963). Furthermore, should there be substantial evidence in the record to support more than one result, it is the agency's choice which governs. See New Jersey Bell Tel. Co. v. State, 162 N.J. Super. 60, 77 (App. Div. 1978).

Here there is ample justification for the State Board to reject the Commissioner's decision and to reinstate the determination of the ALJ whose findings are based on sufficient and substantial credible evidence in the record.

Petitioner requests interest on his withheld salary increment from the date of the State Board's decision affirming the ALJ's determination because the Township Board has had the use of his money since 1980-81 school year. Also, he asserts that the Township Board will benefit unjustly from the use of his moneys if interest is not imposed.

Generally, interest is allowable where the damages are readily ascertainable. Kamens v. Fortugno, 108 N.J. Super. 544, 549 (Ch. Div. 1970). While interest does not run upon liquidated claims as a matter of course, but in accordance with the principles of equity, Bak-A-Lum Corp. v. Alcoa Building Prod., 69 N.J. 123, 131 (1976); see Small v. Schunke, 42 N.J. 407, 415-416 (1964), it may be awarded as damages for delay in payment. City of East Orange v. Palmer, et al., 52 N.J. 329, 336 (1968). It is an exaction for past due obligations and in essence in the nature of a penalty. Tp. of Wayne v. Ricmin, Inc., et al., 124 N.J. Super. 509, 514 (App. Div. 1973); State v. Pia Star Realty Co., 118 N.J. Super. 55, 66 (Law Div. 1971).

In Decker v. Bd. of Education of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977) the court upheld an award of interest by an administrative agency to a female employee who was wrongfully paid a lower salary than a male employee performing the same duties. In so doing, the court noted:

> The award of interest . . . was proper and not prejudicial. The purpose of the back pay award was to make complainant whole, to compensate her for her rightful wages.
>
> During the period of discrimination, the board had the use of the money to which complainant was entitled and hence it was "unjustly enriched. . . and therefore equity and justice requires payment by way of interest for its use." Hodgson v. American Can Co., 440 F. 2d 916, 922 (8 Cir. 1971).

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The determination of the State Board of Education is affirmed. The matter is remanded to the Board of Education of the Township of Parsippany-Troy Hills for a calculation as to the amount of the increment withheld as well as any subsequent increments together with interest to be calculated in accordance with R. 4:42-11(a).

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SHIRLEY K. LICHTMAN, :

APPELLANT, :

V. : SUPREME COURT

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY, :

RESPONDENT. :

:

Decided by the N.J. Superior Court, Appellate Division, March 23, 1982

On certification to the Superior Court, Appellate Division.

Peter N. Perretti, Jr., argued the cause for appellant (Riker, Danzig, Scherer & Hyland, attorneys; Mark A. Baber, on the briefs).

Rodney T. Hara argued the cause for respondent (Aron, Till & Salsberg, attorneys; Mr. Hara and David A. Wallace, of counsel and on the briefs.

Alfred E. Ramey, Jr., Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Regina Murray Mahoney, Deputy Attorney General, on the brief).

David W. Carroll, General Counsel, submitted a brief on behalf of amicus curiae New Jersey School Boards Association (Mr. Carroll, attorney; Russell Weiss, on the brief).

The opinion of the Court was delivered by HANDLER, J.

This case requires the Court to determine whether the seniority acquired by a tenured teacher employed as a part-time librarian entitles her to preference over a non-tenured teacher for appointment as a full-time librarian. Last term in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), this Court decided that teachers occupying part-time positions could acquire tenure. The Court did not, however, explicitly resolve the possible differences between the legal concepts of tenure and seniority as they might affect the benefits and retroactive rights of teachers occupying part-time positions. Id. at 84. The Court must now decide whether the tenure and seniority statutes recognize varieties of seniority rights for teaching staff members holding positions with different time requirements.

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We now hold that a tenured part-time teaching staff member with proper certification can claim, as against a non-tenured applicant, seniority rights in seeking appointment to a full-time position that is within the specific categories covered by the certification and that has responsibilities identical to those of the part-time position in which employment was actually held. Accordingly, we reverse the determination of respondent refusing to hire appellant as a full-time school librarian.

Appellant Shirley Lichtman was employed as a part-time librarian serving three days a week by the Ridgewood Board of Education from the beginning of the 1965-66 academic year through the end of the 1975-76 academic year.[1] Throughout her employment, appellant held a valid certificate as a "teacher librarian," which qualified her for both full-time and part-time positions.[2] Appellant's duties as a part-time librarian were identical to those of a full-time librarian.

In April 1976 the Superintendent of Schools of the Village of Ridgewood informed appellant that her position as a part-time librarian was being eliminated for the following school year. The superintendent recognized that appellant had tenure but limited such tenure to any "3/5 time" position. Nevertheless, appellant applied for a full-time librarian position that was then open. She also requested the Board to review her employment status and seniority rights in light of her application. Upon review, the Board determined that appellant held no seniority rights for a full-time position. Accordingly, in July 1976 the Board rejected appellant's application and hired, instead, a non-tenured applicant for the full-time librarian position.

Appellant appealed to the Commissioner of Education claiming that the Board improperly determined her seniority rights. She also claimed that the Board's failure to hire her violated

---

[1]During the second half of the 1968-69 academic year appellant served as school librarian five days a week and was paid five-thirds of the salary which she earned during the first half of the year while working three days a week, or the equivalent of a full-time employee. Appellant claims she held "full-time" employment while the Board maintains that her "full-time" status was temporary since she was merely substituting for the regular full-time librarian who was on sabbatical. From the beginning of the 1979-80 academic year through October 10, 1980, she served as a full-time librarian.

[2]Appellant was certified as a teacher librarian under N.J.A.C. 6:11-12.5 and -12.6. Although those sections have been repealed, her position is now incorporated in N.J.A.C. 6:11-12.21 to -12.23, which describes the certification as an "educational media specialist."

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N.J.S.A. 18A:28-12.[1] A hearing examiner appointed by the Commissioner of Education conducted a hearing in April 1977. More than two years later, in May 1979, the examiner recommended that appellant be reinstated as a full-time librarian with back pay and other benefits. He ruled that an employee's seniority should be determined solely on the basis of category of certification and without regard to "full-time" or part-time" employment. In June 1980 the Commissioner adopted the examiner's report and ordered appellant reinstated. 1980 S.L.D. 573 (Comm'r 1980). The local school board appealed to the State Board of Education, which reversed the Commissioner's decision. 1980 S.L.D. 585 (St. Bd. 1980). We granted the petition for certification, 91 N.J. 538 (1982), following the affirmance of the State Board's decision by the Appellate Division.

II

The determination of seniority rights in this case is governed by N.J.A.C. 6:3-1.10(b), which provides in pertinent part:

> Seniority . . . shall be determined according to the number of academic or calendar years of employment, or fraction thereof, . . . in specific categories as hereinafter provided.
> [Emphasis added.]

Under this regulation seniority can be accumulated only within the specific categories of certification provided in the regulations. See N.J.A.C. 6:3-1.10(k). The regulations do not establish categories in terms of part-time or full-time employment. In this case appellant was certified in the category of "teacher librarian." See N.J.A.C. 6:3-1.10(k)(30) (establishing additional categories under specific certificates). Her seniority therefore

[1]N.J.S.A. 18A:28-12 provides:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service.

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depends upon the amount of service accumulated under the particular category of her certification, namely, teacher librarian.

The regulations do not directly indicate how part-time employment should be treated in calculating seniority. In this case, the Commissioner of Education, adopting the reasoning of the hearing examiner, concluded that part-time service affects only the arithmetic computation of seniority; it serves to quantify, not qualify, seniority. The hearing examiner determined that N.J.A.C. 6:3-1.10(b) "must be construed by using 'academic years' or 'calendar years' as a common denominator when the total accumulated seniority of tenured teaching staff members' employment service is being determined within particular classification categories [regardless of] whether [the] service in any category of certification is either full-time or less than full-time." Lichtman, supra, 1980 S.L.D. at 581. The Commissioner ruled that once tenured, appellant was entitled to claim the benefit of seniority accumulated in her part-time position when applying for a full-time position in the same specific category of certification.

The State Board of Education reversed the Commissioner's determination. The State Board relied upon two of its own decisions issued after the date of the Commissioner's decision, Aslanian v. Board of Ed. of Fort Lee, 1980 S.L.D. 1475 (St. Bd. 1980), aff'd App. Div. Docket No. A-4745-79T1 (March 27, 1981 unreported) and Zubkoff v. Madison Bd. of Ed., (St. Bd. 1980), aff'd App. Div. Docket No. A-4506-79 (March 27, 1981 unreported). The decisions in Aslanian and Zubkoff reversed decisions by the Commissioner of Education. In Aslanian, the appellant was certified as a teacher of art, although her actual work experience was as a part-time teacher of testing. Her duties as a teacher of testing were fundamentally different from those of a teacher of art, which position she sought and for which she claimed seniority rights based on her prior service under a teacher of art certificate. The State Board of Education ruled that for "purposes of tenure and seniority rights at least, full-time teaching staff members are in a different class from part-time teachers." Aslanian, supra, 1980 S.L.D. at 1476. The State Board reasoned that neither N.J.S.A. 18A:28-13, which directs the Commissioner to classify categories in which seniority obtains, nor N.J.A.C. 6:3-1.10 makes any reference to seniority for part-time teaching staff members. Furthermore, relying in part on the now overruled case of Point Pleasant Beach Teachers Ass'n v. Callam, 173 N.J. Super. 11 (App. Div. 1980), certif. den., 84 N.J. 469 (1980), see Spiewak v. Rutherford Bd. of Ed., supra, 90 N.J. at 81, and the differences in the nature of the job duties between full- time and part-time positions, the State Board "believe[d] that the Legislature did not intend part-time staff members to have the same status or be in the same category with full-time personnel so as to allow the former to obtain seniority over the latter." Aslanian, supra, 1980 S.L.D. at 1475.

We find this reasoning unpersuasive. The regulations governing the award and calculation of seniority do not evince any legislative intent to distinguish between full-time and part-time positions. Furthermore, in applying its Aslanian decision to this

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case, we think the State Board of Education failed to discern that in Aslanian the critical differences between the respective teaching positions were primarily attributable to the different duties entailed in each position and not the full-time/part-time distinction as such.

We agree with the Commissioner that the language and import of N.J.A.C. 6:3-1.10(b) are to be understood as allowing a pro rata calculation of seniority based upon the total accumulated service in a specific category. In this way, actual service can be duly recognized and relevant experience and seniority of all tenured employees within a single category can be readily ascertained and compared.[4] Indeed, regulations recently adopted by the Commissioner of Education to replace N.J.A.C. 6:3-1.10, see 15 N.J.R. 464 (adopted June 1, 1983), clarify this basic policy by emphasizing that actual experience in particular positions should be the critical determinant in awarding seniority.[5]

We recognize that this is a field properly committed to the expertise of the Commissioner and Department of Education. In this case some confusion has arisen in the administrative application of the regulatory standards governing the seniority rights of teachers. We think that our decision today reflects a correct understanding of the law and policies applicable to this controversy and does not in any way interfere or conflict with the essential jurisdiction and discretion of the responsible administrative agencies. We further acknowledge that this subject matter is most appropriately addressed by the constructive rule-making authority of the responsible agencies.

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[4] We note the conceptual differences between "tenure" and "seniority." In Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), we held that remedial and supplemental teachers who had served part-time could acquire tenure. We observed that tenure is statutorily defined and all "teaching staff members" who fulfilled the conditions of N.J.S.A. 18A:28-5 were eligible for tenure. Tenure as such can attach to each individual based on distinctions in particular jobs (e.g., full-time and remedial teachers). Seniority, on the other hand, provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies. See N.J.S.A. 18A:28-10 to -12. N.J.A.C. 6:3-1.10, promulgated pursuant to N.J.S.A. 18A:28-13, sets standards for determining seniority. N.J.A.C. 6:3-1.10(b) establishes the means of calculating seniority. It makes distinctions between jobs for seniority purposes only on the basis of explicit categories and without reference to any other distinctions such as part-time or full-time employment.

[5] N.J.A.C. 6:3-1.10(1)(15) now provides in pertinent part:

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In this case, appellant's seniority accrues from her actual service in the particular position for which she is certified. This was "teacher librarian." Furthermore, the nature and duties of the five-day-a-week position that she sought were identical to those of her three-day-a-week position which had been eliminated. As a tenured employee, appellant accumulated seniority rights by virtue of her employment in the position for which she was certified. The service and experience she compiled in this position -- her seniority -- properly entitled her to a preference over a non-tenured applicant. The local Board and the State Board clearly erred in failing to consider appellant's seniority and to grant her the employment for which she applied. The Commissioner's determination was correct.

Accordingly, the judgment of the Appellate Division is reversed.

Chief Justice Wilentz and Justices Clifford, Schreiber, Pollock and O'Hern join in this opinion.

Justice Garibaldi did not participate.

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15. ...Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served. ...Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such certificate or endorsement.

N.J.A.C. 6:3-1.10(1)(16) now provides in pertinent part:

16. ...Any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such certificate or endorsement.

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IN THE MATTER OF THE BOARD OF : SUPERIOR COURT

EDUCATION OF THE CITY OF LINDEN : APPELLATE DIVISION

_____ :

Decided by the Commissioner of Education, October 6, 1980

Decided by the State Board of Education, May 6, 1981

Argued January 18, 1983--Decided January 28, 1983

Before Judges Botter, Polow and Brody.

On appeal from State Board of Education.

Robert H. Greenwood argued the cause for appellant (Greenwood & Sayovitz, attorneys; Mr. Greenwood, on the brief).

Alfred E. Ramey, Jr., Deputy Attorney General, argued the cause for respondents State Board of Education and Commissioner of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Debra T. Poritz, Deputy Attorney General, of counsel; Mr. Ramey, on the brief).

PER CURIAM

This appeal is taken from a decision of the State Board of Education dated May 6, 1981 in which the State Board affirmed the decision of the Commissioner of Education (Commissioner) for the reasons stated in the Commissioner's decision. The Commissioner's decision was dated October 6, 1980. It directed the Board of Education of the City of Linden (the Board) to present a plan for the "final desegregation of its elementary schools" in accordance with the recommended order of the administrative law judge before whom a hearing on this matter had been held. The Commissioner's decision also provided that, "in the absence of such action the Commissioner shall present his own plan by April 1, 1981." On this appeal the following contentions have been advanced on behalf of the Linden Board of Education:

> POINT I - THE COMMISSIONER AND STATE BOARD IMPROPERLY IGNORE UNCONTROVERTED EXPERT TESTIMONY THAT A COMMISSIONER-IMPOSED MANDATE TO REASSIGN PUPILS TO ACHIEVE NUMERICAL RACIAL BALANCES WOULD, IN THIS PARTICULAR CASE, BE COUNTER-PRODUCTIVE TO HIS OWN OBJECTIVES OF MEANINGFUL INTEGRATED EDUCATION; HIS COERCION OF A PLAN IN THIS CONTEXT IS, THEREFORE, ARBITRARY AND MUST BE REVERSED.

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POINT II - THE COMMISSIONER AND STATE BOARD FAILED IN THIS CASE TO APPLY THE PROPER BURDEN OF PROOF; HAD THE PROPER BURDEN BEEN APPLIED THE ORDER IN QUESTION COULD NOT PROPERLY HAVE BEEN ISSUED.

POINT III - THE RECORD IN THIS CASE REVEALS THAT THE STATE POLICY ON RACIAL BALANCE CANNOT PROPERLY SUPPORT THE COMMISSIONER'S DECISION.

A. The State Policy and Guidelines on Racial Balance Represent an Insufficient Basis for the Decision Below.

B. The Decision of the State Board is Based on the State Board Policy and Guidelines of November 5, 1969, which is a Rule of General Applicability and which was not Adopted in Accordance with the Administrative Procedure Act, and the State Board Decision Should Therefore be Reversed. (This Point was not presented below).

POINT IV - SINCE IT IS CLEAR THAT THE COMMISSIONER AND STATE BOARD DECISIONS DID NOT ADEQUATELY ADDRESS THE ISSUES RAISED, THIS COURT SHOULD OVERTURN THE DECISIONS BELOW OR REMAND THE CASE WITH APPROPRIATE INSTRUCTIONS.

Despite this appeal we are informed that the Board devised a desegregation plan which is acceptable to the Commissioner in principle. However, the Board has failed to submit to the Commissioner resolutions verifying the formal adoption of the plan. On this appeal the Board contends that the Commissioner has no right to coerce the adoption of such a plan in the particular circumstances of this case, that because of the likelihood of "white flight" the implementation of a desegregation plan would be counterproductive, and that the evidence indicates an insufficient justification on educational grounds for compelling such an integration plan.

Contentions of this nature were rejected by the Commissioner in his decision, and we concur in the Commissioner's conclusion. It is the longstanding public policy of this state to avoid racial discrimination and segregation in the public schools occurring because of intentional and invidious motives or de facto because of residential patterns. N.J. Const. 1947, Art. I, par. 5; N.J.S.A. 18A:36-20; Jenkins v. Morris Tp. School Dist. and Bd. of Educ., 58 N.J. 483, 495-497 (1971); Booker v. Board of Educ. of Plainfield, 45 N.J. 161, 170-171, 173-175 (1965). Accordingly, we find no merit to appellant's challenge to the Commissioner's power to rectify racial imbalances in public schools.

Appellant's expert testified to the controversy among researchers concerning the benefits to be gained and harm to be

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avoided by ending racial imbalance in public schools. Although he testified that in his view there are no specific measurable educational harms which can be significantly affected by ending racial imbalance, we do not find this evidence a sufficient basis for invalidating the State's established policy of desegregation. With respect to the contentions concerning the effects of integration on the enrollment of white pupils, we reiterate the admonition in Booker, supra, 45 N.J. at 180, that in effectuating a desegregation plan efforts should be made to combat "trends towards withdrawal from the school community by members of the majority...." Appellant's expert indicated that the voluntary withdrawal of white students from a public school system would be reduced if there was strong support in the white community for a mandatory pupil reassignment plan.

Finding no merit to appellant's contentions, the decision of the Commissioner, as adopted by the State Board, is affirmed.

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MARY ELLEN MONACO,	:	
Petitioner-Respondent,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF RIVER EDGE, BERGEN COUNTY,	:	APPELLATE DIVISION
Respondent-Appellant.	:	

Decided by the Commissioner of Education, June 8, 1981

Decided by the State Board of Education, February 3, 1982

Argued May 2, 1983 - Decided May 23, 1983

On appeal from New Jersey State Board of Education

Irving C. Evers argued the cause for appellant

Gregory T. Syrek argued the cause for petitioner (Bucceri & Pincus, attorneys; Louis P. Bucceri, of counsel; Mr. Syrek, on brief)

Irwin I. Kimmelman, Attorney General, submitted a statement in lieu of brief on behalf of State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, on the statement)

PER CURIAM

Under Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) petitioner accrued credit towards tenure eligibility based upon service as a State compensatory education teacher during the 1977-78 school year. The State Board of Education ruled in her favor in February 1982, following our decision in Spiewak, 180 N.J. Super. 312 (App. Div. 1981). The Supreme Court subsequently affirmed this court in Spiewak on June 23, 1982.

Respondent local board of education nevertheless appeals, in reliance upon the Supreme Court footnote in Spiewak, 90 N.J. at 83, footnote 2: "... [T]teachers not involved in this case who were terminated prior to the date of this opinion are not entitled to be rehired." Solely in reliance upon the footnote, respondent is seeking the reversal of an administrative decision based upon the governing law at the time of the decision and in accordance with the governing law today.

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In our view respondent's sole argument on this appeal is palpably without merit. As the Supreme Court stated in Ramirez v. Amsted Industries, Inc., 86 N.J. 332, 357 (1981):

> While we agree that there was a reasonable basis for reliance by successor corporations and their insurance carriers on the general rule of nonliability under the McKee approach, the plaintiffs in this case should not be denied the reward for their efforts and expense in challenging the traditional corporate law principles expressed in McKee. Therefore, we apply the new rule to the present case and its companion, Nieves v. Bruno-Sherman Corp. and Harris Corp., 86 N.J. 361. Moreover, we conclude that on balance and as a matter of fundamental fairness, the benefit of today's rule should be extended to other similarly situated plaintiffs with products liability suits against successor manufacturers affected by this rule, which suits were in progress as of November 15, 1979, the date of the Appellate Division decision. There is a basic justness in recognizing that persons who have exercised the initiative to challenge the existing law should be accorded relief if their claims--not yet resolved when the new rule of law is announced--are ultimately vindicated.

Under the circumstances, including the petitioner's diligence in pursuing her claim of tenure status, we perceive no mandate in the Spiewak footnote on prospective applicability which bars us from applying the substantive holding of Spiewak, both in this court and in the Supreme Court, in petitioner's favor.

We affirm.

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THERESA MULHEARN,	:	
Petitioner-Appellant,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	APPELLATE DIVISION
Respondent-Respondent.	:	
	:	

Decided by the Commissioner of Education, February 2, 1982

Decided by the State Board of Education, June 2, 1982

Argued October 5, 1983 - Decided October 31, 1983

Before Judges Fritz, Furman and Deighan

On appeal from the State Board of Education

Steven R. Cohen argued the cause for appellant (Selikoff & Cohen, attorneys; Mr. Cohen, of counsel; Mr. Cohen and Barbara E. Riefberg, on the brief)

William D. Hogan argued the cause for respondent (Davis & Reberkenny, attorneys; Mr. Hogan, on the brief)

Statement in lieu of brief submitted on behalf of the State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; Alfred E. Ramey, Jr., Deputy Attorney General, on the statement)

PER CURIAM

Appellant held a secondary teaching certificate in English as well as French but had only taught French during a 17 year teaching career in respondent's school district. The issue on this appeal is whether she was entitled to employment as an English teacher upon a reduction in force among French teachers, based upon her seniority in the school district over certified English teachers who had been teaching English but were non-tenued. The issue will be non-recurrent in view of a subsequent amendment in 1983 to the regulation defining seniority for secondary teachers.

At the time of respondent board's denial of seniority as an English teacher to appellant, N.J.A.C. 6:3-1.10(k)(27) provided: "Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate...." The 1983 amendment to the regulation, N.J.A.C. 6:3-1.10(l)(15), limits

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seniority to subjects or field which the certified secondary teacher has actually taught. The governing regulations were adopted pursuant to statutory authorization to the Commissioner of Education to establish standards to determine seniority, N.J.S.A. 18A:28-10,13.

Under the plain language of the regulation then in force, appellant was entitled to seniority as a certified secondary English teacher. Nevertheless, the recommendation of the Administrative Law Judge rejecting her claim to seniority was adopted by the Commissioner of Education. The Commissioner concluded that her tenure rights as a French teacher would not be infringed. The State Board affirmed for the reasons expressed in the Commissioner's opinion.

The issue, however, is seniority rights exercisable upon a reduction in force, not tenure rights. Under N.J.S.A. 18A:28-1 et seq. tenure is acquired only in subjects or fields in which the secondary teacher has served.

In his decision adverse to appellant, the Administrative Law Judge, emphasizing that appellant obtained her secondary certification in English only in 1965 after her initial employment by respondent board in 1964, relied without analysis upon two school law decisions, Morer v. Bd. of Ed. of Teaneck, 1976 S.L.D. 963 (Comm. of Ed. 1976) and Dedrick v. Bd. of Ed. of Hammonton, 1977 S.L.D. 1043 (Comm. of Ed. 1977). Morer and Dedrick recognize seniority rights without teaching service only in subjects or fields in which the secondary teacher was certified at the time of employment within the school district and not in subjects or fields in which the secondary teacher subsequently earned certification. Neither Morer nor Dedrick attempts to reconcile its result with N.J.A.C. 6:3-1.10(k)(27). Morer, the earlier of the two precedents relied on by the Administrative Law Judge, relies itself upon a substantively distinguishable tenure rights case, Reinish v. Bd. of Ed. of Cliffside Park, 1965 S.L.D. 50 (Comm. of Ed. 1965), aff'd 1966 S.L.D. 252 (St. Bd. 1966), aff'd 1966 S.L.D. 253 (App. Div. 1966, unpublished opinion).

Despite the contrary result in Morer and Dedrick we construe the plain meaning of N.J.A.C. 6:3-1.10(k)(27) as precluding any ambiguity. Administrative interpretation must be rejected as a guide to construction if in conflict, as here, with the plain meaning of the statute or regulation under review. Safeway Trails, Inc. v. Furman, 41 N.J. 467, 483 (1964).

Respondent board does not argue that the Commissioner of Education impliedly amended his own regulation defining seniority for secondary teachers, in the exercise of his statutory authority to establish seniority standards. In our view such argument, if raised, would be untenable. A formally promulgated regulation should not be amended by implication, in any event not without explanation or delineation as here.

Respondent board argues alternatively that appellant should be barred from seniority rights because of her waiver of them in

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declining proposals to take English, as well as French, teaching assignments during several preceding years. As a matter of law, we conclude that such choices of assignments in preceding years did not constitute a waiver, that is, a voluntary relinquishment of appellant's right under N.J.A.C. 6:3-1.10(k)(27) to seniority as an English teacher upon a one-sixth reduction in her teaching time and pay as a French teacher.

We reserve and direct that appellant be granted seniority as a secondary English teacher for the 1981-82 and 1982-83 school years and be reimbursed for any loss of pay because of respondent's denial of such seniority rights.

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NEW MILFORD EDUCATION ASSOCIATION ET AL.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 20, 1982

For the Petitioners-Appellants, Bucceri & Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Respondent, Dorf & Glickman
(Mark S. Ruderman, Esq., of Counsel)

Petitioners are Title I and SCE teachers who were nonrenewed for the 1981-82 school year and filed a Petition of Appeal with the Commissioner of Education on July 10, 1981, seeking relief on tenure, seniority and compensation issues. Subsequently, they were renewed for the 1981-82 school year. The Commissioner held that, in accordance with Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), petitioners were tenured full-time teaching staff members and awarded them prospective salary guide placement. In the absence of a reduction in force, the seniority issue was not addressed by the Administrative Law Judge, nor the Commissioner. This appeal to the State Board of Education specifically raises the issue of full retroactive remedy and the proper salary guide placement of Scult and Flieger.

With regard to the issue of retroactivity of salary, we cite our holding in Bridgewater-Raritan Education Association et al. v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County, 1981 S.L.D. ____ (July 30, 1981), 1982 S.L.D. ____ (December 1, 1982). There, in keeping with the principles expressed in Spiewak, supra, we declined to award back pay prior to June 23, 1982, the date Spiewak was decided by the New Jersey Supreme Court. In the instant matter, we note the Administrative Law Judge's award of a salary differential for the 1981-82 school year as follows:

> "3. Compensate petitioners, including Bogyo, for the difference in salary received for services in the 1981-82 school year and salaries they should have received consistent with this opinion***."

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Based on the New Jersey Supreme Court's holding in Spiewak, and our determination in Bridgewater-Raritan, we decline to award back pay for the 1981-82 school year and reverse that portion of the decision which so holds.

Remaining are the claims of Petitioners Scult and Flieger for credit on the salary guide for previous teaching experience. We note that Scult's placement on the salary guide does not reflect four years of teaching experience credit which had been evaluated by the Superintendent of Schools pursuant to the collective bargaining agreement, and recognized by the district for credit prior to the 1982-83 school year; also, Flieger's placement on the salary guide does not reflect two years of teaching experience credit which had been evaluated by the Superintendent of Schools pursuant to the collective bargaining agreement, and recognized by the district for credit prior to the 1982-83 school year. These claims were rejected by the Commissioner. We fail to see why this previous teaching experience, which had been recognized and credited for salary guide placement prior to the 1982-83 school year, should now be denied. We, therefore, correct that portion of the Commissioner's decision which so holds, and order prospective placement on the salary guide, reflecting this experience.

With these modifications, the decision of the Commissioner is affirmed for the reasons expressed therein.

May 4, 1983

PENDING N.J. SUPERIOR COURT

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IN THE MATTER OF THE TENURE	:	
HEARING OF JOAN R. NOLAN, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
MERCHANTVILLE, CAMDEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, April 22, 1982

Decided by the State Board of Education, August 4, 1982

For the Petitioner-Appellant, Brown, Connery, Kelp, Wille, Purnell & Greene (Paul Mainardi, Esq., of Counsel)

For the Respondent-Respondent, White & Uzdavinis (John L. White, Esq., of Counsel)

For the Amicus Curiae, New Jersey School Boards Association, David W. Carroll, Esq.

This tenure case was settled by the attorneys for the parties in early March 1982. The Consent Order Dismissing Tenure Charges was approved by the Administrative Law Judge, subject to the review and approval of the Acting Commissioner of Education. On April 22, 1982, the Acting Commissioner rejected the settlement and remanded the matter for a full plenary hearing. The Merchantville Borough Board of Education has appealed from the Acting Commissioner's decision. In view of the Acting Commissioner's determination, Respondent Nolan no longer "desires to proceed with the settlement." (Letter of Respondent's Attorney, May 19, 1982) Over Respondent's objection, the New Jersey School Board's Association was granted leave to appear as amicus curiae and has filed a brief in this matter.

Respondent is the Board Secretary of the school district. She has been charged by the Board of Education with misappropriation of ESEA Title I funds. In rejecting the settlement of this matter, the Acting Commissioner found that the charges were of such a serious nature that it would be against the public interest to allow the settlement to stand.

The State Board decision, In the Matter of the Tenure Hearing of Frank Cardonick, April 6, 1983, sets forth those criteria and guidelines which the State Board considers to be of importance in evaluating and reviewing tenure settlements and withdrawals. We believe the Commissioner's determination to require a full resolution of this case is appropriate and necessary in these circumstances, in accordance with the criteria set

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forth in Cardonick. We specifically note the seriousness of the charges and the need to safeguard the public interest in this matter. For these reasons, the State Board of Education affirms the decision of the Acting Commissioner of Education.

Attorney Exceptions are noted.
April 6, 1983

PENDING N.J. SUPERIOR COURT

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NORTH PLAINFIELD EDUCATION ASSOCIATION, on behalf of ARLENE KOUMJIAN AND MICHEL SPRATFORD,	:	
PETITIONERS-APPELLANTS,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
THE BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 15, 1981

Decided by the State Board of Education, May 5, 1982

Argued: June 6, 1983 -- decided: June 20, 1983

Before Judges Bischoff, J. H. Coleman and Gaulkin.

On appeal from a determination of the New Jersey State Board of Education.

Mark J. Blunda argued the cause for appellant (Rothbard, Harris & Oxfeld, attorneys; Sanford R. Oxfeld, of counsel).

Sanford C. Vogel argued the cause for respondent (Vogel Vastola and Gast, attorneys).

No one appeared on behalf of the New Jersey State Board of Education. (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Regina Murray Mahoney, Deputy Attorney General, on the Statement in Lieu of Brief).

PER CURIAM

Petitioners, Arlene Koumjian and Michel Spratford, are teachers employed by the Board of Education of the Borough of North Plainfield, Somerset County (Board). They filed a Petition of Appeal with the Commissioner of Education seeking credit toward a yearly increment pursuant to N.J.S.A. 18A:29-8 for time spent on a sabbatical leave. Their claim was dismissed as untimely as being in violation of the 90-day period of limitations set forth in N.J.A.C. 6:24-1.2. The State Board of Education affirmed. This appeal followed.

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Petitioners are tenured teachers who were granted sabbatical leaves pursuant to the labor agreement between the Board and the North Plainfield Education Association (Association) for the spring semester of 1979 in order to permit them to attend a full-time program of study during which time each acquired a master's degree. When their leave began petitioner Spratford was on Step 8 of the bachelor's degree level of the salary guide and petitioner Koumjian was on Step 7 of the same level. Upon commencement of the 1979-80 school year each petitioner was placed on the same level of the salary guide as she was previously on except they were placed in the master's degree category.

Petitioners, on November 12, 1979, filed a grievance which alleged a violation of a labor agreement in that they did not receive credit for the time spent on the sabbatical leave for purposes of moving along the various steps of the salary guide. Petitioners' grievance was denied by the Board; it was sent to arbitration, and on July 20, 1980 the arbitrator decided in favor of the Board.

On Sept. 29, 1980 the Association filed this petition with the Commissioner seeking salary placement for each petitioner on the next higher step of the salary guide. Petitioners allege that upon return from the sabbatical leave they should have been placed on the next higher salary step. They were not and while they were both advanced one step in September, 1980 they contend they should be one step higher since they were not advanced in September, 1979 upon return from the sabbatical leave.

The petition was referred to an Administrative Law Judge for hearing. The Board moved for a dismissal of the petition asserting 1) the doctrine of res judicata and collateral estoppel, 2) failure of the Association to invoke the grievance procedure, and 3) the asserted failure of the Association to file the petition in a timely fashion under N.J.A.C. 6:24-1.2. The ALJ rejected the res judicata and collateral estoppel argument but did rule that the petition was time barred by N.J.A.C. 6:24-1.2. He rejected petitioners' contention that the claim for 1980-81 was separate and independent of any claim for 1979-80 and held the 90-day time period under N.J.A.C. 6:24-1.2 began to run from September 15, 1979, the approximate date of the first pay period of that school year, when petitioners learned where the Board had placed them on the salary guide. The ALJ dismissed the appeal for that reason. Both the Commissioner and the State Board of Education affirmed.

The sole issue presented by this appeal is whether the petition is time barred. Petitioners argue that they seek relief for the years 1980-81 and thereafter. They do not seek relief retroactively for the 1979-80 school year. They argue that the 90-day period starts to run from the receipt of notice (about September 15, 1980) as to the salary step the Board placed them on for that year.

We agree. N.J.S.A. 18A:29-8 provides:

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> Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section.

In strikingly similar language, N.J.S.A. 18A:29-11 provides that members[1] "shall be entitled to receive equivalent years of employment credit for" active military or naval service "as if he had been employed for the same period of time in some publicly owned and operated college, school or institution..." (with limitations not here relevant).

In Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982) the Supreme court held that the increment for military service provided by N.J.S.A. 18A:29-11 was a statutory entitlement and the Statute of Limitations was not applicable. It there held that the emolument was not provided for services rendered or to be rendered for teaching but for services rendered in the military.

That reasoning also applies to N.J.S.A. 18A:29-8. The emolument there provided by advancement on the salary scale for each year of service is not for services rendered or to be rendered for teaching, but as a reward for a year's service in the employ of a school district as a full-time teaching staff member. It is essentially longevity pay. When viewed realistically the emolument bears no relationship to services to be rendered as an employee. "Certainly the value of petitioner's services as a school teacher is not greater than the services of a colleague who had the same training and was teaching the same educational course over the same period of time" less one year. There would be no basis from a teaching standpoint for paying a lower salary to a teacher's twin who had only 10 years instead of 11 years teaching experience. Lavin v. Hackensack, supra, 90 N.J. at 150. See also Union Tp. Teachers Ass'n. v. Union Tp. Bd. of Ed., 90 N.J. 161 (1982).

We view the emolument provided by N.J.S.A. 18A:29-8 for each additional year of service as a statutory entitlement unrelated to the teacher's qualifications, performance or quality of teaching services rendered. As such the regulation is not applicable. N.J.A.C. 6:24-1.2 is a form of Statute of Limitations and does not provide a bar to petitioners' application for the increment. Since petitioners seek only prospective application we are not here concerned with the doctrine of laches.

Furthermore, if petitioners were entitled to the salary increment for a combination of one semester teaching and one

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[1]Member is defined in N.J.S.A. 18A:29-6 as follows: "Member" shall mean a full-time teaching staff member as defined in this title except one who is the holder of an emergency certificate.

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semester sabbatical leave in the 1978-79 school year, each year of deprivation of the statutory increment could be viewed as a continuing deprivation and, as such, a petitioner seeking redress would not be barred by the 90-day time limit contained in N.J.A.C. 6:24-1.2. See Terry v. Mercer Cty. Freeholders Bd., 173 N.J. Super. 249, 253 (App. Div. 1980), modified 86 N.J. 141 (1981); Decker v. Bd. of Education of the City of Elizabeth, 153 N.J. 470 (App. Div. 1977), certif. den. 75 N.J. 612 (1978).

The decision of the State Board of Education is reversed and the matter is remanded to the Commissioner of Education for a plenary hearing on the merits of petitioners' claim.

Pending N. J. Supreme Court

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PARSIPPANY-TROY HILLS EDUCATION EDUCATION ASSOCIATION,

APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS,

RESPONDENT.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, July 13, 1981

Decided by the State Board of Education, November 10, 1981

Argued December 21, 1982 - Decided February 1, 1983

Before Judges Matthews, Antell and Francis.

On appeal from State Board of Education.

Cassel R. Ruhlman, Jr., argued the cause for appellant (Ruhlman and Butrym, attorneys; Richard A. Friedman and Cassel R. Ruhlman, Jr., on the brief).

Myles C. Morrison, III, argued the cause for respondent (Dillon, Bitar & Luther, attorneys; Henry N. Luther, III, of counsel; Myles C. Morrison, III, on the brief).

Alfred E. Ramey, Jr., Deputy Attorney General of New Jersey, argued the cause for State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

The opinion of the court was delivered by MATTHEWS, P.J.A.D.

High school sophomores in the Parsippany-Troy Hills School District are required to attend for credit five weeks of classroom instruction in driver education. Behind-the-wheel training is offered after school, evenings and weekends by the Adult Evening School for a $105 fee. The Education Association appeals from the State Board of Education's reversal of the administrative law judge's decision. The Association contends that Driver Education is an essential part of a constitutionally mandated thorough and efficient education and that the program may not be bifurcated with the behind-the-wheel portion offered on a fee basis by the Adult Evening School.

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We are being asked to decided the degree of control a local board of education has over a driver education program in its high school. Does the Thorough and Efficient (T&E) clause of the State Constitution require the board to offer driver education? If not, but the board chooses to require all students to take a classroom driver education program, does the T&E clause mandate that the board also provide behind-the-wheel training? If not, may the board choose to provide behind-the-wheel training under the auspices of its Adult Education School for $105 taught either after school and on Saturdays by State "certified" teachers or in the evening by a professional driving school?

The administrative law judge summarized his conclusions as follows:

1. The Board's failure to provide behind-the--wheel instruction in driver education in the regular school curriculum does not constitute a denial of a thorough and efficient education;

2. The classroom instruction in driver education is an integral part of the health program, which is an integral part of the required physical education program, which is an integral part of the school curriculum;

3. Behind-the-wheel training is an integral part of the driver education program;

4. The Board may bifurcate behind-the-wheel training from its curricular offerings incorporated in the regular school day, assuming proper supervision and the use of certified teachers; and

5. The Board may not charge a tuition fee for pupils participating in the behind-the-wheel training program.

Issues presented in this appeal by the Association exactly parallel these summary conclusions.

On review, the State Commissioner of Education set aside the administrative law judge's decision and awarded summary judgment for the Board. He agreed that a thorough and efficient education does not necessarily include any driver education program and that driver education may be offered outside of regular school hours. The Commissioner also found that the Evening Adult School could offer behind-the-wheel instruction as a general community service available on a fee basis to anyone desiring the program. The only limitations on such a program are that no regular school credit or record of participation must be on a public school student's transcript, and the course must be offered exclusively during those

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hours in which the adult school is normally in session. The Commissioner's decision is based exclusively on his previous decision in Ann Camp v. Board of Education of the Borough of Glen Rock, Bergen County, 1977 S.L.D. 706 and on N.J.S.A. 18A:11-1 and N.J.A.C. 6:8-3.5 which gives the Board power to determine and adopt the educational program for each school. The Commissioner did not agree or disagree with the administrative law judge's determination that behind-the-wheel training is an integral part of driver's education, nor did he discuss the relevance of that determination. The State Board of Education summarily affirmed the Commissioner's decision "for the reasons expressed therein" and provided no additional support or analysis.

Plaintiffs maintain that this court is not bound by the State Board's determination of the legal issues. Where the issue is one of law, the Commissioner's and State Board's decision do not carry a presumption of validity and it is for this court to decide whether those decisions are in accord with the law. Biancardi v. Waldwick Board of Education, 139 N.J. Super. 175, 177 (App. Div. 1976), aff'd for reasons below 73 N.J. 37 (1977). "An appellate tribunal is . . . in no way bound by the agency's determination of a strictly legal issue." Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93 (1973).

However, a review of the statutory and code provisions concerning the delegation and distribution of control over educational issues among the State Board, the Commissioner and the local boards reveals that determination of curriculum is actually a discretionary decision of these administrative bodies. The State Board has the general duty to supervise and control public education in New Jersey. N.J.S.A. 18A:4-10. This includes the duty to make and enforce rules for carrying out the state school laws. N.J.S.A. 18A:4-15.

The Commissioner is the secretary of the State Board, N.J.S.A. 18A:4-9, and the chief officer of the State Department of Education, N.J.S.A. 18A:4-22. The Legislature has delegated to him the duty to "inquire into and ascertain the thoroughness and efficiency of operation of any schools .... N.J.S.A. 18A:4-24. See also In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 273 (1981), Robinson, et al. v. Cahill, et al., 62 N.J. 473, 509 n. 9 (1973). Thus, the Commissioner's interpretation of what is required under thorough and efficient should be accorded certain deference. The Commissioner has also been delegated power to prescribe minimum courses of study for the public schools. N.J.S.A. 18A:4-25. This section has been used by the courts to allow the Commissioner to correct racial imbalance, Jenkins v. Morris Tp. Dist., 58 N.J. 483 (1971), and to administer statewide achievement tests, Chappell v. Comm'r of Education of N.J., 135 N.J. Super. 565 (App. Div. 1975).

The local school boards have the duty to enforce rules promulgated by the State Board. N.J.S.A. 18A:11-1. They have also been granted discretion over their curriculum choices by the Legislature.

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The "Legislative Finding" prefacing the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq. (1975 Act), established that curriculum is essentially a local question, decisions on which are to be made "democratically and with a maximum of citizen involvement and self-determination." N.J.S.A. 18A:7A-2(a)(6). Section 7 of that same Act also requires in part that each local board of education shall establish particular educational goals, objectives, and standards pursuant to rules prescribed by the State Board. [N.J.S.A. 18A:7A-7]

N.J.S.A. 18A:33-1 requires each school district to provide for all resident children a course of study suitable to their age and attainment.

Many of these statutory requirements have been implemented in Chapter 8 of Title 6 of the Administrative Code. These code provisions include general statements to the effect that a thorough and efficient education shall be provided to all students. In addition, certain minimum high school curriculum requirements have been established. N.J.A.C. 6:8-4.2(c).

These statutory provisions and implementing code regulations leave little doubt that the choice of which courses to offer and, necessarily, the content of those courses, is a discretionary decision left to the local boards of education, subject only to the periodic review of the Commissioner and State Board of Education. In such a case "the decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965). An "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 294 (App. Div. 1960).

We conclude that the local board's decision not to offer behind-the-wheel training is a discretionary decision which was reviewed and upheld by the Commissioner and State Board.

The Association has not presented any single instance where the "T and E" Clause has mandated that a given course be included in a curriculum. Many skills not taught in public schools would open new employment opportunities to large numbers of students. Must every public school system offer a full range of computer science courses? Should the curriculum of each district reflect the career goals and expectations of all or most or some of its students? The problems flowing from courts reading mandatory curriculum content into the T&E Clause are legion. The policy reasons for mandating the inclusion of driver education are not sufficiently compelling for this court to break such new ground.

The administrative law judge found behind-the-wheel training an integral portion of the driver education curriculum as included in the health program. He defined "integral" as "essential

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to completeness," "formed as a unit with another part." He went on to find that nothing in New Jersey's law indicated a de jure relationship between the two parts of driver education. Certainly no one can argue with his conclusion that behind-the-wheel instruction has a "de facto relationship" with the classroom instruction. The purpose of the classroom instruction is to make the students aware of the automobile, its operation, its maintenance, and the rules and regulations pertaining to its use. Such instruction must be directly related in fact to "hands on" training.

However, the administrative law judge found no de jure relationship and the Association in this appeal has not provided any additional case law or statutory language or even any policy arguments which would compel the conclusion that behind-the-wheel training is an essential or integral portion of classroom driver education in any legal sense. Both the administrative law judge and the Association analogize driver education without hands-on-training to a science course taught without integrated laboratory training. Neither the administrative law judge nor the Association provides any support for finding driver education more akin to science than to, e.g., swimming. Courts cannot require schools to provide practical training for all topics the Board chooses to have discussed in the classroom. Neither the administrative law judge nor the Association demonstrated what legal implications must flow from a simple de facto relationship. The issue as to whether the driver education program can be bifurcated with the behind-the-wheel training portion offered at a time other than during the regular school hours was addressed in Camp in a challenge to the legality of a curricular change authorized by a local board of education which resulted in the termination of employment of tenured teachers. 1977 S.L.D. at 706. As an element of that case, the Commissioner was required to determine whether behind-the-wheel training could be relegated to non-school hours and contracted on an hourly basis to be taught by persons other than salaried teaching staff members. Id. at 709. Without giving any analysis, the Commissioner found in Camp that the board may legally relegate behind-the-wheel training to non-school hours even when it was still considered part of the curriculum. Id. at 711. Camp recognized that behind-the-wheel training is qualitatively different from conventional academic studies: "it is usually completed in as few as six hours of individual instruction and not commonly assigned credit." Id. We see nothing that would necessarily require behind-the-wheel training to be taught in regular school hours. It is noteworthy that such training must be provided in very small groups of students making scheduling of training for all high school sophomores within regular hours very difficult.

The Commissioner declared without giving reasons, the behind-the-wheel training "must be offered exclusively during those hours in which the Adult School is normally in session." Although we might speculate on his reasons, we prefer not to. It has not been established in this record what the hours of the Adult School are, and whether after-school and Saturday sessions must be eliminated under the Commissioner's decision. Since we conclude

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that behind-the-wheel training may be offered by the Adult School we see no reason to place a limitation on the hours unless the Adult School generally has legally restricted hours.

The Association argues that the Adult Evening School is designed to serve an entirely different population than the regular school. It sees the arrangement under which students are charged a fee of $105 for behind-the-wheel training as a method of "permitting the Board to assess a large fee in violation of the thorough and efficient clause . . ." and that if the Board elects to teach a specific course to "regular students" it "must do so through a regular school. Otherwise any course could be offered through the Evening Adult School." The Board does not argue for such a broad extrapolation of their powers. Plaintiffs' conclusion follows from its premise that Driver Education including behind-the-wheel training is a mandatory course, a premise which we reject.

Willet v. Bd. of Ed. of Tp. of Colts Neck, Monmouth County, 1966 S.L.D. 202, 206, and In the Matter of the Appeals of the Boards of Education of the Black Horse Pike Regional School District and the Sterling Regional School District, Camden County, 1973 S.L.D. 130, aff'd 1973 S.L.D. 138, relied on by the Association, are not apposite. Both were concerned with the impermissibility of charging fees for activities that were an integral part of classroom instruction and/or for which credit was given. Without the Association's premise that behind-the-wheel training should be so characterized, the permissibility of charging a fee for the training is unquestionable.

Finally, the Association questions whether behind-the-wheel training may be taught by individuals not certified by the New Jersey State Board of Examiners.

The State Board of Examiners has the duty to issue teaching certificates to those individuals qualified to teach in the public schools. N.J.S.A. 18A:6-38. Because behind-the-wheel training is not taught in the public schools, as we have noted above, we find no merit in this issue.

In Camp, the Commissioner concluded that behind-the-wheel training may be relegated to hours other than the regular school day assuming the schools provide for "proper supervision and the use of certified teachers." 1977 S.L.D. at 711. The decision was given, however, in the context of the local board acknowledging factually that behind-the-wheel training was an integral part of its classroom driver education program. Camp, therefore, is not relevant here.

Affirmed.

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IN THE MATTER OF THE TENURE :
HEARING OF CARMINE PELLECHIO, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF NORTH BERGEN, HUDSON COUNTY. :
:

Decided by the Commissioner of Education, May 20, 1982

For the Petitioner-Appellant, Martin R. Pachman, Esq.

For the Respondent-Respondent, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

Tenure charges were certified against Carmine Pellechio as vice principal and teacher by the North Bergen School District on July 21, 1981. Mr. Pellechio, hereinafter Respondent, had served as Student Council Advisor and School Treasurer. During his service as Student Council Advisor, it is alleged that he purchased $33,000 worth of candy, for which there was no record of profits; failed to account for $2,500 which the Class of 1979 loaned to Student Council; failed to make an accounting for receipts of sales of hot dogs, soda, at basketball games; and failed to account for soda machine moneys. The Superintendent of Schools charged Respondent with violating the public trust in that he specifically failed to account for these moneys, to keep appropriate ledgers, vouchers, invoices, receipts. Tenure charges of inefficiency and unbecoming conduct were filed with the Commissioner of Education. It is noted that the above incidents are alleged to have occurred during the school years prior to September 1, 1978. The record shows this was at the time Respondent served as a tenured English teacher in the district, and prior to his appointment as a vice principal.

The tenure pleadings filed with the Commissioner of Education on August 6, 1981, include a Written Statement of Evidence, sworn to and subscribed by the Superintendent of Schools on July 14, 1981, and refer to "Carmen [sic] Pellechio, Vice Principal and Teacher," (Emphasis supplied.) Point 1 of the Written Statement of Evidence reads:

> "That Carmen [sic] Pellechio is presently a Vice Principal and teacher in the North Bergen school district."
>
> (Emphasis supplied.)

The statement of written charges reads in part:

> "The undersigned does hereby charge Carmen [sic] Pellechio, Vice Principal and Teacher

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> of the Township of North Bergen with conduct unbecoming a Vice Principal and Teacher***."
> (Emphasis supplied.)

On September 8, 1981, Respondent answered the tenure charges and denied any breach of the public trust or fiduciary obligation. He claimed the charges constituted inefficiency, at most, and must be dismissed for failure to comply with N.J.S.A. 18A:6-11 (which allows 90 days to correct inefficiencies). He also responded that the handling of student funds was with the express approval and authorization of the Superintendent of Schools; that the charges were brought for political reasons and in retribution for his earlier filing of a Petition of Appeal against the Board; that the charges should be dismissed because of laches and failure to follow the requirements of the tenure statute.

In addition to answering the charges, Respondent counterclaimed against the Board, asserting its resolution suspending him as vice principal, one week after the filing of tenure charges, and reassigning him to classroom teaching, was invalid. This phase of the controversy has been the subject of a State Board of Education decision, dated August 4, 1982, and is currently on appeal to the Appellate Division of the Superior Court. The State Board upheld the validity of the Board's suspension of Respondent, one week after certification of tenure charges, and upheld the reassignment of Respondent to the classroom; however, no reduction of salary was permitted.

In his counterclaim, Respondent asserted the following fact:

> "Respondent is a tenured vice-principal in petitioner's school district pursuant to N.J.S.A. 18A:28-5 and 18A:28-6."
> (Emphasis supplied.)

Whether through unavailability of personnel records (which the Board claims were unavailable until Spring of 1981) or through inadvertance, error, neglect, or for whatever reason, in its Answer to the Counterclaim, dated September 15, 1981, the Board admitted this asserted fact. (The Answer was not prepared by the Board's present attorney.) The assertion in Respondent's counterclaim of September 8, 1981, followed by the admission of the Board on September 15, 1981, is a critical point in this controversy. The Board's subsequent inconsistent position was advanced in its Notice of Motion for Summary Decision dated January 13, 1982, which has culminated in this appeal to the State Board. Thus, from September 15, 1981, until January 13, 1982, this case proceeded on the assumption that Respondent, a tenured English teacher, also held tenure in the position of vice principal.

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On January 13, 1982, the Board belatedly raised the question of Respondent's tenure as vice principal. It advanced three points of argument in its Brief on the Motion for Summary Decision:

> "Point I Tenure is a legislative status and not a contractual status between the Board of Education and a teaching staff member.
>
> Point II In order to acquire tenured status, a teaching staff member must comply with precise statutory conditions.
>
> Point III Although a board of education may shorten the statutory probationary period to allow early acquisition of tenure, it may not do so on an individual or an ad hoc basis."
>
> (Board's Brief in Support of Motion for Summary Decision, January 13, 1982.)

Respondent argued the following points in his opposing Brief:

> "Point I Pellechio gained tenure as a vice principal.
>
> Point II The Board's adoption of a settlement resolution in the prior case acts as a waiver of its ability to challenge Pellechio's tenure status as a vice principal.
>
> Point III The Board is not entitled to summary judgment in this matter because of the existence of material disputed facts.
>
> Point IV (In the Alternative) Assuming arguendo, that the respondent is not a tenured vice principal, he is entitled to sixty days pay upon termination of his contract."
>
> (Respondent's Brief in Opposition to Summary Judgment, February 19, 1982.)

On March 22, 1982, the Administrative Law Judge's Substantive Order-Summary Decision concluded that the Respondent was a tenured vice principal. The Commissioner affirmed the findings and determination of the Administrative Law Judge, and adopted them as his own on May 20, 1982. This appeal followed.

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The Administrative Law Judge found that Respondent, in an earlier dispute with the Board, was induced to accept a settlement, the terms of which caused him "to abandon a cause of action to his detriment by terms of settlement that ended the matter with prejudice." Initial Decision of the ALJ, March 22, 1982. (Pellechio was petitioner in the earlier dispute. We shall refer to him by name when discussing the earlier dispute.) The settlement in the prior dispute is then held against the Board in this dispute, on the basis of the Board's bad faith, Pellechio's detrimental reliance, and the Commissioner's dismissal of the petition with prejudice.

The prior dispute between these parties was entitled Carmine E. Pellechio v. Board of Education of the Township of North Bergen, Hudson County, 1981 S.L.D. _____ (decided by the Commissioner, April 10, 1981). As the basis of his decision in the matter sub judice, the Administrative Law Judge has taken notice of the case records in respect to the prior dispute. The ALJ found that:

> "The Board is now derogating against its own prior act; is palpably acting in bad faith; and is estopped therefrom on ground of equity in view of Pellechio's detrimental position change."

Notice has been taken of the case records in the prior dispute.

The prior dispute was brought by Pellechio's verified Petition of Appeal, filed February 4, 1980, with the Commissioner of Education; the Board's Answer was filed March 5, 1980; the Prehearing Order was entered May 13, 1980; the Initial Decision of the ALJ was rendered February 26, 1981, incorporating a Consent Order and the Board's ratificatory resolution; and the Commissioner's decision was rendered April 10, 1981. Since the Petition of Appeal, Answer and Prehearing Order were not reproduced in the record presented to the State Board of Education for review, we have reproduced and attached these papers to the Legal Committee Report as Attachments 1, 2 and 3.

The Petition of Appeal was brought by Pellechio on the ground of his demotion/transfer from the nontenured position of vice principal, without statement of reasons, to the status of teacher. Petition of Appeal, February 4, 1980. At paragraph 10, Pellechio alleges as follows:

> "10. Petitioner alleges that the Board's actions with regard to his demotion/non-reemployment are unlawful, arbitrary, capricious, and in violation of N.J.S.A. 18A:27-10, 11, and 12, and N.J.A.C. 6:3-1.21. In further support of Petitioner's contention

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the following cases are cited: Highton, et al. vs. Board of Education of the City of Union, 1974 SLD 207 holding that the failure to notify a non-tenured teaching staff member by April 30th of the prior school year results in a contract of employment for the following school year; Fallon v. Board of Education of the Township of Mt. Laurel, 1975 SLD 156 and 162 providing that the offer and acceptance of employment to a non-tenured teaching staff member results in a contract even if no formal contract is executed; Searles v. Board of Education of the Township of Hillside, 1975 SLD 483 providing that NJSA 18A:27-10, 11, and 12 apply to non-tenured administrators; Procopio v. Board of Education of the City of Wildwood, 1975 SLD 805 and 807 providing that a statement of reasons must be specific and explanatory and Procopio, Supra which provides that the diversion (sic) of the teaching staff member contained in N.J.S.A. 18A:1-1 includes principals and superintendents of schools."

Pellechio's demand clause reads as follows:

"WHEREFORE, Petitioner demands judgment as follows:

1. An Order by the Commissioner directing the Board to employ Petitioner as a Vice-Principal for the current school year.

2. An Order by the Commissioner to have the Board make Petitioner whole for any and all loss of salary and other emulates (sic) of employment denied to Petitioner due to the Board's unlawful action.

3. An Order granted Petitioner, attorney's fees, and costs of suit.

4. Such other relief as the Court may deem appropriate.

s/CARMINE E. PELLECHIO"

With the exception of paragraph 10, the Board admitted each and every count of the Petition of Appeal.

A Prehearing Order entered May 13, 1980, describes the nature of the proceedings as follows:

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"1. NATURE OF PROCEEDINGS

A tenured English teacher, appointed vice principal for 1978-79, was transferred or demoted back to teaching duties on September 20, 1979, against his will, at lesser salary, without charges or explanation, and without notification of non-reemployment as vice principal prior to April 30th of the 1978-79 school year. Having purported to accept employment as vice principal by letter to the Board on May 9, 1979, under N.J.S.A. 18A:27-11, 12 having served in the position from September 1, 1979 (sic) to September 20, 1979, and having then been transferred as above, he seeks reinstatement as vice principal, restoration of salary loss, and such other relief as is proper. There is no claim of tenure acquisition in category of vice principal under N.J.S.A. 18A:28-6." (Emphasis supplied.)

Stipulations as to issues were as follows:

"5. STIPULATIONS AS TO FACTS AND ISSUES

Paragraphs 1 through 9 of the petition are admitted. Petitioner holds a supervisors' certificate. Position of vice principal has never been certified by the county superintendent. At issue are the following:

A. Whether a non-tenured vice principal, who nevertheless holds tenure as an English teacher, can be transferred to his prior teaching position against his will, at lesser compensation, without charges or explanation, assuming non-compliance by the Board with N.J.S.A 18A:27-10.

B. Whether the Board constructively complied with N.J.S.A. 18A:27-10, assumming (sic) it was so required, on the evidence here.

C. Whether petitioner was a 'teaching staff member' in serving as vice principal within the meaning of N.J.S.A. 18A:1-1; 27-10, 11, 12; and N.J.A.C. 6:3-1.21.

D. Whether petitioner was entitled to a pre-determination hearing before the Board before transfer back to teaching duties.

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E. Assuming petitioner is entitled to relief, the measure thereof."

In reviewing the case records, which are listed above, it is clear that tenure in the position of vice principal was not pleaded or stipulated as an issue in the prior dispute. Indeed, Pellechio, by his verified Petition of Appeal, avers he was a nontenured vice principal seeking reinstatement. Subsequently, the parties settled their dispute. The Board's ratificatory resolution of January 21, 1981, contains a phrase which reads as follows:

"BE IT RESOLVED, that the resolution of September 30, 1979 as to Carmine Pellechio is hereby rescinded and the Board recognizes Carmine Pellechio's status as a Vice-Principal from September 1, 1978 to date."

This quoted phrase, without testimony below or further elucidation, is offered as the Board's recognition of Pellechio's tenure status as vice principal. We do not reach that conclusion.

In our review of the case records in the prior dispute, we find the Board agreed to a settlement which essentially upheld Pellechio's claims as put forward in his Petition of Appeal. The Commissioner concurred in the settlement and dismissed the Petition with prejudice. To this point, we would agree with the ALJ and the Commissioner that dismissal of the Petition with prejudice bars relitigation of the matters which were raised; however, we find that Pellechio's tenure status was clearly not an issue within the parameters of the prior dispute. The issue of Pellechio's tenure as vice principal was interjected by later events. The interpretation of the phrase, then, as somehow assuring Pellechio's tenure as a vice principal is inconsistent with the issues which were raised in the prior dispute, and unwarranted on the record. The matters which were raised pertained to an entirely different cause of action, addressed different issues and may not now be invoked as entitling Pellechio to the res judicata effect of estoppel in the present matter.

Furthermore, the courts have consistently held that tenure accrues to teaching staff members who meet the precise conditions of the tenure statute. Zimmerman v. Newark Board of Education, 38 N.J. 65 (1962); Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E. & A. 1941); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). N.J.S.A. 18A:28-6 sets forth the statutory conditions for tenure upon transfer or promotion:

"18A:28-6. Tenure upon transfer or promotion

Any such teaching staff member under tenure or eligible to obtain tenure under this

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> chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

The essential facts in this matter are not the subject of any dispute. Respondent was appointed vice principal beginning September 1, 1978. He served in the vice principal position until September 20, 1979, when he was transferred/demoted to a teaching position. On January 21, 1981, his service as vice principal began again. He served until July 28, 1981, when he was suspended. It was stated in Spiewak, supra:

> "As a practical matter, the protection of tenure would be greatly reduced if it were subject to contract principles. If tenure were subject to contract, it would be available to teachers only if school boards agreed to grant it to them. But the Legisla-

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> ture has explicitly mandated that teachers be granted tenure under certain conditions as a means to improve public education. Neither school boards nor teachers are free to disobey that mandate. Tenure is not dependent on agreement between the parties. Teachers are entitled to tenure because the Legislature has granted them that right."
>
> The New Jersey Supreme Court held further:
>
> "***We hold that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1.***"

In computing Respondent's service as a vice principal in accordance with the tenure statute, N.J.S.A 18A:28-6, we conclude that Respondent has not served the requisite period of time to qualify for a tenure status in the position of vice principal with the North Bergen School District. The State Board reverses the Commissioner's decision of May 20, 1982, for the reasons expressed above.

S. David Brandt, Gustavo A. Mellander, Sonia B. Ruby and Robert J. Wolfenbarger opposed in the matter.

Attorney Exceptions are noted
May 4, 1983

PENDING N.J. SUPERIOR COURT

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GENEVIEVE PETERSON, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, : DECISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, December 29, 1982

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

For the Respondent-Appellant, Sharkey & Sacks (Richard K. Sacks, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed with the modification that petitioner receive back pay retroactive to November 19, 1980. The record is clear that petitioner made a written claim for military service credit on November 19, 1980, and should receive back pay from that date forward. In all other respects, the Commissioner's decision is affirmed for the reasons expressed therein.

Maud Dahme abstained in this matter.

July 6, 1983

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RUSSELL ROGERS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 22, 1982

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

For the Respondent-Appellant, Irving C. Evers, Esq.

Petitioner alleges he was improperly denied tenure and seniority rights in an administrative capacity by the Board of Education of the Wallkill Valley Regional High School District, hereinafter "Regional Board." Petitioner was an administrator in the Franklin School District, a constituent district of the newly created Wallkill Valley Regional High School District. The Regional Board advised Petitioner that only his tenure and seniority rights as a teacher would be recognized and transferred to the newly created regional district. Petitioner appealed to the Commissioner of Education who held that Petitioner retained tenure as a vice principal in the newly created regional district. The Regional Board appeals from the Commissioner's determination to the State Board of Education.

The issue in this case centers on the statutory interpretation of N.J.S.A. 18A:13-42:

> 18A:13-42 Pension and tenure rights; certain teachers transferred to regional districts; preserved
>
> Whenever a regional district has been created subsequent to April 1, 1951, or shall hereafter be created, for high school or junior high school education, the tenure and pension rights of any high school or junior high school teacher, who, at the time of the holding of the election to create such regional district, was assigned for a majority of his time in a grade or grades from grades seven to 12 inclusive, in any high school or junior high school in any of

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> the constituent districts of such regional district, shall be recognized and preserved by the board of education of the regional district in the organization and operation of any high school or junior high school in the regional district, and any period of employment in any one or more of the high schools or junior high schools of any constituent district or districts, shall count toward the acquisition of tenure in the regional district, but nothing in this section shall be applicable to any superintendent or high school or junior high school principal."

The interpretation of this statute by the ALJ, which was affirmed by the Commissioner, is set forth at page 11 of the ALJ's Initial Decision (slip opinion). Briefly, the ALJ concluded that since the position of vice principal is not specifically excluded from the terms of the statute, and since the Legislature has afforded tenure rights in parallel situations, petitioner is entitled to tenure as vice principal within the newly created regional district.

The State Board of Education does not support this analysis. There is no provision in N.J.S.A. 18A:13-42 which compels the Wallkill Valley Board to recognize Petitioner's tenure and seniority rights as an administrator; and, we may not construe the statute to reach that result. See the analysis in In the Matter of the Closing of Jamesburg High School, School District of the Borough of Jamesburg, Middlesex County, 83 N.J. 540 (1980). We believe a broad interpretation of the statute, which includes vice principals within its protection, is not the intent of the Legislature.

Initially, we look to N.J.S.A. 18A:28-5 which was cited by the ALJ to buttress the conclusion that Petitioner's case falls within the protection of N.J.S.A. 18A:13-42. That the New Jersey Legislature has distinguished between "teachers" and "teaching staff members" can readily be seen in the language of N.J.S.A. 18A:28-5, which is quoted in pertinent part as follows:

> 18A:28-5 Tenure of teaching staff members
>
> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses***and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certifi-

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> cates in full force and effect, shall be under tenure during good behavior and efficiency***."

As can be seen, the term "teaching staff members" encompasses teachers, as well as vice principals, superintendents, principals, and other professional employees of a school district. The ALJ concluded that a vice principal position, which is tenurable under N.J.S.A. 18A:28-5, and neither enumerated nor excluded by N.J.S.A. 18A:13-42, falls within the protection of N.J.S.A. 18A:13-42.

The difficulty with applying this reasoning is that it cannot transcend the result in this particular case. If we were to accept this reasoning as to vice principals, we would have to conclude that it also applies to all of the other teaching staff members who are not specifically excluded from the statute. To follow this reasoning, "assistant" superintendents, "assistant" principals, school business administrators or any other teaching staff members, would be inferentially included. This reasoning, however, leads to an incongruous result. As an example, using this analysis, assistant superintendents would be protected, even though superintendents are specifically excluded. The result is illogical.

The ALJ cites N.J.S.A. 18A:28-15, 18A:28-17, 18A:13-49 and 18A:13-64 as parallel statutes where the Legislature affords tenure rights. Under N.J.S.A. 18A:28-15, "no teaching staff member" is affected. Under N.J.S.A. 18A:28-17, "all teaching staff members" in a "school" continue in their positions. Under N.J.S.A. 18A:13-49, "principals" are specifically included. And, under N.J.S.A. 18A:13-64, all "employees" are protected. Because of the dissimilarity among these statutes, we find no basis for concluding that these are parallel situations.

In summary, the State Board of Education does not find the reasoning advanced by the ALJ, and adopted by the Commissioner, to be persuasive, nor supportive of a broad interpretation of N.J.S.A. 18A:13-42. The decision of the Commissioner of Education is reversed.

Attorney exceptions are noted.
September 7, 1983

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MINDY ROSEN,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CITY OF BAYONNE et al.,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 11, 1981

Decided by the State Board of Education, November 10, 1981.

Argued May 17, 1983 - Decided June 8, 1983.

Before Judges Matthews and Francis.

On appeal from Final Decision of the State Board of Education.

Margaret A. Holbrook argued the cause for appellant.

Merritt T. Viscardi argued the cause for respondent Board of Education of the City of Bayonne (John V. Gill, of counsel and on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education, filed a Statement in Lieu of Brief (Alfred E. Ramey, Jr., Deputy Attorney General, on the Statement).

PER CURIAM

The decision of the State Board of Education is affirmed essentially for the reasons expressed in its Decision of November 10, 1981, and as it incorporates the Initial Decision of Administrative Law Judge Reiner, dated July 9, 1981, as well as the Decision of the Acting Commissioner of Education, dated August 11, 1981. R. 2:11-3(e)(1)(D).

Affirmed.

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IN THE MATTER OF MELVIN SANDERS,	:	
PLAINTIFF-APPELLANT,	:	
V.	:	SUPERIOR COURT
EAST ORANGE BOARD OF EDUCATION,	:	APPELLATE DIVISION
DEFENDANT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 13, 1981.

Decided by the State Board of Education, March 24, 1982.

Submitted September 14, 1983 - Decided October 5, 1983.

Before Judges Furman and Deighan.

On appeal from the State Board of Education.

Robert M. Schwartz, attorney for appellant.

Love & Randall, attorneys for respondent (Melvin Randall, of counsel and on the brief).

Irwin I. Kimmelman, Attorney General, attorney for the State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, on the Statement in Lieu of Brief).

PER CURIAM

In an administrative reorganization petitioner's position with respondent board of education as principal of the Hart Middle School Complex, a 12-month principalship, was abolished, three 10-month principalships for each of the three separate buildings of the Hart Middle School Complex were created, and petitioner was reassigned to the pre-existing 10-month principalship of the Vernon L. Davey Junior High School. Petitioner's annual salary was reduced from $37,312 over 12 months to $33,159 over 10 months. Raising the issue of a violation of his tenure rights under N.J.S.A. 18A:28-5 and 18A:6-10 et seq., petitioner appealed to the State Commissioner of Education. From the State Board of Education decision affirming the commissioner in upholding respondent board, petitioner appeals to us.

N.J.S.A. 18A:28-9 is applicable on the undisputed facts and mandates an affirmance. That statute provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the

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> district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Petitioner relies on In re Piscataway Township Board of Education, 164 N.J. Super. 98 (App. Div. 1978). In Piscataway the board reduced the work year of a class of teaching employees from 12 to 10 months, not in an administrative reorganization involving the elimination of a 12-month position, as on the appeal before us. Piscataway held that the unilateral, unnegotiated slash in pay for employees remaining in the same employment constituted an unfair labor practice. In our view the facts of Piscataway are clearly distinguishable and petitioner's reliance upon its holding unfounded.

We affirm.

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SAYREVILLE EDUCATION ASSOCIATION, :
on behalf of JOANN RUCKI, JOSEPHINE
MARCHESI AND DEBORAH FARLEY, :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF SAYREVILLE, MIDDLESEX COUNTY,

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, June 18, 1982

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Boehm & Campbell (Casper P. Boehm, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. We do not find it necessary to attempt to define, in the context of this case, substitute employment; and, therefore, we do not endorse the language of the Initial Decision of the Administrative Law Judge which attempts to do so.

[illegible] by the Board.

May 4, 1983

PENDING N.J. SUPERIOR COURT

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ROBERT SCHMIDT, :

PETITIONER-CROSS-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY, : DECISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, August 19, 1982

For the Petitioner-Cross-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellant, Kreiger, Ferrara & Feinsilver, Flynn & Catalina (Brian N. Flynn, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Petitioner/Cross-Appellant's motion to remand this matter for supplementation of the record and recalculation of seniority is denied.

May 4, 1983

PENDING N.J. SUPERIOR COURT

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ROBERT SCHWAB,

PETITIONER-RESPONDENT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN, MONMOUTH COUNTY, : DECISION

RESPONDENT-APPELLANT.

Decided by the Commissioner of Education, December 20, 1982

For the Petitioner-Respondent, Chamlin, Schottland, Rosen, Cavanagh & Uliano (Thomas W. Cavanagh, Jr., Esq., of Counsel)

For the Respondent-Appellant, Vincent C. DeMaio, Esq.

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

June 1, 1983

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CLAUS SCHWARTZKOPF,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN AND CHARLES SMERIN, SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, July 8, 1982

For Petitioner-Appellant, Bisgaier & Pancotto
(Carl S. Bisgaier, Esq., of Counsel)

For Respondents-Respondents, Murray & Granello
(Karen A. Bulsiewicz, Esq., of Counsel)

The State Board of Education reverses the decision of the Commissioner of Education and remands this matter for hearing, based on the following.

The record shows that petitioner was notified of the abolishment of his position by letter dated April 28, 1981. (Exhibit B) The Notice contained no reference to salary. The record shows further that petitioner was notified of his transfer and assignment by letter of July 29, 1981 (Exhibit D), to be effective September, 1981. This notice also contained no reference to salary. After April 28, 1981, and until August 31, 1981, petitioner's salary continued unchanged. On September 15, 1981, petitioner received a reduced pay check for the period September 1 to September 15, 1981. Petitioner made efforts to resolve the salary dispute. (Petition of Appeal, at para. 5; Answer, at para. 5) By letter dated October 19, 1981, the Superintendent of Schools clarified that petitioner was placed on the maximum step of the psychologists' salary guide. (Exhibit II) Petitioner filed a Petition of Appeal with the Commissioner of Education on January 4, 1982.

We find the date which triggered the running of the 90-day period was October 19, 1981. On that date, salary clarification was transmitted to petitioner's attorney. Under these circumstances, we find the operative event occurred on October 19, 1981, when it was clarified that petitioner had been placed on the maximum step of the psychologists' salary guide.

Accordingly, we find that the Petition of Appeal was timely filed and this matter should proceed to hearing.

S. David Brandt abstained.
Attorney Exceptions are noted.
September 7, 1983

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ANGELA SGRO,	:	
APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	APPELLATE DIVISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, November 5, 1981.

Decided by the State Board of Education, March 24, 1982.

Argued April 18, 1983 -- Decided April 29, 1983.

Before Judges Bischoff, J. H. Coleman and Gaulkin.

On appeal from the State Board of Education.

Thomas W. Cavanagh, Jr., argued the cause for appellant (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys).

Ronald L. Reisner argued the cause for respondent (Gagliano, Tucci, Iadanza and Reisner, attorneys).

Irwin I. Kimmelman, Attorney General, submitted a statement in lieu of brief on behalf of the State Board of Education (Regina Murray Mahoney, Deputy Attorney General, on the statement).

PER CURIAM

Appellant Angela Sgro, a teacher employed by respondent Board of Education of the Shore Regional High School District (Board), brought this action before the Commissioner of Education to challenge the Board's determination that she be paid "according to the M designation, and not according to the M plus 30 designation to which she is entitled." She alleged that the action of the Board was "arbitrary, capricious, unjustified, improper, without justification and substantiation and in violation of salient legal principles as determined by the Commissioner of Education." The matter was transferred for hearing to the Office of Administrative Law, which framed the issues as follows:

1. Subsequent to petitioner's receipt of her master's degree, did the Board improperly deny her request to be placed at the master's plus 30 credits level of the Board's salary policy?

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2. Does the Board's salary policy provide that, in order to be placed at its master's plus 30 credits level, the teaching staff member must earn 30 graduate credits subsequent to the receipt of a master's degree?

3. Does the Board's salary policy require the superintendent's prior approval of academic and/or graduate credits to be applied to the Board's master's degree plus 30 credits on the salary schedule?

In the initial decision the Administrative Law Judge found that in its collective bargaining the Board had "adopted a policy which, in part, provides additional salary compensation to its teachers for earned academic credits"; that at least seven teachers had been advanced "to the B.A. plus and M.A. plus levels by virtue of crediting those teachers with academic course work they had completed prior to, rather than subsequent to, the award of the degree"; that certain teachers had been permitted "to use the same prior credits earned to advance to the B.A. plus 15 credits and the M.A. plus 30 credits on the Board's salary guide"; that the Board's application of its salary policy to Sgro "was inconsistent with the Board's past practice and interpretation"; and that the Board had not "amended nor modified the language of its policy since awarding advanced credit" to the seven teachers. The Administrative Law Judge concluded that "the Board's denial of [petitioner's] request to be placed upon its M.A. plus 30 salary guide was improper pursuant to the Board's policy and past practice."

The Acting Commissioner of Education rejected that determination in a decision which concluded that the Board's salary policy as expressed in the collective bargaining agreement permits a teacher "to receive compensation for only those graduate courses taken subsequent to the attainment of the BA or MA degree in accordance with current placement and compensation." He specifically rejected the suggestion that the Board "may not take the appropriate action to prospectively correct the erroneous interpretation" that had previously been given to the salary policy. The Acting Commissioner accordingly dismissed the Petition of Appeal.

On Sgro's ensuing appeal, the State Board of Education affirmed the decision of the Acting Commissioner "for substantially the reasons expressed therein." Sgro now appeals from that determination.

The parties agree that credit for graduate courses taken prior to the award of a degree may be denied only if a specific formal board policy so provides. McAllen, Jr. v. Board of Ed. of the Bor. of North Arlington, 1975 S.L.D. 90 (Comm'r of Ed.), aff'd 1975 S.L.D. 92 (St. Bd. of Ed.); Siebold v. Board of Ed. of the Bor. of Oakland, 1980 S.L.D. 526 (Comm'r of Ed.), aff'd 1980 S.L.D. 527 (St. Bd. of Ed.); Hutchinson v. Board of Ed. of the Tp. of

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Greenwich, [decided by the Comm'r of Ed. March 23, 1981]. Such a formal policy can be expressed in the collective bargaining agreement. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); In the Matter of the Tenure Hearing of Michael A. Pitch, 1975 S.L.D. 764 (Comm'r of Ed.), aff'd 1976 S.L.D. 1159 (App. Div.). We find ample support in the record for the conclusions reached by the Acting Commissioner and the State Board that the collective bargaining agreement here fixed such a policy and that, fairly construed, its language proscribed the grant of credit for courses taken before the award of a degree. Those conclusions are neither arbitrary, capricious nor unreasonable, nor do they violate any legislative policies; accordingly there is no warrant for our disturbing them. See East Windsor Reg'l Bd. of Ed. v. State Bd. of Ed., 172 N.J. Super. 547, 552 (App. Div. 1980). The erroneous applications of the policy on prior occasions did not abrogate or amend the policy and, as held below, those prior occurrences cannot foreclose the Board from adhering to its stated policy in this and future cases.

The March 24, 1982 decision of the State Board of Education is affirmed.

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LOIS SHELKO,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 11, 1981.

Decided by the State Board of Education, May 5, 1982.

Argued May 17, 1983 -- Decided August 3, 1983.

Before Judges Fritz, Joelson and Petrella.

On appeal from New Jersey State Board of Education.

Richard A. Friedman argued the cause for appellant (Ruhlman, Butrym and Friedman, attorneys).

Henry E. Kirchoff argued the cause for respondent.

Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of respondent New Jersey State Board of Education (James J. Ciancia, Assistant Attorney General, of counsel; Michael J. Haas, Deputy Attorney General, on the statement).

PER CURIAM

This is a teacher case in which the teacher appeals from a determination dismissing her petition asserting a right to tenure. Its difficulty is demonstrated by its procedural history. The Administrative Law Judge recommended that the teacher's petition be dismissed. The Commissioner of Education "set aside" that initial decision and determined that the teacher had acquired tenure. Thereafter, the State Board of Education (Board) reversed the decision of the Commissioner and dismissed the petition. Of one thing we are certain and that is the aptness of the statement in the decision of the Board that "the case is not free from difficulty."

With minor exception, there is no substantial dispute respecting the facts. In any event the findings by the Board are express and adequate. Our review of the record satisfies us that they might reasonably have been reached from sufficient credible evidence in the record and, accordingly, we accept them. Mayflower

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Securities v. Bureau of Securities, 64 N.J. 85 (1973). They are as follows:

> Starting as a substitute teacher with the Ewing Board in September of 1976, petitioner was employed under a regular teacher's contract effective October 1 with that Board for the remainder of the 1976-77 academic year. She was also employed by Ewing under a regular teacher's contract for the following academic year, 1977-78. During all of her employment under the regular contracts, petitioner was assigned to a program called "Project Child." This was a multifaceted program, funded annually through State or Federal grants, to provide instruction to multiply [sic] handicapped infants, preschoolers and kindergarten children. The Director of Special Services in Ewing submitted annual applications for the program funds, which the Ewing Board acted as the local education agency for carrying out the program. No support for it was provided by the Ewing Board from its current expense operating budgets. The pupils enrolled in Project Child were residents of districts throughout Mercer County, including Trenton, Ewing, the Windsors, Hamilton and Hopewell.
>
> Project Child was discontinued by the Ewing Board at the end of the school year 1977-78. In the previous November the Mercer County Board of Freeholders had created the respondent Special Services School District and sometime thereafter it had engaged the Director of the Ewing Project Child as a consultant. The Director applied for a grant on behalf of the County District to continue a program similar to that which he had operated at Ewing. During the spring of 1978, the Director notified the Ewing Board and the Project Child staff that the County District would be operating Project Child. The Ewing Board thereupon made no further application for Project Child funds and terminated its connection with that program at the end of June. The following autumn the County proceeded with a "Project Child" program similar to that previously in effect at Ewing. Pursuant to a contract offered by the County Board to petitioner and accepted by her, she went to work for the County and continued with Project Child under contract until the end of the school year 1979-80. The County Board refused to renew her employment thereafter.

Petitioner argues that the term "school," as that word is used in the phrase "any school previously operated by a school district" in N.J.S.A. 18A:28-16, means "program" as well. The Administrative Law Judge thought not and the Board thought not. We think not also. This is in part because we are permitted to accord deference to the interpretation of the law applied by the administrative agency affected. The Passaic Daily News v. Blair, 63 N.J. 474, 484 (1973); but see Mayflower Securities, supra, 64 N.J. at 93. This is also because to us intent is also apparent from the plain language of the statute. The Legislature, not at all without opportunity to expand the perimeters of the tenure grant, limited

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the expression and the context to the school situation, speaking in context, for instance, of the undertaking of "the operation of any school" and "the agency assuming operational control of the school." Even without reference to the obvious meaning of the word "school," we observe that it is the institution which is "operated." It is much more likely that programs are administered rather than operated. Where a statute has a clearly expressed meaning, there is no room for construction or interpretation. As was recently said in State v. Butler, 89 N.J. 220 (1982):

> As a general rule of statutory construction, we look first to the language of the statute. If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent. See Renz v. Penn Central Corp., 87 N.J. 437, 440 (1981); Watt v. Mayor and Council of Borough of Franklin, 21 N.J. 274, 276-277 (1956). [At 226.]

But in our view we need not wrestle with that problem here. It is clear from the findings recited above that the Board found a hiatus in the administration of Project Child which interrupted the service in any event. Specifically, it said,

> The Commissioner overruled the initial decision on the ground that the facts spelled out "a tacit understanding and agreement" between Ewing and respondent that the program in which petitioner was employed was being transferred with Ewing's cooperation to respondent's district. In our view, the course of events did not establish an agreement of the type contemplated by N.J.S.A. 18A:28-6.1.

We incline toward the same view respecting the nature of "the course of events" as did the Board.

In any event, we affirm substantially for the reasons set forth by the Board. No costs.

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LOIS SHELKO,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	
	:	

JOELSON, J.A.D. dissenting.

I believe that a remand to the State Board of Education is required in order to obtain findings of fact as to whether there was an "agreement" between the Ewing Board of Education and respondent within the meaning of N.J.S.A. 18A:28-6.1. Furthermore, I am not without misgivings as to whether the word "school" as used in N.J.S.A. 18A:28-16 should be construed as narrowly as my colleagues have construed it. Tenure provisions "...are designed to aid in the establishment of a competent and efficient school system by providing teachers, principals, and superintendents with a measure of security...." Bd. of Ed. of Manchester Tp. v. Raubinger, 78 N.J. Super. 90, 101 (App. Div. 1963). As stated in Barnes v. Bd. of Ed. of Jersey City, 85 N.J. Super. 42, 45 (App. Div. 1964), certif. den. 43 N.J. 450 (1964): "Moreover, since tenure statutes are intended to secure efficient public service by protecting public employees in their employment 'the widest range should be given to the applicability of the law.' Sullivan v. McOsker, 84 N.J.L. 380, (E. & A. 1913)." Tenure provisions "should be given liberal support...." Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). Neither a need for flexibility nor the source of funding can overcome a claim of tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). As impliedly acknowledged in the majority opinion of my colleagues, in the "but see" reference to Mayflower Securities v. Bureau of Securities, 64 N.J. 85 (1973), an appellate tribunal is "...in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Id. at 93.

However, the principal reason for this dissent is N.J.S.A. 18A:28-6.1, which provides for a situation in which any school district shall discontinue "...any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such ... grades to such other district...." This statute provides that in such event, teaching staff members shall have their tenure rights preserved, and that "[a]ny periods of prior employment in such sending district shall count toward the acquisition of tenure in the other district to the same extent as if such prior employment had been in such other district."

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In the case under review, the Commissioner of Education found that "...the Ewing Board's failure to provide petitioner herein with either a contract of employment or a written notice that her employment would not be continued for the 1978-79 school year pursuant to N.J.S.A. 18A:27-3.2 represented a tacit understanding and agreement on its part that the program in which petitioner herein was employed was being transferred with its cooperation to another district." However, the State Board of Education concluded that "...the course of events did not establish an agreement of the type contemplated by N.J.S.A. 18A:28-6.1." I cannot agree with my colleagues in the majority that in using this language, the State Board "found a hiatus in the administration of Project Child which interrupted the service in any event." I interpret the decision of the State Board as using the phrase "the course of events" to disprove the existence of a take-over agreement between the Ewing Board and respondent, and not to establish an interruption of the Project Child program. Furthermore, a finding of interruption would not have been warranted from the evidence present in the record.

In finding that "...the course of events did not establish an agreement of the type contemplated by N.J.S.A. 18A:28-6.1," the State Board of Education merely rendered an ultimate conclusion. Thus, I think it necessary that we remand the matter for "...specific findings of basic facts and of related ultimate conclusions so as to enable us properly to perform the appellate role of ascertaining whether the final conclusion... is supported by substantial credible proof on the whole record." Katz v. Township of Howell, 67 N.J. 51, 63 (1975). The decision of the State Board of Education did not discuss the failure of the Ewing Board to notify petitioner of the termination of her employment, nor did it refer to the important letter of March 29, 1978, to petitioner from the President of the Mercer County Board of Education, Special Services School District. That letter informed petitioner that the Project Child program of Ewing Township was to be terminated "...and will be absorbed by the Mercer County Special Services School District." It added that respondent had received performance reports concerning petitioner from the Ewing Township Board of Education and anticipated offering petitioner a contract of employment for the school year 1978-1979.

Furthermore, the decision of the State Board failed to make any findings of fact whatever on the circumstances surrounding the transfer of the Project Child program. Without such findings, we cannot knowledgeably review the State Board's conclusion that there was no agreement between the Ewing Board and respondent within the meaning of N.J.S.A. 18A:28-6.1. Among the circumstances to which I here refer is the continuation of the program in the Kisthardt Center. The State Board of Education has made no findings of fact as to the ownership of the Kisthardt Center or any rental arrangement. Similarly, it has made no finding of fact as to the transfer of materials and supplies, or the identity of the youngsters who were in the program after the take-over by respondent. All these are relevant factors in the determination of whether there was an agreement within the meaning of N.J.S.A. 18A:28-6.1. I would apply here the same test as set forth for a

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trial judge in Reiser v. Simon, 63 N.J. Super. 297, 300-301 (App. Div. 1960): "A trial judge must be explicit in his recital of the evidence and in his factual findings and must so correlate them to his legal conclusions that the ... judgment entered manifestly appears to be undergirded by legal proof of substantial probative value and by specific factual findings thereon." See also Wertlake v. Wertlake, 137 N.J. Super. 476, 485-486 (App. Div. 1975).

Finally, I refer to the belief expressed by the State Board of Education that the Project Child program was not a "grade" within the meaning of N.J.S.A. 18A:28-6.1. Such a strained and technical construction defeats the liberality to be accorded to tenure legislation as discussed hereinabove. Furthermore, the reasoning used by the State Board to support its conclusion runs counter to Spiewak v. Rutherford Bd. of Ed., supra, which was decided shortly after the State Board's decision.

Even if I were satisfied that N.J.S.A. 18A:28-16 does not require a reversal, I believe that at least a remand is needed in order to resolve the issue underlying the applicability of N.J.S.A. 18A:28-6.1 in accordance with the foregoing.

Pending N.J. Supreme Court

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IN THE MATTER OF THE TENURE :
HEARING OF RENEE SOKOLOW, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWN- : DECISION
SHIP OF EAST BRUNSWICK, :
MIDDLESEX COUNTY. :
:

Decided by the Commissioner of Education, December 20, 1982

For the Petitioner-Appellant, Rubin, Lerner & Rubin (Frank J. Rubin, Esq., of Counsel)

For the Respondent-Respondent, Lennox S. Hinds, Esq.

The decision of the Commissioner of Education, dismissing the tenure charges and reinstating respondent to her position less mitigation of earnings and less the increment, is affirmed for the reasons expressed therein.

May 4, 1983

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IN THE MATTER OF THE TENURE :

HEARING OF ORAZIO TANELLI, SCHOOL : STATE BOARD OF EDUCATION

DISTRICT OF THE TOWN OF MONTCLAIR, : DECISION

ESSEX COUNTY. :

:

Decided by the Commissioner of Education, September 9, 1982 and November 1, 1982

Decided by the State Board of Education, February 1, 1983

For the Petitioner-Appellant, McCarter & English (Lois VanDeusen, Esq., of Counsel)

For the Respondent-Cross-Appellant, Katzenbach, Gildea & Rudner (Arnold M. Mellk, Esq., of Counsel)

The decision of the Commissioner of Education reinstating Orazio Tanelli to his position as foreign language teacher with the Montclair Public School District is reversed. We believe the act of placing harassing telephone calls by this teacher to his principal is conduct unbecoming a teacher and warrants dismissal and forfeiture of tenure. It is the opinion of the State Board of Education that reinstatement of respondent to his teaching position would not be in the best interests of the students, who look to their teachers as role models, would undermine the authority of the principal, who is the educational leader of the school, and would interfere with the harmonious operation of the educational process.

Jack H. Bagan, Mateo F. DeCardenas, John T. Klagholz and Sonia B. Ruby opposed in the matter.

March 2, 1983

PENDING N.J. SUPERIOR COURT

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ALAN TENNEY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 24, 1982

For the Petitioner-Appellant, Aronsohn & Springstead (Anthony M. Gallina, Esq., of Counsel)

For the Respondent-Respondent, Eisenstein & Govan (Jack F. Govan, Esq., of Counsel)

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

May 4, 1983

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THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
PETITIONER-RESPONDENT,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
THOMAS TIEFENBACHER,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 22, 1982.

Decided by the State Board of Education, August 4, 1982.

Argued September 20, 1983 - Decided December 5, 1983.

Before Judges Antell and McElroy.

On appeal from final decision of the State Board of Education.

Arnold S. Cohen argued the cause for appellant (Rothbard, Harris & Oxfeld, attorneys; Mr. Cohen, of counsel and on the brief).

Melvin Randall argued the cause for respondent (Love & Randall, attorneys; Mr. Randall of counsel and on the brief).

Regina Murray Mahoney, Deputy Attorney General, argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; Ms. Mahoney, on the brief).

PER CURIAM

After sixteen years of apparently unblemished service as a teacher in respondent's school system appellant was discharged from his tenured position by order of the State Board of Education (Board) for "unbecoming conduct." N.J.S.A. 18A:6-10. His offense involved the use of physical force in disciplining a student while attempting to maintain order in class.

The charges brought against appellant were heard in a contested hearing by an administrative law judge (ALJ) who concluded the charges were proved by the evidence and recommended dismissal. Unlike the ALJ, the Commissioner of Education (Commissioner) found the evidence insufficient as to some of the facts of appellant's alleged assault upon his pupil, adequate as to other aspects of appellant's misconduct but concluded that "summary dismissal...

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for a single offense is unwarranted in light of [appellant's] prior unblemished record of teaching experience... his past voluntary efforts on behalf of other pupils outside of the school day" and "the anguish he has undergone over possible loss of livelihood and the damage he has sustained to his professional reputation." The Commissioner, with obvious intent to ensure that appellant would not engage in such conduct in the future, deemed a forfeiture of pay for 120 days as proper penalty.

The respondent appealed to the Board. The legal committee of the Board apparently gave an oral report in which it recommended affirmance of the Commissioner's decision. The Board, in a four to three decision, affirmed the "Commissioner's determination," took no notice that the Commissioner's determination differed in material factual degree from that of the ALJ yet reimposed the penalty of dismissal recommended by the ALJ. The four to three decision of the Board, a determination of singular brevity in light of the extreme penalty inflicted, reads:

> The State Board of Education affirms the Commissioner's determination, with the modification that the Commissioner's penalty be vacated and the penalty of the Administrative Law Judge be reinstated for the reasons expressed in the initial decision.

This is a troublesome case. It naturally assumes that character because it concerns the termination of a 16 year career of a tenured teacher who, so far as the competent evidence in this record is concerned, served in that capacity for those years without exhibition of reprehensible disciplinary behavior toward his students, gave of his personal time to some of them and was never refused annual pay increments for any reason. His long history of service was characterized by the Commissioner as a "prior unblemished record of teaching experience."

There appears to be ample evidence that on December 8, 1980 this teacher, confronted with a disturbance of the class by D.H., a student, reacted in a manner properly characterized by the Commissioner as both "totally unwarranted" and as an emotional "overreaction." Clearly there was ground for some disciplinary action. Our review of the evidence convinces us that the teacher's total denial of almost all of the material facts involved in the incident is without credible basis. Likewise, on the entire record, we conclude that of the four issues raised on this appeal by the teacher none has merit except the question as to whether termination of his 16 year teaching career with respondent is so excessive a penalty as to be an arbitrary, capricious and unreasonable exercise of the power of the State Board of Education. R.2:11-3(e)(1)(D) and (E).

We approach the question of whether the penalty imposed by the Board is excessive with due caution, conscious that in cases of this nature our review cannot involve substitution of our sense of

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fairness and justice for that of the Board where the Board's decision is demonstrated to be supported by sufficient substantial credible evidence. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452-453 (App. Div. 1982). The Board is the ultimate decision maker for controversies under the school laws. Ibid.

Moreover, we are aware that the determination of the question posed to us is of obvious importance not only to appellant but to the educational system and to all who serve it. There is a clear need to prohibit and to properly penalize the unreasonable use of physical persuasion by those we place in charge of our pupils. Corporal punishment is directly prohibited, N.J.S.A. 18A:6-1, and the credible evidence here presented does not demonstrate that appellant's conduct fell within any exception to that statute. But the determination that a teacher used unreasonable and unwarranted methods of discipline should not invoke a per se rule of dismissal. Unfitness to continue as a teacher may be demonstrated by a single sufficiently flagrant incident. However, the question of whether the ultimate penalty of dismissal should be imposed must, in the circumstances here presented, be based upon more than findings that the unwarranted act occurred and the teacher's testimony as to the incident is the less credible version.

Additionally, we acknowledge the expertise of the Board and respect its obvious concern that incidents of the kind here described not occur. Nevertheless, the balancing procedure necessary to an imposition of a just and reasonable penalty involves other considerations as well. The opinion of this court in the case of In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) delineates these equally important factors. There Judge Carton observed:

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o.b. 131 N.J.L. 326 (E. & A. 1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.
>
> Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. The Commissioner noted that the

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> teacher received his full salary during his suspension by the township board. However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his equity rights in the Teacher's Pension Fund accruing from his 19 years credit.
>
> At the time appellant was suspended he had 23 years' teaching experience and held a master's degree. He had been employed since 1954 by the Holland board. It appears that if this teacher, who is aged 56, is re-employed in New Jersey, he will be eligible for retirement in approximately four years with a pension for life of one-half of his last year's salary - in this case an annual pension of at least $3,500. We observe that the local board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the board prior to the date of the incidents involved in these charges, and he had consistently received pay raises each year.
>
> This matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system. [Id. 421-422].

Unfortunately, by reason of the state of the record presented, we have no clear avenue by which to approach the question of whether the decision of the Board to discharge appellant was arbitrary and unreasonable. Facially, we might assume it to be of that character because the Board's truncated decision is devoid of determination of any facts upon which it rests its imposition of this extreme penalty of discharge. We say this because the Commissioner's determination and the initial decision of the ALJ both adopted in part by the Board do not track each other and the Board's decision makes no independent attempt to bolster its final determination. In the circumstances, such action was necessary. Because of its brevity the opinion is confusing. It affirms "the determination of the Commissioner" but it must be observed that in

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his determination the Commissioner, unlike the ALJ, rejected the assertion that D.H. was injured by appellant in the confrontation that occurred in the classroom. He noted the absence of competent medical proof by the respondent Board that D.H. was injured in that aspect of the assault. Such evidence was available but was not produced. Thus, the Commissioner diminished the allegedly violent nature and resulting effect of the initial contact between appellant and D.H.

What the Commissioner appears to have found to be conduct unbecoming a teacher was appellant's twisting of D.H.'s face in the hallway following the classroom incident and his subsequent attempt to return to the classroom. The Commissioner characterized this action as "untimely and professionally unwise in view of the highly charged emotional atmosphere which was attendant to the incidents involving himself and D.H. a short time before." Likewise, the Commissioner faulted appellant's failure to immediately report the incident to the school principal. It was on the basis of these findings of misconduct that the Commissioner ruled that appellant "is guilty of conduct unbecoming a teacher as charged by the Board." He only adopted "in part . . . the findings of fact set forth in the Initial Decision [of the ALJ]."

When he proceeded to weight the penalty required, the Commissioner considered some of the factors set forth in Fulcomer, supra, and to that extent his decision is sustainable as an attempt to reach a reasonable punishment. The same cannot be said of the ultimate decision by the Board which, although it affirmed "the Commissioner's determination," modified it to vacate the 120 day loss of pay penalty and reinstated the "penalty of the Administrative Law Judge . . . for the reasons expressed in the initial decision [of the ALJ]."

The ALJ found appellant's conduct both in the classroom and out in the hallway occurred "as described by D.H." Clearly, he found that combined conduct "so gross as to impose the most severe penalty allowed under N.J.S.A. 18A:6-10, the forfeiture of tenure rights." The Commissioner had grave doubts as to the character of the classroom incident and although he regarded the later events as "totally unwarranted" and as a result of appellant's "overreaction," and as unprofessional and serious, he did not regard them as requiring the extreme penalty of discharge because he considered other relevant "Fulcomer" factors.

If the Board intended to affirm "the Commissioner's determination," which materially differed from that of the ALJ, there appears to be no justification for it to impose the penalty reached by the ALJ for the "reasons expressed" in that officer's initial decision.

The result is that in the circumstances presented we cannot, without speculation, determine by what process and reasoning the Board imposed this penalty upon appellant. The situation is akin to a failure of a trial court to find the facts and state its

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conclusions of law as required of judges by R.1:7-4. By reason of the Board's brief opinion and its contextual confusion we have no realistic basis from which to judge whether its action was unreasonable. It is apparent that the Board and the ALJ, to the extent the Board relied upon his "reasons" for the severe penalty, did not consider the factors outlined in Fulcomer and quoted earlier in this opinion. The penalty to be imposed is not ours to make in the first instance. Our role is that of review. We are, therefore, obligated to remand the matter for reconsideration of the fair and just penalty to be imposed and a delineation of the reasons for such action.

We observe, that in achieving the delicate balance of the Fulcomer factors, as in any weighing process necessary to imposition of a penalty to be selected from a spectrum of permissible punishments, that the evaluation of the conflicting elements of societal needs and interests, the offender's history, his propensity for like conduct in the future, and the probable effect upon the latter consideration of the choice of a reasonable penalty molded to that end, should be exercised with due caution. Paramount to this process is the consideration of whether these conflicting elements are best served by a penalty which figuratively cuts off the offending hand by terminating the offender's employment. Is the offense of so flagrant a nature and the prospect for the future so dim as to require the ultimate punishment available?

We also note in this connection, that in this case there is a suggestion, never actually developed by the respondent who had the burden of proof, of some past incident of disciplinary misconduct on the part of appellant. This bare innuendo can have no place in the weighing of punishment. To do so would be to throw impermissible speculation into the process.

Accordingly, the matter is remanded to the State Board of Education for reconsideration of the reasonable and proper penalty to be imposed. We do not retain jurisdiction.

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IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM T. VEROST,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
VILLAGE OF RIDGEWOOD, BERGEN	:	
COUNTY.	:	
	:	

Decided by the Commissioner of Education, October 18, 1982

For the Petitioner-Respondent, Aron, Till & Salsberg (Ellen S. Bass, Esq., of Counsel)

For the Respondent-Appellant, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

The State Board of Education denies the request for oral argument in this matter and affirms the decision of the Commissioner of Education with one modification. The State Board determines that a remand for hearing of charges 1-8, rather than dismissal, would have been the appropriate action in the proceedings below; however, the State Board does not find a remand to be necessary, since the remaining charges are sufficient to warrant dismissal. With this modification, the decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 4, 1983

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WARREN E. WARD,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
STATE OF NEW JERSEY, ANNE KLEIN, BERNARD B. BLANKS, ACTING SUPER-INTENDENT, WOODBINE STATE SCHOOL, CAPE MAY COUNTY,	:	APPELLATE DIVISION
RESPONDENTS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, March 26, 1982.

Decided by the State Board of Education, August 4, 1982.

Argued September 13, 1983 -- Decided September 29, 1983.

Before Judges Michels, King and Dreier.

On appeal from the State Board of Education.

Richard H. Greenstein, argued the cause for appellant, (Fox & Fox, attorneys; Mr. Greenstein, of counsel and on the brief).

Regina Murray Mahoney, Deputy Attorney General, argued the cause for respondents, (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Ms. Mahoney, on the brief).

Bennet D. Zurofsky, argued the cause for Amicus Curiae, Communications Workers of America (Reitman, Parsonnet, Maisel & Duggan, attorneys; Sidney Reitman; and Thomas S. Adair, of the Georgia Bar and Adair & Goldthwaite; Mr. Zurofsky, on the brief).

PER CURIAM

The final decision of the State Board of Education (State Board) declaring that petitioner Warren E. Ward (Ward), a teacher employed in the Department of Human Services at the Woodbine State School, was not tenured and, therefore, not entitled to a hearing before the Commissioner of Education (Commissioner) prior to his dismissal, is affirmed substantially for the reasons expressed by Administrative Law Judge Errickson in his initial decision of February 16, 1982, the findings and determination of which were adopted by the Commissioner and affirmed by the State Board.

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We emphasize that N.J.S.A. 18A:7B-11 of The State Facilities Education Act of 1979 clearly did not grant tenure to Ward. This section provides:

> a. This act shall not affect actions or proceedings, civil or criminal, brought by or against the Garden State School District and pending on the effective date of this act, but such actions may be further prosecuted or defended in the same manner and to the same effect by the Department of Corrections, the Department of Human Services, or the Department of Education, whichever has assumed those duties, powers, and responsibilities which are the subject of the proceedings.
>
> b. Whenever in any law, rule, regulation, order, contract, document, judicial or administrative proceedings, or otherwise, reference is made to the Garden State School District, the same shall be considered and mean the Department of Corrections, the Department of Human Services, or the Department of Education, which has assumed those duties, powers, and responsibilities which are the subject of the reference.
>
> All rights and privileges enjoyed by teaching staff members of the Garden State School District shall be enjoyed by teaching staff members employed in State facilities. (Emphasis added).

The last paragraph of N.J.S.A. 18A:7B-11 simply preserves the rights of the former Garden State School District teachers who were in litigation at the time the 1979 Act abolished that district. That such was the legislative intent is abundantly clear from the following statement of the Education Committee:

> The employees of the Garden State School District are currently litigating the rights they contend they have under the Garden State School District Statute with regard to tenure and salaries. With the repeal of that Statute, the legal basis for their case would be wiped out. The amendments in sections 10 and 15 would restore that legal basis but would not, in the opinion of the committee, grant them any rights which they do not currently enjoy. [Senate Education Committee Statement to Assembly No. 86 (Republished at West Cum. Supp. 1983-84, p. 77, 79)].

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Obviously, it was the Legislature's intent that employees of the Garden State School District who had attained tenure before the district was abolished by the 1979 Act would have that right preserved. The section did not create an independent basis for the acquisition of tenure by those teachers who, such as Ward, were not employed within the Garden State School District before its abolition.

We are further satisfied that Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), relied upon by both Ward and the Communications Workers of America, does not compel a contrary conclusion. In Spiewak, the Supreme Court found that public school teachers who provided remedial and supplemental instruction to educationally handicapped children could acquire tenure under N.J.S.A. 18A:28-5. This statute provides:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title,[1] after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purposes; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years;

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[1]Section 18A:6-9 et seq.

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> provided that the time in which such teaching staff member has been employed as such in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district or under that board but no such teaching staff member shall obtain tenure prior to July 1, 1964 in any position in any district or under any board of education other than as a teacher, principal, assistant superintendent or superintendent, or as a school nurse, school nurse supervisor, head school nurse, chief school nurse, school nurse coordinator, or as the holder of any position under which nursing services are performed in the public schools. (Emphasis added).

The Supreme Court concluded that since the remedial and supplemental teachers were, in fact, serving in school districts or under a board of education they fell "within the express terms of the statute" and were "presumptively eligible for tenure unless a statutory exception applies." Id. at 74. Here, however, Ward, a teacher at the Woodbine State School, was not serving in any school district or under any board of education. Thus, he was not a member of the class eligible to attain tenure under N.J.S.A. 18A:28-5. Although the Spiewak case teaches that "the Tenure Acts should be liberally construed to achieve its beneficial ends," Id., that principle cannot apply where, as here, there had not been an initial statutory grant of tenure.

Affirmed.

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ELAINE WHALEN AND THE SAYREVILLE EDUCATION ASSOCIATION,

PETITIONERS-APPELLANTS,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY, : DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, August 12, 1982

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Boehm & Campbell (Casper P. Boehm, Esq., of Counsel)

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

James Jones and Robert A. Wolfenbarger opposed in the matter.

February 1, 1983

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ELAINE WHALEN AND THE SAYREVILLE EDUCATION ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT,	:	
AND	:	
STATE BOARD OF EDUCATION,	:	
RESPONDENT.	:	

Decided by the Commissioner of Education, August 12, 1982.

Decided by the State Board of Education, February 1, 1983.

Argued December 19, 1983 - Decided December 28, 1983.

Before Judges Ard, Morton I. Greenberg and Trautwein.

On appeal from the State Board of Education.

Arnold S. Cohen argued the cause for appellants (Rothbard, Harris & Oxfeld, attorneys).

Casper P. Boehm, Jr., argued the cause for respondent Board of Education of the Borough of Sayreville, Middlesex County (Boehm & Campbell, attorneys).

Regina Murray Mahoney, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; Deborah T. Poritz, Deputy Attorney General, of counsel; June Kanter, Deputy Attorney General, on the brief).

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

The factual and procedural background of this appeal is not complicated. Petitioner, Elaine Whalen (hereinafter called "Whalen"), was hired by the respondent, Board of Education of the Borough of Sayreville (hereinafter called "Sayreville Board"), as a business education teacher effective September 1, 1973. This employment continued until June 30, 1979 when, notwithstanding her tenure, the Sayreville Board terminated her employment because of a reduction in its force. When discharged Whalen was earning $13,300

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yearly on step five of a salary guide adopted by the Sayreville Board. From September 1, 1979 to June 30, 1981 Whalen was employed as a teacher of business education by the Woodbridge Board of Education. The Sayreville Board rehired Whalen as a tenured business education teacher effective September 1, 1981. At that time she was not given credit on the salary guide for her two years at Woodbridge. Thus she was placed on step six of the Sayreville Board's guide earning $15,575.

Whalen and her bargaining unit, petitioner Sayreville Education Association, filed an appeal with the commissioner of education (hereinafter called "Commissioner"). They alleged that the Sayreville Board had improperly denied her credit for the two years she had been employed in Woodbridge. Petitioners' appeal was transferred to the Office of Administrative Law. An administrative law judge subsequently rendered an initial decision which he said was a matter of first impression. The judge considered that the issue was whether a board of education upon rehiring a tenured teaching staff member pursuant to N.J.S.A. 18A:28-12 must give the teacher salary credit for the period of dismissal upon her rehiring. N.J.S.A. 18A:28-12 provides for a preferred eligibility list for persons laid off because of a reduction in force for economic reasons. Reemployment rights are based on seniority determined on previous years of service. The administrative law judge held that N.J.S.A. 18A:28-12 required only that Whalen be given credit toward computation of seniority on the basis of her service in Sayreville. The judge reached his conclusion because administrative regulations treated "previous years of services" within N.J.S.A. 18A:28-12 as limited to service for the rehiring district. N.J.A.C. 6:3-1.10(b). Thus the judge reasoned that Whalen's reemployment on the next step after her last previous step on the Sayreville guide was appropriate.

The Commissioner on August 12, 1982 issued a decision affirming the findings and determination in the initial decision and adopting them as his own. The State Board of Education (hereinafter called "State Board") on February 1, 1983 affirmed the decision of the Commissioner for the reasons he expressed. Petitioners have appealed to us from the State Board.

On this appeal petitioners contend that: "The New Jersey Education Law mandates that Elaine Whalen be credited by the Board of [sic] salary purposes for the two (2) years she was employed by the Woodbridge Board of Education." Specifically petitioners assert that the State Board erred in considering this as a seniority case since this matter concerns salary. Petitioners assert that when a teacher is reemployed after being laid off for economic reasons, she must be credited for salary purposes with time spent employed in another school district. Petitioners point out that N.J.S.A. 18A:29-8 provides that any member, meaning a full-time teaching staff member (N.J.S.A. 18A:29-6), holding office in any school district shall be entitled to annual employment increments. N.J.S.A. 18A:29-7 requires annual increments (up to maximums not

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germane herein) based on "Years of Employment." A "Year of employment" includes employment for one academic year in any publicly owned and operated college, school or other institution of learning for one academic year in New Jersey or any other state or United States territory. N.J.S.A. 18A:29-6. Therefore petitioners contend that Whalen's two years in Woodbridge were years of employment for which she must be given credit on the salary guide.

Petitioners contend that N.J.S.A. 18A:28-12 which establishes reemployment rights must be read in pari materia with N.J.S.A. 18A:29-1 et seq. dealing with compensation. N.J.S.A. 18A:28-12 provides:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service. [Emphasis supplied.]

Petitioners contend that "previous years of service" includes years in other districts.

We agree with petitioners that this is not a seniority case. Therefore in our view this case is not controlled by N.J.S.A. 18A:28-12. In our view that section only specifies a rule to determine seniority for rehiring purposes. Thus while it does not provide for seniority to include employment in other than the rehiring district, see N.J.A.C. 6:3-1.10(b), such omission is not determinative of this case.

We disagree with petitioners, however, that any State law requires that Whalen be given credit for her Woodbridge service. N.J.S.A. 18A:29-7 establishes a State salary schedule with a maximum salary set forth on the schedule for a teacher with a doctor's degree and maximum experience of $8,550. The State schedule includes provision for $250 annual increments. The State guide, however, sets forth minimum salary and increments. N.J.S.A. 18A:29-12. Accordingly a local board is free to negotiate salary guides which are not less than those required by State law.

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N.J.S.A. 18A:29-4.1; Bd. of Ed. Englewood v. Englewood Teachers, 64 N.J. 1, 7 (1973). N.J.S.A. 18A:29-8 provides:

> Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section.

The reference to "the preceding section" in N.J.S.A. 18A:29-8 is to the state schedule. But nothing in N.J.S.A. 18A:29-8 provides that a local salary schedule must include credit for years in other districts.

We recognize, of course, that in no event may the Sayreville Board pay less than the salary designated on the State guide. Thus if N.J.S.A. 18A:29-7 provided Whalen with a higher salary, taking into account the broad definition of years of employment in N.J.S.A. 18A:29-6, than the guide adopted by the Sayreville Board, N.J.S.A. 18A:29-7 would have to be followed in her case. But here it does not. Whalen, even without credit for her two years at Woodbridge, was reemployed at $15,575, a salary far in excess of the maximum for any teacher required in the State schedule. Accordingly N.J.S.A. 18A:29-8 is inapplicable here insofar as it requires credit for employment in other districts other than that rehiring Whalen.

We conclude therefore that petitioners are unable to point to any statute or regulation requiring that Whalen be credited with the time spent in Woodbridge for purposes of salary. Accordingly the decision of the State Board of Education dated February 1, 1983 is affirmed.

[192 N.J. Super. 453 (App. Div. 1983)]

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JANE M. WILLIAMS, :

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY, : APPELLATE DIVISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, March 12, 1982.

Decided by the State Board of Education, July 7, 1982.

Argued: October 11, 1983 - Decided: November 16, 1983.

Before Judges Bischoff, Petrella and Brody.

On appeal from Final Decision of the State Board of Education.

John E. Collins argued the cause for appellant (Selikoff & Cohen attorneys).

Betsy Shain argued the cause for respondent (Capehart & Scatchard attorneys; H. Louise Orth on the brief).

Regina Murray Mahoney, Deputy Attorney General, argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

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

The novel issue presented on this appeal involves an interpretation of a provision in N.J.S.A. 18A:30-2.1 authorizing continuation of salary during absence from work for up to one calendar year due to a personal injury caused by an accident arising out of and during the course of employment. An absence under that provision is not charged to annual or accumulated sick leave.

Petitioner Jane M. Williams (Williams) claimed entitlement to her full salary for a recurrent absence from work more than two years after the incident in which she was injured in 1977 while at her "post of duty."[1] She asserted that the most recent absence was also due to the 1977 injuries she received during the course of her employment as a special education teacher with the Deptford Township Board of Education (Board). Because her aggregate absences due to her injuries from that incident did not add up to a full year, Williams claimed she should receive her full salary without

[1]This is the phrase used in N.J.S.A. 18A:30-2.1.

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charging any part of it to her annual or accumulated sick days. She acknowledges, however, an appropriate offset against her salary for temporary disability awards in workers' compensation. The Board denied liability contending that under the statute such a payment was only authorized for up to one calendar year from the date of the accident. On appeal to the Commissioner from the Board's ruling, the matter was heard before an Administrative Law Judge (ALJ) who rendered an initial decision upholding the determination of the Board. The Commissioner of Education adopted the decision of the ALJ. On a further appeal to the State Board of Education, the Commissioner's decision was affirmed.

The facts are not disputed. Williams was employed by the Board since September 1972 as a special education teacher. She sustained injuries on November 11, 1977 during school hours and on school property while attempting to restrain an unruly student. As a result of her injuries she was absent from her employment for one week in December 1977, during which she was paid her full salary without her absence being charged against her annual or accumulated sick leave. In October and November 1979 she was again absent from employ she was again absent from employment for six weeks. She claimed that the 1977 injuries were the cause of this absence. During that time the Board paid Williams her full salary without charging the absence to accumulated or annual sick leave.[2]

On January 12, 1981 Williams was again absent from employment because of the 1977 injuries. Although the Board paid Williams her full salary, this absence was charged against her annual and accumulated sick leave.[3] The Board took the position that N.J.S.A. 18A:30-2.1 obligated it to pay, without charging annual and accumulated sick leave, only for those absences from post of duty which occurred within one year from the date of the original 1977 work-related injuries. This determination by the Board precipitated the proceedings which have resulted in this appeal by Williams.

While the matter was pending before the ALJ, Williams amended her petition to allege that the Board waived any right to assert that benefits paid under the statute ceased after November 11, 1978 (one year from the date of the 1977 accident)

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[2]Sick leave was the subject of the decision in Piscataway Twp. Bd. of Ed. v. Piscataway Maint. & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977). There the union tried to compel arbitration on a contract provision purporting to provide unlimited disability benefits. It was held that such a contract provision was ultra vires the board.

[3]Sick-leave days are accumulated at the rate of not more than 15 days per year. N.J.S.A. 18A:30-7. Not having to charge an absence to sick leave effectively increases the compensation for an absence covered by N.J.S.A. 18A:30-2.1 for employees with unused accumulated sick leave time.

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because it had paid her for her absence in October and November 1979 without charging it against her sick time. She had been paid workers' compensation temporary disability benefits from January 12, 1981 through the end of the 1980-81 school year and returned to work in the 1981-1982 school year.

On this appeal Williams argues that N.J.S.A. 18A:30-2.1 and N.J.S.A. 34:15-1 et seq. should be construed in pari materia; that the "period of such absence for up to one calendar year" in N.J.S.A. 18A:30-2.1 should be considered to include disjunctive segments of time which may be aggregated, even if involving dates beyond one calendar year from the date of the accident or injury. Williams also argues that the issue of excess payments should not have been considered by the administrative agency because it had not been properly asserted by the Board and thus had been waived.

We initially address whether the education statutes and the Workers' Compensation Act should be read in pari materia; and then the correct time frame to be used for the period during which payment for absence is to be made under N.J.S.A. 18A:30-2.1.

N.J.S.A. 18A:30-2.1 provides:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability. (Emphasis added).

Williams argues that "N.J.S.A. 18A:30-2.1 must be construed in a manner which is harmonious with the Workers' Compensation Act" and that this court "should look for guidance to prior decisions...construing the workers' compensation statutes." She relies on Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407, 415 (App. Div. 1982), in which we held that the phrase "accident arising out of and in the course of employment" as used in N.J.S.A. 18A:30-2.1 "was intended to have precisely the same meaning as it does within the context of the Workers' Compensation Act." Support for the conclusion in Theodore was found in the statement

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accompanying the 1967 amendment of the statute which said that the purpose of the amendment was to "provide leave of absence with pay in cases of injuries or illness arising from employment and subject to the Workman's Compensation Act." Ibid. The nature of the petitioner's accident in that case was reviewed in light of the workers' compensation cases, and we concluded there that it was a compensable accident in the workers' compensation scheme, and it was also within the scope of N.J.S.A. 18A:30-2.1. However, our decision in Theodore was only concerned with the construction of the phrase "an accident arising out of and in the course of his employment." It did not deal with the language presently before us delineating the length of time for which the local Board is required to make full salary payments to injured employees without charging that time against annual sick leave or accumulated sick leave. Nothing in Theodore suggests that any other portion of N.J.S.A. 18A:30-2.1 is to be construed in conjunction with or in light of the Workers' Compensation Act.

Appellant also argues that the maxim that the Workers' Compensation Act is to be liberally construed to bring as many cases as possible within its coverage should be applied here to result in reading the two statutes in pari materia. However, the statute before us in this case is not part of the Workers' Compensation Act, but is rather part of the statutory scheme governing and regulating the educational system in New Jersey. Broadly viewed, the Workers' Compensation Act and N.J.S.A. 18A:30-2.1 both share a concern, in a way, with methods of compensation of employees for personal injuries sustained in accidents arising out of and in the course of their employment. But this is only a broad or general similarity. The rule of in pari materia is only invoked to aid in the construction of statutes that pertain to the same subject matter. State v. DiCarlo, 67 N.J. 321, 325 (1975). In DiCarlo the two statutes pertained generally to narcotic drugs and the Supreme Court refused to construe the motor vehicle statute (N.J.S.A. 39:4-50(a)) to require the same definition of narcotic drug as in section 2 of the Controlled Dangerous Substances Act N.J.S.A. 24:21-1 et seq.

> ...It is true that each may be said to pertain, in a way, to the same subject matter - narcotic drugs. But there the similarity ends. The statutes clearly do not have the same purpose or object, and it is identity or similarity of purpose or object that most convincingly justifies resort to the rule of in pari materia as an aid in statutory construction. The adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will normally not justify applying the rule.
>
> As between characterization of the subject matter with which a statute deals and characterization of its object or purpose, the latter appears to

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> be the more important factor in determining whether different statutes are closely enough related to justify interpreting one in the light of the other. For example, it has been held that where the same subject is treated in several acts having different objects the rule of in pari materia does not apply. 2A Sutherland, Statutory Construction, sec. 51.03, p. 298 (4th ed. 1973). [67 N.J. at 325].

The court in DiCarlo found that the purposes of the two statutes involved were quite different. Likewise, we find sufficient differences in the two statutes here to persuade us that they need not be read in pari materia with respect to the language at issue even though we interpret the language in both statutes to allow for intermittent absences within the allowable time frame. The Workers' Compensation Act "is humane social legislation designed to place the cost of work-connected injury on the employer who may readily provide for it as an operating expense." Hornyak v. The Great Atlantic & Pacific Tea Co., 63 N.J. 99, 101 (1973). The school laws were enacted for a very different purpose and to implement the constitutional mandate of a thorough and efficient education. Allen v. Bd. of Ed. of Passaic, 81 N.J.L. 135, 140 (Sup. Ct. 1911), aff'd o.b. 84 N.J.L. 402 (E.&A. 1913).

Similarly, the difference in purpose between Civil Service sick leave provisions and the Workers' Compensation Act impelled us to refuse to apply the rule of in pari materia in Morreale v. State of N.J. Civil Service Comm., 166 N.J. Super. 536 (App. Div. 1979), certif. den., 81 N.J. 275 (1979). We there rejected the claim that the State was required to grant plaintiff disability sick leave because her disability was covered by workers' compensation. The appellant in Morreale was employed by the State and sustained an injury in a fall on a sidewalk off State property while on her lunch hour. The injuries temporarily prevented her from working. She received a workers' compensation award, and then requested sick leave disability benefits under a Civil Service Commission regulation providing that any State employee disabled because of an occupational injury or disease could be granted a leave of absence with pay for a certain period of time less any compensation award. (166 N.J. Super. at 538). She appealed the denial of her claim arguing that the Civil Service regulation and the workers' compensation statute used the same language to refer to injuries received in the course of employment, and therefore a qualifying injury under the workers' compensation laws should also qualify under Civil Service regulations. This court disagreed, holding that "[t]he respective statutes sought to be analogized by appellant have wholly different ends and purposes, and the differences warrant different rules of construction in their application." Id. at 539. We observed that while the workers' compensation statute was designed to relieve the employee of the burden of paying for work-connected injuries, the Civil Service Act "has the different objective of achieving an efficient public service system for the welfare of all citizens." Id. at 539.

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The decision in Morreale is reconcilable with that in Theodore v. Dover Bd. of Ed., supra, 183 N.J. Super. at 407 because the Legislature, by the statement appended to the 1967 amendment to N.J.S.A. 18A:30-2.1, made clear its intention that the leave of absence with pay provision for an "accident" applied to those injuries arising from employment and subject to the Workers' Compensation Act. There was no similar reference to the Workers' Compensation Act in the Civil Service regulations for the Morreale court to consider.

On the other hand, there is no suggestion that the time limitation present in N.J.S.A. 18A:30-2.1 and the nonchargeability of sick leave during that period was likewise intended to be read in conjunction with a specific provision of the workers' compensation law. The second sentence of section 2.1 points up a distinction between the two laws. Unlike the workers' compensation requirement, payments under the education law are made without any waiting period and during the period the employee received or was eligible to receive temporary disability under the workers' compensation laws, and they are coupled with a preservation of sick leave time. N.J.S.A. 18A:30-2.1 also provides for the reduction of salary payments by the amount of any workers' compensation award made for temporary disability.[4]

The phrase which is the subject of the dispute between the parties here is "the period of such absence for up to one calendar year...." There is nothing in the legislative history which sheds light on the meaning of that phrase.[5] The use of the article "the" before "period" would seem to indicate a single period or time frame might be intended. Although standing alone that might seem to negate interrupted periods of absence, that is not necessarily the case because the term "period" can refer to a single period of

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[4]Under N.J.S.A. 34:15-29 there is a set off of disability benefits or payments against amounts received in workers' compensation. Applying that section would result in no temporary disability payments being made in workers' compensation because petitioner's salary here was not reduced. However, by virtue of N.J.S.A. 18A:30-2.1 Williams received, or should have received, her normal salary reduced by the workers' compensation temporary disability award. See Young v. Western Electric Co., 189 N.J. Super. 1 (App. Div. 1983), certif. granted, 95 N.J. 175 (1983).

[5]N.J.S.A. 18A:30-2.1 was originally enacted in slightly different form in L.1959, c.175. It was amended by L.1967, c.168 (the most recent amendment) to change the discretionary nature of the payment to a mandatory one by substituting the word "shall" for the word "may." Other than a brief statement attached to the bill noting that change, there is little in the way of legislative history for this section of the law.

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prescribed length which can have interruptions within it without creating new periods.[6]

Williams argues by analogy to N.J.S.A. 34:15-38 in the workers' compensation law which allows intermittent temporary disability payments. Such a construction of the workers' compensation statute was accepted in Colbert v. Consolidated Laundry, 31 N.J. Super. 558 (App. Div. 1954). N.J.S.A. 18A:30-2.1 does contain the word "period," which is likewise contained in N.J.S.A. 34:15-38, however, there are significant differences in the qualification and description of that word in the two statutes which further militate against an in pari materia reading. First, N.J.S.A. 34:15-38 specifically provides for intermittent payments of temporary disability because it allows for a deduction for periods when the employee was able to work. Thus, there is a clear indication in that statutory language that intermittent time frames were allowed. The balance of the phrase "period of such absence for up to one calendar year" in N.J.S.A. 18A:30-2.1 is significant, and we have to read the statute in its entirety and give effect wherever possible to all the words used. Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 68 (1978); Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969); Foy v. Dayko, 82 N.J. Super. 8, 13 (App. Div. 1964). In analyzing the statute, we also have to consider the significance of the use of the word "calendar" modifying the word "year." That meaning becomes evident when it is considered that an academic or school year (N.J.S.A. 18A:29-6) is normally less than 12 full months and that there are statutes in the education law effectively describing a school work year as 200 days. See N.J.S.A. 18A:30-6. The academic year does not include the summer vacation. See e.g., N.J.S.A. 18A:28-5; 18A:29-3; 18A:29-6, and 18A:60-8.

We recognize that the term "calendar year" normally and in common usage refers to a year beginning January 1 and ending December 31. See Newman v. Fair Lawn, 31 N.J. 279, 283 (1960). However it was noted in that case that the word "year"[7] is given many meanings, and it is sometimes defined to mean a 365-day or 12-month period regardless of when it begins and ends. 31 N.J. at 284. Indeed, this court applied the term "year" in this sense in Bd. of Ed. of Manchester Twp. v. Raubinger, 78 N.J. Super. 90 (App. Div. 1963). There we held that the term "three consecutive calendar

[6]We consider these as subperiods. However, this may be contrasted with petitioner's argument that she is entitled to be paid for absences totalling up to 365 days under the statute no matter how many years are involved or have elapsed from the time of the injury.

[7]The word "year" is defined in N.J.S.A. 1:1-2 as a calendar year unless "it be otherwise expressly provided or there is something in the subject or context repugnant to such construction."

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years" specified in the then tenure statute, N.J.S.A. 18:13-16, meant 36 months of continuous employment regardless of when the employment began. Id. at 97. Thus, the term "calendar year" was construed in the tenure statute, which is part of the school laws, as meaning any 12-month period. The current statute is N.J.S.A. 18A:28-5.

In our view the legislature intended to make clear that a school year was not intended, and that what was intended was a period of time the equivalent of a calendar year. That is a period of up to 12 full months, see Bd. of Ed. of Manchester Twp. v. Raubinger, supra, but no longer. We are of the opinion that the period begins with the date of the injury or first absence resulting from the personal injury and continues for one calendar year therefrom. But we see no reason to exclude payments for intermittent absences causally connected and arising from the same injury within "the period of up to one calendar year" from the date of the injury, which we hold is the period created by the statute. Accordingly, the determination of the State Board that the meaning of the phrase "period of such absence for up to one calendar year" encompasses only the 12-month period from the date of injury or first absence is affirmed.

Appellant further argues that the State Board erred in determining that the Board could recover payments already made to her after the one-year period ended because there had been no hearing on the matter, there was no counterclaim asserted and the Board had waived such claim by having made the payments. The Commissioner relied upon Bd. of Ed., Passaic v. Bd. of Ed., Wayne, 120 N.J. Super. 155 (Law Div. 1972), aff'd o.b. (App Div. 1973) (unreported), certif. den. 64 N.J. 508 (1974), in permitting recoupment by the Board. In that case the school boards were permitted to recoup funds erroneously paid because they had been paid under a mistake of law. It was held that "a municipality or subdivision thereof, as an instrument of the people, should [not] be bound by a misinterpretation of the law by the authorities in charge." 120 N.J. Super. at 164. At issue therein was a question of law involving interpretation of a statute, and that could be resolved by summary judgment.

In the case before us the Board had raised the applicability of the statute and had urged that it was only required to pay for the period of one calendar year from the injury or inception of absence. Even though it had not specifically sought reimbursement, the Commissioner could conclude that the Board had paid certain of the benefits to appellant because of an erroneous interpretation of N.J.S.A. 18A:30-2.1. We must be mindful of the fact that public funds are involved. An erroneous payment due to a misinterpretation of the law inures to the detriment of the taxpayers of the school district. Hence, on balance equity demands that the Board be permitted to recoup moneys paid under such circumstances and rectify its error.

Affirmed.

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JANE M. WILLIAMS,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT OF NEW JERSEY
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

BRODY, J.A.D., dissenting.

N.J.S.A. 18A:30-2.1 is essentially a statute of monetary, not temporal limitation. The limitation is expressed as follows:

> [H]is employer shall pay...for the period of such absence "for up to one calendar year...."

The same kind of limitation appears in N.J.S.A. 34:15-12(a) which provides workers' compensation temporary disability benefits. The limitation there is expressed as follows:

> This compensation shall be paid during the period of such disability, not however, beyond 400 weeks.

Although the language of the two statutes is not identical, it conveys the same meaning: benefits are to be paid for a continuous period or for intermittent periods of disability until the period or periods add up to the time specified.

We gave that interpretation to the Workers' Compensation Act language in Colbert v. Consolidated Laundry, 31 N.J. Super. 588, 594-595 (App. Div. 1954), where we cited with approval Johnson v. Mills, 39 N.J.L.J. 306 (Com. Pl. 1916). Johnson was decided without benefit of L. 1921, c. 230, sec. 3, the source statute of N.J.S.A. 34:15-38, which later confirmed that interpretation and fine-tuned the method of calculation. Referring to the words "shall be paid during the period of such disability, not, however, beyond three hundred weeks," the judge in Johnson said:

> The words "during the period of such disability" seem to indicate more than length of time during which compensation shall be paid; they seem to declare and determine that such compensation shall be paid, as the words clearly state, "during the period" of such disability. This

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> language answers conclusively the question as to when such compensation shall be paid. It has not been paid during the period of disability in this case. [Johnson v. Mills, supra, 39 N.J.L.J. 311]

Applying that interpretation to N.J.S.A. 18A:30-2.1, I would say that its benefits have not been paid "for the period of such absence" in this case.

After noting that "the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period," we gave "accident" as used in N.J.S.A. 18A:30-2.1 the same definition given that word under the Workers' Compensation Act. Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407, 415-416 (App. Div. 1982). We were moved then by the express reference in N.J.S.A. 18A:30-2.1 to the Workers' Compensation Act and by the Statement accompanying N.J.S.A. 18A:30-2.1 which states that its purpose is "to provide leave of absence with pay in cases of injuries or illness arising from employment and subject to the Workmen's Compensation Act." There is no reason to turn our back on Theodore and hold that the two statutes are no longer to be read in pari materia.

I adhere to the view that N.J.S.A. 18A:30-2.1 provides excess temporary disability benefits complementing workers' compensation temporary disability benefits. Entitlement to both should depend on the same criteria. The only significant difference is that workers' compensation temporary disability benefits are payable for up to 400 weeks whereas Title 18A benefits are only payable for up to one year.

N.J.S.A. 18A:30-2.1 should not be read to establish a limited period of eligibility running continuously for one year from the date of the accident or even from the first qualifying absence. In giving the statute that reading, the majority unfairly penalizes conscientious employees who return to work during the period but are later disabled by the accident.

I would reverse and remand to calculate N.J.S.A. 18A:30-2.1 benefits accordingly and order whatever payment and adjustment of petitioner's sick-leave account may be appropriate.

[192 N.J. Super. 31 (App. Div. 1983)]

Pending N.J. Supreme Court

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ROBERT WOLDIN,	:	
Petitioner-Respondent,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS,	:	
Respondent-Appellant.	:	
	:	

Decided by the Commissioner of Education, March 26, 1981.

Decided by the State Board of Education, March 24, 1982.

Submitted September 26, 1983 - Decided October 20, 1983.

Befores Judges Ard and Trautwein.

On appeal from the State Board of Education.

Lucid, Jabbour, Pinto & Rodgers, attorneys for appellant (Michael E. Rodgers, on the brief).

Mandel, Wysoker, Sherman, Glassner & Weingartner, attorneys for respondent (Jack Wysoker, on the letter brief).

Irwin I. Kimmelman, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education (Jaynee LaVecchia, Deputy Attorney General, on the statement).

PER CURIAM

This is an appeal by the Board of Education of the Township of Bernards (Board of Education) of a decision of the State Board which affirmed the decision of the New Jersey State Commissioner of Education. The Commissioner's decision ordered the reinstatement of Robert Woldin, respondent, to a full-time guidance counselor position.

In the 1980-81 school year the Board of Education unilaterally transferred Woldin from his position as guidance counselor, in which he had served since the 1973-74 school year, to a teaching position. The Board of Education did not abolish the guidance counselor position in which Woldin had served nor did it fill the position with someone else. Woldin initiated this action by filing with the Commissioner a petition of appeal against his employer, the Board of Education, alleging that his involuntary transfer to a teaching position violated his tenure and seniority rights.

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Cross-motions for summary judgment were filed, and an "Initial Decision" was rendered by the Administrative Law Judge dismissing the Board of Education's motion for summary judgment and ordering Woldin's reinstatement to a full-time guidance counselor position. The Commissioner of Education affirmed the findings and determination as rendered in the Initial Decision. The State Board of Education affirmed the decision of the Commissioner of Education.

We affirm substantially for the reasons set forth in the opinion of the Administrative Law Judge as adopted by the Commissioner of Education and affirmed by the State Board of Education.

Affirmed.

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GEORGE A. WOOD, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY, : DECISION

RESPONDENT-CROSS-APPELLANT. :

:

Decided by the Commissioner of Education, October 7, 1982

For the Petitioner-Appellant, Katzenbach, Gildea & Rudner (Ezra D. Rosenberg, Esq., of Counsel)

For the Respondent-Cross-Appellant, Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan (Philip Rosenbach, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed with the modification that petitioner receive back pay from the 1979-80 school year. The record is clear that petitioner made a written claim for military service credit in September 1979 and should receive back pay from that date forward.

May 4, 1983

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CLAUDE WRIGHT, JR. AND EAST ORANGE PERSONNEL ASSOCIATION,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 30, 1982

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Barry A. Aisenstock, Esq., of Counsel)

For the Respondent-Respondent, Love & Randall (Melvin Randall, Esq., of Counsel)

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

Betty A. Dean and Gustavo A. Mellander opposed in the matter.

March 2, 1983

PENDING N.J. SUPERIOR COURT

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CLAUDE WRIGHT, JR. and EAST ORANGE PERSONNEL ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, August 30, 1982.

Decided by the State Board of Education, March 2, 1983.

Argued November 29, 1983 - Decided December 15, 1983.

Before Judges Antell and Joelson.

On appeal from Final Decision of the New Jersey State Board of Education.

Barry A. Aisenstock argued the cause for appellants (Rothbard, Harris & Oxfeld, attorneys).

Melvin C. Randall argued the cause for respondent Board of Education of the City of East Orange (Love & Randall, attorneys).

Statement in lieu of brief by State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent State Board of Education; June Kanter, Deputy Attorney General, on the statement).

The opinion of the court was delivered by

JOELSON, J.A.D.

Petitioner Claude Wright, Jr., a custodian employed by respondent, was notified in May, 1981 that his employment would be terminated as of July 17, 1981. Claiming that the termination constituted a violation of his bargained right to tenure, Wright and East Orange Personnel Association, his labor representative, requested the Commissioner of Education to hear the controversy and order Wright's reinstatement. The matter was referred to an Administrative Law Judge who rendered an initial decision on a stipulation of facts. In his initial decision, the Administrative Law Judge determined that the termination of Wright's employment violated a right of tenure that he possessed under a collective bargaining agreement between Wright's bargaining unit, East Orange

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Personnel Association, and respondent. The Commissioner of Education rejected the recommendation of the Administrative Law Judge and dismissed the petition. On appeal to the State Board of Education, with two dissenting votes, the decision of the Commissioner of Education was affirmed. This is petitioners' appeal from the determination of the State Board of Education. We reverse.

According to the stipulation of facts entered into by the parties, Wright was appointed as a custodian in 1973 and was thereafter reappointed "...for fixed periods not in excess of 12 months." It was further stipulated that under a collective bargaining agreement between respondent and East Orange Personnel Association for the period from July 1, 1980 through June 30, 1982, it was agreed that "[a]ll members of the bargaining unit shall receive tenure after three years of employment." It further appears that the same provision was contained in a collective bargaining agreement with a predecessor labor organization from July 1, 1974 through June 30, 1980.

N.J.S.A. 18A:17-3 provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position, or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense....[1]

Respondent contends that since all of Wright's appointments were for fixed terms, he was foreclosed from the tenure afforded under N.J.S.A. 18A:17-3, and that the provision in the collective bargaining agreement relied upon by petitioners is unenforceable because [it is] in contravention of the statute. It has been settled that "[a] binding agreement concerning matters whose regulation the Legislature has chosen to place outside the control of a public employer would not be within the employer's power." State v. State Supervisory Employees Association, 78 N.J. 54, 79 (1978). See also Bd. of Education Bernards Tp. v. Bernard Tp. Ed. Ass'n., 79 N.J. 311 (1979); Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409, 440 (1970). However, because N.J.S.A. 18A:17-3 clearly affords a school district the option of deciding whether it wishes to grant tenure to a janitor, we do not accept respondent's contention that the collective bargaining agreement is in derogation of that statute. The manner in which a school district may grant tenure under the statute is by appointing a

[1] It has not been argued that this section does not apply to Wright. Obviously, a "custodian" is a janitor dressed in fancier semantic garb.

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janitor for an indefinite term. Therefore, the provision in the contract that "[a]ll members of the bargaining unit shall receive tenure after three years of employment" obligated respondent to appoint Wright for an indefinite term after he had completed three years of employment.

We note in conclusion that respondent does not contend that negotiation of tenure was an impermissible invasion of managerial prerogatives. We add that the negotiation of a tenure not specifically granted or forbidden by statute has been held valid. Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978).

Reversed.

[194 N.J. Super. 181]

Pending N.J. Supreme Court

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GAYLE M. YOUNG,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BELMAR, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 20, 1982

For the Petitioner-Respondent, Ruhlman, Butrym & Friedman (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Sim, Sinn, Gunning & Fitzsimmons (Steven A. Pardes, Esq., of Counsel)

Petitioner has requested dismissal of this appeal and has submitted to the State Board of Education a settlement agreement executed between the parties. The State Board declines to issue an order dismissing this appeal. This matter is remanded to the Commissioner of Education for review in accordance with the principles expressed in In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, Camden County, decided by the State Board on April 6, 1983, and the Attorney General Opinion regarding settlement of tenure cases, rendered April 5, 1983.

May 4, 1983

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FOSTER J. ZANETTI AND RICHARD DEXHEIMER,

PETITIONERS-APPELLANTS,

V.

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

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 8, 1982

For the Petitioners-Appellants, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Aron, Till & Salsberg
(Stephen R. Fogarty, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Petitioners' motions to supplement the record and for oral argument are denied.

May 4, 1983

PENDING N.J. SUPERIOR COURT

New Jersey State Department of Education
225 West State Street
Trenton, New Jersey 08625

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